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De Facto School Segregation and the "State Action" Requirement: A Suggested New Approach

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DE FACTO SCHOOL SEGREGATION AND THE "STATE ACTION" REQUIREMENT: A SUGGESTED NEW APPROACH

While many of our institutions have a tendency to divide us—religious institutions, social institutions, economic institutions, political institutions—the public school... is the one unique institution which has the capacity to unite this nation and to unite this diverse and pluralistic society that we have.*

Since Brown¹ was decided in 1954, it has been clear that racial segregation in the public schools contravenes the equal protection clause of the fourteenth amendment when required, enforced, or encouraged by color or under operation of law. Today, the time for "all deliberate speed"² has long past. Only if so-called "freedom of choice" plans procure the most efficient possible termination of racial dualism will they pass constitutional muster.³ Alexander v. Holmes County Board of Education⁴ makes clear that further evasion or delay in complying with the mandate of Brown will not be tolerated. Moreover, the Supreme Court recently reaffirmed the broad scope of equity power that may be employed to rectify the effects of de jure segregation.⁵ However, the Court has not yet passed judgment on schools whose racial imbalance is primarily the product of external factors other than the force of law or the actions of the school authorities.⁶ This note asserts that such de facto segregation also contravenes the fourteenth amendment.

DE FACTO AND DE JURE SEGREGATION PRESENT THE SAME NUCLEUS OF OPERATIVE FACT

Jurisprudentially, law can be thought of in two ways. One is the traditional notion of stare decisis. Utilizing the body of decided cases as a frame of reference, this approach standardizes challenge and response. Current controversies are then stated and resolved in terms of those fixed legal symbols, and the same precedents simultaneously circumscribe the

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6. Id. at 23. However, it granted certiorari in such a case on January 17, 1972, Keyes v. School Dist. No. 1, 404 U.S. 1036 (1972) (No. 71-507), and heard oral argument on October 12. 41 U.S.L.W. 3201 (S. Ct. 1972).
law’s application. Such a conception of the legal process is fundamentally normative.

But law has a managerial dimension as well. As a tool for social engineering, it seeks to channel behavior and expectation in the light of approved social values. The managerialist approaches law as a body of internally consistent, continuously reviewed conduct-directives designed to effect certain desired behavior. Since his aim is to account for all the relevant factors that determine individual life and group existence, he must make “a disciplined use of all relevant modes of thinking and observation.”

Brown and its progeny are fundamentally exercises in the managerial function of law. Drawing heavily on the social sciences, Chief Justice Warren, writing for the Court in Brown, reasoned:

Segregation . . . in public schools has a detrimental effect upon

7. For example, contract law refuses to sanction nominal consideration because it was not recognized at common law. Cogent policy considerations favor the recognition of nominal consideration. See Brody, An Exercise in Sociological Jurisprudence: Herch in the Signal Theory, 20 DePaul L. Rev. 791 (1971); Fuller, Consideration and Form, 41 Colum. L. Rev. 799 (1941). Nevertheless, both the courts and the commentators have rejected it. E.g., Marsh v. Lott, 8 Cal. App. 384, 97 P.2d 163 (1908); 1 A. Corbin, Corbin on Contracts §§ 110-12, 130-31 (2d ed. 1963); 1 S. Williston, A Treatise on the Law of Contracts §§ 107, 115, 115A-115 C (3d ed. 1957).


12. Brown v. Board of Educ., 347 U.S. 483, 494-95 n.9 (1954). The Court’s reliance on this data provoked an enduring controversy. Cahn, Jurisprudence, 31 N.Y.U. L. Rev. 182 (1956); Clark, The Desegregation Cases: Criticism of the Social Scientist’s Role, 5 Vill. L. Rev. 224 (1959); Greenberg, Social Scientists Take the Stand: Review and Appraisal of Their Testimony in Litigation, 54 Mich. L. Rev. 953 (1956); Rose, The Social Scientist as an Expert Witness, 40 Minn. L. Rev. 205 (1956); Van den Haag, Social Science Testimony in the Desegregation Cases—a Reply to Professor Kenneth Clark, 6 Vill. L. Rev. 69 (1960); Verba, The Supreme Court, Segregation, and Social Research, 31 Temple L.Q. 1 (1957). The critics’ most telling point was that constitutional rights should have firmer foundations than the shifting sands of sociological research. Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 159, 157-58, 167 (1955); Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 31-34 (1959). However, the test applied by the managerialists is in fact pragmatic: does a given measure promote, retard, or defeat attainment of the desired goal policy? What that policy is, and whether the means at hand are adequate or adapted to its realization, must be constantly ascertained anew. Chroust, supra note 8, at 269. Therefore, the Court would properly overrule Brown if the data on which it rests is ever found defective to any significant degree.
the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is generally interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

The analysis suggested in this note proceeds on the assumption that the constitutionally significant fact of Brown was segregation's harmful impact on black children, rather than the origin and nature of the segregation itself. This assumption proceeds from an interpretation of Brown's language. Although Brown spoke only of the detrimental psychological effects of state enforced school segregation, its conclusion that this "impact is greater when it has the sanction of law" indicates that the Court believed that such harmful impact is present, although perhaps to a lesser degree, in any racially identifiable school.

