Volume 46 | Number 2 Article 3

2-1-1968

Teachers and the Fourteenth Amendment -- The Role of the Faculty in the Desegregation Process

Hal R. Lieberman

TEACHERS AND THE FOURTEENTH AMENDMENT—THE ROLE OF THE FACULTY IN THE DESEGREGATION PROCESS

by HAL R. LIEBERMAN‡

I. INTRODUCTION

A recent survey conducted on a national scale by the United States Office of Education found that:

> For the nation as a whole, the average Negro elementary pupil attends a school in which 65 percent of the teachers are Negro; the average white elementary pupil attends a school in which 97 percent of the teachers are white. White teachers are more predominant at the secondary level, where the corresponding figures are 59 and 97 percent. The racial matching of teachers is most pronounced in the South, where by tradition it has been complete. On a nationwide basis, in cases where the races of pupil and teachers are not matched, the trend is all in one direction: white teachers teach Negro children but Negro teachers seldom teach white children. . . .[1]

In addition, it was found that:

> The average Negro pupil attends a school where a greater percentage of the teachers appear to be somewhat less able as measured by rough indications of teacher quality (as years of teaching experience, salary, educational level of mother, and scores on a short verbal ability test) than those in schools attended by the average white student. . . .[2]

These facts point to serious inequalities in our system of public education that were not expressly considered fourteen years ago when the Court in *Brown v. Board of Education*[3] held that officially enforced segregation in the public schools violated the fourteenth

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‡ A.B., University of Chicago, 1964; LL.B., Harvard University, 1967; Instructor, Shaw University.

[1] OFFICE OF EDUCATION, EQUALITY OF EDUCATIONAL OPPORTUNITY 3 (J. Coleman ed. 1966) [hereinafter cited as COLEMAN REPORT]. The survey was conducted pursuant to Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-1 (1964). For a discussion of some of the survey's findings see Jencks, *Education: The Racial Gap*, THE NEW REPUBLIC, Oct. 1, 1966, at 21-26.

[2] COLEMAN REPORT 12.

[3] 347 U.S. 483 (1954) (Brown I).

amendment. In the past few years, however, civil rights litigators have come to recognize the importance of this facet of the desegregation process. Increasingly they request that relief include some provision for faculty desegregation and equalization of educational facilities, including equal allocations of faculty resources. A major breakthrough occurred when the federal government, through the Department of Health, Education, and Welfare, recognized the pressing need for faculty and staff desegregation in its Guidelines governing nondiscriminatory requirements for federal aid to public elementary and secondary schools (pursuant to Title VI of the Civil Rights Act of 1964).[4]

The purpose of this article is to explore in some depth the legal, social, and practical implications of these developments. Of primary concern will be the relation of teacher desegregation and equalization of faculty quality to the constitutional rights of *pupils* to equal educational opportunities. Although the problem of employment discrimination inherently arises, that issue will not be a major focus of the discussion.[5]

This article will deal first with the teacher problem from a legal viewpoint, analyzing in some detail the main features of litigation to date—standing, the "state action" requirement of the fourteenth amendment, and the nature of harm which allegedly constitutes a deprivation of equal educational opportunity. The issue of "harm" will be further explored in separate analyses of "racial" allocation and "unequal" allocation of teachers, with some attention devoted to empirical evidence tending to substantiate theoretical conclusions. A short summary of federal programs constitutes the following section.

Underlying theoretical and empirical justifications for nonracial and equal faculty allocation is the assumption that viable remedies exist. It is often said of today's Supreme Court, that where the harm is sufficiently serious a way will be found to right the wrong.[6] Yet the practical barriers to alleviation of deprivation

[4] 42 U.S.C. § 2000d (1964); 45 C.F.R. § 181.13 (1967).

[5] See Wall v. Board of Educ., 378 F.2d 275 (4th Cir 1967); Franklin v. School Bd., 360 F.2d 325 (4th Cir. 1966); Chambers v. Board of Educ., 364 F.2d 189 (4th Cir. 1966); Brooks v. School Dist., 267 F.2d 733 (8th Cir. 1959), *cert. denied,* 361 U.S. 894 (1959).

[6] *Cf.* Baker v. Carr, 369 U.S. 186 (1961).

are very great; for, as will be argued, a successful resolution of the faculty problem is heavily dependent on the general progress of pupil desegregation in the public schools. The concluding section, which contains the discussion of remedy, will be divided into two categories: contemporary southern problems and northern metropolitan problems.

II. Legal and Empirical Bases for a Requirement to Eliminate Racial Segregation and Unequal Allocation of Teachers—Constitutional Litigation

The problem of teacher allocation based on racial considerations is new to the law. Prior to 1965, the United States Supreme Court never expressly considered racially-motivated allocation of faculty in the public schools.[7] 1965 also marks the first time a branch of the federal government dealt with teacher segregation specifically,[8] pursuant to the Civil Rights Act of 1964. Most of the constitutional "common law" of teacher litigation has evolved in the lower federal courts, and only in the last few years. In addition, recent federal statutory provisions related to teachers and the civil rights of minorities are scant and ill-defined. Set forth below are the main cases and federal statutes which deal with teachers and the deprivation of constitutional rights of pupils under the fourteenth amendment.

A. Standing to Sue

Where teachers are discriminatorily hired, assigned, demoted, promoted, or dismissed, both pupils and teachers have standing to sue. The right of a pupil to bring suit is based on the broad proposition that his rights to a nondiscriminatory education are directly affected by employment practices of school boards. In this connection, the Supreme Court stated in *Bradley v. School Board* that: "petitioners [pupils] were entitled to such full evidentiary hearings upon their contention [that faculty segregation deprived them of their rights]. There is no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the ade-

[7] See Bradley v. School Bd., 382 U.S. 103 (1965); Rogers v. Paul, 382 U.S. 198 (1965).

[8] *See* note 4 *supra.*

quacy of the desegregation plans is entirely speculative."[9] The Court reiterated this position in the companion case of *Rogers v. Paul.*[10]

Teachers have been granted standing on differing theories: as victims of injurious discrimination caused by school board *employment* practices[11] and as representatives of third parties (*i.e.* students).[12] Moreover, the arguments made by several commentators[13] in support of the doctrine of "jus tertii," which allows teachers standing to raise the rights of third parties, would also seem to be applicable to the standing of pupils (on behalf of teachers). The requisite elements would seem to be present where, as here: both parties have an interest in the adjudication; the asserted right is sufficiently important; there is a close relationship between plaintiff and the party whose right is allegedly violated; and it is not practical for the third party to assert his own rights.[14]

An additional basis for standing has been found where the party alleging discrimination is an organization or association. In *Smith v. Board of Education*[15] the court granted standing to the Arkansas Teachers' Association as a "real party in interest" under Rule 17(a) of the Federal Rules of Civil Procedure. The court held that in spite of the absence of certain parties-plaintiff, and in spite of the fact that the Arkansas Teachers' Association technically was not itself a member of a class for which relief was sought, standing was permissible in light of other factors present which dictated a liberal evaluation of the requirement. In particular, the court mentioned the public policy interest in nondiscrimination where the pupil-faculty relationship is affected.

It is now evident that the courts have adopted a flexible approach to standing, the theoretical basis for which is further justified by the findings in a more extensive analysis of harm to pupils appearing

[9] 382 U.S. 103, 105 (1965). The practical effect of this decision was to promote greater judicial economy by reducing the amount of litigation necessary to complete desegregation of school systems.

[10] 382 U.S. 198, 200 (1965). *See also* Betts v. School Bd., 269 F. Supp. 593, 602 (W.D. Va. 1967); Lee v. Bd. of Educ., 267 F. Supp. 458, 472 (M.D. Ala. 1967); Kier v. School Bd., 249 F. Supp. 239, 245-46 (W.D. Va. 1966).

[11] *See* note 5 *supra.*

[12] *See* Adler v. Board of Educ., 342 U.S. 485 (1952); Brewer v. School Dist., 238 F.2d 91 (8th Cir. 1956).

[13] See Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 YALE L.J. 599 (1962); 51 IOWA L. REV. 681, 688-89 (1966).

[14] *See* p. 317 *infra.*

[15] 365 F.2d 770 (8th Cir. 1966).

later in this article. However, litigators still face tactical problems in this area. For example, a question of legal strategy may arise where employment discrimination (necessary if the suit is teacher-oriented) is harder to prove than deprivation of equal educational opportunity (if the suit is pupil-oriented), as suits have generally been less successful when pursued from the former standpoint.[16]

But without doubt, the main problem facing lawyers is the great susceptibility of teachers in certain areas to sanctions or other pressures from school officials or from the general community.[17] Hence, it may often be very difficult to find Negro teachers who wish to alter the status quo. Integration and school consolidation have simply meant loss of employment for many Negro teachers in the rural South. In counties where "free choice" plans have been adopted, Negro teachers frequently are known to encourage Negro children to "stay with their own kind."[18] In the North, where there exist acute shortages of teachers, Negro teachers do not feel this economic urgency to maintain the segregated status quo, but often other psychological or political factors may create a similar unwillingness to be part of teacher desegregation suits.[19] Thus it is probably safe to conclude that for purely expedient reasons, most teacher desegregation suits will continue to be brought by pupils concerned with protection of educational rights.

B. The "State Action" Requirement of the Fourteenth Amendment

The equal protection clause of the fourteenth amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." In teacher desegregation and equalization suits, the requirement of "state action" is satisfied where school boards, as "officials" of the state, affirmatively determine which teachers are hired, where they are to be assigned, on what basis they are promoted or demoted, and for what reasons they are dismissed. A real problem may arise, however, where racial and other staffing patterns are based in large measure on

[16] The concept of "jus tertii" described in Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962), also renders this approach somewhat unnecessary. Furthermore, it may be more consistent with requested remedies—such as preferential rehiring—to found the suit on a pupil-oriented theory. *See* pp. 355-56 *infra*.

[17] Brewer v. School Dist., 238 F.2d 91 (8th Cir. 1956).

[18] *See* Knowles, *School Desegregation*, 42 N.C.L.REV. 67, 78 (1963).

[19] *Id.* at 79.

the voluntary decisions of teachers themselves, or upon factors beyond the immediate control of the school board.

Arguably, purposeful segregation is unconstitutional, even where it results from state *inaction* rather than positive interference.[20] In a recent case before the domestic relations court of New York City, *Matter of Skipwith*,[21] the question arose whether a violation of equal protection could be based on discriminatory staffing patterns in city schools, even though discrimination was due to "voluntary" decisions of teachers themselves, where the board had, by default, put the power of assignment in the hands of its teachers. The court replied:

> That the Board of Education is entirely responsible for the existing discrimination in teacher assignments, there is in my opinion, not the slightest doubt. . . . The assigning of teachers is the exercise of a governmental function. It is no less the exercise of such a role if performed by teachers, rather than an Assistant Superintendent of Education, or the Superintendent of Education, or the Board itself.[22]

The result reached by the New York court has been criticized on the grounds that the court did not properly consider the board's serious problems with respect to teacher shortages and its other "good faith" efforts to allocate equally physical resources (buildings, texts, and so on).[23] While this criticism raises a host of issues on the merits of the discrimination allegation[24] and the problems of remedy,[25] for present purposes the question is whether obstacles such as teacher shortage excuse board acquiescence in, and therefore responsibility (in the "state action" sense) for the continued unequal allocation of teachers, or, in other instances, racial assignment patterns.

In the recent and very significant litigation involving numerous allegations of illegal discriminatory practices within the school sys-

[20] Webb v. Board of Educ., 223 F. Supp. 466 (N.D. Ill. 1963).

[21] 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. 1958). The New York City Board of Education brought an action for child neglect against parents who refused to send their children to schools to which they had been assigned, on the ground that educationally inferior opportunities were discriminatorily offered at those schools based on evidence of racial imbalance and unequal allocation of faculty.

[22] 180 N.Y.S.2d 852, 871.

[23] 107 U. PA. L. REV. 1053, 1058 (1959).

[24] *See* p. 322 *infra.*

[25] *See* p. 350 *infra.*

tem of the District of Columbia, Judge J. Skelly Wright had occasion in his exhaustive opinion to comment upon exactly this question. In typically conclusive fashion, he argued:

> But if any truth is axiomatic, it is that the Negro *students'* equal protection rights to an integrated faculty cannot be undermined or thwarted by the racially induced preferences of the teachers who, after all are minor public officials whose actions must therefore pass constitutional muster. *Rogers* unquestionably extends to every situation in which teacher segregation results from the deliberately segregatory decision of any public officer, or from a pattern of such decisions. Ultimate authority for teacher assignment under the law is vested in the Board of Education. It cannot avoid constitutional responsibility when public officers, including teachers, to whom it delegates the actual assignment power govern themselves according to illicit racial criteria.[26]

Thus it would seem that regardless of pressures under which the New York or District of Columbia School Boards seem to operate, they clearly may not avoid responsibility for "voluntary" staffing patterns which perpetuate the old order of faculty segregation. As Judge Wright observes, it has been clear from the outset (1954) that most teachers are naturally reluctant to depart from schools where they are established and voluntarily attempt to secure transfers into institutions from whose faculties they have previously been barred because of their race.[27] Obviously, for a school board to do nothing in such a situation is simply to maintain teacher segregation and consequently to perpetuate the effects of past discrimination in the classic sense of the concept as presently applied.

