

NOTES

DE FACTO SCHOOL SEGREGATION AND THE LAW: FOCUS SAN DIEGO

I. INTRODUCTION

Since the 1954 *Brown v. Board of Education*¹ decision declared segregated schools to be "inherently unequal," steadily mounting numbers of American children have been attending increasingly segregated schools.² As a result, there has been a marked if gradual shift in the focus of legal actions. Where primary concern had, for a time, centered rather impersonally upon the spectacle of Southern resistance and obstruction, by degrees the phenomenon of segregated education has come to be recognized by many as a national dilemma rather than a localized idiosyncrasy. In *Brown*, invidious de jure segregation was held to violate the equal protection clause of the fourteenth amendment.³ Increasingly, the establishment or maintenance of "inherently unequal" schools has been challenged in the courts as no less unconstitutional where these schools flourish within the framework of so-called de facto, rather than de jure segregation.⁴

The purpose of this note will be to: (1) Provide background

¹ 347 U.S. 483 (1954).

² "Over the past 15 years, Negro elementary school enrollment in most city school systems has risen. There also has been an increase in the number of Negro elementary students in majority-Negro and nearly all-Negro schools." U.S. COMMISSION ON CIVIL RIGHTS, *RACIAL ISOLATION IN THE PUBLIC SCHOOLS* 8 (1967) [hereinafter referred to as U.S. COMMISSION REPORT].

In Cincinnati, Ohio, for example, the Negro elementary school enrollment doubled over the last 15 years, but the number of Negro children in majority-Negro schools almost tripled In Oakland, California, almost half of the Negro elementary school children were in 90-100 percent Negro schools in 1965. Five years earlier, less than 10 percent were.

Id.

³ We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

347 U.S. at 495. In *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) de jure segregation was also held to be a "denial of the due process of law guaranteed by the Fifth Amendment"

⁴ In the following cases de facto segregation was recognized to create inequalities warranting judicial remedy: *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967); *Barksdale v. Springfield School Comm.*, 237 F. Supp. 543 (D. Mass. 1965), *vacated on other grounds*, 348 F.2d 261 (1st Cir. 1965); *Blocker v. Bd. of Educ.*, 226 F. Supp. 208 (E.D.N.Y. 1964); *Branche v. Bd. of Educ.*, 204 F. Supp. 150 (E.D.N.Y. 1962); *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963); *Booker v. Bd. of Educ.*, 45 N.J. 161, 212 A.2d 1 (1965). For decisions denying relief from de facto segregation, see cases cited note 8 *infra*.

material on the causes and consequences of substantial racial imbalance in schools, together with an outline of some basic remedial measures which may be available to alleviate this imbalance; (2) review and evaluate the major theories underlying litigation involving de facto segregation; (3) discuss California law as it relates to the compulsory elimination of de facto segregation; and (4) analyze the possibilities for obtaining legal remedies to correct the racial imbalance prevalent within the San Diego Unified School District.⁵

II. BACKGROUND MATERIAL ON CAUSES AND CONSEQUENCES OF RACIAL IMBALANCE

A. Definition

The term "de facto school segregation," as it is generally applied, denotes a condition of substantial racial imbalance in the schools which has come about adventitiously rather than by operation of law.⁶ That such a definition is inadequate has been recognized by numerous legal writers;⁷ the contention that it can also be seriously misleading is fundamental to today's controversy regarding the precise scope and limitations of the *Brown* decision and the authority of the fourteenth amendment to compel state action to remedy "de facto" school segregation.

It may be best to admit, from the start, that the terms "de jure" and "de facto" represent elusive and frequently overlapping concepts. Many courts, unfortunately, have declined to acknowledge this.⁸ Thus, while racial discrimination, as in *Brown*, has repeatedly been held to constitute state action in derogation of the Constitution's equal protection clause,⁹ *state-imposed* compulsory attendance

⁵ See text accompanying notes 69 & 70 *infra*.

⁶ See Annot., 11 A.L.R.3d 782-83 (1967); U.S. COMMISSION REPORT at 219; 16 STAN. L. REV. 434, 435 n.6 (1964).

⁷ See, e.g., Fiss, *Racial Imbalance in Schools*, 78 HARV. L. REV. 564, 584 (1965); Kaplan, *Segregation Litigation and the Schools—Part I: The New Rochelle Experience*, 58 NW. U.L. REV. 1, 2 (1963).

⁸ See *Deal v. Bd. of Educ.*, 369 F.2d 55, 62 (6th Cir. 1966), *cert. denied*, 88 S. Ct. 39 (1967); *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963); *Webb v. Bd. of Educ.*, 223 F. Supp. 466, 468 (D. Ill. 1963); *Henry v. Godsell*, 165 F. Supp. 87, 90 (D. Mich. 1958); *Briggs v. Elliot*, 132 F. Supp. 776, 777 (E.D.S.C. 1955). Explicit or implicit in all these decisions is the conviction that de jure and de facto segregation are readily distinguishable; the first involves discrimination, which is arbitrary and therefore proscribed, the second does not and is therefore constitutionally permissible. See also text accompanying notes 44-50 *infra*.

⁹ *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Borders v. Rippey*, 247 F.2d 268 (5th Cir. 1957); *Dowell v. School Bd.*, 219 F. Supp.

zones which result in segregation have, unless purposely discriminatory, been generally exempt from this constitutional sanction on the ground that the resultant segregation was merely adventitious or "de facto."¹⁰ While a detailed analysis of such court imposed distinctions will be made in a later section of this note, the object here is primarily to illustrate some definitional problems.

It would appear, then, that whether a particular instance of racial imbalance is classified as "de jure" or "de facto" is by no means determined simply by the presence or absence of coercive state action. More often, it is a function of the courts' relatively arbitrary determination that unless school segregation is the direct result of a particular form of state action (*i.e.*, invidious discrimination), it has come about adventitiously—it is "de facto."¹¹ Because of such defects in the prevailing definition of de facto segregation, some writers have abandoned the term altogether.¹² Others have chosen to retain it conditionally, making certain to inject appropriate qualifications and warnings.¹³ For the purposes of this note, the term "de facto segregation" will encompass the broad range of situations to which it is normally applied. It will not, however, be defined as adventitious—for whether de facto segregation is adventitious remains one of the principal issues to be determined. The working definition, then, will be: a condition of substantial racial imbalance in schools, which has resulted from any circumstance or combination of circumstances other than state-imposed racial discrimination.

B. *Causès and Nature of De Facto School Segregation*

The phenomenon of racially segregated education, long familiar in the southern and border states as the product of overt discriminatory legislation,¹⁴ has, as a result of mass Negro migrations to the

427 (D. Okla. 1963), *aff'd in part*, 375 F.2d 158 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967).

¹⁰ See, e.g., *Deal v. Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 88 S. Ct. 39 (1967); *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963).

¹¹ *Id.*

¹² In 78 HARV. L. REV. at 565, the legal implications of de facto segregation are categorized in terms of the intent of school boards in creating segregated schools. These categories: (1) active gerrymandering; (2) a policy of approval; and (3) a policy of disregard are, in effect, substituted for the term de facto.

¹³ E.g., CARTER, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented*, In DE FACTO SEGREGATION AND CIVIL RIGHTS 28, 29 (1965).

¹⁴ E.g., VA. CODE § 22-221 (1950) provided: "White and colored persons shall not be taught in the same school, but shall be taught in separate schools . . ."

northern cities, gradually evolved into an established nationwide system of separate and unequal schools.¹⁵ While precise causal patterns may vary from district to district, the two fundamental sources of this racial imbalance can be readily identified: (1) Purposely discriminatory school policies; and (2) neighborhood schools in segregated minority areas.

