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Comment on C. Arnold Anderson's Review of The School Segregation Decision by James C. N. Paul

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them to justify prompt desegregation. On the other hand, one can sympathize with a community that objects to being called upon to undergo the trauma of desegregation (if it is going to be traumatic) merely because it happens to have few Negroes or to have been more statesmanlike in handling racial tensions in the past.

There is in fact some reason to doubt that the foregoing social conditions are closely related to rigidity of racial attitudes. There is no feasible way to determine the attitudes of a community toward desegregation except to carry out the policy and observe the results. Already we have evidence that the attitudes of school officials toward desegregation is a major factor affecting a community’s reactions to desegregation.

The argument of this note has been a simple one: the alleged logical grounds for gradualness of desegregation are equivocal. The same arguments support a policy of prompt desegregation and integration for at least a sizeable fraction of pupils.

COMMENT ON A REVIEW

By Richard D. Gilliam, Jr.

This Journal welcomes the foregoing sociologist’s review of a legal article. The lawyer and the judge need the assistance of all the sciences in solving all legal problems, and more especially, in solving such complex problems as those involved in the School Segregation Cases. Perhaps, however, a lawyer’s comment on some of Professor Anderson’s points may not be inappropriate here.

In considering the adequacy of legal precedent for “establishing a principle of gradualness” we should remember that the School Segregation Cases are equity cases in which the plaintiffs are seeking the extraordinary remedy of injunction. Persons whose legal rights are violated have other sanctions available, and they are entitled to have

4 See the writer’s “Inequality in Schooling in the South,” American Journal of Sociology, 1955, 60:547-61.

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2 These are, in these cases, the tort and criminal sanctions of the Civil Rights Acts. 42 U.S.C. Sections 1981 to 1986, inc., (1952); 18 U.S.C. Sections 241-242 (1952). See Legal Sanctions to Enforce Desegregation in the Public Schools: The Contempt Power and the Civil Rights Acts, 65 Yale L.J. 630 (1956). But note that it is an open question whether the “right” recognized by the Brown decision is “an immediate right to attend an integrated school,” an immediate
those sanctions applied immediately.\(^3\) In equity, however, the plaintiff may not be entitled to any relief at all, even though it is found that his rights have been violated.\(^4\) Thus, it would not have been contrary to equitable principles if the Supreme Court had, in the *Brown* decision, merely declared the constitutional right and denied injunctive relief, leaving the problem to be resolved by the application of the other sanctions provided by law.

The books abound with authority for the proposition that it is the duty of a court of equity "to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief."\(^5\) Directing that the District Courts follow equitable principles the Court, in the *Brown* decree,\(^6\) said: "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." Only two cases were cited,\(^7\) but they amply support the Court's position. No case involving flexibility in molding a decree to protect a

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\(^3\) But as pointed out in note 2, supra, it may be that no right has yet been violated in the cases under discussion.

\(^4\) In re Richard's Appeal, 57 Pa. 105, 98 Am. Dec. 202 (1868), where the Court refused to enjoin an admitted nuisance because a greater injury would result from granting an injunction than from refusing and leaving plaintiff to his tort action. And see Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 53 S.W. 658 (1904), and its sequel, Georgia v. Tennessee Copper Co., 206 U.S. 230, 27 S.Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488 (1906), 237 U.S. 474, 35 S.Ct. 631, 59 L.Ed. 1054 (1915), 240 U.S. 650, 36 S.Ct. 465, 60 L.Ed. 846 (1916). Here the farms of a small number of mountain people were being rendered unusable by fumes from two large smelters. The Tennessee court, pointing out that the farms were worth only about $1000.00 and that the smelters, worth around $2,000,000.00, employed 12,000 people and were the main economic support of the community, denied an injunction, leaving the plaintiffs to their tort action. At the suit of the State of Georgia, however, the Supreme Court of the United States took a different view and, applying the principle of gradualness, allowed, but forced the defendants to improve their processes gradually so as to lessen the volume of fumes blown over plaintiff's citizens' lands. The result was a valuable by-product for defendants. Comment: Injunction-Nuisance-Balance of Convenience, 37 Yale L.J. 96 (1927). Each of these solutions was in accordance with traditional equity principles, but it is obvious that the solution adopted by the United States Supreme Court was the more rational. The Tennessee court did not study the matter carefully enough, stuck too closely to its law books.

