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ABSTRACT

In May 1954, the Supreme Court's decision in "Brown v. Board of Education" seemed a great, transforming event. In the spring of 1964 the achievement of school desegregation seemed almost as far off as ever. We asked ourselves: When will the law be enforced? But without a clear understanding of what the law was--and without a solid political coalition to rally behand a clear view of the law--enforcement and obedience could only become more problematic. For 10 long years the Supreme Court did not decide even one major case to define just what school "desegregation" meant. Between the years 1964 and 1974 the Supreme Court has spoken at last. Freedom-of-choice plans in the South have been swept aside, for example. And both busing and assignment on an explicitly integrative basis have been upheld as reasonable means to achieve that end. The present breakdown in enforcement and obdience to the law is tied--as it was in 1964--to a new and troubling uncertainty as to the substance of the law. What is uncertain is the extent of applicability of the principles originally set forth in "Brown v. Board of Education." It is our job to build the doctrine we once thought secure and to re-establish integration in our schpol as the basic goal. (Author/JM)

TWENTY YEARS AFTER BROWN:

WHERE ARE WE NOW?

Conference on School Desegregation:

"Brown Plus Twenty and Into The Future"

April 4, 1974

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TWENTY YEARS AFTER BROWN:
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In May of 1954, rewarding the hope and toil of decades,[1] the Supreme Court's decision in Brown v. Board of Education seemed a great, transforming event. A great event it was. Whether it would work the transformation it promised remained to be seen. For, after all, the Fourteenth Amendment itself had promised much, but accomplished little over almost a century.

In the Spring of 1964, a decade after Brown and a decade ago, the achievement of school desegregation seemed almost as far off as ever. We asked ourselves: When will the law be enforced? When will the law be obeyed? But, behind those questions lay another: What was the law?

Without a clear understanding of what the law was -- and without a solid political coalition to rally behind a clear view of the law -- enforcement and obedience could only become more problematic.

That was the situation on the tenth anniversary of Brown. And, I believe, that is the situation today, on the twentieth anniversary. Despite all of the progress during the intervening years, we are standing at a cross-

roads again, where the future is opaque and the tasks before us difficult.

I.

The comparison with 1964 is instructive. At that time, concerned with enforcement and obedience, we lawyers focused on the Supreme Court's "all deliberate speed" formula. There was much debate about the chain of causation. Had the Court's formula opened the door for -- indeed, encouraged -- Southern resistance and federal foot-dragging? Or, was Southern resistance and federal inaction inevitable at first? Was "all deliberate speed" a corruption of the rule of law, or was it a statesmanlike recognition that desegregation could only be a slow process.[2] This debate on Brown's tenth anniversary was interesting; but, in a way, it missed a basic problem underlying the lack of progress in the fifties and early sixties.

The problem was that for ten long years the Supreme Court had not decided even one major case to define just what school "desegregation" meant. "All deliberate speed" was all the less speedy because no one knew what we were supposed to be inching toward.

Some might be inclined to explain the Court's long silence as another example of "statesmanship." Be that as it may, the effect was corrosive.

In 1955, only one year after Brown, a Southern federal court had raised the most central issue, going to the heart of school desegregation. In the famous (or infamous) case of Briggs v. Elliott,[3] a District Court in South Carolina had argued that the Constitution forbids segregation, but "does not require integration." Brown, according to the Briggs court, did not imply that a State must "mix persons of different races in the schools or ... deprive them of the right of choosing the schools they attend."[4]

One might have thought the Supreme Court would respond. But it did not. In 1958, it convened a special session to announce that, whatever the resistance, a judicial desegregation order must be obeyed.[5] But what sort of desegregation were the lower courts entitled to order? The Court did not say. It maintained its silence up to 1964.

Finally, in the year of Brown's tenth anniversary, it did signal that the time for delay had run out;[6] and a year later it stated that "delays in desegregating school systems are no longer tolerable."[7] But, still, it gave no real clue what "desegregating school systems" implied.

With no lead to follow, and with no answer to the issue posed in Briggs v. Elliott, the lower courts did little for ten years. They issued decrees permitting a few token, though courageous, black children voluntarily to attend "white" schools.[8] And they struck down the most egregious Southern pupil placement laws that preserved the segregatory assignment system.[9] But nothing -- no affirmative duty to integrate -- was put in their place.

By 1964, during the tenth anniversary celebrations, a conservative scholar, Alexander Bickel, could predict that "the end result of desegregation" would simply be "a school system in which there is residential zoning, either absolute or modified by some sort of choice or transfer scheme." The most ever to be expected, he said, was that Southern school districts would settle "into conditions of substantial de facto segregation, alleviated by a number of successful integrated situations. In other words, essentially Northern conditions. ... /T/his, "he concluded," is the likely -- and anticlimactic -- outcome of all the litigating and striving."[10]

The years between 1964 and 1974 would seem to have proved Bickel wrong. The Supreme Court has spoken at last. Freedom-of-choice plans in the South have been swept aside.[11] Effective dismantling of formally dual school systems has been mandated.[12] And both bussing and assign-

ment on an explicitly integrative basis -- cutting across neighborhood lines -- have been upheld as reasonable means to achieve that end.[13]

It might seem, then, that we have solved the problem of what is the law. We might suppose that the central issue has now been resolved: Integration is required in America. It might appear, once again, that the only remaining problem is one of enforcement and obedience to the law.