Purposely discriminatory school policies, when challenged in the courts, have generally been outlawed.¹⁶ These policies, notably gerrymandering of school district boundaries and discriminatory student transfer practices, are merely the reverse sides of the traditional segregationist coin. The objective is the same: racial separation; the method, however, is one of indirection and subterfuge. The usual gerrymandering technique, which has been held to violate the Constitution's equal protection clause,¹⁷ is to manipulate compulsory attendance zones in such a way that all or most Negro children find themselves assigned to predominantly Negro schools, while white children are zoned into white schools. In *Goss v. Board of Education*,¹⁸ the practice of permitting white children to transfer from majority-Negro to majority-white schools while denying such transfers to Negro pupils similarly located was also declared unconstitutional under the *Brown* mandate.¹⁹

However by far the most pervasive cause of substantial racial

¹⁵ See U.S. COMMISSION REPORT at 8-14.

¹⁶ See cases cited note 9 *supra*.

¹⁷ *Cooper v. Aaron*, 358 U.S. 1, 17 (1958).

[T]he constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by State legislators or State executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."

See also cases cited note 9 *supra*.

¹⁸ 373 U.S. 683, 687.

¹⁹ Even within this limited context, however, the difficulty of obtaining clear and convincing proof of discrimination may serve as an imposing obstacle to obtaining relief. The extent to which this obstacle can be surmounted is very largely dependent on a court's allocation of the burden of coming forward with the evidence. In *Evans v. Buchanan*, 207 F. Supp. 820 (D. Del. 1962) for instance, it was held that a presumption of unconstitutionality arose from "the existence of an all Negro student body and faculty, administered by a separate board and surrounded by white districts on all sides" *Id.* at 825. This, combined with the fact that "the evidence, in great part, rest[ed] in the hands of those who conceived and implemented the plan" was sufficient to place the burden of producing evidence of non-discriminatory motives upon the defendant school boards. *Id.* The majority of courts, however, allocate to plaintiffs the burden of producing evidence of discriminatory intent. See, e.g., *Cragget v. Bd. of Educ.*, 234 F. Supp. 381, 386 (D. Ohio 1964); *Bell v. School City of Gary, Indiana*, 213 F. Supp. 819, 826 (D. Ind. 1963); *Henry v. Godsell*, 165 F. Supp. 87, 92 (D. Mich. 1958).

imbalance in public education is the system of neighborhood schools operating in segregated minority communities. It is this amalgam of state imposed school districting and societally imposed residential patterns which constitutes the core of de facto segregated education. By their tendency to regard the neighborhood school system as fundamental and immutable, many courts have, in effect, exempted states from their share of the responsibility for having established or maintained segregated educational facilities. Referring to the effects of neighborhood zoning, the opinion in *Deal v. Cincinnati Board of Education* that "boards of education have no constitutional obligation to relieve against racial imbalance *which they did not cause or create* . . ." ²⁰ typifies this line of reasoning.

Since no responsible court would seek to impose upon a state the duty of eliminating, or even substantially altering an educational policy which is not merely traditional, but for which there are no reasonable alternatives, the initial question to be answered is a factual one: Is the neighborhood school policy indispensable to a sound public education? As will be seen later, the question is rarely posed in these terms. Most courts are disinclined to interfere with administrative discretion further than to proscribe policies which are clearly arbitrary or capricious, relating to no reasonable educational objective.²¹ The following critical examination of the neighborhood school concept, however, may well suggest answers, or at least approaches to a variety of judicial theories on de facto segregation, regarding the constitutional implications of state action or inaction.

In general, the goals of the neighborhood school are: (1) To provide a cheap, safe and fast means of transporting children between the home and school;²² (2) to keep schools small;²³ (3) to

²⁰ 369 F.2d at 61 (emphasis added).

²¹ See text accompanying notes 44-50 *infra* for discussion of rational relationship principle as it is applied to administrative actions which result in segregation.

²² BLACKMAN, THE NEIGHBORHOOD SCHOOL VERSUS RACIAL INTEGRATION: A REPORT TO THE PLANNING PROFESSION 2-3 (a paper read at the American Institute of Planners meeting March 21, 1964) [hereinafter cited as BLACKMAN REPORT] points out, however, that: (1) "where educational goals can be achieved only by transportation to distant schools, Americans have generally paid the cost, the time cost as well as the money cost" (*i.e.*, parochial or specialized schools, and centrally located schools in rural areas); and (2) the assumption that greater walking distances, or major intersections to be crossed by a child increase the danger of accidents may not be correct. "Is not a child safer crossing a major intersection with traffic controls than a minor intersection without controls?" *Id.*

²³ BLACKMAN REPORT at 3-4.

[S]chool size is not a function of location but of organization. If the ideal size for an elementary school unit is 400 pupils . . . [with] a central location draw-

engender in children a sense of security by means of familiar surroundings and proximity to home;²⁴ and (4) to promote parental support of schools.²⁵

While it has been ably argued that the neighborhood school is by no means the only, or even necessarily the best vehicle for achieving the above-mentioned goals,²⁶ of greater consequence is the demonstrable harm it can do.

Segregated schools, according to *Brown*, are inherently unequal; needless to say it is the segregated *minority* schools which are inferior. But segregated minority schools located in segregated minority *neighborhoods* impose a double handicap, for they subject their pupils to the additional burden of trying to learn in what is usually an unpleasant and socially harmful environment. Thus, the inequality inherent in any racially segregated school system tends, in this respect at least, to be intensified rather than diminished by the neighborhood school. More generally, the very characteristics of the neighborhood school system which are most prized by the community at large are frequently those which work the greatest hardships upon low-income and minority school children.²⁷

It is important, however, to distinguish between inequalities which are *inherent* in all segregated educational experiences from those which are merely the customary, though not inevitable incidents of the ghetto or slum school. Since only the latter are even potentially correctible without eliminating segregation, the distinction may be crucial in determining whether administrative actions to remedy fundamental inequalities have been made in good faith. If, in the context of segregated education, only those inequities arising from

ing 2,000 pupils, there is no reason why we cannot build five separate buildings at the one location or . . . even in one building, create five school units.

²⁴ BLACKMAN REPORT at 4. However, "[t]wo recent studies have pointed out that lower-class students feel quite insecure in school, indeed feel alienated in school even though the school is close to home." For these children, a different environment may be far more beneficial. Even for middle-class children, it is questionable that crippled, private, rural or parochial school children "feel insecure simply because of the distant location of their schools." *Id.*

²⁵ BLACKMAN REPORT at 5. Parental support and control of schools is a peculiarly middle-class function from which the low-income child rarely benefits. Moreover, one of the goals of such control by middle-class parents is to "keep [their childrens'] schools from being dominated by Negroes, by the children of the slums, by lower class and deprived children of all sorts." *Id.*

²⁶ See discussion notes 22-25 *supra*.

²⁷ For example, children from low income homes are often deprived of a stable classroom experience. Since their families tend to be very mobile, each time the family moves, the child must change schools. BLACKMAN REPORT at 6. See notes 24 & 25 *supra*.

poverty are sought to be corrected, it is at least arguable that the school authorities intend to maintain segregated schools.²⁸ In the majority of states, absent statutory mandates requiring affirmative action to remedy racial imbalance,²⁹ such an argument is unlikely to be entertained, as it would have little relevance in jurisdictions which impose no duty to alleviate segregated conditions. In California, however, it will be seen that evidence of good faith or the lack of it may carry considerable weight.³⁰ The following distinctions, then, will be addressed to those jurisdictions in which, as in California, they may have legal significance.

