

# COLUMBIA LAW REVIEW

Vol. 64

FEBRUARY 1964

No. 2

## THE DECADE OF SCHOOL DESEGREGATION PROGRESS AND PROSPECTS†

ALEXANDER M. BICKEL\*

It is now nearly a decade since the Supreme Court handed down its first opinion in *Brown v. Board of Education*,<sup>1</sup> the *School Segregation Cases*. Southern disaffection to the side, there are abroad in the land, by and large, two sets of attitudes about the events of the decade. One large body of opinion, while avoiding complacency, feels on the whole encouraged by progress achieved, and by prospects for further progress. Another, no doubt smaller, but highly articulate group is outraged by the passage of a decade during which we have witnessed in the South little more than token compliance with the law declared by the Supreme Court; a decade, moreover, which has seen in the country as a whole the merest beginnings of any effort to grapple with the cognate problems of *de facto* school segregation, *de facto* housing segregation, and *de facto* employment discrimination. In the words of the song from which James Baldwin borrowed the title of his famous best-seller, and with all the urgency and all the alarm bordering on despair that those words connote in Baldwin's usage, many people feel: "No more water, the fire next time!"

I should like to declare myself as sharing both sets of attitudes. Both, I think, proceed from an accurate view of reality. But the reality of the Negro condition in the United States is very large indeed, and endlessly ramified. Most of us are quite unable to see it whole, at least without hopeless blurring of detail and even of outline. It is only natural, therefore, that we should from time to time observe different parts of this total condition, and it is then more than natural that we should respond with different attitudes formed by our different impressions. Yet if we would observe for any purpose other than simply enriching the literature of protest or preserving the results

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† This paper was first presented to a conference on discrimination and the law held at the University of Chicago Law School on November 22-23, 1963, under the joint sponsorship of the Law School and the Anti-Defamation League of B'nai B'rith. A comment which was also presented to the conference is printed at the end of this article.

\* Professor of Law, Yale University. B.S., City College of New York, 1947; LL.B., Harvard University, 1949. Professor Bickel is writing the volume on the period from 1910 to 1930 for the *History of the Supreme Court of the United States* under the sponsorship of the Permanent Committee for the Oliver Wendell Holmes Devise.

1. 347 U.S. 483 (1954).

in a storage-house of private bitterness, we must, while attempting to see the existing situation, at the same time keep in focus the modes and possibilities of legal and other orderly social action, by which the Negro condition can be altered. We see differently, and not necessarily less feelingly, when our field of vision includes those additional realities as well.

Public education for the Negro is a problem that has at least two distinct aspects. One, the immediate aspect in the South and in a limited number of places in the rest of the country, is desegregation. Another is integration. It is no novelty to suggest that the two are very substantially different matters. The failure to see them, not perhaps separately, but distinctly, accounts in part, I believe, for the attitude of unrelieved alarm to which I have referred. Moreover, the chief—with few and very recent exceptions, the only—method of attack on the problems both of desegregation and of integration has been legal; more particularly, judicial. This method has its ineluctable limitations. A certain impatient failure to appreciate what Roscoe Pound nearly forty years ago called the limits of effective legal action<sup>2</sup> is a second factor, in my judgment, accounting for a mood of alarm and frustrated urgency. Legal action also has two, certainly not separate, but somewhat distinct aspects. One is the establishment of law, which sometimes in our system means more than merely announcing a rule; it means, sometimes, following through on the announcement with an effort, essentially political in nature and not necessarily assured of success, to generate consent to the rule in principle. Another aspect of legal action is administration of the law, which includes enforcement. If, for the moment, one is prepared to examine the problem of desegregation by itself, on the premise that its solution must precede any process of integration in the South; and if one perceives that the first step had to be the firm establishment of desegregation as a rule of law, then one can find the basis for a modest sense of achievement, and for a tolerably sanguine feeling about the future.

## I.

According to the September, October, and December 1963 issues of the *Southern School News*,<sup>3</sup> the current figures on desegregation in the South are as follows: There are 3,029 biracial districts in a formerly segregated seventeen-state southern region; that is, 3,029 districts with both white and Negro pupils. Of these 3,029 districts, as of December 1963, 1,141 have desegregated. Of these 1,141 districts, in turn, some 161 desegregated for the first time this past fall. This compares with 46 desegregating for the first

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2. Address Before Pennsylvania Bar Association, June 27, 1916, 22 PA. B. A. REP. 221 (1916).

3. *Southern School News*, Dec. 1963, p. 1, cols. 1-5; *id.* Oct. 1963, p. 1, col. 1; *id.*, Sept. 1963, p. 1, cols. 1-5.

time in 1962, and 31 in 1961. (It compares also with 200 desegregating in 1956—a figure to whose significance I shall presently draw attention.) Moreover, of the 161 districts desegregating for the first time in 1963, 141 did so voluntarily, without awaiting the compulsion of a court decree. Quite evidently, the pace is quickening.

It is possible, nevertheless, to view these figures as disastrously bad. 1,141 districts is well under half. Moreover, a large number even of this unsatisfactory total are districts in border states such as Delaware, Kentucky, Maryland, Missouri, Oklahoma, Tennessee, and West Virginia, in which the tides of change had begun their work well before 1954. Again, counting by districts, which are not necessarily of comparable size, is far from the most accurate method. And finally, a district is counted into this total even if just one Negro child out of many hundreds now attends school with whites, and in many of these districts that is about the extent of desegregation. Such a gloomy view has its validity, as I have suggested. Yet it leaves out of account, as I have also suggested, the possibilities of ordered social action, which are never limitless and are also part of the reality, so long at least as we insist on achieving our goal without abandoning existing principles and institutions of government that we deem fundamental and otherwise satisfactory; so long, that is, as our goal remains integration, not disintegration. We must, then, consider a more immediate and more complex standard by which to judge these figures good, bad, or indifferent.

Obviously, the first standard to which we should repair in search of a standard is the Supreme Court's own "all-deliberate-speed" decree.<sup>4</sup> The standard stated in that decree is relatively simple and straightforward, and the figures I gave above do not look particularly good or promising when measured against it, either. The lower courts, said the Supreme Court, will require "a prompt and reasonable start toward full compliance"<sup>5</sup> with the Supreme Court's judgment of desegregation. Once such a start has been made, but by plain implication, not before, the lower courts might consider reasons why additional time should be allowed to carry out the judgment in an effective manner. The Supreme Court proceeded to list relevant reasons of this sort. They had to do with

problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.<sup>6</sup>

It should go without saying, the Court also remarked, taking care not

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4. *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).

5. *Id.* at 300.

6. *Id.* at 300-01.

to let it go, "that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."<sup>7</sup> It really went without saying, however, that the problems listed as relevant by the Court were not the only ones, and perhaps not even the major ones; although they were real and relevant and undoubted occasions of delay. It went without saying also that while the vitality of constitutional principles as reflected in specific court orders ought, to be sure, not be allowed to yield simply because of disagreement with them, disagreement is legitimate and relevant and will, in our system, legitimately and inevitably cause delay in compliance with law laid down by the Supreme Court, and will indeed, if it persists and is widely enough shared, overturn such law.

Others, saying what the Court had left unsaid, filled in the meaning of "all deliberate speed," and I shall offer three rather extensive quotations. Aubrey Williams, a Southerner certainly to be counted not only as man of good will but as a man of progressive, liberal outlook, said, in February 1956, addressing the National Lawyers' Guild, which is itself no collection of reactionaries, and which yet does not appear to have hooted him down:

Now I favor this Supreme Court decision. . . . But I think the Court was absolutely right when it postponed for a year its discussion of implementation, and it was right in its position that it would take as good faith a move toward carrying out the mandate of the Court. There's going to have to be some time given here. We're going to have to back away and give these people some time to get out of the hysteria that they're in. I don't know if they will ever get out of it.<sup>8</sup>

At about the same time, Robert Penn Warren published an interview with himself:

Q. Are you for desegregation?

A. Yes.

Q. When will it come?

A. Not soon.

Q. When?

A. When enough people, in a particular place, a particular county or state, cannot live with themselves any more. Or realize they don't have to.

Q. What do you mean, don't have to?

A. When they realize that desegregation is just one small episode in the long effort for justice. It seems to me that that perspective, suddenly seeing the business as little, is a liberating one. It liberates you from yourself.

. . . .

Q. Are you a gradualist on the matter of segregation?

A. If by gradualist you mean a person who would create delay for the sake of delay, then no. If by gradualist you mean a person

7. *Id.* at 300.

8. 16 LAW. GUILD REV. 21, 22 (1956).

who thinks it will take time, not time as such, but time for an educational process, preferably a calculated one, then yes. I mean a process of mutual education for whites and blacks. And part of this education should be in the actual beginning of the process of desegregation. It's a silly question, anyway, to ask if somebody is a gradualist. Gradualism is all you'll get. History, like nature, knows no jumps. Except the jump backward, maybe.<sup>9</sup>

Finally—and for obvious reasons I shall quote this at greatest length—here are Thurgood Marshall and Robert L. Carter, special counsel and assistant counsel to the NAACP Legal Defense Fund, in an article published in 1955 and entitled, "The Meaning and Significance of the Supreme Court Decree":

While the Court's solution differed from that proposed by counsel for the Negro litigants, chiefly in regard to the fixing of a deadline for compliance, the formula devised is about as effective as one could have expected. The net result should be to unite the country behind a nationwide desegregation program, and if this takes place, the Court must be credited with having performed its job brilliantly. . . .

The decision has opened the door for Negroes to secure unsegregated educational facilities if they so desire. . . . Certainly, on the surface at least, a time limit would have afforded a sense of security that segregation would end within a specific number of years. We fear, however, that such security would have been fed on false hopes.

Some states—Missouri, Maryland, West Virginia, Kentucky seem to fall in this category—would have taken official steps to comply with whatever formula the Court devised. Pressure skillfully applied in a few other states would have resulted in the adoption of a similar policy. While desegregation could be successfully undertaken in many areas of the deep South tomorrow, little will be done for the most part unless Negroes demand and insist upon desegregation. In states such as Georgia and Mississippi, it looks as if desegregation will be accomplished only after a long and bitter fight, the brunt of which will have to be borne by Negroes. In short, we must face the fact that in the deep South, with rare exceptions, desegregation will become a reality only if Negroes exhibit real militancy and press relentlessly for their rights. And this would have been the situation no matter what kind of decision the Court had handed down.

. . . . Great responsibility has been placed at the local level [on the federal judges] where it belongs, and where it would have been exercised in any event.

. . . . Delays may be occasioned by various devices. This would result in any case. We can be sure that desegregation will take place throughout the United States—tomorrow in some places, the day after in others, and many, many moons hence in some, but it will come eventually to all.<sup>10</sup>

9. WARREN, *SEGREGATION* 112-14 (1956).

10. 24 *J. NEGRO EDUCATION* 397, 402-03 (1955).

The passages I have given at such length unite in an appreciation of the southern reality that is at once sensitive and hardheaded, and an assessment of the possibilities of judicial law that is at once confident and down-to-earth. These passages have probative value, therefore, not merely, like certain exceptions to the hearsay rule, by virtue simply of having been made, thus indicating states of mind, vintage 1954; I give them also as evidence of the truth of the matter asserted. By way of rather stark contrast, let me cite a later opinion, which I know has come to be rather widely held. In a study of reactions and developments in South Carolina, Professor H. H. Quint, who had taught in the state but left it before publication of this work in 1958, says that the first judgment of the Supreme Court stunned public and official opinion. Moderate voices in the state remained quiet rather than incur risks by coming to the Court's support, because they relied on the Court itself and on its authority to make the judgment effective. The year's delay that followed and the further delay implicit in the deliberate-speed formula allowed time for opposition to gather. "Had the Court ordered immediate integration, compliance might well have been forthcoming since at the time there was no alternative course of action."<sup>11</sup> This view proceeds from a radically different assessment of the southern situation and from a radically different, if wholly silent, premise about the role and possibilities of law. If this view is accepted, the judgment that we must pass today is simple and unavoidable. The law has almost succeeded in snatching defeat from the very jaws of its own victory.