Without doubt, enforcement and obedience are major problems now. They no longer stem from the "all deliberate speed" formula. That formula was finally buried forever (we may hope) in 1969.[14] Rather, delay 1974-style stems from federal government foot-dragging -- even hostility. It is not an altogether unfamiliar phenomenon. During Brown's first ten years, we felt the deadening effect of President Eisenhower's refusal even to endorse the principle of desegregation and President Kennedy's excessive caution in the face of pressure from Southern Democrats. But, in the middle and late sixties, we learned what an important, powerful weapon enforcement by the federal government can be. Vigorous court action by the Justice Department and, particularly, vigorous enforcement of desegregation guidelines by the Department of Health, Education and Welfare under the Civil Rights Act of 1964, boosted by the Elementary and Secondary Education Act

of 1965 pouring sustantial sums of federal aid into local school coffers, helped to produce the first really substantial progress toward school desegregation in the South.[15] Now that the Nixon Administration has cut back enforcement across the board, the chilling effect is all too plain.[16]

One solution might be to exert new pressure on the now-vulnerable Administration to mend its ways. This should be coupled with a good kick of the erstwhile liberals who hold their political skins above ensuring equal opportunity for all the nation's children. Another might be to more vigorously invoke the Supreme Court's Alexander[17] decision, repudiating Justice Department requests for delay in enforcing court decrees. Yet another solution might be to implement the recent District Court decision in Adams v. Richardson, ordering the Department of Health, Education and Welfare to resume desegregation enforcement under the 1964 Act.[18]

All of these efforts, focusing on enforcement, are important. But the present problem is deeper than that.

The present breakdown in enforcement and obedience to the law is tied -- as it was in 1964 -- to a new and troubling uncertainty as to the substance of the law. What is uncertain is the extent of applicability of the principles originally set forth in Brown v. Board of Education. As we all were taught in law school, the law grows

incrementally, by analogy to past cases, with little regard for overriding principle. But, if that is the case, the growth of the law may be stopped at any point. And, today, as new and different issues of school desegregation present themselves, some question whether Brown still has the life left in it to meet them. For the principles of Brown appear almost as susceptible to limitation as to expansion.

One might ask: How can that be? Hasn't Briggs v. Elliott been discredited? Hasn't it been held that desegregation demands effective integration. The answer is: Yes, those paramount issues of the sixties have been resolved. But they were resolved in the context of Southern school districts, very recently separated by law into "white" schools and "black" schools. It has been established that unconstitutional segregation must be remedied by integration. But the issue we face now is a more basic one: What is unconstitutional segregation?

The problem lies not just in the familiar distinction between de jure and de facto segregation. It is a problem of having had to spend too long just beginning to dismantle the most egregious forms of school segregation. Anything seems tame by comparison. And now it is being suggested that the job is finished. New questions assume key importance. What does de jure segregation mean in the North? How blatant must it be? How long do its effects last? Are we approaching a time when courts will say that the "taint" -- even in the South -- has been dissipated and

that the remedy of affirmative integration is no longer required? Is anything short of the most extreme form of segregation really harmful of children? If the harm is not so great, should the remedy be less strict?

There are those who say that Brown v. Board of Education suggests no answer to these questions, that Brown is now "obsolete."[19] And there are those who would declare that America's schools have been "desegregated" without being fully integrated. Thus the prediction by Professor Bickel ten years ago -- that we would end up with the nationwide institution of de facto school segregation -- has still to be finally disproved.

Once again, as the Supreme Court draws back from "activism" and as the civil rights coalition of the sixties comes apart, the law threatens to come unhinged. It is our job to put it right once more, to build the doctrine we once thought secure, and, in my view, to re-establish integration in our schools as the basic goal.

I recognize that there are those, black and white, who quarrel with this goal. As one who grew up in segregated and unequal schools, themselves the product of power inequities between whites and blacks grounded in the deep racism still pervasive in all America, I hold the strong view that real integration is the best goal and the best strategy for achieving nondiscriminatory, quality and re-

sponsive education for black children and all children. I reject bargaining off constitutional rights for other necessary steps toward building a good educational system for our children including community control and "compensatory" educational measures which black and white parents should demand for the good of their youngsters anyway. We should never forget the power and political realities with which we live and the problem posed to segregation of resources and power along with segregation of schools. Those people who have resisted real integration have also fought equalization and will fight empowerment of minority communities to control their own lives, which they are entitled to do regardless of segregation or desegregation. While desegregation is not the answer to all the difficult problems of schooling today - inequitable financing schemes, misclassification and tracking, unresponsive and sometimes hostile teachers - can there be doubt that the root of some of these problems is founded in the racial (and class) discrimination which Brown attempted to address?

