Volume 9 | Issue 2 Article 7

1964

De Facto Segregation - The Elusive Spectre of Brown

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privacy as it has developed in the courts,[51] but obligating the advertiser, who uses another's name or photograph without authorization, by a promise implied in law to compensate the party imposed upon for the reasonable value of his services.[52] Of course the damages will vary according to the stature of the person involved and the way in which his name or photograph is used. Such relief would be a reasonable protection of the unwary against over-zealous entrepreneurs.

Nicholas C. Bozzi

DE FACTO SEGREGATION—THE ELUSIVE SPECTRE OF *BROWN*

I.

INTRODUCTION

There is no virtue in sinning against light or in persisting in palpable error, for nothing is settled until it is settled right.[1]

In 1954 the United States Supreme Court declared discrimination in public education unconstitutional.[2] This decision was a reflection of the changing philosophy of our era expressed in a new approach to constitutional rights.[3] Nine years after *Brown v. Board of Educ.*, national recog-

51. See Note, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123, 1130 (1953), where it was stated:

> In applying the right of privacy, courts have confused commercial interests with privacy interests. The result of making one doctrine do the work of two has been inadequate protection for both these interests in personality. The right of privacy gives inadequate protection to the commercial interest in one's personality because courts have placed upon the right limitations which are appropriate only to the privacy interest.

52. This view was rejected in Birmingham Broadcasting Co. v. Bell, 259 Ala. 656, 68 So. 2d 314 (1953). The court, in denying plaintiff's claim in assumpsit, stated: The only recognizable claim in respect to damages for the unauthorized use of one's photograph for commercial purposes is that it violates his right of privacy.

1. Sidney Spitzer & Co. v. Commissioners, 188 N.C. 30, 32, 123 S.E. 636, 638 (1924).

2. Brown v. Board of Educ., 347 U.S. 483, 74 S.Ct. 686 (1954). See also Brown v. Board of Educ., 349 U.S. 294, 75 S.Ct. 753 (1955); Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693 (1954).

3. The change away from the "separate but equal" doctrine was gradual. In Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232 (1938), the Court emphasized the need for real equality and rejected any attempt at mock equality. It would not suffice for a state to provide a law school at home for whites and mere fiscal aid to qualified Negroes to help them attend law schools in other states. In Sipuel v. Board of Regents of Univ. of Okla., 332 U.S. 631, 68 S.Ct. 299 (1948),

nition is afforded the duty not to discriminate in public education. Both positive and negative reactions to this duty have found their way into print.[4] But whether a corresponding duty to integrate was imposed by the *Brown* decision has not been settled. Legislatures and school boards have been left in confusion, not knowing what they must, can, or cannot do. The legal aspects of the states' role in implementing the Supreme Court's mandate will be the subject of this comment.

II.

IS THERE AN AFFIRMATIVE DUTY TO INTEGRATE?[5]

There is no doubt that *Brown v. Board of Educ.* forbids the use of governmental powers to enforce segregation,[6] but one is left without clear authority that declares whether the equal protection clause of the Fourteenth Amendment affirmatively commands integration. Both the courts[7] and the legal commentators[8] have differed on this issue. Those authorities who hold that there is no affirmative duty to integrate base their argument on the negative wording of the Fourteenth Amendment. The district court

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the Court maintained that qualified Negroes must be furnished the equivalent of legal training within the state, if they are not admitted to the state law school. When Negroes are admitted to a regular state university, they may not be segregated for purposes of scholastic activity. McLaurin v. Oklahoma State Regents, 339 U.S. 637, 70 S.Ct. 851 (1950). In Sweatt v. Painter, 339 U.S. 629, 70 S.Ct. 848 (1950), the requirement of real equality was stressed as far as to suggest that, at least in professional education, nothing less than identical treatment would satisfy the Constitution. The Court held that the Negro law school to which petitioner was admitted excluded eighty-five per cent of the state's population including most of the state's lawyers, witnesses, jurors and judges, and therefore the education was not substantially equal to that which he would receive if admitted to the University of Texas Law School.