True, a board of education may indeed face difficult alternatives when it must decide how to allocate resources or whether, as the New York City Board of Education chose, simply to abdicate responsibility on the ground that the threat of a teacher shortage (*i.e.* no education) is worse than unequal or damagingly inferior

[26] Hobson v. Hansen, 269 F. Supp. 401, 502 (D.D.C. 1967).

[27] *Id.* at 426. *See also* Kelley v. School Dist., 378 F.2d 483, 494 (8th Cir. 1967). For an interesting analogy to the general problem of racial staffing patterns arising in the treatment of racial imbalance (de facto segregation), see I COMM'N ON CIVIL RIGHTS, REPORT ON RACIAL ISOLATION IN THE PUBLIC SCHOOLS 245 (1967) [hereinafter cited as COMMISSION REPORT]. *See* Barksdale v. School Comm., 237 F. Supp. 543 (D. Mass. 1965), *rev'd on other grounds*, 348 F.2d 261 (1st Cir. 1965); *but see* Deal v. Board of Educ., 369 F.2d 55 (6th Cir. 1966).

education. Yet there is force to the contention that if the situation was originally state-created, the state or subdivision thereof should be held accountable in all circumstances for the present crisis.[28] And this result should apply whether the present context of *past discriminatory* effects is northern "de facto" segregation or the easier case of southern ex-"de jure" segregation.

C. *The Nature of the Constitutional Deprivation*

Deprivation of equal educational opportunity may assume many forms. There seem to be two major ways, however, in which the allocation of *teachers* may result in this deprivation: (1) allocation by race and (2) unequal distribution of teaching resources. Because theoretical origins of the unconstitutionality of each form of allocation are different, they require separate analysis. However, I shall argue that *both* constitute, under all circumstances of contemporary significance, deprivations of equal educational opportunity guaranteed by the equal protection clause of the fourteenth amendment.

1. The Racial Segregation of Teachers

Although, up to now, the Supreme Court has refused to adopt an explicit requirement of faculty desegregation, it is evident from recent decisions that the Court is moving in that direction.[29] After the first *Brown* decision one might have inferred a direct requirement of faculty desegregation as part of the total desegregation process, based on the following language: "To separate them from others of similar age and qualifications solely because of their race *generates a feeling of inferiority* as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[30] The theory would run, extrapolating from *Brown*, that racial segregation of any kind in school "generates a feeling of inferiority" which is irreparably damaging. Thus, to alleviate this occurrence schools must desegregate in all phases of

[28] *See* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 584-85 (1965). See generally Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Comment, *'Equal Protection' and the Neighborhood School*, 13 CATHOLIC UNIV. L. REV. 150 (1964).

[29] Bradley v. School Bd., 382 U.S. 103, 105 (1965); Rogers v. Paul, 382 U.S. 198, 200 (1965).

[30] Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (Brown I) (emphasis added).

operation which "may effect their hearts and minds," including allocation of faculty in a way that identifies schools by race.

This interpretation, however, did not rise to the level of constitutional obligation because of the second *Brown* decision.[31] In that opinion the Court, in the context of defining "good faith compliance," said: "To that end, the courts *may* consider problems related to administration, arising from . . . personnel . . . which *may* be necessary in solving the foregoing problems."[32] Thus, faculty desegregation became discretionary.

Because of the slow progress of pupil desegregation in the deep South since *Brown II*,[33] the Supreme Court has since reconsidered its 1955 meaning of "good faith compliance." In 1965 two cases came down which indicate a new current of thinking on measures required to dismantle the dual school structure. The Court indicated in *Bradley v. Board of Education* that faculty desegregation is now clearly more than "speculative" in relation to the adequacy of school plans, though still less than required in all cases.[34] And again in *Rogers v. Paul* the Court articulated several bases for directly challenging racial allocation of faculty, but also declined committment on the merits. These theories were: "(1) that racial allocation of faculty denies [to pupils] equality of educational opportunity without regard to segregation of pupils; and (2) that it renders inadequate an otherwise constitutional pupil desegregation plan soon to be applied to their grades."[35] How soon the Court will decide the faculty issue on its merits, and on what grounds, is uncertain. But it is now clear the Court views faculty segregation as constitutionally significant, at least in relation to those still subject to the remnants of the dual school system.

A majority of lower Federal courts agree, especially since 1965, that faculty segregation is unconstitutional. The rationales for these holdings of constitutional violation most frequently offered by courts and commentators can be broadly divided into three categories: discriminatory racial classification, impairment of the overall desegregation process, and educational and psychological damage

[31] Brown v. Board of Educ., 349 U.S. 294 (1955) (Brown II).
[32] *Id.* at 300-01 (emphasis added).
[33] For a general discussion of the progress of southern school desegregation, see Leeson, *The Deliberate Speed of Title VI*, SATURDAY REVIEW, December 17, 1966, at 74.
[34] 382 U.S. 103 (1965).
[35] 382 U.S. 198, 200 (1965).

(different from, but often related to, the "harm" resulting from pupil segregation).

(a) Discriminatory Racial Classifications

A number of post-*Brown* per curiam decisions, not related to education, have made it apparent that the principles enumerated in *Brown*, and the acts proscribed, did not depend on a showing of harmful inequality. Rather, in these cases, as in *Brown*, it was sufficient that Negroes were separated from whites but offered equal or identical facilities.[36] In a recent Fifth Circuit opinion upholding the validity of the 1966 U. S. Department of Health, Education, and Welfare Guidelines on southern school desegregation, Judge Wisdom, speaking for the three-judge court, stated:

> The *Brown I* finding that segregated schooling causes psychological harm and denies equal educational opportunities should not be construed as the sole basis for the decision. . . . We think that the judgment 'must have rested on the view that racial segregation is, *in principle*, a denial of equality to the minority against whom it is directed. . . .' The relief *Brown II* requires rests on recognition of the principle that state-imposed separation by race is an invidious classification and for that reason alone is unconstitutional.[37]

A number of other circuits have also adopted the view that invidious racial classifications related to faculty assignments (or to any other phase of school operations) are discriminatory per se.[38] In sum, the teaching of these cases is that, be it segregation in public parks, public court houses, or of teachers in public schools, where

[36] Schiro v. Bynum, 375 U.S. 395 (1964) (municipal auditoriums); Johnson v. Virginia, 373 U.S. 61 (1963) (courtrooms); Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (athletic contests); Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks and golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Bolling v. Sharpe, 347 U.S. 497 (1954) (racial classifications in public education are per se denials of due process). *See also* Burton v. Parking Authority, 365 U.S. 715 (1961) (restaurants in public buildings).

[37] United States & Stout v. Board of Educ., 372 F.2d 836, 871 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3138, 3144 (Oct. 9, 1967) (emphasis added). *See also* COMM'N ON CIVIL RIGHTS, SURVEY OF DESEGREGATION IN SOUTHERN AND BORDER STATES 57 (1965-66).

[38] Wall v. Board of Educ., 378 F.2d 275 (4th Cir. 1967); Smith v. Board of Educ., 365 F.2d 770 (8th Cir. 1966); Chambers v. Board of Educ., 364 F.2d 189 (4th Cir. 1966); Deal v. Board of Educ., 369 F.2d 55 (6th Cir. 1966). *But see* Downs v. Board of Educ. 336 F.2d 988, 997 (10th Cir. 1965).

the basis of separate treatment is race, the policy of separation is forbidden by the equal protection clause.

(b) Impairment of the Desegregation Process

The basis for the allegation that faculty segregation is unconstitutional because it jeopardizes the overall desegregation process lies in the language of *Brown II*:

> [A]t stake is the personal interest of plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles [of the first *Brown* decision].[39]

As previously mentioned, the Court recently revitalized this language in *Bradley* when it decided that petitioners were entitled to full evidentiary hearings upon their contention that faculty desegregation is unconstitutional because of the relation between faculty allocation on a racial basis and the adequacy of a desegregation plan.[40]

In addition, most lower courts have now concluded that teacher desegregation is constitutionally required as "an inseparable and indispensable command within the abolition of pupil segregation in public schools as pronounced in[*Brown I*]."[41] The uniform assumption of these cases is that faculty segregation *always* "encourages pupil segregation and is detrimental to achieving a constitutionally required non-racially operated school system."[42]

This contention, it would appear, is applicable to the North as well as to the South. In the far-reaching *Hobson v. Hansen* decision, Judge Wright has argued that if faculty segregation is unconstitutional in the context of southern free choice plans because it

[39] Brown v. Board of Educ., 349 U.S. 294, 300 (1955) (Brown II).

[40] Bradley v. School Bd., 382 U.S. 103, 105 (1965).

[41] Kelley v. School Dist., 378 F.2d 483, 491 (8th Cir. 1967); Wheeler v. Board of Educ., 363 F.2d 738, 740 (4th Cir. 1966); Smith v. Board of Educ., 365 F.2d 770, 778 (8th Cir. 1966); Betts v. School Bd., 269 F. Supp. 593, 601 (W.D. Va. 1967); Wright v. School Bd., 252 F. Supp. 378, 383-84 (E.D. Va. 1966); Kier v. School Bd., 249 F. Supp. 239, 246 (W.D. Va. 1966); Brown v. School Bd., 245 F. Supp. 549, 560 (W.D. Va. 1965). And see Comment, *The HEW School Desegregation Guidelines*, 2 HARV. CIV. LIB.-CIV. RIGHTS L. REV. 86, 103-05 (1966).

[42] Clark v. Board of Educ., 369 F.2d 661, 669 (8th Cir. 1966). *But see* Bell v. School Bd., 249 F. Supp. 249 (W.D. Va. 1966); Monroe v. Board of Comm'rs, 244 F. Supp. 353 (W.D. Tenn. 1965).

always encourages pupil segregation, then clearly it is unconstitutional in the setting of the North's neighborhood school systems as well. Since the neighborhood school system results in the assignment of Negro students to schools defined (in part) by Negro faculties, "the race of the student body in effect serves as the predicate for an official decision—assignment of a teacher—which in turn confirms and solidifies the school's racial character."[43]

Thus in both the North and the South, courts have increasingly recognized that teacher segregation and pupil segregation tend mutually to reinforce each other. As Judge Wright indicates, if southern teacher segregation, in itself unconstitutional, makes the free choice plan unconstitutional by influencing students' choice of schools, then northern teacher segregation is even more destructive of otherwise valid student assignment patterns, where it is allowed to reinforce pupil segregation under the guise of a nondiscriminatory neighborhood school system.[44]

At best it is difficult to analyze statistically the general relationship between faculty segregation and the progress of pupil desegregation, or, even more basically, a nondiscriminatory school system. However, statistical correlations are unavoidably present in many parts of the country.[45]

The correlation between faculty segregation and the slow progress of pupil desegregation is most apparent in the South. Coleman reports[46] the average Negro elementary school pupil in the non-metropolitan South[47] in the Fall of 1965 was taught by Negro

[43] Hobson v. Hansen, 269 F. Supp. 401, 503 (D.D.C. 1967).

[44] *Id.* at 503. *See* note 27 *supra.*

[45] The two main sources of the following data are the COLEMAN REPORT and the COMMISSION REPORT. Several caveats are in order. The problem of race, in any phase of educational behavior, has only recently been studied on a national scale. Much of the data is scant, and the methods are uncertain. Education is largely individual; national or large-scale analyses are by definition general. As in most matters of human behavior, relationships are complex. Local differences often affect results. And finally, it is important to appreciate the distinction between "correlation" and "causation." The figures and findings presented here represent correlation. They do not prove a given incident or factor was the *cause* of another incident or event. This notion should not, of course, prevent an inference of causation where correlation is high.

[46] COLEMAN REPORT 16-18, tables 6a, 6b & 7.

[47] *Id.* at 9. Data for most tables was classified by geographic region. The South was defined as: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia. It is important to note that Coleman's statistics do not measure what may be the most significant factor in an analysis of the effect

teachers 90 percent of the time; he also tended to be in classes with mostly white classmates 17 percent of the time. In the metropolitan South in the Fall of 1965 the average Negro elementary school pupil was taught by Negro teachers 96 percent of the time; correspondingly, he tended to be in classes with mostly white classmates only 7 percent of the time. In the non-metropolitan Southwest[48] in the Fall of 1965 the average Negro elementary school pupil was taught by Negro teachers 75 percent of the time; he tended to be in classes with mostly white classmates 19 percent of the time. In the metropolitan Southwest in the Fall of 1965 the average Negro elementary school pupil was taught by Negro teachers 65 percent of the time; he tended to be in classes with mostly white classmates 27 percent of the time.

Comparing the four localities, the extent of teacher desegregation seems to be directly proportional to the progress of pupil desegregation; where Negro students are less likely to be taught by Negro teachers they are also more likely to be in classes with mostly white classmates.

A recent survey shows that until the 1966-1967 session, not a single Negro teacher in Alabama, Mississippi, or Louisiana had been assigned to a school where there were white teachers.[49] Prior to 1966-1967 these same states also had the lowest figures in the South for percentage of Negroes enrolled in schools with whites—each had one percent or less.[50]

Most of the South and Southwest which, prior to 1954, officially sanctioned school segregation, have adopted "freedom of choice" as a method of complying with current constitutional and statutory requirements. The "freedom of choice" plan presents many difficulties for Negroes desiring for the first time to attend integrated schools. It places the heavy burden of desegregation upon them. The United States Commission on Civil Rights made the following comments on the relation of faculty segregation to effectiveness

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of teacher segregation on pupil desegregation efforts: that is, the percentage of Negroes attending schools in which faculties are entirely or predominantly of one race (segregated). The visibility factor is a most significant aspect of the relation between faculty and pupil desegregation.