Of the inherently harmful consequences of segregated education, perhaps the most pernicious is its tendency to further alienate minority children from the majority race and culture. This alienation, which reinforces an already debilitating sense of inferiority, generally results in poor motivation and feelings of futility.³¹ The more impersonal deficiencies frequently associated with ghetto or slum schools are: (1) Limited curriculum and services; (2) inferior physical facilities; (3) overcrowding; (4) poor vocational guidance; (5) high ratio of inexperienced and substitute teachers; (6) inadequate community resources and support; and (7) unsafe and unhealthful school sites.³²

It should be noted that the *general* inferiority of low-income or

²⁸ See material cited on remedial measures undertaken by the Board of Education, San Diego Unified School District, text accompanying notes 82-85, 115 *infra*.

²⁹ *But cf.* MASS. GEN. LAWS ANN. ch. 71, § 37D (Supp. 1966) which provides:

The school committee of each city, town and district shall, annually . . . submit statistics sufficient to enable a determination to be made of the percent of non-white pupils in all public schools . . . Whenever the state board of education finds that racial imbalance exists in a public school it shall notify . . . the school committee . . . [The committee] shall thereupon prepare a plan to eliminate such racial imbalance and file a copy of such plan with the board.

See U.S. COMMISSION REPORT at 232 n.95 for discussion of sanctions available under Massachusetts law; text accompanying notes 57 & 58 *infra*. However, in *Tometz v. Bd. of Educ.*, 36 U.S.L.W. 2011, the Illinois Armstrong Act, which requires schools to eliminate racial imbalance, was held to violate the equal protection clause of the fourteenth amendment.

³⁰ See text accompanying notes 101-03 *infra*.

³¹ U.S. DEPT. OF HEALTH, EDUC. AND WELFARE, OFFICE OF EDUC., EQUALITY OF EDUCATIONAL OPPORTUNITY 22 (July, 1966).

[A] pupil attitude factor, which appears to have a stronger relationship to achievement than do all the 'school' factors together, is the extent to which an individual feels that he has some control over his own destiny. . . . [M]inority pupils, except for Orientals, have far less conviction than whites that they can affect their own environments and futures. . . . [This attitude] . . . is related, for Negroes, to the proportion of whites in the schools. Those Negroes in schools with a higher proportion of whites have a greater sense of control.

³² See *Hobson v. Hansen*, 269 F. Supp. 401, 421-42 (1967).

"slum" schools is substantially the same whether they are majority-Negro or majority-white.³³ Much of this inequality can be partially corrected by the simple expedient of distributing educational funds equally among low, middle and high income schools of comparable pupil enrollment. In addition, some school districts have sought to counteract the harmful educational effects of poverty by channeling additional funds, largely federal, into low-income schools.³⁴ Thus, with sufficient and wise expenditures of money, it would seem that most, if not all of the educational deficiencies of the low-income school could be rectified. When dealing with the majority-Negro school, however, the additional element of *inherent inequality* must be taken into account—an inequality which by its nature can be remedied in no other way than by eliminating segregated schools.

In order to compel reforms in the traditional system of neighborhood districting it is not enough, however, to decry its shortcomings, or even to demonstrate that it is necessarily attended by serious educational inequities. Under any acceptable theory, an affirmative duty to alter existing school policies must depend on the existence of reasonably feasible alternatives to the neighborhood school plan.³⁵ That alternatives exist cannot be disputed; what must be determined is whether they are feasible.

In evaluating the feasibility of alternative pupil assignment or site selection plans, the primary administrative and judicial considerations have generally been pupil safety and convenience, utilization of school space and cost. The practicability of any given remedial device would naturally vary with the size, population, topography and racial makeup of each community. Thus, the Princeton Plan,³⁶ for example, which requires enlargement of school zones to permit

³³ "[W]hite areas with below average income receive just as bad educational service as do Negro areas." BLACKMAN REPORT at 6.

³⁴ See BOARD OF EDUCATION, CITY OF SAN DIEGO, REPORT OF CITIZENS COMMITTEE ON EQUAL EDUCATIONAL OPPORTUNITIES at 84-104 (1966) [hereinafter cited as CITIZENS COMMITTEE REPORT].

³⁵ Rejecting the suggestion of the district court that de facto segregation "must be removed at all costs," the court of appeals in *Barksdale*, argued that "when the goal is to equalize educational opportunity for all students, it would be no better to consider the Negro's special interests exclusively than it would be to disregard them completely." *Barksdale v. Springfield School Comm.*, 348 F.2d 261, 264 (1st Cir. 1965).

³⁶ U.S. COMMISSION REPORT at 142.

School pairing was introduced in 1948 in Princeton, N.J., a community which had been served by two elementary schools, one nearly all white and the other Negro. The school system merged the attendance areas of the two schools and assigned all students in grades K-5 to one school and all students in the remaining grades, grades 6-8, to the other. As a result of the pairing, each of Princeton's elementary schools became majority-white.

the pairing of adjacent majority-Negro and majority-white schools to achieve racial balance, may be eminently suitable to some areas and very nearly unworkable in others. Or, a pairing plan whereby all pupils within a given area are assigned to previously imbalanced school "A" for their first two or three years and then to school "B," might impose undue traffic hazards or walking distances upon elementary school pupils, but involve no such problems for junior or senior high school students. For most large metropolitan school districts, only a studiously tailored combination of corrective measures is likely to effect any substantial diminution of existing racial imbalances.

In general, alternatives to the neighborhood plan fall naturally into three major categories: (1) Voluntary pupil assignment (open enrollment, permissive transfers, permissive bussing); (2) changes in existing school zones (school pairing, altered elementary-junior-senior high school feeder patterns, redrawing attendance boundaries); and (3) location of new schools (educational complexes, educational parks, new schools in fringe areas).³⁷ Perhaps the most promising and widely applicable of these plans is embodied in the concept of the educational park. These parks, envisioned as the total educational facilities of the future, would draw their student populations from the whole community and would group primary schools, middle schools, high schools, and in some cases colleges, on a single site with shared auditoriums, language labs, gymnasiums, health and other services. Educational parks of varying sizes and types are presently planned or under construction in Pittsburgh, New York, Syracuse, Fort Lauderdale, East Orange, Berkeley, Evanston and several other cities.³⁸ Ideally, such parks could provide not only equal educational opportunities, but also furnish scope for innovations, permit greater individual attention to pupils and still operate economically.

III. MAJOR JUDICIAL THEORIES INVOLVING DE FACTO SEGREGATION

Relying heavily on the fact situation underlying the *Brown* decision, the majority of state and federal courts have apparently concluded that since *Brown* specifically proscribed pupil assignments

³⁷ See U.S. COMMISSION REPORT at 140-83.

³⁸ *Educational Parks: What They Are and Why They Are*, EDUCATION SUMMARY 5 (October 1, 1966); CITIZENS COMMITTEE REPORT at 42.

based upon invidious racial classification, the holding contemplated no wider prohibitions, and, in particular, exempted nondiscriminatory state action from constitutional purview.³⁹ This view was persuasively challenged in *Blocker v. Board of Education*,⁴⁰ where a New York District Court held that "[t]he Fourteenth Amendment does not cease to operate once the narrow confines of the *Brown*-type situation are exceeded . . . [C]an it be said," reasoned the court, "that one type of segregation, having its basis in state law or evasive schemes to defeat desegregation, is to be proscribed, while another, having the same effect but another cause, is to be condoned? Surely, the Constitution is made of sturdier stuff."⁴¹ This reasoning is perhaps best viewed as the logical extension of a more fundamental argument—the argument that it is equality of opportunity which is constitutionally protected. In reply to the contention that there is no constitutional mandate to remedy racial imbalance, the court in *Barksdale v. Springfield School Committee* pointed out that "that is not the question. *The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system.*"⁴² Having enunciated the central issue, the *Barksdale* court concluded that where "the constitutional fact—the inadequacy of segregated education" existed, such a duty had, indeed, been imposed by the *Brown* decision.⁴³

More often than not, courts which have denied plaintiffs relief from de facto segregation have done so without actively disputing the existence of this "constitutional fact." Rather, they have avoided the constitutional implications of a failure to provide equal educational opportunities and have proceeded, instead, on the theory that only discriminatory intent could impose upon the state a duty to act.