4. For the positive reaction see, *e.g.*, Fairman, *The Attack on the Segregation Cases*, 70 HARV. L. REV. 83 (1956). Olney, *Comment, A Government Lawyer Looks at Little Rock*, 45 CALIF. L. REV. 516 (1957). For the negative reaction see, *e.g.*, Byrnes, *The Supreme Court Must Be Curbed*, U.S. News & World Reports, May 18, 1956, p. 50; Ervin, *The Case for Segregation*, Look, April 3, 1956, p. 32. Southern senators and representatives submitted separate identical "Manifestos," which declare their interpretation of Constitutional principles. This so-called "Southern Manifesto" is printed at 102 Cong. Rec. 4459, 4515 (March 12, 1956).

5. Integration as used in this comment is the attainment of a racial balance by achieving a more equal attendance in schools located in areas where such interrelationship is possible. This does not necessitate a complete numerical balance, but rather a more equal interracial mixture.

6. See, *e.g.*, Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955); Avery v. Wichita Falls Independent School District, 241 F.2d 230, 233 (5th Cir. 1957), *cert. denied*, 353 U.S. 938, 77 S.Ct. 816 (1957); Shuttlesworth v. Birmingham Board of Educ., 162 F. Supp. 372, 378 (N.D. Ala. 1958), *aff'd on limited grounds*, 358 U.S. 101, 79 S.Ct. 221 (1958); Evans v. Buchanan, 207 F. Supp. 820, 824 (D. Del. 1962).

7. See, *e.g.*, Borders v. Rippy, 247 F.2d 268, 271 (5th Cir. 1957); Evans v. Buchanan, 207 F. Supp. 820, 823 (D. Del. 1962) (no duty to integrate). *But see, e.g.*, Branche v. Board of Educ., 204 F. Supp. 150 (E.D.N.Y. 1962); McCoy v. Greensboro City Board of Educ., 283 F.2d 667 (4th Cir. 1960) (duty to integrate) (by implication).

8. See, *e.g.*, Avins, Book Review, 58 COLUM. L. REV. 428, 430-31 (1958), Comment, 38 CHI-KENT L. REV. 169 (1961) (no duty to integrate). *But see, e.g.*, Maslow, *De Facto Public School Segregation*, 6 VILL. L. REV. 353 (1961) (duty to integrate).

in Delaware, in *Evans v. Buchanan,*[9] one of many school segregation cases, stated:

> The court holds that the States do not have an affirmative, constitutional duty to provide an integrated education. The pertinent portion of the Fourteenth Amendment of the United States Constitution reads, "nor [shall any State] deny any person within its jurisdiction the equal protection of the laws." This clause does not contemplate compelling action; rather, it is a prohibition preventing the States from applying their laws unequally.[10]

The *Brown* case was construed to prohibit only school segregation based *solely* on race, and to indicate that there is no constitutional prohibition against racial separation resulting from district boundaries based on non-racial criteria[11] in the absence of "state action"[12] towards the perpetration of segregation.

The advocates of the "no duty to integrate" position argue that the Fourteenth Amendment must be applied universally without regard to race, color or nationality. To command integration in the absence of planned segregation would merely give a small minority special treatment[13] in opposition to the neutrality of the Constitution.[14]

Those who maintain that there exists an affirmative duty to integrate ground their argument upon the theory that the state must provide equal educational opportunities for all of its citizens, and upon the statement in the *Brown* case that "separate educational facilities are inherently unequal."[15] They look to the *fact* of racial separation rather than to its *cause,* and point to the resulting harm to Negro children who are deprived of association with white achievement and cultural accomplishment.[16] (They can also argue that segregated white children are deprived of association with Negro achievement and cultural accomplishment.) State legislatures must now become "color-conscious,"[17] recognizing that *de facto* segregation (the term used to categorize all-Negro or all-white schools that reflect

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9. 207 F. Supp. 820 (D. Del. 1962).
10. *Id.* at 823.
11. *Id.* at 823-24.
12. See generally Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion,* 110 U. PA. L. REV. 473 (1962); Van Alstyne & Karst, *State Action,* 14 STAN. L. REV. 3 (1961); Comment, 6 VILL. L. REV. 218 (1961).
13. Comment, *supra* note 8.
14. Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959).
15. Brown v. Board of Educ., 347 U.S. 483, 495, 74 S.Ct. 686, 692 (1954).
16. See Taylor v. Board of Educ., 191 F. Supp. 181, 193 (S.D.N.Y. 1961), *appeal dismissed,* 288 F.2d 600 (2d Cir. 1961), 195 F. Supp. 231 (S.D.N.Y. 1961), *aff'd,* 294 F.2d 36 (2d Cir. 1961), *stay denied,* 82 S.Ct. 10 (1961), *cert. denied,* 368 U.S. 940, 82 S.Ct. 382 (1961). Here the New York court stated that twenty white children in a school attended by four hundred and fifty four Negro children were not afforded the educational and social contacts and interaction evisioned by *Brown.* It should be noted that in the *Taylor* case the school board had originally gerrymandered the school district boundaries to obtain segregation, although this policy of active segregation had been dropped eleven years before the action commenced.
17. See LEVINE & MASLOW, FROM COLOR BLIND TO COLOR CONSCIOUS (1959), cited in Maslow, *supra* note 8, at 359.

