PART II

Public Law

CHAPTER 8

Constitutional Law

JOHN D. O'REILLY, JR.

A. Administration of Justice

§8.1. Procedural rule-making by the Supreme Judicial Court. Perhaps one of the most significant constitutional developments in recent history was the implementation, during the 1967 SURVEY year, of the supervisory power of the Supreme Judicial Court over the administration of inferior courts for the furtherance of justice and the regular execution of the laws. A statute, couched in broad, general terms, lodges powers of superintendence in the Court.[1] The scope of these powers was expanded by a 1956 statute, which also provided for administrative machinery to aid in the execution of these powers.[2] To some extent, this legislation is declaratory of independently existing powers.[3] Certainly there are areas in which the Court's supervisory power inheres in its status as a repository of judicial power. The boundaries of these areas have never been defined with any degree of precision. Principally, the power of the Court has been exercised for regulation of the practice of law.[4]

In the first few years after the enactment of the expansive statute

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§8.1. 1 G.L., c. 211, §3.

2 Id., as amended by Acts of 1956, c. 707. The amendment also added §§3A-3F to G.L., c. 211, creating the office of executive secretary, defining his functions and authorizing the establishment of judicial conferences.

3 See Commonwealth v. Bouchard, 347 Mass. 418, 198 N.E.2d 411 (1964), noted in 1964 Ann. Surv. Mass. Law §11.3. See also 1962 Ann. Surv. Mass. Law §§10.1, 10.2.

4 See Collins v. Godfrey, 324 Mass. 574, 87 N.E.2d 838 (1949), and cases cited therein.

of 1956, the Court exercised its supervisory power mainly in the area of judicial "housekeeping" in the lower courts. The Court's power extended to the optimum utilization of judicial manpower, the maintenance of adequate courthouse facilities, and the collection of judicial statistics.[5] Another aspect of the supervisory power has extended to the perception of deficiencies in the statutes governing practice and procedure in the courts, and the recommendation of corrective legislation.[6]

In 1960, however, a change in the emphasis of the supervisory power occurred. The concept of supervisory power became one which stressed the rule-making power of the courts themselves.[7] There has come about a transition of the office of the Court into one of overseer of the administration of justice in a broad sense. It would be an oversimplification to pinpoint 1960 as marking the precise date of a shift in the scope of supervisory power from judicial housekeeping to the general administration of justice. Thus, in 1958, the Court anticipated *Gideon v. Wainwright*,[8] which was not decided until 1963, by promulgating its Rule 10.[9] This rule provided for assignment of counsel to represent indigent defendants charged with non-capital felonies. Assignment of counsel for indigent defendants had been provided for by statute to a limited extent.[10] In expanding on this statute, the Rule recited an inherent power of courts to assign counsel even in cases not covered by the Rule.

In 1965, the Court went far beyond its customary regulation of the practice of law, which traditionally had consisted of determining who may and who may not practice. In promulgating Rule 14,[11] it exercised supervision, not of the relation between attorney and court, but of that between attorney and client, by establishing a comprehensive code governing contingent fee agreements. The following year the Court brought its rule-making power to bear in an area traditionally regulated by legislation. Except to the extent established by case law with respect to bills of discovery in equity, a litigant's right to compulsory process for obtaining information in advance of trial had been only that accorded by the statutes providing for written interrogatories addressed to adverse parties, and those providing, in narrowly defined circumstances, for the taking of the depositions of

[5] See 1957 Annual Report to Supreme Judicial Court of Executive Secretary, Mass. Pub. Doc. No. 166.

[6] Id. Of course, collection of judicial statistics and interest in proposed procedural legislation continues to be an important part of the work of the executive secretary, as appears in all of the annual reports of that officer.

[7] 1960 Annual Report to Supreme Judicial Court of Executive Secretary, Mass. Pub. Doc. No. 166, at 17 et seq. See also subsequent annual reports, *passim*.

[8] 372 U.S. 335 (1963).

[9] Now Rule 3:10. In 1963 the Rule was amended so as to require assignment of counsel in any case where punishment might be imprisonment.

[10] G.L., c. 277, §47. This statute permitted assignment of counsel to an indigent defendant in a capital case.

[11] Now Rule 3:14.

parties and others.[12] By Rule 15,[13] the Court established a procedure under which a party to a civil case may obtain, in advance of trial, any information which is relevant to the case of either plaintiff or defendant, by taking the deposition of the opposing party or of any other person. Previous to this Rule, information could only be obtained which would be admissible as evidence at trial.

§8.2. Use of Massachusetts "All Writs" Act. During the 1967 SURVEY year, the Court, by its decision in *Bishop v. Commonwealth*,[1] further underscored its role of overseer of the administration of justice. In *Bishop*, the petitioner found himself enmeshed in the criminal law in such a way that the established legal processes afforded him no avenue of final determination of his position. He had been convicted of a criminal offense after a trial before a judge in the District Court of Brockton. Pursuant to a relevant statute,[2] he appealed to that court for trial before a six-man jury. It developed that there were no jury trials in that district court. Bishop then moved to transfer his appeal to the Superior Court for trial, but he was informed that the motion would not be heard because no provision was made by statute for such transfers of criminal appeals. He then moved to dismiss the complaints against him, but was informed that this motion would not be heard because no legislative provision had been made for court attendants to serve at motion hearings of the court. It became apparent that there was no prospect of a criminal jury session of the court in the immediate future.

Bishop could not appeal, because there was no final judgment of conviction from which an appeal would lie. It did not appear that he was in custody; thus he could not obtain relief on habeas corpus. The writ of error was not available, since there was no record for a higher court to review. Yet Bishop found himself subject to criminal charges on which, as he asserted, he had not been accorded his constitutional right of speedy trial. In these circumstances, Bishop filed a petition for relief in the Supreme Judicial Court. The Court ruled that he could be given a remedy, quoting the statutory provision which gives the Court authority to "issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration."[3]

12 G.L., c. 231, §§61-67 (interrogatories); G.L., c. 233, §§24-63 (depositions); G.L., c. 231, §68 (inspection of documents); G.L., c. 153, §9 (inspection of ways, works and machinery in certain cases).

13 Now Rule 3:15.

§8.2. 1 1967 Mass. Adv. Sh. 519, 225 N.E.2d 345.

2 Acts of 1964, c. 660.

3 G.L., c. 211, §3. On the merits, the Court held that the trial had been too long delayed and ordered the case dismissed. A few days before the decision was announced, the Supreme Court of the United States applied the same substantive principle in Klopfer v. North Carolina, 386 U.S. 213 (1967).

§8.3. Establishment of the Massachusetts Judicial Conference. On June 1, 1967, Rule 3:16 became effective and brought to a new high point the Supreme Judicial Court's capacity to supervise the administration of justice in the Commonwealth. The Rule established the Massachusetts Judicial Conference, consisting of the members of the Supreme Judicial Court, the chief justices and chief judges of the lower courts, the chairman of the Judicial Council, and the executive secretary of the Supreme Judicial Court, who is designated the principal administrative officer of the Conference.

The Conference resembles, in organization and function, the Judicial Conference of the United States.[1] It provides a mechanism for considering and channeling "recommendations on matters relating to the conduct of judicial business, the improvement of the judicial system, and the administration of justice." It is obviously designed to be a focal point for research into, and processing of proposals for improvement of the administration of justice through informed use of the rule-making and/or legislative powers. Specific provision is made for the orderly and coordinated use of all persons whose talents are made available to these ends. The Rule contemplates the appointment of reporters, advisers, and research assistants, and the utilization of the facilities of law schools, other educational institutions, bar associations, foundations, and similar organizations. The promulgation of this Rule will make it feasible to face the problems of judicial administration, not on a piecemeal, *ad hoc* basis, but on extended fronts with an informed and organized group of representatives.

B. Obscenity

§8.4. Pornography: Juveniles laws. One aspect of a matter discussed in these pages a year ago[1] came before the Supreme Judicial Court during the present Survey year. In connection with a review of cases under obscene literature statutes, note was made of the subcategory consisting of legislation dealing with the distribution of such literature to minors. The immediate focus of the comment was upon a 1966 amendment to the Massachusetts obscenity statute,[2] but the general point made was that pornography-and-juveniles laws pose special constitutional problems. One such problem was presented in *Commonwealth v. Corey*.[3] The prosecution was for sale of a certain book to a young girl. The sale took place before the enactment of the 1966 amendment,[4] so that it was unnecessary to go into the question of whether the book was obscene for children, as distinct from obscene

§8.3. 1 28 U.S.C. §331 (1965). See, particularly, the amendment of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356, explained in 1958 U.S. Code Cong. & Ad. News 3023.