II.

The present uncertainty afflicting desegregation law is a matter partly of doctrine, partly of politics, and partly a mixture of the two. But let us focus for the moment on doctrine.

Probably the most ominous doctrinal problem now on the horizon is the suggestion that the "taint" of past

school segregation may soon be dissipated. Most school districts that once mandated segregation by statute no longer do so. By 1964, they had stopped basing school assignments on race in any explicit way. Ten years have gone by. The courts have been requiring these districts to remedy the effects of the past segregation through affirmative integration. But will they still be doing so in five or ten more years?

The question was first raised by the Supreme Court in the Swann case. The Court said expansively that the "objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."[20] But it added: "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in Brown . . . It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."[21]

At some point, in other words, the Court said that the "vestiges" of past, unconstitutional segregation will be gone; affirmative integration will no longer be

necessary; and a new, de facto segregation may be allowed to establish itself. This is hardly heartening news.

When will the Court say that the "taint" of the past has been dissipated? Could it happen this year, or next? The Nixon Administration may be expected to urge the Court to proceed quickly -- not with "all deliberate speed" -- to such a finding. But the Court in Swann provided no clue as to when it will act. It offered not even a principle to guide its decision. If the Court does hold that the "vestiges" of past segregation are gone, it will be by political fiat, not by law as we understand it. And political fiats are inherently unpredictable.

Litigators should respond forcefully to this suggestion -- or, rather, threat -- contained in Swann. The Court must not be allowed to slip away from its responsibilities for school desegregation through the back door.

We must demonstrate to the courts, in every case, that the present-day segregation we attack is not the "vestige" of one statute or one decision in the past. It is, rather, a manifestation of hundreds of years of American racism -- racism that was institutionalized, a composite of myriad disabilities, habits, attitudes and expectations. Segregatory laws supported the institution. When they disappear from the books, the institution they helped support remains.

Just last year, the Supreme Court -- in an opinion written by Mr. Justice Brennan, rather than by the Chief Justice as in Swann -- seemed to endorse (or at least suggest) this broader view. It may have granted us a temporary reprieve. In Keyes v. School District No. 1, the Court said that "a connection between past segregative acts and present segregation may be present even when not apparent and ... close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation."[22]

This language from the Keyes opinion may prove useful. We must not allow it to be forgotten.

But, in the end, this effort will be only a holding action. If constitutionally required school desegregation is to remain on a firm foundation, (and real integration a goal), we must look to another aspect of desegregation doctrine: the definition of de jure segregation. For if de jure segregation is defined broadly -- broadly enough to include many present actions by school authorities that produce segregation-in-fact -- then we need not worry so much about drawing a connection to segregative laws in the past.

III.

Yet the definition of de jure segregation is probably the most unsettled aspect of desegregation doctrine today. Often, integrationists seek to short circuit this problem. They argue that courts should simply hold now that all de facto segregation is unconstitutional, making the definition of de jure segregation unimportant.

This approach offers the great advantage of clarity. In time, we may hope that it will prevail. But, at present, such a holding would require a great doctrinal and psychological leap. For years, lower courts have refused to go so far, so fast. The Supreme Court has not only avoided the issue; recently, when the claim was presented in far too sweeping form, it summarily rejected it. Thus the game of defining de jure segregation, in my opinion, must be played through to its conclusion.

For the time being, there is no need even to concede the validity of the de jure/de facto distinction. Indeed, there is no such thing as de facto school segregation of the pure type. Governmental involvement of one sort or another can usually be found in the history of segregated residential patterns; and, after all, it is a governmental agency that bases school assignments on neighborhoods known to be segregated-in-fact. [23]

What we face are varying kinds and degrees of governmental responsibility for assignment by race. Until the Court rigidly confines the meaning of de jure segregation to certain kinds and degrees of governmental responsibility, de facto segregation has no meaning of its own. And, until that time, there is no reason to ask the courts to take the leap of declaring all de facto segregation unconstitutional.

At present, the Court has not so confined the meaning of de jure segregation. And yet it has defined it in such a way that confusion and uncertainty now prevail -- and will for some while.

For nineteen years after Brown, the Court heard argument only in cases from school districts that had very recently been openly segregated by statute. De jure segregation in that context was too clear to be questioned. Finally, just last year, the Court took a case from the North: from Denver, Colorado. In the Keyes[24] case, it began at long last to define the broader meaning of de jure segregation. Its decision was important not only for the North. It also could be controlling in cases from the South if it is ever held that the "taint" of Southern segregation by statute has been dissipated.