Thus, the largely unsupported view that the law does not require "that a school system . . . *honestly and conscientiously constructed with no intention or purpose to segregate* . . . must be destroyed or abandoned . . ."⁴⁴ because it results in racial imbalance has been adopted by a number of courts.⁴⁵ In the 1966 case of *Deal v. Cincin-*

³⁹ See cases cited note 10 *supra*.

⁴⁰ 226 F. Supp. 208 (E.D.N.Y. 1964).

⁴¹ *Id.* at 223.

⁴² 237 F. Supp. 543, 546 (D. Mass. 1965) (emphasis added).

⁴³ *Id.*

⁴⁴ *Bell v. School City of Gary, Indiana*, 324 F.2d 209, 213 (7th Cir. 1963) (emphasis added).

⁴⁵ E.g., *Downs v. Bd. of Educ.*, 336 F.2d 988, 998 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

nati Board of Education,⁴⁶ however, the same conclusion was reached not by evading the issue of equal educational opportunity, but by actually defining equality in terms of discriminatory state action. The court held that "*the element of inequality in Brown was the unnecessary restriction on freedom of choice for the individual, based on the . . . arbitrary factor of his race [a factor] . . . unrelated to legitimate governmental considerations.*"⁴⁷ The court reasoned that the limitation inherent in a state imposed neighborhood school plan does not share "the arbitrary, invidious characteristics of a racially restrictive system."⁴⁸

While not directly responsive to the claim that inequality is to be equated with arbitrary restrictions, the general view that rational relationship to a legitimate governmental purpose is sufficient to exempt state action from constitutional scrutiny, has been challenged both in and out of the courtroom. In a 1965 address on the subject of de facto school segregation, United States District Court Judge Skelly Wright, presaging his landmark decision in *Hobson v. Hansen*,⁴⁹ argued that:

[R]ational relationship is not the test of the legality of state action where that action results in racial segregation [T]he officials responsible therefor must show, not that their action was only rationally related to a legitimate state purpose, but that there is no way reasonably to accomplish that purpose absent racial segregation.⁵⁰

In general, two central convictions have emerged from the cases denying the existence of a constitutional duty to remedy de facto school segregation. In addition to the belief that only intentional segregation is constitutionally prohibited, courts have also contended that school segregation resulting from a combination of neighborhood districting and segregated housing patterns is adventitious.⁵¹ The resultant opinion, that imposition of the neighborhood school plan does not constitute state action cognizable under the fourteenth

⁴⁶ 369 F.2d 55 (6th Cir. 1966).

⁴⁷ *Id.* at 60 (emphasis added).

⁴⁸ *Id.* But see Fiss, *supra* note 7, at 591-95.

⁴⁹ 269 F. Supp. 401 (D.D.C. 1967).

⁵⁰ Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U.L. REV. 285, 296-97. The rationale for demanding that state action resulting in segregation be justified by demonstrating necessity rather than mere absence of arbitrariness or bias seems to rest upon the fundamental nature of the liberties sought to be protected. See *Blocker v. Bd. of Educ.*, 226 F. Supp. 208, 224-25 (E.D.N.Y. 1964).

⁵¹ See text accompanying note 20 *supra*.

amendment, has been subject to two main lines of criticism. The primary argument is that compulsory, publicly financed education, which results in substantial racial imbalance, constitutes segregation compelled by law and thus provides sufficient state action to bring it within the rule of *Brown*.⁵² A second, more limited line of reasoning, is based on possible state responsibility for the segregated housing conditions, without which neighborhood districting alone would be constitutionally innocuous.

For example [it is argued] where state policy with reference to housing, or state encouragement of private racial covenants in housing, lead to residential segregation and the school board uses the neighborhood plan in making pupil assignments, the school segregation that results is clearly the responsibility of the state. Certainly the state will not be allowed to do in two steps what it may not do in one.⁵³

To date, the majority of courts have restricted the *Brown* decision to its facts; they have denied or overlooked the state's role in creating de facto segregated schools and have concluded that only discriminatory state action could warrant judicial relief.⁵⁴ As the harmful consequences of segregated schooling continue to manifest themselves, perhaps the minority position will gain in stature. Perhaps it will be generally recognized that the Constitution is not, after all, powerless to correct fundamental inequalities.

IV. THE LAW IN CALIFORNIA

As one of the handful of states which has taken official notice of the harmful effects of de facto segregation and reinforced this conviction by means of administrative action⁵⁵ and judicial pronouncement,⁵⁶ California appears to promise much to those seeking relief from segregated educational practices. The full breadth and significance of that promise remain to be determined.

According to section 2010 of the California Administrative Code:

It is the declared policy of the State Board of Education that persons or agencies responsible for the establishment of school attendance

⁵² See *Barksdale v. Springfield School Comm.* 237 F. Supp. 543, 546 (D. Mass. 1965); *Blocker v. Bd. of Educ.*, 226 F. Supp. 208, 227 (E.D.N.Y. 1964); *Wright*, *supra* note 50, at 296.

⁵³ *Wright*, *supra* note 50, at 295.

⁵⁴ See cases cited note 10 *supra*.

⁵⁵ 5 CAL. ADM. CODE § 2010.

⁵⁶ *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963).

centers or the assignment of pupils thereto shall exert all effort to avoid and eliminate segregation of children on account of race or color.⁵⁷

This code section, adopted in 1963, is implemented and clarified somewhat by the guidelines contained in accompanying section 2011, which specify five considerations relating to ethnic or racial composition of schools which all school boards are to include among the factors determining their establishment of school attendance areas and practices.⁵⁸ While the constitutionality of these regulations has been confirmed by the Attorney General of California⁵⁹ and their soundness attested to by the state supreme court,⁶⁰ the scope and methods of enforcement remain unclear. Unlike New York and New Jersey, whose commissioners have authority to withhold state funds for noncompliance with directives relating to equal educational opportunities,⁶¹ the California Codes contain no specific sanctions to induce compliance.⁶² Rather, the State Board of Education has

⁵⁷ 5 CAL. ADM. CODE § 2010.

⁵⁸ 5 CAL. ADM. CODE § 2011 provides:

ESTABLISHMENT OF SCHOOL ATTENDANCE AREAS AND SCHOOL ATTENDANCE PRACTICES IN SCHOOL DISTRICTS. For the purpose of avoiding, insofar as practicable, the establishment of attendance areas and attendance practices which in practical effect discriminate upon an ethnic basis against pupils or their families or which in practical effect tend to establish or maintain segregation on an ethnic basis, the governing board of a district in establishing attendance areas and attendance practices in the district shall include among the factors considered the following:

(a) The ethnic composition of the residents in the immediate area of the school.

(b) The ethnic composition of the residents in the territory peripheral to the immediate area of the school.

(c) The effect on the ethnic composition of the student body of the school based upon alternate plans for establishing the attendance area or attendance practice.

(d) The effect on the ethnic composition of the student body of adjacent schools based upon alternate plans for establishing an attendance area or an attendance practice.

(e) The effect on the ethnic composition of the student body of the school and of adjacent schools of the use of transportation presently necessary and provided either by a parent or the district.

⁵⁹ 42 OPS. CAL. ATT'Y. GEN. 33 (1963).