§8.4. 1 1966 Ann. Surv. Mass. Law §11.2.
2 Acts of 1966, c. 418, amending G.L., c. 272, §28.
3 351 Mass. 331, 221 N.E.2d 222 (1966).
4 The prosecution was under G.L., c. 272, §28, as amended through Acts of 1959, c. 492, §1.

in general. In fact, the Supreme Judicial Court did not find it necessary to pass upon the merits of the book under the statute.

The defendant was a bookstore clerk who sold the book to a minor. There was no proof, however, that the clerk had any knowledge of the contents of the book. The Court passed over exceptions to the trial judge's exclusion of proffered expert testimony as to the "redeeming social value" of the book, his refusal to rule that the book was not in fact obscene, and his refusal to rule that the statutory standard—"which . . . manifestly tends to corrupt the morals of youth"[5]—is void for vagueness. It found persuasive and controlling the defendant's contention that failure to prove scienter constituted failure to prove that there had been a violation of the statute.

Although the Massachusetts obscenity statute does not expressly limit its condemnation to one who "knowingly" sells forbidden literature to minors, the Court felt that the law must be read as impliedly containing such a qualification. To hold otherwise would necessitate a determination that the statute is unconstitutional, under the principle that punishment of innocent distribution of obscene literature in general is contrary to constitutional provisions in aid of the freedom of speech and of the press.[6]

While the Court recognized that the legislature may, for policy reasons, impose absolute liability for even unwitting performance of certain antisocial acts,[7] it rejected the Commonwealth's contention that the instant situation could be fitted into that category. Forcing the bookseller to sell at his peril, regardless of intent, would tend to make him reluctant to sell the good, as well as the bad, unless he had first familiarized himself with the content of the book. This "chilling" effect would tend to obstruct free transmission of ideas which both the United States and Massachusetts constitutions were designed to nurture, and this cannot be justified, even by the admittedly laudable objective of preserving immature minds from tainting influences.

There remain many unresolved constitutional problems in this area. There are, of course, the issues which the Court did not reach in the instant case, such as whether the statutory definition of obscenity in the prohibition of sale of obscene matter to children meets the standard of definiteness,[8] and whether proof of "redeeming literary or social value" will save from condemnation pornography distributed to children, as it apparently saves such matter distributed to adults.[9] Perhaps these questions will soon be answered by the Supreme Court of the United States. The Court has admitted to its

[5] Id.

[6] See Demetropolos v. Commonwealth, 342 Mass. 658, 175 N.E.2d 259 (1961), noted in 1961 Ann. Surv. Mass. Law §10.1, following Smith v. California, 361 U.S. 147 (1959).

[7] Commonwealth v. Mixer, 207 Mass. 141, 93 N.E. 249 (1910), and cases cited therein.

[8] See Burstyn v. Wilson, 343 U.S. 495 (1952).

[9] See Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts, 383 U.S. 413 (1966), noted in 1966 Ann. Surv. Mass. Law §11.2.

calendar for consideration in the October Term, 1967, three cases[10] which may evoke decisions on the validity of "double-standard" statutes, i.e., laws which provide, in effect, that publications which would not be "obscene" for adults may nevertheless be "obscene" in a context of distribution to minors.

§8.5. **Recent United States Supreme Court decisions.** Of possible relevance to obscenity issues is what appears to be a trend in Supreme Court practice, if not in Supreme Court doctrine. After hearing full argument in three obscenity cases, the Court on May 8, 1967, disposed of all three in a per curiam opinion in *Redrup v. New York*,[1] reversing civil and criminal judgments of state courts against sellers of books and magazines. The opinion summarized the various interpretations of the First Amendment which different justices or combinations of justices had deemed determinative of recent obscenity cases, and concluded that the judgments in the instant cases must fall by any of these tests.

A month later, on June 12, 1967, the Court in twelve obscenity cases granted certiorari and summarily reversed state and federal court judgments against distributors or their products,[2] and in a thirteenth case, on appeal, it likewise reversed a judgment.[3] In most of the cases the notation of reversal simply cited the per curiam decision of May 8, 1967. One notation cited *Sunshine Book Co. v. Summerfield*[4] and one cited no authority at all.[5] On October 23, 1967, the Court summarily reversed three more obscenity cases.[6]

At this stage, one can do little more than speculate as to the mean-

10 Interstate Circuit, Inc. v. City of Dallas, No. 56, October Term, 1967; United Artists Corp. v. City of Dallas, No. 64, October Term, 1967, probable jurisdiction noted, 387 U.S. 903 (1967), reported below, 402 S.W.2d 770 (Tex. Civ. App. 1966); Ginsberg v. New York, No. 47, October Term, 1967, probable jurisdiction noted, 388 U.S. 904 (1967). Two other cases presenting a similar issue have been docketed, but no action upon them has been reported as of the present writing. They are Interstate Circuit, Inc. v. City of Dallas, No. 42, October Term, 1967, and City of Dallas v. Interstate Circuit, Inc., No. 44, October Term, 1967. Both cases are on petition for certiorari to the Fifth Circuit, and are reported below in 366 F.2d 590 (1966).

§8.5. 1 386 U.S. 767 (1967).

2 Keney v. New York, 388 U.S. 440 (1967); Friedman v. New York, 388 U.S. 441 (1967); Ratner v. California, 388 U.S. 442 (1967); Cobert v. New York, 388 U.S. 443 (1967); Sheperd v. New York, 388 U.S. 444 (1967); Avansino v. New York, 388 U.S. 446 (1967); Aday v. United States, 388 U.S. 447 (1967); Corinth Publications, Inc. v. Wesberry, 388 U.S. 448 (1967); Books, Inc. v. United States, 388 U.S. 449 (1967); Rosenbloom v. Virginia, 388 U.S. 450 (1967); A Quantity of Copies of Books v. Kansas, 388 U.S. 452 (1967); Mazes v. Ohio, 388 U.S. 453 (1967).

3 Schackman v. California, 388 U.S. 454 (1967).

4 355 U.S. 372 (1958). This was the authority cited in Rosenbloom v. Virginia, 388 U.S. 450 (1967). It is a per curiam decision summarily reversing a decision below, citing only Roth v. United States, 354 U.S. 476 (1957).

5 Corinth Publications, Inc. v. Wesberry, 388 U.S. 448 (1967).

6 Potomac News Co. v. United States, 389 U.S. 47 (1967); Connor v. City of Hammond, 389 U.S. 48 (1967); Central Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967).

ing of such a pattern of summary decision. It could indicate disenchantment by the Court with the role of evaluator of every challenged publication at the cost of having to wade through mountains of literary trash every term. On the other hand, it could indicate a basic change of the constitutional limitations upon legislative power to deal with obscenity. Finally, this pattern of summary decision could indicate a recognition that no definitive opinion clarifying applicable doctrine in this area can command the assent of even a majority of the Court.

The original per curiam opinion in *Redrup* marked out three areas in which government restraints upon publication may be approved. The first area would involve statutes reflecting "a specific and limited state concern for juveniles." This language may forecast a new application in the pornography-and-juveniles field of the "narrowly drawn statute" standard which has been traditionally applicable to regulation of publication.[7]

The second area in which government restraint would be permissible would involve those cases where there is an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. While it is always dangerous, and perhaps pointless to draw inferences from denials of certiorari, the Court has recently declined to review three obscenity cases which could conceivably fall within this area. The first, *G.I. Distributors, Inc. v. New York*,[8] is clearly inconclusive. While one justice dissented from the denial of certiorari upon the authority of *Redrup*, others made a point of stating that their votes against review were grounded on their belief that the case was moot. The denial of certiorari in the second case, *Fort v. City of Miami*,[9] comes closer to supporting the thesis. That case involved a back yard display for sale of lewd sculpture. There were three dissents from the denial of certiorari. It is conceivable that some of the votes for denial may have been based upon the failure of the petitioner to go to the Supreme Court of Florida, the issue having been raised that that court, rather than the intermediate court of appeal to which the petition was directed, was the highest court with jurisdiction over the case. The third case, *Bennett v. California*,[10] involved a conviction, under a lewdness statute, of "topless go-go girl dancers." One justice registered a dissent, but, typically, there was no explanation from any of the other eight justices of the refusal to review. Thus, the extent to which the Court will follow the implication of this *Redrup* caveat remains rather speculative. The uncertainty on this point is not likely to be clarified by whatever action the Court may take on the other obscenity case on its docket at the current writing, *Levin*

[7] E.g., Cantwell v. Connecticut, 310 U.S. 296 (1940); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[8] 389 U.S. 905 (1967).