[48] *Id.* Coleman defines the Southwest as: Arizona, New Mexico, Oklahoma, and Texas.

[49] Department of Health, Education, and Welfare (Office of Education) Release, table III (Sept. 27, 1965).

[50] *See* Lee v. Board of Educ., 267 F. Supp. 458, 473 (M.D. Ala. 1967). *See also* SATURDAY REVIEW, December 17, 1966, at 88.

of "free choice" plans in metropolitan areas of the South in its 1967 Report:

> There are other factors that also impede desegregation under free choice plans. A prerequisite to the exercise of free choice by white and Negro students would appear to be the elimination of racial identity of schools. The racial identity of Southern schools, however, is maintained in a variety of ways. One is the continued segregation of teaching staff. In Houston, for example, only 6 of the city's more than 200 schools had any desegregation of their full-time staffs in 1965. This involved only 17 out of 9,500 teachers in the city. In Louisville, 84% of Negro teachers taught at schools more than 90% Negro. In Atlanta, only 4 out of 59 schools 90% or more Negro had any white teachers in 1965. In Baltimore, 85% of the Negro staff were in schools more than 90% Negro in 1965. The story is the same in many other cities.[51]

It is probably fair to conclude that a number of factors tend to inhibit exercise of "free choice" by southern Negroes in the direction of integration. These may include, in addition to "symbolic" inhibition where faculties remain segregated, community hostility, covert discouragement by school officials, fear of academic failure due to past educational deprivation, and traditional patterns of behavior created by past discrimination. Nonetheless, it is significant that a strong statistical relationship exists between pupil cross-over and faculty segregation viewed broadly. No doubt exceptions can be found. But theory and fact do merge where, as observed in *Brown v. Board of Frederick County, Virginia*: "[T]he presence of all Negro teachers in a school attended solely by Negro pupils in the past denotes that school a 'colored' school just as certainly as if the words were printed across its entrance in six-inch letters."[52]

(c) Educational and Psychological Damage

A third, less frequent justification for remedying racial allocation of teachers on constitutional grounds is the notion that segregation of teachers produces harmful effects on students, not justified by other administrative considerations, and damaging wholly apart from pupil segregation. As stated previously, it is possible so to construe *Brown I*.[53] The little-heralded case of *Gilliam v. School*

[51] I COMMISSION REPORT 67-68. See also II COMMISSION REPORT app. A, table A-2, 8-11, 93; II COMMISSION REPORT app. B, tables 5-6, 28-31.
[52] 249 F. Supp. 549, 560 (W.D. Va. 1965).
[53] *See* p. 320 *supra.*

Board,[54] companion to the *Bradley* decision on certiorari, also may support this proposition. In that case the Supreme Court reversed the lower court and ordered a hearing on the faculty question where the school board had adopted a "geographic zone" plan. One is left to infer, since the plan was otherwise constitutional (and there was no question of the board's motive for assignment of teachers), that the basis of reversal was educational or other harm which might accrue to students in *integrated* situations from continued faculty segregation.

At least one lower court has also concluded that serious psychological and motivational damage ensues where there is racial segregation of teaching staff. The district court in the first *Dowell* decision agreed, on the basis of plaintiff's statistical evidence, that the board was guilty of discrimination in assignment policies.[55] In that case the court stated:

> Inasmuch as the Superintendent of Schools has established the proof necessary that Negro teachers are equal in quality to the white teachers, it seems only reasonable and fair that in all schools, mixed or otherwise, the School Board would and should make a good faith effort to integrate the faculty, in order that both white and Negro students would feel that their color was represented upon an equal level and that their people were sharing the responsibility of high-level teaching. That the feeling of a Negro student predominant in the school in his own race being denied as his principal and/or teacher brings this Court to the conclusion that the statement made by the

[54] 382 U.S. 103 (1965), *vacating and remanding*, 345 F.2d 325 (4th Cir. 1965).

[55] Dowell v. School Bd., 219 F. Supp. 427 (W.D. Okla. 1963) (Dowell I). When the Superintendent of Schools was asked why faculties and administration had not been integrated, he replied:

> A. As we have considered this matter of whether or not teacher staffs of the various schools should be integrated, I have advised the Board and have concluded that nothing would be gained educationally by a desegregation of staffs and that as a matter of fact, the appointment of Negro teachers in certain schools and the mixing of staffs could very well detract from the quality of the instructional program in Oklahoma City; and that there would be only one reason that I could think of for doing this, and it would not be an educational reason. It would be merely for the sake of integration and we feel, that is, the Board of Education and myself feel, that this is not sufficient cause because our responsibility is primarily an educational responsibility. . . .
>
> Q. Is this decision made in any degree upon the fact that you feel Negro teachers are not equal to white teachers?
>
> A. *No, sir, not at all.*

Id. at 444.

> Honorable Earl Warren is here most appropriate, wherein he declared that segregation of Negro children, especially in their formative years, "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[56]

In a similar vein, the prominent sociologist, Kenneth Clark, observed that if Negroes and whites did not assume equal positions of "power" in schools, the "teaching and learning of democratic ideals may be hindered" by this example of undemocratic behavior.[57] On the other hand, proponents of the "Black Power" philosophy expound, with a good deal of justification, a different approach to the broad issue of integration in light of disillusioning experience with it: "Integration has always been Negroes going to white schools because the white schools are good and black schools are bad. . . . If integration means that moving to something white is moving to something better, then integration is a subterfuge for white supremacy. . . . The problem is that less money is spent on black schools than on white schools. We're not concerned about going to a white school—we want a good school."[58] And many years ago the great Negro leader, W. E. B. DuBois, stated with eloquence:

> . . . [W]e shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired . . . . There are certain positive reasons for separate institutions due to the fact that American Negroes have, because of their history, group experiences and memories, a distinct entity, whose spirit and reactions demand a certain type of education for its development.[59]

But if there is controversy about the psychological impact of separate faculties in separate institutions, there is also uncertainty about the purely "educational-motivational" consequences of segregation, and its component, racial isolation of teachers. Kaplan[60]

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[56] *Id.* at 444-45. *Compare* Blocker v. Board of Educ., 229 F. Supp. 709 (E.D. N.Y. 1964).

[57] K. CLARK, PREJUDICE AND YOUR CHILD 86-90 (2d ed. 1963).

[58] Grant, *Developing Power in the Ghetto,* SATURDAY REVIEW, December 17, 1966, at 75 (quoting Stokely Carmichael).

[59] DuBois, Does the Negro Need Separate Schools?, 4 J. NEGRO ED. 328, 331, 333 (1935).

[60] Kaplan, *Segregation Litigation and the Schools—Part III: The Gary Litigation,* 59 NW. U.L. REV. 121 (1964) [hereinafter cited as KAPLAN]. *See* 51 IOWA L. REV. 681, 686-87 (1966).

suggests several reasons for a requirement of faculty desegregation from an educational standpoint. He argues that Negro teachers on the whole tend to be academically inferior because of restricted educational opportunities (*i.e.* inferior Negro colleges) that perpetuate a cycle of second-rate education. This fact may be compounded, he continues, by the greater likelihood that Negro teachers come from lower class backgrounds. Certain studies have indicated that teachers from lower class backgrounds tend to be less sympathetic toward lower class children than are middle class teachers.[61] The "upwardly mobile" person with a lower class background tends *not* to sympathize because of common background and experience, but rather to be more prejudiced against his former class because of his status-insecurity and the need to disassociate. Thus, education suffers where Negro teachers act out inner anxieties in hostile yet subtle ways. On the other hand, Kaplan believes sociological and psychological information may be too tentative for the broad conclusions just outlined. He recognizes the possibility that Negroes may in fact be better teachers for the resilience which they display in surmounting barriers of lower class status and inferior education, and that they may be more sympathetic because of common origins.[62]

Turning to the student, any conclusions based on empirical data relating to the psychological and educational impact of racial segregation of faculty on student performance and attitudes would be at present extremely tenuous. Little is known about variance in pupil achievement and attitudes where racial characteristics of teachers differ. For example, it is uncertain whether, controlling for social class characteristics[63] and quality of teacher, there is a relationship between achievement and race when faculties are segregated or integrated. Would racial characteristics of teachers affect aspirations? Would they influence interracial attitudes? Meyer Weinberg discusses several instances in which positive attitudes were observed after faculty desegregation had taken place.[64] But he also reports some negative experiences. Clearly these results are rather isolated and therefore merely tentative. The subject requires further and more systematic research.

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[61] See KAPLAN 151-52.
[62] *Id.* at 154-55.
[63] *See* note 95 *infra.*
[64] M. Weinberg, Research on School Desegregation: Review and Prospect, 16-19 (Integrated Education Associates, Chicago, Ill. 1965).

One thing is certain, however. Since we know that most teachers instruct students of the same race, and that Negro teachers tend to be less capable academically (for reasons suggested by Kaplan[65] and documented by Coleman[66]), empirical inquiry into the question of teacher segregation and educational harm can be posed from a different standpoint. Namely, what is the effect of teacher quality per se upon student motivation and achievement? This question is considered at some length below.[67]

(d) Summary and Concluding Remarks on Racial Segregation of Teachers

It is now evident from recent decisions and empirical investigations that any of the three rationales, if alleged, is sufficient in constitutional interpretation and factual underpinning to justify requiring faculty desegregation. Where it is alleged that faculty segregation perpetrates an invidious discrimination against pupils because of unconstitutional classification by race, the only further showing needed is proof of racial motive. If, on the other hand, the complaint is based on impairment of the overall desegregation process or educational and psychological harm, proscription would depend on evidence showing that the present practices constitute an unreasonable or arbitrary administrative decision in view of the harm thereby caused to Negro students.

As a practical matter most plaintiffs allege alternative theories of constitutional deprivation. Yet clearly the soundest basis for ordering desegregation of faculties is the first theory, that "racial classifications" are always invidious discriminations.[68] In this regard, several commentators have remarked:

> We see as the sounder view which looks on *Brown* as establishlishing the proposition that it is the disadvantageous treatment of individuals on account of their race which is prohibited by the equal protection clause. In this sense, the relevance of the psychological evidence is that it served as one factor in developing judicial wisdom concerning the role which segregation plays as part of a pattern of social control, or control

[65] KAPLAN 151-152.
[66] COLEMAN REPORT 12, 16-17, 122-23.
[67] *See* p. 336 *infra.*
[68] *See* p. 322 *supra. But cf.* Korematsu v. United States, 323 U.S. 214 (1944).

beginning with the forbidden premise that Negroes are as a class inferior to whites.[69]

Although traditionally school boards have been given wide discretion in matters of personnel,[70] statistical evidence may be sufficient in certain instances to prove racial motivation without further inquiry. In *Evans v. Buchanan*[71] the court compelled affirmative action by the board where Negro school children who wished to attend integrated schools were attending an all-Negro school, with an all-Negro faculty, surrounded by a white attendance area. The court allocated the burden of proof regarding nondiscrimination to the board initially "since a *presumption* of unconstitutionality arises under this set of facts."[72]

Recently, the status of burden of proof has been substantially liberalized in a number of cases concerned specifically with evidence of discriminatory motivation in school boards' dealings with faculties. The court in *Franklin v. Board of Education*[73] allocated to the board the burden of demonstrating that all seven displaced Negro teachers were less qualified for available positions prior to their dismissals than others still teaching in the system. In *Wall v. Board of Education*[74] the history of the school board's prior discrimination was deemed sufficient in the court's opinion to shift the burden of proof to the board, where the plaintiff, a former teacher, was dismissed after being denied opportunity to compete for remaining positions in the newly consolidated school system.

Several reasons were stated for shifting the burden of proof to defendants in the *Hobson v. Hansen*[75] decision: first, it was argued that where, as in the Washington, D. C. schools, racial matching of teachers and students is pervasive throughout the system, circumstantial evidence of intent is sufficient to alter the presumption of nondiscrimination; and second, defendants simply have better access than plaintiffs to their own assignment policies.

[69] Hyman & Newhouse, *Desegregation of the Schools: The Present Legal Situation*, 14 BUFFALO L. REV. 208, 218 (1965). *See also* Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

[70] See K. DAVIS, ADMINISTRATIVE LAW 132-33, 537-38 (1959); 64 MICH. L. REV. 692 (1966).

[71] 207 F. Supp. 820 (D. Del. 1962).

[72] *Id.* at 825 (emphasis added).

[73] 360 F.2d 325, 328 (4th Cir. 1966).

[74] 378 F.2d 275, 278 (4th Cir. 1967).

[75] 269 F. Supp. 401, 426 (D.D.C. 1967). *See also* Reece v. Georgia, 350 U.S. 85, 88 (1955); Chambers v. Board of Educ., 364 F.2d 189, 192 (4th Cir. 1966); Northcross v. Board of Educ., 333 F.2d 661 (6th Cir. 1964).

Finally, some courts have concluded that proof of discriminatory motive is unnecessary where teacher assignments, nondiscriminatory on their face, have a discriminatory *effect.*[76]

Where courts are willing to consider the merits of an argument based on a racial imbalance in faculty (by failing to accept the contention of constitutionally impermissible "classification"), it becomes necessary to evaluate the degree of harm to Negroes in light of countervailing administrative and other policy concerns. Faculty segregation may reflect the difficulty of recruiting teachers, practical accommodation to the wishes of teachers, or someone's educational notions.