⁶⁰ *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963).

⁶¹ See discussion in U.S. COMMISSION REPORT at 233.

⁶² 5 CAL. ADM. CODE § 2001(c) lists five factors affecting the ethnic composition of an area to which the Department of Education will give special attention when approving school sites. 5 CAL. ADM. CODE § 135.3 provides that:

County committees on school district organization in formulating plans and recommendations for unified school districts shall consider the following standards:

...
(e) BOUNDARIES OF PROPOSED DISTRICTS. Each study report submitted in support of a certificate of recommendation for district organization by a county committee shall contain assurance that . . . (2) in the judgment of the

essentially confined its implementation of these code sections to an advisory memorandum to District and County Superintendents, informing them that ". . . in California, school administrators and school boards have not only the authority, but the *legal duty* to take reasonable affirmative action to alleviate de facto segregation in schools." The memorandum also offers the consultative services of the Department of Education's Bureau of Intergroup Relations staff to school districts requesting assistance in the development of desegregation plans.⁶³ A resolution of the Commission on Equal Opportunities in Education, revising the applicable Administrative Code so as to require school districts with racially imbalanced schools to "prepare plans to eliminate such imbalance"⁶⁴ was rejected by the State Board of Education.⁶⁵

Despite the seeming dearth of practicable administrative remedies, however, the prospects for judicial relief from segregated schooling in California appear favorable. What remains uncertain is not so much the potential availability of judicial redress as the conditions under which such redress might be granted. In *Jackson v. Pasadena City School District*,⁶⁶ the California Supreme Court in 1963 declared, by way of dictum:

[W]here [residential] segregation exists, it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of segrega-

county committee the proposed new district will not place obstacles in the way of achieving racial integration in the schools.

Neither code section, however, contains sanctions.

⁶³ Memorandum from Max Rafferty, Superintendent of Public Instruction, to District and County Superintendents, *School District Responsibility to Prevent De Facto Segregation* at 3 (April 20, 1967).

⁶⁴ Resolution adopted by the Commission on Equal Opportunities in Education at 2 (April 6, 1967) on revisions to 5 CAL. ADM. CODE, relating to State Board policy and to school district and state responsibilities in preventing and eliminating racial and ethnic imbalance.

⁶⁵ At a November, 1967 meeting of the State Board of Education, both this resolution, and a similar recommendation presented by the State Committee on Public Education, were rejected by the board. Instead, the board agreed, by consensus, to propose legislation which would authorize them to require local school districts to prepare plans and time-tables for integration of their students. Although the board is apparently determined to seek legislative authorization before it will act, it is by no means settled, however, that such additional grant of power is required. Telephone interview with Mr. Ted Neff, Chief, Bureau of Intergroup Relations and Executive Secretary, Commission on Equal Opportunities in Education, California State Department of Education, Nov. 16, 1967. See *Los Angeles Times*, Nov. 11, 1967, Part I at 20, col. 1-4.

⁶⁶ 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963).

tion require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause.⁶⁷

On the fundamental issue of duty, the court's dictum is clear—school boards may be required to take steps to alleviate racial imbalance even in the *absence* of discriminatory conduct. The importance of resolving the remaining uncertainties, however, can hardly be over-rated, for it is the construction and practical application of this principle which is likely to signify the difference between a broad, viable mandate for change and an arid pronouncement, powerless to correct any but the most glaring inequities. The three central issues which emerge from the *Jackson* dictum are: (1) What remedial steps are to be characterized as reasonably feasible; (2) to what extent must racial imbalance be alleviated; and (3) what degree of local administrative inaction will be deemed sufficient to justify judicial intervention?

V. DE FACTO SEGREGATION IN SAN DIEGO

Since an abstract quest for solutions is likely to prove self-defeating, the remainder of this note will be devoted to an analysis of California law as it may reasonably be applied to the de facto segregation problems of one city—San Diego. Such an evaluation may not be entirely academic, since prolonged dissatisfaction among various individuals and civic groups with the alleged inaction of the board has led one such group to file a class action against the board in behalf of all adversely affected children.⁶⁸

As of October, 1965, approximately 10 per cent of the city-wide population of San Diego was Negro.⁶⁹ During 1965-66, 73.3 percent of Negro children within the San Diego Unified School District attended majority-Negro schools. Of these, approximately 14 percent attended schools where the racial composition was 90 to 100 percent Negro; at the same time, 88.7 percent of the white children in the district were enrolled in schools which were 90 to 100 percent white.⁷⁰ In brief, the majority of San Diego school children have been attending substantially imbalanced schools.

⁶⁷ *Id.* at 881, 382 P.2d at 881-82, 31 Cal. Rptr. at 609-10.

⁶⁸ The Interorganizational Committee for School Integration, composed of representatives or members from about 30 civic and other organizations has retained attorneys to file a class action against the San Diego Board of Education on behalf of all children adversely affected by segregated schooling in San Diego.

⁶⁹ CITIZENS COMMITTEE REPORT at 13. Another 10 percent were Mexican-American.

⁷⁰ U.S. COMMISSION REPORT at 4.

Recognizing that racial imbalance "may be a deterrent to equal educational opportunity,"⁷¹ the Board of Education of the San Diego Unified School District in 1965 appointed a Citizens Committee on Equal Educational Opportunities, charged with:

1. The responsibility for a full review of the opportunity available to children from racial or ethnic minorities, and;
2. The development of proposals for policies which should be adopted or action which may be appropriately taken by the board to reduce or eliminate any factors found which limit the educational opportunities of these children.⁷²

On August 10, 1966, the Citizens Committee submitted to the Board of Education a 136-page report, including 39 recommendations for remedial action.⁷³ The report concluded that "a serious condition of racial/ethnic imbalance"⁷⁴ exists in the San Diego school system, that the trend "is to an increasing number of schools with minority group imbalance" and that "the degree of minority concentration in these schools is increasing . . ."⁷⁵ It was further determined that the existing imbalance was "detrimental to the education of all children in the schools."⁷⁶

In assessing the possible legal effect of the school board's response to the committee recommendations and findings, it will be necessary, first, to appreciate the dual character of the study and of the resultant recommendations. Since the primary responsibility of the committee was to formulate informed proposals aimed at securing equal educational opportunities for racial/ethnic minority children, the recommendations were almost necessarily of two kinds. First, those which sought to improve the educational opportunities of minority children within the context of segregated schools. Second, those aimed at reducing or eliminating the segregation itself. In an apparent attempt to forestall the anticipated response of the school board to these

⁷¹ Office of the Superintendent, San Diego City Schools, *Equality of Opportunity* at 3 (September 7, 1965).

⁷² *Id.* at 6.

⁷³ The committee, chaired by Judge Byron Lindsley of the San Diego Superior Court, was broadly representative of the community at large. Ten subcommittees were appointed. The study was conducted by means of questionnaires, interviews, published materials, statistical data and professional assistance from the District Administration, and inspection of schools. Five open hearings were also conducted, at which 72 persons testified. CITIZENS COMMITTEE REPORT at 5-7.

⁷⁴ *Id.* at 134.

⁷⁵ *Id.* at 17.

⁷⁶ *Id.* at 19.

proposals, the committee, in its summary of the report, reiterates its position:

We contemplate an assault upon segregation and an assault upon its effects. The recommendations to alleviate the deleterious consequences of segregation are not answers to the problem. They are an indictment of it. If there were no imbalance of the nature we have found to exist, many of these proposals would be unnecessary. Therefore, we emphasize again the necessity for reduction and elimination of the basic causes.⁷⁷

In the 14 months since the Citizens Committee Report was presented, the San Diego Board of Education has acted upon 24 of the 39 committee recommendations.⁷⁸ Of these 24 recommendations, the majority have been accepted in principle;⁷⁹ a few have been noticeably implemented,⁸⁰ and only four have been openly rejected.⁸¹ In

⁷⁷ *Id.* at 135.

