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EMERGING NATIONWIDE STANDARDS FOR SCHOOL DESEGREGATION — CHARLOTTE AND MOBILE, 1971

By KENNETH L. KARST AND HAROLD W. HOROWITZ

IN THOSE STATES where the public schools were racially segregated by command of law, it has been the constitutional duty of the school authorities, at least since 1955,[1] to dismantle "dual" school systems and replace them with racially nondiscriminatory systems. The transition was to be effected "with all deliberate speed."[2] The Supreme Court, its collective patience worn thin by the repeated triumphs of deliberation over speed in southern school districts, announced in 1968 that time for the conversion had run out:

> The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.[3]

The occasion for this pronouncement was the case of *Green v. County School Board of New Kent County*,[4] in which the Court held unconstitutional the "freedom of choice" plan that had been adopted by the school board of a rural Virginia county. A year later, in rejecting the plea of the United States for relaxation of some immediate desegregation decrees in Mississippi, the Court laid the "all deliberate speed" formula to rest:

> Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.[5]

The question of the timing of desegregation was thus placed beyond dispute. What remained unclear, however, a decade and a half after *Brown v. Board of Education*,[6] was the very substance of the constitutional right in question: What does it mean to "terminate" a dual system — or, indeed, what is a "unitary" system? In two 1971 decisions, the Court began to provide some clarification. The cases, unlike *Green*, came from urban school districts; the cities were Charlotte, North Carolina and Mobile, Alabama. There were those who, recalling the 1968 presidential campaign and President Nixon's 1970 memorandum on school desegregation,[7] expected some departure from *Green*, or at least a pronouncement that in an urban context the neighborhood school policy satisfied the constitutional requirement of a unitary school system. One significant feature of the 1971 decisions is that the Court did no such thing, recalling Sherlock Holmes' "curious incident."[8] An equally significant feature of the 1971 cases is that they provide the basis for identifying emerging *nationwide* standards for school desegregation.

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1. Brown v. Board of Education, 349 U.S. 294 (1955).
2. 349 U.S. at 301.
3. Green v. County School Board of New Kent County, 391 U.S. 430, 439 (1968), hereinafter cited as Green. (Emphasis in original.)
4. *Id.*
5. Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969).
6. 347 U.S. 483 (1954), 349 U.S. 294 (1955).
7. N.Y. Times, March 25, 1970, p. 26, col. 1 (city ed.).
8. In the story *Silver Blaze*, Dr. Watson and Holmes had the following colloquy:
   "Is there any point to which you would wish to draw my attention?"
   "To the curious incident of the dog in the night-time."
   "The dog did nothing in the night-time."
   "That was the curious incident."
   A. C. DOYLE, MEMOIRS OF SHERLOCK HOLMES, vol. III, 22 (1904). For this citation we are grateful to our colleague Benjamin Aaron, who was able to go, with Holmeslike avoidance of waste motion, directly to the right story. "This [passage] is perhaps the most famous example of what the late Monsignor Ronald Knox felicitiously termed the *Sherlockismus*." 2 THE ANNOTATED SHERLOCK HOLMES 276 (Baring-Gould ed. 1967).

The school district in *Swann v. Charlotte-Mecklenburg Board of Education*[9] covers not only the city of Charlotte, but all of Mecklenburg County, some 550 square miles in all. Of the district's 84,000 students, about 24,000 (or 29%) were black. Some 14,000 black students attended schools that were 99% black. The federal district court, which had been dealing with this case since 1965, had responded to the *Green* decision by ordering the grouping of nine inner-city black elementary schools with twenty-four outlying white schools, with attendant busing of students. Black students in the first four grades were to be bused to the outlying schools, and white students in the fifth and sixth grades were to be bused to the inner-city schools. Corresponding "satellite zones"[10] were established for junior high schools, and high schools were redistricted largely in accordance with the school board's own desegregation plan.[11] The Supreme Court unanimously affirmed the order of the district court.

Davis v. Board of School Commissioners of Mobile County[12] arose in a countywide school district that covers 1,248 square miles. Out of some 73,500 students, 58% were white and 42% black. A desegregation plan based entirely on neighborhood geographic zones had been rejected in 1969 by the Court of Appeals for the Fifth Circuit, which even previously had insisted that a conscious effort be made to draw attendance zones "to desegregate and eliminate past segregation."[13] On remand, the district court approved a new plan that left about 60% of the black students in schools that were either all black or nearly so. The Fifth Circuit once again held the district court's plan inadequate; this time, however, the exasperated court of appeals adopted its own plan. High schools and junior high schools were to be paired, and grade structures in those schools adjusted, in order to eliminate the all-black schools. The number of all-black elementary schools was halved by the plan adopted by the court of appeals, but even so about 60% of the black elementary students would remain in all-black schools.

The lower courts in *Davis* had perceived an obstacle to a more thoroughgoing desegregation. A major north-south highway divided the city; west of the highway, where only 6% of the black students lived, it was easy to desegregate the schools. For the great majority of black students who lived east of the highway, however, it would be impossible to avoid assignment to all-black (or nearly all-black) schools without busing. Neither the district court nor the court of appeals had ordered such busing. The Supreme Court, concluding that "inadequate consideration was given to the possible use of bus transportation and split zoning," unanimously remanded for development of a decree "that . . . promises realistically to work *now*."[14] This quotation from the *Green* opinion was a calculated signal: there was to be no retreat from the Court's earlier position on the disestablishment of dual school systems; the public's attention was deliberately drawn to the "curious incident."

In rural New Kent County, Virginia, the Court had held a "freedom of choice" plan invalid, and had suggested simple neighborhood zoning as an alternative that would pass constitutional muster.[15] The county's two schools (one all black

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9. 91 Sup. Ct. 1267 (1971), hereinafter cited as Swann. Discussion of the background to this litigation, and the litigation in Mobile, is contained in SOUTHERN REGIONAL COUNCIL, INC., THE SOUTH AND HER CHILDREN: SCHOOL DESEGREGATION 1970-71 (1971). For comment on *Swann*, see INEQUALITY IN EDUCATION, no. 9 (Aug. 3, 1971, Harvard Center for Law and Education). After this article was in press, another discussion of *Swann*, reaching conclusions generally similar to ours, came to our attention. See Fiss, *The Charlotte-Mecklenburg Case — Its Significance for Northern School Desegregation*, 38 U. Chi. L. Rev. 697 (1971).
10. Such a zone is "an area which is not contiguous with the main attendance zone surrounding the school." Swann, 1273 n.3.
11. The Court also upheld the lower courts' decrees requiring corrective action relating to faculty and staff desegregation and to new school construction. In a companion case, the Court held invalid North Carolina's 1969 Anti-Busing Law, which had been adopted during the pendency of the *Swann* litigation in the district court. North Carolina State Board of Education v. Swann, 91 Sup. Ct. 1284 (1971).
12. 91 Sup. Ct. 1289 (1971), hereinafter cited as Davis.
13. Davis v. Board of School Commissioners, 414 F. 2d 609, 610 (5th Cir. 1969).
14. Davis, 1292.
15. The Court had also suggested the possibility of pairing and consolidating the county's two schools, so that all students in, say, grades 1-7 would attend one school, and all in grades 8-12, the other. Green, 442, n.6.

and the other 85% white) would, because of the existing residential patterns, be effectively rid of significant racial imbalance. The busing of children, previously carried on to maintain segregation, would be reduced by a change to neighborhood schools. In contrast, in *Swann* the Court approved the lower court's order *requiring* busing, and in *Davis* the Court remanded expressly so that the lower courts could make busing a part of the remedy that would end a dual system. In the southern and border states, then, where segregation was formerly commanded by law, the message is clear: The neighborhood school policy is permissible (and may be required by a district court) when such a policy contributes to the improvement of racial balance. When a neighborhood school policy impedes the process of improving racial balance, however, its abandonment may be ordered. In school districts that are emerging from segregation based on racial school-assignment classifications, the neighborhood school is by no means invulnerable to constitutional attack.