[9] 389 U.S. 918 (1967).

[10] 389 U.S. —, 88 Sup. Ct. 463 (1967).

v. Maryland.[11] That case involves a book of photographs of nude males, with pictorial emphasis upon the genital organs of the models. Certainly, apart from the *Redrup* dictum, the Court has not yet ruled affirmatively that forcible imposition of pornography upon a captive or quasi-captive audience is relevant to appraisal of the validity of censorship laws, either on their face or in their application.

The third area in which government restraint on publication may be permissible is where the situation involves "pandering," such as was found controlling in *Ginzburg v. United States.*[12] While the full scope of the *Ginzburg* doctrine has not yet been spelled out, one may be justified in speculating that the process of "merchandising with a leer" may be a factor in resolving doubts of obscenity in a close case. (It is hardly likely, for example, that a paperback edition of Charles Dickens' *David Copperfield* would be placed in the category of legal obscenity if it were published with a lurid cover.) It is conceivable, however, that the method of merchandising would become a larger factor in appraisal of pornographic materials distributed to the young than it would be in appraisal of similar materials distributed to the general public.

Speculation as to the significance of *Redrup* and the memorandum decisions of June 12, 1967, must be tempered by considering that on that date the Court also granted certiorari and summarily affirmed a state court decision finding a film to be pornographic.[13] There were four dissents in this case, the dissenters voting for summary reversal. Nor were that date's other memorandum decisions, previously discussed, unanimous. In some of them Justice Harlan either dissented or concurred specially on the basis of the distinction he drew between federal and state censorship power in his separate opinion in *Roth v. United States.*[14] In some, one or more of the justices voted to affirm summarily, and in others one or more voted to take the case and set it down for oral argument.

The state of Supreme Court precedent, therefore, is hardly helpful to the judges in state and lower federal courts in wrestling with the problems presented by obscenity statutes in general and by obscenity-for-juveniles statutes in particular. It is hoped that the Supreme Court will, in the near future, be able to produce some useful guidelines in this extremely complex area.

C. Student Comment: Racial Imbalance in the Schools

§8.6. Introduction. The legal challenge to racially segregated

[11] No. 594, October Term, 1967, on petition for certiorari to the Maryland Court of Special Appeals.

[12] 383 U.S. 463 (1966), noted in 1966 Ann. Surv. Mass. Law §11.2.

[13] Landau v. Fording, 388 U.S. 456 (1967).

[14] 354 U.S. 476 (1957).

schools achieved a major victory in the decision in *Brown v. Board of Education of Topeka.*[1] The United States Supreme Court there ruled that school segregation imposed by statute violated the equal protection clause of the Fourteenth Amendment. In later cases, school segregation, caused or fostered by state or local officials, was also declared to be unconstitutional.[2] Although racial separation actively promoted by government officials remains a problem, especially in the South,[3] attention has shifted to problems arising from racially separated schools where the separation has been passively allowed by government rather than actively promoted.[4]

Some states, such as Massachusetts, have enacted statutes to alleviate racial imbalance.[5] Two of these statutes have been attacked in the courts as violative of the equal protection clause of the Fourteenth Amendment.[6] The result of this litigation has been a conflict among the courts as to the validity of this type of legislation.[7] It will be the purpose of the remainder of this chapter to analyze the judicial response to legislation seeking to end racial imbalance in the schools. The possibilities for judicial relief, absent or in addition to a racial imbalance statute, will also be examined.

§8.7. Racial imbalance laws. Of the racial imbalance statutes, the Massachusetts Racial Imbalance Act provides the strictest standards

§8.6. [1] 347 U.S. 483 (1954).

[2] E.g., Taylor v. Board of Education of the City School District of New Rochelle, 294 F.2d 36 (2d Cir. 1961), *cert. denied*, 368 U.S. 940 (1961); Clemons v. Board of Education of Hillsboro, 228 F.2d 853 (6th Cir. 1956), *cert. denied*, 350 U.S. 1006 (1956). See Cooper v. Aaron, 358 U.S. 1 (1958).

[3] See United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing*, 380 F.2d 385 (5th Cir. 1967), *motion for stay of execution denied sub nom.* Caddo Parish School Board v. United States, 386 U.S. 1001 (1967).

[4] See Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564 (1965); Freund, Civil Rights and the Limits of the Law, 14 Buffalo L. Rev. 199 (1964); Hyman and Newhouse, Jr., Desegregation of the Schools: The Present Legal Situation, 14 Buffalo L. Rev. 208 (1964); Kaplan, Segregation Litigation and the Schools, parts 1-2, 58 Nw. U.L. Rev. 1, 157 (1963); Sedler, School Segregation in the North and West: Legal Aspects, 7 St. Louis U.L.J. 228 (1963). The terms de facto and de jure will be avoided in this article because of the different and often confusing meanings given these terms by the courts and law review writers. Instead, the terms racial segregation and racial separation (or racial imbalance) will be used, the former meaning the division of the races actively fostered by state law or school board action, and the latter meaning the division of the races not actively promoted by the state or school board.

[5] G.L., c. 71, §§37C, 37D. See also Ill. Ann. Stat. c. 122, §10-21.3 (Smith-Hurd Supp. 1967); Ind. Ann. Stat. §28-5157 (Cum. Supp. 1966).

[6] School Committee of Boston v. Board of Education, 1967 Mass. Adv. Sh. 1027, 227 N.E.2d 729, *appeal dismissed for lack of a substantial federal question*, 88 U.S. 692 (1968); Tometz v. Board of Education, Waukegan City School District No. 61, Doc. No. 40292 (Ill. Sup. Ct. June 22, 1967).

[7] Compare School Committee of Boston v. Board of Education, 1967 Mass. Adv. Sh. 1027, 27 N.E.2d 729 (1967), with Tometz v. Board of Education, Waukegan City School District No. 61, Doc. No. 40292 (Ill. Sup. Ct. June 22, 1967).

and strongest enforcement powers.[1] Each year the local school committee must take a racial census, and, if the State Board of Education decides that racial imbalance exists, the local school committee must file a satisfactory plan to eliminate imbalance.[2] Racial imbalance is defined as a sharp disparity between the ratio of non-white to white students in the school and the ratio of non-white to white individuals in the society "in which non-white children study, serve and work."[3] For purposes of the statute, racial imbalance exists when more than fifty per cent of the students in any public school are non-white.[4] If no plan is filed, or if the filed plan is not satisfactory, state funds can be withheld.[5]

The Boston School Committee, in *School Committee of Boston v. Board of Education*,[6] challenged this statute on several grounds. Primarily, the Committee argued: (1) that the statute was too vague to satisfy the Fourteenth Amendment's due process requirements in that it did not provide standards for determining a student's race and did not adequately define the term racial imbalance;[7] and (2) that state action predicated on the classification of students into groups of "white" and "non-white" was a forbidden classification under the equal protection clause of the Fourteenth Amendment.[8]

The Supreme Judicial Court upheld the statute. With respect to the standards for determining the student's race, the Court reaffirmed an earlier case,[9] which held that an individual's race was sufficiently obvious for a school committee to take a racial census with reasonable accuracy. As to the ambiguity in the definition of racial imbalance, the Court appeared to construe the statute to mean that racial imbalance exists only when the school has more than a fifty per cent non-white student body.[10] The Court held this definition to be sufficiently specific.