⁷⁸ The recommendations are listed in CITIZENS COMMITTEE REPORT at 115-29 [arabic numerals are substituted for original roman numerals: hereinafter the recommendations will be cited only to the appropriate numbers]. Recommendations acted upon: 1, 4, 5(B), 6, 7, 9, 10, 11, 12, 13, 15, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 32, 34, and 38. San Diego Bd. of Educ. Minutes, Oct. 11, 1966 to July 11, 1967. These recommendations are reprinted in *Compilation of Conclusions From the Superintendent's Equal Educational Opportunities Reports to the Board of Education*, (Nos. 1-11) [hereinafter cited as *Compilations*].

⁷⁹ However, Recommendation 7, that "[n]o school be built nor attendance area established which would violate California Administrative Code, Title V, Section 2011" was in part implemented, in part, apparently, ignored. The requirements of subsection A of Recommendation 7, that "Bell Junior High School be built only if a plan is devised which will not contribute to racial/ethnic imbalance at either O'Farrell or Bell Junior High Schools" were met by modifying the boundaries of Bell Jr. High School so as to maintain roughly the existing racial balance at both Bell and O'Farrell. See *Compilations* at 1. The recommendation in subsection B that "racial/ethnic balance should be a major factor in determining the location of . . . a new high school to serve in the northeast section of the District" seems to have been disregarded. The site selected for construction of the new Patrick Henry High School will result in an essentially or totally white high school.

⁸⁰ Recommendation 12, proposing an open enrollment plan, was adopted and immediately implemented. During 1966 approximately 200 Negro children were enrolled in schools outside their neighborhoods. In 1967, about 490 minority children are being privately transported to majority-white schools, at their families' expense. The district has not provided transportation, thus effectively discriminating against children whose families cannot afford to transport them. Recommendation 39 requested adequate attention to aiding in the transportation of open enrollment transferees. The statistics above were obtained from the Office of Intergroup Education, San Diego City Schools. For comment on open enrollment plans, see note 115 *infra*.

⁸¹ Recommendations 4, 5(B) and 6 were rejected as unfeasible. *Compilations* at 7; *Proposal to Pair Secondary Schools Termed Unfeasible*, San Diego City Schools Staff Bulletin Board, Feb. 14, 1967; San Diego not now deemed practical locale for Educational Parks; San Diego Union, Nov. 17, 1966, § B at 3. Recommendation 11, proposing that "[r]acial/ethnic balance be a major objective in designing the summer school program . . .," was rejected more politely. School Superintendent Dailard's Equal Educational Opportunities Report #10, *Compilations* at 10, concludes that "the ob-

order to evaluate the practical effect and consequent legal significance of these board actions, however, it is essential to examine not merely the number, but the *nature* of the proposals considered, adopted, implemented or rejected. To begin with, therefore, it should be noted that only 9 of the 39 committee recommendations address themselves to the formulation of specific, fundamental plans for alleviating racial imbalance in the schools;⁸² seven proposals approach the problem of imbalance in general or very limited terms,⁸³ and the other 23 focus on the secondary objective of upgrading segregated schools in such areas as curriculum, textbooks, counseling, teacher training, class size and facilities.⁸⁴ Having established this much, it will perhaps be easier to view in realistic perspective the significance of the board's response to the committee proposals. Of the primary nine recommendations, all but two have been either rejected or substantially ignored.⁸⁵

In this context, then, it should be profitable to return to an analysis of the *Jackson* dictum and California Administrative Code sections 2010 and 2011 as they might be applied in a suit seeking to compel the San Diego school board to take further affirmative action to alleviate racial imbalance in the San Diego city schools.

Recommendations 5(B)⁸⁶ and 6,⁸⁷ rejected by the school board as unfeasible,⁸⁸ proposed, respectively: (1) The reorganization of six secondary schools to achieve a better racial balance;⁸⁹ and (2) the immediate promulgation of plans for development of educational parks.⁹⁰ Excessive cost was advanced as the reason for rejecting the school reorganization plan;⁹¹ the board's refusal to formulate even

jective sought by the committee can best be achieved by continuing and strengthening the practices already established."

⁸² Recommendations 3, 5, 6, 7, 8, 9, 10, 12, and 39. Of these, only 7(A) has been meaningfully implemented. See note 79 *supra*. For disposition of Recommendation 12 see note 80 *supra*.

⁸³ Recommendations 1, 2, 11, 13, 24, 29, and 30. Of these, only Recommendation 1, calling for a policy statement, was fully implemented. *Compilations* at 12. Recommendations 13 (intergroup education) and 24 (integrated camp experiences) appear to have been partially implemented. *Compilations* at 31 & 7.

⁸⁴ *E.g.*, Recommendation 25 (Textbooks used should depict minority groups in undistorted or non-stereotyped roles); Recommendation 35 (Counseling service be professionalized).

⁸⁵ See note 82 *supra*.

⁸⁶ CITIZENS COMMITTEE REPORT at 120.

⁸⁷ *Id.* at 121.

⁸⁸ See note 81 *supra*.

⁸⁹ CITIZENS COMMITTEE REPORT at 120.

⁹⁰ *Id.* at 121.

⁹¹ *Proposal to Pair Secondary Schools Termed Unfeasible*, San Diego City Schools Staff Bulletin Board, Feb. 14, 1967.

long-range plans for educational parks remains substantially unexplained.

There can be little doubt that the mere introduction of evidence attesting to the feasibility of the proposed school reorganization or educational park plans would be held insufficient to warrant judicial intervention. It is well established in California, as in most other states, that courts "should let administrative boards and officers work out their problems with as little judicial interference as possible. . . . Such boards are vested with a high discretion and its abuse must appear very clearly before the courts will interfere."⁹² While it is true, therefore, that judicial policy will almost certainly preclude consideration of the feasibility of any particular plan as tending to establish an abuse of discretion, evidence of the poor judgment exercised and the cumulative harm arising from an aggregate of questionable administrative decisions may be sufficient to impel court action. Thus, while it is the general rule that courts will not "compel a public administrative agency possessing discretionary power to act *in a particular manner* [nor] . . . substitute its discretion for the discretion properly vested in the administrative agency,"⁹³ it may compel such agency to act. Although the *Jackson* language does not prescribe ends to be attained, but rather imposes a conditional duty to act, the obligation to take steps to alleviate racial imbalance is no less judicially enforceable because it commands action rather than dictating results. Moreover, the duty of devising remedies to combat segregation need not be rendered nugatory merely because it is a contingent rather than an absolute obligation.

Fundamentally, what must be demonstrated in San Diego is that some reasonably feasible methods of alleviating segregation do appear to exist and that the school board has either purposely or negligently failed to discover and/or to implement the available methods—in short, that the school board has abused its discretion. Since these appear to be the two necessary preconditions to the granting of judicial relief, a proper evaluation of each condition would seem to require that they be studied separately.

In evaluating the feasibility of a particular remedial measure, the *Jackson* opinion first points out that "the practical necessities of

⁹² *Maxwell v. Civil Service Comm'n*, 169 Cal. 336, 339, 146 P. 869, 871 (1915).

⁹³ *Lindell Co. v. Bd. of Permit Appeals*, 23 Cal. 2d 303, 315, 144 P.2d 4, 11 (1943) (emphasis added).

governmental operation"⁹⁴ cannot be overlooked. This much seems inherent in the concept of feasibility. It is the next sentence, however, which provides the sole, hazy guidelines by means of which administrators, courts or potential plaintiffs must seek to balance imponderable equities.