This article first examines the meaning of the *Swann* and *Davis* decisions in the context of the disestablishment of dual school systems based on racial school assignments. Then we turn to a question the Court explicitly reserved in *Swann*: the constitutional standards that govern what has come to be called by the misleading name of "de facto segregation" — the racial isolation that results not from a school segregation law but from the adoption of a neighborhood school policy to govern school assignments in a residentially segregated community. We turn, in other (and slightly oversimplified) words, from problems of the southern and border states to problems in northern and western cities. Despite the Court's careful disclaimer, the *Green, Swann* and *Davis* cases do contain important implications for the constitutional issues surrounding the phenomenon that has hitherto been called de facto segregation.

I. Disestablishing Dual Systems

In his opinion for the Court in *Swann,* Chief Justice Burger reaffirmed what the Court had said in *Green:* the school board's obligation is to come forward with a desegregation plan that is effective. The district court should retain jurisdiction "until it is clear that the state-imposed segregation has been completely removed."[16] The *Swann* and *Davis* opinions make much of the "remedial" aspects of the decisions. The substantive violation of the equal protection clause is described in general terms; it is "state-enforced separation of races in public schools."[17] Thus, in characterizing *Brown v. Board of Education,* the Chief Justice comments that the *"remedy* commanded was to dismantle dual school systems."[18] There is surely some comfort in this approach for a judge who might have difficulty in finding the specifics of busing or neighborhood schools in the grand generalities of "the equal protection of the laws." School desegregation litigation, after all, invokes the Equity jurisdiction, and "breadth and flexibility are inherent in equitable remedies."[19]

Yet there is substantive constitutional law in these decisions. The remedies accepted in *Swann* and mandated in *Green* and *Davis* are appropriate not in the abstract but because they lead toward a particular goal: "to achieve the greatest possible degree of actual desegregation."[20] In other words, the remedial effectiveness of a school board's plan or a district court's decree is to be judged on the basis of numbers of transferred children and the resulting racial population percentages in the various schools. It is fair to ask, what is the substantive constitutional principle that requires the "remedy" of desegregation that is "actual," desegregation that "works" by significantly rearranging school racial percent-

16. Swann, 1275, quoting Green, 439.
17. Swann, 1279.
18. *Id.* (Emphasis added.)
19. Swann, 1276.
20. Swann, 1281; also Davis, 1292. In the *Davis* opinion, the Court adds this significant phrase following the quoted words: "taking into account the practicalities of the situation."

ages? Why is it not constitutionally sufficient for a school board to abandon racial criteria for school attendance eligibility? Necessarily, the answer must be that, despite the abandonment of explicit racial classifications, either (a) the effects of past de jure segregation continue, or (b) de jure segregation presently exists, *i.e.*, the district "still practices segregation by law."[21] Chief Justice Burger, commenting in *Swann* on the school boards' burden of proof, said that the school authorities must satisfy a court that the "racial composition [of one-race schools] is not the result of *present* or *past* discriminatory action on their part."[22] The remedial orders in these cases make sense only as means to eradicate, as Judge Sobeloff said when the Fourth Circuit decided *Green*, "segregation and its effects."[23]

A. The Continuing Effects of Past De Jure Segregation

In his *Swann* opinion, Chief Justice Burger discussed one specific example of a constitutional obligation to undo the present effects of past de jure segregation. He emphasized the importance for the desegregation process of continued judicial supervision over the selection of sites for new schools. Where neighborhoods are residentially segregated, a decision to locate a new school in the heart of the ghetto or on the fringes of a white suburb may intensify racial separation — as may a decision to increase or reduce the size of a given school.[24] In this discussion, the Chief Justice said:

> People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.[25]

If the Chief Justice is accurate in this assessment, past decisions on the location of schools have produced not only intensified racial separation in the schools but also intensified residential segregation. If these racial residential patterns are the result of past racially discriminatory action by a school board, then the racial separation which follows from a neighborhood school policy is the product of unconstitutional governmental action:

> "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain artificial racial separation.[26]

Analogies abound in the civil rights area: (1) In *Gaston County v. United States*,[27] the Supreme Court held that a "neutral" literacy test for voters in North Carolina had "the effect of denying or abridging the right to vote on account of race or color" (thus violating the Voting Rights Act of 1965), in view of the county's past maintenance of "separate and inferior schools for its Negro residents."[28] (2) Compensatory education may be constitutionally required for children whose past education has been segregated and inferior.[29] (3) An employer's policy of giving weight to seniority in a specific position may be impermissible under Title VII of the Civil Rights Act of 1964, because of past racial discrimination in eligibility for the position.[30] (4) In the 1964 sit-in cases, the Solicitor General's brief for the United States as amicus curiae argued that past laws commanding racial segregation in places of public accommodation had produced a

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21. Swann, 1281.
22. *Id.* (Emphasis added.)
23. Bowman v. County School Board, 382 F. 2d 326, 333 (4th Cir. 1967) (concurring opinion).
24. The separation my be further intensified by closing schools that are becoming racially mixed.
25. Swann, 1278.
26. Swann, 1282.
27. 395 U.S. 285 (1969). See Fiss, *Gaston County v. United States: Fruition of the Freezing Principle*, 1969 Sup. Ct. Rev. 379.
28. 395 U.S. at 293.
29. United States v. Jefferson County Board of Education, 372 F. 2d 836 (1966), aff'd en banc, 380 F. 2d 385 (5th Cir.), *cert. denied sub nom.* Board of Education of Bessemer v. United States, 389 U.S. 840 (1967); Hobson v. Hansen 269 F. Supp. 401 (D.D.C. 1967), *aff'd as modified sub nom.* Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969). An analogous feature of *Hobson* was the district court's decree ordering the abolition of the "track system," under which students were supposedly grouped by ability. Because of past discriminatory operation of the track system in elementary schools, students in the upper grades were unfairly disadvantaged in taking the tests on which their present ability was measured.
30. See United States v. National Lead Co., 438 F. 2d 935 (8th Cir. 1971).

cultural milieu in which it was meaningless to speak of a lunch counter owner's "private" choice to refuse service to blacks — so that it was proper to conclude in such a context that the state had been significantly involved in otherwise private racial discrimination.[31]

In *Swann,* the district court also found that racial residential patterns in Charlotte had been influenced by the racially discriminatory action of governmental bodies other than the school board. Must a court treat those other forms of governmental action as the equivalent of the school board's own past conduct? The Supreme Court, keenly aware of the implication of the latter question in the context of de facto segregation, explicitly refused to answer it:

> We do not reach in this case the question whether a showing that school segregation as a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it.[32]

We shall return to this question in our discussion of de facto segregation. For now, we note that there are a great many factors — some governmental, some not — other than school location that influence a family's selection of a place to live. What is significant for our present purposes is that the Court chose to mention *past* racially discriminatory school-location decisions as relevant to the *present* constitutionality of school assignment policies that are, on the face of things, racially neutral. For with equal force it can be argued that the entire dual structure of racial school assignments influenced past choices of residential location, with the result that present residential patterns throughout the urban south can be said to be the consequence of past discriminatory action by school authorities. The Court did not mention this possibility, but its analysis seems to invite the contention.