\(^5\) Eccles v. Peoples Bank, 333 U.S. 426, 431, 68 S.Ct. 641, 644, 92 L.Ed. 784, 789 (1948); 1 Story, Equity Jurisprudence (14th Ed. 1918) Section 28; 5 Pomeroy, Equity Jurisprudence (5th Ed. 1941), Section 1338.

\(^6\) Note 1, supra.

\(^7\) Alexander v. Hillman, 296 U.S. 222, 239, 56 S.Ct. 204, 209, 80 L.Ed. 192 (1935); Hecht Co. v. Bowles, 321 U.S. 321, 329-330, 64 S.Ct. 587, 591, 592, 88 L.Ed. 754 (1944). The Court might have cited numerous anti-trust cases, such as United States v. American Tobacco Co., 251 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 63 (1912), or nuisance cases such as those cited in note 4, supra.
constitutional right was cited, and presumably there are none. But the source of the right is not the important thing. All rights, regardless of source, are entitled to protection on the same basis. Equity should treat them all alike, granting or refusing injunctive relief not with regard to the source of the right but with regard to the effects of the decree.

A lawyer should be pardoned for hesitating to believe that any legal proposition has been conclusively demonstrated. In most cases, as a court approaches decision, it has available alternative policies, each supported by legal doctrine. While we, perhaps, still have the principle of *stare decisis* in our common-law system, it is notorious that courts have never been bound by preceding doctrine, although they may follow it in most cases, or at any rate, mouth the fiction that they are following it. In the process of decision a court is continually subject to two pressures, the social need for stability of legal norm and the social need for decisions in accordance with contemporary notions of justice. These needs often conflict. The conflict is resolved one way or the other depending upon when, where, how competently, by whom and on whom the pressures are applied. The result is a sort of flexible stability which tends to justify defining law as a dynamic process of ordering relations in the community. While prediction is one of the functions of a lawyer, he hesitates to predict in such strong terms as "conclusively."

If the Court, in passing on implementation of the *Brown* decree, should adopt the reasoning of the "white primary" cases, it could easily hold almost any device adopted by a southern state unconstitutional. But the *Brown* decision does not require the Court to go so far, and the primaries certainly present a problem different from that of school segregation. If a state should set up a three-fold school system, one school open to all, one open to Negroes only, and one open to whites only, it is obvious that in any area where there is any problem the legally integrated school will be attended by Negroes only. If in such case a Negro should seek admission to the white school, it would not be contrary to the *Brown* decision for the Court to say that

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8 It would seem that a sociologist who supports the *Brown* decision, note 1, supra, would hesitate to demand precedent, for that decision was contrary to the great weight of authority, including a precedent in the Supreme Court itself as recent as Gong Lum v. Rice, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172 (1927).

9 Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); Rice v. Elmore, 165 F.2d. 387 (4th Cir. 1947), cert. den. 333 U.S. 875 (1948); Brown v. Baskin, 174 F.2d. 391 (4th Cir. 1949); Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953). The effect of these decisions is that no group can have a political party the members of which agree to support anything Negroes do not approve, an absurd result reached, no doubt, because the court thought the plan in *Baskin* was a mere subterfuge to avoid the rule of *Allwright* and *Rice*. 
Brown did not mean that integration was compulsory but only that compulsory segregation was prohibited and that, the state having provided a school open to all, whatever segregation resulted was voluntary and not state action.\(^\text{10}\)

Moreover, if a state should abolish its public schools and then appropriate the same amount of money to each child for tuition in a school of his choice, it would not be contrary to the Brown decision for the Court to say that the only state action present accords exact equal protection; provided, of course, that the schools themselves are genuinely private. It would be extremely difficult for the Court to hold that operation of a genuinely private school is state action, as this would endanger the position of parochial schools.\(^\text{11}\)

It is not the purpose here to be exhaustive, but merely to suggest that it might be premature to say that compulsory integration in the schools has been made conclusively inevitable legally by the Brown decision.