the surrounding housing patterns) means inferior education for all concerned. To draw school lines without considering the ethnic composition of the resulting school districts is simply to allow the *status quo* to continue, thereby perpetuating in many communities the discredited "separate but equal" doctrine.[18]

Although the majority of courts and legal writers agree that there is no duty to integrate under the Constitution, a number of cases showing a trend towards affirmative integration have appeared.[19] Such cases find a duty to integrate only by implication. They are not clear authority for positive legislation in the area of integration.

A. *The Presumption of Unconstitutionality*

In spite of a holding that there was no duty to integrate, upon the facts, the Delaware district court in *Evans v. Buchanan*[20] still found that the school board had discriminated in drawing school boundaries. The court reasoned that the existence of a school with an all-Negro student body and faculty, administered by a separate board, raised a presumption of unconstitutionality of the pupil placement. The use of a presumption was due to the onerous task of proving racial discrimination when the legislature disavowed any discriminatory intention. Since the board had superior access to the criteria used in determining district boundaries, the court required it to overcome the presumption.[21] A presumption may affect only the burden of production, or it may also affect the burden of persuasion.[22] The Delaware district court held that the board had not come forward with enough evidence to overcome the presumption.[23] If the burden of persuasion is also shifted to the school boards, there is a possi-

18. Maslow, *supra* note 8, at 361.

19. Comment, 49 VA. L. REV. 367 (1963). The first significant step towards an affirmative duty to integrate was taken in Holland v. Board of Pub. Instruction, 258 F.2d 730 (5th Cir. 1958), which held that although the school districts were not gerrymandered, they were still drawn on a racial basis due to a city ordinance which enforced compulsory residential segregation. *Accord,* Taylor v. Board of Educ., 191 F. Supp. 181 (S.D.N.Y. 1961). Previous gerrymandering of school lines was outlawed, although there was no present policy of active segregation. Branche v. Board of Educ., 204 F. Supp. 150 (E.D.N.Y. 1962). On facts similar to those in the *Taylor* case, but where there was no finding of any previous gerrymandering, the court held the defendants were not entitled to summary judgment since they did not demonstrate that there had not been segregation because of race. Similar to the preceding three cases is McCoy v. Greensboro City Bd. of Educ., 283 F.2d 667 (4th Cir. 1960). There Negroes attempted to enter an all white school; this school became all Negro in the following year. The court held it unnecessary for plaintiffs to reapply for transfer since "their desire to attend an integrated school was completely frustrated." *Id.* at 669.

20. 207 F. Supp. 820 (D. Del. 1962). Nine Negro children petitioned to be admitted to a desegregated school outside their designated school district. Their district was all-Negro and much smaller than the all-white and predominately-white surrounding districts. Petitioners argued that the school board must affirmatively integrate and take into consideration racial factors when districts are drawn.

21. Evans v. Buchanan, 207 F. Supp. 820, 825 (D. Del. 1962). The court also found the facts of this case are "highly probative of the presumed fact."

22. Roberts, *An Introduction to the Study of Presumptions,* 4 VILL. L. REV. 1, 15-29 (1958).

23. Evans v. Buchanan, 207 F. Supp. 820, 825 & n.14 (D. Del. 1962). The school board offered little evidence other than one witness who asserted that only facilities, location and access roads were considered in drawing up the districting plan.

bility that a decision may be rendered against a defendant without any showing of actual racial discrimination.[24] Shifting the burden of persuasion appears to be based on equitable principles and is used by the courts to enforce the *Brown* decision when the facts warrant it. When the Supreme Court has decided a vital constitutional issue, the federal courts in following its mandate often disregard technicalities, which might be used to avoid deciding the same issue if the case arose as one of first impression, in order to reinforce the higher Court's decision.[25] In effect, the *Evans* case establishes an affirmative duty to integrate which may be negated only by the positive showing that racial discrimination was not a factor in drawing school boundaries.