Assuming that past racial school policies, in combination with a neighborhood school policy, produce the present effect of racial imbalance in the public schools, what is the school board's duty? In theory, it is arguable that if the state has acted unconstitutionally, it must totally undo the wrong. Such a duty would take no account of costs to other community interests, but would be absolute, a duty to do everything necessary to eliminate all present effects of past de jure segregation. To the extent that *Swann* is based on a duty to undo the continuing effects of past segregation, however, it is clear that no such absolute duty exists. There are two obvious reasons for this determination.

First, not only is it impossible to undo every effect of past compulsory segregation, but it is even impossible to identify causes and effects with any precision. There is a sense, of course, in which the effects of an action or an event never end. Novelists and historians compete with philosophers in making the point: once the pebble is dropped in the lake, the lake and the Universe are forever altered. So it is with segregation. Nothing the courts can do — nothing any of us can do — will even identify, let alone erase, all the effects of slavery, of the Compromise of 1877, of the whole fabric of Jim Crow legislation, of which school segregation was a part. Secondly, once formal racial classifications have been abandoned in the law, there are possible non-racial independent justifications for a neighborhood school policy. Even if racially imbalanced school populations persist, in other words, the justifications for neighborhood schools can legitimately be argued against the claim of an absolute duty to undo every effect of past de jure segregation. Furthermore, after a neighborhood school policy has been adopted, that policy itself has a casual relationship with present school popula-

31. Brief for the United States as Amicus Curiae, p. 40, Griffin v. Maryland, 378 U.S. 130 (1964), and companion cases. In the companion case of Bell v. Maryland, 378 U.S. 226 (1964), Justice Black commented that acceptance of this argument implied "one Fourteenth amendment for the South and quite a different and more lenient one for the other parts of the country." 378 U.S. at 318, 334 (dissenting opinion).
32. Swann, 1279.

tion patterns, so that it becomes even more difficult to trace the effects of past formal racial classifications in present school populations.

Given these reasons why there can be no absolute duty to undo all effects of past racial school-assignment classifications, it is not surprising that the Court chose to define a school board's duty in terms of "dismantling" a dual system. Such a definition necessarily implies that at some time, for purposes of constitutional analysis, it will be possible to say that a school board has performed its constitutional duty — that it no longer is constitutionally responsible for what may arguably be the continuing effects of past de jure segregation. In *Swann,* the Court said:

> At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I.* The systems will then be "unitary" . . . .[33]

The crucial question, of course, is how a school board or a court can determine whether that point has been reached. What factors would be relevant to such a determination? *Green, Swann* and *Davis* provide, by analogy, a doctrinal answer. The contours of the emerging formula are not clear-cut, but to expect greater precision would be to expect the impossible. In *Swann,* the Chief Justice's opinion for the Court concludes by drawing special attention to the flexibility that must attend the fashioning of decrees in his area:

> The Court of Appeals, searching for a term to define the equitable remedial power of the district courts, used the term "reasonableness." In *Green,* . . . this Court used the term "feasible" and by implication, "workable," "effective," and "realistic" in the mandate to develop "a plan that promises realistically to work, and . . . to work *now*.[34]

Here, as elsewhere, the Chief Justice seems to be discussing only matters of remedy. And in *Swann* itself, the Court did merely approve the district court's solutions to the problems of Charlotte and its surrounding county:

> On the facts of this case, we are unable to conclude that the order of the District Court is not reasonable, feasible and workable . . . . Substance, not semantics must govern, and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity.[35]

But the district court's decree, after all, had included countywide busing, with noncontiguous districting, to the end that very significant changes would be wrought in the racial balance of the county's schools. In *Davis,* in contrast, all that talk about the flexibility of Equity notwithstanding, the Court remanded for reconsideration of the desirability of using buses to take Mobile's children across the psychological barrier of the north-south highway. To put it more succinctly: in Charlotte's case, the Court said that Equity was flexible enough to include ordering busing; in Mobile's case Equity was inflexible enough so that busing had to be included — all because the required result was "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation."[36]

When the Court proceeded to the question of justifications for the continuation of some racial imbalance, it recognized that one of the "practicalities" may be that the distances between black and white segregated neighborhoods may be too great to justify busing. In Charlotte, under the district court's order, elementary school children would be bused an average of seven miles, with a maximum one-way trip of about 35 minutes. That was not enough of a burden to constitute a "practicality" that would justify modification of the remedy. But there might be such a burden in busing:

> An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process . . . . It hardly needs stating that the limits of time of travel will vary with

33. Swann, 1283.
34. *Id.*
35. *Id.*
36. Davis, 1292.

many factors, but probably with none more than the age of the students.[37]

Another implication from this passage seems clear: The greatest *possible* degree of actual desegregation does not necessarily mean the school board must eliminate all racial imbalance, so that each school mirrors the total community's racial proportions. And the matter need not be left to implication, for the Court in *Swann* makes explicit that:

> The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.[38]

(Yet in *Swann* the district court had used the community's racial percentages, 71% white and 29% black, as a starting point in devising a desegregation plan, when the school board defaulted in coming forward with a workable plan of its own — and the Supreme Court gave its approval to that use of racial percentages.)

The constitutional requirement is the same whether we characterize the issue as one of remedy or as one of substantive obligation. To the extent that present effects of past de jure segregation can be shown, there is a duty to adopt all "reasonable," "feasible," "workable" means available to ameliorate those effects. The question of when the dual system ends — when the system's continuing effects are no longer constitutionally attackable — has been answered: the system is "unitary" when all these "reasonably feasible" means have been adopted.

But the analysis of *Green, Swann* and *Davis* cannot end here. In *Green*[39] and in *Davis*[40] there was no mention of any continuing effects of past segregation, and in *Swann* the opinion identified only one relatively minor example of such a continuing effect.[41] Yet in each of these cases the Court held that there was a constitutional obligation to reduce racial imbalance in school attendance patterns throughout the entire district. This obligation surely does not rest solely on the need to undo the effects of past explicit segregation. Furthermore, we have previously noted the difficulties that would result from confining the analysis to the continuing effects of past segregation: (a) the difficulty of tracing the present effects of past racial school-asignment policies, and (b) the presence of another cause of present school population patterns, namely, the neighborhood school policy. Thus if we are to find a satisfactory explanation for the results in these three cases, we must turn to the other major theme to be found in the opinions; the theme of presently existing de jure segregation. This theme grows out of the Court's determination in all three cases that while the school authorities had abandoned one form of state-imposed racial separation (the assignment of children to schools on the basis of race), the districts were now engaged in another form of racially discriminatory action which resulted in racially imbalanced school populations.