That minority-group children attending racially identifiable schools perform less well than do their white peers attending predominately white schools in an empirically verified fact. The controversy centers on whether racially identifiable, objectively inferior schools are the primary cause of this disparity. The poor performance of black children has been ascribed variously to matriarchal black family structure, black socio-economic status, and even inherently lower black intelligence quotients. However, despite these controversial opinions, the general consensus

14. 347 U.S. at 494 (emphasis added).
17. COLEMAN, supra note 15, at 275-325.
19. The methodology employed, as well as the results reached, have been attacked. See, e.g., Bowles & Levin, The Determinants of Scholastic Achievement — an Appraisal of Some Recent Evidence, 3 J. HUMAN RESOURCES 3 (1968); Bowles & Levin, More on Multicollinearity and the Effectiveness of Schools, 3 J. HUMAN RESOURCES 393 (1968); Deutsch, Happenings on the Way Back to the Forum: Social Science, I.Q., and Race Differences Revisited, 39 HARV. EDUC. REV. 523 (1969); Goodman, De Facto
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remains that this phenomenon is in some measure a correlative of the racially identifiable nature of the schools in question. 20


20. This note is predicated on the adverse psychological impact of de facto school segregation. "Equal education opportunity," if measured in terms of objective input and output alone, is an unsatisfactory constitutional standard for purposes of racial integration:

[A] child has a greater educational opportunity in a school with children from backgrounds that are educationally stronger. . . . It's probably not appropriate to say on achievement grounds alone that segregated schooling does not provide equality of educational opportunity. There is not sufficient evidence to show that the kind of benefits to lower-class children that arise from a socio-economically heterogeneous or racially heterogeneous school can't also be provided by other means. . . . In this sense, judges have looked at that study and used the results more strongly than the results warranted. Coleman on the Coleman Report, THE EDUCATIONAL RESEARCHER, Mar., 1972, at 13, 13-14. Cf. Jencks, supra note 18, at 29-33, 97-106, 135-75, 320-50. Substandard academic performance appears to be an evolute of class rather than race. Coleman, supra note 15. See generally A WILSON, THE CONSEQUENCES OF SEGREGATION: ACHIEVEMENT IN A NORTHERN COMMUNITY (1969); Long, Test Results of Third Grade Negro Children Selected on the Basis of Socio-Economic Status (pts. 1-2), 4 J. NEGRO EDUC. 192, 523 (1935); Nam, Rhodes & Herriott, School Retention by Race, Religion, and Socioeconomic Status, 3 J. HUMAN RESOURCES 171 (1968); Wilson, Residential Segregation of Social Classes and Aspirations of High School Boys, 24 AM. SOC. REV. 836 (1959). If improved scholastic attainments by black children in integrated settings are due to their insertion into an achievement-oriented, middle-class milieu — and Armor, The Evidence on Busing, THE PUBLIC INTEREST, Summer, 1972, at 90, challenges this basic assumption — that makes a good case for integrating the schools along socio-economic lines. See, e.g., Keyes v. School Dist. No. 1, 313 F. Supp. 90, 96-99 (D. Colo. 1970). But it provides no support for balancing the races as such. Cohen, Defining Racial Equality in Education, 16 U.C.L.A. L. REV. 255 (1969). However, as a practical matter, there are so few middle-class blacks that even attempts to strike a socio-economic balance in the schools will entail de facto integration for the foreseeable future.

In part, the root causes of this phenomenon are psychological. Racial discrimination contributes directly to psychological deprivation. Segregation has corrosive effects on all parties concerned. Its perpetrators develop an irrational sense of innate racial superiority, while the disdained group lives with the constant knowledge that it is looked down upon and, if it lacks a cultural base on which to build a sense of self-esteem, is subject to constant pressure to feel ashamed and resentful of inherited characteristics.

The connection between segregation and negative self-image may be indirect, but it is nonetheless real. It has been extensively documented in the case of blacks. However, it is not a psychological mutation unique to them. Both Puerto Rican and Chicano children, when subjected to similar segregated conditions, evidence the same psychological deprivations as black children. It appears to be a function of minority status—

269 F. Supp. 401, 493 (D.D.C. 1967). However, the managerial function of the law must tailor its conduct-directives exactly. If they are not organic outgrowths of the initial hypothesis behind a chosen goal, they cannot logically be employed to further realization of that goal. Chroust, supra note 8, at 268. Therefore, unless the evidence of de facto segregation's adverse psychological impact is firm enough to sustain imposition of a duty to correct the situation, decrees couched in terms of racial balance lack the internal consistency essential in a rule of law. Cf. Goodman, supra note 19.

22. It has been diagrammed as follows:

Not
White cupidity \( \rightarrow \) Negro suffering
but
White cupidity creates
Social and Personal Responses which serve to sustain the individual in his punishing world but also generate aggressiveness toward the self and others
which results in
Suffering directly inflicted by Negroes on themselves and others.


be it racial, ethnic, or religious in nature. Internalizing the dominant society’s perceptions of them, minority-group children learn to look on themselves with contempt. This negative self-image adversely affects both their aspirations for the future and their motivation to learn.