The most significant aspect of the Court's opinion is its treatment of the equal protection issue. The Court held that the statute was entitled to a presumption of validity; that the statute was adopted to achieve a legitimate state purpose; and that the racial classification was reasonably related to effectuating that purpose. The Court stated:

> The statute has its foundation in a legislative finding that the Commonwealth is faced with an emergency because of racial imbalance in the public schools. This fact, fundamental to the issue

§8.7. [1]Compare G.L., c. 71, §37D and G.L., c. 15, §11 with Ill. Ann. Stat. c. 122. §10-21.3 (Smith-Hurd Supp. 1967) and Ind. Ann. Stat. §28-5157 (Cum. Supp. 1966).

[2] G.L., c. 71, §37D.

[3] Id.

[4] Id.

[5] G.L., c. 15, §1I.

[6] 1967 Mass. Adv. Sh. 1027, 227 N.E.2d 729.

[7] Id. at 1030, 227 N.E. 2d at 733.

[8] Id. at 1031, 227 N.E. 2d at 733.

[9] School Committee of New Bedford v. Commissioner of Education, 349 Mass. 410, 208 N.E.2d 814 (1965).

[10] 1967 Mass. Adv. Sh. at 1030-1031, 227 N.E.2d at 733.

> before us, is not open to judicial reexamination. . . . The heart of the matter is whether the means are reasonably related to the objective and hence are free of sound constitutional criticisms.
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> . . . "All rational presumptions are made in favor of the validity of every legislative enactment. Enforcement is to be refused only when it is in manifest excess of legislative power. . . . It is only when a legislative finding cannot be supported upon any rational basis of fact that reasonably can be conceived to sustain it that a court is empowered to strike it down. . . ."[11]

The Court has apparently placed the burden on the plaintiff to show that the purpose of the statute is to discriminate unjustly or that the classification used is not reasonably related to accomplishing a legitimate purpose.

In reaching its decision in *School Committee of Boston,* the Supreme Judicial Court utilized the tests that traditionally have been applied in determining the validity of statutes under the equal protection clause.[12] The equal protection clause is designed to prevent state action which discriminates between groups of citizens where there is no rational basis for distinction.[13] In determining the validity of state action under the equal protection clause, the courts have looked to two elements: (1) the purpose of the legislation; and (2) the classification used to effectuate that purpose.[14] Under the traditionally employed tests, if the purpose of the legislation is found to be legitimately within the state's police power, and the classification employed is found to be reasonably related to the effectuation of that legitimate purpose, the legislation will be upheld.[15]

The significance of the Court's holding in *School Committee of Boston* is that the Court refused to deviate from these traditional tests in determining the validity of a statute embodying racial classifications. In contrast to the Massachusetts decision, other courts have departed from the traditional tests when faced with statutes embodying racial classifications and have employed one of two other tests: (1) the state must bear a heavy burden of justification, both as to the purpose and the classification, where a racial classification is present; and (2) racial classifications are per se violative of the equal protection clause.

The case most illustrative of the per se approach is *Tometz v. Board of Education, Waukegan City School District No. 61.*[16] In *Tometz,* the Illinois Supreme Court rendered an opinion on the con-

11 Id. at 1031-1032, 227 N.E.2d at 733-734.

12 See, e.g., Loving v. Virginia, 388 U.S. 1, 9 (1967); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526-527 (1959).

13 Tussmann and tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 357-358 (1949).

14 Id. at 377-379. See Skinner v. Oklahoma, 316 U.S. 535 (1942).

15 Tussmann and tenBroek, note 13 *supra* at 377-378.

16 Doc. No. 40292 (Ill. Sup. Ct. June 22, 1967).

stitutionality of its racial imbalance law, the Armstrong Act. The act provides in part:

> As soon as practicable, and from time to time thereafter, the board shall change or revise existing units or create new units in a manner which will take into consideration the prevention of segregation and the elimination of separation of children in public schools because of color, race, or nationality.[17]

The Armstrong Act, to a greater degree than the Massachusetts law, allows the school boards to exercise their discretion. In Illinois a school board has only to take corrective action "as soon as practicable." Furthermore, it need only "take into consideration" the elimination of racial separation. The Illinois court declared the statute unconstitutional. The court held that the equal protection clause unexceptionally prohibited programs administered with regard to race. Therefore, the racial imbalance law violated the equal protection clause solely because it embodied a racial classification.

In reaching its decision, the court relied on *Brown v. Board of Education of Topeka,* interpreting the case as holding that racial discrimination is per se unconstitutional.[18] In *Tometz,* however, the court equated racial classification with racial discrimination by defining discrimination as "the act of making distinctions based on race. . . ."[19] Professors Tussman and tenBroek, in an article discussing classifications under the equal protection clause, point out that courts have used the term "discrimination" to mean either "distinctions" or "bias." Classifications based on bias are unconstitutional:

> It is perhaps necessary to point out that there are two senses of the term "discrimination" which are often confused. In one sense, to exercise discrimination is simply to be discerning, to be quick at recognizing differences, to be cognitively alert. In the second sense, discriminatory action is action which is biased, prejudicial, unfair. It should be clear that legislators must, in the first sense, be discriminating. They must discern and recognize relevant distinctions and differences, they must draw lines, they must, in short, classify—and classify reasonably. What is forbidden as discriminatory is the bias and prejudice suggested by the second sense of that term.[20]

In *Brown,* the Supreme Court did not condemn all distinctions based on race, but rather struck down the racial classifications in the segregation laws because they deprived Negro children of equal educa-

[17] Ill. Ann. Stat. c. 122, §10-21.3 (Smith-Hurd Supp. 1967).

[18] Tometz v. Board of Education, Waukegan City, No. 61, Doc. No. 40292 at 4 (Ill. Sup. Ct. June 22, 1967).

[19] Id.

[20] Tussmann and tenBroek, note 13 *supra* at 358 n.35 (1949). See Loving v. Virginia, 388 U.S. 1, 9 (1967).

tional opportunities.[21] Thus, the state did not classify reasonably, but rather promulgated a law prejudicial to Negroes.

The question remains, however, whether racial classifications should logically be considered per se violations of the equal protection clause. The Illinois court's conclusion would be logical if all racial classifications involved discriminations in the sense of bias or prejudice. Prejudice is defined as an unreasonable predilection against something or a leaning adverse to anything without just grounds.[22] There is ample evidence, however, that racial separation in the schools is educationally harmful to both Negro and white children.[23] Since a racial discrimination (in the form of distinction) could be based on such just grounds, a per se rule would not be appropriate.

While racial classifications may not be per se violative of the equal protection clause, it remains to be determined whether statutes embodying such classifications must bear a "heavy burden of justification." Several United States Supreme Court decisions appear to support the view that statutes embodying racial classifications bear a heavy burden of justification. In *Korematsu v. United States*,[24] the Supreme Court sustained the removal of Japanese Americans, living on the West Coast, to detention centers during World War II. In reaching its decision, the Court recognized that the government had to bear a heavy burden of justification for the measure, but felt that the war-time emergency justified the statute even though it contained a racial classification. In striking down a Virginia miscegenation statute, the Supreme Court, in *Loving v. Virginia*,[25] noted that the Virginia Supreme Court of Appeals, in an earlier case, had declared the legislative purpose of the statute to be to preserve the racial integrity of its citizens by preventing the corruption of blood and mongrel breeds; Chief Justice Warren observed that this amounted to an endorsement of white supremacy.[26] The Court concluded that the state had not satisfied the "very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race."[27]

Furthermore, the Court has indicated that not only must the state sustain a heavy burden in justifying the purpose of the statute, but

21 347 U.S. at 493.

22 Webster's Third New International Dictionary 1788 (1961).

23 United States Commission on Civil Rights, Racial Isolation in the Public Schools (1967); Report of the Advisory Committee on Racial Imbalance and Education, Massachusetts State Board of Education, Because It Is Right — Educationally (1965).

24 323 U.S. 214 (1944). See Hirabayashi v. United States, 320 U.S. 81, 100-101 (1943). Since it was federal action being challenged in this case, the Fourteenth Amendment's equal protection clause, which applies only to the states, was not involved. However, attacks under the Fifth Amendment's due process clause have been held to raise the same issues. See Bolling v. Sharpe, 347 U.S. 497 (1954).

25 388 U.S. 1 (1967).