Professor Quint's premise, and the premise of many other laments—toward which I intend no disrespect, for they are in almost every instance the product of a fine inability to suffer the scandal of social injustice—must be that when the Supreme Court lays down a rule of constitutional law, that rule is put into effect just about instantly, in just about the totality of the real-life situations to which it is applicable. As the Court itself was pleased to say in *Cooper v. Aaron*,<sup>12</sup> the Little Rock case, it becomes the duty of all persons affected, and especially of government officials, state or federal, to implement the Court's law. Officials at all levels of government are subordinate officers, oath-bound to effectuate the Court's will. Very often, that is how things work, and the practice then seems to confirm this theory. Most often, when the Court's law affects limited interests and when the Court's prestige is sufficient to obtain general acquiescence in its will, that is how things work. But that has never been how things have worked on occasions when the Court's judgments have been directed at points of serious stress in our society, and on such occasions that is not the way things should or conceivably could work. The basis of all our law—by which I mean rules of conduct, whether legislative, judicial, or administrative in origin, behind

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11. QUINT, PROFILE IN BLACK AND WHITE 21 (1958).

12. 358 U.S. 1 (1958).

which is the coercive power of the state—is consensual. We are willing and ought to be willing to pay a limited price only in coercing minorities, and whenever, therefore, a minority is sufficiently large or determined or strategically placed, we are not quite in a position to have law on whatever the subject may be on which the minority is constituted and situated as I have described it. We resort, then, to other methods of social action—methods other than law, methods of persuasion and inducement, by appeal not only to reason but to interests, not only to material but to political interests, rather than methods of attempted coercion. It is especially true of judge-made constitutional law, and ought to be, as I have argued more extensively elsewhere,<sup>13</sup> that both its basis and its effectiveness are essentially consensual.

This is no mere theory. As Messrs. Marshall and Carter were so well aware and made so completely clear, it is built into the very mechanics of the system. The general practice—I shall recur to this point in more detail later—is to leave the enforcement of judge-made constitutional law to private initiative. It is also the general practice to enforce judge-made constitutional law prospectively only, so that no penalties attach to failure to abide by it prior to completion of a judicial proceeding seeking enforcement. This means that, generally, no one is under an obligation to carry out a rule of constitutional law announced by the Court, until someone else has conducted a successful litigation and obtained a decree directing him to do so. Any rule of constitutional law, therefore, that is not put into effect voluntarily by officials and other persons who acquiesce in it, or that is not taken up by legislation and thus made at least somewhat more effective by administrative or non-coercive means, is not in our system an effective rule of law, for in such circumstances of widespread nonobservance, the resources neither of private litigating initiative nor of the judicial process are equal to making it effective. I don't mean to suggest, of course, that there isn't opposition from dissenting or antisocial minorities to virtually all law, or that our system abhors or ignores the necessity for occasional coercion. Nor do I mean to suggest that enforcement is not in itself a method of persuasion, and indeed almost always an essential one, for there are always those whose acquiescence cannot be obtained if resistance is free of cost. Nor, again, do I have any quantitative knowledge of just how big and determined a minority needs to be before it can render judicial law, or before it can render legislative law, ineffective. But I do know that it can do so, and that it can render judicial law ineffective much more easily than it can render legislative law ineffective. It is thus never true, to use Professor Quint's words, that there is "no alternative course of action." There always is, when feelings run strong; namely, inaction on the one hand, and political action in opposition to the Court's law, on the other.

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13. See BICKEL, *THE LEAST DANGEROUS BRANCH passim* (1962).

But *should* these alternatives to compliance be open, or is this merely, in a couple of Holmesian phrases, law washed in the cynical acid, the badman's view of the law—and thus a brand of realism that perceives too little and too narrowly, and that in any event, like some behavioral science or other, represents a sterile concentration on what is, with no regard for the ought. Yet the view is accurate, so far as it goes; Messrs. Marshall and Carter were not for a moment lulled into believing they had won any more than this, or could have won more, when they obtained a favorable judgment in *Brown v. Board of Education*. No doubt, though accurate, this view is partial. Messrs. Marshall and Carter also knew that in many places where feelings did not run so deep, or where political power is differently distributed than it is in the South, they had won something more immediate; in such places, the good or the indifferent man's view of the law—the unwashed law—was the accurate one, and the mere pronouncement of the Court's new rule had palpable effect. There are two realities; and neither must be allowed to block out the other. As to the ought, the badman we are talking about is a dissenter against a command that comes to him, not from the political institutions in whose formation he plays his part and to whose deliberations he has access, but from an insulated, unrepresentative court. The dissenter may, for all we know, be a majority, or be in a position to form one. The coherence of the social order demands that he obey decrees specifically addressed to him. But should there not be the opportunity and the means to reject and to alter the rule of law handed down from above? If there weren't, I for one would find it extremely difficult to defend the Supreme Court's function as ultimately consistent with democratic self-rule. There ought to be, and there is. This is the meaning of the dissenter's option to wait for litigation. He waits to see how intensely others are concerned to have the rule enforced; the speed and extent of litigation will reveal that, and litigation is thus itself something of a process of balancing interests and of measuring strength. (Little will be done, observed Messrs. Marshall and Carter, "unless Negroes demand and insist upon desegregation.") He waits to assess the reaction, in the interstitial area left to them to react in, of the Supreme Court's first constituency—the lower federal and state judges. And he waits to allow time for the agitation of public opinion, since he knows that if he turns out to be in the majority, or to feel intensely where all others are merely indifferently acquiescent, he can change the law, or make it a dead letter, without recourse to the extremely cumbersome process of amendment. He ought, in such circumstances, to be able to change the law, even aside from the undoubted fact that ultimately, in a government where all the physical and money power is in representative hands, nothing can keep him from doing so. In principle, moreover, as I have suggested, if he feels intensely enough and there are enough of him, even if he is in a minority, and even if the command comes to him from the representative institutions,



he ought not to be coerced, at least not forthwith. He—he at large, his entire number and his political leadership—ought rather to be brought around in time; and it gives rise to no contradiction, merely to some untidiness, to hold also that in the meantime, while the issue is in doubt and subject to settlement by political means, coercion does also take place, as litigation succeeds and produces specific decrees. This much of enforcement is part of the process of political settlement.

The course of opposition to the Court's law that I have described, calling for inaction and for political action inconsistent with the law, and embodying what is loosely called disobedience of the law of the land on the part both of private and official persons—this course was widely pursued, for example, after the Court declared minimum-wage legislation unconstitutional in 1923, in *Adkins v. Children's Hospital*,<sup>14</sup> until it succeeded fourteen years later with a judicial retreat in *West Coast Hotel Co. v. Parrish*.<sup>15</sup> It was pursued with respect to released-time programs for religious instruction in public schools, which the Court held unconstitutional in *Illinois ex rel. McCollum v. Board of Education*,<sup>16</sup> and succeeded within five years, with quite as real a judicial retreat in *Zorach v. Clauson*.<sup>17</sup> It is being widely followed now in the wake of the Court's recent *School Prayer Cases*,<sup>18</sup> and it may well succeed. It was followed, with the greatest of vigor, shrewdness, and determination, in opposition to the *School Segregation Cases*, and it has failed. That is one measure of a decade's progress and of the Court's triumph.

It was not to be expected that the principle of school desegregation should be accepted and implemented forthwith in the South, as it was in Pennsylvania and New Jersey and Kansas, in New Mexico and Arizona, or under the federal government's immediate authority in the District of Columbia. The deliberate-speed formula was a candid recognition of this fact. The system would have worked no differently in any event, no matter what the form of the Supreme Court's decree. It is illusion to think otherwise, as was demonstrated, for example, by the history of desegregation in higher education, which began without any express deliberate-speed qualification over a generation ago.<sup>19</sup> A realistic objective, as of 1954-1955, was, Aubrey Williams said, to draw white Southerners "out of the hysteria that they're in." Aside

14. 261 U.S. 525.

15. 300 U.S. 379 (1937).

16. 333 U.S. 203 (1948); see Patric, *The Impact of a Court Decision: Aftermath of the McCollum Case*, 6 J. PUB. L. 455 (1957).

17. 343 U.S. 306 (1952).

18. *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

19. See *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956), 355 U.S. 839 (1957); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); U.S. COMM'N ON CIVIL RIGHTS, *EQUAL PROTECTION OF THE LAWS IN PUBLIC HIGHER EDUCATION*, 1960 (1961); U.S. COMM'N ON CIVIL RIGHTS, *EDUCATION 167-71* (1961).

from the South, and as a crucial factor in the process of extracting it from its hysteria, the task was, as Messrs. Marshall and Carter put it, "to unite the country behind a nationwide desegregation program." For two years after the initial judgment, there was considerable desegregation along the border, and a scattering in the South proper. I have noted that the high figure of 200 desegregating districts was reached in 1956. The South was assessing the courses of action and inaction open to it. Then for about six years, from early 1956 onward (March 11, 1956, the date the Southern Congressional Manifesto<sup>20</sup> was issued, is a convenient starting date), there was a pitched political struggle over the validity of the ultimate goal of desegregation, and for a good while the issue was in doubt, especially because during the Eisenhower administration, while the President kept his own counsel, the substantial nationwide majority favoring the Court's judgment was left without political leadership. In 1957 and 1958 the South miscalculated badly. The use of bayonets to keep Negro children out of Central High School in Little Rock, and the subsequent school closings in Arkansas and Virginia caused Northern opinion to coalesce and harden—although even during these crises the President would not lead. Responsible political leadership was, however, assumed in the 1960 Presidential campaign and after, and it can now be said that the country is united behind the general outlines of a desegregation program. The hysteria of the deep South has been mastered in state after state—Virginia, Arkansas, Louisiana, Georgia, South Carolina. It is in train of being mastered under exceptionally adverse conditions even in Alabama. The "process of mutual education for whites and blacks," which Robert Penn Warren foresaw and of which "the actual beginning of . . . desegregation" is an essential part—this process is under way. Mississippi alone now stands, emotionally and in practice, where it stood, say, in 1957. It cannot long maintain such a posture entirely alone.

As I have indicated, this is, in my judgment, an enormously important achievement; without it, nothing else would have been possible. No doubt, a resisting, and even a violently resisting, minority may yet have to be dealt with—for example, in Mississippi, and perhaps in black-belt counties in other states as well. Nor does it follow that progress in other areas can now be expected to be entirely voluntary, although voluntary compliance is plainly on the increase, and may be expected to increase further as Negro communities, perhaps aided administratively by the federal government, exert pressure. Yet many lawsuits are still in prospect. Many communities, weighing the attractions of delay as against the costs of litigation, might well still prefer to wait and incur the latter, even though the outcome, immediate and ultimate, no longer leaves room for doubt or hope. The law of desegregation is established, but it still needs to be administered on a broad front.

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20. See N.Y. Times, March 12, 1956, p. 19, col. 2.

On the basis of decided cases and other communiqués from the front lines, so to speak, I propose now to attempt a more concrete statement of the present status of school desegregation. I will rely rather heavily on the developing case law, of course, for the cases set the pace; they build models that are then voluntarily followed; they are a form of art widely imitated by life. Yet a good deal also happened before there was any case law, notably massive desegregation in Baltimore, St. Louis, Louisville, Washington, D.C., not to speak of Arizona, New Mexico, and other more isolated areas in the North and West. These models from real life have, in their turn, exerted their influence on the case law.

## II.

It is not accurate to say that the federal courts at any stage, even the earliest, led the way toward tokenism, as it has come to be called. It is quite true, however, that for a season the federal courts accepted what I might make bold to call "genuine tokenism," when it was more or less voluntarily offered. At the same time, the attitude of the courts was quite different when they were faced with complete inactivity, with total resistance. The leeway provided by the deliberate-speed formula enabled the courts to react flexibly and politically in accordance with their assessment of local situations, and to feel their way toward the kind of decree which in this place or in that would be most likely to strengthen influences working toward ultimate compliance. In North Carolina, where the hysteria of massive resistance never took hold, the Court of Appeals for the Fourth Circuit as early as 1956 settled on a course of accepting a limited number of transfers of highly selected Negro children into a few white schools.<sup>21</sup> Beneath this outer show, the schools remained segregated, just as they had always been. But this outer show did signify acceptance in principle of the law of desegregation at a time when it was being violently resisted on a last-ditch basis in other places. Plainly, the Fourth Circuit decided to wait in North Carolina, and to allow the impetus of a start toward desegregation to have a chance to develop on its own.<sup>22</sup>

The overshadowing issue in the Fourth Circuit was the massive resistance of Virginia, to which the judicial reaction was quite different. North Carolina managed its tokenism through a pupil placement statute setting forth criteria

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21. See *Carson v. Warlick*, 238 F.2d 724 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957); *Covington v. Edwards*, 264 F.2d 780 (4th Cir.), *cert. denied*, 361 U.S. 840 (1959); see McKay, "With All Deliberate Speed," 43 VA. L. REV. 1205, 1215-20 (1957); Meador, *The Constitution and the Assignment of Pupils to Public Schools*, 45 VA. L. REV. 517, 533-34 (1959). See also Note, *State Efforts To Circumvent Desegregation*, 54 NW. U.L. REV. 354 (1959); Note, *The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placements Acts*, 62 COLUM. L. REV. 1448 (1962).