Self-concept is admittedly a broad notion. Even selecting the variables by which to define and measure it is difficult; thus, to factor out the effects of non-school forces in molding the psyche of black children borders on the impossible. However, perceptible (albeit slight) improvement in their self-image has been observed in the aftermath of integration. This leads to the conclusion that, in at least some degree, the racial composition of the student body accounts for the lower self-concepts of minority-group children trapped in racially imbalanced schools. The force of law may aggravate this detrimental psychological impact but the same harmful effects exist nonetheless. Even though the evidence of the correlation between racially identifiable schools and psychological harm to black children is far from conclusive, courts are justified in drawing this inference since the harm that results to black children if this connection is

26. For a particularly searing account of this process, see J. Kozol, Death at an Early Age: The Destruction of the Hearts and Minds of Negro Children in the Boston Public Schools (1967). However, the underlying assumption that minority-group children have self-images lower than those of their white peers has been challenged. Soars & Soars, Self-Perceptions of Culturally Disadvantaged Children, 6 AM. EDUC. RESEARCH J. 31 (1969).


tion does exist would be irremediable later in life. It will be time enough to reexamine this premise when and if a consensus emerges among social scientists that racial imbalance is neutral so far as ego development is concerned.

A PATTERN AND PRACTICE OF DISCRIMINATORY SCHOOL BOARD ACTION OFFENDS THE FOURTEENTH AMENDMENT

Despite the absence of formal legal compulsion, schools in the North and West are effectively segregated de facto as any in the South were de jure. By every objective standard, they no more pass constitutional muster than did their Southern counterparts at the time of Brown. Nevertheless, to bring de facto segregation within the purview of Brown, the “state action” requirement of the fourteenth amendment must first be satisfied.

“State action” is a label of shifting content. It demands government action-in-fact. However, the specific authority that the state vests in its officials is not what connects their actions to it. The true link is the power that they possess by virtue of their position alone, and so “state action” embraces “all . . . action of every kind . . . sanctioned in some way by


33. Comparison of White, Integrated, and Negro Schools in Chicago: 1962

<table>
<thead>
<tr>
<th>Type of School</th>
<th>White</th>
<th>Integrated</th>
<th>Negro</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total appropriation per pupil</td>
<td>$324.00</td>
<td>$320.00</td>
<td>$269.00</td>
</tr>
<tr>
<td>Annual teacher’s salary per pupil</td>
<td>246.00</td>
<td>231.00</td>
<td>220.00</td>
</tr>
<tr>
<td>Percent uncertified teachers</td>
<td>12.00</td>
<td>23.00</td>
<td>49.00</td>
</tr>
<tr>
<td>No. pupils per classroom</td>
<td>30.95</td>
<td>34.95</td>
<td>46.80</td>
</tr>
<tr>
<td>Library resources per pupil</td>
<td>5.00</td>
<td>3.50</td>
<td>2.50</td>
</tr>
<tr>
<td>Expenditures per pupil other than teacher’s salaries</td>
<td>86.00</td>
<td>90.00</td>
<td>49.00</td>
</tr>
</tbody>
</table>


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However, before state action is constitutionally offensive, both (1) a causal connection between the governmental action and its alleged discriminatory impact and (2) an intent to discriminate must be proved. The first requirement demands that there be a nexus between the action complained of and the state sufficient to impute that action to the state as its own. The second factor requires a showing that the

36. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), although dealing with allegedly state supported private discrimination, is significant because it stands as the Supreme Court's most recent pronouncement on the "causal connection" requirement of state action.

In *Moose Lodge*, a bona fide private club refused service to Irvis, a guest of a member in good standing, for the stated reason that he was black. Lodge 107 held a liquor license from the state of Pennsylvania, which has a detailed, comprehensive scheme for issuing these licenses and regulating the licensees. *Pa. Stat. Ann.* tit. 47, § 1-101 et seq. (1969). For a succinct outline of the operation of this scheme, see Judge Freedman's opinion for the three-judge court below, 318 F. Supp. 1246, 1248-50 (M. D. Pa. 1970). One requirement imposed by the Liquor Control Board is that "every club licensee shall adhere to all the provisions of its constitution and by-laws." *Reg. of the Pa. Liquor Control Bd.*, § 113.09 (1970) (quoted in 407 U.S. at 177).

Local Moose lodges are bound by the constitution and by-laws of the Supreme Lodge, which limit membership to white males over twenty-one years old. *Const. of the Supreme Lodge of the World, Loyal Order of the Moose* § 71-1 (1971). The issue before the Court was whether Pennsylvania's pervasive liquor regulations sufficiently connected the state with Lodge 107's exclusion of Irvis so as to bring that action within the scope of the equal protection clause.

In itself, Pennsylvania's regulatory scheme was not enough to activate the amendment. In the words of Justice Rehnquist:

> The Court has never held . . . that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct. . . .