26 Id. at 7.

27 Id. at 9.

it must also meet the same requirement in showing the relationship of the classification used to this purpose. In *McLaughlin v. Florida*,[28] the Court invalidated a fornication statute imposing heavier penalties, and requiring a lesser quantum of proof, for interracial fornication than for intraracial fornication. The Court stated:

> There is involved herein an exercise of the state police power which trenches upon constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy.[29]

It is questionable, however, whether racial imbalance laws should be evaluated in terms of the "heavy burden of justification" test. Several distinctions can be drawn between racial imbalance laws and the statutes discussed in *Loving* and *McLaughlin*. The Supreme Court, in the latter case, emphasized that the statutes in question were criminal in nature. The concurring opinions in both *Loving* and *McLaughlin* argued that any law which predicated *criminality* on the race of the defendant was per se unconstitutional.[30] The majority of the Court in *McLaughlin* did not make such a sweeping statement, but did stress the special caution needed in evaluating a racial classification in a criminal statute. The Court implied that it must be more careful in evaluating a racial classification embodied in a criminal statute than one embodied in a civil statute because the criminal statute directly deprives the individual of his liberty solely on the basis of race.[31] Thus, a different test of validity may be applicable to a civil statute, such as a racial imbalance law, which does not deprive an individual of his liberty. This distinction was the basis of the Massachusetts Supreme Judicial Court's refusal in *School Committee of Boston* to apply the *McLaughlin* test.[32]

The statutes involved in the Supreme Court cases discussed above are distinguishable from the racial imbalance laws on other grounds. In *Loving*, the Court determined that the legislature's motive and the statute's effect was invidious, in that the law harmed a specific group because of its race:

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justified this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifica-

28 379 U.S. 184 (1964).

29 Id. at 196.

30 Loving v. Virginia, 388 U.S. at 13 (concurring opinion); McLaughlin v. Florida, 379 U.S. at 198 (concurring opinion).

31 379 U.S. at 192.

32 1967 Mass. Adv. Sh. at 1033, 227 N.E.2d at 734 (1967).

> tions must stand on their own justification, as measures designed to maintain White Supremacy. *We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race.*[33] [Emphasis added.]

Similarly, in *Korematsu,* the Supreme Court emphasized that a racial classification *limiting the civil rights of a minority* would be upheld only if there was an overriding legitimate state purpose supporting it.[34]

On the other hand, where the legislature's purpose in utilizing the racial classification is to promote, rather than infringe, a group's civil rights, the legislation may then be classified as "benign" and should not be subjected to the "heavy burden of justification" test. Rather, the legislature should be encouraged to pass such beneficial legislation. As the Massachusetts Court found, with regard to the Racial Imbalance Act, the statute was not designed to harm a racial group or give a benefit to one group not given to another. Rather, the statute was designed to promote equality between the races. Thus, the Court stated:

> It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment.[35]

The fact that racial imbalance laws are civil statutes, and may be classified as "benign," in that their purpose is to promote, rather than infringe, a group's civil rights, would appear to be sufficient to distinguish these laws from those upon which the Supreme Court imposed a heavy burden of justification.

Since a per se rule as to racial classifications would appear not to be valid, and the heavy burden of justification test would appear to be inapplicable to racial imbalance laws, the Supreme Judicial Court was correct in applying the tests traditionally employed in determining the validity of state action under the equal protection clause to the Racial Imbalance Act. The question remains, however, whether the Court properly applied the test to the act. This involves determining whether the Racial Imbalance Act does serve a legitimate public purpose and whether the classification is reasonably related to this purpose.

In considering the former, there is ample educational evidence to show a rational basis for the act. A recent scientific survey, commonly referred to as the "Coleman Report,"[36] was conducted for the United

33 388 U.S. at 11-12.
34 323 U.S. at 216.
35 1967 Mass. Adv. Sh. at 1031, 227 N.E.2d at 733.
36 United States Department of Health, Education, and Welfare, Equality of Educational Opportunity §1 (1966).

States Office of Education by a committee of educational experts. The study was concerned with the quality of education in predominantly Negro schools and the relation of cultural and socio-economic factors to academic achievement. The Coleman Report states that the achievement of children from minority groups is lower than the achievement of white students and that improving the physical plant, curriculum, and quality of teachers would help improve the education of children from minority groups.[37] The Report, however, indicates that the difference in teachers, facilities, and curriculum between the schools that are predominantly white, and schools that are predominantly composed of minority groups is not very great.[38] Thus, the achievement gap cannot be explained by these factors alone. The Report contends that the school's student composition is a primary factor in minority scholastic achievement:

> Thus, if a white pupil from a home that is strongly and effectively supportive of education is put in a school where most pupils do not come from such homes, his achievement will be little different than if he were in a school composed of others like himself. But, if a minority pupil from a home without much educational strength is put with schoolmates with strong educational backgrounds, his achievement is likely to increase.[39]

The Coleman Report is not clear, however, as to whether it is the cultural, socio-economic separation or the racial separation that is causing the harm. If cultural, socio-economic separation were the critical problem, then perhaps racial classifications would not be reasonably related to securing a legitimate public purpose, and the state could only classify along cultural lines. If both cultural and racial separation are harmful, however, statutes designed to eliminate either separation would be founded on a valid basis.

The ambiguities of the Coleman Report were resolved in a report of the United States Commission on Civil Rights[40] which specifically addressed itself to the effect of *racial* separation. The Coleman Report's statistics and findings, as well as the additional information gathered by the Commission, were analyzed.[41] The Commission found that separation in the schools is increasing, not decreasing, and that a great disparity exists in educational achievement of Negroes as compared to whites. It attributed the major source of the disparity in educational achievement to the harmful effect on Negro attitudes caused by school separation. Specifically, the Commission found that: (1) Negroes in predominantly Negro schools have lower educational aspirations than Negro students with similar backgrounds attending

37 Id. at §1.4.
38 Id.
39 Id.
40 United States Commission on Civil Rights, Racial Isolation in the Public Schools (1967).
41 Id. at viii.

schools with a majority of white students; (2) predominantly Negro schools are considered as inferior by the community and teachers, and this stigma affects Negro attitude and achievement; (3) Negro children attending desegregated schools that do not have compensatory educational programs perform better than Negro children in racially isolated schools with these programs; (4) Negro students in schools with a majority of white students with poor teachers achieve better than Negro students in schools with a majority of Negro students with better teachers; (5) disadvantaged Negro students in schools with a majority of equally disadvantaged white students achieve better than Negro students in schools with a majority of disadvantaged Negro students.[42]

Although they differ in some respects, these two studies do not necessarily conflict. Racial separation seems to coincide with poor ghetto schools and cultural separation. While the Coleman Report discusses the educational difficulties of students mainly in regard to cultural deprivation, the Civil Rights Commission used these statistics, interrelating the cultural problems to racial separation. Thus, the report of the Civil Rights Commission is an application of the principles expounded in the Coleman Report to the specific problem of racial separation. These two reports are the most authoritative educational studies; other less extensive reports have come to basically the same conclusions.[43]

While there is disagreement among educators concerning the effects of racial separation in the schools, there is significant support for the proposition that racial separation, regardless of who causes the separation, impedes Negro motivation and achievement and deprives Negroes of educational opportunities equal to those available to whites. Therefore, the racial imbalance laws are serving a legitimate public purpose in ameliorating the effects of racial separation.

The educational reports may also support the view that the racial classification embodied in the Racial Imbalance Act is reasonably related to the legitimate state purpose of achieving equal educational opportunities. Under the act, a school with greater than fifty per cent Negro enrollment would be considered imbalanced. The report of the Civil Rights Commission indicates that a school with a greater than fifty per cent Negro enrollment is harmful to the Negro students.[44] Hence, a racial classification embodied in a statute designed to eliminate predominantly Negro schools is reasonably related to the purpose of achieving equal educational opportunity.

However, an objection might be raised that the classification is not reasonably related to the purpose because it is both too broad and

[42] Id. at 203-205.

[43] E.g., Report of the Advisory Committee on Racial Imbalance and Education, Massachusetts State Board of Education, Because It Is Right—Educationally 2 (1965).

[44] United States Commission on Civil Rights, Racial Isolation in the Public Schools 204 (1967).

too narrow. The act might be considered too broad because it classifies in terms of white and non-white, and does not limit its scope to those non-whites suffering educational harm. The educational findings of the Civil Rights Commission were specifically phrased in terms of Negroes rather than non-whites.[45] Yet, under the Racial Imbalance Act, a majority school of Chinese-Americans with superior scholastic achievement would be considered imbalanced. In such a situation, it may be said that there is no relationship between the classification and the purpose of achieving equal educational opportunities for non-whites.