B. The Present Existence of De Jure Segregation

The determination that a school board is presently practicing de jure segregation eliminates the problems, practical and philosophical, raised by the question whether past unconstitutional action has spent its force. As might be expected, in the *Green* opinion, as well as in the more recent *Swann* and *Davis* opinions, the Court appears to have relied more on

37. Swann, 1283. In August, 1971, Chief Justice Burger was asked to stay the order of a federal district court which required extensive busing in reliance on *Swann*. The school board alleged in its application that the "average time" of bus travel would be one hour. The Chief Justice denied the stay, saying:
> The "average" travel time may be generally relevant but whether a given plan trespasses the limits on school bus transportation indicated in *Swann* . . . cannot be determined from a recital of a "one hour average" travel time.

Winston-Salem/Forsyth County Board of Education v. Scott, No. 71-274, October Term, 1971, p.6 (1971). In a footnote the Chief Justice said that an average travel time of "*three* hours daily" would be "an extreme example of a patent violation of *Swann*," sufficient to justify a stay until the Court could act. *Id.*

38. Swann, 1280.

39. In *Green*, the Court added a footnote quoting a report of the U.S. Commission on Civil Rights concerning the kinds of community pressures that typically prevented a "freedom of choice" plan from producing actual integration. Green 440, n.5.

40. In *Davis*, the Court merely said that once the district court has found a constitutional violation, the school board and the judge have the duty "to achieve the greatest possible degree of actual desegregation, . . . " Davis, 1292.

41. The reference is to the impact of school location decisions, discussed earlier. Swann, 1278.

the theory of the present existence — *i.e.*, the persistence in another form — of de jure segregation than on the theory that past unconstitutional action is still causing discernible effects. What is significant about these decisions is their common pathway to the critical determination that de jure segregation is presently being practiced. The Court recognized in all three cases that the states had abandoned their enforcement of school assignment statutes that were explicitly racially discriminatory. But the Court discerned de jure segregation of another kind: school board policies that maintained in fact what had been abandoned in form, *i.e.*, a dual system in which students continued to be separated by race.

In *Green*, the school board's "freedom of choice" plan permitted each student in rural New Kent County to choose which of the county's two schools he or she would attend. As fate would have it, all the white children chose to remain in the formerly white school, and 85% of the black children chose the formerly black school.[42] Since there was no significant racial residential segregation in the county, plainly a dramatic improvement in racial balance could have been achieved either by conversion to a straight neighborhood zoning principle or by pairing the two schools so that all children in the lower grades would attend one school and all upper-grade children would attend the other. The Supreme Court expressly suggested both possibilities. "Freedom of choice" plans were not ruled out categorically. But,

> if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, "freedom of choice" must be held unacceptable.[43]

Furthermore,

> where other more promising [than "freedom of choice"] courses of action are open to the board, that may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method.[44]

In other words, if reasonable alternatives are available for achieving a more thorough-going desegregation, and the school board fails to adopt one of the more effective alternatives, then the board is guilty of practicing de jure segregation, even though all official racial discrimination has otherwise been removed from school assignments. Viewed against a background of past racial school assignments, the failure to use the more effective alternative is the equivalent of the intentional adoption of an alternative that produces more segregation. The school board is constitutionally responsible, in effect, for that quantum of segregation that is measured by the difference between the actual or anticipated results of the plan chosen and the anticipated results of the competing, more effective plan that is "reasonably available."

There is much in the foregoing paragraph that speaks to questions of more and less, of reasonableness and of practicality. Anyone familiar with the history of the "all deliberate speed" formula — which was buried in 1969 but, in Maitland's figure, rules us from its grave — may be expected to raise at least one eyebrow when new mushy-sounding doctrinal formulas are proposed. The proof of the "reasonably feasible" recipe is in the desegregation pudding. In *Green*, the result of following the Supreme Court's opinion would be that both the county's schools would mirror the county's total racial proportions. In *Swann*, the result was affirmance of the district court's order that included large-scale grouping of schools in noncontiguous districts and countywide busing. (The district judge did note proudly that his solution would require only 138 buses in addition to the 280 already used in the county.)[45] And in *Davis* the Court did not simply approve a local judge's busing order, but

42. Violence, physical threats and fear of economic reprisals (*e.g.*, loss of employment) appear to have given fate a push in the usual "freedom of choice" situation. See note 39, *supra*.
43. Green, 441.
44. Green, 439.
45. Swann v. Charlotte-Mecklenburg Board of Education, 318 F. Supp. 786, 795 (W.D. N.C. 1970).

reversed both the district court and the Fifth Circuit, insisting on further consideration of noncontiguous zoning and its attendant busing. The Burger Court plainly means business by its applications of the "reasonably available" formula.

Thus when the Court in *Swann* faced up to the question of the constitutionality of the continued existence of all-black schools in communities where schools were formerly explicitly segregated by law, the conclusion was that such schools were presumptive evidence of de jure segregation. The existence of "some small number of one-race, or virtually one-race, schools within a district is not in and of itself" a sign of continuing de jure segregation, said the Court.[46] But since the school board's duty is to achieve the greatest possible degree of actual desegregation, both the board and the district court "will thus necessarily be concerned with the elimination of one-race schools." There is "a presumption against schools that are substantially disproportionate in their racial composition," and if a board's proposed desegregation plan provides for the continuation of any schools that are "all or predominantly one race,"

> the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.[47]

Presumably the only way that the school board could carry its burden of proof on this question would be to demonstrate that busing, for example, was not practical for the reasons pointed out in the *Swann* opinion. In view of the Supreme Court's insistence on busing in Mobile, and its approval of busing in Charlotte — both cities of substantial size, sharing school systems with large counties — it appears that the school board's burden is a heavy one. A school of predominantly one race is a sure invitation to judicial intervention.

This language in *Swann* about the presumptive illegality of one-race schools is just a specific application of what was said in *Green* — with flesh on the skeleton of the "reasonably available" formula in the form of a determination that busing *is* a reasonably available alternative. The chief significance of *Swann* and *Davis* is precisely this — that despite changes in the personnel of the Supreme Court, not only is there no retreat from *Green,* but *Green* is applied in the context of two large urban school districts, where its implementation requires both increased money cost and the abandonment of the neighborhood school policy.

