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THE LIMITS OF GOOD FAITH:

DESEGREGATION IN TOPEKA KANSAS

Mary L. Dudziak

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Professor Burke Marshall
Yale Law School

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CONTENTS

1. INTRODUCTION

Brown v. Board of Education [1] caught the State of Kansas by surprise. In its policies on race, Kansas maintained a middle ground between the widespread enforced segregation in the South and the comparative lack of legally mandated segregation in the North.[2] For Kansas, civil rights and segregation were compatable concepts, and the state maintained laws which permitted segregation in some aspects of public life, yet prohibited it in others.[3] Granting too great a legal status to racial prejudice would conflict with the heritage of Kansas, the "free state," born amidst a struggle against slavery within its borders.

In the early 1950's, Kansas' middle-of-the-road approach did not exempt it from the growing national controversy over racial segregation. In 1951, the NAACP brought suit against the Board of Educaton of Topeka, Kansas, challenging the constitutionality of the Kansas law permitting segregated schools.[4] Caught in the embarrassing position of supporting a policy which was coming into increasing disfavor in other parts of the country, state and local officials waffled on the question of whether to defend the segregation statute

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[1] 347 U.S. 483 (1954).

[2] See generally Pauli Murray, STATES' LAWS ON RACE AND COLOR (1950).

[3] Id. at 8, 10.

[4] Brown v. Board of Education, 98 F.Supp. 797 (1951).

when the NAACP appealed a lower court judgment to the U.S. Supreme Court. Some considered Kansas a "hapless defendant" in a suit that was really concerned with practices in the deep South.[5] The state chose to defend its statute and, in 1953, while the appeal was pending, the Topeka school board voted to abolish segregation in its schools.[6]

Taking what it considered to be an important and progressive step, the school board moved slowly and carefully to dismantle its system of enforced racial segregation. All along the way, it was careful to provide parents who preferred to avoid integration with the time and the means to avoid it. Such private choice was not for the school board to oppose, but rather to facilitate. The school board's plan would leave formerly all-black schools exlusively black and formerly all-white schools predominately white. The remaining racial distribution was not the school board's problem, however, as it was the result of private choice and residence patterns. As far as the Topeka school board was concerned, once they stopped enforcing a clear color line in school attendance, segregation as a matter of fact and of law no longer existed.[7]

school board allowed seg. from private choice + residence patterns

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[5] In Court Paradox, Kansas City Star, Nov. 29, 1953.

[6] See infra at 53 - 58, 62 - 66.

[7] See infra at 70 - 72.

The efforts of the Topeka Board of Education and other boards of education in Kansas resulted in little actual integration.[8] The actions of school authorities in Kansas stood in sharp contrast to the massive resistance to attempts at far less integration in many Southern states.[9] However, the Kansans were not being forced to integrate. They were not trying to resist the Court's mandate, but rather hoped to be the first to comply, that the good name of Kansas would not be sullied through association with the misdeeds of the South.

Because the district court trusted the school board as a result of their "good faith beginning" of desegregation, the court left the board to its own devices in completing the

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[8] The effectiveness of the Topeka school board's desegregation plan would later be questioned by federal authorities and subsequent parents. In 1974, the Department of Health, Educaton and Welfare found that the schools remained racially segregated and that the predominately black schools were of poorer quality, and consequently the school board was in violation of the Civil Rights Act of 1964. However, HEW was enjoined by the federal district court from terminating the city's federal funding because it was acting under a court order in Brown, and was therefore not subject to the enforcement provisions of the Civil Rights Act. Unified School Dist. #501 v. Weinberger (74-160-C5); see Brown v. Bd. of Educ., 84 F.R.D. 383 (1979); see also How Much Integration? Topeka Capital-Journal, May 12, 1974. A group of black parents later moved to intervene in the Brown case. Among them was Linda Brown Smith, one of the original plaintiffs, now suing on behalf of her children. Intervention was granted in 1979. Brown v. Bd. of Educ., 84 F.R.D. 383 (1979). The case is currently pending in federal district court in Kansas.

[9] See Francis M. Wilhoit, THE POLITICS OF MASSIVE RESISTANCE (1973).

process. As a result, desegregation in Topeka could be accomplished to the limit of the board's good faith. Through discussing the events leading up to Brown, and the school board's desegregation efforts, this paper will explore the conditions which lead to the court's reliance on the school board, as well as the scope and limits of the board's good faith, suggesting that the school board's relationship with its predominantly white constituency would shape and constrain the steps they were willing to take.

2. THE LEGAL HISTORY OF SCHOOL SEGREGATION IN KANSAS

One hundred years before Brown v. Board of Education brought race relations in Kansas to national attention, the territory of Kansas was embroiled in a heated controversy over the role of blacks within its borders. In 1854, Congress passed the Kansas-Nebraska Act which revoked the prohibition of slavery in the Missouri Compromise with respect to the two largely unsettled territories of Kansas and Nebraska. Under the Act, the permissibility of slavery in the two territories would be determined by local rule. After its passage, pro- and anti-slavery forces rushed to Kansas and established rival state governments. A civil war ensued which would give "bleeding Kansas" its name. The conflict was not resolved until 1861, shortly after the Southern states seceeded from the Union, when the federal

government finally recognized an anti-slavery constitution and granted statehood to Kansas.[10]

Although opposition to slavery was a motivating force in the battle for control of Kansas, the new state's constitution did not extend equal rights to free blacks.[11] Sufferage was extended only to white male citizens. The framers of the Kansas constitution considered and rejected a proposal to make Kansas "not only a free state, but a free white state" by forbidding black immigration.[12] The convention was divided on the question of black education. In discussing a provision regarding a system of "common schools" for the children of the state, several delegates argued that blacks should be excluded entirely from public schooling. Their opponents argued that, since blacks would be living in Kansas, "they should be made as intelligent and moral as education can make them."[13] Further, the white majority in a community could "protect itself," from blacks,

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[10] Thomas C. Cox, BLACKS IN TOPEKA, KANSAS, 1865 - 1915: A SOCIAL HISTORY 3 - 15; Foster, THE NEGRO PEOPLE IN AMERICAN HISTORY, 177 - 182 (1954).

[11] Rival groups of Kansans passed two different constitutions prior to the adoption of the Wyandotte constitution which gained federal government recognition. One would have allowed slavery and one would have outlawed it. The first anti-slavery constitution would have completely excluded blacks from Kansas. Cox, supra note 10 at 10.

[12] KAN. CONST. DEBATES at 178.

[13] KAN. CONST. DEBATES at 176.

if need be, by providing racially segregated schools.[14] In its final form, the Kansas Constitution did not expressly address the question of black education, leaving discretion over the matter to the state legislature.

In enacting its first school law in 1861, the Kansas State Legislature granted school districts the authority "to make such orders as they deem proper for the separate education of white and colored children, securing to them equal advantages."[15] This authority to segregate was retained for several years in varying forms.[16] However, when Kansas codified its school laws in 1876, it deleted the authority to segregate from its statutes with no recorded debate or explanation.[17] This temporary aberration apparently had no effect on the practice of segregation.[18]

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[14] Id.

[15] 1861 Kan. Laws, ch. 76, art. III, sec. I.

[16] In 1862, the Kansas legislature required separate taxation of white and non-white persons for the purpose of supporting segregated schools. All white taxes would go for the support of white schools, and non-white taxes would support non-white schools. 1862 Kan. Laws, Ch. 46, Art. IV, Sec. 18 - 19. This measure was repealed two years later, and discretion over school taxes was vested in boards of education. 1864 Kan. Laws, ch. 67, sec. 14 - 16. The 1864 school law retained for school boards the power to segregate school children, but contained no proviso that separate schools had to be equal. Id., sec. 4.

[17] 1876 Kan. Laws, ch. 122, art. X, sec. 4.

[18] But see Richard Kluger, SIMPLE JUSTICE 371 (1977). Kluger suggests, I believe erroneously, that the process of desegregation began after passage of the 1876 law. This is unlikely as, in 1876, it was not at all clear

In 1879, the Kansas state legislature enacted the law which would shape the course of permissible school segregation in Kansas for the next seventy-five years. The legislature distinguished between "cities of the first class" with populations of 15,000 and over, and smaller cities of the second and third classes. First class cities were explicitly granted the authority to segregate students in the elementary grades. Such segregation was permitted, but not required, and "no discrimination ... on account of color" was allowed in high school.[19] The legislature was silent on the question of whether smaller cities could segregate school children.

Whether, under Kansas law, "cities of the second class" could provide segregated schooling without legislative authorization was considered by the Kansas Supreme Court in 1881 in a case involving the schools in Ottawa, Kansas. Until September of 1880 the city of Ottawa, a city of the

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that legislative authorizaton was necessary for local school officials to segregate their schools. Further, even after the illegality of certain forms of segregation was settled in 1881, a court mandate was usually required to dismantle illegally segregated schools. See infra at 7 - 10, 15 n. 38. Some, if not all, school districts were unaffected by the temporary change in the law. See Board of Education of the City of Ottawa v. Tinnon, 26 Kan. 1, 18 (1881). Kluger refers to the existence of some mixed-race schools in 1876. Most likely, these schools began as integrated schools, rather than changing their racial composition due to legislative action.

[19] 1879 Kan. Laws, ch. 81, sec. 1. This statute withstood a constitutional challenge in Reynolds v. Bd. of Educ. of the City of Topeka, 66 Kan. 672 (1903). See discussion, infra at 10 - 14.

second class, educated all city school children, grades one through twelve, in one school building. By 1880 the accommodations had become somewhat crowded, and the Board of Education to moved all black children to a separate building. Leslie Tinnon, a black second grader, sued the Ottawa Board of Education, claiming that segregation violated his rights under the laws of Kansas and the Fourteenth Amendment of the U.S. Constitution. He sought a mandamus to compel the Board to admit him to the white school, arguing that Kansas law requiring communities to maintain a system of "common schools" "free to all children residing in such city"[20] prohibited the establishment of separate schools for blacks. In addition, he claimed that school segregation violated the Fourteenth Amendment.[21]

Noting that the law on the subject was unclear, the Kansas Supreme Court did not consider the constitutionality of segregation per se. It limited its inquiry to the question of whether, in the absence of state legislation authorizing segregation, smaller "cities of the second class" had the authority to establish separate schools. The court found that

> [t]he tendency of the times is, and has been for several years, to abolish all distinctions on account of race, or color, or previous condition of servitude, and to make all persons absolutely

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[20] 1879 Kan. Gen. Stat., ch. 92, sec. 151.

[21] Bd. of Educ. of the City of Ottawa v. Tinnon, 26 Kan. 1, 3, 8 - 10 (1881).

> equal before the law. Therefore, unless it appears clear beyond all question that the legislature intended to authorize such distinctions to be made, we should not hold that any such authority has been given.[22]

In construing the school law, the court noted that it had been passed in an era "when the minds of all men were inclined to adopt the most cosmopolitan views of human rights, and not to adopt any narrow or contracted views founded merely upon race, or color, or clan, or kinship."[23] According to the court, the "tendency of the present age" was to educate all kinds of children together without classifying them on the basis of race, sex or other characteristics. Society as a whole gained from such integration, for

> [a]t the common schools, where both sexes and all kinds of children mingle together, we have the great world in miniature; there they may learn human nature. ... But on the other hand, persons by isolation may become strangers even in their own country; and by being strangers, will be of but little benefit either to themselves or to society. As a rule, people cannot afford to be ignorant of the society which surrounds them; and as all kinds of people must live together in the same society, it would seem to be better that all should be taught in the same schools.[24]

These considerations led the court to strictly construe Kansas school laws on the question of whether authority to segregate had been granted. It held that boards of

Kansas Sup. Ct.

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[22] 26 Kan. at 18.

[23] 26 Kan. at 18.

[24] 26 Kan. at 19.

education did not have the power to segregate students by race unless the legislature clearly authorized such segregation, and did not find such a clear authorizaton for segregation in cities of the second class. Rather, "by the clearest implication, if not in express terms, [the legislature] has prohibited the boards from establishing any such [segregated] schools."[25]

In 1903, in a case involving the schools in Topeka, the Kansas Supreme Court considered the question it had reserved in Tinnon: whether legislatively authorized school segregation violated the state and federal constitutions. Reynolds v. Board of Education of the City of Topeka [26] involved a city of the first class that had segregated its elementary schools in accordance with the Kansas statute

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[25] 26 Kan. at 20. Justice Valentine's majority opinion prompted Justice Brewer to file the term's only dissent. Brewer found Valentine's analysis to turn on matters more properly reserved for the legislature. For him, the question was not the wisdom of segregation as an educational policy, but rather the scope of the power the legislature had conferred upon boards of education. In addition, although Valentine had reserved the question of the constitutionality of legislatively authorized segregation, Brewer "dissent[ed] entirely from the suggestion" that school segregation might be unconstitutional. He would have held that "free schools mean equal school advantages to every child, leaving questions of classification by territory, sex, or color, to be determined by the wisdom of the local authorities." 26 Kan. at 25.

Tinnon would remain good law throughout the history of legislatively authorized school segregation in Kansas.

[26] 66 Kan. 672 (1903).

1903 Kansas Sup Ct. considered (fed. & state) constitutionality of seg. - Reynolds case

permitting such segregation.[27] In the fall of 1902, William Reynolds, a black resident of Topeka, sought admission of his son to a white school. When he was refused, Reynolds sought a Writ of Mandamus in the Kansas Supreme Court to compell the Topeka school board to admit his son to the school. Reynolds claimed that school segregation in Topeka violated state law and the federal constitution.[28]

The court first considered and rejected technical arguments that the statute permitting segregation had not been properly enacted.[29] It then turned to the question of whether segregation violated the provision of the state constitution requiring the establishment of "a uniform system of common schools."[30] The court found it "perfectly plain" that a uniform system of schools did not imply integrated schools, but rather uniform educational facilities. And in Kansas,

> [t]he system of educational opportunities, advantages, methods and accommodations is uniform, constant, and equal, whether availed of by children in a rural district or a city ward; whether by males or females; whether by blacks and whites commingling, or by them separately; and whether race classification be made in one grade,

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[27] 1879 Kan. Laws, ch. 81.

[28] Affidavit for Alternative Writ of Mandamus at 4, Reynolds v. Bd. of Educ. of the City of Topeka, 66 Kan. 672 (1903). See infra at 20 - 24 for a discussion of the social history behind Reynolds.

[29] 66 Kan. at 673 - 679.