III.

CAN THE STATE LEGISLATURES ACT TO BRING ABOUT A RACIAL BALANCE IN SCHOOLS?

De facto segregation presents an extremely complex problem for state legislatures. The courts, in holding that there is no affirmative duty to integrate, have left the state legislatures and their local school boards with the problem of whether they *can* integrate public schools. The use of race as a criterion to perpetuate segregation has been held unconstitutional. In order to accomplish integration, it appears that the same criterion of race must be used, which may still result in unequal treatment.

Until recently, the question of whether state governments can validly encourage transfers of pupils and redistricting of schools on racial grounds to achieve integration had not come before the courts. The issue arose for the first time in *Balaban v. Rubin.*[26] Due to the protests of Negro parents, civic groups, and the New York Commission on Intergroup Relations,[27] New York City adopted a policy of trying to achieve a racial balance by means of reshaping school districts and transferring Negro pupils from schools in their own neighborhood to schools in white neighborhoods.[28] In *Balaban,* a group of white parents living in East Flatbush, a predominantly white section of Brooklyn, brought a suit contesting the redistricting of their neighborhood school boundary. Negro pupils had been transported into East Flatbush schools by bus from other over-crowded sections for several years. New York school authorities had built a new junior high school, J.H.S. 275, in Brownsville, an adjacent section which was heavily populated by Negro and Puerto Rican families. Had J.H.S. 275 not been built, the children of East Flatbush would have attended

24. 63 COLUM. L. REV. 546, 553 (1963). "If *X* [racial discrimination] is an indispensable element of plaintiff's case, a presumption transferring the burden of persuasion of *non-X* to defendant permits the finder of fact, under some circumstances, to render a verdict for plaintiff in the absence of proof of *X* and thereby may render *X* inessential to a decision against defendant." Compare 15 STAN. L. REV. 681 (1963).

25. McCoy v. Greensboro City Bd. of Educ., 283 F.2d 667 (4th Cir. 1960).

26. 242 N.Y.S.2d 973 (Sup. Ct. 1963).

27. Maslow, *supra* note 8, at 366.

28. *Id.* at 366-67. The transfer program in New York City is open to all races, however, only students from over-crowded schools are permitted to transfer.

J.H.S. 285 which is located in their own neighborhood. The school zone that was initially recommended for J.H.S. 275 had a racial and ethnic composition of 52 per cent Negro, 34 per cent Puerto Rican, and 14 per cent white students.[29] This zone was rejected by the school board on the grounds that it was not centrally located, and that it would result in undesirable *de facto* segregation if adopted. The district which was finally adopted and later challenged created an enrollment of 35.2 per cent Negro, 33.5 per cent Puerto Rican and 31.2 per cent white students.

The plaintiffs contended that their children should go to J.H.S. 285 in East Flatbush. They charged that their children were barred from that school because they were white. Justice Baker pointed out that "in the ordinary course" these children would have attended their own neighborhood school, J.H.S. 285.[30] He found that the racial and ethnic balance accomplished by the new boundary was the result of a fixed purpose to bring white students into J.H.S. 275.[31] The judge held the assignment of pupils violated the spirit and intent of a New York State law which said: "No person shall be refused admission into or be excluded from any public school in the state of New York on account of race, creed, color or national origin."[32] He maintained that: "[I]t is unnecessary to consider whether respondents' determination was based, in part, on factors other than racial balance. Unquestionably, racial composition or balance was material to the Board's determination, and is incapable of separation from the other factors alleged to have been considered."[33] In effect, Justice Baker has ruled there is no legal duty to integrate, nor is there a duty to encourage reduced segregation, and furthermore, that it is a violation of New York law even to consider race as a factor in school districting, reasoning that once race is considered, it is always inseparable from the other factors. Where does this leave the legislature and its school boards—in the position of maintaining school boundaries regardless of the ethnic make-up of the neighborhood. The Pasadena (California) Board of Education had also taken a firm stand against any tampering with school zoning in declaring that it would not allow "practices by parents which alter the faithful racial representation of the geographical area served by each school."[34]