What the Court did in Keyes was barely to inch forward from the Southern paradigm of de jure segregation. Instead of proceeding from the "top-down" to define de jure

segregation in general and then to apply it to the particular case, the Court reasoned, in its usual fashion, by analogy to the one form of school segregation already declared unconstitutional. But because Southern segregation had been so blatant, so malevolent, the definition of de jure segregation adopted by the Court was necessarily quite limited.

Specifically, in Keyes, the Court held that segregation-in-fact is unconstitutional if it is the product of "segregatory intent" on the part of governmental authorities.[25] Some thought this a victory. For the Court went beyond the pure form of Southern segregation. But the formula of "segregatory intent" presents all sorts of problems. It is itself hard to define. And, depending on its definition, it may be difficult to prove and narrow in impact.

Despite the lack of a recently mandated statutory segregation and despite protestations that the Denver school board was simply following a "neutral" neighborhood school policy, the Court held that sufficient "segregatory intent" had been shown in the board's "manipulations" of its neighborhood policy to increase the segregation than would have resulted from a truly "neutral" approach.

The occasions for "manipulation" of a neighborhood policy are present every time any school board draws a zoning line, or locates a new school, or determines the

size of a new school, or closes an old school, or adopts a voluntary transfer plan.[26] The Keyes opinion recognizes most of these occasions, and more. Certainly, the myriad decisions involved in administering a neighborhood school policy offer litigators many opportunities for investigation and many opportunities to make a showing of de jure segregation.

But what kind of showing? Is it enough, for example, simply to show that the location of new schools resulted in increased segregation? Must that result have been foreseeable or known to the school board? Or must there be a showing of a desire for increased segregation -- a conscious segregatory policy -- underlying such "manipulative" decisions? If so, can it be inferred from a pattern of decisions producing segregatory results? Or must it be proved independently?

If particular "manipulations" of a neighborhood policy can be explained only as serving a segregatory purpose, "segregatory intent" would seem clear. But what if they can be explained as serving other purposes as well? That probably is the most typical case. Is an inference of "segregatory intent" still possible? Must the segregatory purpose be "dominant?"

The Keyes opinion raises all these problems, but does not resolve any of them conclusively. For, in a way, Keyes

was an easy case for the Supreme Court. The District Court had already found that the Denver school board had pursued a "policy of deliberate racial segregation" in one section of the city. That finding was not contested; and the Supreme Court did not examine it. Rather, the Court simply held that once there has been such a finding as to one part of the city, the burden is on the school board to show that it did not act with "segregatory intent" in the rest of the city and that the board could not meet its burden at that stage simply by showing that its actions served some end in addition to segregation. But the Court said nothing about how litigants may make the crucial, initial showing of "deliberate" segregation.

Thus Keyes does not close the door to nationwide integration. Nor does it open the door wide. At best, Keyes leaves it swinging ajar, uneasily and uncertainly.

In the short run -- and, in matters of school desegregation, that unfortunately means the next five or ten years -- litigators will have to press carefully for an elaboration of the Keyes standard that is both clear and expansive. What success awaits us remains to be seen. That it will be difficult goes without saying.

There is one dialectic that will confront our efforts, whether in the short run attempt to expand the meaning of de jure segregation or in the long run assault on the

citadel of de facto segregation, once defined. That is the dialectic of fairness in rules of selection versus fairness in fact.

The rhetoric of equal protection law, as applied to racial discrimination, has purported to separate the two rigidly. It has focused largely on fairness in governmental rules of selection -- rules of selection for juries, for voting rights, for employment, for use of public facilities, for school assignments. Courts have suggested that so long as those rules of selection are held to be fair, it is improper to inquire into their results. So long as the rule used to select jurors is fair, courts will not concern themselves with the actual representation of minorities.[27] So long as the rule used to select employees is fair, courts will not worry about the number of minority employees hired.[28] And so long as the actions that determine school assignments are fair -- or, in Keyes, are not infected by "segregatory intent" -- courts insist that they will not mandate actual integration.

In theory, this rigid distinction corresponds to the powerful American ideology of equal opportunity. But, in practice, the distinction is untenable. The fairness of a rule of selection -- whether for juries or employment or school assignments -- cannot be assessed in total blindness to results achieved.

In the law of employment discrimination, it has

repeatedly been held that a showing of a discriminatory effect is enough to establish, prima facie, that the criteria used for hiring are discriminatory.[29] And, in the law of jury discrimination, it has been held that even though a rule of selection may appear fair on its face, a court must look to the results it achieves to determine if it is being applied discriminatorily.[30] In the law of school desegregation, too, the courts have examined the results of apparently "neutral" policies of school assignment, at least in Southern school districts once segregated by statute.[31] They must be urged to do so in all cases.[32]

It is the task of litigators now to persuade the courts that the element of "segregatory intent" is something that can be inferred from results, as well as proved independently. More importantly, we must persuade the courts that the very meaning of "segregatory intent" is tied to the actual segregation resulting from governmental action.