Beyond those instances in which judges considering faculty segregation conclude administrative decisions based on racial classifications are invidious and therefore unconstitutional per se, they face difficult problems. Entrance of courts into the "school business," though increasing, is perhaps most precarious where questions of educational policy are immediately affected.

However, there is substantial support for the proposition that in every instance, the value of integration outweighs whatever other administrative and educational alternatives exist. The basis of this suggestion is the principle, formulated by Professor Horowitz, that wherever administrative or legislative choices effect an inequality and there is available a rationally related alternative, there has been a denial of due process.[77] It would appear that this idea, which Horowitz calls the "least onerous alternative" principle, is applicable to any educational service offered by school systems, including allocation of faculty, in view of the Supreme Court's pronouncement in *Brown v. Board of Education* of the fundamental importance of public education and the right to equal educational opportunity.

In this regard, Professor Sedler argues:

> If one choice would prevent actual segregation and at the same time not interfere with the operation of the school system, there is no reason why the Board should not adopt that choice. Its failure to choose the reasonable alternative is unreasonable

[76] *See* Goss v. Board of Educ., 373 U.S. 683, 689 (1963); Matter of Skipwith, 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. 1958) (the court did not look beyond statistical disparities to infer discriminatory motive). See generally COMMISSION REPORT 219-229.

[77] Horowitz, *Unseparate But Unequal—The Emerging 14th Amendment Issue in Public School Education,* 13 U.C.L.A. L. REV. 1147 (1966).

> in view of the harm that the choice it has made causes to Negro students, which harm could be easily eliminated. In other words, the reasonableness of the Board's action must be considered in light of the fact that actual segregation harms the Negro student.[78]

Even where harm is not easily eliminated, because of intervening administrative obstacles or practical problems (for example, those related to the transition to a desegregated system, or northern "de facto" complexities), arguably any abdication of responsibility is impermissible where in all probability the situation was originally caused by state agencies.[79] Judge Wisdom recently stated the priority which administrative agencies and states must now give to integration as part of educational policy:

> The holding in *Brown*, unexplained by its underlying reasoning, requires no more than the decision in *Bell*, but when illuminated by the reasoning, it permits the result in *Barksdale* and may require that result. At the very least, as the *Barksdale* court saw it, *there is a duty to integrate in the sense that integration is an educational goal to be given a high, high priority among the various considerations involved in the proper administration of a system beset with de facto desegregated schools.*[80]

It has been the attempt of the preceding pages to present a picture of the substantial legal, theoretical, and empirical underpinnings of a requirement to desegregate public school faculties. No doubt many of the reasons making it vital that school boards comply with this requirement to the fullest extent are closely tied to the problem to be discussed next—unequal allocation of teacher resources.

2. Unequal Allocation of Teacher Resources

Presumably the right of pupils to equal allocation of teacher resources is part of their basic fourteenth amendment right to equal educational opportunity. In addition to the fact that Negro children are almost always taught by Negro teachers, these teachers are also, on the average, more poorly trained and less able academically for a variety of reasons suggested previously.

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[78] Sedler, *School Segregation in the North and West: Legal Aspects*, 7 St. Louis L.J. 228, 263-64 (1963).

[79] *See* note 27 *supra*.

[80] United States & Stout v. Board of Educ., 372 F.2d 836, 867 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3138, 3144 (Oct. 9, 1967) (emphasis added).

Actionable deprivation of equal educational opportunity by unequally allocating teachers depends on proof of discriminatory motive.[81] It has been pointed out that courts have now adopted the view that a presumption of unlawful racial motive arises in cases where statistical discrepancies of this sort occur.[82] Often, however, it is unnecessary to demonstrate discriminatory purpose in these cases where the official action, nondiscriminatory on its face, has a discriminatory effect, as is the case where discriminatory staffing results from voluntary decisions of teachers.[83] Here it is possible to allege discrimination on the ground that harm incurred by plaintiffs outweighs countervailing administrative considerations which led to the unequal allocation. Once more, the problem arises whether courts can and should engage in determinations traditionally left to school boards. Yet again, it could be argued, entrance is justified by the seriousness of the educational deprivation magnified by racial implications apparent to those who receive unequal allocations of teacher resources.

Outwardly, it is difficult to assess the significance of teacher "quality" in relation to the harmful effects of unequal allocation. Certainly quality of teaching is influenced by objective, measurable factors, such as years of experience, specialization, academic training, certification, and simply the ratio of pupils to teachers. Yet intangible qualities of teachers may be of equal or even greater importance; such factors may include psychological characteristics, social attitudes, unique ability, unique disability, or socio-economic background. Measurement of such factors is difficult to say the least. Despite these intangibles, however, historically it is clear that courts have made qualitative determinations. The Supreme Court in *Sweatt v. Painter*[84] purported to know what "equal" meant when it held that disparity in "reputation and members" of faculty were among the tangible factors significant in judging whether plaintiffs were deprived of equal educational opportunity. In more

[81] Matter of Skipwith, 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. 1958).

[82] It appears that discrepancies in allocation of faculties, even though not grounded in racism, will not be tolerated. See especially Hobson v. Hansen, 269 F. Supp. 401, 513-14 (D.D.C. 1967), where it was stated that school officials could no more discriminate in public schools on account of poverty (for example) than on account of religion, race, or color. See also Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[83] *See* note 76 *supra.*

[84] 339 U.S. 629, 633-34 (1950).

recent cases courts have increasingly accepted tangible disparities at face value. The court in *Skipwith* simply held that a substantially smaller proportion of regularly licensed teachers in nonwhite schools compared with white schools was sufficient to demonstrate unlawful discrimination.[85] Several courts have ordered equalization of teacher-pupil ratios on the basis of simple statistical proof of disproportion.[86] And finally, equitable distribution of teachers with advanced degrees, experience, and specialized skills has been required of school systems in certain instances.[87]

There are several responses to the contention, which will no doubt be heard, that courts relying solely on statistical evidence of qualitative disparities greatly oversimplify the matter of denial of equal educational opportunity. However, in the first place, like it or not, experience is a very real asset for a teacher, just as it is for any professional person. Unquestionably the first few years of teaching contribute significantly to a teacher's competence. And, with regard to certification, it is evident that despite the generally poor quality of typical college education curricula, certification qualifications do affect teacher quality. Even a mediocre course in teaching methods and curriculum contributes to the level of initial teaching effort. Secondly, if school administrations really believed in the irrelevancy of qualifications, these would simply be dispensed with. Yet it is undeniable that pay scales, tenure, and other benefits do reflect such tangible measures as the number of years of teaching experience, previous academic training, and certification.[87a]

In the last analysis, whether or not one accepts as objective evidence of harmful inequality such clearcut administrative guages as pay rates, tenure, and certification, it is nonetheless apparent from data which has recently been compiled for the Coleman Report and

[85] Matter of Skipwith, 14 Misc. 2d 325, 180 N.Y.S.2d 852, 868 (Dom. Rel. Ct. 1958). See also N.Y. Bd. of Educ. Comm'n on Integration Rep. 28-29 (1957).

[86] United States & Stout v. Board of Educ., 372 F.2d 836, 899-900 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3138, 3144 (Oct. 9, 1967); Lee v. Board of Educ., 267 F. Supp. 458, 484 (M.D. Ala. 1967); Henry v. School Dist., 11 Race Rel. L. Rep. 719, 726 (N.D. Miss. 1965).

[87] Kelley v. Altheimer, 378 F.2d 483, 499 (1967) (*rehearing denied en banc*, May 9, 1967); Lee v. Board of Educ., 267 F. Supp. 458, 489 (M.D. Ala. 1967).

[87a] These arguments are based primarily on the views of Judge Wright presented in Hobson v. Hansen, 269 F. Supp. 401, 434-36 (D.D.C. 1967). *See also* Kaplan 151-52.

the 1967 Report of the Commission on Civil Rights that unequal allocation of teacher resources detrimentally affects motivation and educational achievement of Negro students.

Coleman found that in general teachers of the average Negro pupil, when compared with teachers of the average white student in this country, were academically inferior.[88] What is more significant, however, are those statistics and observations which describe the impact of the teacher variable as such upon educational development. An examination of those figures follows.

No doubt many factors influence educational development. For some children innate ability or home environment may be the most significant determinants of success. For others, books, physical surroundings, specialized facilities, curriculum, teachers, or attitudes of other students may be more important educational factors.[89]

The characteristics of teachers which seem to be most related to pupil achievement are (1) score on verbal skills test and (2) educational background (own and parents). On both measures the level of teachers of minority students, especially Negroes, is lower. Further, differences in quality of teachers show a cumulative effect on achievement over the years, the effects of variance increasing for higher grades. Finally, and most important, differences in quality of teachers show *more* relation to difference in achievement of educationally disadvantaged minority groups than to achievement of the white majority. This variation corresponds roughly to the general sensitivity of minority groups to variations in school environment.[90] Coleman states, apropos this finding:

> This result is an extremely important one, for it suggests that good teachers matter more for children from minority groups which have educationally deficient backgrounds. It suggests as well that for any group, minority or not, the effect of good teachers is greatest upon the children who suffer most educational disadvantage in their background, and that a given in-

[88] COLEMAN REPORT 122-83.

[89] The COLEMAN REPORT and the COMMISSION REPORT were chiefly designed to ferret out those educational variables which most significantly affect school children. The aim in the following discussion is, of course, to describe the findings of these studies with regard to the relative importance of the teacher variable. This purpose should be kept in mind even though it is necessary, in order to digest the relevant conclusions of both reports, to discuss some of their more general results, including important factors which influence educational developments in addition to academic qualities or other characteristics of teachers.

[90] COLEMAN REPORT 317-19.

> vestment in upgrading teacher quality will have most effect on achievement in underprivileged areas.[91]

Comparing teacher effects with other factors affecting school achievement, Coleman found the most significant determinant of achievement in school is social class, that is, one's own socio-economic status, and social class composition of one's classmates.[92] To fully understand this finding, however, it is important to note certain qualifications which are confusing as stated in the Report.

There are several components to the finding that social class environment and socio-economic status most heavily weigh on school achievement. At one point the Report states that if socio-economic factors, strongly related to academic achievement, are controlled statistically, differences between schools account for only a small amount of difference in pupil achievement.[93] Yet this finding is not true across the board. While the average white student's achievement seemed to be less affected by the strength or weakness of his school (i.e. facilities, curriculum, and teachers)[94] than other factors (social class), for the average minority pupil the magnitude of difference between social class factors and certain school characteristics was only "slight". Coleman states:

> Attributes of other students account for far more variation in the achievement of minority group children than do any attributes of school facilities and *slightly* more than do attributes of staff . . . This comparison shows that the school characteristics are the weakest of the three, and that teachers' characteristics *are comparable to but slightly weaker than* characteristics of the student environment.[95]

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[91] *Id.* at 317. Coleman also observed that teacher differences are over twice as strongly related to the achievement of southern as compared to northern Negroes. In addition, he found that the differential relation of teacher quality to achievement is *not* a factor of pronounced variation of any of the three most important variables (verbal test score, educational background of family, own education). These variables were approximately the same, which indicated not a difference in the variability of teachers, but a difference in the effect of a given *degree* of variability which is responsible for the differential relation (*i.e.*, I take it this means the cumulative effect of all three variables).

[92] *Id.* at 22-23.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 302, 318 (emphasis added). Coleman's findings on this point are plainly ambiguous, if not contradictory. For example, summarizing his findings of school effects on achievement, he states, contrary to the quote in the text: "Given the fact that no school factors account for much variation in achievement, teachers' characteristics account for more than any other. . . ." *Id.*

Summarizing, in addition to the finding that "social class" is the most significant determinant of educational outcome, Coleman also found that characteristics of faculty were highly relevant variables affecting the achievement level of minority pupils.

The Civil Rights Commission arrived at substantially the same conclusions. In their 1967 Report the Commission found that when disadvantaged Negroes are placed in school with a majority population of other disadvantaged children, there is a (+.4) positive difference in *grade level performance* when the quality of the teacher is higher. The same relationship holds when disadvantaged children are placed in schools with a majority population of advantaged students (+.3). These findings are consistent with Coleman's observation that disadvantaged minorities are especially sensitive to school environment.