The strict approach to redistricting of neighborhood schools in Pasadena has been nullified by *Jackson v. Pasadena City School District*.[35] In this case the board removed school *A* from the city's school system. Students (all white) who lived in school zone *A* were reassigned to school *B* which remained in the system. Plaintiff, a Negro student enrolled in school *C*, alleged that the reassigned students more naturally belonged in

29. Balaban v. Rubin, 242 N.Y.S.2d 973, 975 (Sup. Ct. 1963).
30. *Id.* at 974.
31. *Id.* at 975.
32. N.Y. EDUC. LAW, § 3201.
33. Balaban v. Rubin, 242 N.Y.S.2d 973, 976 (Sup. Ct. 1963).
34. Superintendent's Bulletin No. 8, Pasadena City Schools, July 22, 1958, cited in Maslow, *supra* note 8, at 364.
35. 31 Cal. Rptr. 606, 382 P.2d 878 (1963).

school *C*, but were put in *B* to establish *C* as a segregated school. Plaintiff instituted mandamus proceedings to compel the school board to permit him to transfer to school *D*, also in the system and unquestionably integrated. The court pointed out that the school board has the power to exercise reasonable discretion in establishing attendance zones within a district, and could require students in a certain area to attend a given school. However the board's powers are subject to the exercise of the constitutional guarantees of equal protection and due process.[36] The court held that indirect state action violating the Fourteenth Amendment occurs where school zoning is merely a subterfuge for producing or perpetuating racial segregation in schools.[37] The fact that zone *C* was not changed in its physical or racial composition was no indication that discrimination was not practiced. Even in the absence of affirmative discriminatory conduct by a school board, the court held a student would be entitled to relief where, by reason of residential segregation, substantial racial imbalance exists in his school. So long as large numbers of Negroes live in segregated areas, the court continued, school boards will be faced with the problem of giving Negroes the equal education they deserve. "Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior."[38]

The California court further declared that, when segregation in schools exists, it is not enough to refrain from further affirmative discriminatory conduct. The harmful influence on children due to racial imbalance caused by geographically-based districts must be corrected. The court called attention to the fact that the State Board of Education had adopted regulations designed to avoid racial imbalance wherever possible: "It is the declared policy of the State Board of Education that persons or agencies responsible for the establishment of school attendance centers or the assignment of pupils thereto shall exert all effort to avoid and eliminate segregation of children on account of race or color."[39] The next section of the California Administrative Code establishes race as a criterion for setting up a racially-balanced school system wherever reasonably possible.[40]

36. *Id.* at 608, 382 P.2d at 880.
37. *Id.* at 609, 382 P.2d at 881.
38. *Ibid.*
39. CAL. ADM. CODE, tit. 5, § 2010.
40. CAL. ADM. CODE, tit. 5, § 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 school 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

California and New York have thus taken opposite views on the problem of racial discrimination in public education. In so doing, they represent the two major methods of attacking the "separate but equal" doctrine of *Plessy v. Ferguson*.[41] New York has adopted the position expounded by Mr. Justice Harlan in his now famous dissent in *Plessy* that our Constitution is "color-blind" and that the regulation of all civil rights, including segregation, based *"solely* upon the basis of race"[42] is unconstitutional. (Emphasis added.) California, on the other hand, seems to have adopted the sociological and psychological basis for nondiscrimination upon which the *Brown* decision rests,[43] holding that "separate educational facilities are inherently unequal,"[44] and that encouraging the law's acceptance of separate facilities adds to the inequality. California has adopted the "color-conscious" view, affirmatively acting to end the vestiges of segregation by assuming the duty to integrate wherever possible.

A. *The Neighborhood School System and Its Alternatives*

The California and New York approaches to education rely upon the neighborhood school system. Justice Baker, in effect, finds that each individual has the right to attend a school in his own chosen neighborhood[45]—a right based not on constitutional principles, but upon the American attitude toward the neighborhood school. The neighborhood school is an integral part of the community and a training ground for its leaders; its elimination could therefore result in a breakdown of the community social pattern.