"Segregatory intent" must be broader than the desire for segregation. We are not dealing with first degree murder cases. We should not be looking for "malice aforethought." The Constitution, after all, is meant to protect, not to punish.

In other areas of the law, more comparable to constitutional law, one is held to "intend" particular results if he simply knew that those results would follow his act.

Such knowledge is inferred if a reasonable man would have been substantially certain that the results would, in fact, occur.[33]

The finding of "intent," in other words, is based on a showing that the results which occurred were substantially certain to follow an act, and that a reasonable man would have known it. Similarly, it should be enough to show "segregatory intent" that increased segregation was substantially certain to follow a "manipulation" of a neighborhood school policy, and that any reasonable member of the school board should have known it. Such a showing usually would not be too difficult.[34]

Such a definition of "segregatory intent" may have a more sweeping impact than the Keyes Court had in mind. If the Court were to accept it, it might feel that it must balance the harm done by the intended, increased segregation against the value of other intended results of the particular "manipulation" of the neighborhood policy. But such a balancing act would lead us directly to the basic issue of de facto segregation. For once a court starts balancing segregation against other values as those, for example, allegedly served by a neighborhood policy, it matters little whether it is dealing with the increased segregation resulting from a "manipulation" of the policy or with the basic segregation inherent in the policy itself.

We should endeavor to lead the courts through this step-by-step progression to the basic issue at stake. If,

in the end, defining de jure segregation becomes more a matter of weighing the costs and benefits of the results of a neighborhood policy than a matter of searching out "segregatory intent," that is entirely appropriate.

Violations of the First Amendment rights need not generally be "intentional" before they are unconstitutional. Nor Fourth Amendment rights. Nor Fifth Amendment rights. Why should the right to the equal protection of the laws under the Fourteenth Amendment be somehow different?

When the courts apply the equal protection clause to apportionment laws, they do not look for "intent" to discriminate against certain voters. Rather, they look to the extent of the inequality that results from the apportionment laws.[35] Why should racial discrimination be treated more leniently?

In time, then, if all goes well, the question of "intention" may drop away. For, in view of residential patterns in our cities, segregation is the substantially certain result of any neighborhood policy.

By Brown's thirtieth anniversary, the Court may see that its job, finally, is to decide whether the values served by a neighborhood school policy justify the resulting segregation. Our job will be to show that there can be no such justification. I feel strongly that there is not.

IV.

The outcome will depend, to a large extent, on the showing we make that a segregated education -- no less de facto than de jure -- is an inferior education. I personally believe this is true for black and white children alike. But simply as a matter of equal protection doctrine, the showing of inferior treatment may be crucial. A racial classification that works no harm on a minority may be beyond constitutional attack.

Indeed, the showing of inferior treatment is crucial not only at the eventual stage of attacking de facto school segregation, but also at the present stage of expanding the definition of unconstitutional de jure segregation. A court unconvinced that a segregated education is an inferior education will be reluctant to give the de jure concept a very wide meaning.

One might have thought that this showing was beyond question. Didn't Brown resolve the issue? But the unfortunate fact is that many people believe today that Brown did not resolve the issue. Whether segregated schools are inevitably inferior schools is yet another element of uncertainty plaguing desegregation law on this twentieth anniversary.

To be sure, the Brown opinion did state squarely

that: "Separate educational facilities are inherently unequal."[36] But the opinion appeared to base this conclusion on a set of empirical assumptions -- for example, that segregated schools generate "a feeling of inferiority" which "has a tendency to (retard) the educational and mental development of Negro children."[37] In a famous footnote, the Brown Court cited supporting psychological literature, and suggested that it was this advance in social science knowledge that led it to reject the old doctrine of Plessy v. Ferguson.[38]

That was in 1954. Now, in 1974, there is a great deal more social science literature purporting to assess the educational effects of segregated education. Many opponents of further integration point to some of this literature and argue that the psychological assumptions underlying Brown have now been disproved -- that integration is no longer worth the dislocations it will cause.

So far, the Supreme Court has not injected itself into this debate. Yet the Court cannot be ignorant of it. It has proceeded as though the harmfulness of school segregation were still firmly established; but it is possible that doubts on this score helped prompt its suggestion in Swann that the "taint" of de jure segregation will someday be dissipated or its seemingly narrow definition of de jure segregation in Keyes.

At some point, it is inevitable that this element

of uncertainty in the law will be presented, full-blown, for resolution by the Court. It is important that integrationists be prepared to respond.

The response could take two forms. First, we could fight the opponents of integration on their chosen ground, countering "their" social science studies with "ours." As a result, the future of school desegregation would depend upon several judges' evaluations of statistical survey techniques, or learning theories. This would be absurd. More than that, it would cheapen the principle established in Brown v. Board of Education, and degrade the concept of constitutional law.