When teacher qualifications are controlled, however, the Commission found that disadvantaged pupils placed in school with advantaged children perform at a higher level than those in disadvantaged schools whether the constant is uniformly low (+.9) or uniformly "high" (+.8). In fact, disadvantaged children placed in advantaged settings perform at a higher level than those placed in disadvantaged schools when the teacher index is "high" in the disadvantaged school but "low" in the advantaged school (+.5).[98] Thus the Commission concludes:

> There is. . . a pronounced relationship between the qualification of teachers and the performance of students. It appears to be consistent for Negro students of all social class levels in schools of different social class compositions. The relationship between teacher qualifications and student performance, however, is not as consistently strong as the relationship between student performance and the social class composition of schools. Although teacher quality is important, when taken into account it does not alter the significance of the relationship between

at 325. Comparing family background, social composition of student body, certain motivational measures, and school characteristics, Coleman then concludes: "Schools bring little influence to bear on a child's achievement that is independent of his background and general social context; and that this very lack of an independent effect means that the inequalities imposed . . . on children by their home, neighborhood, and peer environment are carried along to become the inequalities with which they confront adult life at the end of school. For equality of educational opportunity through the schools must imply a strong effect of schools that is independent of the child's immediate social environment, and that strong independent effect is not present in American Schools." *Id.*

[98] COMMISSION REPORT 95.

the social class composition of schools and the achievement of Negro students.[97]

The Commission Report differed from the Coleman Report in several important ways. First, the Commission examined the consequences of racial isolation beyond educational achievement, considering its effects on later life. They found that desegregated schooling correlates highly with improved income, white-collar occupation, positive racial attitudes, and more frequent interracial associations.[98] Second, and more significant for our purposes, they found, on further analysis of Coleman's data, that when social class is controlled, there is a strong correlation between integration and educational achievement.[99]

Analyzing this finding in light of the relationship between student performance and teacher quality in differing racial settings, one obtains results analogous to Coleman's where the variable is social class. That is, the performance of Negro students is consistently higher in majority-white schools than majority-Negro schools where teacher quality *and* school social class are held constant. And again, as Coleman found with regard to social class, when disadvantaged Negro students attend schools with a majority of *disadvantaged white* students and *poorer* teachers, they nonetheless perform at a *higher* level than similarly disadvantaged Negro students attending school with *better* teachers and a majority of equally *disadvantaged Negroes*.[100] Thus the Commission concludes: "Although teacher quality has a consistent relationship to student achievement in majority-Negro schools, it is equally consistently outweighed by the effect of being in majority-white schools."[101]

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[97] *Id.* at 96.

[98] *Id.* at 106-14.

[99] *Id.* at 90, 107. The Commission Report concludes with a strong statement critical of those who believe "social class" is really the crux of the educational disadvantage:

> [T]he relatively small number of middle class Negro children in the public schools means that it will be possible to provide social class integration only by providing racial integration. And even if social class integration could be accomplished without racial integration, the remedy would still be partial and inadequate, for children would still be attending schools stigmatized because of race. Thus the complexity of the problem of educational disadvantage should not be allowed to obscure the central fact—that racial isolation is the heart of the matter, and that enduring solutions will not be possible until we deal with it.

Id. at 144-45.

[100] *Id.* at 98.

[101] *Id.* at 99.

Teacher attitude, a factor explored but not correlated with student achievement or aspiration by Coleman, was also analyzed in the Commission Report. The Commission found that teachers affect students' attitudes and aspirations as well as their verbal achievement. Often the standards which teachers set are likely to be reflected in the attitudes and goals of their students.[102] Again, however, differences in teacher attitudes and expectations are not as important as racial composition of schools, if measured by the frequency with which Negro students in both settings report definite college plans.[103]

It is clear from the Coleman Report and the Commission Report that teacher quality affects student performance. That other factors may be more important determinants of achievement, as social class and racial composition of the school, does not detract from the fact of harm derived from unequal allocation of teacher resources. It merely suggests the inadequacy of remedy based on the teacher element alone. Nor is it satisfactory that the difference is "slight" compared to effects on achievement caused by other circumstances, as social class and racial composition. Judge Wisdom clearly stated in *Jefferson* that there is now a "high, high priority" to be placed on providing equality of educational opportunity.[104] And there is no evidence to merit the assumption that he meant to exclude comparatively small inequalities from the pronouncement. At any rate, as Coleman observed, allocation of equal teacher resources is most important for minority or disadvantaged children who are, as a group, quite responsive to school characteristics, especially the quality of teaching.[105]

III. Federal Programs

The following is a brief description and analysis of major federal programs related to teachers and equal educational opportunity.

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[102] *Id.* at 126-33. *See also* K. Clark, Dark Ghetto 127-48 (1965); Davidson & Long, *Children's Perceptions of Their Teachers' Feelings Toward Them Related to Self-Perception, Social Achievement, and Behavior*, 29 J. of Exp. Educ. 107 (1960).

[103] Commission Report 99.

[104] United States & Stout v. Board of Educ., 372 F.2d 836, 875 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3138, 3144 (Oct. 9, 1967).

[105] Coleman Report 317-19.

A. The Civil Rights Act of 1964: The HEW Guidelines

Title VI of the Civil Rights Act of 1964 was drafted to prohibit discrimination against beneficiaries of federal programs on the ground of race, color, or national origin. Section 601 of the Act provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.[106]

Section 602[107] of the Act requires that each department extending federal assistance issue regulations which detail their implementation of section 601. Pursuant to this requirement the Department of Health, Education, and Welfare (HEW) issued its Regulation,[108] which was approved by the President on December 3, 1964 and published in the Federal Register on December 4, 1964.

Under its Regulation, elementary and secondary schools can qualify for federal assistance in either of two ways:

> (c) The requirements of paragraphs (a) and (b) of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any further modification of such order, or (2) submits a plan for the desegregation of such school or school system which the Commissioner of education determines is adequate to accomplish the purpose of the Act and this part, and provides reasonable assurance that it will carry out such plan. . . .[109]

Pursuant to the part of the Regulation authorizing determination by HEW of the adequacy of school desegregation plans submitted by school systems seeking to meet the "assurance of compliance" requirement, and a further requirement[110] that such information be published, HEW issued in April, 1965, the "General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting

[106] 42 U.S.C. § 2000d (1964).
[107] 42 U.S.C. § 2000d-1 (1964).
[108] 45 C.F.R. pt. 80 (1967).
[109] 45 C.F.R. § 80.4(c) (1967).
[110] 45 C.F.R. § 80.12(b) (1967).

Desegregation of Elementary and Secondary Schools."[111] In March, 1966, HEW reissued its Guidelines, then called "Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964." The present (1967) Guidelines are practically identical to those reissued in 1966.

One of the features all plans must contain is provision for faculty and staff desegregation. Section 181.13 of the 1967 Guidelines generally declares that teachers shall not be hired, fired, promoted, or demoted on the basis of race, color, or national origin, except to affirmatively correct past discriminatory practices. With regard to assignments to correct the effects of past discriminatory practices, section 181.13(d) states:

> The pattern of assignment of teachers and other professional staff among the various schools of a system may not be such that schools are identifiable as intended for students ot a particular race, color, or national origin, or such that teachers or other professional staff of a particular race are concentrated in those schools where all, or the majority of, the students are of that race. Each school system has a positive duty to make staff assignments and reassignments necessary to eliminate past discriminatory assignment patterns. Staff desegregation for the 1967-1968 school year must include significant progress beyond what was accomplished for the 1966-1967 school year in the desegregation of teachers assigned to schools on a regular full-time basis.[112]

The Fifth Circuit recently upheld the validity of the revised HEW Guidelines, stating:

> [W]e hold that HEW's standards are substantially the same as this Court's standards. They are required by the Constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964. In evaluating desegregation plans, district courts should make few exceptions to the Guidelines and should carefully tailor those so as not to defeat the policies of HEW or the holding of this Court.[113]

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[111] 45 C.F.R. pt. 81 (1967).

[112] 45 C.F.R. § 181.13(d) (1967).

[113] United States & Stout v. Board of Educ., 372 F.2d 836, 848 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3138, 3144 (Oct. 9, 1967). *See also* Smith v. Board of Educ., 365 F.2d 770 (8th Cir. 1966); Davis v. Board of Comm'rs, 364 F.2d 896 (5th Cir. 1966); Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965); Singleton v. School Dist., 348 F.2d 729 (5th Cir. 1965) (Singleton I); Price v. Board of Educ., 348 F.2d 1010 (5th Cir. 1965).

With regard to the requirement of faculty desegregation, the court said:

> Everyone agrees, on principle, that the selection and assignment of teachers on merit should not be sacrificed just for the sake of integrating faculties; teaching is an art. Yet until school authorities recognize and carry out their affirmative duty to integrate faculties as well as facilities, there is not the slightest possibility of their ever establishing an operative non-discriminatory school system.[114]

Three problems are raised, however, in connection with the meaning and scope of teacher provisions in the new Guidelines. First, how much faculty and staff desegregation is required? The Guidelines themselves do not specifically state the amount required; they merely indicate that at least "some" desegregation will be required to correct past discrimination. Section 181.13(d) provides:

> Patterns of staff assignment to initiate staff desegregation *might* include, for example: (1) Some desegregation of professional staff in each school in the system; (2) the assignment of a significant portion of the professional staff of each race to particular schools in the system where their race is a minority and where special staff training programs are established to help with the process of staff desegregation; (3) the assignment of a significant portion of the staff on a desegregated basis to those schools in which the student body is desegregated; (4) the reassignment of the staff of schools being closed to other schools in the system where their race is in a minority; or (5) an alternative pattern of assignment which will make comparable progress in bringing about staff desegregation successfully.[115]

A commentator who worked for the Office of Education (Equal Educational Opportunity Program) in the summer of 1966 stated that: "In practice, the Commissioner generally requires that there be at least as many full time teachers in desegregated situations as there are schools in the system . . . but this rule is only an approximate guide and is subject to variation with individual conditions."[116]

An additional problem is whether the Guidelines can and should

[114] United States & Stout v. Board of Educ., 372 F.2d 836, 892 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir. 1967); *cert. denied*, 36 U.S.L.W. 3138, 3144 (Oct. 9, 1967).

[115] 45 C.F.R. § 181.13(d) (1967).

[116] Comment, *The HEW School Desegregation Guidelines*, 2 HARV. CIV. LIB.-CIV. RIGHTS L. REV. 86, 92 (1966).

apply to employment practices *other* than teacher *assignments*, a matter which is less clearly an "employment" problem and more closely related to discrimination against beneficiaries of federal assistance programs. Section 604 of Title VI seems to prevent such broader reading of the Act's scope of application. It states:

> Nothing contained in this subchapter shall be construed to authorize action under this title by a department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.[117]

Yet at least four factors support the broad construction of this provision (reflected by section 181.13 of the Guidelines) which would allow application of Title VI to the hiring, firing, promoting, or demoting of teachers on the basis of race, color, or national origin. First, it is clear that discriminatory employment practices other than assignment adversely affect students, the intended beneficiaries of federal programs. "When race becomes a consideration in faculty hiring, firing, and the like, it results in reducing the weight of academic qualifications and ability as criteria. This interferes with an ideal situation in which the teacher best qualified academically would be placed before the students in any given situation."[118] By the same token, of course, this view raises questions (to be discussed in Part IV) concerning the merits of affirmative actions to correct past discrimination, as preferential rehiring, disregard of tenure, and the like.

Second, the legislative history of section 604 precludes a narrow reading. Section 604 was intended to exempt from Title VI coverage only employers who discriminate against employees who (the employees) are *not* the intended beneficiaries of federal programs.[119] There is therefore no reason why section 604 should be read to exclude from Title VI those programs where discrimination is perpetrated against intended beneficiaries simply because connected with

[117] 42 U.S.C. § 2000d-3 (1964).

[118] Comment, *School Desegregation and the Office of Education Guidelines*, 55 GEO. L.J. 325, 337 n. 70 (1966).

[119] 110 CONG. REC. 10076 (1964). *See* United States & Stout v. Board of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd* 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3138, 3144 (Oct. 9, 1967). *But see* Note 51 IOWA L. REV. 681, 693-94 (1966).

the discrimination there is an employment practice of the recipient of federal funds.

Third, Title VII of the Civil Rights Act of 1964 states: "This title shall not apply to . . . an educational institution with respect to the employment of individuals who perform work connected with the educational activities of such institution."[120] Also excluded from Title VII coverage are state or other government employees.[121] Therefore, if section 604 was added to clarify potential overlap between Title VI and Title VII (which is specifically concerned with *private* discrimination in employment practices),[122] there is no conflict of application since Title VII obviously excludes employment practices related to public school teachers and professional staff.

Fourth and last, the fact that most courts have held faculty desegregation is required by the equal protection clause lends weight to a broader reading of section 604.

A final issue regarding the scope of the faculty desegregation provisions of the 1966 and 1967 Guidelines is whether they apply in any part to "de facto," northern-style segregation. As noted, section 601 is addressed to discrimination against beneficiaries of federal programs. Certainly northern school children are beneficiaries of many federal programs. The trouble is, Title IV, section 401 of the Act states:

> As used in this subchapter . . . *desegregation* means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.[123]

And section 407(a), related to powers of the Attorney General to institute desegration suits, contains the following caveat:

> [P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another in order to achieve such racial balance. . . .[124]

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[120] 42 U.S.C. § 2000e-1 (1964).
[121] 42 U.S.C. § 2000e(b) (1964).
[122] See 110 CONG. REC. 11225 (1964).
[123] 42 U.S.C. § 2000e (1964). *See* 110 CONG. REC. 2280 (1964).
[124] 42 U.S.C. § 2000c-6(a) (1964).