22. Cf. remarks of Brown, J., Transcript of Trial, *Vick v. County Bd. of Educ.*, 205 F. Supp. 436 (W.D. Tenn. 1962), in 6 RACE REL. REP. 1001, 1003 (1962), quoted in U.S. COMM'N ON CIVIL RIGHTS STAFF, CIVIL RIGHTS U.S.A.: PUBLIC SCHOOLS, SOUTHERN STATES 3-4 (1962).

(relating to school administration, educational policy, and the health, welfare, and safety of pupils) for the assignment of individual pupils to available schools. Virginia also enacted such a statute, differing, to be sure, in detail, but differing chiefly in that it was not being administered at all, in that it reeked with the rhetoric of massive resistance, and in that it was tied to a wholly defiant school closing law. The North Carolina statute was allowed to stand, but the Virginia statute was struck down.<sup>23</sup> School closings followed in Virginia by order of the governor, and the federal court, happily joined by the state Supreme Court of Appeals, declared the school-closing law unconstitutional.<sup>24</sup> This hard judicial attitude achieved what had quite evidently been its aim. It broke the back of massive resistance.<sup>25</sup> The Fourth Circuit then assimilated Virginia, which enacted a new pupil placement statute and began to administer it, to North Carolina.

Further south, the Court of Appeals for the Fifth Circuit had no occasion to accept tokenism on the North Carolina model, for none was brought into litigation. On the narrowest of grounds, the court declined to strike down the Alabama pupil placement statute, although not the merest token of desegregation had taken place under it.<sup>26</sup> But this was at a time when the outlook in Alabama might have seemed ambiguous; Alabama was in any event not yet writhing in the grip of massive resistance, and it happened to be the moment when the crises in both Arkansas and Virginia were at their height. This was a peak of the political struggle, and the court, not unnaturally, was holding its breath. It is also to be remarked that Negro pressure in Alabama was then not intense. Earlier in the Fifth Circuit, a Louisiana pupil placement statute, which was accompanied by a constitutional amendment reaffirming segregation, was struck down,<sup>27</sup> as, in due course, was a school closing law.<sup>28</sup> Somewhat later, in Houston and Dallas, a form of tokenism which, unlike the North Carolina variety, flaunted a purpose substantially to continue segregation, and flaunted it explicitly, right on its face, was disallowed.<sup>29</sup> In Florida, the Fifth Circuit made it clear that a mere

23. *School Bd. v. Atkins*, 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957).

24. *James v. Almond*, 170 F. Supp. 331 (E.D. Va.), *appeal dismissed per stipulation*, 359 U.S. 1006 (1959); *Harrison v. Day*, 200 Va. 439, 106 S.E.2d 636 (1959). See also *James v. Duckworth*, 170 F. Supp. 342 (E.D. Va.), *aff'd*, 267 F.2d 224 (4th Cir.), *cert. denied*, 361 U.S. 835 (1959).

25. Except, notoriously, in Prince Edward County, where particularly ingenious and resourceful local determination has combined with misfortunes of litigation to create a unique situation. See *Griffin v. Board of Supervisors*, 322 F.2d 332 (4th Cir. 1963), *cert. granted*, 32 U.S.L. WEEK 3242 (U.S. Jan. 6, 1964) (No. 592).

26. *Shuttlesworth v. Birmingham Bd. of Educ.*, 162 F. Supp. 372 (N.D. Ala.), *aff'd per curiam*, 358 U.S. 101 (1958).

27. *Bush v. Orleans Parish School Bd.*, 138 F. Supp. 337 (E.D. La. 1956), *aff'd*, 242 F.2d 156 (5th Cir.), *cert. denied*, 354 U.S. 921 (1957).

28. *Hall v. St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd per curiam*, 368 U.S. 515 (1962).

29. These were the so-called "salt-and-pepper" plans, which provided an integrated school for those, white and Negro, who wanted it, but otherwise continued the segregated system intact. *Ross v. Peterson*, 5 RACE REL. L. REP. 703, 709 (S.D. Tex. 1960); see

preferred readiness to administer a pupil placement statute was no defense to a desegregation suit.<sup>30</sup> Tokenism itself was merely a promise, and the Fourth Circuit was accepting it as such. But a promise to promise would not do.

In the Eighth Circuit, the problem of Arkansas was dominant. The federal district court assumed a role in meeting massive resistance, as did its counterpart in Virginia, by striking down the school closing law,<sup>31</sup> although, unlike the Virginia federal court, it lacked the support of the state Supreme Court.<sup>32</sup> But before the crisis in Little Rock, Arkansas had somewhat resembled North Carolina, and in the aftermath of the crisis, it acted very much like Virginia. Both before and after, therefore, being offered tokenism in the form of palpable symbols, the Eighth Circuit accepted it, like the Fourth.

Delaware in the Third Circuit and Tennessee in the Sixth went their own rather different ways, on which I shall touch presently; but what I have summarily described here represents, I believe, the main lines along which litigation moved in the first five or six years. I think it not too much of a generalization to say, despite some variant cases, that tokenism was allowed where the local authorities were prepared to symbolize their acceptance of the principle of desegregation by the actual physical introduction of Negro pupils into white schools. It was allowed, that is, where it resulted in action that might hopefully be regarded as carrying a forward momentum. Not otherwise. Administration of the law at this relatively early stage was geared to the process of establishment; the courts accepted a palpable symbol of acquiescence, but also exerted rigid pressure when nothing concrete was forthcoming voluntarily. This, I believe, is the sense of the cases, and in this sense they are coherent. Doctrinally, however, the law was in some conflict and disarray.

In the Fourth Circuit the doctrine developed to fit the North Carolina situation, to which Virginia was soon assimilated. The court held that no class actions seeking fuller desegregation would be entertained so long as selected Negro students were admitted to white schools under the pupil placement statutes. The court thus foreclosed itself from noticing the continuation, formal or informal, of essentially segregated school systems. It allowed only individual Negro plaintiffs to litigate, each for himself, and only after exhaustion by each plaintiff of the administrative remedies pro-

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Boson v. Rippey, 285 F.2d 43 (5th Cir. 1960); Borders v. Rippey, 195 F. Supp. 732 (N.D. Tex. 1961); U.S. COMM'N ON CIVIL RIGHTS, EDUCATION 18-19, 53-55 (1961); cf. Davis v. East Baton Rouge Parish School Bd., 219 F. Supp. 876, 885 (E.D. La. 1963).

30. Mannings v. Board of Pub. Instruction, 277 F.2d 370 (5th Cir. 1960); Gibson v. Board of Pub. Instruction, 272 F.2d 763 (5th Cir. 1959); Holland v. Board of Pub. Instruction, 258 F.2d 730 (5th Cir. 1958).

31. Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark.), *aff'd sub nom.* Faubus v. Aaron, 361 U.S. 197 (1959); cf. Aaron v. Cooper, 261 F.2d 97 (8th Cir. 1958), *order on remand*, 169 F. Supp. 325 (E.D. Ark. 1959) (transfer of school to private corporation enjoined; school, if reopened, must be integrated).

32. See Garrett v. Faubus, 230 Ark. 445, 323 S.W.2d 877 (1959).

vided by the pupil placement statutes.<sup>33</sup> It was open to an individual Negro plaintiff to prove that he personally had been denied a transfer to a white school for explicitly or necessarily racial reasons,<sup>34</sup> unmixed with other plausible reasons, such as residential zoning, overcrowding in the white school, or the pupil's lack of aptitude as revealed by various tests. Such plausible reasons were rather indulgently regarded. The upshot of litigation would every now and then be that the transfer of an additional Negro child or two would be ordered, but no comprehensive plan was put into operation by the federal courts.<sup>35</sup> In the rest of the Circuit, West Virginia was proceeding mainly on its own with substantial desegregation, and there was no movement whatever in South Carolina, nor much pressure; the litigation in Clarendon County, S. C., which was one of the five original *School Segregation Cases*, was intentionally allowed to lag by plaintiffs.<sup>36</sup> Both of these states, for their diametrically opposed reasons, were therefore not significantly in litigation.

In the Fifth Circuit, pupil placement statutes were held to be no defense to a class action to desegregate the schools, and the Court of Appeals entertained such actions without requiring individual Negro plaintiffs to exhaust their state administrative remedies.<sup>37</sup> This was squarely in conflict with the doctrine in the Fourth Circuit. The Eighth Circuit fudged the doctrine, but made it explicit that only the North Carolina model of palpable tokenism would be accepted. School districts, the Court of Appeals said, must take steps "publicly to disestablish segregation,"<sup>38</sup> and at least one district court went to great lengths, indeed, to see to it that the steps taken were public and real. Tokenism, it was clear, requires a token.<sup>39</sup>

All this was not administration of compliance with the law, but administration marking time and seeking to assist in the establishment of law. This phase is now over, and the cases show it, if not yet quite uniformly. In the Fourth Circuit, the rule against class actions and the requirement that individual plaintiffs must exhaust the remedies provided by pupil placement statutes are no longer operative. In both North Carolina and Virginia, the court has pierced the veil of tokenism, looked beneath at continued biracial zoning, and demanded more comprehensive action. In May 1962, in *Green*

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33. *Holt v. Raleigh City Bd. of Educ.*, 265 F.2d 95 (4th Cir.), cert. denied, 361 U.S. 818 (1959). But see *McCoy v. Greensboro City Bd. of Educ.*, 283 F.2d 667 (4th Cir. 1960).

34. *Beckett v. School Bd.*, 185 F. Supp. 459 (E.D. Va. 1959), aff'd sub nom. *Farley v. Turner*, 281 F.2d 131 (4th Cir. 1960).

35. See *Jones v. School Bd.*, 278 F.2d 72 (4th Cir. 1960).

36. See *Brunson v. Board of Trustees*, 311 F.2d 107 (4th Cir. 1962), cert. denied, 373 U.S. 933 (1963); *N.Y. Times*, Oct. 22, 1963, p. 31, col. 2.

37. See cases cited note 30 *supra*.

38. *Parham v. Dove*, 271 F.2d 132, 135 (8th Cir. 1959); see *Dove v. Parham*, 282 F.2d 256 (8th Cir. 1960).

39. See *Dove v. Parham*, 196 F. Supp. 944 (E.D. Ark. 1961).

*v. School Board of the City of Roanoke, Virginia*,<sup>40</sup> the Fourth Circuit had before it a system under which Negro pupils were assigned to Negro elementary schools without regard to geographic zoning, and then fed to Negro junior high and high schools. Under the pupil placement statute, however, nine Negro children (of thirty-nine applying) were admitted to white schools. Twenty-eight who failed to obtain a transfer sued to enjoin the school board from continuing this essentially segregated system of tokenism. They did not bother to exhaust further remedies under the pupil placement statute. And the court did not require them to do so. The pupil assignment practices of Roanoke were "infected," the court said, with racial discrimination. Such practices were tolerated in earlier cases "as interim measures only," but their day was now done.<sup>41</sup> The court ordered submission of a plan for full compliance. Soon thereafter, in similar circumstances, the court took even stronger action with respect to Charlottesville, Virginia.<sup>42</sup> And in two further cases, one from Caswell County, North Carolina,<sup>43</sup> a rural county with a Negro majority among its school children, the other from Durham,<sup>44</sup> the court again heard class actions and issued broad and demanding decrees. The new mood in the Fourth Circuit has been carried forward in more recent cases, including one ordering the District Court for the Eastern District of South Carolina to hear a class suit filed in behalf of Negro pupils in Clarendon County, South Carolina.<sup>45</sup>

The Sixth Circuit, embracing Tennessee, did not have early occasion to express itself on the doctrinal problem of individual suits and exhaustion of remedies that bedevilled the Fourth Circuit's transition from an acceptance of tokenism to the administration of compliance. But in a suit from Memphis, a city oriented to Arkansas and Mississippi, decided in March 1962, the Sixth Circuit brushed aside the Tennessee pupil placement statute, under which, by August 1961 thirteen Negro children had been admitted to white schools. The court noted that Memphis still maintained "dual area zone maps, one for white schools and one for Negro schools," and held that "the admission of thirteen Negro pupils . . . is not desegregation, nor is it the institution of a plan for a non-racial organization of the Memphis school system."<sup>46</sup> The judgment, expressed by a writer in the *Columbia Law Review* in 1962, that pupil placement statutes and the tokenism they produced are

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40. 304 F.2d 118 (4th Cir. 1962).