There are other ways of looking at a school board's constitutional duty, given a history of racial school assignments, to take "reasonably feasible" steps to ameliorate racial imbalance in school populations even after racial assignments have been abandoned. Before *Green* was decided by the Supreme Court, Judge Wright, in *Hobson v. Hansen,*[48] anticipated the arguments that would support a rule requiring "substantial actual integration" of schools that were formerly segregated by law. Speaking cautiously in terms of "remedy," as Chief Justice Burger was to do later in *Swann,* Judge Wright articulated two reasons for insisting on actual integration:

> One, the court is entitled to real assurance that the school board has abandoned its earlier unconstitutional policy of segregation, assurance which only the objective fact of actual integration can adequately provide, inasmuch as only that is "clearly inconsistent with a continuing policy of compulsory racial segregation." . . . Two, the entire community, white and black, whose own attitude toward Negro schools is what stigmatizes those schools as inferior, must be disabused of any assumption that the schools are still officially segregated, an assumption it might cling to if after supposed "desegregation" the schools remained segregated in fact.[49]

The emphasis in this passage is not so much on the present existence of a new form of de jure segregation as it is on the failure to abandon earlier segregation that had rested on formal racial school

46. Swann, 1281.
47. *Id.*
48. 269 F. Supp. 401 (D.D.C. 1967), *aff'd as modified sub nom.* Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969).
49. 269 F. Supp. at 494-95.

assignments. But this way of stating the point is not inconsistent with the principle that emerges from the *Green, Swann* and *Davis* opinions. Both considerations mentioned by Judge Wright go to states of mind. His first reason for insisting on actual integration relates to the school board's good faith and its intentions; to have a "policy," or to abandon one, is to have a set of intentions to act in the future. In this sense, nothing desegregates like desegregation. Professor Bickel, who seeks to limit *Green's* implications to the context of school districts which have recently used racial school-assignment criteria, finds such a limitation in the opinion's suggestions of bad faith on the part of a school board that deliberately opts for a relatively ineffective "desegregation" plan. Decrees such as those ordered in *Green,* he says (echoing Judge Wright),

> purport merely to demand the production of convincing evidence of compliance with the minimal rule that legally-imposed segregation must be disestablished.[50]
>
> [In such cases the] courts insisted that the principle of segregation and, gradually, all its manifestations in the system of law and administration be abandoned; and they required visible proof of the abandonment, namely, the presence of black children in school with whites.[51]

This "evidentiary" view of the *Green* principle[52] is not inconsistent with our earlier suggestion that a school board's duty to achieve actual integration must rest on a constitutional obligation to do away with present de jure segregation (as well as continuing effects of past, and now abandoned, de jure segregation). Good faith, after all, is not a concept that is meaningful in the abstract. One has good faith (or doesn't) with respect to something. In the present context, a school board intends (or doesn't) to abandon — what? The *principle* of segregation? In 1971, that kind of talk will come easily, even in Mobile. Abandon state segregation *laws?* That is another kind of cheap talk, only trivially more costly than assertions about principle. Abandon segregation in *administration?* Now we are getting somewhere, provided that we are indeed talking about "black children in school with whites." The constitutional principle itself requires no less. In other words, the present existence of reasonably preventable racial imbalance in school populations is evidence of a school board's adherence to a policy of racial segregation, even after the abandonment of a formal racial school-assignment policy.

Judge Wright's second reason for requiring actual integration — to educate the public that the schools are indeed desegregated — is based on the assumption of *Brown v. Board of Education* that official governmental imposition of the stigma of caste impairs black children's motivations to learn, and thus denies them equality of educational opportunity. The point here is not that public officials (such as school board members) have evil states of mind, but that the community perceives the fact of continued racial separation as a continuation of the officially imposed racial stigma. If a school board has effective, "reasonably feasible" alternatives before it, and instead knowingly chooses a "desegregation" plan that produces less actual integration than would the proposed alternative plans, what *should* the community think the official governmental position is on the question of racial separation? If a school board accepts racial imbalance that is reasonably avoidable, it is appropriate to draw the inference that there is *now* an official policy to separate the races, whether or not this present policy is described as the continuation of an earlier racial school-assignment policy.

II. De Facto Segregation as a Dual System

There is more racial imbalance in public schools in the major cities of the

50. A. Bickel, The Supreme Court and The Idea of Progress 130 (1970).
51. Bickel, *Desegregation: Where Do We Go From Here?,* The New Republic, Feb. 7, 1970, p. 20.
52. The view is supported in both the *Swann* and *Davis* opinions, which speak to the school boards' do-nothing attitudes in terms strongly suggesting bad faith. *Cf.* Goss v. Board of Education of the City of Knoxville, 444 F. 2d 632 (6th Cir. 1971).

north and west than there is in the south.[53] De facto segregation — a term that has been used primarily to describe the racial isolation prevailing in schools of a community that has no recent history of a school assignment policy that was explicitly based on race — results from the superimposition of contiguous geographic attendance zoning (the neighborhood school policy) on racially segregated neighborhoods. The constitutional attack on de facto segregation began in the decade following the *Brown* decision, and continues to this day. With no decision of the Supreme Court to guide them, the lower courts have reached varying conclusions. Some courts, reading *Brown* as a prohibition on racial classifications, have held that a school board has no constitutional duty to remedy racial imbalance, absent a showing of present effects of such past de jure segregation.[54] Other courts have found a constitutional duty to take steps to reduce de facto segregation, and have defined the school board's duty in terms strikingly similar to those used in *Swann*. The California Supreme Court, for example, held in 1963 that Pasadena's school board had a duty to "take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause."[55] The similarity between this formula and that employed in *Green, Swann* and *Davis* suggests the inquiry we now make.

A. The Continuing Effects of Past De Jure Segregation

In each of these three cases, the emphasis of the Court's opinion is on the obligation to abandon present racially discriminatory action. It is this aspect of these decisions that seems most applicable in the context of de facto segregation. Yet the Court's pronouncements on the continuing effects of past de jure segregation are also relevant to an inquiry into the constitutional duty of a northern urban school board.

Swann suggests that segregated schools may have contributed to the formation of segregated residential patterns, and that such past discriminatory action by school boards gives rise to a present constitutional duty to take steps, within the limits of practicality, to undo the past action's present effects. In the north and west, of course, governmental action has been of major casual significance in producing racial segregation in housing.[56] Sometimes the governmental action has been blatant, as in the courts' pre-1948 enforcement of racially restrictive covenants;[57] at other times, the government has been relatively sophisticated, as in the location of public low-income housing in the heart of the ghetto.[58] In either case, the governmental action concerned housing directly. The point is that the state's responsibility for segregated housing in the north and west is far easier to demonstrate than is the Court's assertion in *Swann* that school location decisions