Almost twenty years ago, just after Brown was announced, Herman Cahn argued that the references to psychological studies should not be taken as a critical element in the landmark decision. It would be a disaster, he suggested, "to have our fundamental rights rise, fall, or change along with the latest fashions of psychological literature." [39]

I want to say one word here about the irrelevance, in my view, of one of the issues raised by some social scientists, who disagree with desegregation. I refuse to spend time either reading about it or debating it, for I have always thought that "dumb" children - black and white - had the same constitutional claim to equal protection as "smart"

children? This issue -- like bussing -- strikes me as a smokescreen used to express a deeper opposition to nondiscriminatory education.

What must be done is to show that *empirical* proof of psychological harm resulting from segregated education is not, and never was, central to the constitutional requirement of school desegregation. Mere quotation of passages from the Brown opinion cannot resolve this issue either way. But even a passing look at what the Court did with other types of segregation immediately after Brown is decisive.

Beginning in 1955, in a long series of per curiam opinions, the Supreme Court made clear that the doctrine of Brown was not limited to segregated education or its psychological effects. It summarily struck down segregation on public beaches,[40] on public golf courses,[41] in public parks,[42] and even in airport restaurants.[43] In none of these opinions did it even mention any psychological harm. Nor did it mention any social science literature. Rather, it took for granted that segregation is harmful to the minority race . And it simply cited Brown for support.

Surely, the principle of these per curiam decisions is correct -- and authoritative. Of course, they dealt with instances of segregation openly proclaimed by statute. But, as the Court demonstrated in the Keyes cases, that factor is not critical. Segregation of any sort is inherently

harmful to the minority (and I think majority) that is segregated-out. In a society that is supposedly committed to equal opportunity, and a society in which the majority rules, a minority can have no equal opportunity if it is separated off from the majority, denied the benefits that the majority provides for itself and denied the right -- even if some choose not to exercise it -- to associate with those who presently control virtually every instrument of power. This is most obviously the case in education. It would be ironic indeed if courts were to hold that in education -- but in no other area -- desegregation depended on special empirical showing of psychological harm.

V.

But even if we do manage to establish that the "taint" of segregation is not soon dissipated, that de jure segregation is not confined to narrowly "intentional" segregatory acts, and that a segregated education is indeed an inferior education we shall face one last uncertainty at the core of desegregation law.

This is the uncertainty of remedy. Unlike the others, this one is not the product of anything the Supreme Court has yet said or done. Rather, it is the product of something the Court did not do and of what one fears the

Court may do in the future.

In a word, the problem of remedy may be the problem of bussing. Bussing -- or rather a particular kind of bussing (of white children to black schools, of too many black children to white schools, etc.) -- is not very popular today. Even though we have spent ever increasing energy and resources getting more busses for more children every decade, totally unrelated to desegregation, the present opposition to it stems from a more basic opposition to further integration or from a dislike of sending one's children to a "distant", "unfamiliar", and often "inferior" school (the fact that usually gives rise to the necessity to desegregate in the first place). After all, you cannot expect our children to suffer what "their" children are forced to suffer! The fact is that "bussing" has become a symbol, a separate political issue of its own, created by the Southerners with Mr. Nixon's help, to achieve the basic end of resegregating the nation's schools. It drove liberal politicians in 1972 to speak the language of "quality education," as if it were irreconcilable or separable from nondiscriminatory or desegregated education! And it may have contributed to the now-tattered mandate the President received that year. If the Court, as is said, "follows the election returns," the bussing remedy may be in for trouble. Because bussing is <u>not</u> a separate issue, but is tied to the only possibility

for real desegregation, the effect of a pull-back by the Court could be devastating.

Since the Green decision, in 1968, the Court had held that, once a condition of de jure school segregation or its "vestiges" are found in a school district, the remedy must be a total one, a "root and branch" dismantling of the segregated system.[44] In Swann, the Court held that this remedy could include bussing, within the reasonable discretion of the trial judge.[45] Both Green and Swann arose in Southern school districts, that had recently been openly and thoroughly segregated by statute. Last year, in the Keyes decision, the Court took a major step forward -- despite the election returns. It held that the "root and branch" remedial requirement, including bussing, applies no less in a Northern city where de jure segregation is the result of many, discrete segregatory "manipulations," rather than of a statutory "dual system."[46]

One might think, after Keyes, that the bussing remedy presents no separate doctrinal problems. That may be correct -- insofar as it is established that "root and branch" desegregation must follow any finding of de jure segregation. But must "root and branch" desegregation include bussing? And how much bussing must there be?

When we step back for a moment, we see a troubling uncertainty in the very decision once hailed as a great victory: Swann v. Charlotte-Mecklenburg Board of Education.

The Court there stated that desegregation plans "cannot be limited to the walk-in school."[47] It required that transportation of students at least be considered. But it did not require any particular degree of bussing. To the contrary, it suggested a vague, uncertain limit on the bussing remedy.