41. *Id.* at 124.

42. *Dillard v. School Bd.*, 308 F.2d 920 (4th Cir. 1962), *cert. denied*, 374 U.S. 827 (1963).

43. *Jeffers v. Whitley*, 309 F.2d 621 (4th Cir. 1962).

44. *Wheeler v. Durham City Bd. of Educ.*, 309 F.2d 630 (4th Cir. 1962).

45. *Brunson v. Board of Trustees*, 311 F.2d 107 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963). See also *Bell v. School Bd.*, 321 F.2d 494 (4th Cir. 1963); *Jackson v. School Bd.*, 321 F.2d 230 (4th Cir. 1963); *Bradley v. School Bd.*, 317 F.2d 429 (4th Cir. 1963); *Marsh v. County School Bd.*, 305 F.2d 94 (4th Cir. 1962).

46. *Northcross v. Board of Educ.*, 302 F.2d 818, 820, 824 (6th Cir.), *cert. denied*, 370 U.S. 944 (1962).

obsolescent seems correct.<sup>47</sup> And yet, paradoxically, these statutes appear to be enjoying a finishing canter in the Fifth Circuit, where their career never amounted to anything in the past.

The Fifth Circuit's actions in the summer of 1962 were quite in line with those of the Fourth Circuit at about the same time, exhibiting an equally business-like mood. In a case from Pensacola, Florida,<sup>48</sup> the court declared itself unsatisfied with the operation of a pupil placement plan which had resulted in the admission of thirteen Negro children to white schools. A month later, in the latest phase of the New Orleans case,<sup>49</sup> the court held that maintenance of racial zoning was unconstitutional, and that the unconstitutionality was not cured by selective assignments under a pupil placement scheme of some Negro children to white schools. And in February 1963, in a case from Fort Worth,<sup>50</sup> the same court made short shrift of the argument, proceeding from the now-abandoned Fourth Circuit cases, that class actions circumventing state administrative proceedings should not be allowed. But in the summer of 1963 came three regressive actions.

In September 1961, Atlanta had put into effect a graduated transfer plan approved by the federal district court. It provided for use of the pupil placement statute to select Negro children for transfer to white schools. By the time the case reached the court of appeals, some fifty-four Negro pupils had been so transferred. But the initial assignment system was unchanged; Negroes went to Negro schools, whites to white. This is the classic method of tokenism. The Fifth Circuit, like the Fourth and Sixth, had rejected it the summer before in Pensacola and in New Orleans, as I have shown. But it now gave it its blessing in Atlanta.<sup>51</sup> The court's opinion was by Judge Griffin B. Bell, a recent appointee. It was concurred in by Judge Lewis of the Tenth Circuit, sitting by designation, who doubtless did not feel himself competent, on an *ad hoc* basis in a divided court, to be the one to spur a Southern city on to greater efforts. Judge Rives of Alabama, the third member of the panel, dissented, citing the prior decisions in the Circuit. Shortly thereafter, two other panels of Fifth Circuit judges were faced with extraordinary action in Alabama. In Birmingham, District Judge Lynne accepted the Alabama pupil placement act, without more, as an adequate desegregation plan, and held that no class actions would be entertained and that individual plaintiffs would be allowed to sue against discriminatory application of the statute only after having exhausted appropriate state admin-

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47. Note, *The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placement Acts*, 62 COLUM. L. REV. 1448, 1471-73 (1962).

48. *Augustus v. Board of Pub. Instruction*, 306 F.2d 862 (5th Cir. 1962).

49. *Bush v. Orleans Parish School Bd.*, 308 F.2d 491 (5th Cir. 1962).

50. *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963).

51. *Calhoun v. Latimer*, 321 F.2d 302 (5th Cir. 1963), *cert. granted*, 32 U.S.L. WEEK 3254 (U.S., Jan. 13, 1963) (No. 623).



istrative remedies.<sup>52</sup> Thus he flew in the face of all applicable authority in his own circuit, and by now in other circuits as well. In Mobile, in a case filed in March 1963, seeking to desegregate the schools for the fall term, Judge Thomas, on June 24, set the case for trial in November, with a view to working out a plan for the fall term of 1964.<sup>53</sup> In both cases, the court of appeals, no doubt feeling that, by July, when the cases reached it, its hands had been tied by the delay and, in the Birmingham case one can surely say, obstruction below, ordered only that actual administration of the pupil placement statute begin by September 1963.<sup>54</sup> And so it was on this basis of old-fashioned tokenism that desegregation began in both Birmingham and Mobile—though, to be sure, begin it did.

I think it plain—fitting this recital into the larger context which I attempted to set forth in the early part of this paper—that it is the consensus of the judges on the firing line, so to speak, that one phase in the administration of the law—the establishment phase, characterized by permissive tokenism, by a sort of minimal judicial holding of the line while the political process did, as it must, the main job of establishment—this phase has been closed out. The resistant minority has been politically reduced to manageable numbers and to a manageable temper, and it is now time for another phase, that of enforcement in earnest. To be sure, there are what I might call opposition judges, willing in varying degrees to give effect to their feelings whatever the risk of reversal. There have been such judges all along—one of them, in the Savannah, Georgia, case,<sup>55</sup> recently set out expressly to overrule *Brown v. Board of Education*—and there are, unfortunately, some new ones. But the consensus I speak of is broadly based. This consensus, articulated in a sufficient number and variety of cases, provides a foundation, I believe, for the Supreme Court to grant a group of certioraris and to lay down some new guidelines for the new phase, superseding the very sketchy ones of nearly a decade ago. It will be beneficial if the Court gives a new and unified sense of direction to the lower judges, and it will, incidentally, also be helpful if the Court exerts itself to keep the few opposition judges in line.

There are signs that the Supreme Court may intend to do just that. The

52. *Armstrong v. Board of Educ.*, 220 F. Supp. 217 (N.D. Ala.), *mandate issued ordering district court to issue preliminary injunction pending appeal*, 323 F.2d 333 (5th Cir. 1963), *petition for cert. filed*, 32 U.S.L. WEEK 3223 (U.S. Dec. 11, 1963) (No. 670).

53. *Davis v. Board of School Comm'rs*, 219 F. Supp. 542 (S.D. Ala.), *mandate issued ordering district court to issue preliminary injunction pending appeal*, 322 F.2d 356 (5th Cir.), *cert. denied*, 84 Sup. Ct. 170 (1963).

54. *Armstrong v. Board of Educ.*, 323 F.2d 333 (5th Cir. 1963), *petition for cert. filed*, 32 U.S.L. WEEK 3223 (U.S. Dec. 11, 1963) (No. 670); *Davis v. Board of School Comm'rs*, 322 F.2d 356 (5th Cir.), *cert. denied*, 84 Sup. Ct. 170 (1963). See also *Lee v. Macon County Bd. of Educ.*, 221 F. Supp. 297 (M.D. Ala. 1963).

55. *Stell v. Savannah-Chatham County Bd. of Educ.*, 220 F. Supp. 667 (S.D. Ga. 1963) (Scarlett, J.), *mandate issued ordering district court to issue preliminary injunction pending appeal*, 318 F.2d 425 (5th Cir. 1963); see *Harris v. Gibson*, 322 F.2d 780 (5th Cir. 1963); PELTASON, FIFTY-EIGHT LONELY MEN 7-8 (1961).

Court went out of its way, in a dictum in last term's *Memphis Parks* case,<sup>56</sup> to indicate that the time had come to raise the speed limit. The Court at the same time also struck down a device that had been permitted by the Court of Appeals for the Sixth Circuit in Tennessee in connection with plans for fairly massive desegregation through nonracial residential zoning. The Sixth Circuit had allowed a provision under which students finding themselves in a racial minority in a school to which they had been newly assigned could request a transfer to a school in which they were in a racial majority. Quite obviously, the effect of this was to allow white children who found themselves zoned into a previously Negro school to escape. As an expedient making a massive desegregation plan more palatable, the device, no doubt, served its purpose. However, at this late date the Supreme Court struck it down as unconstitutionally based on a racial criterion, which in practice, in a city formerly segregated by law, it plainly is.<sup>57</sup> The upshot may be to discourage residential zoning plans of desegregation and encourage free choice plans, but in any event, as applied in Tennessee, which has come a long way, the result is to obtain more actually mixed schools than would have been possible before. The Court's action must be read in context of the general speed-up trend.

The Court ought also to address itself to the problem of pupil placement tokenism. There is no longer good reason why newly desegregated places like Atlanta, or Mobile and Birmingham, and others that will come along, should be treated as they would have been had they desegregated five or six years ago. Tokenism, superimposed on an essentially segregated system, which the courts no longer tolerate elsewhere, should not be allowed anywhere. It is time for the Court so to hold, and make official, as it were, recognition of the law's firm establishment. No doubt there are pockets in the South—Mississippi, as I have said, is one, and many black-belt counties are also—where the establishment has not been achieved. But they are not isolated or insulated pockets. What happens in Memphis has its effect in Mississippi, and what happens in Charleston has its effect on Clarendon County, and so forth. The deepest, most backward, pockets gain time from the fact that their own Negro communities are exerting pressure very mildly; that is, they gain time before litigation brings the matter to a point. But when it has come to a point, it would seem late in the day to reward such communities for the length of time they took, and treat them as if they were North Carolina in 1956. There must be no premium placed on massive resistance. Nothing can be plainer than the Fourth and Fifth Circuit's awareness of this in the late fifties, as demonstrated by the different initial treatment of North Carolina and Virginia. We mustn't now relax and forget it.

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56. *Watson v. City of Memphis*, 373 U.S. 526 (1963).

57. *Goss v. Board of Educ.*, 373 U.S. 683 (1963).

Finally, it is time for an authoritative word on the grade-a-year plans. It has been fairly general practice in the Fourth, Fifth, and Sixth Circuits to allow either free-choice or nondiscriminatory residential zoning plans to be put into effect on a grade-a-year basis, so that system-wide desegregation will often not take place till well into the nineteen seventies.<sup>58</sup> Even the Atlanta pupil placement plan operates on a grade-a-year basis, and oddly enough, from the top down at that. Sometimes lateral transfers in grades not covered are provided for, sometimes not. The reason why this form of gradualism was allowed is clear. It is the reason for insisting on, but also accepting, palpable tokenism, of which these plans are an extension, though differing very substantially in kind. It made good sense to allow Houston, for example, or New Orleans, to make a relatively slow but real start, and indeed a start embodying the very method of ultimate full desegregation. But does it continue to make sense to allow the slow pace to proceed now? A number of grade-a-year plans, new and old, have been speeded up by the lower courts. One sensible criterion for new plans, which has received mention in the cases, is the stage reached by surrounding or otherwise comparable communities. If Dallas has by now desegregated up to a certain grade, there is no reason why Fort Worth should be allowed additional time to get there. If Nashville has desegregated through the fourth grade, there is no reason why Davidson County right outside should start all over again at grade one.<sup>59</sup> Other criteria are harder to define. It remains true, as the Solicitor General advised the Supreme Court in 1955, that deadlines are unwise, if for no other reason than that "maximum periods tend to become minimum periods."<sup>60</sup> Still, the Supreme Court could require the lower courts to examine existing grade-a-year plans, to put the burden of proof on the school authorities to demonstrate their continuing need for more time, and to disallow whatever cannot fairly be supported.

It is not to be expected, however, that the Supreme Court can, by speaking out now on problems that seem soluble, solve all remaining problems. One of the most perplexing of these, now barely emerging into litigation,<sup>61</sup> is the problem of Negro teachers and administrative personnel. Of course they

58. See, e.g., *Bush v. Orleans Parish School Bd.*, 308 F.2d 491, 502 (5th Cir. 1962) (New Orleans); *Ross v. Peterson*, 5 RACE REL. L. REP. 703, 709 (S.D. Tex. 1960) (Houston).