[30] Id. at 679; KANS. CONST. art. VI, sec. 2.

or department, or city, or county, or in many.[31]

In disposing of the state law claim, the Kansas court noted that the convention which framed the state constitution had considered the question of education for blacks, and had intended to leave the legislature free to act as it saw fit.[32]

The court then turned to the validity of the Kansas law under the U.S. Constitution, quoting at length from opinions by other state courts holding that the Fourteenth Amendment was not violated when states provided separate-but-equal schooling for blacks.[33] The court grounded its view of the Fourteenth Amendment on the U.S. Supreme Court's ruling in Plessy v. Ferguson,[34] which found that

> [t]he object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a

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[31] 66 Kan. at 679 - 680. The court quoted at length from decisions by the courts of Indiana, New York and Massachusetts involving similar state law issues which supported their conclusions. Cory, et. al. v. Carter, 98 Ind. 327 (____); People, ex. rel. Cisco v. School Board, 161 N.Y. 598 (1900); Roberts v. City of Boston, 5 Cush. [Mass.] 198 (1859).

[32] 66 Kan. at 686.

[33] 66 Kan. at 686 - 690, quoting The States, ex rel. Garnes v. McCann, et. al., 21 Ohio St. 198 (____); People, ex rel. King v. Gallagher, 93 N.Y. 438 (____); Ward v. Flood, 48 Cal. 36 (____).

[34] 163 U.S. 537 (1896).

commingling of the races upon terms unsatisfactory to either.

According to Plessy, segregation statutes did not necessarily "imply the inferiority of either race to the other," and were generally recognized to be within the police power of the states. The most common instance of such segregation was "the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."[35] Following Plessy, the Kansas court held that the Kansas statute permitting segregation did not violate the U.S. Constitution. It further held that the educational facilities provided to blacks in Topeka were not unequal and, consequently, segregation in the Topeka schools was consistent with state and federal law.[36]

In upholding segregation in Reynolds, the Kansas Supreme Court validated the dichotomy in Kansas law which would remain in effect until segregation was outlawed in Brown v. Board of Education in 1954.[37] Segregation was lawful in larger cities where it was authorized by the legislature, and unlawful in smaller cities where it was not explicitly

[35] 163 U.S. at 543 - 544, quoted in 66 Kan. at 691.

[36] 66 Kan. at 692. See infra at 21 regarding the disparity in school facilities.

[37] 347 U.S. 483 (1954).

authorized. As the legislature would not choose to materially alter the school segregation laws in the intervening years,[38] the only legal questions between Reynolds and Brown would be concerned with the refinement and application of these principles.[39] What is most surprising is that litigation continued even though the law was so clearly settled by 1903. Smaller cities continued to segregate their elementary schools until ordered by the courts to comply with the law.[40] And black students and their parents in larger cities continued to seek access to the white schools from which they were legally excluded.[41]

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[38] The only change in the segregation statutes between 1903 and 1954 was a 1905 law permitting high school segregation, but only in Kansas City, Kansas. 1905 Kan. Laws, ch. 414, sec. 1. See Richardson v. Bd. of Educ. of Kansas City, Kansas, 72 Kan. 629 (1906).

There was at least one unsuccessful attempt to extend high school segregation to other cities. In 1911, a bill was introduced to amend the 1905 law to allow segregated high schools in all cities of the first class. The bill was reported favorably out of the House Committee on Cities of the First Class, but ultimately failed to become law. Kan. House Bill No. 264 (1911).

Legislation to expand the scope of permissible segregation to include cities of the second class was introduced in 1919. Kan. House Bill No. 9 (1919); Kan. Senate Bill No. 567 (1919). The bills engendered strong public reaction in favor of and against expanded segregation. See Kan. State Historical Society, Archives Dept., Governor Allen's Papers, Box 26, file no. 22, "School Segregation," (1919). The legislation failed in both houses.

Segregated first class schools - have to provide equal educ.?

Although Kansas statutes on segregation would be consistent over time, their very consistency would lead to a change in the permissible scope of segregation. The needs of school districts changed with population growth, yet Kansas maintained its increasingly anachronistic distinction between first and second class cities as those above and below 15,000.[42] Because the definition of first- and second-class cities remained the same, as Kansas communities grew in population, an increasing number would gain the authority to segregate.[43] By 1954, ninety percent of black Kansans would live in cities of the first class, so that the state's seemingly ambiguous policy would mean widespread permissible segregation in practice.[44]

Although segregation in second- and third-class cities was never authorized by the Kansas State Legislature, it was practiced in many such cities through most of Kansas history. See Bd. of Educ. of the City of Ottawa v. Tinnon, 26 Kan. 1 (1881); Cartwright v. Bd. of Educ. of the City of Coffeyville, 73 Kan. 32 (1906); Woolridge v. Bd. of Educ. of the City of Galena, 98 Kan. 397 (1916); Webb v. School Dist. No. 90 in Johnson County, 167 Kan. 395 (1949) (cases involving segregation in cities of the second class).

39 The most important application of Kansas segregation law through the courts came with the introduction of junior high schools, as they were not mentioned in the Kansas school laws. Thurman-Watts v. Bd. of Educ. of the City of Coffeyville, 115 Kan. 328 (1924), held that ninth grade was part of high school under Kansas law, and therefore junior high school students could not be segregated in the ninth grade.

To comply with Thurman-Watts, the Topeka school board sent white students to junior high schools for grades seven, eight and nine, but sent black students to black elementary schools through the eighth grade, then to

3. SEGREGATION AND BLACK EDUCATION IN TOPEKA

C. Vann Woodward has suggested that systemic racial segregation came into existence in the South in the 1890's. Prior to that time, although race discrimination was a widespread phenomenon, it did not manifest itself in rigid racial separation.[45] However, prior to the 1890's, segregation was prevalent in certain areas, particularly education, in the South and elsewhere.[46] Southern schooling for blacks largely began as segregated schooling provided by Northern missionary groups who sent teachers to the South for the purpose of educating blacks during Reconstruction. In the North, black education often began through the efforts of private groups, such as the Manumission Society,

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integrated junior high school for ninth grade only. This pattern of school attendance was challenged in 1941 as violating the requirement that separate schools must be equal. Graham v. Bd. of Educ. of the City of Topeka, 153 Kan. 840 (1941). The Kansas Supreme Court found that, due to the great differences in educational programs and facilities between grades seven and eight in the black elementary schools and the white junior high school, Topeka was not providing black students with an equal education. However, because grades seven and eight were considered elementary grades, the court did not require junior high school integration. It only held that if Topeka was to provide junior high schools for white children, it must do the same for blacks. 153 Kan. at 844 - 848. Topeka complied with the court order by integrating its junior high schools. Kluger, supra note 18 at 379. See also infra at 25 - 26.

[40] See cases cited, supra note 38.

[41] Williams v. Bd. of Educ. of the City of Parsons [I], 79 Kan. 202 (1908); Williams v. Bd. of Educ. of the City of Parsons [II] 81 Kan. 593 (1910); Wright v. Bd. of Educ. of the City of Topeka, 153 Kan. 840 (1941) (school

which established the New York African Free School in 1787. Northern states generally educated blacks within their public school systems by the time to the Civil War. Some Northern states segregated public school students. Others did not.[47]

Kansas, a developing state at the close of the Civil War, educated its comparatively small black population in public schools and missionary schools in the 1860's and early '70's. The prevalence of segregated schooling varied city-by-city, depending on the size of the black population in a given community. As one commentator noted in 1871,

> [T]he people of this State have from its earliest settlement been imbued with the spirit of freedom; and their legislation in reference to educational matters has consequently been free from invidious

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integration sought due to unequal conditions in cities of the first class).

[42] When the legislature wished to distinguish in the size of cities for the purpose of education-related regulation, it simply created population groupings within the category of cities of the first class. E.g. Kan. Gen. Stat. sec. 72-1725, 72-1725a, 72-1726, 72-1737 (1949).

[43] Compare Cartwright v. Bd. of Educ. of the City of Coffeyville, 73 Kan. 32 (1906) (Coffeyville as a city of the second class) with Thurman-Watts v. Bd. of Educ. of the City of Coffeyville, 115 Kan, 328 (1924) (Coffeyville as a city of the first class).

[44] Joint Comm. of the National Educ. Assn. and the American Teachers Assn., LEGAL STATUS OF SEGREGATED SCHOOLS 14 (1954).

[45] C. Vann Woodward, THE STRANGE CAREER OF JIM CROW (1957).

[46] See e.g. Roberts v. City of Boston, 5 Cush. [Mass.] 198 (1859).

> discriminations as to the several races. Their schools are generally open to black and to white children alike; and it is only at a few points, where large numbers of negro emigrants are to be found, that schools for colored children exist separately.[48]

freedom if #'s small enough

As the population of Kansas expanded rapidly between 1870 and 1890, the state's black population increased dramatically due to emigration from the South.[49] By the 1880's, many Kansas cities had substantial black populations. However, school segregation in the state remained varied. Some smaller cities had separate schooling, while some larger cities had mixed race schools.[50] The practice remained in a state of flux until just after the turn of the century. In 1906, the Superintendent of Public Schools of Kansas noted that "[t]here is a movement in Kansas looking toward the

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[47] See Stanley Leiberson, A PIECE OF THE PIE: BLACKS AND WHITE IMMIGRANTS SINCE 1880 133 - 145 (1980); Virgil A. Clift, Educating the American Negro, 366 - 368.

[48] U.S. Office of Educ., THE HISTORY OF SCHOOLS FOR THE COLORED POPULATION 346 (2d. ed. 1969) (1st. ed. 1871). The approximately fifteen segregated schools in the state were run by "benevolent agencies" including the American Missionary Association, the Michigan and Northwestern branches of the American Freedmen's Union Commission and the General Assembly of the Presbyterian Church.

[49] See Nell Irvin Painter, EXODUSTERS: BLACK MIGRATION TO KANSAS AFTER RECONSTRUCTION 146 - 147, 184 - 185 (1979).

[50] Compare Bd. of Educ. of the City of Ottawa v. Tinnon, 26 Kan. 1 (1881) (segregated schooling in city of the second class) with Reynolds v. Bd. of Educ. of the City of Topeka, 66 Kan. 672 (1903) (partial integrated schooling in city of the first class until 1900). I do not, at this time, have data to determine the extent to which segregation was correllated with the predominance of blacks.

segregation of the races in the public schools, where the per cent. of colored population will warrant the separation."[51] Following the trend toward greater segregation in the Southern states, the practice of segregation became more prevalent in Kansas in the early twentieth century. With or without legislative approval, school segregation became common throughout much of the state.

For the first Superintendent of Schools of Topeka, Kansas, black education was an important priority. In 1867, one hundred blacks were enrolled in an overcrowded one-room elementary school in which one teacher would teach all subjects to the fifty or so who attended each day. In addition, working people crowded into the segregated evening school which was maintained for several weeks during the winter. As Topeka expanded and improved its educational facilities and programs for the increasing population of white students, Superintendent L.C. Wilmarth urged the Board of Education to "fully recognize the claims that the colored race have upon us for educational privileges," and to act promptly to provide additional facilities for black schools. As he wrote in his first report to the Board,

> It is plainly to be seen, that but a short time will elapse, ere the colored race by the general law of progress will be placed, side by side with us, equal participants in all rights, franchises

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[51] Quoted in Stephenson, RACE DISTINCTIONS IN AMERICAN LAW 184 (2d. ed. 1969) (1st. ed. 1910).

> and privileges of our government, qualified candidates for Legislative, Executive, and Judicial honors. Therefore it behooves us to be preparing not only for him, but ourselves, for the coming of changes by freely furnishing them with the best of educational advantages.[52]

Whether Wilmarth's successors provided black Topekans with an equal education, by the 1880's the city did provide four black schools.[53] The teaching staffs of the black schools were initially white. As Superintendent D.C. Tillotson noted in his report for the year 1886-87, "[s]ix years ago, with two exceptions, all the teachers in our colored schools were white," however white teachers were transferred once black teachers could be found.[54] After the first black students graduated from integrated Topeka High School in 1882, that school began to provide "a small consistent flow of colored teachers to the community."[55] Through hiring local and outside black teachers, Topeka eventually achieved completely segregated teaching staffs.[56]

In one part of Topeka, there was partial elementary school integration as late as 1900. When the Lowman Hill area was annexed to the City of Topeka in 1890, only one

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[52] Topeka Bd. of Educ., HISTORY OF THE TOPEKA SCHOOLS 110 - 111 (1954).

[53] Id. at 113.

[54] Quoted in Id. at 115 - 116.

[55] Id. at 116.

[56] Kluger, supra note 18 at 379.

One school in Lowman Hill area - and it was integrated.

school house existed in that new part of the city.[57] It was attended by all children in the district regardless of race. After the school burned down in 1900, the Topeka School board purchased a new site upon which to rebuild, claiming that the old site was unsanitary and inconvenient. It built a modern, two-story brick school building on the new site, and equipped it with new furniture and modern plumbing. The board then moved an old one-story structure to the original school site, equipping that two-room building with second-hand furniture. As the water mains for the city water supply stopped two blocks short of the old site, well water remained its sole water supply.[58] Once school was re-opened in the Lowman Hill District in early 1902, only white children were admitted to the new school building. Although the one-hundred and thirty whites occupied only four of the eight school rooms, black students were directed to the two room building on the old site.[59]

School burned down. New school built on new site - for whites only.

Bldg placed on old site - for blacks.

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[57] Defendant's Return to Alternative Writ of Mandamus at 2 - 3 (May 1902), Reynolds v. Bd. of Educ. of the City of Topeka, 66 Kan. 672 (1903). There may have been scattered pockets of school integration in other parts of the city as well. According to one source, Langston Hughes, the black writer, attended elementary school at Harrison School, which was considered a white school. Topeka Bd. of Educ., supra note 52 at 115. Hughes was born in 1902 and consequently would most likely have attended the Topeka schools between the years 1907 and 1915.

[58] Plaintiff's Affidavit for Alternative Writ of Mandamus at 1 - 4, Reynolds ; Defendant's Return to Alternative Writ of Mandamus at 4 - 5, Reynolds ; Lowman Hill School, The Topeka Plaindealer, Feb. 1902.