Professor Anderson's suggestion as to immediate assimilation of the qualified Negro pupils with the qualified white pupils, etc., makes sense on paper. But even in the absence of the race problem, proposals to segregate pupils in accordance with intellectual ability have not met with much acceptance in America. It is said to be undemocratic to do so, or harmful to the less able pupil, or harmful to the gifted student.\(^\text{12}\) Is it likely that such proposals will be any more acceptable with the race problem mixed in?

The problem presented by these cases is how to remove from the Negro the "mark of oppression,"\(^\text{13}\) and the problem must be solved in a nation in which the overwhelmingly dominant race almost unani-

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\(^\text{10}\) See Judge John J. Parker's statement on opening of retrial of Briggs v. Elliott, South Carolina's branch of Brown, 1 Southern School News, No. 2, Aug. 1955, p. 6. Also see Alabama legislative action for a three-school system. 2 Southern School News, No. 8, Feb. 1956, p. 6, and No. 9, Mar. 1956, pp. 1 and 6.

\(^\text{11}\) When it was at first believed that the entry of the Brown decree, note 1, supra, meant integration by September, 1955, the authorities of Prince Edward County, Virginia, (the County before the Court), took legal steps to close all public schools at once. White citizens then raised a large sum to pay white teachers for white schools privately. 2 Southern School News, No. 1, Jul. 6, 1955, p. 15. Presumably the intention was to use the public school buildings. Unless the use of such buildings were based on a sale or lease made in "absolutely good faith", the plan would have fallen under the rule of Tate v. Department of Conservation and Development, 133 F.Supp. 53 (E.D. Va. 1955). But conceivably plans could be devised which a court could uphold. At any rate there would be no schools for Negroes until the question was resolved. See infra, next to last paragraph.

\(^\text{12}\) Eckhauser, The Gifted Child—the Neglected Child, 38 New York State Education 408 (1951); Witty, Educational Provision for Gifted Children, 76 School and Society 177 (1952); Knight, Edgar Wallace, Some Disturbing Educational Contradictions, 76 School and Society 337 (1952).

\(^\text{13}\) Kardiner and Ovesey, The Mark of Oppression, a Psychological Study of the American Negro (1951). This work shows the devastating effect of discrimination on Negro personality.
mously holds to a "theory of color caste," the basic concern of which is for "race purity," "the primary and essential command" of which is "to prevent amalgamation," the whites being "determined to utilize every means to this end." This theory requires rejection of "social equality" as a "precaution to hinder miscegenation and particularly intermarriage." "The danger of miscegenation" is considered "so tremendous that the segregation and discrimination inherent in the refusal of 'social equality' must be extended to nearly all spheres of life" including education.14

One studying Myrdal's great work could scarcely expect that the problem of segregation can be solved by merely posting a copy of the Brown decision at the door of each court house. The solution will not come by stressing the establishment of doctrinaire principles. The concentration must be on improving the lot of the Negro, with continually in mind the adage that "politics is the art of the practicable." The best efforts of lawyers and of specialists in all the other social sciences will be needed. There will be required of the Negro great patience, combined with an appropriately varied amount of persistence.

Here, as in all cases requiring infusion of content into the great constitutional phrases such as "equal protection" or involving equitable balancing of interests, is a place for the application of the theories of jurisprudence developed by Professors Myres S. McDougal and Harold D. Lasswell in their seminar on Law, Science and Policy in Yale Law School.15 According to their theories a court should seek the norm for its decision in a study of the entire community process, in which "people strive to maximize values by applying institutions to resources."16 More fully expressed, they think of the community process "in terms of people, with varying perspectives, employing base values, by practices (myth and technique), to effect a redistribution among people of certain demanded or 'scope' values."17 "In any particular study of specific value processes, the people and their perspectives, the situations in which they demand values, the base values they employ, the practices by which they shape and share values, and the effects they obtain upon distribution of values may be described in as much detail as the materials permit or as the particular problem of the

14 Myrdal, An American Dilemma (1944) 58.
15 While their treatise on jurisprudence is still in preparation, their theories and an application thereof to international law are set out in a series of lectures delivered by Professor McDougal at the Academy of International Law at the Hague in 1953. McDougal, International Law, Power and Policy: A Contemporary Conception, 82 Recueil des Cours, Academie de Droit International, 137 (1954).
16 McDougal, op. cit., at 167.
17 Id., 168.
investigator requires. It may be emphasized that any particular value may be either employed as a means or sought as an end, may be either a base value or a scope value.”