For example, [advises the court] consideration should be given, on the one hand, to the degree of racial imbalance in the particular school and the extent to which it affects the opportunity for education and, on the other hand, to such matters as the difficulty and effectiveness of revising school boundaries so as to eliminate segregation and the availability of other facilities to which students can be transferred.⁹⁵

It is not unreasonable, perhaps, to suppose that such loosely drawn criteria may encourage, or at least tempt, courts to exercise very nearly unlimited discretion in weighing relevant factors, with the result that lower court decisions may parallel closely the predelictions and social theories of individual courts rather than reflecting a clearly defined state policy. Possibly this was the intent of the California Supreme Court.⁹⁶ Such speculation aside, however, what is of consequence today is how the Supreme Court of California would deal with the central dilemma of balancing degrees of racial imbalance and consequent harm against the practical necessities of governmental operation. Whether the court's choice of words reflected a fundamental uncertainty or simply signified its reluctance to establish potentially rigid priorities is thus largely irrelevant. The clues, it would seem, must lie not so much in the *Jackson* decision's "balancing" paragraph as in the fundamental intent of the court respecting de facto school segregation and the manifest need for reforms. While it would be presumptuous to attempt to gauge with any accuracy the depth of commitment or sense of urgency with which the court views the problem of segregated schools, it is difficult to believe that it would permit the obligation it has imposed to be evaded by the mere showing that an entrenched system of unequal education cannot be remedied without effort, some difficulty and perhaps substantial cost.

The City of San Diego, despite extensive residential segregation, is in a relatively favorable position to take effective steps to combat segregation in its schools. That reasonably feasible remedies are available is suggested by the following: (1) Unlike metropolitan

⁹⁴ 59 Cal. 2d at 882, 382 P.2d at 882, 31 Cal. Rptr. at 610.

⁹⁵ *Id.*

⁹⁶ See 51 CALIF. L. REV. 810, 816 (1963).

areas with large, even overwhelming Negro concentrations, in San Diego less than 12 percent of school children are Negro;⁹⁷ (2) as administrators of a unified school district, the school board has authority to effect reforms within a broad area without requiring the consent or cooperation of outlying school districts;⁹⁸ and (3) the excellent San Diego freeway system would permit even long-distance transportation of school children to be conducted efficiently and with a minimum of hardship. By its rejection of some committee recommendations and continuing refusal to consider others, the school board impliedly asserts that neither educational parks, pairing of schools, bussing of students, nor the finding of a relatively central location for its new high school,⁹⁹ are reasonably feasible.¹⁰⁰ This assertion seems ill-founded.

Assuming the existence of feasible remedies which the San Diego school board has declined or otherwise failed to adopt, it remains to be established that such failure or refusal to act constitutes an abuse of administrative discretion. Whether willful or negligent abuse is alleged, judicial intervention may be invoked on several grounds. Of these, charges of arbitrary, capricious or unreasonable administrative action are perhaps the most common.¹⁰¹ Should these allegations appear unwarranted, plaintiffs may choose to allege plain disregard of duty, breach of duty or action taken without due regard to the

⁹⁷ For the 1966-67 school year, Negro pupils comprised 11 percent of the district's K-12 school population. Board of Education, City of San Diego, Racial and Ethnic Distribution of Enrollment—school year 1966-67, at 21 (Nov. 1, 1966).

⁹⁸ See *Hobson v. Hansen*, 269 F. Supp. 401, 515-16 (D.D.C. 1967) (which suggests cooperation between city and suburban school districts). Since school districts with predominantly or entirely white populations may be reluctant to cooperate in integration plans, it is a decided advantage for a district to be capable of implementing its plans independently.

⁹⁹ See note 79 *supra*.

¹⁰⁰ The school board has also maintained imbalance-causing optional attendance zones which, if continued, might support an allegation of state imposed discrimination. The effect, and often the purpose of optional zones in racially mixed areas, is to permit white students living in predominantly Negro or "changing" areas to avoid attending schools nearest their residences and to "escape" to majority-white or all-white schools. The San Diego School Board has taken steps to eliminate a number of racially innocuous optional zones but it is unclear whether those zones responsible for serious racial imbalance will be meaningfully readjusted. See *Compilations* at 23-30. If, for example, the optional zone between under-utilized Lincoln High School, which is nearly all Negro, and overcrowded Crawford High School, which is predominantly white, were eliminated without adjusting the boundaries so as to assign some white Crawford students to Lincoln, the effect of eliminating the optional area between them would be to freeze Negro and white students in their respective imbalanced schools. To date, no such plans have been formulated by the school board.

¹⁰¹ 2 AM. JUR. 2d *Administrative Law* § 650 (1962).

rights of the petitioner.¹⁰² While each of the above seems reasonably applicable to claims of either willful or negligent abuse of discretion, petitioners also have the option of asserting such exclusively intentional grounds as bad faith or improper motive or influence.¹⁰³

Although the San Diego school board's actions or failures to act may properly support any one or more of these charges, the following discussion will center largely upon those which appear most readily demonstrable. For example, since courts traditionally allow administrators great latitude in determining feasibility,¹⁰⁴ the contention that board action rejecting committee recommendations as unfeasible was arbitrary, capricious or unreasonable is certain to be subjected to an unusually high standard of proof. Any indication that the decisions resulted from the exercise of judgment, however faulty, rather than mere whim, may be held a sufficient refutation of the charge.¹⁰⁵

Less easily disposed of would be the allegation that board *inaction* in failing even to consider 14 of the Committee recommendations and offering no alternatives to proposals rejected as unfeasible,¹⁰⁶ constitutes a breach or disregard of duty and indicates a lack of due regard for the rights of petitioners. A necessary concomitant to this allegation is the fact that the complained of inaction has continued despite a report by the San Diego Superintendent of Schools in February, 1967, which conceded that "[t]he racial imbalance of the San Diego city schools is continuing—the number of imbalanced schools is increasing—and the degree of minority group concentration in certain schools is increasing."¹⁰⁷

Finally, the motives of the school board and school superintendent might well be questioned by alleging bad faith or improper motive or influence. It should be understood, however, that such allegations need not be predicated on a theory of personal racial bias—it would be sufficient to demonstrate that either: (1) It is the intent of the board, for whatever reasons, to maintain a substantial degree of

¹⁰² 2 CAL. JUR. *Administrative Law* § 182 (1952).

¹⁰³ *Id.*

¹⁰⁴ See 2 AM. JUR. 2d *Administrative Law* § 672 (1962).

¹⁰⁵ *United States v. New York Tel. Co.*, 326 U.S. 638, 655 (1945).

¹⁰⁶ Recommendation 5(D) proposes that "[a]ny alternative means which may be devised for correcting these racial/ethnic imbalances at the secondary level should achieve no less than the plans presented above." The school board has devised *no* alternatives for the recommendations rejected.

¹⁰⁷ San Diego City Schools Staff Bulletin Board, Feb. 6, 1967.

school segregation; (2) it is the intent of the board *not* to take steps, insofar as reasonably feasible, to alleviate racial imbalance; or (3) in arriving at policy decisions regarding the alleviation of racial imbalance the board was influenced by improper considerations.