[59] There are conflicting accounts as to the number of black

Black parents in the Lowman Hill District were outraged by the school Board's action, and many responded by keeping their children out of school. According to the Women's League, an organization of black women in the Lowman Hill area, black parents would boycott the schools "until the trouble is adjusted in some satisfactory way." As they wrote to a local newspaper,

> We did not oppose the separation of the white and colored children in school because we fear our own race cannot teach them. We are proud to say that we have men and women fully competent, and if the board had given us equal school facilities for our children we would have had no grounds for complaint, though we were not in favor of separate schools, because we have not had one heretofore and it is not pleasant to have even the school house doors closed in one's face.[60]

The group did not want "to appear stubborn or unreasonable, but simply ask for equal school facilities."[61]

According to the Topeka papers, the black community was willing "to agree to almost any sort of a compromise if the board had shown any spirit of conciliation, and would have

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children involved. The plaintiff claims there were fifty in the district. Plaintiff's Affidavit for Alternative Writ of Mandamus at 2, Reynolds. According to the defendants, there were about thirty-four black children enrolled in the two-room school, a larger number of black children than had ever been enrolled in the Lowman Hill district. Defendants' Return to Alternative Writ of Mandamus at 5, Reynolds. The difference may be due to a boycott of the segregated school by black parents. That School Question, The Topeka Plaindealer, Feb., 1902.

[60] That School Question, The Topeka Plaindealer, Feb. 1902, quoting a letter to the Topeka Capital.

[61] Id.

let the matter drop if the colored children had been admitted to the sixth grade at the Lowman Hill School."[62] However, when it met to consider the segregated schools controversy, the Topeka Board of Education was not in a compromising mood. The Board's "attitude" forclosed "all possibility of compromise or setting the matter on any basis which has hitherto been proposed."[63] Instead, Topeka blacks took the school controversy to the courts, as the Board's hard line position on segregation polarized the community. G.C. Clement, the attorney representing the black parents vowed to "see these people through to the Supreme court of the United States, if need be, and spare my state this disgrace, if it takes the remainder of my life. I shall fight this miserable spirit of caste, and fight it to the last ditch."[64]

Reynolds case constit. args.

Two months later, Clement filed a Writ of Mandamus in the Kansas Supreme Court on behalf of William Reynolds, a black parent whose son was excluded from the Lowman Hill School. Clement's most important legal argument was that racial segregation violated the state and federal constitutions. With the constitutional standard set by Plessy v. Ferguson, [65] he would not get far. Citing Plessy and numerous cases

[62] The Lowman Hill School, Topeka Plaindealer, Feb. 1902.

[63] Id.

[64] Id.

[65] 163 U.S. 537 (1896).

upholding school segregation in other states, the Kansas Supreme Court upheld the constitutionality of the Kansas school segregation statute, paving the way for an increasingly rigid and pervasive system of segregation in Topeka.[66]

Although Reynolds established the constitutionality of segregation in the Topeka schools, it was not the last time the city would be called upon to defend its practices in the Kansas courts. As the city's school system expanded in the early decades of the twentieth century, it maintained a limited number of black schools, so that many black children had to travel some distance to attend school. In 1930, Wilhelmina Wright sued the Topeka school board, claiming that the distance she had to travel to get to school constituted unequal treatment in violation of the Plessy standard. Wright lived a few blocks from Randolph School for whites, but was assigned to Buchanan School twenty blocks away. She claimed that her assignment to Buchanan was unreasonable due to the distance and the number of busy intersection she would have to cross. Wright did not argue that the facilities at the schools were unequal.[67] In a brief opinion, the court noted that, as a city of the first class, Topeka had maintained segregated schools for many

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[66] Reynolds v. Bd. of Educ. of the City of Topeka, 66 Kan. 672 (1903). See discussion supra at 10 - 14.

[67] Wright v. Bd. of Educ. of the City of Topeka, 129 Kan. 852 (1930).

years in accordance with state law. The city provided the plaintiff with bus transportation to and from Buchanan School, and the plaintiff did not allege that the transportation was inadequate. Consequently, the court held that Wright's assignment to Buchanan was not unreasonable.[68]

Black education in Topeka was again challenged as unequal in 1941. When the city established junior high schools,[69] it continued to segregate students through eighth grade, but not ninth grade, as Kansas law permitted.[70] White school children attended elementary school through sixth grade, junior high school for grades seven to nine and high school for grades ten to twelve. Black children, on the other hand, attended black elementary schools through the eighth grade, attended junior high for ninth grade only, and then attended the integrated high school. In Graham v. Board of Education of the City of Topeka,[71] blacks successfully

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[68] 129 Kan. at 853. Here and in other unequal treatment cases the Kansas Court did not compare the school board's treatment of whites with their treatment of blacks to determine whether the treatment of blacks was unequal. The sole question was whether the board's action regarding blacks, in isolation, was unreasonable. See Williams v. Bd. of Educ. of the City of Parsons [I], 79 Kan. 202 (1908); Williams v. Bd. of Educ. of the City of Parsons [II], 81 Kan. 593 (1910).

[69] Topeka's first junior high school was established in 1914 or 1915. Plaintiff's Brief at 6 Graham v. Ed. of Educ., 153 Kan. 840 (1941).

[70] See discussion supra note 39.

[71] 153 Kan. 840 (1941). See supra note 39 for a discussion of the ruling.

challenged this pattern of schooling as providing unequal education for blacks in the seventh and eighth grades. Amid dissention in the black community stemming from the effect integration might have on the jobs of black teachers, the school board complied with the Kansas Supreme Court ruling by integrating black seventh and eighth graders into the junior high schools. Six black teachers lost their jobs, and two more were reduced to half-time.[72]

1942 One year after the Graham ruling, Topeka hired a new school superintendent. Kenneth McFarland, a young, ambitious Kansan, was a gifted speaker who would provide forceful, perhaps overbearing, leadership in the Topeka school system during his tenure. Considered prejudiced and arrogant by many Topeka blacks, he held a hard line on segregation. In his racial ideology, McFarland invoked Booker T. Washington, suggesting that the only way to gain equality was to get a job and earn it. While he believed in segregation, he also believed in keeping separate schools equal, and tried to ensure that black students in Topeka were provided with equal opportunities.[73]

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[72] Christopher A. McElgunn, Graham v. Board of Education of Topeka: A Hobson's Choice 20 - 21 (1984) (unpublished paper, Washburn Univ. Law School). Three of the teachers whose jobs were affected had some connection to the Graham litigation.

[73] Kluger, supra note 18 at 379 - 383.

To enforce his policies on race, McFarland hired a black assistant, Harrison Caldwell, to supervise black education in Topeka. Caldwell used strong tactics to enforce a segregationist philosophy on black teachers, capitalizing on the insecurity created when blacks were fired as a result of Graham. Caldwell suggested that elementary school integration would lead to the elimination of black teachers from the Topeka schools. Shortly after he arrived, black teachers, responding to his pressure, increased segregation within their profession by forming a separate black teachers association.[74]

A focus of Caldwell's attention was Topeka High School. Topeka's only high school was considered "a segregated school within an integrated school."[75] Through 1949, classes were integrated but activities were not. Caldwell was ever vigilant to keep black and white students apart outside the classroom. He held separate "good-nigger assemblies" for black high school students while whites attended chapel. As one student later recalled,

> Caldwell would tell us not to rock the boat and how to be as little offensive to whites as possible -- to be clean and study hard and accept

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[74] Id. at 381.

[75] Isabell Masters, THE LIFE AND LEGACY OF OLIVER BROWN 31 (Ph.D. Diss., U. of Okla. 1981). Masters' dissertation is somewhat problematic in her analysis of Brown's role in Brown. She does collect some interesting information, however, including her own recollections from her experience as a black student at Topeka High and as a resident of Topeka during the 1930's and 40's.

> the status quo -- and things were getting better. Those who went along got the good after-school and summer jobs, the scholarships, and the choice spots on the athletic teams.[76]

Blacks were segregated from music groups, sports and student government. There was a separate black student council which sent the only black representative to the student government body composed of representatives from all student groups. Blacks had their own school "kings and queens."[77] One sport open to blacks was basketball through a separate black league. The black team, the "Ramblers," could not use the Topeka High team name or colors. They played home games at East Topeka Junior High.[78] Separate black teams were abolished when, with little fanfare, the school board rescinded its formal policy of internal segregation at the high school in 1949.[79]

By mid-century, Topeka was a city of over 100,000, and approximately 7.5 per cent of its residents were black.[80] Segregation in the city was not limited to its schools. Most of its public accomodations were segregated, even

[76] Samuel C. Jackson, quoted in Kluger, supra note 18 at 382.

[77] Id. at 31; Topeka High School, THE 1947 SUNFLOWER 54, 56, 69 (1947) (school yearbook); Kluger, supra note 18 at 382.

[78] Julia Etta Parks, THE DEVELOPMENT OF ALL-BLACK BASKETBALL TEAMS IN TOPEKA HIGH SCHOOL, 1929 - 1949, (1982); Kluger, supra note 18 at 382.

[79] Topeka Bd. of Educ. Minutes, Sept. 26, 1949.

[80] Kluger, supra note 18 at 372.

though Kansas law formally prohibited it.[81] Only one Topeka hotel, the Dunbar, would serve blacks, and most restaurants would not seat them. Of the seven movie theaters in town, five served only whites, one provided balcony seating only for blacks, and one theater was for blacks only. The municipal swimming pool at Gage Park was for whites only, with the exception of one day a year when it was open to the black community. Not everything in Topeka was segregated, however. There was no racial segregation in bus or train transportation.[82] And while many blacks lived in eastern Topeka, residential segregation was not absolute. Blacks also lived in mixed-race neighborhoods scattered through the rest of Topeka.[83]

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[81] 1935 Kan. Gen. Stat. 21-2424. Kansas law provided civil and criminal penalties against any person making "any distinction on account of race, color, or previous condition of servitude" in the operation of a public accomodation licensed by a municipality. 1935 Kan. Gen. Stat. 21-2424.

To circumvent the law, Topeka repealed its city ordinance which required the licensing of theaters and opera houses in the fall of 1947, Shortly thereafter, two black Topekans, were refused admission to a Topeka theater. As they could not sue the theater owners for discrimination, they brought suit against the City of Topeka, challenging its authority to repeal its licensing requirement. Stovall v. City of Topeka, 166 Kan. 35 (1948). The Kansas Supreme found that the "[a]ppellants had no vested rights in the continued existence of the licensing ordinance and the city was at liberty to repeal it whenever it so desired." 166 Kan. at 36.

[82] Kluger, supra note 18 at 374 - 375.

[83] See Id. at 377, 408; Transcript of Record at 81 - 109, Brown v. Bd. of Educ., 347 U.S. 483 (1954).

On the question of segregation, Topeka was in keeping with the practices throughout most of the state. In the early 1950's a black Kansas state Senator felt the pervasiveness of segregation in his home state as he took his family on a vacation in Kansas. The family was refused service in restaurants and had to eat take-out food. They were not able to find hotels which would take blacks, and were forced to sleep in the car. Of greatest inconvenience was the refusal of gas station owners to let them use bathrooms.[84] And all in the free State of Kansas.

Although Kansas caught on to segregation a bit more slowly than the South, and practiced it with a bit less pervasively than the Southernors, by mid-century their patterns of segregation were equally well entrenched. However, the winds of change were in the air. Southern urban planners began to question the economic viability of segregation.[85] International criticism of American apartide hightened sensitivities in the North.[86] And little by little, responding to the NAACP's careful strategy, the U.S. Supreme Court began to chip away at the legal foundation for segregation. Plessy v. Ferguson no longer seemed

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[84] Barbara Watkins, A Matter of Justice -- Brown v. Board of Education, 2 THE KANSAS IMMIGRANTS 33 - 35.

[85] John Van Sickle, PLANNING FOR THE SOUTH (1943)

[86] Gordon W. Allport, THE NATURE OF PREJUDICE 330 -331 (1954).

permanently etched in stone.[87]

Sensing the change, the State of Kansas began, slowly, to reconsider its practices. Nearly one hundred years before Kansas had preceeded the Civil War as its citizens fought each other on the question of slavery. Now Kansas would again seek to settle the problem on its own, and ahead of the rest of the country. If public opinion were to turn against segregation, the state would not be caught among those who violated the collective morality. Kansas was proud that it was not the South.

Of course, when Kansas began to reconsider segregation, it was at the instigation of those outside of the political mainstream: its black citizens. And their actions were first greeted with recalcitrance, then delay, before white Kansas jumped on the desegregation bandwagon. They would not jump quickly enough to keep Kansas out of the federal courts and the national press, and to spare it considerable embarrassment.

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[87] Kluger, supra note 18 at 256 - 284.

4. THE SCHOOL SEGREGATION CONTROVERSY

4.1 NAACP ORGANIZING

When McKinley Burnett took over the leadership of the Topeka NAACP in 1948, his first attempt to rid the schools of segregation was through a petition to the Board of Education. Calling themselves "The Citizens' Committee" to avoid the wrath mention of the NAACP would invoke, Burnett and NAACP member Daniel Sawyer presented their petition in the fall of 1948. Their letter was an attack on the McFarland-Caldwell administration. They claimed that Caldwell, the director of black education, was "a stumbling block to our progress," as he "attempted to invoke social and economic sanctions on all who oppose his methods and policies of fostering more and more segregation in the senior high school."[88] However Caldwell was only the "willing tool" of the real villian, Superintendent McFarland. The petition continued,

> Dr. McFarland says: separate schools are here to stay. Regardless of added expense, the extra drain on a short supply of teachers ..., [r]egardless of the national trend toward integration; regardless of the fact that separation in our schools prevent[s] the educational processes from acting positively in the field of race relations, and sets up another barrier to American unity, and hampers our leadership in world affairs. Dr. McFarland says Separate schools are here to stay, and separate

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[88] Petition of The Citizens' Committee, quoted in Kluger, supra note 18 at 393. The petition is not reprinted in the minutes of the Topeka Board of Education.

> secondary schools are in the plans. To which Mr. Caldwell says: Amen![89]

But the day for McFarland's vision had passed, the Committee warned the board.

> Things and conditions don't remain static because a few well-placed people will it so. The world is in the midst of a mighty upheaval and conditions change in the twinkling of an eye. Consequently we believe the segregation policy in Topeka schools [is] subject to change. ... We therefore pray that the Board will take cognizance of our petition and instruct its agents to adopt policies which will be an inspiration to all the people regardless of race, color or creed.[90]

The Board had listened to such petitions before, and, as usual, they only listened.