While it is true that the statute is not drawn with mathematical precision, it would be impracticable administratively to determine in each instance whether students at a particular school are being educationally harmed by racial imbalance. This can only be determined by costly, time-consuming composite educational surveys. The educational reports indicate that non-whites as a whole will be benefited by legislation reducing racial separation. Of course, a school composed of Chinese-American students may not be educationally detrimental to these students, and thus the act will not benefit them. On the other hand, there is no indication that the act will be harmful to those Chinese students by reducing the homogeneity of the school's enrollment. Under the traditional equal protection test, the means only have to be *reasonably* related to the purpose. Thus, the Imbalance Act's classification does not have to be related to its purpose of achieving equal educational opportunity in every instance, but rather must be judged by its overall effect. Since the overall effect is to reduce imbalance, and the educational reports indicate that correcting racial imbalance is educationally beneficial, the act's means are reasonably related to its purpose.

The Racial Imbalance Act might be considered too narrow in that it does not resolve the educational problems of culturally deprived white children; the Coleman Report noted the educational harm to culturally deprived children regardless of race. If this objection were valid, the state would have to solve the educational problems of all groups in one enactment. The courts, however, have held that the legislature can proceed on a step-by-step basis to eliminate the problem and does not have to attempt to cover the field with one enactment; it can decide that one problem is more serious than another and thus warrants prior action. Thus, in *Williamson v. Lee Optical of Oklahoma, Inc.*,[46] a state statute prohibited anyone except a licensed optometrist or ophthalmologist from fitting lenses to a face or duplicating lenses except upon a written prescription. The plaintiff alleged that the statute violated the equal protection clause by proscribing the activities of opticians and by exempting from its prohibi-

[45] Id. at 199-204.
[46] 348 U.S. 483 (1955).

tions sellers of ready-to-wear glasses. The United States Supreme Court rejected this contention:

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here. For all this record shows, the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch.[47]

Applying these principles to racial imbalance laws, while the legislature may be quite cognizant of the problems of culturally deprived whites, it reasonably may conclude that, partially because of the severity of harm and the number of educationally deprived, the Negro faces problems proportionally more severe that demand priority treatment. Furthermore, while the harm resulting from cultural separation may be equal to that emanating from racial separation, the legislature may conclude that the means of correcting the former are more complex, and thus can proceed on a step-by-step basis to eliminate educational harm, giving priority to that caused by racial separation. The legislature does not have to achieve cultural integration of all groups at the same time it achieves racial integration; it does not have to solve all the educational problems suggested by the educational reports in one enactment. The Supreme Judicial Court was, therefore, correct in holding that the classifications in the Massachusetts Racial Imbalance Act were reasonably related to its purpose of achieving equal educational opportunity.

A further constitutional question might arise, however, if a legislature which had previously passed a racial imbalance law, as did Massachusetts, subsequently repealed that law, or if a state court, on independent state grounds, declared that state's law unconstitutional.[48] For example, the present Massachusetts law prohibits any school from having more than a fifty per cent non-white enrollment. Thus, racial separation is reduced, and Negro children have the opportunity to receive a better education. If, however, the legislature should now repeal the statute, the schools would again become imbalanced, and in effect, the state would be assisting the deprivation of equal educational opportunities for Negroes.

[47] Id. at 489.

[48] In Tometz, the Illinois Supreme Court had state grounds for declaring their racial imbalance law invalid. Tometz v. Board of Education, Waukegan City School District No. 61, Doc. No. 40292, at 6 (Ill. Sup. Ct. June 22, 1967).

The California Supreme Court considered an analogous situation in *Mulkey v. Reitman*.[49] The California legislature had enacted statutes designed to eliminate racial discrimination in housing, but these statutes were subsequently nullified by the electorate in a referendum amendment to the state constitution. The California court overturned the referendum because it constituted state action authorizing private racial discrimination in the housing market in contravention of the equal protection clause of the Fourteenth Amendment. State authorization to discriminate was no less state action than state-imposed discrimination:

> [T]he state, recognizing that it could not perform a direct act of discrimination, nevertheless has taken affirmative action of a legislative nature designed to make possible private discriminatory practices which previously were legally restricted. We cannot realistically conclude that, because the final act of discrimination is undertaken by a private party motivated only by personal economic or social considerations, we must close our eyes and ears to the events which purport to make the final act legally possible. Here the state has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is encouraged within the meaning of the cited decisions.[50]

The Supreme Court affirmed, holding that the California court was correct in interpreting the repeal as a tacit authorization for private individuals to discriminate, and hence constituted invalid state action.[51]

Assuming that there were no constitutional requirement on the state to correct racial separation in the schools, on the basis that the separation was not fostered by state action, once the state has acted to end the separation, the subsequent repeal or invalidation of the statute might be considered violative of the Fourteenth Amendment, under the rationale of the *Mulkey* case. Although the state may have had no original duty to act, once it did, the repeal or invalidation of the law might constitute state action which had the effect of denying equal educational opportunities.

§8.8. Constitutionally required state action. While some legislatures and school boards have taken voluntary action to remedy racial separation, many more have been indifferent to the problem.[1] As a result, interested parents and other groups have sought relief through the courts to compel state action where none has been taken by the

[49] 64 Cal. 2d 529, 413 P.2d 825 (1966), *aff'd*, 387 U.S. 369 (1967).

[50] Id. at 541-542, 413 P.2d at 834.

[51] Reitman v. Mulkey, 387 U.S. 369 (1967). The Supreme Court did not construe the California opinion as finding state action from the repeal alone. Id. at 376.

§8.8. [1] See, e.g., Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 88 Sup. Ct. 39 (1967).

legislature. Several courts have held that the state has an affirmative duty to alleviate racial separation.[2] Others have rejected this doctrine. The body of law developed in these cases is relevant to the present situation in Massachusetts for several reasons. First, it might be argued that the Massachusetts Racial Imbalance Act does not reduce racial separation enough to achieve equal educational opportunity for Negroes; or that it has not worked quickly enough. In the three years since the statute was enacted, racial imbalance has not been significantly reduced.[3] In such a situation, state remedies would not prevent an individual from seeking judicial relief to indicate a federal right.[4] Second, the possibility exists that the Racial Imbalance Act might be repealed or amended, thus leaving an area in which there would be no voluntary state action to alleviate racial separation in the schools. This section will discuss the judicial response to suits seeking to compel state action.

These attacks pose somewhat different problems from those involved in the constitutional challenge to the racial imbalance laws. To uphold a racial imbalance law, a court need only find that there is some rational support for the proposition that racial separation deprives minority groups of equal educational opportunities. The court does not have to determine the correctness of the legislative finding, but must only decide that the legislature had a reasonable basis for such a finding. The educational reports could serve as that basis. On the other hand, in deciding whether to compel state action to alleviate racial separation, the courts can not merely determine whether there is reasonable evidence that such separation causes educational harm, but rather must make a judicial determination that it does cause such harm. In addition, the court must find that state action is present; the Fourteenth Amendment prohibits only state action that denies equal protection of the laws. In suits challenging racial imbalance laws, state action is obviously present.

The courts that have considered the issue of educational harm are uniform in holding that racial separation, irrespective of the causes of such separation, deprives minority groups of equal educational opportunity. In *United States v. Jefferson County Board of Education*,[5] the United States Court of Appeals for the Fifth Circuit stressed that "psychological harm and lack of educational opportunities may exist whether caused by de facto or de jure segregation. . . ."[6] In *Booker v. Board of Education of Plainfield*,[7] the New Jersey Supreme Court commented that separation without force of law is harmful:

2 See, e.g., Booker v. Board of Education of Plainfield, 45 N.J. 161, 212 A.2d 1 (1965).

3 Boston Globe, Jan. 16, 1968, at 4, col. 4.

4 See McNeese v. Board of Education, 373 U.S. 668 (1963).

5 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing*, 380 F.2d 385 (5th Cir. 1966), *motion for stay of execution denied sub nom.* Caddo Parish School Board v. United States, 386 U.S. 1001 (1967).