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53. Los Angeles Times, June 18, 1971, pt. I, p. 4, col. 2.
54. *E.g.*, Deal v. Cincinnati Board of Education, 369 F. 2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); Bell v. School City of Gary, Indiana, 324 F. 2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964). The cases and literature are collected in Bell, *School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools*, 1970 Wis. L. Rev. 257.
55. Jackson v. Pasadena City School District, 59 Cal. 2d 876, 881 382 P. 2d 878, 31 Cal. Reptr. 606, 610 (1963). This was an alternative holding in the decision that the school district's demurrer should be overruled. For the California Supreme Court's own characterization of this ruling as a holding, see Serrano v. Priest, 5 Cal. 3d 584, 604, 96 Cal. Reptr. 601, 615, 487 P. 2d 1241, 1255 (1971).
For an analysis of a school board's obligation in terms of the "justifications" for school-assignment policies which result in racial imbalance, see Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564, 607-09 (1965); for a similar discussion in terms of a "reasonable choice test," see the approach suggested by John Silard in *Metropolitan School Desegregation Conference*, Dec. 4-5, 1970, *Summary of Proceedings* 15-18 (Center for Nat'l Policy Review & Potomac Institute 1971). Judge Sobeloff, dissenting in United States v. Scotland Neck City Board of Education, 442 F. 2d 575 (4th Cir. 1971) and concurring in Turner v. Littleton-Lake Gaston School District, 442 F. 2d 584 (4th Cir. 1971), used a phrase which could be applied effectively as another way of describing a school board's obligation as stated by the California Supreme Court: "If challenged state action has a racially discriminatory effect, it violates the equal protection clause unless a compelling and overriding state interest is demonstrated." 442 F. 2d 593, 595.
56. School zoning itself may have an effect on private housing decisions, as the Chief Justice noted in *Swann*. See text at note 24, *supra*. See Fiss, note 55 *supra*, at 587; Kaplan, *Equal Justice in an Unequal World: Equality for the Negro — The Problem of Special Treatment*, 61 Nw. U. L. Rev. 363, 400 (1966).
57. In Shelley v. Kraemer, 334 U.S. 1 (1948), the Supreme Court held unconstitutional the enforcement by state courts of covenants restricting he occupancy of real propery on a racial basis. See Fiss, note 55 *supra*, at 586. Compare Buchanan v. Warley, 245 U.S. 60 (1917), in which a racial zoning ordinance was held to violate the due process clause of the 14th amendment.
58. See, *e.g.*, Gautreaux v. Chicago Housing Authority, 436 F. 2d 306 (7th Cir. 1970), *cert. denied*, 91 Sup. Ct. 1378 (1971). See generally *Hearing Before the Select Committee on Equal Educational Opportunity of the United States Senate, Part 5 — De Facto Segregation and Housing Discrimination*, 91st Cong., 2d Sess. (1970).

may have produced segregated residential patterns.[59]

The argument may be made, as Chief Justice Burger said in *Swann,* that

> The elimination of racial discrimination in public schools . . . should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities.[60]

But the equal protection clause speaks not merely to school boards but to states, and surely does not permit a state to avoid its responsibility by carving up public functions into pieces so as to immunize itself from constitutional attack. All governmental agencies in a state — not excluding public school districts — must surely be subject to the same obligation to take "reasonably feasible" steps to ameliorate the continuing effects of past de jure segregation by one such governmental agency. And as long as the scope of this obligation is limited by the "reasonably feasible" standard, there is no persuasive reason to relieve school districts of that obligation — particularly when there is now no way in which the other culpable governmental agency can right its past constitutional wrong.[61]

B. The Present Existence of De Jure Segregation

In the south, we have seen, there are two types of de jure segregation: the segregation resulting from the racial school-assignment policy that was explicitly commanded by law before *Brown v. Board of Education,* and the segregation that is maintained when school boards fail to use reasonably feasible alternatives which would lessen racial imbalance, after the abandonment of explicit racially discriminatory school assignment laws. It was the latter type of de jure segregation that the Supreme Court responded to in *Green, Swann* and *Davis.* In the urban north and west, where there is no recent history of laws commanding school segregation, nonetheless school board policies and practices do maintain racial separation of school children. In other words, the difference between north and south relates not to present official action but to the past existence (or not) of laws basing school assignments on race. Indeed, the most significant aspect of *Green, Swann* and *Davis* is that the constitutional principle declared in those cases must inevitably be applied as well in the north and west, since there is no difference of constitutional dimension between the two situations.[62]

It is not accidental that a regular feature of litigation in the north and west attacking de facto school segregation is an allegation by the plaintiffs that the school board not only has tolerated de facto segregation but also has practiced de jure segregation. The obvious reason

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59. See Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private Housing,"* 52 Calif. L. Rev. 1 (1964); Reitman v. Mulkey, 387 U.S. 369, 385 (1967) (concurring opinion of Mr. Justice Douglas); San Francisco Unified School District v. Johnson, 3 Cal. 3d 937, 956, 479 P. 2d 669, 681, 92 Cal Reptr. 309, 321 (1971).

60. Swann, 1279. *Cf.* Deal v. Cincinnati Board of Education, note 54, *supra.*

61. An analogous argument deserves marginal notice. One vestige of past official segregation is the presence in northern and western cities of large numbers of black immigrants from the south, whose education has begun or been completed in schools segregated by law. The Kerner Commission took note of this phenomenon. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 237-38 (1968). The effects of this prior segregation are felt in the states where these immigrants (and their children) now live. Can California, for example, be a knowing participant in perpetuating a condition unconstitutionally created by Mississippi? A negative answer to a similar question was one reason for a ban on literacy tests for voting in the Voting Rights Act Amendments of 1970, upheld in United States v. Arizona, 91 Sup. Ct. 260 (1970). See the opinion of Justices Brennan, White and Marshall, 91 Sup. Ct. at 317, 319-20. A California school board's duty, given such a migratory history, would not be to end all racial imbalance in schools attended by the migrant children, but to take reasonably feasible steps to ameliorate racial imbalance.

62. The last substantive paragraph of the *Swann* opinion is not fully consistent with this statement. After noting that at some point, school authorities will have complied with *Brown I* so that the school systems are "unitary," Chief Justice Burger adds this comment:

> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school auhorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary. Swann, 1284.

In defense of our statement in the text, we point out that the major inconsistency is that between the paragraph just quoted and the rest of he *Swann* opinion, and also the *Davis* opinion. Both opinions were unanimous, and they wear some of the ill-fitting clothing of negotiated documents. It is entirely possible that some of the Justices subscribe wholeheartedly to the quoted paragraph, and less enthusiastically to the rest of the *Swann* opinion and to the *Davis* opinion. Our argument is that eventually the Court will necessarily resolve the inconsistency in the other direction.

for this strategy is the uncertain doctrinal sufficiency of allegations of de facto segregation alone. The plaintiffs in these actions may like the idea of making new constitutional law, but their main objective is to integrate the schools. Furthermore, given the preference of trial judges for being affirmed, it is not accidental that the judges who sit as triers of fact in these suits in Equity find de jure segregation. In Southern California alone, the past two years have seen such findings in four cases involving different cities: Los Angeles,[63] Pasadena,[64] Inglewood[65] and Oxnard.[66] Indeed, in the Oxnard case, summary judgment was granted to the plaintiff black and Mexican-American parents. No trial was needed, Judge Pregerson said, because there were, in his words, "de jure overtones" in the case that were beyond dispute:

> These "de jure overtones" arise from such practices as Open Enrollment, Individual Intradistrict Transfer (or "bussing"), location of new schools, placement of portable classrooms, *failure to adopt proposed integration plans*, and rescission of resolutions to relocate "portables."[67]

Can it be doubted that such "de jure overtones" are present in *every* school district in the urban north and west that is characterized by de facto segregation? In a case involving suburbs of Chicago, plaintiffs had alleged a racially discriminatory purpose on the part of the school board, and the defendant board denied having such a purpose. In evaluating these contentions, said Judge Hoffman, the court

> may properly consider, in addition to such factors as the credibility of witnesses and the apparent availability of educationally sound and racially less exclusionary alternatives [citing *Green*], the evidence with respect to [faculty and staff segregation].[68]
>
> The *intended and inevitable effect* of the series of policy decisions by the defendants and their predecessors, made with respect to attendance zones, transportation of pupils, school site selection and construction, and organization of the structure of the educational program . . . has been to preserve racial segregation of students . . . .[69]

Judge Hoffman's citation to *Green* might now be supported with a citation to *Swann* and *Davis*. How does one prove an improper purpose? By proving the effects of the actor's conduct, in the context of that conduct, *i.e.*, in light of the range of alternatives available to the actor.[70] The principle is as old as law itself.