Altering the neighborhood school system to eliminate *de facto* segregation may place a burden upon the Negro children who may be forced to compete with more advanced white students. It is feared that these children will be overcome by a failure complex. However, if the efforts to overcome *de facto* segregation are coupled with an assignment of special personnel to aid the children (such as counselors, remedial mathematics and reading teachers, and cultural enrichment teachers), the failure complex can be overcome.[46]

As basic as the neighborhood school system appears to be in the traditional American approach to education, other methods may work just as well. The "Princeton Plan" offers a relatively simple method of achieving a racial balance in areas where Negro and white schools are in close proximity. Such a balance was achieved in Princeton, New Jersey, where

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

41. 163 U.S. 537, 16 S.Ct. 1138 (1896).
42. *Id.* at 559, 16 S.Ct. at 1146.
43. Brown v. Board of Educ., 347 U.S. 483, 494 n.11, 74 S.Ct. 686, 692 n.11 (1954).
44. *Id.* at 495, 74 S.Ct. at 692.
45. Balaban v. Rubin, 242 N.Y.S.2d 973, 974 (Sup. Ct. 1963).
46. Maslow, *supra* note 8, at 374-76. Students in an experimental project of a *de facto* segregated school showed gains in all phases of their education when such special personnel were added to the school.

school authorities assigned all children in the first three grades to one school in a Negro area and the other three grades to a second school outside the area.[47] Other school systems maintain a policy of allowing a child to attend any school, provided that the school has room for him after enrolling children from the neighborhood. However, this plan has not brought about a racial balance in Philadelphia, perhaps because of the general problem of over-crowded schools prevalent in most districts.[48]

B. *De Facto Segregation as a Violation of the "Equal Protection" Clause*

If the neighborhood school is not guaranteed to the individual, either constitutionally or by tradition, the state is free to adopt any plan. In adopting a school system that results in segregation the state may deprive the Negro of his constitutional right to equal protection of the law under the Fourteenth Amendment.

The boundaries of school zones are normally drawn along neighborhood lines. Where racial imbalance exists it is usually caused by the fact that the Negro population tends to concentrate in certain areas, primarily because of economic factors and discriminatory housing practices.[49] The right to live wherever one wishes is fundamental, and if an individual wishes to live in areas containing his own ethnic group, this right cannot be challenged by the courts.

In the *Civil Rights Cases*[50] the Supreme Court decided that the Fourteenth Amendment placed no restrictions on the acts of private individuals. Negroes who had been denied access to threatres and inns solely because of their race, petitioned the Court for redress. The Court held the Civil Rights Act of 1875,[51] which made it a federal crime for the owners of public conveyances, theatres, and other places of public amusement to deny anyone the full and equal enjoyment of their accommodations, to be beyond the constitutional authority granted Congress by the Thirteenth and Fourteenth Amendments. From this landmark case, the doctrine of "state action" evolved. The fundamental right to equality was protected only from "state" interference, and not from "private" discriminatory practices.

It was generally believed that judicial enforcement of private discrimination did not constitute state action.[52] In 1948 the Supreme Court, in *Shelley v. Kraemer*,[53] held that the enforcement of a racially restrictive covenant by a state court was a violation of the equal protection clause of

47. *Id.* at 362.
48. *Id.* at 363. Only 5,000 out of 243,000 children attend schools outside their home boundaries.
49. Weaver, *Integration in Public and Private Housing*, 304 ANNALS 86 (1956).
50. 109 U.S. 3, 3 S.Ct. 18 (1883).
51. 18 Stat. 335 (1875).
52. See, *e.g.*, Los Angeles Inv. Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1920); Queensborough Land Co. v. Cayeaux, 136 La. 724, 67 So. 641 (1915). *But see* Gandolfo v. Hartman, 49 Fed. 181 (S.D. Cal. 1892).
53. 334 U.S. 1, 68 S.Ct. 836 (1948).

the Fourteenth Amendment. Following the Court's logic, it would appear that all state judicial enforcement of private discrimination would entail "state action," resulting in the denial of equal protection. However, the Court, as yet, refuses to expand the holding of *Shelley* beyond restrictive covenants.[54] Despite this refusal, the case remains a potential weapon against all forms of private discrimination.