At the time these passages in Title IV were enacted, it was clear Congressmen and Senators were anxious to limit the scope of the Act, *i.e.*, Title VI, to southern and border regions.[125] The United States Office of Education now also views its authority under Title VI as limited primarily to southern and border regions by the Title IV provisions.[126]

A sounder interpretation of Title VI would permit action by the Office of Education in northern "de facto" settings where certain kinds of discrimination are blatently present. A case in point is teacher allocation by race. HEW and the Commissioner of Education contend that the difference between the requirement of "affirmative integration" which appears in the new Guidelines and "overcoming racial imbalance"[127] is as follows: the former involves dismantling the dual system, eliminating its past discriminatory effects; whereas the latter concerns a dilemma exempted from HEW's jurisdiction by Title IV of the Act. New standards, they continue, must be developed in order to cope with northern, urban discrimination.[128]

This distinction crumbles, it would seem, when discriminatory faculty assignments, or discriminatory employment practices, are alleged under Title VI of the Act. Many courts have said such practices are discriminatory per se, and therefore unconstitutional, whether or not "free choice" plans are impaired. Further, the Title IV caveat refers in specific terms only to "students". And finally, the justification for excluding "racial imbalance" from the Act presumably rests on the notion that racial imbalance is not considered remediable by most courts due to the "state action" clause of the fourteenth amendment. However, "state action" is present, it was established, whenever assignments or other employment practices with regard to teachers are based on race or result in unequal educational opportunity for certain school children.

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[125] 110 CONG. REC. 12715, 2280 (1964).

[126] See Speech by U.S. Commissioner of Education Harold Howe, N.Y. Times, May 4, 1966, § 1 at 30, col. 1 (city ed.); *Hearings Before the House Committee on Rules*, 89th Cong., 2d Sess., pt. 2, at 64, 67-71 (1966).

[127] 45 C.F.R. § 181.54 (1967) (requirement of "effectiveness" of free choice plans).

[128] *See generally* Department of Health, Education, and Welfare, Authority for the 1966 School Desegregation Guidelines, 2-8, May 20, 1966 (U.S. Government Printing Office, Washington, D. C.).

B. *Federal Aid: Title IV of the Civil Rights Act and the Elementary and Secondary Education Act*

Under Title IV of the Civil Rights Act of 1964, the Office of Education, pursuant to sections 403 and 404,[129] is authorized to provide technical assistance and grants to states and local school boards in order to help them implement desegregation plans and handle problems connected with desegregation of public schools and faculties. Most Title IV money is spent on training institutes for teachers, though a sizeable portion has also been made available for experimental project grants.

The Elementary and Secondary Education Act of 1965 (ESEA)[130] was designed to provide funds specifically for those localities defined as "impacted" by the Act.[131] Title II, section 201 (Title I, as amended) sets forth the major purposes of the Act, as follows:

> In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, Congress hereby declares it to be the policy of the United States to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.

Among the possible uses of Title I funds, the following relate to teachers and ways to improve teaching in deprived schools: in-service training for teachers, additional teaching personnel to reduce class size, teacher aids, supervisory personnel and full-time

[129] 42 U.S.C. § 2000c-2 (1964); 42 U.S.C. § 2000c-3 (1964).

[130] 20 U.S.C. §§ 236-41 (Supp. I, 1965), *as amended*, (Supp. II, 1965-1966).

[131] 20 U.S.C. §§ 241c(a) (2), 241c(c) (1964). Generally, grants to local public school districts are allocated to areas where the children (age 5 to 17) come from families whose annual incomes are less than 3000 dollars (for the fiscal year beginning July 1, 1967) and where children (age 5 to 17) come from families whose incomes from ADC are 3000 dollars or more (for the fiscal year beginning July 1, 1967). The amount of the grant is then determined automatically by multiplying the average expenditure per pupil in the state by the number of children who qualify under the preceding criteria. This figure is then divided in half to arrive at the grant amount.

specialists for improvement of instructional techniques and related pupil services, and training institutes for teacher aids.

In addition, Title II of the ESEA provides grants for school libraries, texts, and other instructional materials; Title III provides funds for supplemental educational centers; Title IV provides grants for educational research and training;[132] and Title V provides funds for strengthening state departments of education.

Every ESEA program is administered at the local level by states, municipalities and subagencies which share in its cost. The degree of federal support is not usually apparent. All federal aid programs like ESEA are, however, subject to the provisions of Title VI of the Civil Rights Act of 1964.[133]

In 1966 ESEA was partly amended by the following clause in section 704 (as amended and redesignated) to wit, nothing contained in the Act shall be construed "to *require* the assignment or transportation of students or *teachers* in order to overcome racial imbalance."[134] As a matter of history, HEW has in fact allotted Title I funds to projects designed to reduce racial imbalance, and it encourages projects involving transportation of Negro children to under-utilized majority white schools.[135]

[132] Not to be confused with Title IV grants under the Civil Rights Act of 1964, which grants must be expressly related to desegregation techniques and problems. Money under this Title of ESEA can be used to study education of the poverty-stricken, for example.

[133] Both practical and legal questions are raised by this arrangement. The practical problems are of two sorts: the nature of internal coordination of the Office of Education, and external ramifications of internal "confusion." Often the people who administer Title IV of the Civil Rights Act (The Equal Educational Opportunity Program) are not informed by the people who administer ESEA funds of their proposed usage. (This situation should be familiar to anyone formerly employed by the federal government.) Thus, Title VI people may first learn of the use to which an ESEA grant is being put from a complaining civil rights organization, or an individual, in one of the localities receiving such grants. Typically, the allegation contains charges of discrimination in the system concerned which require complex investigations. Usually the grant has been released by this time anyway. The net result is that Title VI no longer applies and the money may be used to further a discriminatory practice. Section 602 of Title VI states: "Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record. . . ." Thus the ball game is over, so to speak, when the grant has already been processed. In addition, ESEA grants are made in lump sum amounts. It is therefore irrelevant to defer new funds, the other remedy provided by section 602.

[134] 20 U.S.C. §§ 236-41 (Supp. I, 1965), *as amended,* (Supp. II, 1965-1966).

[135] *See, e.g.,* COMMISSION REPORT 131 which states: "During part of the

It is problematic whether this amendment does not also directly conflict with section 601 of Title VI of the Civil Rights Act of 1964. If, as argued, Title VI broadly requires desegregation of teachers, north as well as south, then the two provisions are contradictory; the 1966 amendment seems to say the Office of Education can provide federal assistance under ESEA to programs where teachers are segregated by race, contrary to section 181.13 of the 1966 Guidelines. And, as we have noted, the "racial imbalance" caveat in Title IV of the Civil Rights Act is inapplicable where teacher allocation is the means of discrimination.

On the other hand, it is possible to rationalize the conflict if the 1966 amendment to ESEA is read to mean *no further* or affirmative measures need be taken by programs receiving federal aid *beyond* the normal "assurance of compliance" requirement.[136] That is, assuming schools receiving federal aid agree to nondiscriminatory policies with regard to general employment practices, and have made "some" progress in the direction of correcting past discriminatory assignments,[137] nothing further would be required by Title VI of the Civil Rights Act at present. And ESEA would also be satisfied insofar as further steps to overcome racial imbalance of faculties are not required as a condition to receipt of funds.

C. *The National Teacher Corps*

The National Teacher Corps came into being as part of the "Higher Education Act of 1965."[138] Its purpose as stated in section 511 of that Act is to:

> strengthen the educational opportunities available to children in areas having concentrations of low-income families and to encourage colleges and universities to broaden their programs of teacher preparation by—

1965-66 school year, the Berkeley school authorities, with Federal assistance, bussed 230 Negro children from majority-Negro to majority-white schools."

[136] Paragraphs (a) and (b) of section 80.4 of the Regulation adopted pursuant to section 602 of the Civil Rights Act of 1964, 45 C.F.R. pt. 80 (1967), provide that every application for federal financial assistance to carry out any program to which the Regulation is applicable must be accompanied by an assurance that the program is, or will be, conducted in compliance with the requirements promulgated pursuant to the Regulation, *i.e.*, the HEW Guidelines. Section 80.2 of this same part makes the Regulation applicable to "any program" for which federal financial aid "is authorized under a law administered by HEW. . . ."

[137] 45 C.F.R. § 181.13(d) (1967).

[138] Pub. L. No. 89-329, 79 Stat. 1219 (1965).

> (1) attracting and training qualified teachers who will be made available to local educational agencies for teaching in such areas; and
> (2) attracting and training inexperienced teacher-interns who will be made available for teaching and inservice training to local educational agencies in such areas in teams led by an experienced teacher.

Thus it appears the main object of the Corps is to train a sizeable number of inexperienced and beginning teachers who will be specialists in the education of the "culturally deprived." Corps teachers will be placed throughout the country in rural or central city schools, wherever the need is greatest.

Supporters seem to feel this program holds large hope for uplifting the educational achievement and aspirations of this country's poor.[139] Unfortunately, there are many problems. Originally Congress was authorized under section 511(6) to appropriate 36,100,000 dollars for the fiscal year ending June 30, 1966 and 64,715,000 dollars for the fiscal year ending June 30, 1967. But Congress refused to appropriate the funds, and subsequently released only 17,000,000 dollars, of which less than half (7,500,000 dollars) composed the 1966-1967 budget. In addition, the program has dwindled from 1600 initial trainees in 1966 to 1200 in mid-1967. That the program will survive further financial cuts is doubtful. Beyond this, there are other problems with the Teacher Corps. Is it large enough to be significant in any way? What are the educational ramifications of bringing into the profession people not trained in traditional, "accredited" institutions of teacher preparation? How effectively will Corpsmen operate under the direct control and supervision of officials of local educational agencies to which they are assigned, as required under section 516?

IV. Remedy

It should be apparent from what has preceded that both racial segregation and racially motivated unequal allocations of teachers are unconstitutional. But the fact that courts and the Congress have power to correct this deprivation of equal educational opportunity does not fully solve the problem. If anything, the most complex aspect of the solution is remedy.

[139] Egerton, *Odds Against the Teacher Corps*, Saturday Review, Dec. 17, 1966, at 71.

The major issues and tentative proposals of courts and commentators concerning remedies for racial and unequal allocation of teachers are presented in the following paragraphs. Since there are presently two distinct and visible contexts upon which most attention is focused, discussion will follow this division.

A. The South

A major advance in the province of southern faculty desegregation was the promulgation of the 1965 HEW school desegregation Guidelines. For the first time the executive branch of the federal government became committed to alleviation of teacher segregation. However, since then little has happened. The 1966 and 1967 Guidelines require "significant progress beyond what was accomplished for the 1965-1966 (1966-1967) school year in the desegregation of teachers,"[140] but, as previously noted, they fail to define these terms beyond certain "suggestions."[141] A 1966 amendment to the Elementary and Secondary Education Act of 1965 (ESEA)[142] also clouds the picture; whether section 181, which precludes federal expenditures to further "the assignment or transportation of students *or teachers* in order to overcome racial imbalance," will now be read into other federal requirements remains uncertain.[143]

Judicial approaches to remedying racial and unequal allocation of teachers have varied. Some courts focus on specific and immediate results. For example, in *Dowell v. School Board*,[144] defendants were required to achieve a proportion in which each race assigned to teach in each school would be the same as the proportion of teachers of that race in the entire system, or in the level of the system in which they were employed. Several courts have required that at least one minority faculty member be assigned to each majority setting.[145] Some courts have been less concerned with results and

[140] 45 C.F.R. § 181.13(d) (1967).

[141] Comment, *The HEW School Desegregation Guidelines*, 2 HARV. CIV. LIB.-CIV. RIGHTS L. REV. 86, 91-92 (1966).

[142] 20 U.S.C. §§ 236-41 (Supp. I, 1965), *as amended*, (Supp. II, 1965-1966).

[143] See p. 349 *supra*.

[144] 244 F. Supp. 971, 977-78 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967) (Dowell II). *See also* Kelley v. School Dist., 378 F.2d 483, 498 (8th Cir. 1967); Betts v. School Bd., 269 F. Supp. 593, 603 (W.D. Va. 1967); Kier v. School Bd., 249 F. Supp. 239, 247 (W.D. Va. 1966).

[145] United States & Stout v. Board of Educ., 372 F.2d 836, 900 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3138,

more concerned with the mechanics of eliminating effects of past discrimination. These courts have simply approved consent decrees which set forth detailed criteria for filling vacancies or reassigning faculty to achieve integration.[146] A third group has been even less specific. They support affirmative steps to eliminate effects of past discrimination, but do not require specific results or particular means by which to achieve faculty desegregation.[147]

There are a number of practical as well as legal problems raised in connection with stepped-up remedial actions that may be undertaken in the future. For example, to what extent is affirmative integration of faculty constitutionally required, and how soon must it be accomplished? Must boards disregard tenure provisions of current contracts? To what extent, subsequent to school consolidations, may courts disregard qualifications of displaced teachers who wish to be absorbed into the now smaller school system? Is it permissible to hire or rehire Negro teachers on a "preferential" basis in order to achieve racial balance? May courts award "damages" where teachers have been discriminatorily dismissed subsequent to school consolidation? Should Negro teachers be placed, in every instance, on an equal plane with white teachers in desegregated schools, even though adverse consequences may flow from disparities in ability visible to newly integrated students? What can be done to overcome faculty resistance to integration, *i.e.* the "private school" movement?

Several courts and the HEW Guidelines (section 181.13) require affirmative assignment of teachers in order to overcome faculty racial imbalance. In *Dowell v. School Board*[148] the court set a goal of 1970 by which time the Oklahoma City school system had to contain approximately the same percentage of non-white teachers

3144 (Oct. 9, 1967); Beckett v. School Bd., 269 F. Supp. 118, 139 (E.D. Va. 1967); Lee v. Board of Educ., 267 F. Supp. 458, 481 (M.D. Ala. 1967).

[146] *See* Bradley v. Board of Educ., Civil No. 3353 (E.D. Va. 1966) (on remand); Gilliam v. School Bd., Civil No. 3554 (E.D. Va. 1966) (on remand); Wright v. School Bd., 252 F. Supp. 378 (E.D. Va. 1966).