6 372 F.2d at 868.

7 45 N.J. 161, 212 A.2d 1 (1965).

> Although such feeling [of inferiority] and denial may appear in intensified form when segregation represents official policy, they also appear when segregation in fact, though not official policy, results from long standing housing and economic discrimination and the rigid application of neighborhood school districting.[8]

The court further noted the importance of an integrated education for all of society.

> The children must learn to respect and live with one another in multi-racial and multi-cultural communities. . . . Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority.[9]

Likewise, in *Hobson v. Hansen*,[10] the United States District Court for the District of Columbia found that racially segregated schools psychologically disrupt the aim of a democratic education, whether the segregation is de jure or de facto, while a racially integrated school system improves the attitude and increases the scholastic achievement of the disadvantaged child:

> This court, though unwilling to assume that Negro school children can readily perceive the sharp difference between de jure and de facto situations which lawyers note, does not doubt that the personal harm which segregation imparts may, in some circumstances, be somewhat less in the de facto situation. What, however, can we expect the Negro children to think and feel when almost all the adult faces they see at their predominantly Negro schools are black, . . . when — among other comparative indignities — their own school is crammed with students, though they are aware that schools across the Park have classroom space to spare. These circumstances, the court is convinced, in the context of the local de facto segregation conspire to inflict the entire emotional hurt crippling to academic motivation set out in *Brown*.[11]

The court also found that racial separation deprived both Negroes and whites of social encounters which are indispensable to a proper education.[12]

Although the courts have often substantiated their opinions with evidence that imbalanced systems tend to lead to poorer educational

[8] Id. at 168, 212 A.2d at 5.
[9] Id. at 170-171, 212 A.2d at 6.
[10] 269 F. Supp. 401 (D.D.C. 1967).
[11] Id. at 506.
[12] Id. at 504-505.

facilities for Negroes, to the courts the critical factor appears to be the feeling of inferiority that segregation produces in the Negro. As early as in *Brown v. Board of Education of Topeka*,[13] the Supreme Court indicated that separation without force of law can have an adverse psychological effect on the Negro student, though not perhaps as great as that resulting from separation by force of law. "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law. . . ."[14]

The above judicial findings are consistent with the educational reports discussed previously. Generally, the facts must be redetermined in each case, since the courts have not been willing to take judicial notice of the findings of the reports. However, *Blocker v. Board of Education of Manhasset*[15] may present a limited exception. There, most white children attended two all-white schools and all of the Negro children attended overwhelmingly Negro schools. In granting relief the United States District Court noted that the system was as racially segregated, in fact, as schools segregated by law. The court held that such racial separation did cause psychological harm to the Negro students. The district court made this finding despite its holding that the plaintiffs had failed to establish a causal relationship between its particular imbalanced schools in the district and the poor academic performance of the Negro students attending those schools.[16] In effect, *Blocker* can be interpreted as creating a presumption that racial separation is harmful where that separation is virtually complete.

The courts that have considered whether racial separation is harmful have always answered in the affirmative. However, these courts have not said what degree of racial separation is harmful. The California Supreme Court[17] and the New Jersey Supreme Court[18] have indicated in rather general language that the school boards must act where there is *substantial* racial separation, without defining what exact amount will be considered substantial. A more specific ruling was made in *Barksdale v. Springfield School Committee*.[19] The evidence in *Barksdale* showed that seven of the thirty-eight elementary schools and one of the eight junior high schools were predominantly Negro and Puerto Rican, even though whites constituted eighty per cent of the total school enrollment. Considering the ratio of whites to non-whites in the total school population, the district court con-

13 347 U.S. 483 (1954).

14 Id. at 494.

15 226 F. Supp. 208 (E.D.N.Y. 1964).

16 Id. at 227-228.

17 Jackson v. Pasadena City School District, 59 Cal. 2d 876, 881, 382 P.2d 878, 882 (1963).

18 Booker v. Board of Education of Plainfield, 45 N.J. 161, 212 A.2d 1 (1965).

19 237 F. Supp. 543 (D.Mass. 1965), *rev'd on other grounds*, 348 F.2d 261 (1st Cir. 1965).

cluded that any school with appreciably more than fifty per cent nonwhite enrollment would be considered imbalanced.[20] The United States Court of Appeals for the First Circuit sustained the district court's finding that the extent of racial imbalance in the particular schools deprived the Negroes of equal educational opportunities but reversed the decision on other grounds.[21] The *Barksdale* formula is consistent with the Civil Rights Commission's finding that majority schools generate a feeling of inferiority in the minority.

The controversy, however, has not centered on whether a given degree of racial separation denies minorities equal educational opportunities, but rather on whether this denial violates the equal protection clause of the Fourteenth Amendment. The cases that have answered in the negative have done so on the basis that the Fourteenth Amendment only prohibits a state from denying the equal protection of the law. If the school board, an arm of the state, has not actively fostered racial separation, the denial of equal educational opportunities has not been caused by the state and thus could not violate the Fourteenth Amendment. For example, in *Deal v. Cincinnati Board of Education*,[22] the Sixth Circuit held that since the racial separation was not caused by the state, but rather by private discriminatory action, the school board had no duty to act:

> [A] showing of harm alone is not enough to invoke the remedial powers of the law. If the state or any of its agencies has not adopted impermissible racial criteria in its treatment of individuals, then there is no violation of the Constitution. If factors outside the school operate to deprive some children of some of the existing choices, the school board is certainly not responsible therefor.[23]

In *Downs v. Board of Education of Kansas City*,[24] the Court of Appeals for the Tenth Circuit took basically the same view:

> [T]he decisions in *Brown* and the many cases following it do not require a school board to destroy or abandon a school system developed on the neighborhood plan, even though it results in a racial imbalance in the schools, where, as here, that school system has been honestly and conscientiously constructed with no intention or purpose to maintain or perpetuate segregation.[25]

The thrust of these two decisions is that school boards do not violate the equal protection clause of the Fourteenth Amendment unless they purposely promote racial separation.

These two cases are rather narrow in their conception of state

20 237 F. Supp. at 544.
21 348 F.2d 261, 264-265 (1st Cir. 1965).
22 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 88 Sup. Ct. 39 (1967).
23 369 F.2d at 59.
24 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).
25 336 F.2d at 998.

action. The concept of state action generally has been expanding. In *United States v. Guest,*[26] the Supreme Court indicated that the state may not be excused merely because it is only indirectly involved or because its action is only one of several factors in depriving Negroes of the exercise and enjoyment of their constitutional rights:

> [T]he involvement of the state need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation.[27]

Following the rationale of *Guest,* the state need only be indirectly involved in deprivation of constitutional rights. For example, school authorities might utilize a neighborhood school system in a town whose neighborhoods are segregated as a result of private residential segregation. The state action in adopting a neighborhood system would then result in racially separated schools. While the use of the neighborhood system per se is not unconstitutional, its use in conjunction with private discriminatory practices may violate the equal protection clause.

Several courts have suggested that the public, compulsory nature of the school system is sufficient state action. In *Barksdale v. Springfield School Committee,*[28] the district court stressed:

> Education is tax supported and compulsory, and public school educators, therefore, must deal with inadequacies within the educational system as they arise, and it matters not that the inadequacies are not of their making.[29]

In *Blocker v. Board of Education,*[30] the district court noted that Negroes have an affirmative right not to be separated:

> In a *publicly* supported, *mandatory* State educational system, the plaintiffs have the civil right not to be segregated, not to be compelled to attend a school in which all of the Negro children are educated separate and apart from over 99% of their white contemporaries.[31] [Emphasis added.]

In *Branche v. Board of Education,*[32] the district court, while accepting the Board's point that the school separation was caused by housing discrimination and not discriminatory action by the board, implied that

26 383 U.S. 745 (1966).
27 Id. at 755-756.
28 237 F. Supp. 543 (D. Mass. 1965), *rev'd on other grounds,* 348 F.2d 261 (1st Cir. 1965).
29 Id. at 546.
30 226 F. Supp. 208 (E.D.N.Y. 1964).
31 Id. at 227.
32 204 F. Supp. 150 (E.D.N.Y. 1962).

state action, and hence the protection of the Fourteenth Amendment, was present regardless of this fact:

> Segregated education is inadequate and when that inadequacy is attributable to state action is a deprivation of constitutional right.
>
> . . . The educational system that is . . . compulsory and publicly afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept and indurate segregation on the ground that it is not coerced or planned but *accepted*.[33] [Emphasis added.]