Compared with segregated schooling in other states,[91] Topeka did quite well by its black citizens in 1948. The days of the Lowman Hill problem were long past.[92] There were no longer such vast disparities in physical plants. No black schools had outdoor plumbing. They had reasonably up-to-date teaching materials and a black teaching staff which the black community was proud of. Many of Topeka's eighteen white schools were newer and prettier than the four black schools, but the oldest and least valuable schools in the city were also white schools.[93] What black parents

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[89] Id.

[90] Id.

[91] See Kluger supra note 18 at 302, 427, 458 - 460.

[92] See discussion supra at 21.

[93] Testimony of Dr. Hugh Speer, Transcript of Record at 117,

complained about was having to send their children far from home when there were schools right in their neighborhood. It was the principle of the matter: being excluded from the nearby school soley because of race.[94]

In the fall of 1950, the Topeka NAACP gave the school board one last try. Burnett attended a meeting prior to the beginning of the 1950 school year, and requested an end to segregation in the schools. As he later recalled, "I told them 'It may sound rather abrupt, but you've had two years now to prepare for this.' As soon as I sat down, one of the board members jumped up and roared, 'Is that a request or an ultimatum?'"[95]

The Topeka NAACP had tired of politely requesting consideration by the recalcitrant school board. By the fall of 1950, they were growing impatient. As the newspapers carried stories of the desegregation battle in the South Carolina schools, the Topeka NAACP became emboldened. They had achieved some changes in the schools through the state courts in the past, particularly when Graham v. Board of Education[96] opened the doors of the junior high schools to

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Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[94] See e.g. Bettina Harris, Some Personal Thoughts -- Out of the Past, 4 TOPEKA MAGAZINE (Jan. 1978) (interview with Linda Brown Smith).

[95] McKinley Burnett, quoted in Kluger, supra note 18 at 394. This episode is not recorded in the minutes of the Topeka Board of Education.

black seventh and eighth graders. Following the lead of blacks in other parts of the country, the Topeka NAACP now looked to the federal courts.[97]

In August of 1950, Lucinda Todd, Secretary of the Topeka Chapter, wrote a letter to Walter White, the Executive Secretary of the NAACP, requesting assistance on the Topeka case. As Todd described it, Topeka had "segregated schools headed up by a Negro who was hired to 'keep the Negro in his place.'"[98] By the fall of 1950, the situation had become "so unbearable" that the local branch decided to test the constitutionality of the Kansas school segregation law. The chapter's legal committee believed that the law would not withstand a constitutional challenge. Todd wrote White that if the chapter "could have legal help from the splendid lawyers in the national organization, we could not but win."[99]

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[96] 153 Kan. 840 (1941). See discussion supra at 25 - 26.

[97] While the desegregation strategy was apparently introduced in other parts of the country largely due to the efforts of the national office of the NAACP, see generally Kluger, supra note 18, desegregation, not just equal but separate education, had been part of the political agenda of the Topeka NAACP for some time.

[98] Lucinda Todd, letter to Walter White, Executive Secretary, NAACP, August 29, 1950. Reprinted in Masters, supra note 75 at 159 - 160.

[99] Id.

The "splendid lawyers" in New York found the time to help out in Kansas. Robert Carter began to work with Charles Bledsoe and John and Charles Scott of the Topeka NAACP legal committee. Meanwhile Burnett tried to solicit community support. Generally lukewarm to the efforts of the local NAACP, the Topeka black community was not enthusiastic about this particular endeavor. The strongest opposition came from black teachers. When Burnett met with a group of black teachers to discuss the suit, "all it did was draw lines tighter," Mamie Williams, a teacher, later recalled. "One of the NAACP people was outraged at the situation, saying, 'Imagine, our children have to go right by these white schools and go to separate black schools' -- as if that was a dreadful thing."[100] One black PTA wrote the school board supporting the maintenance of segregated schools in Topeka.[101]

NAACP in '47 became involved

The black teachers had reason to be concerned. Their jobs depended on Topeka's segregated schools. When the school board integrated the seventh and eighth grades in 1941 after the Graham ruling, several black teachers were fired. "If they were going to sue for integration," J.B. Holland, former principal of black Monroe School later commented, "I thought they should have gone all the way --

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[100] Mamie Williams, quoted in Kluger, supra note 18 at 394 - 395.

[101] Kluger, supra note 18 at 394.

for teachers as well as pupils."[102] No teachers joined in the challenge to school segregation. To do so would have been professional suicide under the McFarland-Caldwell regime, regardless of the outcome of the suit. Yet in spite of their personal interest in maintaining school segregation, black teachers took a low profile. None would actively support the school board either.[103]

As the case moved quickly along, the lawyers identified several willing participants. Twelve black women and one black man were named as plaintiffs, suing on behalf of their children.[104] Among them were Lucinda Todd and other chapter members. However, not all of the plaintiffs belonged to the NAACP. Oliver Brown, active in the black church but not in black politics, was one of these.

By some accounts, Brown was a rather unenthusiastic plaintiff.[105] By others he was a man who "was no longer willing to accept second-class citizenship," quiet but steadfast as he preached about equality.[106] Brown lived with his wife and three daughters in a predominately white

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[102] J.B. Holland, quoted in Kluger, supra note 18 at 395.

[103] Kluger, supra note 18 at 423.

[104] Plaintiffs' Amended Complaint, Brown v. Board of Education, 98 F.Supp. 797 (1951).

[105] Kluger, supra note 18 at 395.

[106] Sam Jackson, quoted in Kluger, supra note 18 at 395; see also Masters, supra note 75.

neighborhood in Topeka. Although they lived seven blocks from Sumner elementary school, Brown's oldest daughter, Linda, was assigned to third grade at Monroe, a black school about two miles from their home. As he told his child, "[t]here is no sense in me having a daughter who has to go clear across town, walk seven blocks up a dangerous railroad crossing, cross a busy street, stand in the cold and rain to catch a school bus, when there is a school so close to our home."[107]

With Brown, Todd and other parents and their children signed on as plaintiffs, on February 28, 1951, the NAACP filed a complaint in federal district court, requesting declaratory and injunctive relief. In keeping with previous school cases, they claimed that the educational opportunities provided in the black schools were inferior to those in the white schools, and further that blacks were required to travel long distances to school, while whites were able to attend school close to home. These differences in treatment, they alleged, constituted a denial of equal protection of the laws.[108] In addition, the complaint asked the court to determine whether the Kansas school segregation statute itself was unconstitutional. When the court later partially granted a Motion for a More Definite Statement,

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[107] As remembered by Linda Brown Smith, quoted in Harris, supra note 94 at 30.

[108] Plaintiff's Amended Complaint, Brown.

the plaintiffs restated their allegation of educational inequality, clarifying the issue before the court. They claimed educational opportunites for black students were inferior in "physical facilities, curricula, teaching, resources, student personnel services, access and all other educational factors, tangible and intangible, offered to school children in Topeka." With regard to these allegations, the Topeka case might be a classic challenge to unequal treatment. However the plaintiffs also claimed that "[a]part from all other factors, the racial segregation herein practiced in and of itself constitutes an inferiority in educational opportunity offered to Negroes, when compared to educational opportunity offered to whites."[109] This latter claim would eventually set the Topeka case apart as clearly framing the question of the constitutionality of segregation itself.[110]

As both parties prepared for trial, the Topeka Board of Education was in the throes of a political battle. Three of the board members of the six who hired Kenneth McFarland were up for re-election. A slate of candidates opposed to McFarland's tactics ran against them. Slogans such as

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[109] Plaintiffs' Amendment to Paragraph Eight of the Amended Complaint, Brown.

[110] Of the five cases consolidated in Brown v. Board of Education, the Topeka case would be the only case where, apart from segregation, equal treatment was found by the lower court. Brown v. Bd. of Educ., 347 U.S. 483, 486 n. 1 (1954).

"Let's end the puppet government in our schools," and "our children deserve a better school administration with a FULL-TIME SUPERINTENDENT" peppered the local papers.[111] Meanwhile the McFarland forces held voter meetings in the schools during school hours and had teachers send campaign literature home with school children.[112] On March 25, 1951, nine days before the school board election, news of improper financial dealings by the McFarland Administration hit the local papers. On April 3, the incumbent board members were voted out of office, and two days later, the Superintendent resigned.[113]

1951

When Kenneth McFarland left office, the Topeka school administration was not without its strong supporters of segregation. However, the new school board was sharply divided, with one member actively opposed to segregation.[114]

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[111] Kluger, supra note 18 at 403.

[112] Id.

[113] Id. at 404. At this point in my research, it is difficult to tell what role the Brown litigation and the issue of segregation played in the school board election. Kluger gives it no role at all, an assumption which is supported by the fact that, at that stage, the white newspapers gave the case very little coverage. Id. at 394. However, Topeka is a small enough city that most everyone must have known about the suit, and must have known that the McFarland camp opposed it. At least some of the voters were most likely motivated in part by their opposition to the segregation policies of the incumbents.

[114] See e.g. Topeka Bd. of Educ. Minutes, Oct. 6, 1952; Firing Negro Teachers To Be Contested, Topeka Captial, April 7, 1953.

Consequently, the April 1951 election ushered in an era of uncertainty in Topeka school politics. The public consensus on segregation was no longer clear. As he prepared his defense of Brown v. Board of Education, school board attorney Lester Goodell may well have felt uncertain about the future of the principles he was charged to defend.

4.2 TRIAL

If Lester Goodell felt somewhat isolated in his defense of segregation, he must have felt all the more alone when, single-handedly, he faced the five attorneys for the plaintiffs at trial on June 25, 1951. Robert Carter and Jack Greenburg from the national NAACP office had joined the local attorneys, Charles Bledsoe and Charles and John Scott, a few days before for last minute preparations. All of plaintiffs' counsel were active participants, though Carter was clearly in charge. In contrast, though accompanied by George Brewster, also representing the school board, two Assistant Attorneys General representing the State of Kansas, and attorneys for the Boards of Education for three other Kansas cities, Goodell handled the trial alone.[115]

Robert Carter led off as the trial began that Monday morning. He opened with two adverse witnesses, outgoing school board member Arther Saville and former Superintendent

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[115] Transcript of Record Brown v. Bd. of Educ., 347 U.S. 483 (1954).

McFarland. When Carter asked Saville why the Board of Education maintained segregated schools, an objection from Goodell was sustained.[116] As Judge Walter Huxman later explained,

> the question before the Court is this case is not what the viewpoint of anyone is or might be as to the future, the present or the past; but it seems to me the question in this case turns upon what the City of Topeka has and is doing, and what they may think about it is immaterial[117]...

In his attempt to carefully control the trial and restrict the scope of questioning to the issues he considered relevant, Huxman allowed the plaintiffs no questions on the subject of the school board's motivation.[118]

Through the testimony of McFarland and the parents of school children, the plaintiffs laid the basis for their claim that school facilities were unequal. However, the evidence on this point was far from compelling. Carter's attempt to elicit testimony from McFarland about differences in school schedules between the white and black schools was dubbed a "fishing expedition" by the court.[119] The parents and the one child who testified were questioned only about the distance from home to the relevant black school as

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[116] Id. at 69 - 70.

[117] Id. at 72

[118] Huxman was the most active of the three members of the district court panel. Sitting with him were Judge Arthur J. Mellot and Judge Delmas Carl Hill.

[119] Id. at 77.

compared with the white school closest to home, the need for black children to take lunches to school because they couldn't go home at noon, and unsatisfactory transportation provided for black students. Only two of these witnesses made any comments on the subject of segregation itself. And one of them caught the court by surprise.

In the middle of his testimony, Silas Fleming, a black parent whose wife and children were named plaintiffs, asked permission to tell the court "why I got into this suit whole soul and body." When, after a moment's deliberation, Huxman allowed him to speak, Fleming told them

> Well, it wasn't for the sake of hot dogs; it wasn't to cast any insinuations that our teachers are not capable of teaching our children because they are supreme, extremely intelligent and are capable of teaching my kids or white or black kids. But my point was that not only I and my children are craving light, the entire colored race is craving light, and the only way to reach the light is to start our children together in their infancy and they come up together.[120]

Silas Fleming's point, that the case was about the fact that racial equality could only come with integration, was addressed as the plaintiffs offered their expert testimony. Only then did the thrust of the NAACP strategy become clear.

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[120] Id. at 109 - 110. Another witness, James Richardson, testified that he sent his children to a parochial school "[s]imply because I do not believe in segregation." Id. at 102.

In all, eight experts in education, psychology and sociology testified for the plaintiffs. The first, Dr. Hugh Speer, Chairman of the Department of Education at the University of Kansas City, had conducted an evaluation of the Topeka schools. He found only minor differences between the white and black schools with regard to the educational background of teachers, class size and teaching load.[121] He found the availability of auditoriums and gymnasiums to be about the same, although some new white schools had particularly luxurious facilities.[122] There were no special classrooms set aside for mentally retarded black children, while there were two in all of the eighteen white schools.[123] Speer found some disparity in the age of school books, which the school board would later attribute to the fact that local PTA's often bought additional books for their particular school.[124] Regarding the school buildings, Speer testified that all the schools were well-preserved and well maintained. He found that, on the average, the white schools were newer than the black schools and had a higher

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[121] Id. at 113.

[122] Id. at 117.

[123] Id. at 113.

[124] Id. at 98 - 99, 198. The testimony of the Clerk of the Board of Education also raised some question as to whether Speer had actually seen all the books at the schools he visited, as she claimed the new books were packed up at the end of the school year. However, Speer testified that, in randomly sampling books, he looked at those in the boxes as well as those on the shelves.

insured value per classroom.[125] Yet although 45% of the white children went to schools that were newer than the newest black school, 14% of the white children attended schools that were older than the oldest black school. Consequently, although there were disparities between white and black schools, the very worst school buildings in Topeka were white, not black.[126]

Hugh Speer believed the black and white schools in Topeka were unequal, however his reason had very little to do with buildings and school books. Speer testified that the curriculum was not equal, defining curriculum as "the total school experience of the child." For him, education was "concerned with a child's total development, his personality, his personal and social adjustment."[127] Segregation itself detracted from the educational experience of black children, for

> the more hetergeneous the group in which the children participate, the better th[ey] can function in our multi-cultural and multi-group society. For example, if the colored children are denied the experience in school of associating with white children, who represent 90% of our national society in which these colored children must live, then the colored child's curriculum is being greatly curtailed. The Topeka curriculum or

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[125] Id. at 117 - 118. The average age of the white schools was 27, while the average age of the black schools was 36. The average insured value per classroom in the white schools was $10,517; the average in the black schools was $6,317.

[126] Id. at 117.

[127] Id. at 118.