Had Pennsylvania done no more than issue a liquor license to Lodge 107, the fact that the Lodge barred blacks would not have put the state in the position of "lend[ing] its authority to the sordid business of racial discrimination." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 191 (1970) (Brennan, J., concurring in part and dissenting in part). But Pennsylvania went further. By requiring club licensees to adhere to all provisions of their constitution and by-laws, it put its weight behind the racially restrictive policies of the Loyal Order of Moose. A local lodge could not have admitted blacks even if it wanted to, without risking loss of its license. On this point, the Court held that Pennsylvania had allowed its power to control liquor distribution to be exploited in pursuit of racial discrimination. 407 U.S. at 177-78. In sum, under *Moose Lodge*, a causal link must tie the discrimination complained of directly to state action.

38. The Fourteenth Amendment . . . implies that there are matters of fundamental justice that the citizens of the United States consider so essentially an ingredient of human rights as to require a restraint on action on behalf of any state that appears to ignore them.

*Orleans Parish School Bd. v. Bush*, 242 F.2d 156, 166 (5th Cir. 1957) (emphasis added). That is our constitutional heritage, but the "original understanding" contemplated the protection of basic rights against private action as well. Frank & Munro,
governmental body has manifested an outward expression of racial prejudice by its discriminatory action. The mere harboring of personal attitudes of racial prejudice by state officials will not suffice.

Both of these requirements are missing from genuinely unadulterated de facto segregation. "State action" was undeniably present in the case of de jure segregation. The several states are bodies politic and sovereign, and can act only through their officers and agents. Boards of education—whether themselves appointed or elected, whether of statewide jurisdiction or restricted to one local political subdivision thereof—are by their very nature instruments of the state. When its constitution and statutes mandate racial separation of the public schools, board compliance with these dictates is without a doubt "state action" in the constitutional sense. The lines are more blurred, however, when we come to de facto segregation. By de facto segregation, we mean racially identifiable schools whose imbalance is the product of external factors other than the force of law or the action of the school authorities. Although "racial segregation and racial imbalance are two names for the same phenomenon, racial separation . . . ," residential housing patterns do more than any board policies to determine the racial balance of schools. De facto segregation results primarily from long-range demographic trends, and these trends lie beyond the ability of school authorities to control or influence in any significant degree. The neighborhood school is not per se unconstitutional since geographic zoning is objectively "rea-

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*The Original Understanding of Equal Protection of the Law, 1972 WASH. U. L.Q. 421. How, then, can the "state action" gloss be explained?*

The 1876 Hayes-Tilden election marked not only the final withdrawal of federal troops from the South, but also the end of Reconstruction as well. The North plainly abandoned that fight and turned its attention elsewhere. Maslow & Robinson, *Civil Rights Legislation and the Fight for Equality*, 20 U. Chi. L. Rev. 363, 370-71 (1953). Did the Court read those auguries and decide the *Civil Rights Cases* accordingly? Like the Continuum Hypothesis, it is an assertion that cannot be proved and yet cannot be disproved. But some support for the idea can be gleaned from Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952).


42. *Brown* itself seems to implicitly sanction the neighborhood school concept, for among the relevant factors in dismantling dual schools are problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, [and] revision
sonable in relation to its subject" as an administrative tool for assigning children to schools. In that context, mere continued adherence to a long-standing neighborhood school plan undeviated from in the past is not tantamount to a law compelling segregation.

The second requirement for constitutionally offensive "state action"—intent to discriminate—is mainly a proof problem in the de facto area. A "realistic racism" will draw attendance zone boundaries to produce as much racial dualism as possible. But rare indeed will be the admission that such decisions rest on considerations other than efficient operation of an effective school system, even though alternate lines would be equally justified geographically and would also result in less imbalance.

If these intricacies and problems of applying the "state action" requirement to de facto school segregation eventually work to prevent eradication of segregation's harm to school children, the continued use of

of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis. 349 U.S. at 300 (emphasis added). Apparently the Court envisioned the end-product of desegregation to be unitary school systems based on residential zoning, either absolute or modified by some sort of transfer system to insure against resegregation. Bickel, supra note 32, at 212.


44. Among the advantages claimed for neighborhood schools are: (1) such schools are small; (2) parental interest in the schools is fostered; (3) a feeling of security is engendered in the children by familiar surroundings; and (4) the cheapest, fastest, and safest means of transportation between home and school can be employed. These factors are critically assayed in M. Weinberg, Race and Place: A Legal History of the Neighborhood School 2-36 (1967).


46. A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 62 (1962).

47. Northern school boards are said to prefer the term "racial imbalance" to "de facto segregation" because it carries no overtones of racial motivation on their part. Fiss, supra note 20, at 565-66.

the requirement in its traditional form becomes suspect. What is needed, apparently, is a new approach to the "state action" problem.