[147] *See* Smith v. Board of Educ., 365 F.2d 770, 784 (8th Cir. 1966); Clark v. Board of Educ., 369 F.2d 661, 669 (8th Cir. 1966); Harris v. Board of Educ., 253 F. Supp. 276, 278 (N.D. Ala. 1966); United States v. Board of Educ., Civil No. 2328 (N.D. Ala. 1966); Carr v. Board of Educ., 253 F. Supp. 306, 310 (N.D. Ala. 1966); Lee v. Board of Educ., 253 F. Supp. 727, 729 (M.D. Ala. 1966); Christmas v. Board of Educ., 231 F. Supp. 331, 337 (D.C. Md. 1964).

[148] 244 F. Supp. 971, 978 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir. 1967), *cert denied*, 387 U.S. 931 (1967) (Dowell II).

in each school as then worked in the entire system. The court felt that this was a reasonable standard in light of personnel turnover figures indicating that about 15 percent of the total faculty is normally replaced each year. Thus faculty integration could be easily accomplished by replacements as well as reassignments over this period of time. Like *Dowell*, the court in *Kier v. School Board*[149] required assignment of Negro teachers to insure, insofar as possible, that the percentage of Negro teachers in each school in the system approximates the percentage of Negro teachers in the entire system for the 1965-1966 school session. Defendants were given up to the end of the 1966-1967 school year to complete this phase of desegregation. A number of other courts have also concluded that affirmative steps must be taken to eliminate the effects of past discrimination.[150]

The theory which underlies a requirement of affirmative action (as opposed to simply the adoption of a nondiscriminatory policy) is chiefly founded on the elimination of effects of past discriminatory practices. Affirmative action may be required in order to effectuate "free choice" plans, adopted by most southern school systems as a method of compliance with desegregation requirements of the Constitution and federal statutes. Affirmative steps are thus distinguishable from efforts to achieve a racial "mix" or "balance" as defined, for example, in Title IV of the 1964 Civil Rights Act, for here the purpose of affirmative action is to further dismantling of the dual school structure in accord with the mandate of *Brown*. As Judge Wisdom in *United States and Stout v. Board of Education* states:

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.

[149] 249 F. Supp. 239, 247 (W.D. Va. 1966).

[150] Cases cited notes 144-47 *supra*. *See also* Mapp v. Board of Educ., 319 F.2d 571 (6th Cir. 1963) (The Chattanooga School Board, as a defense to an allegation of teacher discrimination, introduced evidence that a Negro teacher was teaching by television in the white schools. The court did not consider this important, and ordered substantially greater affirmative action.).

> *The criterion is the relevancy of color to a legitimate governmental purpose.* . . . Here race is relevant because the governmental purpose is to offer Negroes equal educational opportunity. The means to that end, such as disestablishing segregation among students, distributing the better teachers equitably, equalizing facilities, selecting appropriate locations for schools, and avoiding resegregation must necessarily be based on race. . . . If this process be "integration" according to the 1955 *Briggs* court, so be it. In 1966 this remedy appears to us to be the relief commanded by *Brown*, the Constitution, the Past, the Present, and the wavy foreimage of the Future.[151]

The same court has also decided that tenure provisions in teachers' contracts may be disregarded where they impede the progress of faculty desegregation. The decree in the *Stout* decision states in part: "Defendants shall take positive and affirmative steps to accomplish the desegregation of their school faculties and to achieve substantial desegregation of faculties in as many of the schools as possible for the 1967-1968 school year notwithstanding that teacher contracts for the 1966-1967 or 1967-1968 school years may have already been signed and approved. The tenure of teachers in the system shall not be used as an excuse for failure to comply with this provision."[152]

There is ample support for this proposition based on the historic equity power of courts to eradicate the evils of a condemned, or in this case, unconstitutional scheme, by prohibition of the use of provisions otherwise lawful which further that scheme.[153] In order to implement these equity powers courts have been given wide discretion. "The aim of equity is to adapt judicial power to the needs of the situation . . . really a manifestation of the principle that the nature of the relief is to be molded by the necessities."[154] In a recent voting rights decision, *United States v. Duke*,[155] defendants

[151] 372 F.2d 836, 876-78 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3138, 3144 (1967) (emphasis added). *But see* Deal v. Board of Educ., 369 F.2d 55 (6th Cir. 1966); Briggs v. Elliot, 132 F. Supp. 776 (E.D. S.C. 1955) (on remand).

[152] 372 F.2d 836, 900 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3138, 3144 (1967).

[153] See United States v. Bausch & Lomb Co., 321 U.S. 707, 724 (1943); Ethyl Gas Corp. v. United States, 309 U.S. 436, 461 (1939).

[154] Alabama v. United States, 304 F.2d 583, 587 (5th Cir. 1962), *aff'd*, 371 U.S. 37 (1962).

[155] 332 F.2d 759 (5th Cir. 1964). *See also* Louisiana v. United States, 380 U.S. 145, 153 (1965); United States v. Ward, 345 F.2d 857 (5th Cir. 1965).

were enjoined from the imposition of a new voting requirement (interpretation of the Mississippi Constitution), which theoretically applied to all, but which actually affected only those who were past victims of discrimination. Like literacy tests, tenure provisions of teachers' contracts, though generally created for the legitimate purpose of recognizing accumulated seniority rights of teachers, may prevent effectuation of pupils' constitutional rights—in this case the right to nondiscriminatory allocation of faculty.

An additional problem for courts concerned with solutions to faculty inequities is raised by section 181.15 of the 1966 Guidelines, which requires the closing of "small, inadequate schools originally established for students of a particular race and . . . still used particularly or exclusively for the education of students of such race."[156] A number of schools in the South have recently been closed pursuant to this section. However, little attention has been paid until recently to the fate of teachers formerly employed in these schools. For many, consolidation has meant loss of employment.

Viewed from the standpoint of the constitutional rights of pupils, the issue of consolidation and of its concomitant reduction in teaching staff becomes even more serious. The question is whether the Constitution requires that race take precedence over comparative qualifications; and, if so, what remedy is appropriate where dismissals have already occurred? So far the courts are divided.

Those who favor objective comparison where reduction in staff is necessitated base their position on the theory that the fundamental objective of education should be to provide the best available instruction for all students.[157] This goal must not be sacrificed, they urge, for the sake of achieving integration. To some extent, of course, the process of comparison of qualifications of displaced teachers with others in the system is safeguarded when the board is allocated the burden of proving nondiscrimination.[158] Nonetheless it is difficult for courts to determine, even where "good faith" presumptions are applied, whether a board has abused its discretion in attempting to "provide the best available instruction."[159]

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[156] 45 C.F.R. § 181.15 (1967).

[157] Stell v. Board of Educ., Civil No. 1316 (S.D. Ga. 1966); Christmas v. Board of Educ., 231 F. Supp. 331 (D.C. Md. 1964); 64 MICH L. REV. 692 (1966).

[158] Franklin v. School Bd., 360 F.2d 325 (4th Cir. 1966); Evans v. Buchanan, 207 F. Supp. 820 (D. Del. 1962).

[159] *Compare* United States & Stout v. Board of Educ., 372 F.2d 836, 900

Therefore, it seems that a better rule is one that would require absorption into the system of all displaced teachers under all circumstances. In many instances previous segregation has rendered the quality of education of Negro teachers and administrators inferior to that of whites. Negro applicants are thus placed at an objective disadvantage in competition with white applicants for the same positions. Therefore, unless a policy of absorption regardless of qualification is adopted, faculty integration, indeed total desegregation, may be seriously impeded. In *Smith v. Board of Education* the court argued:

> [W]e feel that the board's consolidation policy may not be applied where, as here, a school is closed as the direct consequence of an effort to rectify constitutional defects in the method by which pupils and teachers have previously been assigned, where the effort is to impose, without some concern for qualification to teach, the heavy burden of unemployment solely upon those whose constitutional rights were violated, and where an additional result may be to impede meaningful realization of the constitutional rights of others, that is, pupils. . . . Under circumstances such as these, the application of the policy (although that policy is nondiscriminatory on its face and is based upon otherwise rational considerations) becomes impermissible.[160]

The court then enjoined the board from further discriminatory practices with regard to dismissals, decreed that dismissed teachers were entitled to "preferential" rehiring, and awarded damages based on the amount of loss suffered.[161] Finally, at least one court has attempted to solve this problem by requiring "retraining" where necessary to upgrade the qualifications of some teachers.[162]

All of the forementioned methods adopted by courts to further integration of faculties may result in consequences not anticipated

(5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3138, 3144 (Oct. 9, 1967) (decree). There the court said that where reduction in professional staff was necessitated by desegregation, qualifications of all staff members shall be weighed in selecting those to be released, without regard to race or color. As an added safeguard, however, the court required that defendants file a report, containing the proposed dismissals and stating reasons, with the clerk of court, and serve copies to opposing counsel within five days after such dismissal, demotion, or whatever else was proposed.

[160] 365 F.2d 770, 780 (8th Cir. 1966). *See also* Clark v. Board of Educ., 369 F.2d 661, 669 (8th Cir. 1966).

[161] Smith v. Board of Educ., 365 F.2d 770, 784 (8th Cir. 1966). *See also* Wall v. Board of Educ., 378 F.2d 275, 278 (4th Cir. 1967).

[162] Lee v. Board of Educ., 267 F. Supp. 458, 481 (M.D. Ala. 1967).

by civil rights litigators solely concerned with transforming segregated systems into integrated systems. It has been argued that race relations will in fact seriously suffer where newly integrated Negro teachers do not measure up to the academic quality of white teachers. In their first experience with integration, Negro and white students cannot be expected to understand the segregated educational syndrome that produced this circumstance; they will only compare their present teachers.

In a sense this problem more broadly viewed represents the fundamental issue in school civil rights litigation today, both in the North and in the South. In *Brown* the Supreme Court faced this same unstated dilemma. That court resolved the problem by simple consideration of the opposite solution, a solution which would, they said, impair "the hearts and minds" of Negro children in a way "unlikely ever to be undone."[163]

But aside from the continued impairment of the desegregation process and the psychological impact of segregated faculty on children newly integrated, there are other reasons for faculty integration on an equal basis not previously adverted to. Chief among these is the notion that academic differences are probably more assumed than real; or, if there are differences, they are, in all likelihood, insubstantial. For example, in *Smith v. Board of Education* defendants argued in their brief that race may be a rational and permissible criterion in the employment of teachers in various senses and for various reasons. They were careful not to contend that race "per se" justified discrimination; rather, they argued, certain factors "associated" with race reasonably militated against selection of Negroes for teaching positions.[164] Among these factors were: attendance at poorly regarded Negro colleges, speech patterns differing from those of prospective pupils which would pose serious obstacles to communication, and prejudice or hostility toward members of another race which would render the applicant incapable of effectively educating them. The court responded unsympathetically, stating:

> We recognize that teaching is an art and that excellence does not depend upon knowledge, experience, formal training, and classroom conduct alone. Fitness for teaching rests upon a broad range of factors and encourages numerous personality and

[163] Brown v. Board of Educ., 347 U.S. 483 (1954) (Brown I).
[164] 365 F.2d 770, 781 (8th Cir. 1966).

> character traits. . . . However, in this day race per se is an impermissible criterion for judging either an applicant's qualifications or the district's needs. And this applies equally to considerations described as environmental or ability to communicate or speech patterns or capacity to establish rapport with pupils when these descriptions amount only to euphemistic references to actual or assumed racial distinction.[165]

Even though the question to which the court addressed itself was employment discrimination, the reasoning is of course applicable to the situation where Negro teachers are placed in integrated schools as "teachers' aids" or the like. This situation visibly affects pupils as plaintiffs.

There is one final reason why supposedly adverse consequences of teacher integration on an equal plane should not be seriously considered. Unless teacher integration is ordered unequivocally the cycle of inferior education will probably not be broken in the South. From a purely pragmatic vantage point faculty integration is one way to insure more rapid desegregation of southern teachers' colleges. Only when it is realized that all children, black and white, are to receive an equitable distribution of teachers of both races and differing abilities will the problem of unequal allocation of faculty due to unequal academic preparation be solved.

The final issue considered in this part is faculty "resistance" to integration. As a practical matter the law is powerless where teachers desire to leave the system or quit teaching altogether. In several states the growth of private schools with the resulting drain on public school faculties has notably increased in recent years (probably proportionate to increased Federal pressures). In Virginia, where the movement began in the late 1950's, 15 private schools were opened in 1966. Mississippi has issued 61 state charters for private schools since 1964. And South Carolina has opened 28 private schools in the last three years (encompassing only 4,500 students out of 660,000 in the public schools, however).[166] States may not, it has been held, subsidize "private" education where the purpose is avoidance of Constitutional or federal duties with respect to operation of nondiscriminatory systems of public education.[167]

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[165] *Id.* at 781-82.

[166] Statistics obtained from SATURDAY REVIEW, December 17, 1966, at 80. *See also* N.Y. Times, Feb. 26, 1967, 32 (Magazine).

[167] Griffin v. School Bd., 375 U.S. 391 (1964).