The first two allegations are identical to this extent, that where inaction will necessarily perpetuate segregation, the intention not to take feasible remedial action can, in effect, be regarded as an intent to *maintain* segregation. The first, however, involves opposition to integration itself, while the second may stem from lack of concern, rigid commitment to neighborhood districting, bias against plans involving pupil transportation or fear of community disapproval if necessary steps were taken. Whichever is alleged, the evidence adduced on behalf of either theory would probably include, in addition to the instances of board action and inaction already mentioned: (1) The board's failure to accept the proffered consultative services of the Department of Education's Bureau of Intergroup Relations Staff as an aid in developing desegregation plans;¹⁰⁸ and (2) the refusal of the board to seek apparently available state and federal funds,¹⁰⁹ despite the claim of the San Diego School Superintendent and his staff that certain remedial measures recommended by the Citizen's Committee are unfeasible because of insufficient funds.¹¹⁰

An analysis of certain board established guidelines for evaluating committee recommendations would seem to lend support to the third allegation, charging that board decisions were influenced by improper considerations.

Listed among these guidelines as considerations which might result in a staff recommendation to implement a specific proposal were the following:

(a) The extent to which the proposal will achieve its stated or implied objective.

(b) The extent to which the condition being corrected is due to weakness or malfunction in district policy.

¹⁰⁸ See text accompanying note 63 *supra*.

¹⁰⁹ Other California school districts which have employed federal funds available under Title I of the Elementary and Secondary Education Act to *promote integration* include Berkeley, Oakland, Riverside, Sacramento and Sausalito. *Hearings on Guidelines for School Desegregation, Before the Special Subcomm. on Civil Rights of the House Comm. on the Judiciary*, 89th Cong., 2d Sess., Dec. 14, 15, 16, 1966. Naturally, such funds, although available, must be requested by the school district.

¹¹⁰ See note 91 *supra*.

(c) The extent to which implementation places the school district in line with other districts facing the same problem.

(d) The extent to which it is judged that national and state policy will be used to encourage implementation.

(e) The extent to which there is expectation of community approval.¹¹¹

The implication inherent in guideline (b) appears to be that unless district policies, rather than residential patterns, are the prime causes of the undesirable situation sought to be corrected, the district may have no responsibility to institute remedial measures. Such an interpretation of the duty imposed by California Administrative Code Section 2010, as construed in *Jackson*, would run directly counter to the plain language of the court, which directs school boards to "take steps . . . to alleviate racial imbalance in schools *regardless of its cause*."¹¹²

Guideline (c) suggests that the San Diego School District may be justified in maintaining a course of relative inaction, so long as other school districts with similarly imbalanced schools continue to ignore *their* manifest obligation to act. Were each district's duty to take affirmative action thus conditioned upon compliance by other districts, the obligation would clearly become meaningless.

Finally, the admonition in guideline (e) that otherwise desirable action need not, perhaps, be taken in the absence of community approval, represents an abdication by the board of its responsibility of leadership in formulating school policies.

The school board's oblique disavowal of responsibility for the alleviation of racial imbalance was further manifested in a May, 1967, policy statement reaffirming "its determination to use whatever means are in keeping with sound educational policies to retard the growth of racial/ethnic segregation and to use all reasonable means to reduce racial/ethnic segregation in the schools of the district."¹¹³ Having thus paraphrased the duty-defining words of the *Jackson* dictum, the statement proceeds to so delimit the board's obligation as to substantially preclude meaningful remedies and to vindicate a policy of continued inaction. "Adoption of this position statement," declared the board, "does not establish any new programs nor does

¹¹¹ San Diego City Schools, *Guidelines For Citizens Study Groups*, Nov. 22, 1966, at 5.

¹¹² 59 Cal. 2d at 881, 382 P.2d at 882, 31 Cal. Rptr. at 610 (emphasis added).

¹¹³ San Diego City Schools, *Report on Equal Educational Opportunities*, May 16, 1967, at 3.

it commit the district to any specific new course of action."¹¹⁴ In light of the board's failure to reduce, or even substantially retard the growth of racial imbalance in the San Diego city schools, a declaration of intent to alleviate segregated conditions, accompanied by the caution that no new course of action is to be inferred therefrom, may in itself be sufficient grounds to support an allegation of bad faith.

In terms of California law, this much appears reasonably certain; an abuse of discretion *must* be demonstrated. From this it would seem to follow that neither faulty school board decisions, continuing widespread racial imbalance, nor any degree of administrative inaction would be sufficient, in itself, to induce judicial intervention, absent proof that the school board had abused its discretion. Each of these factors may, however, serve as valuable evidence of such abuse. In San Diego, where token integration measures are insufficient to mask the school board's primary objective of combating the *effects* of segregated schooling rather than school segregation itself, the evidence appears amply sufficient to warrant relief.¹¹⁵

¹¹⁴ *Id.* The statement also specifically rejects solutions which would require major school program reorganization or "a massive redistribution of enrollment," and, finally, intimates a broad disavowal of responsibility for the unilateral initiation of *any* meaningful remedial measures.

¹¹⁵ Despite official statements recognizing the harmful effects of school segregation, an analysis of the San Diego school Board's response to the CITIZENS COMMITTEE REPORT can hardly fail to suggest that the board's fundamental approach to the task of assuring equal educational opportunities to all children within the district is based upon the belief that educational equality can be obtained *without* integrating the schools. The board's commitment, in other words, is to compensatory education rather than desegregation. Such a commitment is unacceptable on several grounds: (1) Contrary to the opinion in *Brown*, it implies that separate schools may, after all, be made equal; (2) it is inherently unresponsive to the *Jackson* court's direction that, where feasible, steps be taken to alleviate racial imbalance; and (3) independent of judicial opinion, it appears to be educationally unsound. In a study of the comparative effects of compensatory education (cultural enrichment, remedial reading, counseling) and desegregation, based upon programs conducted in Syracuse, N.Y., Berkeley, Calif., Seattle, Wash., and Philadelphia, Pa., the U.S. Commission on Civil Rights concluded that the educational achievement of Negro students receiving compensatory education within segregated schools was inferior to that of similarly situated Negro students attending majority-white schools which did not offer compensatory education. U.S. COMMISSION REPORT at 128-40. The San Diego school board's policies and actions reflect adherence to a number of convictions regarded as "misconceptions" in a report adopted and implemented by the Massachusetts State Board of Education. See note 29 *supra*. Designated as "common misconceptions" were the following: (1) That inferior educational achievement among Negro pupils results from poverty, *rather than* segregation; (2) that compensatory education would be more helpful than integration; and (3) that open enrollment is the answer to racial imbalance. The report characterizes open enrollment plans (see note 80 *supra*) as, at best, placing the burden on parents who may be unprepared to make choices, and "*relieving school authorities of a responsibility which is properly theirs.*" MASSACHUSETTS STATE BOARD OF EDUCATION, REPORT OF THE ADVISORY COMMITTEE ON RACIAL IMBALANCE AND EDUCATION at 3-5 (1965) (emphasis added).

VI. CONCLUSION

As de facto school segregation continues to grow, litigation seeking to compel remedial state action will undoubtedly continue to increase. Although two contradictory lines of cases have evolved, the majority of jurisdictions continue to deny relief, absent proof of discriminatory intent. The Supreme Court has remained silent.¹¹⁶

Whether the California Supreme Court based its opinion in *Jackson* on the *Brown* decision, the California Administrative Code or simply state policy,¹¹⁷ its recognition of the duty to alleviate racial imbalance in the schools offers hope that in California segregation which can be reduced or eliminated will not be judicially tolerated. If other state legislatures and courts remain unable or unwilling to impose similar duties, perhaps it is time for the Supreme Court to speak.

VERONICA A. ROESER

¹¹⁶ *E.g.*, *Deal v. Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 88 S. Ct. 39 (1967); *Downs v. Bd. of Educ.*, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); *Dowell v. School Bd.*, 219 F. Supp. 427 (D. Okla. 1963), *aff'd. in part*, 375 F.2d 158 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967).

¹¹⁷ See 51 CALIF. L. REV. at 812; 16 STAN. L. REV. 434, 435-36.