SHIFTING THE BURDEN OF PROOF: A PROPOSAL

The difficulties in applying the state action requirement to de facto school segregation have gotten in the way of what should be our primary concern after Brown: the adverse psychological impact of racial segregation. Black children attending schools segregated-in-fact are not going to draw fine distinctions between the de jure or de facto roots of their inferior education. If the "state action" requirement of the fourteenth amendment would thwart attempts to correct this wrong, then "the logic of words must yield to the logic of realities."40

Awareness of this has led many courts confronted with de facto segregation to take a broad view of state action.40 Reasoning that the state's left hand cannot eschew knowledge of what its right hand is doing, those judges have held racially imbalanced schools to be unconstitutional if any government agency has played a significant role in fostering the underlying residential segregation.51 That approach goes too far. In

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40. Di Santo v. Pennsylvania, 273 U.S. 34, 43 (1927) (Brandeis, J., dissenting). See generally Pound, Mechanical Jurisprudence, 8 COLUM. L. REV. 605 (1908). To restrict inquiry to the "original understanding" of the Constitution, or the meaning of its words at the time it was written, is to risk letting the past blind us to the present. Historical continuity is really a search for evolutionary change over time. Public affairs are the raw materials of constitutional law, and so challenged institutions must be scrutinized in terms of their present function as well as their historical beginnings. Chroust, supra note 8, at 270-72, 274-75 n.38; Clark, The Function of Law in a Democratic Society, 9 U. CHI. L. REV. 393, 400 (1942). The role of history is to sensitize the Court to the complexities of the matter before it for decision. C. Miller, THE SUPREME COURT AND THE USES OF HISTORY (1969); Wifford, The Blinding Light: the Uses of History in Constitutional Interpretation, 31 U. CHI. L. REV. 502 (1964). Therefore, the Court properly employed history when it appraised de jure segregation in Brown. Bickel, The Original Understanding and the Segregation Decision, 69 HARV. L. REV. 1 (1955); Kelly, The Fourteenth Amendment Reconsidered: the Segregation Question, 54 MICH. L. REV. 1049 (1956). But see Avins, School Segregation and History Revisited, 15 CATH. LAW. 308 (1969).


51. While it would be unfair to charge the present defendants [the Detroit Board of Education] with what other governmental officers or agencies have done, it can be said that the actions or the failure to act by the responsible school authorities, both city and state, were linked to that of these other governmental units. When we speak of governmental action we should not
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orthodox constitutional theory, the desired relief has been tied directly to the particular state involvement cited as the basis for activating the fourteenth amendment. Proof that courts,\textsuperscript{52} public housing authorities,\textsuperscript{53} or the federal government\textsuperscript{54} helped to create existing housing segregation makes a good case for open housing. It does not support a school desegregation decree. The chain linking the relief sought to the state agency from which it is demanded must be plain and direct.

A better, and more constitutionally correct, approach than a broad view of state action would be to place a heavy presumption of unconstitutionality on any racially identifiable school. It would then be incumbent on the board of education, if it pleads the defense of genuinely unadulterated de facto segregation, to show that no discrimination on its part played a role in producing that racial dualism. The initial burden of proof should rest with the party alleging racial animus on the part of education authorities. However, once he has made a prima facie showing of conduct claimed to have fostered segregation-in-fact, and its present substantial existence in the schools, the burden of persuasion would shift to the defendant board of education.\textsuperscript{55} It must then come forward with

view the different agencies as a collection of unrelated units. Perhaps the most that can be said is that all of them, including the school authorities, are, in part, responsible for the segregated condition which exists.


clear and compelling evidence that de facto segregation is genuinely unadulterated in order to establish that defense. To apportion the burden of proof in this manner could at times penalize the board on only a circumstantial showing of an intent to discriminate. But racial innuendoes command a degree of vigilance high enough to justify that risk. "Only by sifting the facts and weighing [the] circumstances" in this way "can the nonobvious involvement of the State... be attributed its true significance."

 Allocating the burden of proof in this manner does not collapse the de jure-de facto distinction. Although the difference is a question of degree, not kind, it is not a relatively arbitrary determination to make. De jure segregation is primarily the result of an affirmative course of conduct mandated by the state, even if enforced by custom and tradition as well as by law. De facto segregation in the schools is primarily the result of long-range demographic trends. That is the essential difference,

The plaintiffs failed to meet their initial burden of proof in Gomperts v. Chase, 329 F. Supp. 1192 (N.D. Cal. 1971); Spencer v. Kungler, 326 F. Supp. 1235 (D.N.J. 1971), affd, 404 U.S. 1027 (1972); Parris v. School Comm., 305 F. Supp. 356 (D. Mass. 1969); Johnson v. Hunger, 266 F. Supp. 590 (S.D.N.Y. 1967); Keller v. Sacramento City Unified School Dist., 8 Race Rel. L. Rep. 1406 (Calif. Super. Ct. 1963). In Keller, for example, the half-black Stanford Junior High burned to the ground less than a month before the opening of the 1963-64 school year. The board of education temporarily assigned its students to predominately white Peter Lassen Junior High on a double-shift basis, and simultaneously began a study to determine whether to build a replacement school. (and if so, where). Meanwhile, it also erected mobile classrooms on the old Stanford site and, pending completion of its study, re-assigned Stanford's students and faculty there for the second semester. Its action to relieve the overcrowding at Peter Lassen was held insufficient to justify a preliminary injunction against permanent relocation. Equity's intervention would be premature, for a decision as to permanent relocation had not yet been made.


and the burden-shifting approach developed in this note preserves that distinction. The question is not did the school authorities cause segregation by their actions, but did they have a policy of segregation as evidenced by their actions? Under either a broad state action or a burden-shifting approach, a strong case can be made for finding a fourteenth amendment violation if a court (1) isolates discriminatory gerrymandering of attendance zones or similar actions in the past; (2) determines that the lines drawn or policies settled on at that time are still in use; and (3) establishes present segregation-in-fact—even though that racial imbalance is mainly a by-product of forces other than the actions of school authorities. But to term such a state of affairs de jure segregation is a misnomer. Demographic trends, not board policies, are at the heart of the matter.