It is worthy of note that the Seventh Circuit affirmed Judge Hoffman's decision. The Seventh Circuit is the same court of appeals that rejected a "pure" de facto segregation argument in the 1963 case involving Gary, Indiana.[71] The lesson for attorneys and judges is plain. "Pure" de facto segregation cases, in which de jure segregation or other intentional racial discrimination by the school board is neither alleged nor found, may continue to be useful in classrooms as

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63. Crawford v. Board of Education of the City of Los Angeles, Civ. No. 822,854 (Super. Ct., Los Angeles County, Calif., Feb. 11, 1970).
64. Spangler v. Pasadena City Board of Education, 311 F. Supp. 501 (C.D. Calif. 1970).
65. Johnson v. Inglewood Unified School District, Civ. No. 973,669 (Super. Ct., Los Angeles County, Calif. June 22, 1970).
66. Soria v. Oxnard School District Board of Trustees, 328 F. Supp. 155 (C.D. Calif. 1971).
67. *Id.* at 157. (Emphasis added.) See also Cisneros v. Corpus Christi Independent School District, 324 F. Supp. 599, 620 n.58 (S.D. Texas 1970).
68. United States v. School District 151 of Cook County, Illinois, 301 F. Supp. 201, 230 (N.D. Ill. 1969), *aff'd as modified*, 432 F. 2d 1147 (1970) (2-1 decision).
69. *Id.* Compare the comments of the Supreme Court of California:

    > . . . once the state undertakes to preserve de facto school segregation, or to hamper its removal, such state involvement transforms the setting into one of de jure segregation.

    San Francisco Unified School District v. Johnson, note 59 *supra*, at 958; 92 Cal. Reptr. at 322; 479 P. 2d at 682.
70. Thus, as a California Court of Appeal recently held:

    > The fact, as alleged, the district by a policy of maintaining neighborhood attendance zones, optional attendance zones and other devices, has perpetuated and extended, and will continue to perpetuate and extend racial imbalance in its schools, and *refuses to take available, reasonably feasible steps to alleviate the imbalance*, supports a conclusion the existing racial imbalance is the product of racially motivated state action; or, stated otherwise, supports the conclusion an assumed previously exising de facto imbalance has become de jure.

    People v. San Diego Unified School District, 19 Cal. App. 3d 252, 268; 96 Cal. Reptr. 658, 664 (1971). It is worth noting that the same court, in listing the kinds of considerations that are relevant to a determination of the school district's motive, referred to factors similar to those in Chief Justice Burger's discussion in *Swann* concerning the factors to be taken into account in determining the "practicalities of the situation.":

    > . . . the nonexistence of racially oriented motive, intent or purpose attendant upon state action maintaining an existent de facto segregation in schools may be evidenced by such factors as the costs incident to a change, the availability of facilities, or the safety standards of students. (Citing the Cook County case.)

    Id. at 262; 96 Cal. Reptr. at 664.
71. Bell v. School City of Gary, Indiana, note 54, *supra*. See Kaplan, *Segregation Litigation and the Schools — Part III: The Gary Litigation*, 59 Nw. U. L. Rev. 121 (1964). The same pattern prevails in the Sixth Circuit. *Compare* Deal v. Cincinnati Board of Education, 369 F. 2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967), *with* Davis v. School District of the City of Pontiac, Inc., 443 F. 2d 573 (6th Cir. 1971).

hypothetical questions — but they are no longer likely to be found in courtrooms.[72]

What arguments are there for limiting the obligation to take reasonably feasible steps to ameliorate racial imbalance in schools to the case in which the school district had earlier followed an explicit racial school-assignment policy? The former use of racial classifications may suggest a proclivity by the school board to resort to other means of keeping the schools as segregated as possible, and, perhaps, a real likelihood that it will do so. But even this formulation of the issue focuses on the board's present action, which is, after all, the only action that can be affected by a court's decree. Both of Judge Wright's arguments for "substantial actual integration," made in the context of past explicit racial assignments, apply equally well to the situation we have been discussing — that is, to what might be called (please forgive us) de facto de jure segregation. First, Judge Wright reminded us, substantial actual desegregation would demonstrate that a school board really had abandoned the policy of racial segregation. In our present context, we can say that a school board must choose, from among the reasonably available alternatives, the plan that will most reduce racial imbalance, because its choice of a plan that produces more segregation is proof of its intention — it policy — to produce just that extra quantum of segregation. Secondly, Judge Wright spoke of the need to disabuse the entire community of the idea that black school children have been officially separated from whites, in order to avoid the implication of an officially-imposed stigma of caste. When a school board deliberately chooses a plan that does not reduce racial imbalance, in the face of effective alternative plans that are reasonably available, the community is not so unsophisticated as to fail to notice, and to draw the conclusion that such a stigma has been officially imposed. If we are incorrect in this factual statement, how shall we explain the genteel racism that has become a standard feature of recent school board election campaigns — and indeed municipal election campaigns generally — throughout the urban north and west?

The one remaining arguable distinction between southern school segregation and segregation in the north and west may be that in the case of the south, because of past official racial classifications, there is a presumption against the validity of the continued existence of any all-black school. But such a distinction would be trivial. This presumption, stated in *Swann,* is not conclusive, but can be overcome if the school board shows that there is no reasonably feasible way to avoid maintaining the all-black school in question. Conversely, if the plaintiff parents and children can show that there is a reasonably feasible way to rid the district of an all-black school, then under *Swann* the presumption holds and the board must eliminate the all-black school. The question, in other words, is the same one dealt with in such northern and western communities as the Chicago suburbs and Oxnard, California. Once there is evidence presented on the question of the reasonableness of proposed means for avoiding all-black schools, the judge must decide on that question when it is the court and not a jury that is the trier of fact (as it is in these Equity proceedings), the allocation of the burden of persuasion on the issue of reasonableness seems relatively unimportant.

What was the racially discriminatory action by the school boards in *Green, Swann* and *Davis?* It was the boards' failure to discharge their "affirmative duty

72. In the San Francisco case, the California Supreme Court spoke of the "enormous difficulty" of determining the extent of de jure segregation, arising out of the difficulty of distinguishing de facto from de jure segregation. San Francisco Unified School District v. Johnson, note 59 *supra*, at 957; 479 P. 2d at 681; 92 Cal. Reptr. at 321. In the San Diego case, the Court of Appeal held that in a "pure" de facto segregation case, following *Jackson*, note 55 *supra*, a trial would be necessary for the purpose of determining whether racial segregation caused educational harm in the circumstances of a particular community. People v. San Diego Unified School District, 19 Cal. App. 3d 252, 265-66; 96 Cal. Reptr. 658, 665-67 (1971). In a de jure segregation case, however, the same court held that no such showing need be made; and since the court held that a case of de jure segregation can be made out by showing the "maintenance" of de facto segregation through failure to adopt reasonably feasible plans to improve racial balance, then it is hard to see why a plaintiff's lawyer would ever frame a complaint to allege only de facto segregation.

to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[73] "Freedom of choice" was not enough in *Green*, because there were reasonable alternative means available for ameliorating racial imbalance. Busing was approved in *Swann* and mandated in *Davis* because the school boards had defaulted on their affirmative obligations to take feasible steps to achieve "the greatest possible degree of actual desegregation."[74] The combinations of action and inaction by these three school boards were, in other words, indistinguishable from the action and inaction of northern and western school boards which fail to use reasonably feasible means to lessen racial imbalance in their school populations.