Suits are presently in progress which attack tuition grant laws where they still operate (Alabama, Louisiana, and Mississippi).[168]

Probably the basic source of much of the resistance is widespread adoption of "freedom of choice" plans throughout the South. In the foreseeable future the best such plans can reasonably accomplish, where implemented nondiscriminatorily or even affirmatively, is transition to a system in which there are integrated schools and Negro schools. The South, or any part of the country for that matter, is a long way from the point where whites will desire in any number to choose to attend predominantly or all-Negro schools.

Whether or not the "free choice" plan is therefore unconstitutional because it perpetuates a dual system remains to be seen.[169] What is of concern here is one consequence of that situation; namely, the effect on white teachers assigned to remaining Negro schools. If the "free choice" plan is a significant reason for teacher "resistance" and possible shortage where teachers desire to leave rather than teach in entirely Negro schools, serious questions are thus raised concerning the effectiveness and therefore the constitutionality of this type of plan.

B. The Urban North

Whatever the legal rights of pupils to equal and nonsegregated allocation of teachers in the big cities of the North—and for that matter the South, East, and West—the truth is these rights will continue unfulfilled until those in positions of responsibility come to grips with practical realities. For, as suggested by Professor Thomas Pettigrew, the pervasiveness of unequal educational opportunity in large, "de facto" segregated metropolitan areas can basically be reduced to a problem of "demographics".[170] That is, most metropolitan areas today consist of large, dense central city ghettos composed of lower class minority groups increasingly ringed by white, middle class suburbs. If we add to this simple geography a multitude of social problems associated with lower class slum ghettos, and a declining central city tax base combined with rising

[168] *See* SATURDAY REVIEW, December 17, 1966, at 80.

[169] *See generally* Hobson v. Hansen, 269 F. Supp. 401, 502-03 (D.D.C. 1967). The United States Supreme Court has granted certiorari to review the Virginia "freedom of choice" plan, Green v. School Bd., 382 F.2d 388 (1967), *cert. granted,* 36 U.S.L.W. 3236 (U.S. Dec. 12, 1967) (No. 695).

[170] Address by Professor Thomas Pettigrew, Graduate School of Design, Harvard University, March 21, 1967.

costs (as affluent whites flee to the suburbs), the emergent picture is not one suggesting an easy solution.

Of course, the preceding is not meant to exculpate school boards, state agencies, or the federal government, all of whom have contributed in some measure to the present state of deterioration. Rather, the problem is such that now simple reversal of policy or even affirmative "good faith" actions on the part of school boards to equalize opportunity will not often be sufficient.

For example, in the leading northern case of unequal allocation of teacher resources, *Matter of Skipwith*,[171] the New York court finally concluded it was not their function to say how the Board should effectuate a change in the status quo. But the court then "suggested" several ways in which the Board might rectify the situation:

> by compulsory assignments of veteran teachers to "x" schools for a period of years, by paying a special bonus to teachers to induce them to accept such assignments, or by providing additional services and facilities in such schools, as for example, additional administrative personnel, to make them more attractive to teachers now working in less difficult schools.[172]

Yet the Board was unable to implement these suggestions. In 1960, several months after the *Skipwith* decision was handed down, the New York City Board of Education authorized an examination of the teacher disparity uncovered by the court. After some investigation the Subcommission on Teacher Assignments and Personnel of the Commission on Integration reported to the Board that in "difficult schools where the most effective teaching is urgently needed, we find the lowest percentage of regularly licensed teachers, new appointees declining assignment."[173] The Subcommission argued, in light of the general shortage of licensed teachers, that a city-wide ratio of regular to substitute teachers should be calculated, following which any regular teachers in any school in excess of the city-wide ratio would be transferred to schools whose percentage of licensed teachers was below the city-wide average. After vigorous protests of teachers' unions and associations, however, the Board retreated.

[171] 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. 1958).

[172] *Id.* at 872.

[173] New York City Board of Education, Towards Greater Opportunity, A Progress Report From the Superintendent of Schools to the Board of Education Dealing With Implementation of Recommendations of the Commission on Integration (Theobold Report), 104, 110, June, 1960.

Accepting the Subcommission Report in principle, the Board said it would first attempt to make teaching more attractive in the predominantly Negro-Puerto-Rican schools, and would then rely on "volunteers" to request transfer. In addition the Board promised to give priority in the assignment of newly appointed teachers and to require candidates for the assistant to the principal license to serve at least two years in such schools. The end result was that the percentage of licensed teachers in predominantly Negro and Puerto Rican schools did not improve significantly.[174]

This episode succinctly illustrates the demographic problem. Teachers are simply loathe to teach the underprivileged in "dark ghettos." And results of a recent survey of teacher's colleges in those states (18) which in 1960 included over 90 percent of the Negro population of the United States give little promise of change. The most important finding was that there is a far greater number of children of blue-collar workers attaining school age than of teachers who prefer to teach them. Other findings of significance were: there are a very substantial number of white teachers-in-training, even in the South, who prefer to teach in racially mixed schools; very few teachers of either race wish to teach in predominantly minority schools; and "high-ability" pupils are much more popular with future teachers than "low-ability" pupils.[175]

Up to now the federal government has not been very imaginative or successful in its attempts to overcome unequal educational opportunities in urban ghettos. Federal aid, where it has been dispensed, has accomplished little beyond making the slum dweller, anxious for better education, even more frustrated. As a recent article put it:

> The massive irony, of course, is that most of the federal aid now reinforces slum schooling. It buttresses the segregated ghetto

[174] *See generally,* K. CLARK, DARK GHETTO 128-48 (1965). Clark takes the position that special incentives should be established (other than financial) in order to recruit teachers who would be suited to work with the underprivileged. These teachers, he suggests, should be recognized as "master teachers." Any extra money would be specifically tied to superior skill and more challenging responsibilities. He concludes: "A high-level professional atmosphere of competent and understanding supervision, a system of accountability—objective appraisal of professional performance—and a general atmosphere conducive to high-quality teaching and clear standards for differentiation of inferior, mediocre, and superior teaching with appropriate corrections and rewards must be maintained." *Id.* at 139. See also Peck & Cohen, *The Social Context of DeFacto School Segregation,* 16 W. RES. L. REV. 572, 590-93 (1965).

[175] COLEMAN REPORT 25-27.

> rather than serving to break it up. . . . The embittered residents of the slums don't believe that their schools are appreciably better as a result of the massive federal programs. Class size may be smaller, teachers have more "free" time and better pay—public preschool teachers in Harlem earned $212 a week last summer—and there are more assistant principals, supervisors, and curriculum specialists. "If the schools are really better," the slum dweller asks, "why don't whites want any part of them?"[176]

Under the United States Office of Education's proposed Equal Educational Opportunity Act of 1967, one can probably expect more of the same.[177] Title III, which is very similar to the proposed Kennedy Bill (S. 2928) introduced to amend Title IV of the Civil Rights Act of 1964, and section 4 of the proposed Powell Bill (H.R. 13079), would provide grants to assist schools in the process of desegregation. For example, there would be money available for inservice training of teachers and other school personnel, for the employment of specialists to advise school personnel, parents, children, and the public on problems of desegregation, and for improved guidance and counseling services. In addition, there would be incentive money for the recruitment and advancement of minority-group teachers, and for white teachers who are motivated to teach in ghetto schools and transitional programs.

Whatever the merits of federal aid programs to date,[178] most

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[176] Grant, *Developing Power in the Ghetto*, SATURDAY REVIEW, December 17, 1966, at 75.

[177] See SATURDAY REVIEW, December 17, 1966, at 86.

[178] See generally COMMISSION REPORT 115-40. The Commission did a comparative study of achievement gains in newly integrated schools and schools which are racially isolated but which have compensatory aid programs. Comparisons of Negro students in both settings occurred in Syracuse, N.Y., Berkeley, Calif., Seattle, Wash., and Philadelphia, Pa. In addition, the Commission compared Negro schools which did or did not have compensatory programs, *e.g.*, the Banneker Project in St. Louis, Mo., the Higher Horizons Program in New York City, and the All Day Neighborhood School Program in New York City. In every instance the Commission found only insignificant gains in achievement level.

> It is . . . said with truth that disadvantaged Negro youngsters are in need of special attention, smaller classes, a better quality of instruction, and teachers better prepared to understand and set high standards for them. But the suggestion that this is all that is needed finds little support in our experience to date with efforts to provide compensatory education. The weakest link in these efforts appears to be those programs which attempt to instill in a child feelings of personal worth and dignity in an environment in which he is surrounded by visible evidence which seems to deny his value as a person. This does not appear to be a problem which will yield easily

teachers are nonetheless reluctant to accept positions in racially imbalanced schools. In many instances this reluctance is not attributable only to racial prejudice. Coleman found that many teachers would prefer to teach in racially mixed schools, but wish to avoid the difficulties of teaching a whole class of culturally deprived children.[179]

Unfortunately, there are other reasons why good teachers will not be attracted to slum schools. The "free market" condition, a result of teacher shortages in many areas, is the keystone of current public school employment policy. Money cannot be the answer here because it is incapable of adding to the stature of slum school work; teachers are professionally too proud to appear money-motivated. There are also serious problems with teachers' associations which dislike "unequal pay for equal work." And finally, slum dwellers tend to view money incentives as bribery, which simply reinforces alienation.

Perhaps the most hopeful solution to the "demographic" problem of racial isolation which has yet been proposed is metropolitan districting. The United States Commission on Civil Rights, in its most recent report, strongly favors implementation of this remedy. The theory behind the metropolitan approach, the Commission suggests, is twofold: "(1) to broaden school attendance areas to subsume a more heterogeneous school population, (2) and at the same time . . . improve substantially the quality of education."[180] Methods or plans which would service metropolitan attendance areas fall into three fairly distinct categories: supplementary centers and magnet schools, education complexes, and educational parks.[181]

Metropolitan educational systems seem to be the only remedy thus far suggested that has a chance to affect substantially working

to additional infusions of money. More funds clearly are required, and investments in programs that will improve teaching and permit more attention to the individual needs of students undoubtedly will benefit many children. The evidence suggests, however, that the better services additional funds will provide will not be fully effective in a racially isolated environment, but only in a setting which supports the teacher's efforts to help each child to understand that he is a valuable person who can succeed.

Id. at 194.

[179] COLEMAN REPORT 25-27.

[180] COMMISSION REPORT 163. *See also* Hobson v. Hansen, 269 F. Supp. 401, 515-16 (D.D.C. 1967).

[181] COMMISSION REPORT 163-83.

conditions in city schools and thereby attract better teachers. Dr. Daniel C. Lortie, in a paper prepared for the United States Commission on Civil Rights 1967 Report, listed a number of built-in educational advantages which would attract the best people to these institutions: experimentation, specialization, training institutes, additional physical resources (computers, etc.), and other devices which would allow more time for individual guidance.[182]

In the last analysis there are many strong reasons why the only viable solution to this growing problem of unequal educational opportunity is one which fosters integration both of students and teachers. The Coleman Report and the Commission Report provide ample evidence of the beneficial scholastic impact of integration by class and race compared with all other educational factors. Furthermore, the purpose of school integration, and attraction of good teachers for the disadvantaged, is not merely to raise academic achievement. Rather, equal educational opportunity fostered by integration would alter an entire perspective toward education, would impart a sense of interracial understanding impossible to measure, and would affect the quality of opportunity in a way also impossible to guage. Finally, though perhaps too cynically, integration is probably the only way in which Negroes in this country will obtain equality of educational opportunity in the long run. Professor Kaplan, after discussing the concept of educational "harm" as a question of class interactions, aptly concludes:

> The interaction between race and social class might alone justify the political organs of the community in deliberately choosing to mix the races, if only as a method of avoiding the educational disadvantages of the lower class school. But integration may be defended as more than an indirect attempt to avoid the educational disadvantages of the lower class school. On the political level, it is perhaps the only method, apart from an impractical degree of vigilance, which can prevent the Negro minority from being singled out to receive the least adequate faculty, teaching aids, and many other benefits dispensed by white school authorities. In this context integration is merely one method of insulating a minority from hostile government action.[183]

[182] Lortie, "Towards Educational Equality: The Teacher and the Educational Park," working paper prepared for the Commission Report, Appendix.

[183] Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 Nw. U.L. Rev. 157, 204 (1963).

V. Summary and Conclusion

It is now clear that under the equal protection clause of the fourteenth amendment pupils in the public schools of this country are entitled to non-racial and equal allocation of teacher resources. There are at least three significant constitutional justifications for this requirement. They are: (1) that racially motivated allocations of teacher resources always constitute invidious classifications which are discriminatory per se; (2) that racially motivated allocations of teacher resources—*i.e.* racial segregation of faculty—hinder the general progress of pupil desegregation, and are therefore contrary to the "deliberate speed" command of *Brown II*; and (3) that racially motivated allocations of teacher resources deny equality of educational opportunity not justified by other considerations. The foregoing theories of action find further support in recent empirical studies conducted by the United States Office of Education (the Coleman Report) and the United States Commission on Civil Rights (Commission Report).

The problem which looms largest, however, is remedy. Although it has been argued that racially motivated allocations of teacher resources are unconstitutional because such actions, among other things, hinder the general progress of pupil desegregation, in fact the reverse is often more likely. Both in the South and in the North, where "desegregation" results in a dual system of integrated schools and Negro schools, racial and unequal allocation of teachers will continue as the only means to prevent even more acute teacher shortages. Creative solutions encompassing large-scale integration of pupils are needed in the future to insulate Negroes and other minorities from this form of deprivation of equal educational opportunity.