> any school curriculum cannot be equal under segregation.[128]

The remaining experts elaborated on the contention that segregation, by itself, was harmful to black children. Dr. Horace B. English, Professor of Psychology at Ohio State University, testified that individuals tend to live up to, or down to others expectations of what they can learn. "[L]egal segregation definitely depresses the negroes expectancy, and is therefore prejudicial to his learning."[129] Dr. Wilber B. Brookover, Professor of Sociology at Michigan State College, told the court that the incompatability of segregation and principles of American democracy served to confuse black school children.

> In American society we consistently present to the child a model of democratic equality of opportunity. We teach him principles of equality; we teach him what kind of ideals we have in American society and set this model of behavior before him and expect him to internalize, to take on, this model, to believe it, to understand it. At the same time, in a segregated school situation he is presented a contradictory or inharmonious model. He is presented a school situation in which it is obvious that he is a subordinate, inferior kind of a citizen. He is not presented a model of equality and equal opportunity and basis of operating in terms of his own individual rights and privileges. Now this conflict of models always creates confusion, insecurity, and difficulty for a child who can not internalize a clearly defined and clearly accepted definition of his role ... he has two or three ... definitions of how he is expected to behave.[130]

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[128] Id. at 118.

[129] Id. at 156.

[130] Id. at 164 - 165.

Because black children were presented with a "dual definition" of their role as citizens, segregated schools perpetuated a "conflict in expectancies" which "condemns the negro child to an ineffective role as a citizen and a member of society."[131] Dr. Louisa Holt, Professor of Psychology at the University of Kansas, added that the fact that segregation was enforced by law made it more harmful to black children because it "gives legal and official sanction to a policy which is inevitably interpreted both by white people and by negroes as denoting the inferiority of the negro group."[132] Further, integrated education on the junior and senior high school levels could not erradicate the harm of segregation, for "the earlier a significant event occurs in the life of an individual the more lasting, the more far-reaching and deeper the effects of that incident, that trauma, will be."[133]

The plaintiffs rested early on the second day of trial, and Lester Goodell began his defense of the school board's practices. He presented only three witnesses. Goodell did not attempt to rebut the testimony of the experts regarding the harmful effects of segregation, although he had unsuccessfully attempted to elicit testimony on cross-examination that a black child in the minority at a

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[131] Id. at 165.

[132] Id. at 169.

[133] Id. at 172.

predominately white school would be psychologically harmed by being out-numbered and therefore "left out."[134] Rather, his witnesses called into question some of the inequalities the plaintiffs had alleged. Clarence Grimes, the school bus driver, testified that the conditions on the buses were not as chaotic as had been suggested,[135] while Thelma Mifflin, Clerk of the Board of Education, testified that Dr. Speer may not have seen all the school books when he made his evaluation, as the newest ones were packed in boxes at the end of the year.[136]

Kenneth McFarland, the final defense witness, spoke to the question of segregation itself. Pursuing a line of questioning that Carter had not been allowed earlier in the trial, Goodell asked the former superintendent about the reasons behind the school board's policy.[137] Goodell hoped to elicit the "human factor" involved in segregation as a challenge to the "hypothetical" expert testimony. McFarland responded that "probably the major factor" behind the board's defense of the lawsuit was that "we have never considered ... that it's the place of the public school system to dictate the social customs of the people who support the public school system." The board wished to

[134] Id. at 167.

[135] Id. at 191, 196.

[136] Id. at 198.

[137] Id. at 206.

maintain segregation because "[w]e have no objective evidence that the majority sentiment of the public would desire a change in the fundamental structure."[138]

4.3 PASSING THE BUCK

When it considered the constitutionality of the Kansas statute that summer, the three judge panel was not moved by McFarland's notion that the matter should be left to local sentiment. And as Judge Huxman had suggested, it was not concerned with the board's motivation. The only two questions the court considered were whether the educational opportunites provided black and white students were equal, and whether school segregation was permissible under the Fourteenth Amendment.[139] The panel would take a narrow approach to both of these questions, handing the plaintiffs a temporary setback, while setting an ideal record for appeal.

In comparing the educational opportunities available at the black and white schools, Judge Huxman, writing for the court, did not adopt Dr. Speer's broad notion of curriculum as "the total school experience of the child."[140] Rather, he focused on physical facilities, courses of study,

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[138] Id. at 207.

[139] Id. at 233.

[140] Supra at 45.

qualifications of teachers and other tangible variables, finding the schools to be comparable. While black children were forced to travel much further to school than whites, that was not discriminatory because transportation was provided. Huxman concluded that "in the maintenance and operation of the schools there is no willful, intentional or substantial discrimination in the matters referred to above between the colored and white schools."[141]

Though the court found these objective factors to be comparable in the black and white schools, the court did recognize that segregation itself had a dramatic effect on the educational experience of black children. In findings of fact which were not published with the formal opinion, the panel concluded that

> segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of the child to learn. Segregation with the sanction of law, therefore, has a tendancy to retain [sic] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial [sic] integrated school system.[142]

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[141] Brown v. Board of Education, 98 F.Supp 797, 798 (1951). Huxman also noted that "while plaintiffs' attorneys have not abandoned this contention, they did not give it great emphasis in their presentation before the court. They relied primarily upon the contention that segregaton in and of itself without more violates their rights guaranteed by the Fourteenth Amendment."

[142] Transcript of Record at 245 - 246, Brown.

In approaching the question of the constitutionality of the Kansas statute, Huxman focused on Supreme Court precedent, paying no attention to the social science analysis presented at trial which might provide a justification for reinterpreting the constitutional mandate. He noted that, "[a]s a subordinate court in the federal judicial system, we seek the answer to this constitutional question in the decisions of the Supreme Court when it has spoken on the subject and do not substitute our own views for the declared law by the Supreme Court."[143]

Huxman first turned to Plessy v. Ferguson [144] and Gong Lum v. Rice, [145] finding that, in those cases, the Supreme Court had held that segregation was constitutional, and was within the discretion of the state in regulating public schools.[146] He noted that later cases, McLaurin v. Oklahoma [147] and Sweatt v. Painter, [148] raised a serious question as to the continuing validity of the Plessy and Lum doctrine.

> If segregation within a school as in the McLaurin case is a denial of due process,[149] it is

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[143] 98 F.Supp. at 798.

[144] 163 U.S. 537 (1896).

[145] 275 U.S. 78 (1927).

[146] 98 F.Supp. at 798 - 799.

[147] 339 U.S. 637 (1950).

[148] 339 U.S. 629 (1950).

[149] Here, elsewhere in the opinion, and throughout the trial, Huxman referred to due process as the relevant

> difficult to see why segregation in separate schools would not result in the same denial. Or if the denial of the right to commingle with the majority group in higher institutions of learning as in the Sweatt case and gain the educational advantages resulting therefrom, is a lack of due process, it is difficult to see why such denial would not result in the same lack of due process if practiced in the lower grades.[150]

However, in McLaurin and Sweatt, the Supreme Court had limited itself to the question of the constitutionality of segregation in graduate and professional schcols. The Court had refused to reconsider Plessy, as it was not essential to a decision in either case. Consequently, the panel was "of the view that the Plessy and Lum cases, supra, have not been overruled and that they still presently are authority for the maintenance of a segregated school system in the lower grades." Under the then current state of the law, in spite of the harm suffered, segregation in Kansas was constitutional.[151] While the panel clearly questioned the continuing validity of the segregation doctrine, a reversal of Plessy would have to come from the Supreme Court.

The district court's judgment was entered on August 3, 1951, ensuring that segregaton in the Topeka schools would continue during the upcoming school year. How long it would

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> clause of the Fourteenth Amendment, in spite of the fact that in the pleadings and in oral argument the parties invoked the equal protection clasue. Likewise, McLaurin and Sweatt are equal protection, not due process cases.

[150] 98 F.Supp. at 800.

[151] Id.

continue remained uncertain as the plaintiffs appealed the ruling to the Supreme Court. The Court noted probable jurisdiction in June of 1952, and the focus of the legal battle shifted to Washington.[152]

4.4 POLITICAL SQUABBLES

Back in Kansas, a different battle was being waged, as state and local government officials awoke to the political implications of defending segregation. Proud of the Kansas free state heritage, many citizens were displeased that their state was involved in legal action which they associated with Southern racism. As school superintendent H.H. Robinson of Augusta, Kansas wrote Governor Edward Arn,

> I am surprised and I must say chagrined to learn that Kansas now classifies itself as one of the White Supremacy states as indicated by the case now before the United States Supreme Court. I have just finished reading a new and fine history of Kansas and found much of it thrilling and glorious. As I review those historical events which caused us to be called 'bleeding Kansas', I wonder how we suddenly find ourselves represented before the Supreme Court opposed to those human rights for which our early settlers bled.

Mr. Robinson was concerned that, through defending Brown, "we are throwing the influence of our state against those principles for which we have always stood.[153]

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[152] 343 U.S. 989 (1952).

[153] H.H. Robinson, Superintendent, Augusta Public Schools, letter to Kan. Governor Edward Arn, Dec. 10, 1953, Kan. State Historical Society, Archives Dept., Governor Arn's Papers, Box 62.

Neither the Topeka Board of Education nor the State Attorney General wished to be associated with the controversy. In a split vote, the newly constituted school board decided not to defend itself on appeal. They justified their decision by the fact that the court had ruled in their favor on the question of the equality of educational opportunities. As purely local matters were no longer at issue, they felt that the Attorney General should be responsible for defending the constitutionality of the Kansas law.[154] Attorney General Harold Fatzer waffled in his response. During the summer of 1952, he told the Topeka school board that he intended to argue the case. He later changed his mind, insisting that the school board was responsible for defending its own practices.[155] With the Kansas case and three other school cases set for argument in the Supreme Court that December,[156] attorneys for the other states were concerned that the Topeka case would be decided by default.[157]

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[154] Segregation Suit To Make History, Topeka Capital, November 30, 1952. The vote was apparently taken during the summer of 1951.

[155] Id.

[156] 344 U.S. 1 (1952). As of the fall of 1952, the Kansas case was consolidated with cases coming from South Carolina, Virginia and the District of Columbia. A fifth case, from the state of Delaware, would later be included. See Brown v. Bd. of Educ., 347 U.S. 483, 486 - 488 n. 1 (1954).

[157] Paul Wilson, Speech on Brown v. Board of Education, May 1, 1981, 30 Kan. L. Rev. 15, 21 (1981).

As state and local officials refused to budge, the Supreme Court forced the issue. On November 24, 1952, the Court issued an extraordinary per curiam order. Briefly reviewing the procedural history of the case, the Court noted that no appearance had been entered by any of the defendants, and that counsel for the Topeka Board of Education had informed the court that the board did not intend to appear in oral argument or present a brief. The order continued,

> Because of the national importance of the issue presented and because of its importance to the State of Kansas, we request that the State present its views at oral argument. If the State does not desire to appear, we request the Attorney General to advise whether the State's default shall be construed as a concession of invalidity.[158]

Harold Fatzer was not happy with the Supreme Court's order. The day after it was issued he rushed to Washington to confer with the Clerk of the Supreme Court. Fatzer told the Clerk that the Court's order was "not a fair request. It is not the prerogative of the state executive department to concede the invalidity of any legislative act. That is for the courts to decide."[159] Backed into a corner, Fatzer was forced to abandon his neutral stance. He first agreed to file a brief and later decided that the state would also participate in oral argument.[160] Yet Fatzer couched his

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[158] Brown v. Board of Education, 344 U.S. 141, 142 (1952).

[159] Segregation Suit to Make History, Topeka Capital, Nov. 30, 1952.

capitulation in terms of his duty as Attorney General. In a lengthy public statement explaining his action, Fatzer noted that "[a]s the chief law officer of the state, it is the duty of the attorney general to sustain any state statute which is attacked, as being unconstitutional. No official in the executive branch of the state government can concede the invalidity of any act of the legislative department...."[161] Yet Fatzer felt that primary responsibility rested on the local level. "I have always felt that the board of education had a plain duty to present oral argument to the court. ... It was they who, under the permissive Kansas statute, set up the particular system being attacked in this case."[162]

Fatzer wished to make it clear that his decision to defend the suit did not mean that he, personally, or the State of Kansas favored a policy of racial segregation. "Segregation, in the first place, is a local matter in Kansas," he insisted. Further, the state statute "is permissive and it is not of major importance as it appears to be in the Southern States." Fatzer believed that "segregation in Kansas is rapidly being ended where practiced. Kansas has been making strides to abolish the

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[160] State to Defend School Statute on Segregation, Topeka Capital, Dec. 5, 1952.

[161] Id.

[162] Id.

injustice of segregaton in the public schocl system and elsewhere."[163] Hoping to protect his political reputation from tarnish, Atty Gen. Fatzer announced that "I have never advocated or championed segregation and will not do so before the Supreme Court." The state would restrict its arguments to the constitutional question of whether segregation was within the power of the state legislature in regulating education. Kansas would leave emotional appeals about the goodness or badness of racial segregation to other participants in the case.[164]

To further distance himself from the controversy, Fatzer would send Assistant Attorney General Paul Wilson to argue the case for Kansas. Wilson was new to the Attorney General's Office. After some eight years of legal practice, he had come to work for Fatzer in part to gain appellate experience. He would present the first oral argument of his

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[163] At that point Wichita and Pittsburg, Kansas, had already "desegregated" their schools. Pittsburg closed its black school for financial reasons in 1950, firing its three black teachers and integrating black students into its white schools. Wichita went from a race-based to a residence-based attendance system. However, the school board drew attendance boundaries in such a way that the black schools remained all black and the white schools remained predominately or exclusively white. Because it retained substantial school segregation, Wichita did not fire any of its twenty-six black teachers. Future of State's Negro Teachers Found Uncertain, Topeka Journal, Jan. 14, 1954; Calm At School Ruling, Kansas City Times, May 18, 1954.

[164] State to Defend School Statute on Segregation, Topeka Capital, Nov. 30 1952.

career before the U.S. Supreme Court.[165]

At the October 6, 1952 school board meeting, board member Marlin Casey read a prepared statement criticizing his colleages for their inaction. Casey felt that, as defendants in the Brown litigation, the board had a duty to defend its policies. He felt that the board's failure to take action reflected a desire to take an easy way out of a sticky political controversy. He suggested that

School Bd. member:

> [i]f the majority of the board is against segregation, as I assume they are by not defending this suit, then action should be taken to abolish it as the board can do under the present statute, and not take the weak position of letting the Supreme Court do it. Apparently the board would like to be in a position of saying to the colored people, if the Supreme Court holds the statute unconstitutional, "We have helped abolish segregation by not defending this suit." While on the other hand, they could say to the white people, "We are sorry, there is nothing we could do, the Supreme Court has held the statute unconstitutional and therefore segregation must be abolished.[166]

The Board of Education was not willing to follow Casey's suggestion, preferring a low profile on the substantive issue of segregation. However, the board did begin to prepare for the possibility that the Court might strike down segregation. Topeka would not act on its own, but if the Supreme Court should abolish segregation, Topeka would be ready.