59. See *Maxwell v. County Bd. of Educ.*, 301 F.2d 828 (6th Cir. 1962), *rev'd on other grounds*, 373 U.S. 683 (1963); *Flax v. Potts*, 218 F. Supp. 254 (N.D. Tex. 1963) (Ft. Worth). For decisions requiring more speed now than in the past, see *Jackson v. School Bd.*, 321 F.2d 230 (4th Cir. 1963); *Goss v. Board of Educ.*, 301 F.2d 164 (6th Cir. 1962), *rev'd on other grounds*, 373 U.S. 683 (1963), *Monroe v. Board of Comm'rs*, 221 F. Supp. 968 (W.D. Tenn. 1963). *But cf.* *Gaines v. Dougherty County Bd. of Educ.*, 222 F. Supp. 166 (M.D. Ga. 1963).

60. Brief for the United States on the Further Argument of the Questions of Relief, p. 25, *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

61. See *Mapp v. Board of Educ.*, 319 F.2d 571 (6th Cir. 1963); *Augustus v. Board of Pub. Instruction*, 306 F.2d 862 (5th Cir. 1962).

ought to be assigned on merit and without regard to race. But it may prove quite difficult to try to police teacher assignment practices, which must vary a great deal—in New York City, for example, they appear not to be centrally controlled at all; teachers simply offer themselves to principals—for conformance to constitutional requirements. Another, even more forbidding problem is whether and to what extent the Constitution condemns not only segregation by law, but also racial imbalance that is not the product of law, nor even of any school board's conscious act. To put it differently, does the Constitution merely forbid segregation, or does it also command some measure of integration? At this point, of course, the problems of North, West, and South merge.

### III.

I have freely used the term desegregation, and it is given some content, to be sure, by the cases I have reviewed. I must try now to define it more closely with the aid of other materials as well. Presumably, what most of us visualize as the end result of desegregation is a school system in which there is residential zoning, either absolute or modified by some sort of choice or transfer scheme, and in which, in any event, children are assigned without regard to their race. This may be a good enough abstraction. But it is no statement of what such a system really looks like, nor of how to get there from a system that has for decades been organized on a segregated basis. Sometimes the way of getting there may be simple. If a school district, having few Negro children, had no Negro school itself, but bussed its Negro children to a neighboring segregated school, then it can be ordered—and no doubt should be ordered—to admit its Negro children forthwith to its previously all-white school and stop bussing them elsewhere. Indeed, as has been suggested, such an order need not rest on *Brown v. Board of Education*. It can rest on the earlier higher education cases, which hold pretty nearly exactly this.<sup>62</sup> But if a school district, as is typically true in cities, for example, did have Negro and white schools, what must it do? Simply rezoning geographically may not be easy, for the schools were not located initially on the basis of straight residential zoning, but on the basis of segregated zoning, and so they may not be suitably placed. Moreover, is a school board required to send white children to formerly Negro schools, which may be substandard? Obviously, it ought to improve the Negro schools both physically and educationally, but it cannot do that overnight, nor is there any way for a federal court to produce the resources and the skills needed to do it. Indeed, under present conditions, absent federal financial help, a school board may not be able to do it at all; the entire school system may be in a state of decline.

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62. See U.S. COMM'N ON CIVIL RIGHTS, EDUCATION 31 (1961).

The problem is alleviated somewhat—without being, in any degree, brought nearer to solution—by a measure of inertia not unexpectedly to be found in the Negro community. There is, after all, some reality beneath the rhetoric of “The Southern Way of Life.” Segregation has been, in the South, the habit of both races for quite some time. And so a school board may wipe out all former racial zoning lines, unify the system, and either (a) proceed also to wipe out all residential lines, and institute a free choice plan, under which parents simply present their children at the school of their choice, and the children are accepted so long as there is room; or (b) zone residentially without regard to race, and where a zone contains both a formerly all-white and a formerly all-Negro school, allow a free choice between them to children in the zone. When space problems arise, detailed residential criteria, with particular regard for traffic conditions, or criteria relating to the special circumstances of a given child, such as a physical disability or other factor, or the need or desire for special courses not offered elsewhere, and the like, must decide which of several children wishing to register in a given school is to be allowed to do so. But there can be no special tests imposed on Negro children to which white children are not subjected.<sup>63</sup> There can now be no special transfer provisions in effect allowing white children to transfer out of predominantly Negro schools for that reason and no other, thus causing resegregation.<sup>64</sup> And courts must be on the lookout for the tendency, natural in communities with a history of segregation and not unheard of elsewhere as well, to gerrymander zones so as to produce all-Negro, if not also all-white schools.<sup>65</sup> Perhaps it is possible also to require, as Judge Kaufman did in New Rochelle, New York,<sup>66</sup> that all requests to transfer out of a Negro school be granted subject only to space limitations, or, as was done in Delaware,<sup>67</sup> merely that no Negro child desiring a transfer from a colored to an integrated or white school should be denied it on the ground that the Negro school is nearer to his home. But in the cities, at any rate, space limitations are not trivial. Perhaps in some circumstances it is possible, finally, as was also done in Delaware,<sup>68</sup> to erect a rebuttable presumption that any all-Negro school surrounded by all-white attendance areas has been gerrymandered. All such conditions having been met, however, it is difficult to see what alternative a court has to accepting a plan of the kinds I have described. It is

63. *Dillard v. School Bd.*, 308 F.2d 920 (4th Cir. 1962), *cert. denied*, 374 U.S. 827 (1963); *Green v. School Bd.*, 304 F.2d 118 (4th Cir. 1962); *Dowell v. School Bd.*, 219 F. Supp. 427 (W.D. Okla. 1963); *Davis v. Board of Educ.*, 216 F. Supp. 295 (E.D. Mo. 1963); *Vick v. County Bd. of Educ.*, 205 F. Supp. 436 (W.D. Tenn. 1962); *Vickers v. Chapel Hill City Bd. of Educ.*, 196 F. Supp. 97 (M.D.N.C. 1961).

64. *Goss v. Board of Educ.*, 373 U.S. 683 (1963); *Mapp v. Board of Educ.*, 319 F.2d 571 (6th Cir. 1963).

65. See *Branche v. Board of Educ.*, 204 F. Supp. 150 (E.D.N.Y. 1962).

66. *Taylor v. Board of Educ.*, 195 F. Supp. 231 (S.D.N.Y.), *aff'd*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961).

67. *Evans v. Buchanan*, 195 F. Supp. 321, 325 (D. Del. 1961).

68. *Evans v. Buchanan*, 207 F. Supp. 820 (D. Del. 1962).

plans of this sort that border cities have used in desegregating voluntarily. And it is this sort of arrangement that generally prevails in the North and West. No other models are readily available.

What then happens under such plans? Most white children continue to present themselves at formerly all-white schools, great numbers of Negro children continue to present themselves at formerly all-Negro schools, and a number of Negro children are admitted to white schools. Some few white children go to Negro schools; most flee to other homes, or out of the public school system altogether. In time, there is a settlement into conditions of substantial *de facto* segregation, alleviated by a number of successful integrated situations. In other words, essentially Northern conditions. I do not say such conditions have been achieved throughout the South. I do say this is the likely—and anticlimactic—outcome of all the litigating and all the striving. St. Louis, Missouri, desegregated in 1954-1955. The city was rezoned geographically, without regard to racial considerations. According to a thoughtful and thorough report to the United States Civil Rights Commission by a disinterested observer, the transition was “solidly conceived and brilliantly carried off.” The result as of 1962?

Roughly 70 percent of the Negro secondary students in St. Louis last year attended high schools whose student bodies were 90 to 100 percent Negro. The same was true with respect to approximately 85 percent of the Negro elementary pupils. Only about 15 of the 136 elementary schools were significantly integrated.<sup>69</sup>

Louisville, Kentucky, desegregated in 1956. For elementary and junior high schools, it rezoned residentially, but also allowed free transfer to any pupil, limited only by the availability of space. Again according to an excellent report made in 1962 to the United States Civil Rights Commission:

There is no apparent gerrymander of boundary lines . . . but nevertheless almost one-half of the [elementary] schools are almost all white or all Negro. . . . [The figure may be lower than in St. Louis, but so is the ratio of Negro to white pupils.] Seventy percent of all Negro junior high school students go to the three Negro schools.<sup>70</sup>

Louisville high schools are not zoned. Students have a free choice among six high schools.

Seventy-three percent of the Negro students attend one high school, Central, the predesegregation Negro high school. . . . There was one white student in this high school in 1961-62.<sup>71</sup>

Baltimore desegregated in September 1954, instituting a free choice plan.

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69. U.S. COMM'N ON CIVIL RIGHTS STAFF, CIVIL RIGHTS U.S.A.: PUBLIC SCHOOLS, CITIES IN THE NORTH AND WEST 266, 267 (1962) [hereinafter cited as PUBLIC SCHOOLS IN THE NORTH AND WEST].

70. *Id.* at 30.

71. *Id.* at 27, 29.

By 1960, over 50% of all schools were attended entirely by one or the other race. Most pupils tend to choose the neighborhood school.<sup>72</sup>

And so on. In New York City—all boroughs—75 of 570 elementary schools have 90% or more Negro and Puerto Rican students. In Chicago, some 87% of Negro elementary school pupils attend virtually all-Negro schools. In Philadelphia, 14% of all public schools have a Negro enrollment of *over* 99%.<sup>73</sup> Is there a legal remedy? If there has been a gerrymander, there should be a judicial remedy in New Rochelle, New York,<sup>74</sup> or Hillsboro, Ohio,<sup>75</sup> as well as in Fort Worth, Texas,<sup>76</sup> or in the Rose Hill-Minquadale school district in Delaware,<sup>77</sup> and the courts have so held. But as the cases also show, proof of a discriminatory motive may not be as easily forthcoming as in the New Rochelle case,<sup>78</sup> which was a remarkably ill-conducted litigation from the school board's point of view—and not that proof was all that easy, even so. The Hillsboro case was the *Gomillion v. Lightfoot*<sup>79</sup> of school district gerrymanders; the thing was objectively obvious beyond the possibility of explanation. This will not happen often. Elsewhere, even the presumption set up by the district court in Delaware, to which I referred earlier, may turn out to be rebuttable. Again, if a school board achieves segregation by allowing white children, but not Negro, to escape to other schools in the system, that ought to be, and has been, stopped in New Rochelle as well as in Charlottesville<sup>80</sup> and Lynchburg Virginia,<sup>81</sup> or Knoxville, Tennessee.<sup>82</sup> Other transfer policies which, though fair on their face, are discriminatorily applied can also be policed.<sup>83</sup> Finally, as the Supreme Court has indicated, perhaps federal courts ought to hear class actions in the North, even where there is no history of legal segregation, without requiring exhaustion of state administrative remedies.<sup>84</sup> This had not been uniform

72. U.S. COMM'N ON CIVIL RIGHTS, EDUCATION 17 (1961).

73. See Maslow, *De Facto Public School Segregation*, 6 VILL. L. REV. 353, 354-55 (1961).

74. See note 66 *supra* and accompanying text.

75. See *Clemons v. Board of Educ.*, 228 F.2d 853 (6th Cir.), *cert. denied*, 350 U.S. 1006 (1956).

76. See *Flax v. Potts*, 218 F. Supp. 254, 259 (N.D. Tex. 1963).

77. *Evans v. Buchanan*, 207 F. Supp. 820 (D. Del. 1962).

78. See *Bell v. School City of Gary*, 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963); *Thompson v. County School Bd.*, 204 F. Supp. 620 (E.D. Va. 1962); *Henry v. Godsell*, 165 F. Supp. 87 (E.D. Mich. 1958); *Sealy v. Department of Pub. Instruction*, 159 F. Supp. 561 (E.D. Pa. 1957), *aff'd*, 252 F.2d 898 (3d Cir.), *cert. denied*, 356 U.S. 975 (1958). But a gerrymander can be managed not only by tailoring a zone to a school, but also by locating a new school with the racial factor in mind, and where there is proof, this can also be enjoined.

79. 364 U.S. 339 (1960).

80. *Dillard v. School Bd.*, 308 F.2d 920 (4th Cir. 1962), *cert. denied*, 374 U.S. 827 (1963).

81. *Jackson v. School Bd.*, 321 F.2d 230 (4th Cir. 1963).

82. *Goss v. Board of Educ.*, 373 U.S. 683 (1963).