In the present context, holding school authorities accountable does not offend "traditional notions of fair play and substantial justice." Boards of education are in a position either to ratify or modify the imbalance occasioned by population shifts. Compact zones can be variously shaped; decisions regarding siting new schools, demarcating attendance boundaries, and so forth are for the board to make, and its decisions cannot be influenced by a policy of racial segregation in order to accommodate community sentiment. If these decisions are so influenced, the school


... the 51 white children on whose behalf this proceeding was instituted live closer to or no further from J.H.S. 275 than from J.H.S. 285. Therefore, J.H.S. 275 is the school in the district of their residence. ... The argument that these children live in East Flatbush (in which J.H.S. 285 is located) and, therefore, that J.H.S. 275 (which is in Brownsville) is not a school in the district of their residence is without merit. These area names are purely artificial; there is no defined boundary line between them. Legal rights may not be founded on such nebulous geographic neighborhoods. Id. at 443, 248 N.Y.S.2d at 579. See also DeFelice v. Board of Educ., No. 71 Civ. 502 (E.D.N.Y., April 10, 1972) (adherence to borough lines in fixing high school zones unconstitutional if racial segregation results).
authorities are estopped from later disavowing the de jure overtones of their actions.\textsuperscript{64}

**DISTINGUISHING BELL AND ANALYZING KEYES**

The contrary result in *Bell v. School City of Gary*\textsuperscript{65} does not defeat the approach to "state action" advocated herein. In espousing the dictum that "the Constitution . . . does not require integration,"\textsuperscript{66} the court in *Bell* acknowledged that board of education policies had colored the situation but, in view of the clear white-to-black population trend in the city,\textsuperscript{67} attributed no legal significance to them. In view of the racial animus which permeates the school history of Gary, that conclusion must be deemed erroneous. De jure segregated schools existed there until 1947.\textsuperscript{68} For example, separate, racially homogenous plants stood side-by-side at the Pulaski complex;\textsuperscript{69} school authorities explicitly designated Roosevelt High as a "black" high school in 1938;\textsuperscript{70} black students attending Froebel, the one integrated school in the entire system, could use its swimming pool only on Fridays—and then just before the water was changed\textsuperscript{71} Even the shift to geographic zoning had racial connotations. Close on the heels of a refusal by thirteen whites to attend school with blacks at Froebel, a community-wide white boycott developed in 1945. However, the board of education stood its ground. The white protesters then demanded nondiscriminatory admission of blacks to all the white schools in Gary rather than just Froebel, and, in 1947, the board agreed.\textsuperscript{72}

\textsuperscript{65} 213 F. Supp. 819 (N.D. Ind.), aff'd, 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964).
\textsuperscript{67} Kaplan III, *supra* note 48, at 123 n.12.
\textsuperscript{68} The *Bell* court fixed their terminal date at 1949, when the Indiana legislature proscribed the practice by law — now *Ind. Code* §§ 20-8-6-1 to 20-8-6-7 (1971), *Ind. Ann. Stat.* §§ 28-6106 to 28-6112 (1970). 213 F. Supp. at 822. But Gary actually changed over in 1947; indeed, the impetus provided by the attendant publicity led directly to the state law's enactment two years later. Kaplan III, *supra* note 48, at 125 n.22.
\textsuperscript{69} 213 F. Supp. at 822.
\textsuperscript{71} Kaplan III, *supra* note 48, at 124.
\textsuperscript{72} Id. at 125. Against this background, it bordered on the sheerest hypocrisy for the superintendent of schools to assert in 1950 that Roosevelt School is still completely negro, but it is negro because no white children live in the district surrounding the school [and] not because we have a policy of not allowing white children to attend that school. *Id.* at 126 n.24.
However, the Gary board of education refused to steer its course by maximum feasible integration. In order to funnel the children from the black Dorie Miller housing project into mainly black Roosevelt High School, the school authorities adjusted the attendance boundary between it and predominately white Emerson in 1953. They built Locke High School in 1957 to relieve overcrowding at Washington. By 1962, in no small measure due to the division of the old Washington district along 19th Avenue rather than Whitcombe Street, Locke had become 100 per cent black and Washington 76 per cent white. Such board policies uniformly cultivated a fully blooming racial imbalance: seventeen of the city's forty schools enrolled 97 per cent of the system's 23,000 blacks in 1963. Sixteen thousand of them went to schools 99 per cent black in composition, and the schools attended by another 3,000 were 95 per cent or more black.