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[165] Wilson, supra note 157 at 20, 22 - 23.

[166] Marlin Casey, Statement Presented to the Board of Education, Topeka Bd. of Educ. Minutes, Oct. 6, 1952.

4.5 THE TEACHER PROBLEM

In the spring of 1953, the Topeka papers reported that a "purge" of black teachers had begun. Throughout the state "a mass unannounced weeding-out of Negro teachers" was taking place in anticipation of a possible desegregation decision that might affect the upcoming school year.[167] In Topeka the six newest black teachers were notified that their contracts would not be renewed. Wendell Godwin, the new Superintendent of the Topeka Schools, wrote the teachers that

> [d]ue to the present uncertainty about enrollment next year in schools for Negro children, it is not possible at this time to offer you employment for next year. If the Supreme Court should rule that segregation in the elementary grades is unconstitutional, our Board will proceed on the assumption that the majority of people in Topeka will not want to employ Negro teachers next year for white children. ... If it turns out that segregation is not terminated, there will be nothing to prevent us from negotiating a contract with you a[t] some later date this spring.[168]

The board only terminated the black teachers hired within the past year or two, as "[i]t is presumed that, even though segregation should be declared unconstitutional, we would have need for some schools for Negro children and we would retain our Negro teachers to teach them."[169]

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[167] Negro Teacher Purge Begins in Kansas, Topeka Capital, April 6, 1953.

[168] Wendell Gordon, letter to unidentified black teacher, reprinted in Topeka Plaindealer, Apr. 1953.

[169] Id.

In response to pressure from the community and from one of its own members, the Board of Education reconsidered the firing of black teachers shortly after the initial decision hit the press. Nine blacks representing the Topeka NAACP made an "impassioned plea" that the teachers be reinstated. Marlin Casey, the board's most outspoken advocate of segregation, moved that they be rehired.[170] Jacob Dickenson, Casey's "arch antagonist"[171] tried unsuccessfully to table the motion regarding the teachers while the board reconsidered its segregation policy. When that move failed, he voted against the rehiring on the grounds that the board was not entitled to rehire teachers unless it had a place for them, and in order to have a place for them the board had to establish a policy on segregation and the employment of black teachers. Other board members refused to reconsider the Topeka policy until after the Supreme Court ruling came down. With a vote of three to three, the motion to rehire the teachers did not pass. Later during the same meeting the board hired seven new white teachers.[172]

The six black Topeka teachers would at least temporarily retain their jobs. In June of 1953, the Supreme Court called for reargument in the school segregation cases to be

[170] Topeka Bd. of Educ. Minutes, Apr. 20, 1953.

[171] Firing Negro Teachers To Be Contested, Topeka Capital, April 7, 1953.

[172] Board Rejects Bid to Rehire Negroes Here, Topeka Capital, April 21, 1953.

held the following October.[173] Under the assumption that a subsequent desegregation decree would not affect the 1953 - 54 school year, on June 15 the board rehired the teachers.[174]

4.6 DESEGREGATION KANSAS STYLE

When the Topeka Board of Education decided to postpone a reconsideration of their school segregation policy until after the Supreme Court ruling, they had anticipated a resolution to the problem by the end of the 1952 - 53 school year. The Court's postponement of the case and request for reargument caught the board by surprise. Its posture of "neutrality" would be difficult to maintain through another year. According to Superintendent Godwin, "the board has sort of an agreement to take up the matter of segregation policy after the Supreme Court's decision was known, but I think the members may want to discuss whether the Supreme Court's failure to give a decision soon may change the board's course of action."[175]

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[173] Brown v. Bd. of Educ., 345 U.S. 972 (1953).

[174] Segregation Decision Reaction Is Mixed, Topeka Capital, June 9, 1953; School Board Rehires Negro Teachers, Topeka Capital, June 16, 1953; Topeka Bd. of Educ. Minutes, June 15, 1953.

[175] Segregation Decision Reaction Is Mixed, Topeka Capital, June 9, 1953.

A newly constituted school board would meet to consider these questions in the fall of 1953. Marlin Casey, the board's most vocal supporter of segregation, Charles Bennet, Casey's closest ally and Mrs. David Neiswanger were replaced by three new members as a result of elections during the spring of 1953. The outgoing board members were the remaining three of the original six from the days of the McFarland administration.[176]

new school Bd in 1953

Very late one evening near the end of an unusually lengthy board meeting, the Topeka Board of Education considered the question of whether to continue segregation in the schools. It was 12:30 am on September 4 when the bussing contract was about to be considered to continue transporting black children to segregated schools. Jacob Dickenson, the new board president, offered a motion not on the agenda: "Be it resolved that it is the policy of the Topeka Board of Education to terminate the maintenance of segregation in the elementary grades as rapidly as practicable."[177] The motion was seconded and Dr. Harold Conrad offered an amendment that no action to end segregation be taken until the fall of 1954. The amendment

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[176] I unfortunately have no information about the 1953 school board election at this time. I presume that the incumbents were defeated, in part because of their pro-segregation stance. However it is possible that not all three sought re-election or that other factors were decisive in the outcome. This is clearly an important subject for future research.

[177] Topeka Bd. of Educ. Minutes, Sept. 3, 1953.

was defeated, which the Topeka Capital took as "indicating the board may not see fit even at that time to completely abolish the system of separate classes."[178] Dickenson's motion passed with a vote of five to one. Former board president M.C. Oberhelman cast the only negative vote. He felt that the decision was "ill timed." Oberhelman was careful to note that he was "not opposed to integration," however he thought "we should have an orderly program in mind and a much more definite goal before we pass the resolution."[179] Before adjourning, the board approved the bus contract for the 1953 - 54 school year, ensuring that, for the coming year at least, black children would still be bussed to achieve racial segregation.[180]

Just what the Topeka Board of Educaton intended to do to desegregate its schools was clarified somewhat at a board meeting the following week. Superintendent Godwin presented a report to the board, recommending a first step in the desegregation process. First, he emphasized four general points governing his recommendation:

> 1) That the termination of segregation should be done in a gradual and orderly manner.
>
> 2) That in his judgment it is a social impossibility to terminate segregation suddenly.

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[178] School Board Votes End To Topeka Segregation, Topeka Capital, Sept. 4, 1953.

[179] Id.

[180] Id.

3)That speed with which segregation is terminated depends largely on the forebearance and self-discipline of both white and colored people.

4) That it is not possible to set an accurate time in which segregation is terminated completely.[181]

Deseg. 1st step

As a first step, Godwin recommended that black children residing in the Southwest and Randolph districts be allowed to attend those (white) schools. However, any black student who wished to continue to attend black Buchanan School could do so, although bus transportation would not be provided for them. This move would affect approximately fifteen black students, and would take effect immediately. The board unanimously approved the Superintendent's recommendation.[182]

At the September 8 meeting, the board was called on to defend its decision to desegregate the schools. Edward Goss of the Topeka Civic Club asked the board how they could end segregation before the Supreme Court decided the issue. Board member Conrad explained the "[w]e feel that segregation is not an American practice." As the Topeka Journal reported, Conrad noted that

> the subject had been under discussion for two years and there had been an informal agreement that segregation could not be continued because of the general trends in social and human development and that some time in the future, whether or not the Supreme court decided to end segregation, the board would do so in the best interests of the

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[181] Topeka Bd. of Educ. Minutes, Sept, 8, 1953. See also, Segregation Is Terminated at Randolph and Southwest, Topeka Journal, Sept, 9, 1953.

[182] Id.

public schools and Topeka.[183]

The Topeka school board took further action to end segregation in its schools on January 20, 1954. Superintendent Godwin proposed that segregation be terminated at an additional ten elementary schools and partially terminated at another two. Under this second step, all black children residing in the ten districts could attend the white schools near their home, although they would "be given the privilege of attending the nearest Negro school" if their parents desired. No transportation would be provided these students. The districts partially desegregated each had three black children geographically isolated from other blacks in the district. These children would be allowed to attend the white schools; the others would not. The justification for this distinction was that the white schools had space limitations.[184]

2nd step

Step two of the Topeka program would affect up to 123 of the city's 824 black school children. It would leave nine of Topeka's twenty-two elementary schools completely segregated, four black and five white. The school board unanimously approved the plan to go into effect at the beginning of the 1954 - 55 school year. The primary problem with integrating the remaining white schools was reported to

[183] Segregation Is Terminated at Randolph and Southwest, Topeka Journal, Sept. 9, 1953.

[184] Topeka Bd. of Educ. Minutes, Jan. 20, 1954.

be the overcrowded conditions at the white schools, indicating that desegregation in Topeka was clearly contemplated as a one-way proposition.[185] In a matter-of-fact news story, the Topeka Journal reported the plan under the headline "Segregation Ended in Twelve More Elementary Schools Here." If there was any pronounced public reaction to the plan, the Journal did not choose to report it.[186]

4.7 THE SUPREME COURT SPEAKS

Meanwhile, the wheels of justice continued to turn ever so slowly in Washington. When Brown was reargued in December of 1953, the Topeka school board filed a brief. This time they wished to have their say.

The board's brief dealt only with the remedial questions before the Court. They recommended that the Court not end segregation immediately, arguing that completely ending segregation would require "difficult and far-reaching administrative decisions" which would affect nearly all school children, teachers, buildings and attendance boundaries, making "a hurried and summary" change "both impossible and impractical." The board believed that under immediate desegregation, "the attendant confusion and

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[185] Id.

[186] Segregation Ended in Twelve More Elementary Schools Here, Topeka Journal, Jan. 21, 1954.

interruption of the regular school program would be against the public interest and would be damaging to the children, both Negro and white alike."[187] Since the board had voted to desegregate, they felt they no longer had an active interest in the constitutional questions before the Court.[188]

The Supreme Court finally decided Brown v. Board of Education on May 17, 1954.[189] The Court found that, unlike Sweatt and McLaurin, the Brown cases squarely presented the question of whether school segregation, by itself, deprived non-white students of their constitutional rights, for in Brown the separate schools were equal or were being equalized.[190] In considering the constitutional question, the Court looked broadly at the effect of segregation on public education and the role education played in contemporary society. The Court found that, "[t]oday, education is perhaps the most important function of state and local governments." Education is "required in the performance of our most basic public responsibilites," and is "the very foundation of good citizenship." Consequently, "[i]n these days, it is doubtful that any child may

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[187] 'Gradual' Segregation End Sought, Topeka Capital, Nov. 19, 1953.

[188] In Court Paradox, Kansas City Star, Nov. 29, 1953.

[189] 347 U.S. 483 (1954).

[190] Id. at 492. The Kansas case was the only case where the lower court had found "substantial equality." Id. at 492 n. 9.

reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[191] The court found that the intangible factors that had produced educational inequality in Sweatt and McLaurin "apply with added force to children in grade school and high school." Relying on social science evidence that segregation harms children, the Court found that "[t]o separate [non-white] children from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Therefore, "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[192] The Court reserved the question briefed by the Topeka Board of Education. More time, more briefs and more argument were needed before the Court would decide on an appropriate remedy.

Topeka school officials hailed the ruling. School board president Jacob Dickenson felt it was "in the finest spirit of the law and true democracy." Superintendent Godwin said

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[191] Id. at 493.

[192] Id. at 494 - 495. The Court quoted in full the finding of fact in the Kansas case regarding the detrimental effects of segregation. Id. at 494; see supra at 50.

that the decision would have "no effect upon Topeka schools because segregation already is being terminated in an orderly manner." He thought that segregation would be terminated in Topeka "before the Supreme court decides when and how it should be done."[193] Attorney General Fatzer believed the ruling would present few problems for the state. "Every city now under a segregation program should be able to make the change-over in two years."[194]

The Topeka NAACP was overjoyed with the Brown decision. Chapter President Burnett was "completely overwhelmed." "[T]hank God for the Supreme court. Their decision will enable me to pay my taxes with a little more grace. ... We will celebrate and leave the rest to the court," he added. "We believe we can depend on them." According to Lucinda Todd, "We may have a long time to go before segregation is actually abolished, but we are just thankful we have come this far." Oliver Brown felt that the decision would "bring about a better understanding of our racial situation," however he cautioned that "this case has a deep bearing upon the hearts of our teachers. Certainly we must make an effort for them, also, for there are many I know are capable of teaching anywhere."[195]

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[193] Segregation Already Ending Here, Say School Officials," Topeka Journal, May 17, 1954.

[194] State Officials See No Trouble Adjusting to New Rule, Topeka Journal, May 17, 1954.

[195] Negroes Mark Court Victory Tuesday Night, Topeka

It would be one full year before the Supreme Court would rule on the implementation of Brown. By that time the Topeka school board would adopt one more step in their desegregation plan, a step which they would initially believe fully terminated school segregation in Topeka.

4.8 TOPEKA TAKES ANOTHER STEP

Step Three of the Topeka desegregation plan was proposed in February of 1955. The proposal, which would go into effect in the fall of 1955, was designed to end segregation in all remaining schools. Black students within the remaining white districts would be able to attend the white school near them. Three black schools, Buchanan, Monroe and Washington, would be assigned attendance boundaries, and all children within a school's boundaries could attend that school. McKinley Elementary School was to be closed and placed "on a stand-by basis." No bus transportation would be provided for any children.[196]

Step three would change Topeka to a school system wholly governed by neighborhood attendance boundaries except for two important provisos. The plan allowed that "any child who is affected by the changes in district lines herein recommended, be given the option of finishing elementary

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Journal, May 17, 1954.