83. See, e.g., *Davis v. Board of Educ.*, 216 F. Supp. 295 (E.D. Mo. 1963).

84. *McNeese v. Board of Educ.*, 373 U.S. 668 (1963).

policy in the lower federal courts outside the South<sup>85</sup> before the Supreme Court's recent decision in the *McNeese* case, and one may question its wisdom as a uniform policy, having regard to difficulties of proof, to what is, as we shall see further, the limited range of remedies available to a federal court, and to the greater, though also not unlimited, effectiveness of administrative remedies and the efforts of school authorities in some states to apply them.<sup>86</sup>

Assuming there is a judicial decree, what effect can we expect it to have? Judge Kaufman in New Rochelle ordered free transfers from the effectively segregated Lincoln School to other schools where space was available. The result was something, to be sure. Lincoln school went from 94% Negro to 88%. As to the transferees, in one school they found a very different socio-economic group from their own, and performed rather poorly. Another school in which transfers were accepted already had a considerable Negro enrollment, and, with some whites fleeing to private schools, now threatens to become another Lincoln. Nevertheless, the judicial remedy worked, in the sense that it did some good—as we conceive the good in terms of integration.<sup>87</sup> But it worked, in the degree in which it did, in New Rochelle, a relatively small community of 77,000, of whom 14% are Negroes, with a school system which, as the consequences of Judge Kaufman's decree tend to show, must have been relatively healthy and not overly crowded. And even in New Rochelle, the remedy could work in the long run only because a reconstituted school board proceeded to implement its spirit with administrative imaginative-ness. Quite recently, Lincoln School was closed, and Judge Kaufman modified his order to permit the school board to carry out a program of active racial dispersal throughout the system.<sup>88</sup>

No judicial remedy such as Judge Kaufman's decree could conceivably work any wonders, even small ones, for example, in New York, Chicago, or Philadelphia. The Negro populations of all three of these cities are large and densely concentrated residentially. In Manhattan, nearly 75%, and in New York City as a whole 40%, of grammar and junior high school

85. See *McNeese v. Board of Educ.*, 305 F.2d 783 (7th Cir. 1962), *rev'd*, 373 U.S. 668 (1963); *Shepard v. Board of Educ.*, 207 F. Supp. 341 (D.N.J. 1962).

86. Compare, e.g., *Shepard v. Board of Educ.*, *supra* note 85, with *N.Y. Times*, Oct. 29, 1963, p. 19, col. 1 ("Englewood Acts on Integration"). See *N.Y. Times*, Jan. 11, 1964, p. 1, col. 1; *id.*, Jan. 12, 1964, p. 62, cols. 1-4 (Malverne, L.I.); U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS '63, at 57-62 (1963); Opinion of the California Attorney General, No. 63/101, Aug. 15, 1963. It is almost inevitable, as the California Attorney General's opinion cited above indicates, that efforts to remedy racial imbalance will involve themselves in a presumably benevolent use of the racial criterion for making assignments of pupils to schools. The point is being litigated, for example, in *Brooklyn, New York*. See *Balaban v. Rubin*, 40 Misc. 2d 249, 242 N.Y.S.2d 973 (Sup. Ct.), *motion to vacate ex parte order granting injunction denied*, 19 App. Div. 2d 790, 243 N.Y.S.2d 472 (2d Dep't 1963). I have argued elsewhere that courts ought, for the time being, at least, stay out of this treacherous controversy. See BICKEL, *THE LEAST DANGEROUS BRANCH* 57-72 (1962).

87. PUBLIC SCHOOLS IN THE NORTH AND WEST 90-95.

88. *Taylor v. Bd. of Educ.*, 221 F. Supp. 275 (S.D.N.Y. 1963).



students are Negro or Puerto Rican, and the trend is upward.<sup>89</sup> In Chicago, 40% of all elementary school pupils are Negro, and it is estimated that by 1970, the public elementary schools will be predominantly Negro. In Philadelphia, Negroes constitute 49% of the school population.<sup>90</sup> In St. Louis, 54.4% of elementary and 44% of high school students are Negro.<sup>91</sup> The figures in 1955 were, incidentally, 38.4% and 31.2%.<sup>92</sup> Other comparable figures, such as those for Washington, D.C., are well-known, and what they mean is obvious. A school teacher in New York, speaking no doubt prematurely, is reported to have said: "There is nobody left to integrate with."<sup>93</sup> In Philadelphia, given distances to outlying white areas, it is estimated that "the 120,000 Negroes in the school system could be integrated with no more than 50,000 to 60,000 white children."<sup>94</sup> Moreover, the neighborhood school is a tenet of the American educational faith which could scarcely be held unconstitutional. Ultimately, as has been well said, "the schools must be better [and more integrated] in order to make the community better, but the community must be better in order to provide better schools. This is a familiar but by no means impossible American paradox."<sup>95</sup> Yet surely it is an impossible paradox from the point of view of a judicial remedy, which can disperse no populations, nor house them, nor provide employment for them.

The New Rochelle case has worried some observers as going dubiously beyond the doctrine of *Brown v. Board of Education*. But if one accepts Judge Kaufman's finding of intentional segregation, the result is well within the limits of *Brown*, and the decree is quite like many orders in cases implementing *Brown*. I have questioned the effectiveness of the remedy as applied to large city systems, not its validity. But suppose a case without evidence of intentional segregation, by gerrymander, discriminatory transfers, or otherwise. To declare *de facto* segregation unconstitutional would be, one

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89. See N.Y. Times, Oct. 23, 1963, p. 32, col. 1.

90. PUBLIC SCHOOLS IN THE NORTH AND WEST 118.

91. *Id.* at 181.

92. *Id.* at 266-67.

93. N.Y. Times, Oct. 23, 1963, p. 32, col. 1.

94. PUBLIC SCHOOLS IN THE NORTH AND WEST 118.

95. HILL, CHANGING OPTIONS IN AMERICAN EDUCATION 59 (1958). On the neighborhood school policy, see *Bell v. School City of Gary*, 213 F. Supp. 819, 829 (N.D. Ind.) *aff'd*, 324 F.2d 209 (7th Cir. 1963); CONANT, SLUMS AND SUBURBS 30-31 (1961); HILL, *op. cit. supra* at 57-58. See also N.Y. Times, Dec. 23, 1963, p. 1, col. 4 ("Donovan Rebukes Group Opposed to Racial Policy"). To suggest, however, as the facts require one to do, that the paradox is formidable, that the problem will not yield to prompt or radical solution, and that it will yield to no large-scale judicial solution—all this, which is unfortunately so, is not to disparage or discourage administrative efforts aimed at alleviating the problem. The degree to which the problem will yield at all varies from place to place, and even the neighborhood school policy is not everywhere sacrosanct. Moreover, human lives are in question: the prospects of individual children for happiness and usefulness. Herculean efforts, which leave the social problem unsolved, but rescue the future of one or a dozen children, are emphatically worth all they cost, and will in the end render the social problem itself more manageable. Saving souls is what this business is about, and each soul matters, though the system that destroys a thousand seems for the moment ineradicable. See N.Y. Times, Jan. 20, 1964, p. 1, col. 8 ("Board Instructs Gross To Rezone for Integration").

may think, not so much to step ahead of *Brown v. Board of Education*, as to back up from it. For segregated schools are most often palpably inferior, unequal—and that was unconstitutional before *Brown*. This line of argument is not free from doubt. And yet the chief difficulty with the judicial process in this area is not necessarily substantive, it is remedial. A court is not qualified to order large-scale bussing to distant areas; it is not qualified to decide that the neighborhood system should be abandoned, or that the so-called Princeton plan of consolidating several grades from a number of neighborhoods in one school can be suitably applied;<sup>96</sup> it is not qualified to estimate the tipping point at which a desegregated school will re-segregate—and such judgments will not, and ought not, be accepted from a court. It is for this reason that the judicial process should restrict itself to fashioning narrow remedies only in cases where *de facto* segregation turns out to be the product of conscious school-board action; for then the remedy can perhaps be made to follow the wrong, and thus step in with confidence to undo what was done, not in the exercise of professional judgment, but for an unlawful purpose.<sup>97</sup>

#### IV.

It remains to ask what the federal government might do, by legislation or administratively, to speed along the process of desegregation in the South, and—aside from general economic measures—to assist in solving, in the degree in which it is susceptible to solution, the unsolved problem of integration in the North and on the Border. It has long been urged on many sides that the United States Office of Education, a professional agency, undertake to supply technical advice and assistance to school districts across the country. The administration's proposed omnibus Civil Rights Act of 1963<sup>98</sup> now includes a provision to this effect. To begin with, the bill requires the Commissioner of Education, within a period of two years, to investigate and report on the denial of equal educational opportunities throughout the country—his mandate thus reaching both *de jure* and *de facto* segregation. Despite the valuable work that has been done in the past by the Civil Rights Commission, such a report would provide us with a first picture of the actual situation that would be both concretely detailed and comprehensive. The Commissioner

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96. See U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS '63, at 59 (1963). The plan was recently adopted in Englewood, New Jersey. See N.Y. Times, Oct. 29, 1963, p. 19, col. 1.

97. For an excellent discussion of the subject matter of the preceding few paragraphs, and particularly of the question of the proper role of the courts, see Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 Nw. U.L. REV. 157 (1963). Professor Kaplan arrives at some of the same and also at some different conclusions. Cf. Sedler, *School Segregation in the North and West: Legal Aspects*, 7 St. Louis U.L.J. 228 (1963).

98. H.R. 7152, 88th Cong., 1st Sess. (1963), as reported from House Judiciary Comm. Nov. 20, 1963.

is then authorized, upon request, to help any school board or larger jurisdiction with technical assistance in preparing and implementing desegregation plans. For the first time, school districts will thus be able to inform themselves, from a source both official and professional, about practices and experiences elsewhere. The Commissioner is also authorized to make available personnel especially trained to assist in coping with desegregation problems. He is authorized to finance and arrange special teacher-training programs with a view to solving problems to which desegregation gives rise—chiefly the need to devote special attention to children who might be transferred from sub-standard Negro schools to better white schools. Energetic and imaginative execution of these powers by the Commissioner of Education could achieve startling results.

The administration bill embodies also another proposal that has long been advocated in many quarters. It provides that on request of persons concerned—that is, Negro parents—the Attorney General may bring suit to desegregate schools in the name and at the expense of the United States. Before he may do so he must determine that neither the person concerned, nor interested organizations—meaning, chiefly, the NAACP—are able to bear the expense of the litigation, and secondly, he must determine that “the institution of an action will materially further the public policy of the United States favoring the orderly achievement of desegregation in public education . . . .”<sup>99</sup> This proposal raises serious problems on several levels. It is, obviously, an effort to alter those mechanics of the system to which I referred a good bit earlier, and which ensure that a rule of constitutional law will become effective only when it is widely assented to. Of course, nothing is likely altogether to alter the system. Given the judicial resources that are available, and given, indeed, the resources that can conceivably be made available to the Attorney General himself, it is still out of the question that desegregation can be achieved wholly or even chiefly through litigation; it is still impossible that desegregation can be achieved if people are not moved by political action to achieve it voluntarily, because it is morally right and because it is, on balance, in their political and material interest. Yet the intention, and no doubt, in some measure, the effect, will be more coercion more promptly.

If the system were to be altered in this fashion across the board, as was rather light-heartedly proposed in the House this fall; if, that is, the Attorney General were empowered to enforce all existing constitutional rights, and to seek from the courts declaration of new rights, then surely one would be entitled to the gravest of misgivings, because then the delicate balance between authoritarian judicialism and government by consent would

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99. H.R. 7152, 88th Cong., 1st Sess. § 407(a) (1963).

indeed be significantly altered. Not only would that process of private litigation which, as I have said, is in its totality something of a political process of measuring the intensity and strength of interests affected by a judicial rule—not only would this process be circumvented, with the result that judicial power would be potentially enhanced quite out of proportion to what it now is or ought to be. The Attorney General would gain and share with the courts, at his option, powers entirely free of the imprecise safeguards that are implicit in our present reliance on private litigating initiative. It would be the Attorney General, in the exercise of a discretion for whose control no machinery exists or is easily conceived, who would choose to make existing rules of constitutional law effective, or explore the possibility of new ones, for he would elect from time to time to concentrate on enforcement in this or that area of constitutional law. This would be quite a revolutionary change. I hope, in some appropriately old-fashioned words of Justice McKenna, that “it is something more than timidity, dread of the new, that makes me fear that it is a step from the deck to the sea—the metaphor suggests a peril in the consequences.”<sup>100</sup> The present Attorney General, one is encouraged to note, resists being decorated with any such broad powers.