III. The Emerging Nationwide Standards

The distinction between de jure segregation and de facto segregation is no longer useful. The concept is, in fact, harmful, because it perpetuates the pernicious notion that we live under a Constitution that is regionally selective in its commands. Our conclusion is that both the de jure-de facto distinction and the two-Constitutions idea are destined to come to an end, and that *Green, Swann* and *Davis* point the way.

The situation that triggers a school board's duty under the emerging constitutional principle is simply defined: it is the existence of significant racial imbalance,[75] coupled with the reasonable availability of alternative means for reducing racial imbalance. The reasonableness of any arguable alternatives is tested by the kinds of factors noted in the *Swann* opinion. The question of the reasonableness of the various desegregation plans available is thus not merely a question of remedy, but part of the inquiry into the existence of a substantive duty of the school board. The board's constitutional duty in such circumstances is to take such steps as are reasonably feasible to reduce racial imbalance in school populations.

Most discussions of the constitutional duty of a northern or western city's school board begin from the premise that *Brown v. Board of Education* rests on a finding that educational harm results from racial separation.[76] We do not reject that assumption. The emerging nationwide constitutional standards for desegregation, however, do not require school boards or courts to adopt those social-science conclusions in order to fulfill their respective duties, or to have a trial on the issue of educational harm.[77] For everyone agrees that the minimum command of the *Brown* decision is that intentionally caused racial separation is unconstitutional. The new nationwide principle merely recognizes a simple truth: when a school board has more than one alternative before it, it intends to achieve the results of the alternative it chooses, and it is constitutionally responsible for its choice.

The new nationwide principle is not inconsistent with the currently popular movement toward the decentralization of school administration and "community control." Of course, if the Charlotte-Mecklenburg district were now to be dismembered into several independent districts, in response to the *Swann* decision, the courts would be faced with a problem in evasion not unlike the problem the Supreme Court dealt with successfully in *Griffin v. County School Board of Prince Edward County*,[78] and dealt with not so successfully in *Palmer v. Thompson*.[79] Such questions of evasion aside, the values that underlie a policy of "commu-

73. Green, 437-38.
74. Swann, 1281; Davis, 1292.
75. We recognize the ambiguity in this expression. It seems appropriate to allow lower courts to work out its application in concrete cases. For an example of a legislative attempt to spell out the meaning of racial imbalance, see Mass. Ann. Laws, ch. 15 §§11, 1J (1967 Supp.) ("when the percent of nonwhite students in any public school is in excess of fifty percent of the total number of students in such school"). Such a standard would obviously be inappropriate in a city such as Washington, D.C., where black students comprise upwards of 90% of the public school population.
76. *E.g.*, Jackson v. Pasadena City School District, note 55 *supra*, Fiss, note 56, *supra*.
77. See People v. San Diego Unified School District, 19 Cal. App. 3d 252, 96 Cal. Reptr. 658 (1971).
78. 377 U.S. 218 (1964) (closing of the county's schools). See United States v. Scotland Neck City Board of Education, 442 F. 2d 575 (4th Cir. 1971); Turner v. Littleton-Lake Gaston School District, 442 F. 2d 584 (4th Cir. 1971); Wright v. Council of City of Emporia, 442 F. 2d 588 (4th Cir. 1971).
79. 81 Sup. Ct. 1940 (1971) (closing of Jackson, Mississippi public swimming pools).

nity control" are entitled to weight in the balance of the "reasonableness" formula, just as the similar values of the neighborhood school policy are entitled to weight. Indeed, it is the very uncertainty of the future of the movement for separatism or cultural identity within the black community that may make a flexible formula like "reasonably feasible" politically attractive to judges who do not wish to meddle in the assimilation-versus-separatism dispute.

An additional advantage to the new national principle is, ironically, derived from the principle's equation of objectively demonstrable facts with the school board's intention. Such an approach, of course, focuses inquiry on the facts of racial imbalance and the facts relating to the reasonableness of alternatives that can reduce racial imbalance. The approach, in the hands of a skillful judge, minimizes the occasions for name-calling, and permits the opposing litigants to spend their efforts in contesting questions of fact and policy instead of contesting the purity of the school board members' hearts. The result is that litigation need not be a bar to future good-faith negotiations within the community.[80]

In his *Swann* opinion, Chief Justice Burger makes clear that the Court is deciding questions relating to the dismantling of systems in which children were assigned to schools on the basis of race, and only those questions. He even hints that the Court would reach quite different conclusions if it were presented with a case from the north or the west. Thus:

> One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination . . .
>
> Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil from a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.[81]

There is, in this passage, a recognition of the futility of any hope that the judiciary can right all this country's racial wrongs by forcing all the Nation's school boards to eliminate racial imbalance. Such a hope would, indeed, be vain. But the national standard for desegregation that is emerging from *Green, Swann* and *Davis* implies no such heroic task for school boards or for courts. The issue need not be phrased in all-or-nothing terms. The "reasonably feasible" formula applied in *Swann* itself leaves room for accommodation of genuinely racially neutral values, and does not demand the impossible.

Still, say some commentators, the south is different. It never was a land of cultural pluralism, always has been a dual society.[82] To argue for nationwide standards may seem to ignore this crucial difference. Worse, such a national standard may seem to mask the abandonment of *Green's* insistence on results *"now"* in the south, by tolerating segregation in southern cities through characterizing it as "de facto" segregation. But the nationwide principle that emerges in *Green, Swann* and *Davis* threatens no such retreat. The *Davis* decision should make the point unmistakably clear.

Finally, the new nationwide standards are worth our support precisely because they *are* nationwide, promising a doctrinal unity that is matched by real results. Anything less would mock the great goal of one Nation, indivisible. It would be extraordinary if, in 1971, the Constitution were to mean the "root and branch" eradication of segregation in Mobile, but only an occasional pruning in Pasadena.

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80. See Cohen, *Racial Imbalance in the Pasadena Public Schools*, 2 Law & Society Rev. 42 (1967), summarizing Prof. Cohen's report to the United States Office of Education. In his unpublished full report, Prof. Cohen makes this comment on the *Jackson* case, in which a deliberate racial gerrymander had been alleged:

> Had the case been tried, a finding of gerrymander — right or wrong — would hardly have been a firm basis on which Pasadena could build continuing healthy inter-racial community relationships.

81. Swann, 1279.

82. Charles Morgan, Jr., Southern Director of the American Civil Liberties Union, made this comment in reference to Prof. Bickel's *New Republic* article, note 51, *supra*.