[196] Topeka Bd. of Educ. Minutes, Feb. 7, 1955.

grades in the school which he attended in 1954 - 55, McKinley excepted." Further, it provided "[t]hat entering kindergarten children in 1955 - 56, who are affected by the change in school boundaries as herein recommended, be given the option of attending the same school in 1955 - 56 that they would have attended in 1954 - 55 if they had been old enough to enter."[197] The plan would get the Topeka school board out of the business of making racially based attendance decisions. However, it would leave room for private individuals to avoid racial integration by exercising an attendance option. The board estimated that one third of the black students and all of the whites affected would opt to attend their old schools. The plan would increase the strain on already crowded previously white schools, while reducing enrollment at the black schools which, prior to desegregation, had more than enough space.[198]

When argument was held for the third time in Brown v. Board of Education, Harold Fatzer was proud to go. The Attorney General told the Court in April of 1955 that no order would be required to end segregation in Kansas, as the state was complying with the previous year's ruling "in good faith and with dispatch." In Topeka, school segregation

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[197] Id.

[198] Board Takes Third Step in Integration, Topeka Capital, Feb. 8, 1955; Casey, supra note 166.

would be fully terminated by the fall of 1955.[199] However, the "end of segregation" did not mean that some semblance of racial balance might be achieved in the Topeka schools. In a follow-up letter to the Supreme Court, Fatzer explained that the estimated school population in the formerly black schools was one hundred per cent black. According to Fatzer, this phenomenon was the result of several factors, including:

> 1. The schools were originally built in predominately colored neighborhoods because they were originally for segregated Negro children.
>
> 2. After the schools were built the Negro people who could do so, tended to move nearer to the Negro schools where their children were required to attend.[200]

Further, the options provided by the school board would enable any whites living in black areas to attend their old white school. In addition, "persons who are dissatisfied with the schools their children will be required to attend during the school year of 1955 - 56, may have at least a year to move to a district of their choice."[201]

- this reason would not be relevant after original generation of students graduated

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[199] High Court Told State Complying, Topeka Capital, April 12, 1955.

[200] Harold Fatzer, et. al., letter to Harold B. Willey, Clerk of the U.S. Supreme Court, May 10, 1955, Kan. State Historical Society, Records of the Attorney General, File 851, "Brown — Segregation."

[201] Id.

As the Attorney General unabashedly told the Court, the former black schools in Topeka would remain black schools because previous school board policies had fostered residential segregation, and because the board now provided white people with a way out. Yet in spite of the fact that the educational experience of many of Topeka's black school children remained exactly the same, Attorney General Fatzer and the Topeka Board of Education believed that segregation had ended. Clearly, racial isolation, by itself, did not constitute segregation in their eyes. However, it remains to be considered what the "segregation" was that they had eliminated from the Topeka schools.

4.9 THE QUESTION OF GOOD FAITH

On May 31, 1955, the U.S. Supreme Court announced the remedial order in Brown v. Board of Education.[202] Because the implementation of Brown I would require attention to local conditions, the Court remanded the cases to the lower courts to fashion remedial orders. In fashioning specific decrees, the lower courts would be guided by equitable principles, balancing the "personal interest" of the plaintiffs in admission to non-segregated schools against the "public interest" in eliminating a variety of administrative obstacles in an orderly manner. The Court noted that school authorities had the primary responsibility

[202] Brown v. Board of Education [II], 349 U.S. 294 (1955)

for solving local school problems, and consequently "courts will have to consider whether the action of school authorities constitutes good faith implemenation of the governing constitutional principles." Once defendants had made a "prompt and reasonable start toward full compliance," the court felt that additional time might be required to handle administrative problems. However, "[t]he burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practical date." And the lower courts were to ensure that the parties to the cases were admitted to non-segregated schools "with all deliberate speed."[203]

Brown II would be a license for delay and evasion in some Southern states, as the South prepared for a long period of resistance.[204] For Kansas, the Court had offered a welcome pat on the back, finding that "substantial progress" had been made toward the elimination of segregation.[205] As the Topeka case was remanded to the district court, the defendants set out to show that they had acted in good faith to dismantle segregation.

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[203] Id. at 299 - 301.

[204] See Wilhoit, supra note 9.

[205] 349 U.S. at 299.

Judge Huxman and his colleagues in the district court set the terms of the discussion for argument on remand when they informed the parties that the only question at issue was whether the school board had acted in good faith to desegregate the schools. In a hearing on September 15, 1955, the court expressed reservations about the attendance options provided by the board, and requested both parties to submit briefs on the question of whether the board's plan was a good faith effort towards compliance.[206]

The board argued first that "at the present time no child who resides within the Topeka public school system or district is denied admission to any school on the basis of race." Therefore, "the Board of Education has fully complied ... in that race is no longer a determinative factor as to the right to attend any school in the Topeka public school system."[207] However, they recognized that desegregation might not be fully achieved under their plan, and that the effects of the implementation of Step Three warranted study. Nevertheless, the board strongly defended its plan, particularly the questionable options.

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[206] Segregation Brief Filed, Topeka Capital, Oct. 21, 1955.

[207] Defendant's Memorandum Brief on Plaintiff's Motion for Formulation of a Decree and Judgment at 3, Brown v. Bd. of Educ., 139 F. Supp. 468 (1955) (hereinafter cited as Defendant's Memorandum.)

The board noted that "the options do not require compulsory segregation," and they "apply to any child regardless of race." The intent of the options was to permit "any child affected by the boundary changes to finish the school which he previously attended." Such a provision was important in part out of a concern that "[a] compulsory change of school affecting children of immature, elementary school age disrupts associations and conditions which may, in some cases, cause undesireable and unsettling psychological effects."[208] In addition, however, the board had concerns which related to the phenomenon of racial integration itself.

> It must be granted that the transition from a segregated to an integrated school system is a radical one in the minds of some people. Some parents, regardless of race, may desire to make adjustments in their place of residence to conform with their personal feelings and those of their children to the change. While it is not the province of the Board or the Courts to determine such personal adjustments, it is proper for the Board and the Court to recognize that such adjustments may be made and to afford time therefor.[209]

This, the board added, was the primary motivation behind providing attendance options to entering kindergarten students. It gave parents at least a year to move to another attendance area. Not allowing for such private choice to avoid integration would involve the school board and the court in "suddenly forcing the change upon possibly

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[208] Id. at 5.

[209] Id. at 6.

unwilling persons, which is not what was intended by the decisions of the Supreme Court."[210] Instead, that Court acknowledged that "'private needs' and 'private considerations'" should be taken into account when it allowed for "a period of transition and adjustment."[211]

The Topeka school board's plan left five schools all-white and three schools all-black as of September, 1955.[212] Even without the attendance options, much of this racial isolation would continue. The board maintained that it was not responsible for the racial composition of the schools when it resulted from the fact that blacks "have chosen to reside and remain in" certain districts.[213]

In essence, the board understood its responsibilities under Brown II as ending compulsory race-conscious pupil assignment. Once it got out of the business of enforcing a color line, it was no longer engaged in "segregation." The remaining racial isolation in the school system was the result of voluntary, private choice. Even when motivated by a desire to avoid integration, such choice should be facilitated. To impede private, racially-motivated choice would again engage the school board in compulsion. Forcing

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[210] Id. (Emphasis in original.)

[211] Id.

[212] Segregation Brief Filed, Topeka Capital, Oct. 21, 1955.

[213] Defendant's Memorandum, supra, note 207, at 6 - 7.

integration on parents of school children became, for the board, and evil of the degree that forced segregation had so recently achieved.

As far as the plaintiffs were concerned, the "crucial problem" to be considered by the court was "whether there are any valid reasons of school administration which would warrant a delay in fully putting into effect a policy of nonsegregation in the public schools in Topeka." They criticized the attendance options as facilitating white student transfers out of the remaining black districts. The effect of the options was that Buchanan, Monroe and Washington remained 100% black. Whether or not they were called black schools, because the racial composition remained the same "[s]egregation has not been terminated in the public schools in Topeka." The plaintiffs felt that

> the problem that the defendants do not want to face up to is that of really integrating these former Negro schools into the total school system. Until they face that problem and make these schools a part of the total school system, in our opinion, they have not met their obligation under the Supreme Court decision.[214]

In evaluating the sufficiency of the school board's compliance, the plaintiffs urged that "[i]t must be remembered that this is Topeka, Kansas, and not Sumner, Mississippi. Good faith implementation in the two areas are

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[214] Memorandum in Support of Plaintiffs' Claim that Defendants Have Failed to Meet Their Obligations Under the Supreme Court's Ruling at 5, Brown. (Hereinafter cited as Plaintiff's Memorandum.)

certainly not identical."[215] Because they felt the defendants had made no showing that delay was necessary, they asked the Court to find that the school board plan was inadequate, and to order full desegregation at once.[216]

In a brief per curiam opinion issued on October 28, 1955, the district court upheld the school board's actions. The panel felt that, in a number of respects, "the plan does not constitute full compliance with the mandate of the Supreme Court, but that mandate implies that some time will be required to bring that about." The elements of the plan which were problematic were "mostly of a minor nature," and the court believed that "no useful purpose would be served" by going into any of the details of the plan. However, the court did discuss one specific provision: the attendance option for kindergarteners. The court did not "look with favor" upon that rule, but because the school board had claimed it was a temporary measure, the court did "not feel that it requires a present condemnation of an overall plan which shows a good faith effort to bring about full desegregation..."[217]

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[215] Id. at 2.

[216] Id. at 6.

[217] Brown v. Board of Education, 139 F.Supp. 468, 469 - 470 (1955).

How are residence boundaries drawn?

The court did not consider the existence of all-black and all-white schools as evidence of continuing segregation.

> Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.
>
> If it is a fact, as we understand it is, with respect to Buchanan School that the district is inhabited entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live.[218]

The court approved the board's plan as a "good faith beginning to bring about complete desegregation," and retained jurisdiction for the purpose of entering a final decree.[219]

4.10 A FOURTH AND FINAL STEP

The district court's ruling surely came as a relief to Topeka school officials. The court approved their handiwork and protected their autonomy regarding future school policy. The court also refrained from invalidating their efforts to facilitate parental avoidance of desegregation, although it was clear that the board must take some further action to limit the frustration of desegregation resulting from private preferences.

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[218] Id. at 470.

[219] Id.

Although the superintendent and the school board had, at one point, argued that segregation was completely terminated with Step Three, they now recognized that, at least in the court's eyes, something further was needed. Within two months, Superintendent Godwin came up with a plan to satisfy the district court's reservations. On December 21, 1955, he presented Step Four of the continuing desegregation of Topeka to the Board of Education. Godwin suggested, first, that the kindergarten option be eliminated for the 1956 - 57 school year, so that entering school children would be assigned to the school in the district in which they lived, regardless of preference to attend another school. Further, the nine black and eleven white children who exercised the option during the 1955 - 56 school year would not be entitled to continue in the schools they attended unless they moved into the proper district.

Secondly, all children moving into an elementary school district would be required to attend the school in the district in which they lived. This requirement was subject to two provisos: 1) Topeka would maintain, as it had for many years, optional attendance areas for those neighborhoods equidistant between two schools, and 2) "traditional exceptions" to school attendance rules would be retained.[220]

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[220] The "traditional exceptions were:

1. A kindergarten or first grade child whose parents

For students in grades one through six, the options previously granted would remain unchanged. Sixty-two black and seventy-five white children had opted to attend schools outside of their attendance area. Those children would be permitted to continue in the schools they attended, however no future students would be entitled to exercise such an option. Superintendent Godwin recommended that no action be taken on Step Four until the January 18 board meeting so that the board could solicit views from the community.[221]

Representatives from the Topeka NAACP were not pleased with Step Four. They felt the options it retained would perpetuate racial segregation. Such delay in implementing full desegregation was harmful to the students segregated,

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reside in Topeka and are both employed, may be granted permission to attend the kindergarten or first grade located in the district in which the adult who cares for the child during the day resides.

2. A child whose parents move into a different elementary school attendance district during the school year, may finish the year in the school he has been attending.

3. A child who has finished the fifth grade in an elementary school, and whose parents move into a different Topeka school attendance district, may attend the sixth grade of the school he attended in the fifth grade.

4. A crippled child may be given permission to attend an elementary school which is suitable in view of the nature of his handicap.

5. Pupils who are eligible for any phase of our special educational program which is not housed in the school district in which they reside may be asked to attend the school which does house that particular part of our

and was "creating a feeling of insecurity" among the black teachers at Buchanan, Monroe and Washington Schools.[222] At the January 18 board meeting, Mr. Burnett, President of the local chapter, appealed to the Board of Education to end segregation immediately by eliminating the continuing options in Step Four. He claimed that, under the proposed plan, "it would take seven long years to terminate racial segregation." Burnett also commented that while the board spoke of the need to hire one hundred new teachers, "nothing has been said about the integration of negro teachers." These teachers "had been completely left out of desegregation."[223]

The Topeka Board of Education listened quietly to Burnett's appeal. No discussion followed his remarks. Instead, board member Mrs. Shiner "moved that Step IV in the gradual and systematic termination of racial segregation, as recommended by the Superintendent, and in compliance with the mandate of the U.S. Supreme Court and the U.S. District Court, be adopted." The board unanimously approved its final step to desegregate the Topeka schools.[224] — despite NAACP objections

program which meets the needs of those particular individuals.

Topeka Bd. of Educ. Minutes, Dec. 21, 1955.

221 Id.

222 Id.

223 Topeka Bd. of Educ. Minutes, Jan. 18, 1956.

Topeka's desegregation plan would, even in the eyes of the school board, retain some vestiges of racial segregation for several years.[225] However, Topeka school officials stood behind their remaining attendance options. They considered their policy as well within their rights under Brown II, for it protected the private interests of student who did not "want the sudden disruption of their elementary school pattern." As Superintendent Godwin noted, by proposing to remove these options "[w]hat you are talking about is compelling people to go to a school where they do not want to go."[226]

Topeka had been compelling black children to attend certain schools for nearly a century. Successive school boards had based their decision to segregate on what they felt was best for white and black children alike.[227] Now that Topeka was getting out of the business of segregation,

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[224] Id.

[225] The school board claimed segregation would be fully terminated in five years, while the NAACP claimed it would take seven years. Compare City School Segregation Nears End, Topeka Capital, Dec. 22, 1955 (school board view), with Topeka Bd. of Educ. Minutes, Jan. 18, 1956 (NAACP view). It would actually take six years for those first graders exercising an attendance option in the 1955 - 56 school year to matriculate out of the elementary schools and into the junior high school.

[226] City School Segregation Nears End, Topeka Capital, Dec. 22, 1955.

[227] See, e.g., Bd. of Educ. Minutes, Dec. 12, 1944; Return to Alternative Writ of Mandamus at 2, Reynolds v. Bd. of Educ. of the City of Topeka, 66 Kan. 672 (1903).

it wished to get out of the business of compulsion as well. When it meant controlling the choices that whites might make, compulsion became a dirty word.