Genuinely unadulterated de facto segregation is not unconstitutional. But to concede the absence of a duty to achieve racial balance in these specific narrowly circumscribed premises is not to say that a board of education may deliberately pursue policies whose practical effect is to produce racial segregation in the schools. "It is incumbent upon . . . court[s] to weigh . . . the facts at hand," and to consider alternatives shown to have been both "feasible and more promising" than actions in fact taken to implement Brown. This the Bell court did not do, but rather accepted at face value the justifications proffered by the school authorities. In consequence, the passage of time has imparted a hollow ring to the finely tuned phrases of Bell.

73. 213 F. Supp. at 823-24. They sought to justify their decision on the patently specious ground that children from such closely knit communities should attend the same school. The line of demarcation previously ran through the center of the project. Therefore, had it not been adjusted, presumably approximately half the project's children would have attended Emerson rather than Roosevelt.

74. 213 F. Supp. at 824-25. See Kaplan III, supra note 48, at 140, map II.

75. Feeder patterns further aggravated the racial imbalance in Gary high schools. Consider the integrated Chase Elementary School. It sent its white graduates to 99 per cent white Mann, while its blacks went to 77 per cent black Tolleston. Wolff, supra note 70, at 253, 255.


78. Bell's progeny display similar quanta of official discrimination. Consider
Where courts have treated de facto segregation as though it were de jure, the facts on which they relied in most cases would have satisfied the requirements of the analysis put forward in this note.\(^9\) Keyes v. School District No. 1, Denver, Colorado,\(^8\) is illustrative. In that case, clear “patterns of segregation reinforced by official action”\(^8\) on the part of the school authorities penned the rapid growth of the city’s black population\(^8\) into racially identifiable schools.

Colorado Boulevard marked the eastern edge of the Denver ghetto.
when the school authorities began to plan the Barrett Elementary School in 1950. The Denver school board nonetheless fixed Colorado as the eastern boundary of Barrett's attendance zone, ignoring strident black protests, and Barrett opened its doors in 1960 to a student body already 89.6 per cent black. Safety considerations did not loom large in that decision. Although Colorado is a six-lane highway, similar thoroughfares bisected 18 other primary school districts in Denver at that time. Also, Barrett's small size is not explained by the board's assertion that it was built to accommodate overcrowding at surrounding schools. These excess enrollments aggregated 617 pupils, but Barrett had only 450 seats. And in point of fact, it operated 113 per cent of capacity itself in 1960. To characterize the racial imbalance at Barrett as wholly adventitious would sweep these facts under the rug.

Besides the Barrett situation, the Denver board of education likewise moved affirmatively to clear the way for discrimination in inner-city schools. Williams and High Streets bounded both the black population and the eastern fringe of the Manual High School district in 1953, but the blacks penetrated to York Street over the next three years. In the teeth of black opposition, the school authorities advanced the Manual line to the board had owned the site at 29th and Jackson, on which it built Barrett, since 1949. However, two of its other properties east of Colorado Boulevard would have served the area equally well and also, by including white neighborhoods in the new district, would have made Barrett a de facto integrated school. 313 F. Supp. at 65 & n.3. This admitted fact prompted the black community to publicly air its resentment at Barrett's location where the clearly apparent trend of black migration guaranteed that it would soon become black. The board, thus forewarned of the substantially certain effects of its decision, would later be estopped from denying knowledge of them.

83. 313 F. Supp. at 65 & n.3. Two of these zones, Tedler and Steck, were split by Colorado itself!
84. 313 F. Supp. at 65 & n.4. Two of these zones, Tedler and Steck, were split by Colorado itself!
85. 445 F.2d at 1000 n.3.
86. The racial blend of the other schools in northeast Denver is no more a function of spathaceous residential patterns alone than is Barrett's. The school authorities attached the overwhelming white Hallett-Phillips zone to 100 per cent white Phillips in 1962. Inasmuch as both schools had had ample room for their students before, this only transplanted white children from a transitional area to a "safe" enclave further east. 445 F.2d at 998. In 1964, the board incorporated an eighty per cent white sector of Hallett's district — its highest concentration of whites, 303 F. Supp. at 293 — into the Phillips zone and also placed a largely white neighborhood excised from Stedman within Hallett's boundaries. It simultaneously attached the 96 per cent white Stedman-Park Hill optional zone to 95 per cent white Park Hill. These trimmings stabilized Stedman as a black school and plummeted Hallett from 68.5 to 41.5 per cent white in just one year.
87. 313 F. Supp. at 70. Vocal black dissent also greeted the expansion of Cole Junior High School's boundaries from Race to York that same year. This transfer of part of the Cole-Smiley optional zone to Cole forced black students within the wedge to attend the rapidly changing Cole instead of predominantly white Smiley.
York in 1956. The sixteen blocks between York and Colorado Boulevard were still white in the mid-1950's. Had the board extended the Manual zone east to Colorado, it would have both integrated Manual and eased overcrowding at predominantly white East High School. The board's 1962 adjustments at Morey Junior High,\(^8\) while apparently neutral on their face, also evidence racial motivation. After some whites remonstrated that Morey would emerge as a minority school, the education authorities shifted their neighborhood from Morey's zone into the mainly white Byers district.