But this is an argument at wholesale. The Attorney General already exercises by statute authority to enforce a great deal of law which, in the legislative judgment, needed enforcement beyond what could be expected from private initiative. And so do other administrative officers. There is a difference of more than just degree when the law to be enforced is constitutional rather than statutory. But it can be argued that when Congress passes a statute authorizing the Attorney General to enforce a given rule of constitutional law, the source of that rule is no longer exclusively in the judiciary. And that is so, so long as Congress closely defines what it wishes to see enforced. This is the view that prevailed when the Attorney General was given the authority that he now possesses to enforce the fifteenth amendment's guaranty of an equal vote. There is also a limited criminal statute under which the Attorney General can enforce constitutional rights. But the authority under this statute has been most cautiously and circumspectly limited by the courts, so as to encompass only well-defined and thoroughly established rules of constitutional law.<sup>101</sup> As for the right to vote, there are very special circumstances that make private litigation for its enforcement extremely difficult, indeed almost certainly beyond any private resources. The power to litigate to desegregate public accommodations, also to be conferred by the administration bill, is again a special and different matter. First, the source of the right to be asserted is at most only partly constitutional; essentially, the Attorney

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100. *Arizona Employers' Liab. Cases*, 250 U.S. 400, 434 (1919).

101. See *United States v. Williams*, 341 U.S. 70 (1951); *Williams v. United States*, 341 U.S. 97 (1951); *Screws v. United States*, 325 U.S. 91 (1945).

General is to enforce, on the basis of a specific statute, something not unlike the Wages and Hours Act. Secondly, the private interest involved is so diffuse, and in any individual case so slight, that the incentive to undergo the ordeal of litigation is in this instance at a minimum, and yet the collective feeling on the subject is known, in the most concrete way, to be quite intense. In school cases, private litigation is a going concern. No superhuman efforts at collecting data fit for a census bureau and in any event not likely to be readily obtained from local officials—no such unusual efforts, which characterize voting cases, are required here. What is perhaps most important, no clear statutory definition of the sort of school segregation—*de jure* and perhaps *de facto*—that Congress may wish to see most efficiently abolished is proposed. Congress, of course, could not be brought to agree on such a definition. Nor is there a definition of remedies. With voting and with public accommodations it is otherwise. Both the objectives and the ways of attaining them are relatively clear, and Congress has stated them. The power to be conferred with respect to schools is, therefore, much more far-ranging, and much more independent.

If it is conceded that there is a general presumption against executive power to litigate constitutional rights, and that exceptions must justify themselves, then I believe that the argument I have offered suffices. Still, it is a question of judgment, and there is yet more to be said, even if somewhat cumulatively. If the Attorney General is to decide that this or that case will “materially further the public policy of the United States favoring the orderly achievement of desegregation in public education,” how is he to make this decision? To put the matter quite concretely, when is school desegregation to start in Clarendon County, South Carolina, or in Athens, Georgia, or in Columbia, South Carolina, or in Jackson, or Oxford, Mississippi, and in which of those places should it start first? And is *de facto* segregation to be attacked, and if so, where? And when? As things now stand, private parties, parents locally, local Negro lawyers, if any, the NAACP and its corresponding counsel, and whatever other leadership is present and effective in the Negro community nationwide somehow make the decision. The lawyer in charge of the suit in Clarendon County, South Carolina, has been deciding year after year not to push it.<sup>102</sup> One of these days he may decide that the time has come. He may not be able to articulate the grounds for that decision, and it may be right or wrong as we view it afterwards. If we substitute the Attorney General as the decision-maker, must we not expect from him some more orderly, rational, and articulable process? For his decision will have been made at the expense of a dozen other places which pressed their claims on his resources—the resources of government,

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102. See note 36 *supra* and accompanying text.

to which in principle all are equally entitled. It will be said that we do not displace the private decision-makers by empowering the Attorney General to bring suit, and on the face of things that is no doubt true. But in practice, matters will rest almost entirely in the hands of the Attorney General. Private initiative is bound to be chilled and the flow of private funds is bound to be discouraged and diverted elsewhere, where the help of the federal government is not available. If a private suit is brought, it will inevitably be regarded somewhat suspiciously by the courts and by public opinion, and inevitably be treated as of secondary importance. It will, after all, by hypothesis be a suit that does not necessarily "materially further the public policy of the United States favoring the orderly achievement of desegregation in public education."

It would be a somewhat different matter, I think, if the business of desegregation were seriously taken in hand in administrative fashion. That is, it would be a different matter if the Office of Education, for example, or the Civil Rights Commission, were given adequate statutory standards to formulate plans of desegregation, were then required to hold hearings where there was opposition to the plans proposed, and were authorized to issue orders at the conclusion of those hearings, and to go to court to enforce such orders. Even this sort of more responsible and methodologically different displacement of private and local responsibility would be something to ponder long and carefully. Concerning the proposal as it stands, I cannot free myself of the feeling that those who now favor it most may come to regret it most.

Quite aside from statutory authorization, there is considerable federal litigating power which is not subject to the misgivings I have voiced. Since before *In re Debs*,<sup>103</sup> the Attorney General has been allowed to go into the courts of the United States in special circumstances to protect not only its material, but its functional interests.<sup>104</sup> There was some language in *In re Debs* that was more sweeping than it needed to be, but on its facts, the objection to that case is that the courts were asked to do—and did—something they were not fit to do, at anyone's behest, not that the Attorney General was an improper party to initiate the suit.<sup>105</sup> Just what a definable functional

103. 158 U.S. 564 (1895).

104. *Sanitary Dist. v. United States*, 266 U.S. 405 (1925); *United States v. New Orleans Pac. Ry.*, 248 U.S. 507 (1919); *Heckman v. United States*, 224 U.S. 413 (1912); *United States v. American Bell Tel. Co.*, 128 U.S. 315 (1888); *United States v. Beebe*, 127 U.S. 338 (1888); *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888).

105. Though the United States may not intervene in mere private controversies, "yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts . . ." 158 U.S. at 586.

The objection to *Debs* and to government by injunction in labor cases generally was that federal courts were making law in an area where, either (a) there should be legislative, not judicial, law, or (b) all that was in question was a breach of the peace that was itself either an independent executive responsibility, or a state rather than a

interest of the United States may be which does not include everything is hard to say. But the point of this line of cases is that occasional authority exists in limited circumstances. In each case some special federal responsibility must be shown.<sup>106</sup> And so long as this is the rule, it may be expected that the decision to exercise inherent litigating power, being rare, will be made responsibly, at the highest executive level. And no derogation of private litigating initiative need be feared, for no announced federal undertaking to litigate is in play, and there can be no expectations. The administration has tried some desegregation suits against impacted-area school districts that receive federal funds, and against airports and hospitals that also receive federal funds, with results that are not yet clear, but certainly not negative.<sup>107</sup> There is better than a good chance that inherent power to sue in such circumstances will be confirmed by the Supreme Court. These and other suits that fall somewhere in the traditional category can be prosecuted to good purpose, without raising the difficulties that inhere in broader statutory authority.

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### Comment: John Kaplan\*

Read in conjunction with his fine and perceptive book, *The Least Dangerous Branch*, Professor Bickel's discussion of the implementation of *Brown v. Board of Education* is both subtle and persuasive. Standing by itself, how-

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federal responsibility. The point then is that the federal courts should not have acted, not that the Attorney General was the wrong party to ask them to do so. See Chafee, *The Progress of the Law, 1919-1920*, 34 HARV. L. REV. 388, 402-07 (1921); Dunbar, *Government by Injunction*, 13 L.Q. REV. 347 (1897). In the grant-in-aid cases, and the like, in which, as we shall see, the United States has more recently exercised the inherent power to sue in equity, there is little question of the propriety of judicial action; everyone is satisfied that the courts ought to apply the fourteenth amendment, and even the commerce clause, at the behest of private parties. The criticisms directed at *Debs* are hence not relevant, valid as they are in their own context.

106. See especially the discussion by Miller and Field, JJ., in *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 301 (1888).

107. See *United States v. County School Bd.*, 221 F. Supp. 93 (E.D. Va. 1963); *Simkin v. Moses H. Cone Memorial Hosp.*, 211 F. Supp. 628 (M.D.N.C. 1962), *rev'd*, 323 F.2d 959 (4th Cir. 1963); *United States v. City of Montgomery*, 201 F. Supp. 590 (M.D. Ala. 1962); *cf.* *United States v. Wallace*, 218 F. Supp. 290, 222 F. Supp. 485 (M.D. Ala. 1963); *United States v. U.S. Klans*, 194 F. Supp. 897 (M.D. Ala. 1961). *But see* *United States v. Bossier Parish School Bd.*, 220 F. Supp. 243 (W.D. La. 1963); *United States v. Biloxi Municipal School Dist.*, 219 F. Supp. 691 (S.D. Miss. 1963); *United States v. Madison City Bd. of Educ.*, 219 F. Supp. 60 (N.D. Ala. 1963). See also *United States v. City of Jackson*, 318 F.2d 1, *petition for rehearing denied per curiam*, 320 F.2d 870 (5th Cir. 1963); *United States v. City of Shreveport*, 210 F. Supp. 36, 210 F. Supp. 708 (W.D. La. 1962); *United States v. Lassiter*, 203 F. Supp. 20 (W.D. La.), *aff'd*, 371 U.S. 10 (1962). See generally Dixon, *Civil Rights in Air Transportation and Government Initiative*, 49 VA. L. REV. 205 (1963); Taylor, *Actions in Equity by the United States To Enforce School Desegregation*, 29 GEO. WASH. L. REV. 539 (1961).

\* Associate Professor, Northwestern University Law School; A.B., Harvard University, 1951; LL.B., 1954.

ever, his paper is open to serious danger of misinterpretation. Professor Bickel is quite correct in asserting that the counter-majoritarian nature of judicial review sets up major tensions in our democratic society and that, therefore, disagreement with a Supreme Court decision will, "if it persists and is widely enough shared, overturn such law."<sup>1</sup> The problem comes with the next step: that, therefore, political opposition to any judicial doctrine is a legitimate and proper safety valve. It is in this context that Professor Bickel argues that "no one is under an obligation to carry out a rule of constitutional law announced by the Court, until someone else has conducted a successful litigation and obtained a decree directing him to do so,"<sup>2</sup> and that "the speed and extent of litigation will reveal"<sup>3</sup> the intensity of purpose of those who wish to have the rule enforced. It should be made clear that Professor Bickel is speaking in institutional, not moral, terms.<sup>4</sup> It is using words in the Pickwickian sense to assert that delay is a legitimate means of perpetuating the "Southern way of life" which has been in great part directed toward the stifling of Negro rights and toward the establishment of the Negro as a lower caste too demoralized even to attempt to exercise the rights it has. In the same sense that it may be legitimate<sup>5</sup> for Southern officials to attempt to maintain their exploitive social system in the face of the Supreme Court's decision, it is legitimate for us to do everything we can to prevent their getting away with it. In Professor Bickel's terms, we may act to impose the national majority's consensus upon the local majority.

It was the failure to do just this, that is, the failure of the national political institutions, rather than the legitimacy of Southern delaying tactics,

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1. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193, 196 (1964) [hereinafter cited by page only].

2. *Id.* at 199.

3. *Id.* at 200.

4. This, regrettably, is not made nearly so clear in Professor Bickel's article as it is in his book. See, e.g., BICKEL, *THE LEAST DANGEROUS BRANCH* 267 (1962).