The limit on the remedy, the Swann Court said, "will vary with many factors," including the time and distance to be travelled, the directness of the route, and the age of the students. "The reconciliation of competing values," it said, "is ... a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed."[48] This left matters somewhat up in the air. But, within months, the author of the Swann opinion -- Chief Justice Burger -- was complaining publicly that the opinion had been read too broadly. He said, in a memorandum opinion, that a desegregation plan might "trespass the limits on school bus transportation indicated in Swann," and suggested that a most important limit was that of time to be travelled to school.[49]

The transportation time sanctioned in Swann was about one hour round-trip. Lower courts have upheld plans involving similarly limited travelling time.[50] But no one can be sure whether one hour is an outer limit or not.

It is not clear how serious a limitation this might be as I suspect that most of the bussing in the nation falls within this reasonable limit and practice. Contrary to the

misinformation and fears inflamed by opponents of desegregation, Courts have not been ordering bussing in amounts which broke with past practice or which could be considered unreasonable. Even in the metropolitan remedy proposed in Richmond, in only one of the six sub-districts would bussing time have reached one hour. I would nonetheless like the time flexibility to remain and not have rigid lines drawn. After all, there is precedent for much longer bussing time stemming from efforts to maintain segregation.

The Court's decision not to decide on clear guidelines for the bussing remedy -- but just the same to insist that there are limits -- may have put some desegregation plans into dount and may have influenced another non-decision by the Court: its equally-divided silence in the Richmond metropolitan cross-district bussing case.[51] Of course, the Court is considering this issue again this year in the Detroit case.[52] One hopes that the opinion it issues may not simply compund the current confusion.

That there is confusion and that it could end up limiting, rather than expanding, opportunities for school integration was made clear in Mr. Justice Powell's separate opinion in last year's Keyes decision. Mr. Justice Powell agreed that bussing is "one tool of school desegregation;" but, he said, the "crucial issue is when, under what circumstances, and to what extent such transportation may appropriately be ordered."[53] He then argued that tight restrictions should be imposed in the future, raising the spectre

of "white flight" and even questioning the use of a "root and branch" remedy for separate, discrete segregative acts.[54]

We may be walking on a minefield in the dark. But, if we look and not leap too far, we should be able to expect success. For, so long as we hold the courts to the obligation of "root and branch" desegregation, the bussing remedy will be indispensible and no arbitrary limits can be imposed on it.

If, on the other hand, the courts abandon the standard of "root and branch" desegregation, then all desegregation's future may be extremely difficult.

VI.

Perhaps not too difficult. There is still the possibility of voluntary action by particular local communities to adopt plans for "root and branch" dismantling of even de facto school segregation. Many communities have taken such action. The courts, unanimously, have upheld their action.[55]

Yet the unanimity is among the lower state and federal courts. The Supreme Court has not spoken. In Swann, it did strongly indicate that voluntary desegregation, using "benign" racial classifications and bussing, is permissible.[56] But not until this very year did it even take a

case involving such classifications.

The case, of course is DeFunis v. Odegaard.[57] It involves an affirmative effort by a state law school to admit minority students. It may be distinguishable from voluntary school desegregation. But the basic principles involved are the same. Whatever the Court does could have a profound "ripple" effect in many other areas. We can only wait -- and hope.

VII.

The DeFunis case is important in one other respect which should be mentioned in closing. It revealed for all to see that the civil rights coalition of the sixties may be coming apart. But it should not be surprising that the willingness to share and sacrifice becomes thinner the closer one's own perceived interests are affected. Civil rights groups, educators, some unions, some jewish groups and many other organizations supported the state law school's affirmative admissions program. But the AFL-CIO, several Jewish groups and a few "ethnic" organizations and some academics opposed it in amicus briefs to the Court.

If, in fact, the coalition of the sixties does break apart, the effect could be more devastating than any of the doctrinal uncertainties I have discussed up to now.

There is no simple preventive medicine to be applied. The issues of the seventies are difficult ones for many who supported civil rights before. The danger simply shows that our task now is less a legal one than a political and leadership one.

If the sixties were the time of eradicating egregious segregation, the seventies are the time of seeking real equality. This will be much harder because it involves an equalization of sacrifice in order to overcome the past inequality of sacrifice imposed on some minorities.

It may even mean that some individuals may have a more difficult time in the process during the interim of trying to ensure fairness in the process for all groups and all individuals. It also means that many institutions, unusually timid in the past, who have condemned and practiced overt or covert discrimination, must go beyond adopting paper policies to implementing affirmative programs to desegregate th will be controversial. But any reform, racial or non-racial is controversial. What is needed is nondefensive leadership with a commitment to real equality.

VIII.

This account of the state of school desegregation on Brown's twentieth anniversary may not be encouraging. Some

might prefer to celebrate the achievements of the past ten years -- and leave developments in the next ten for discussion at the thirtieth anniversary.

But, if that occasion, ten years hence, is to be a pleasant one, we must realistically assess where we stand now -- perhaps stressing the dangers. For, if we are to avoid them, we must first see them clearly.