5. CONCLUSION: THE LIMITS OF GOOD FAITH

It would be quite a while before the Topeka school board found themselves before the district court on the question of school segregation again. In the interim, Step Four would quietly progress. Judge Huxman and his district court panel had had their last word on the adequacy of the Topeka plan. They had entrusted desegregation to the school board's good faith efforts, and it was in the school board's hands that the authority and autonomy to enforce desegregation would remain. Twenty years later, when the question of continuing segregaton was raised by Topeka blacks and federal authorities, the board would claim that the court's aquiescence to their plan was evidence that they had fully complied with the law.[228]

In finding that Topeka had acted in good faith, the district court was right in recognizing that the school board's actions were motivated by a desire to rid the city of what they came to believe was wrong. Brown v. Board of Education had thrust Topeka and its policy of school segregation before national attention, associating Kansas

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[228] See supra note 8.

with the "American dilemma" of their time.[229] As Kansans asserted the idealized heritage of their state, the free state, they wondered how and why Kansas was embroiled in a problem that really concerned the South. As two successive school board elections placed an anti-segregation majority on the Topeka Board of Education, that city moved to distance itself from the conflict, and to distinguish itself from the South. In contrast to Southern resistance, they moved to desegregate before the Supreme Court would require them to.

The courts commended Topeka for their prompt action. While the school board might have a ways to go, it had begun to dismantle segregation. Since Topeka had acted on its own without court supervision, the lower court could comfortably find that good faith had motivated their actions. After all, the city adopted its plan because it came to believe that segregation was unAmerican. They wanted to get rid of it, to rescue their public image as much of the country pointed a finger at the South. However, there were limits to what the school board was willing to do.

The school board could handle one-way integration. They had few problems with sending some of Topeka's black children to several predominately white schools. However, sending white children to the black schools would have

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[229] Gunnar Myrdal, AN AMERICAN DILEMMA (1944).

forced the board to face two questions they preferred to avoid. The first was the "teacher problem." If Topeka retained three segregated schools, it could continue to employ its black teachers in the schools, and gradually retire them, without being forced to choose between firing the teachers and having them teach in integrated schools.[230] The maintenance of segregated black schools also enabled the board to avoid either doubling the proportion of blacks integrated into the formerly white schools or sending white children to black schools. By maintaining separate black schools, the board could keep the level of blacks at other schools at an artificially low level, and protect white majority status at all integrated schools. The board achieved its level of continuing racial segregation by straining the overcrowded white schools while the black schools continued to have plenty of room.

Even in implementing this limited, one-way integration plan, the Topeka Board of Education adopted a gradualist strategy, arguing that gradualism was the most sensible, rational means to achieve integration in Topeka. Their gradualist position essentially exposed their ambivalent embrace of desegregation, for gradualism recognizes a wrong, yet accepts its perpetuation for a period of time. The

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[230] As Linda Brown Smith remembers it, black teachers were gradually phased out of the schools as they retired. Interview by Richard Kluger, Kluger Papers, Manuscripts and Archives Dept., Yale Univ. Library.

Topeka school board recognized that segregation was harmful, yet chose to continue to live with some of it in order to provide whites with the time and the means to avoid integration. And the limitation of its escapist options came only at the prodding of the court.

The Topeka school board members may have meant well, but as a body of school officials elected by a predominately white populus, it could only be expected that they would take white interests into account in framing their policies. And though white liberal Kansans may have felt concerned that the Brown case ran counter to their state's heritage, their commitment to moral principles fell short when faced with the prospect of sending their children to schools with black teachers in black parts of town.

For the Topeka school board, compulsion certainly meant something different when applied to whites rather than to blacks. And the difference boiled down to politics. The good faith of a local school board is ultimately governed by the interests of its constituency. It is limited by what the political climate will bear. In granting autonomy to the Topeka school board in desegregating its schools, the district court was necessarily leaving room for majority interests to frustrate the enforcement of recognized minority rights.

TOPEKA: NOTES ON DUDZIAK REPORT L-19

1. IS TOPEKA BOUND BY 1964 CIVIL RIGHTS ACT, OR ROOT & BLANCH LANGUAGE? pg. 3.

2. LOWMAN HILL 1890 & 1900 @ p. 20

3. CAN I CITE REPORT OR DO I NEED SOURCES. ans. yes till further notice.

4. LOWMAN HILL OVER IN 1948? NEEDS TO RETHINK. pg. 33

Topeka: Notes on Rudzisk Study.

pg 7. 1. Law: 1879 - State Law permissive re: 1st class cities. @ elem. grades.

pg 11. 2. Law: 1903 - Reynolds v. Topeka Bd. Reynolds (black) refused admin. to white school. Kansas Sup. Ct. upholds

pg 14. 3. Law: 1905 - Richardson v. Kansas City Bd., Kansas Sup. Ct upholds segregation in High School.

pg 15. 4. Race stats: "By 1954 90% of black Kansans in First Class Cities

F.N. #44 - Joint Comm. of National Educ. Assn. and the American Teachers Assn., "Legal Status of Segregated Schools 14 (1954)"

pg 15. 5. Law: Thurman-Watts v. Bd of Ed. of Topeka: (1924) Kan. Sup. Ct. held. that there could be segregation in 7th & 8th grades (Junior High School) but not 9th

pg 16. 6. Law: Graham v. Topeka. (1941) Kan. Sup. Ct. held. Topeka must provide Junior High Schools for blacks if provided for whites.

pg. 19. 7. Race Stats: 1867 - 100 blacks in Topeka school for blacks, 1 teacher.
Source: ?

pg. 19 8. Notice: (1867?) Supt. L.C. Wilmarth foresees equality for blacks limited on education only.

Source: F.N. 52, "History of the Topeka Schools" 110-111

pg. 20 9. Race Stats: 1880 Topeka provided (4) black schools

Source: F.N. 53, "Hist. of the Top. Schs." @ 113

pg 20 10 Teachers: 1886-7, Supt. Tillotson says all teachers in black schools were white, but were replaced as black teachers were found.

Source: F.N. 54. "Hist. of the Top. Schs @ 115-116

TOPEKA: NOTES ON DUDZIAK STUDY CCNTS

pg. 20 11. SCHOOLS: LOWMAN HILL ANX'S 1890 INTEGRATES F.N. 57, REYNOLDS V. TOPEKA Bd.

pg. 21 LOWMAN HILL BURNS 1900 F.N. 57 ETC.

pg. 21 TOPEKA Bd. REBUILT SCHOOL ON NEW SITE FOR WHITES ONLY. THEN PROVIDED OLD ONE STORY BLDG. FOR BLACKS. (1902)

WHITE SCHOOL OPENED @ 50% CAPACITY.

SOURCE: F.N. 59. "THAT SCHOOL QUESTION." TOPEKA PLAINDEALER FEB., 1902.

pg. 22 BLACK PARENTS OUTRAGED

pg. 24 12. RACE STAT: WRIGHT V. TOPEKA, WRIGHT LIVES NEAR
13. LAW. RANDOLPH BUT HAS TO ATTEND BUCHANAN. (1930) 129 KAN. 852

pg 26 14. TEACHERS: 6 BLACK TEACHERS COST JOBS AS RESULT OF GRAHAM. 2 BLACKS PUT TO HALF TIME F.N. 72. 1941

pg 26. 15. INTENT: SUPT. KENNETH MCFARLAND BELIEVES THAT BLACKS HAS TO EARN EQUALITY.

F.N. 73.

pg. 27 16. SCHOOL RACE: UNDER MCFARLAND & CALDWELL, TOPEKA H.S. CLASSES WERE SEGR. BUT EXTRA-CURR. ACTIVITIES WEREN'T

F.N. 75.

pg. 28 17. SCHOOL RACE: SEPARATE SPORTS TEAMS. 1929-1949

F.N. 78.

pg. 28 18. SCHOOL RACE: EAST TOPEKA JUNIOR HIGH WAS SITE OF BLACK SPORTS COMPETITIONS.

FN. 79.

TOPEKA: NOTES ON DUDZIAK STUDY CONT'

pg. 29. 19. CITY SEG: 1947, CITY REPEALED LICENSING ORDINANCE WHICH REQUIRED SEPARATION OF PUBLIC PLACES. SEG. STARTED ALMOST IMMEDIATELY.

F.N. 81

pg. 29 20. CITY SEG: ROOK PK. POOL FOR WHITES ONLY

" 21. CITY RACE: BLACKS LIVED ~~RECENTLY~~ SCATTERED THROUGHOUT CITY.

F.N. 88

pg 29 22. CITY RACE: TRANSPORTATION NOT SEG.

F.N. 82

pg 29 23. LAW: 1935 KAN. GEN. STAT. 21-2424 PROVIDED AGAINST SEG. IN PUBLIC ACCOM.

F.N-81.

pg 33 24. SCHOOLS: OLDEST & LEAST VALUABLE WERE WHITE

F.N. 93

? WHEN, WHERE, WHICH.

pg. 52 25 LAW: 1ST JUDGEMENT IN CASE BROWN 3 AUG. 51

pg. 59. 26. TEACHERS: (INTENT) SPRING. BROUGHT "PURGE" OF TOPEKA BLACK TEACHERS. & REPLACED W/ WHITES

F.N. 167 & 172

pg 62 27. DESEG: TOPEKA VOTES TO DESEG. 4 SEPT. '53

F.N. 177

pg 63 28. DESEG: TOPEKA CONTINUES TO BUS BLACK KIDS (1953-54)

F.N. 180

pg. 63 29. DESEG: TOPEKA SUPT. GODWIN RECOMMENDS GRADUALISM (SEPT. 53)

F.N.

TOPEKA: DUDZIAK STUDY CONTD

pg. 64 30. DESEG: BLACKS CAN NOW ATTEND ALL BLACK SCHOOLS BUT W/O TRANSPORTATION. (SEPT. 53)

F.N. 182

pg. 64 31. ~~DESEG~~: SOUTHWEST & RANDOLPH DESEG'D (15 BLACK STUS) (SEPT. 53)

F.N. 181

pg. 65 32. DESEG: 1-20-54, GODWIN PROPOSES DESEG OF 10 MORE WHITE SCHOOLS PLUS PARTIAL AT TWO MORE. BD APPROVES. (3 BLACK KIDS EACH)

?

F.N. 184 ? (SEE # 35 BELOW)

" 33. DESEG: LIMITED BY OVERCROWDING @ WHITE SCHOOLS.

(NEED TO SHOW BD HAND IN WHITE FLIGHT.)

F.N. 184.

" 34. ROCK STAT: IN 1954-5 THERE WERE 4 BLACK AND 5 WHITE SEG. SCHOOLS.

F.N. 185. (IS THIS SO?) YES,

" 35. ROCK STAT: CITY HAS 814 BLACK SCHOOL CHILDREN 123 WOULD BE AFFECTED BY DESEG.

F.N. 185

69. 36. DESEG: STATE ATTY. GEN. SAYS ANY CITY COULD DESEG. IN 2 YRS.

F.N. 194

" 37. TEACHERS: JOBS IN JEOPARDY FOR BLACK TEACHERS.

F.N. 195

70 38. SEG. TOPEKA PLANS ATTEND BNDS THAT SEGREGATE BUCHANAN, MONROE & WASHINGTON.

F.N. 196

70 39. ~~DES~~: OPTIONS CREATED FOR KINDERGARTEN.

F.N. 197

TOPEKA: DUDZIAK STUDY.

p 72 40. SEG. STATE A.G. SAYS SCHOOLS WILL STAY ALL BLACK BECAUSE THEY WERE PLACED SO AS TO BE. AND. THE PLACEMENT OF SCHOOLS PLAN ATTRACTS BLACKS AND WHITES KIDS IN SCHOOL.

F.N. 200.

72 41. SEG. BLACKS AND WHITES GIVEN ONE YEAR TO FLEE SCHOOL OR ASSIGNMENT. STATE A.G.

F.N. 201

75 42. SEG: TOPEKA Bd RECOGNIZES THAT MIGHT NEVER ACHIEVE DESEG. WITH 1954-55 PLAN.

76 43. SEG! TOPEKA ACKNOWLEDGES THAT OPTIONS DO NOT REQUIRE COMPULSORY SEGREGATION.

F.N. 208

11 44. SEG! TOPEKA Bd. FELT THAT INDIVIDUALS HAD RIGHT TO PREJUDICE ~~BUT~~ AND THAT Bd AND COURTS HAD TO ALLOW ~~THEM~~ THEM TIME TO ACT ON THOSE PREJUDICES

F.N. 209.

p 77 45. RACE STAT: SEPT 1955, TOPEKA Bd. PLAN LEAVES THREE ALL BLACK & 5 ALL WHITE SCHOOLS.

F.N. 212

11 46. INTENT: TOPEKA Bd. FELT ALL IT HAD TO DO WAS CEASE TO ENFORCE SEGREGATION AND THEN FACILITATE FREEDOM OF CHOICE.

F.N. 213.

79 47. SEG.: TOPEKA Bd claimed KINDERGARTEN option was temporary - CHECK?

80 48. SEG: DIST. COURT MISUNDERSTOOD ROLE OF SCHOOL Bd IN DRAWING BOUNDARIES

F.N. 218.

81 49. DESEG: SUPT. GODWIN PROPOSES ELIMINATION OF KINDERGARTEN OPTION IN 1956-57.

Topeka : Pudziak Study

81. 50. Seg: Topeka Bd would maintain optional attendance zones for neighborhoods ~~[illegible]~~ equidistant between two schools.

F.N. 220.

? What was their notion of a "neighborhood"

81 51. Seg: Topeka Bd would maintain "traditional" options.

they were: 1. Child care option
2. Right to finish school year.
3. Right to finish 6th grade or matriculation option.
4. Handicapped option.
5. Special Ed option.

F.N. 220

83 52. Notice: Local NAACP chapter pres. appeals to Topeka Bd. to end seg. by ending options.

F.N. 223

83 53. Notice: NAACP chap. pres. cites growing insecurity among black students and teachers.

F.N. 222

" 54. Notice: NAACP chap. pres. claims it would take 7 yrs to end seg.

F.N. 223

" 55. Notice: NAACP chap. pres. points out that teachers have been left out of desegregation plans.

F.N. 223

" 56. Seg: Topeka Bd. approves its plan despite views of NAACP chap pres.

F.N. 224

57. Intent: Supt Godwin says people should not be made to go to a school they don't like.

F.N. 226