The rationale of these cases may be that acceptance of racial separation implies consent, and thus inaction implicates the state in the deprivation of equal educational opportunities. Other cases, such as *Barksdale* and *Blocker*, indicate that there is state action because the state makes school attendance compulsory, and although the school board has no discriminatory motive, certain administrative decisions, such as school zoning, transfers, and site selection, in conjunction with residential separation, lead to racially separated schools.

In the cases which hold that racial separation violates the Fourteenth Amendment, the courts have not agreed on what corrective measures are necessary to satisfy constitutional requirements. Since the state is violating the equal protection clause by tolerating racial separation, the logical step would be to require the school board to take immediate steps to eliminate this racial separation. The courts, however, have not required that the school boards must make the elimination of racial separation their sole objective.

In *Booker v. Board of Education of Plainfield*,[34] the New Jersey Supreme Court stated that exact apportionment of whites and Negroes in each school according to the racial ratio in the total district enrollment was not required, and noted that:

> [T]he goal here is a reasonable plan achieving the greatest dispersal consistent with sound educational values and procedures. This brings into play numerous factors to be conscientiously weighed by the school authorities. Considerations of safety, convenience, time, economy, and the other acknowledged virtues of the neighborhood policy must be borne in mind.[35]

This "rule of reason" approach suggested by the *Booker* opinion, in which the correction of racial separation is balanced against other educational factors, characterizes the judicial response to suits seeking to compel state action to alleviate racial separation. Other courts, however, have not agreed with *Booker* as to the relevant educational factors which must be taken into consideration. For example, in *Jackson v.*

[33] Id. at 153.
[34] 45 N.J. 161, 212 A.2d 1 (1965).
[35] Id. at 180, 212 A.2d at 11.

Pasadena City School District,[36] the California Supreme Court endorsed the weighing of educational factors against the reduction of racial separation, but did not find as many factors to be relevant as in *Booker:*

> The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause.
>
> . . . School authorities, of course, are not required to attain an exact apportionment of Negroes among the schools, and consideration must be given to the various factors in each case, including the practical necessities of governmental operation. For example, 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.[37]

The district court in *Hobson v. Hansen*[38] appeared to give greater emphasis to racial separation than either of the above opinions:

> [C]uring segregation is not so automatically paramount an interest that "little, if any, consideration need to be given to the safety of the children, convenience of pupils and their parents, and costs of the operation of the school system." . . . On the contrary, these factors should be carefully assessed; but integration must also be given its due and *considerable* weight.[39] [Emphasis added.]

While *Hobson* does not define exactly what is meant by "considerable weight," it appears that school boards are required to give primary attention to eliminating racial separation.

By failing to set precise standards, the courts have insured the school boards a certain measure of discretion. The willingness of the courts to allow the school boards a measure of discretion and flexibility is quite understandable, since devising educational schemes is a technical area in which the courts have no special expertise. This judicial willingness to formulate general standards and to allow the school authorities to determine the means by which to carry out these standards is predicated, however, upon the good-faith cooperation of the school board. When the court does not have confidence in the good faith and cooperation of the school board to devise an acceptable plan and to cooperate in working toward reduced racial separation, it will formulate an order with very specific requirements and maintain close supervision. In *Hobson*, the district court observed that the school adminis-

[36] 59 Cal. 2d 876, 382 P.2d 878 (1963).
[37] Id. at 881-882, 382 P.2d at 882 (dicta).
[38] 269 F. Supp. 401 (D.D.C. 1967).
[39] Id. at 508 n.199.

tration was affirmatively satisfied with the present racial separation and that the case just fell short of the actual intent needed for de jure segregation.[40] Although the district court did not expressly state that bad faith was the reason for the specificity of its order, the decision is exceptional in its detailed instruction to the school board. The court required the school board to take such specific action as abolishing the optional zoning plan which tended to perpetuate the separation, transporting children who volunteered from overcrowded Negro schools to white schools with vacancies, and seeking the cooperation of the suburbs in a voluntary bussing program.[41]

The confidence the court has in the good-faith cooperation of the school board will determine the extent of discretion the court will allow the board. In *Springfield School Committee v. Barksdale*,[42] the United States Court of Appeals for the First Circuit vacated the district court's order requiring the committee to submit a plan designed to eliminate racial imbalance to the fullest extent possible. The court of appeals reversed because the case was moot.[43] The school committee had resolved, before the lower court's decision was rendered, to "take whatever action was necessary to eliminate to the fullest extent possible, racial concentration in the schools, within the framework of effective educational procedures."[44] The court of appeals was willing to give the committee full discretion to devise effective solutions because they had indicated their desire to cooperate. Since they had so indicated prior to the district court's decision and since they had resolved to take the very action which the district court eventually ordered, the case was considered moot.[45]

Thus, in those cases where litigants have sought to compel state action to correct racial imbalance, the courts have not been as demanding as the Racial Imbalance Act in requiring corrective action by the school board. The courts have not imposed an absolute duty on the board to eliminate racial imbalance, but have only required the school officials to eliminate it as much as possible, taking into account such relevant factors as cost, safety, and transportation difficulties.

§8.9. **Conclusion.** The Massachusetts Racial Imbalance Act gives the State Board of Education power to prevent a school committee from operating a school with a non-white enrollment greater than fifty per cent.[1] The Supreme Judicial Court has upheld the constitu-

[40] Id. at 503.
[41] Id. at 407.
[42] 348 F.2d 261 (1st Cir. 1965).
[43] Id. at 264-266.
[44] Id. at 264-265.
[45] Id. at 265. Cf. Taylor v. Board of Education of the City School District of the City of New Rochelle, 191 F. Supp. 181, 197 (S.D.N.Y. 1961): "Litigation is an unsatisfactory way to resolve issues such as have been presented here. It is costly, time consuming—causing further delays in the implementation of constitutional rights—and further inflames the emotions of the partisans."

§8.9. [1] See G.L., c. 71, §37D; G.L., c. 15, §11.

tionality of the statute, noting that there did not have to be an overriding legislative justification for enacting a statute embodying a racial classification.[2] Rather the Court held that since there was a rational basis for the legislative finding that racial imbalance is educationally harmful and since the racial classification was reasonably related to achieving equal educational opportunities, the statute was constitutional.[3]

Despite the measures provided by the statute, three years after its enactment many imbalanced schools still exist in the Commonwealth.[4] Perhaps it is too soon to judge the effectiveness of the act. Many school committees may have been awaiting the results of the court test before making a serious effort to implement it. Whatever the inadequacies of the legislative solution, legislation, such as the Racial Imbalance Act, is likely to be the most effective source of relief.

It is possible that Negro parents will litigate to compel the local school board to correct racial imbalance. While the trend of judicial decisions is to require state action to correct racial imbalance, the courts have employed a rule of reason approach in granting relief. They have left much to the discretion of a cooperative school committee and have not imposed an absolute duty to eliminate racial separation. Only a good-faith, reasonable effort to alleviate racial separation has been required. Thus, the legislature, and not the judiciary, may be the proper branch to correct any deficiencies in the coverage and enforcement powers of the Racial Imbalance Act.

The majority of courts considering the problems of racial separation appear to understand that there is a vicious cycle of racial problems, the core of which seems to be the racially isolated schools. These schools place upon the Negro a badge of inferiority which culminates in pervasive lack of self-confidence, serious injury to his concept of self-worth, and deterioration of the Negro as a person. As educational studies point out, integrated schools may be a way to help remove this badge of inferiority, to help the Negro child gain an attitude of self-worth, self-confidence, and a sense of dignity. The judicial trend seems to give extensive weight to the educational and psychological harm engendered, and therefore to require or to sustain affirmative state action to reduce racial separation.

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[2] School Committee of Boston v. Board of Education, 1967 Mass. Adv. Sh. 1027, 1032-1033, 227 NE.2d 729, 734 (1967).

[3] Id. at 1031-1032, 227 N.E.2d at 733, 734 (1967).

[4] There is evidence that the Racial Imbalance Act has not been successful to date. See Boston Globe, Jan. 16, 1968, at 4, col. 4.