Professors Lasswell and McDougal list as their values power, respect, enlightenment, wealth, well-being, skill, affection, and rectitude. Their is no magic in any particular list, but the list should be such that one can subsume under one or another of the symbols all the “major categories of desired events” in the community. It should be sufficiently detailed to enable convenient study of related “desired events” together.

They “emphasize that law is a dynamic process in which policies are constantly being made and applied” but they do not advocate arbitrary decision. Decisions should be based on community values. If, before making a decision, a court will study the entire problem in the light of the entire community process, in the light of the probable effect of any suggested decision on the value distribution in the community, it will inevitably be presented with alternative policies and be in better position to make a rational choice among them. This does not mean abandonment of legal doctrine and legal rules. Doctrine and rules (subsumed under the symbol “myth” in their description of the community process) are important practices by which people engage in the process of striving to maximize values.

If one should apply these theories to the cases under discussion, it is almost inconceivable that he could come up with a decision which did not permit variation of implementation of the Brown decree on a temporal and geographical basis. In a matter of the complexity of this, a solution appropriate in Adair County, Kentucky, would not necessarily be appropriate in Tuscaloosa County, Alabama.

As stated above, the problem is how to remove from the Negro the “mark of oppression.” Perhaps, this objective could have been approached more rapidly if the Court had adhered to the “separate but equal” doctrine, with rigorous insistence on true equality in all tangible

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18 Id., 168-169.
19 Id., 168. For a more detailed exposition of the concept of values used by them see Lasswell and Kaplan, Appendix: On Power and Influence, at page 223 of Lasswell, Power and Personality (1948).
20 McDougal, op. cit. at 168.
21 Id. at 183.
22 Willis v. Walker, 136 F. Supp. 181 (W.D. Ky. 1955), in which the court ordered immediate admission of Negro pupils to schools without regard to race or color, in a community where tension between the races has been negligible.
24 Note 13, supra.
factors. The southern whites would then have seen that the only alternative to integration was the immediate provision of adequate school facilities for Negroes. Then all the emotional, intellectual and physical energies which are now being marshalled to hold the Negro down would have been marshalled to improve him educationally, with the result that the cultural gap between the races would have been lessened from year to year, and the Negro race would have gradually become more and more acceptable to integration in more and more facets of community life. As it is, all the white energies, in the areas where the Negro needs help most, are being marshalled to prevent any improvement of the Negro, with the prospect that he may be denied any educational facilities whatever for an extended period, with the probable result that the race will become less and less acceptable for integration as the years roll by. And in the meantime racial tensions are being further increased, with the probability that discrimination will increase, not lessen. It should not be overlooked that the effects described by Kardiner and Ovesey are effects on Negroes of Harlem, an area where the rule of the Brown decision has been in force for decades. It is true that the effects are traceable to southern origins, but there is no evidence that abolition of school segregation has eliminated discrimination anywhere.

The foregoing is not set forth as an attempt to reopen the Brown case. It would be virtually impossible for the Court to overrule that decision even though each of the justices became convinced that they had made a mistake. The analysis is presented to emphasize the point that legal problems having such broad and deep social implications cannot be properly solved by recourse to law books alone, nor by recourse alone to one facet of psychologic science. The courts, in further steps to implement the Brown decree, should study the whole community process with all the scientific tools available. And that is where the sociologist comes in. He and the lawyer must work together, each getting as much insight into the science of the other as possible. And this goes for the other social scientists too. The courts need to be informed, not only of the pertinent legal doctrine, but of the probable social effects of each suggested step.

25 Id.