5. I am here sidestepping Professor Bickel's main argument on the legitimacy of refusal to obey constitutional doctrine promulgated by the Court. I am doing so because of a shortage of space and time rather than because the problem is trivial—which it most certainly is not. Professor Bickel is doing far more than merely raising the old but interesting issue of the citizen's duty to obey the law. See Wasserstrom, *The Obligation To Obey the Law*, 10 U.C.L.A. L. REV. 780 (1963). Rather he regards the absence of any duty to act in accordance with a Supreme Court doctrine as one of an intricate panoply of institutional checks upon the Court. For entirely different reasons, a legal positivist would agree with Professor Bickel's conclusion. If such a duty existed, there would be no practical means of enforcing it, with the conceivable exception of the very interesting possibility that a Southern official might be served with civil process in the North and charged under 28 U.S.C. § 1343 (1958) and Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1958) with having deprived a Negro student of a constitutional right to nonsegregated education. Neither the approach of Professor Bickel nor that of the positivist satisfies me, however. The language in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), may be too broad, but I would assert that the public official exercising state power has a higher duty to obey the law—even Court enunciated interpretations of the law—than does the private citizen. Unless the official entertains a bona fide belief that the Supreme Court will either overrule its previous decision or find the situation before him distinguishable from the Court's precedents, he is required by our system of government to act in that case in accordance with the requirements of the Supreme Court's ruling—whether the area at issue is desegregation or that of school prayer.



which was responsible for the slow pace of desegregation in the decade after *Brown*. This is indicated by the following figures.<sup>6</sup> In the first two school years after the *Brown* decision, an estimated 450 segregated school districts had undergone some desegregation; in the school year 1956-1957 some 270 more were added to this list; then, in 1957-1958 the number of districts desegregating dropped precipitously to 60; the number dropped further to 22 in 1958-1959 and remained at approximately that level for three years. To my mind the most significant of these years was 1956-1957. This year witnessed the two battles that determined in great part the course of desegregation in the South.

In Clinton, Tennessee, the local school board was preparing to obey the district court order requiring the admittance of Negroes to its high school when segregationist John Kasper arrived and began organizing opposition to the court's decree. The District Judge, fearful that his decree was going to be disregarded, asked the Attorney General of the United States for help but was informed that these problems must be settled at the local level. The situation was allowed to deteriorate, and although desegregation was in fact accomplished, there was no doubt that the community had been badly disrupted and had suffered because of it. The school board, in a resolution asking the Attorney General for help, somewhat bitterly commented, "The local F.B.I. agents and the U.S. District Attorneys' officers spend considerable time in this County tracking down moonshiners and apprehending minors who steal copper from the Federal Reservation at Oak Ridge; for some unexplained reason, they are oblivious to the internationally known Clinton integration problem."<sup>7</sup> Clinton, Tennessee, thus taught the South that the community that desegregated would not only suffer for it but would do so without any help forthcoming from the national government.

Mansfield, Texas, taught an even more significant lesson. In Mansfield, a federal court had ordered the admission of Negroes to the high school. The Governor of Texas, however, intervened, calling the Texas Rangers into Mansfield and issuing a statement that he was not going to see officers of the law shooting down Texans who resisted such things as the Supreme Court's decision on segregation.<sup>8</sup> Requests that the Attorney General intervene in Mansfield were refused, and when the President was asked at a press

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6. Statistics for the first few years after the *Brown* decision are extremely hard to procure. This explains the discrepancy between my figures and Professor Bickel's. The otherwise excellent *Southern School News*, first published by the Southern Education Reporting Service, at Nashville, Tennessee, in September 1954, failed to pick up all of the early developments. Moreover, over the years, the *Southern School News* has changed its rules for reporting statistics as experience was gathered with more meaningful and complete methods of presenting data. Furthermore, the entire statistical problem has been complicated by the general movement toward consolidation of school districts throughout the nation.

7. The resolution is reported in 2 RACE REL. L. REP. 27, 28 (1957).

8. See 1 RACE REL. L. REP. 885 (1956).

conference whether he had anything to say about the situation there, he replied that he felt that it was up to the local people to take care of the problem.<sup>9</sup> The Negroes were, therefore, sent back to segregated schools where, so far as is known, they remain today. Thus, Mansfield taught the further lesson that if the local authorities wanted to prevent desegregation, they could do so without fear of any retribution or interference from the national government.

Only after these two lessons had been learned did the precipitous drop in districts undergoing desegregation occur,<sup>10</sup> and unless one takes a deterministic view that what has happened was therefore inevitable and proper, it is hard to assert that this phenomenon was due simply to legitimate Southern disagreement. Quite the contrary: neither of these lessons was necessary, as a sufficient majority of the nation would have supported forceful Presidential action on either or both occasions.

However, that is all in the realm of what might have been. Whether or not they had a duty to desegregate, Southern communities did not in fact do so. Despite the fact that we probably would have disagreed over most of the past decade, Professor Bickel and I agree that it is time now to enforce the *Brown* doctrine and to re-examine the grade-a-year plan, the racially administered pupil placement plan, the initial racial assignment with right of transfer plan, and the whole panoply of legal methods to slow down desegregation.<sup>11</sup>

High among the illegitimate methods of delaying desegregation, in my view, is the use of the ability to litigate as a yardstick to determine when and where desegregation should occur, thus capitalizing on the poverty and lack of legal resources available to the Negro. Admittedly to allow the Attorney General to institute legal action to guarantee any citizen any constitutional right would alter the "delicate balance between authoritarian judicialism and government by consent."<sup>12</sup> On the other hand, considering the history and position of the Negro in the South, the balance does seem in favor of

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9. N.Y. Times, Sept. 6, 1956, p. 10, col. 1.

10. Contrary to Professor Bickel, *op. cit. supra* note 4, at 256-58, I would argue that the Southern Manifesto was not of such great importance. First of all, it was released in March of 1956, in plenty of time to affect the number of school districts planning to desegregate the next September. In fact, this number was greater than the average of the previous two years and, indeed, one might have expected that it would be considerably lower, since those districts which actually wished to desegregate could be assumed to have done so almost immediately. Second, Southern officials are probably very used themselves to blowing off steam and could not be expected to be impressed with their congressional delegations doing the same thing. Last, although the Manifesto in a sense was the father of Clinton and Mansfield, those two incidents were very much bastard children, since they involved violence and defiance of specific court orders, both of which were disclaimed in the Manifesto.

11. I wish to make clear that my only quarrel with Professor Bickel here is not that I reject tokenism completely, but rather that, taking a far dimmer view of the legitimacy of this facet of the Southern way of life, I would not have allowed nearly as much time for change as have the courts.

12. Bickel, *supra* note 1, at 219.

allowing this type of action in the school desegregation area.<sup>13</sup> Nor would I find fault with the civil rights bill for empowering the Attorney General to decide whether any given case would materially further the public policy of achieving desegregation in public education. This power exists primarily to make clear the grant of discretion as to the prosecution of such suits, and the standard, though broad, is not a great deal more so than those we encounter in many branches of administrative law. I cannot believe that the choice among many equally worthy candidates for action would be so difficult as either to paralyze the Department of Justice or to induce it to expend its resources foolishly. The argument that private initiative will be chilled and the flow of private funds discouraged if the Attorney General is permitted to prosecute suits deserves more attention. First, not much in the way of private funds has been collected for school desegregation anyway, and the only major fund raiser, the NAACP Legal Defense Fund, has had to divide its limited budget between this and other equally pressing claims. Secondly, I see no evidence that federal action in the one field where it is now permitted, that of voting rights, has cut down the flow of private funds for voter registration drives. Lastly, in those cases where the Attorney General did not feel it necessary to intervene, the private parties would presumably be motivated just as highly as they would be had the Attorney General no such power. It is reasonable to assume that in such a situation they would attempt, as they do now, to raise the money themselves. The foregoing, however, are merely short answers to Professor Bickel's arguments against this section of the civil rights bill. Of more importance are the arguments in its favor. First of all, in many areas, the possibility that the Attorney General might initiate a suit might be a spur to local desegregation on a voluntary basis. Second, in many communities there simply is not enough money to prosecute a desegregation suit, even though the local Negroes may wish legal action as fervently as less poverty-stricken groups. Third, there is reason to believe, though it is by no means certain, that the complex of extralegal sanctions applied against those who challenge the Southern way of life might be less stringently enforced against parties who were represented by the U.S. Department of Justice. Last, and probably most significant, is the fact that a great shortage of legal talent exists in the desegregation field—at least on the plaintiff's side. In at least one large Southern city, which politeness forbids my mentioning here by name, the Negroes' case has been incredibly mishandled, and it is fair to say that except for the overworked attorneys of the Legal Defense Fund, the quality of legal representation for Negro plaintiffs has, in the main, been poor indeed. The Attorney General, even with his limited re-

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13. I will concede, however, that Professor Bickel is correct in asserting that voting rights and public accommodations present in many ways a far stronger case for institution of actions by the Attorney General.

sources of manpower, could make a major contribution in this area, a contribution that would not only be important in the individual cases, but one that might shape sanctions and rules for the whole South.

Regardless of the fate of this section of the civil rights bill—or for that matter, of the whole bill—Professor Bickel is most probably correct in asserting that essentially Northern conditions are the “likely—and anticlimactic—outcome of all the litigating and all the striving.”<sup>14</sup> I find it almost impossible to believe that within the next generation or so the majority of Negro students in the United States will be attending schools with any reasonable proportion of white children, or that they will be receiving, on the average, as good an education. I see no reason to believe that the South will in the foreseeable future be any better in this respect than the North is now—and the Northern cities of the United States have been growing steadily more segregated.<sup>15</sup> On the other hand, one must not conclude from this that the whole desegregation decision was not worth the effort. First of all, its educative and moral impact in areas other than public education and, in fact, its whole thrust toward equality and opportunity for all men has been of immeasurable importance. Unless its benefits are swallowed by the oncoming age of automation, this alone will have been of enormous significance. Secondly, there is a great difference in practical as well as in constitutional<sup>16</sup> terms between the Negro's not being able to attend school with white children on the one hand because of his race, and on the other hand for other reasons including his not choosing to. The threat of desegregation, or more specifically the threat that Negroes will want and be able to move into white schools, has been a powerful impetus in the South, and even in many Northern communities, to improving the grade of education received in the schools populated primarily by Negroes. On the other hand, so long as a school is in fact all Negro, it is in a sense isolated and is vulnerable to all kinds of discriminatory action by the school authorities. This discrimination, moreover, can be expected to occur with considerably greater intensity in the desegregated South than in the North since the habit of shortchanging the Negro is so much more deeply ingrained there. It is very possible that we will soon have to develop some type of jurisprudence, either institutional or doctrinal, to prevent this.

It is in this respect that the United States Office of Education might best fulfill part of the role that Professor Bickel would plan for it. I must confess, however, that I am not at all sanguine about this. The Office of Education has gone far out of its way to shun any connection with the de-

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14. Bickel, *supra* note 1, at 214.

15. See N.Y. Times, Jan. 7, 1964, p. 1, cols. 5-6.

16. I have written on this problem—the constitutionality of de facto segregation—at length elsewhere, see Kaplan, *Segregation and the Schools—Part II: The General Northern Problem*, 58 Nw. U.L. Rev. 157 (1963), and can only add that I agree with just about everything Professor Bickel has so well and succinctly said, *supra* note 1, at 216-18.

segregation problem. Beginning with its report for the year 1953-1954, it even abandoned its prior practice of publishing comparative statistics on Negro and white schools, thus drying up one of the few useful sources of information on the inequalities between white and Negro education. It is fair to say that the Office of Education has been so involved in the battles over federal aid to education (and I am not prepared to say that this battle is in the long run a less important one than the integration-segregation conflict) that its usefulness on the latter question has been slim indeed.

Nor is providing equal schools the only problem. Even if completely equal education were somehow provided in Negro and white schools, we would still be plagued by the legacy of slavery and segregation. Already we can see the pattern emerging. Some twenty per cent of the Negro family population is in the \$7,000 per year or over bracket, while sixty per cent is in an income bracket of \$3,000 or under. This sharp division of the Negro into two basic groups promises to leave us with only the most fortunate one-fifth of our Negro population reasonably well assimilated into our society. They will be subject to relatively little employment discrimination (and indeed they may even receive job preference), except perhaps at the very highest levels of industry (though not of government) and subject to some, though gradually lessening housing discrimination. Unless truly titanic efforts are made, however, the great majority of the remaining Negroes will be confined to their crime-ridden slums at enormous social and human cost. For these people, the important distinction will be not so much that between black and white, but that between rich and poor. They will suffer from no employment discrimination because they will be incapable of holding any job; they will suffer from no housing discrimination because of their inability to afford housing outside their ghettos; and their very demoralization<sup>17</sup> will render them unable to make use of any opportunities to better themselves.

Desegregation may be the problem of the last decade and integration of this one, but the problem of the casualties of the long period before and the decade after the *Brown* decision promises to be with us for a long time to come.

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17. See GLAZER & MOYNIHAN, *BEYOND THE MELTING POT* (1963).