The drawing of school boundaries along the lines of privately segregated neighborhoods may be deemed an encouragement of such discrimination by the state since they reflect the existing racial segregation. These boundaries would then be unenforceable by the courts as violative of the Fourteenth Amendment. The school board may, on the other hand, present reasons for establishing boundaries along the lines of the segregated neighborhoods unconnected with the issue of race. Factors such as proximity to the school, the cost of transportation, avoidance of traffic hazards, and the maximum utilization of all school space in the system may contribute to the determination of boundaries. Does this mean that *de facto* segregation based on the neighborhood school system cannot be challenged if these factors can be shown? This question may be answered by an examination of the recent social trespass cases.[55]

C. *The Social Trespass Cases*

The Supreme Court has found state action in social trespass cases in many varying and unique ways. It has expanded the concept of state action[56] without relying on the logic of judicial enforcement expounded in the *Shelley* decision. However, in so doing, the Court has come nearer and nearer to adopting the *Shelley* rationale.[57] In the case of *Burton v. Wilmington Parking Authority*[58] the state was held responsible for allowing discrimination which, as a lessor, it could have prevented. The state of Delaware was the owner of a restaurant which was constructed as part of a complex of parking and other facilities. The restaurant had been built by the state on public land partly with public funds and was then leased to private individuals for operation. The lessee of the restaurant refused to serve a Negro patron solely because of his race, and the Supreme Court found sufficient "state action" to violate the Fourteenth Amendment. Following the logic of the *Burton* case, it appears that there is state action whenever the state could *prevent* discrimination for which it has been *in some way responsible.* The state could *prevent* racial im-

54. See Gordon v. Gordon, 332 Mass. 197, 124 N.E.2d 226 (1955), *cert. denied,* 349 U.S. 947, 75 S.Ct. 875 (1955) (court enforced discriminatory provisions in a will, held not state action); *In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844 (1958), *cert. denied sub nom.* Pennsylvania v. Board of Directors of City Trusts, 357 U.S. 570, 78 S.Ct. 1383 (1958) (court enforcement of discriminatory terms in a trust not state action).

55. The term "social trespass" is used to describe racially discriminatory conduct in public accommodations.

56. See generally Henkin, *supra* note 12; Van Alstyne & Karst, *supra* note 12; Comment, *supra* note 12.

57. 9 VILL. L. REV. 129.

58. 365 U.S. 715, 81 S.Ct. 856 (1961).

balance in schools by redrawing boundaries, and the state is *in some way responsible* for the imbalance since it has chosen to allow private discrimination in residential areas.

The Supreme Court avoided "state action" considerations in the first two "sit-in" cases.[59] In *Boynton v. Virginia*[60] the Court held that a passenger on an interstate trip has a federal right to be served by a restaurant without discrimination. In *Garner v. Louisiana*[61] the Court held under similar circumstances that there was not sufficient evidence of voluntary discrimination to convict the petitioners. However, in *Peterson v. City of Greenville*[62] the Court held the presence of a statute requiring segregation in restaurant facilities created state action, no matter how voluntary the private discrimination might be. Finally, in *Lombard v. Louisiana,*[63] though no legislative statute was present to enforce discrimination, the Court found "state action" in speeches by the mayor and police chief of New Orleans which directed continuance of segregated service in private restaurants, and prohibited any conduct by either white or Negro towards its discontinuance. The Court treated the two speeches as if they were ordinances prohibiting integrated restaurants.

The Supreme Court has been drawing closer to the rationale expressed in the concurring opinion of Mr. Justice Douglas in the *Lombard* case. He maintained that due to changes in our times, the courts, by enforcing criminal statutes which foster segregation, "are denying some people access to the mainstream of our highly interdependent life solely because of their race,"[64] in violation of the principles expressed in the *Shelley* case. Restaurants are only "nominally" private since they serve the public. Moreover, state licensing and surveillance of such businesses involves a service to the public and the owner rather than mere income-producing activities.[65]

Justice Douglas takes the position that the Fourteenth Amendment keeps the "mainstream" of American life open to all. The principle of *Shelley* prevents a private discrimination from being enforced by courts when such discrimination reaches the level of blocking off part of the "mainstream" solely because of race. Since the Fourteenth Amendment protects the rights of the individual, it guarantees the rights of not only the discriminated, but also the offending individual. In choosing whether to enforce a private discrimination, the court must balance the rights of these two opposing parties taking into consideration all factors which may have led to the discriminatory conduct. Race may not be the sole reason for discrimination.

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59. "Sit-in" cases involved the conviction of petitioners under a criminal statute for violating the private property rights of a restaurant owner.

60. 364 U.S. 454, 81 S.Ct. 182 (1960); 6 VILL. L. REV. 416 (1961).

61. 368 U.S. 157, 82 S.Ct. 248 (1961).

62. 83 S.Ct. 1119 (1963).

63. *Id.* at 1122.

64. *Id.* at 1128.

65. *Id.* at 1130.