Footnotes

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

[2] See, e.g., Quint, Profile in Black and White (1958); Bickel, The Decade of School Desegregation: Progress and Prospects, 64 Col. L.Rev. 193 (1964).

[3] 132 F.Supp. 776 (E.D.S.C. 1955).

[4] Id. at 777.

[5] Cooper v. Aaron, 358 U.S. 1 (1958).

[6] Griffin v. Prince Edward County Board of Education, 377 U.S. 218, 234 (1964).

[7] Bradley v. School Board of Richmond, 382 U.S. 103, 105 (1965).

[8] E.g., Carson v. Warlick, 238 F.2d 724 (4th Cir., 1956), cert. denied, 353 U.S. 910 (1957); Dove v. Parham, 196 F.Supp. 944 (E.D. Ark. 1961).

[9] E.g., Bush v. Orleans Parish School Board, 138 F.Supp. 337 (E.D. La. 1956), aff'd, 242 F.2d 156 (5th Cir.), cert. denied, 354 U.S. 921 (1957); Green v. School Board of the City of Roanoke, 304 F.2d 118 (4th Cir. 1962).

[10] Bickel, supra note 2, at 214.

[11] Green v. County School Board, 391 U.S. 430 (1968); Monroe v. Board of Commissioners, 391 U.S. 450 (1968).

[12] Id.

[13] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

[14] Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969)

[15] See Edelman, Southern School Desegregation, 1954-1973: A Judicial-Political Overview, 407 Annals of Am. Acad. of Pol. and Soc. Sci. 32, 37-39 (1975).

[16] See id. at 39-42

[17] 396 U.S. 19 (1969).

[18] 351 F.Supp. 636 (D.D.C. 1972).

[19] E.g., A.Bickel, The Supreme Court and the Idea of Progress __.

[20] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15.

[21] Id. at 31-32.

[22] 413 U.S. 189, 201 (1973).

[23] See Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L.Rev. 564 (1965).

[24] Keyes v. School District No. 1, 413 U.S. 189 (1973).

[25] Id. at 205-206.

[26] See Fiss, supra note 23.

[27] See Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970).

[28] See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[29] See Castro v. Beecher, 459 F.2d 725, 735 (1st Cir. ____); United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. ____).

[30] See Turner v. Fouche, 396 U.S. 346 (1970).

[31] See Wright v. Council of Emporia, 407 U.S. 451 (1972).

[32] Just this Term, the Court indicated that it would look to results in the context of a Northern city. Mayor of Philadelphia v. Educational Equality League, 42 U.S.L.W. 4405, 4409 (1974).

[33] See, e.g., W. Prosser, Law of Torts 31-32.

[34] See Fiss, The Charlotte-Mecklenburg Case -- Its Significance for Northern School Desegregation, 38 U.Chi. L. Rev. 697 (1971); Note, School Desegregation After Swann: A Theory of Government Responsibility, 39 U. Chi. L.Rev. 421 (1972).

[35] E.g., Reynolds v. Sims, 377 U.S. 533 (1964); Kirkpatrick v. Preisler, 394 U.S. 526 (1969

[36] Brown v. Board of Education, 347 U.S. 483, 495 (1954).

[37] Id. at 494

[38] Id. at 494, n. 11.

[39] Cahn, Jurisprudence, 30 N.Y.U.L.Rev. 150, 167 (1955).

[40] Mayor & City Council v. Dawson, 350 U.S. 877 (1955).

[41] Holmes v. City of Atlanta, 350 U.S. 879 (1955).

[42] New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958).

[43] Turner v. City of Memphis, 369 U.S. 350 (1962).

[44] Green v. County School Board, 391 U.S. 430 (1968).

[45] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1.

[46] Keyes v. School District No. 1, 413 U.S. 189.

[47] 402 U.S. 1, 30.

[48] Id. at 31.

[49] Winston Salem/Forsyth County Board of Education v. Scott, 404 U.S. 1221, 1227 (1971).

[50] E.g., Acree v. County Board of Education, 358 F.2d 486 (5th Cir. 1972); Bondridge v. Jefferson Parish School Board, 456 F.2d 552 (5th Cir. 1972); Brewer v. School Board of City of Norfolk, 356 F.2d 943 (4th Cir. 1972).

[51] Bradley v. School Board of Richmond, ___ U.S. ___ (1973).

[52] Milliken v. Bradley, cert. granted ___ U.S. ___ (1973).

[53] 413 U.S. 189, 244.

[54] Id. at 244-252.

[55] E.g., Offermann v. Nitkowski, 378 F.2d 22 (2nd Cir. 19__); Springfield School Committee v. Barksdale, 348 F.2d 261 (1st Cir. 19__); Tometz v. Board of Education, 39 Ill.2d 593, 237 N.E. 2d 498.

[56] 402 U.S. 1, 16.

[57] Cert. granted, ___ U.S. ___ (1973).