In 1969, these perfoliate leaves of official discrimination coalesced around the recission of Resolutions 1520, 1524, and 1531. In 1964, board policy 5100 had endorsed "changes or adaptations [in neighborhood attendance zones] which [would] result in a more diverse or heterogeneous racial and ethnic school population".\(^9\) In 1968, the school authorities accordingly directed the superintendent to prepare plans to eliminate racial imbalance in the Denver system. His blueprints, which would have lowered its "segregation index" dramatically,\(^90\) crystallized in the board's decision to reorganize attendance districts so that no school would be more than twenty per cent non-white. However, the specter of mandatory cross-busing led to the election of two new board members pledged to preserve neighborhood schools,\(^91\) and the reconstructed majority promptly repealed each resolution individually by votes of four to three.\(^92\) This "precipitate and unstudied action"\(^93\) re-
DE FACTO SCHOOL SEGREGATION

The quantum of official discrimination on the part of the school authorities does not always equal the pointillism of Keyes. However, the faintest trace of racially motivated board action should be fatal to otherwise unadulterated de facto segregation. That action should be unconstitutional per se—whether it "be wholly nascent or abortive on the one hand, or successful on the other." As Justice Field put it:

[W]e cannot shut our eyes to matters of public notoriety and general cognizance. When [judges] take their seats on the bench [they] are not struck with blindness, and forbidden to know as judges what [they] see as men; . . . .

Banks v. Muncie Community School illustrates the suggested reach of such a per se rule. As the final step in replacing the city's consolidated high school with a three-school system, the Muncie board of education planned to open Northwest High in a white area in the fall of 1970. That would have ruptured the existing racial balance in the secondary schools. Alternate locations would have produced some degree of integration-in-fact, and the inference that the board intended North-

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94. Racial and Ethnic Composition of Selected Schools As Influenced by Resolutions 1520, 1524, and 1531

<table>
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<tr>
<th>School</th>
<th>If Resolutions Used</th>
<th>If Resolutions Not Used</th>
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<td>Cole Junior High</td>
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<td>70</td>
</tr>
<tr>
<td>Stedman Elementary</td>
<td>566</td>
<td>27</td>
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96. Ho Ah Kow v. Nunan, 12 F. Cas. 252, 255 (No. 6,546) (C.C.D. Cal. 1879).

97. 433 F.2d (7th Cir. 1970).

98. The neighboring "Whitely Area" and "Industry Area" were both black. Id. at 293. Therefore, to have sited Northwest on their fringes would have reduced its racially identifiable nature somewhat. Muncie Central had been de facto integrated when all students in the system attended high school there, and, even after Southside stored and perpetuated de facto school segregation in Denver.  

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94.
west to be a white school is further strengthened by its refusal to provide transportation for the blacks whom it envisioned assigning there from outside the district. Such facts would clearly fall within the ambit of the proposed per se rule. Thus, the Seventh Circuit's conclusion that Banks was "unfounded" or "premature" is erroneous.

CONCLUSION

The approach proposed in this note will almost always lead to a finding that de facto segregation is unconstitutional. Yet the capricious exception cannot be discounted. A community's politicial organs could manipulate land-use policies in order to blatantly foster residential segregation, while its education authorities did nothing to independently enhance racial imbalance in the schools. Why should such a locality escape the rigors of court-supervised integration? It is a fair question. As Ramsey Clark has pointed out, the equities are closely balanced here. Other state agencies do as much to influence segregation-in-fact in the schools as boards of education. However, the identity of the agency involved is critical. De facto segregation is rooted, not only in race, but also in a myriad of socio-economic factors. To place the onus of cutting that Gordian knot on the board of education alone is unfair unless its actions have contributed to the situation.

High had been built pursuant to the decentralization plan, each school was 13 per cent black until the construction of Northwest.

99. 433 F.2d at 294. Griggs v. Cook, 272 F. Supp. 163 (N.D. Ga.), aff'd, 395 F.2d 705 (5th Cir. 1967), and Sealey v. Department of Public Instruction, 139 F. Supp. 561 (E.D. Pa.), aff'd, 252 F.2d 878 (3d Cir. 1957), cert. denied, 356 U.S. 975 (1958), are clearly distinguishable. The residential patterns involved therein were such that no alternate sites would have resulted in less racial imbalance than the ones in fact chosen.


102. Of course, this runs the risk of having one result in a case set against a Southern de jure background and an opposite outcome in de facto Northern contexts. Compare Bell v. Maryland, 378 U.S. 226, 326-35 (1964) (Black, Harlan, & White, JJ.,
DE FACTO SCHOOL SEGREGATION

At the same time, a word of caution is in order. This note attempts only to pinpoint the line that the school authorities may not cross without transgressing the Constitution. What they may undertake in order to maximize integration is another matter. Race is a suspect classification that the Constitution usually forbids, not because it is inevitably an impermissable classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality.3

A classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color-blind.104 But it is color-conscious in order to promote equality. In view of the psychological damage worked by schools segregated-in-fact, legislatures and school boards ought to be able to take the actualities of segregation into account in order to promote long-term integration.105 Our analysis places no restriction on "voluntary state action aimed toward reducing and eventually eliminating de facto school segregation."109