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## INTRODUCTION: SOME LIMITATIONS ON AN IMPACT ANALYSIS IN EQUAL PROTECTION CASES

RICHARD C. TURKINGTON\*

### I

SIX STATE judges have contributed to this issue of the DE PAUL LAW REVIEW. The articles by Chief Justice Hunter of the Indiana Supreme Court, Justice Kavanagh of the Michigan Supreme Court and Justice Holman of the Oregon Supreme Court were prepared by the authors for a seminar of judges held at De Paul on April 20th of this year. When Robert Emmett Burns, Chairman of the Continuing Education Committee, announced his plan to hold a seminar at De Paul which would provide state trial and appellate judges with an opportunity to express their views on the crisis in our legal system, Justice Holman of the Oregon Supreme Court immediately came to my mind. I first met Justice Holman while attending graduate school at New York University. At that time, he was participating in a unique program sponsored by the graduate school which gave him an opportunity to spend a semester attending the graduate classes of his choice. Justice Holman found his way regularly into three of the jurisprudence seminars that I was attending. Initially, the presence of the West Coast Jurist was somewhat disruptive. Classroom discussions about what judges do when making a decision do not normally contemplate the participation of an appellate judge. Quickly, however, the students in these seminars found the general discussion enriched by his extensive trial and appellate experience and his straightforward manner.

“Straightforwardness” is a quality that one will find frequently in the writings that follow. It is not often, in print at least, that a

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judge compares the judicial system to a "chronic drunk on a continuous binge." Nor are the subjects of duplications in the federal and state criminal appeal process and appointment to the Supreme Court generally dealt with as directly as they are by Justices Holman and Hunter who advocate abolition of the state criminal appeal process and ten year elected terms for Supreme Court Justices respectively. In addition to the articles by the Appellate Court Justices, Judge Berg and Magistrate Samuels of the Traffic Division, First Municipal District of the Circuit Court of Cook County discuss the administration of justice in traffic court. Judge Monroe of the Third Circuit of Illinois writes on the general topic of judicial reform at the state court level.

The view from the bench contained in these pages focuses on various aspects of the legal system from separation of powers and federalism at the national and state level to the administration of justice in traffic court at the municipal level. From these diverse writings, however, can be identified a general theme—namely that court delay is contributing to growing distrust of the legal system by failing to fulfill certain expectations that are created in members of society.

The theme is explicitly identified by Justice Holman in respect to the expectations of law-abiding members of the society concerning identification and isolation of criminals; Judge Monroe addresses himself primarily to the state legal system's failure to provide compensation to participants who have legitimate claims within a reasonable time; and Judges Berg and Samuels come to the aid of those participants in the society who find themselves accused of misdemeanors in the traffic court. These judges express basic concern over the inefficiency of courts in both criminal and civil cases. Judge Monroe's article contains a comprehensive analysis of traditional positions on the backlog problem as well as some pertinent points on causes of court delay which are seldom acknowledged by lawyers or judges. He identifies the need for straight thinking and a conscientious concern by judges over matters such as extended recesses, unnecessary and extended in-chamber conferences, and late morning starts.

## II

Certainly, intermidable and unjustifiable delay in our courts is a basic cause of frustration with the legal system. However, a distinction between the interests that are affected by such delay in criminal and civil cases should be noted. Professor Packard has suggested that the criminal process does not operate solely to identify and isolate criminals.<sup>1</sup> Many aspects of the criminal process promote non-authoritarian values of the society. The doctrine of legal guilt, jurisdiction and venue, statute of limitations, double jeopardy, immunity to conviction (children and insane persons) have nothing to do with insuring the integrity of the fact-determining process. These practices reflect collective suspicion of excessive use of authority and the concept of the primacy of the individual. They function to slow down the apparatus of the state by creating obstacles to the employment of public authority to isolate members of the society. "Maximum efficiency means maximum tyranny" is a precept that deserves at least the same attention by the bench and bar that calls for greater crime control have received.

At a time when too many public officials are calling for more rules, greater punishments and more expedient isolation of those who deviate from criminal norms, greater attention by lawyers and law schools to the deeply entrenched anti-authoritarian values of the society is needed.

In an open society, the operative presumption is that private activity is lawful. When public authority desires to eliminate certain kinds of private activity by isolating those who engage in it, public authority may do so if it can justify use of the criminal process by showing that the activity is dangerous to society. Too often in this country the criminal process is invoked on behalf of laws which are neither necessary for the protection of members of the society nor are they enforceable. Pornography laws and laws making it illegal to possess certain drugs are examples of this. Recently, the assumption that pornographic materials create deviant behavioral patterns in those who read the material has been discarded by a federal

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1. See Packard, *Two Models of the Criminal Process*, 113 PA. L. REV. 1 (1964).

commission. This position has been forcefully argued before.<sup>2</sup> Victimless crimes like possession of marijuana require use of massive informer systems to detect violations of the law. The creation and use of such informer systems causes the state to engage in the very activity that it has made illegal. The hypocrisy of public involvement in criminal activity has no doubt contributed to a growing rejection of the authority of the legal system among young people in this country.

### III

I would like to pursue in a different direction the general theme that has been developed by these judges. To deny that more and more participants in the society are challenging the validity of the legal system is self-delusion at a time when a judge is kidnapped in the courtroom and murdered, and increasing numbers of contempt citations are being awarded against lawyers and spectators for disruptive tactics.<sup>3</sup> The legal system's failure to fulfill the expectations of substantial numbers of black Americans was dramatized by the massive urban disorders that occurred in 1967. Following these disorders, the National Advisory Commission on Civil Disorders published a report which listed (1) pervasive discrimination and segregation which results in exclusion of Negroes from the benefits of economic progress, and (2) frustrated hopes caused by unfulfilled expectations aroused by the legislative and judicial victories of the civil rights movement, as two factors which contributed to a mood of violence among urban blacks.<sup>4</sup> The Commission concluded that nearly 100 years after the passage of the thirteenth, fourteenth and fifteenth amendments and the first federal civil rights statutes, pervasive segregation and discrimination remains in the country. This fact identifies a serious deficiency in our legal system—namely

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2. Murphy, *The Value of Pornography*, 10 WAYNE STATE L. REV. 655 (1964).

3. See U.S. NEWS AND WORLD REPORT, August 3, 1970, p. 33, *A Drive to Curb Terror Bombings*, where the recent increase in bombings is documented; see also Etzioni, *Demonstration Democracy*, a policy paper prepared for the President's National Commission on the causes and prevention of violence, Center for Policy Research, Washington, D.C., where recent increases in the number of street demonstrations is documented.

4. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, p. 5, U.S. Government Printing Office (1968).

failure to enforce constitutional and federal statutory limitations on public and private activity. Within five years after the end of the Civil War, the thirteenth, fourteenth and fifteenth amendments were added to the Constitution by the Republican-dominated Congress.<sup>5</sup> These amendments<sup>6</sup> were clearly designed, at least, to insure that the newly freed slave would not be prevented from full and equal participation in the benefits of the society by public and private activity.<sup>7</sup> To enforce the goals of these amendments, the Congress of this period under power granted by these amendments passed statutes granting civil remedies against public officials and private individuals for unconstitutional activity.<sup>8</sup> In addition, criminal statutes were passed making conspiracies or intentional violations of the amendments a federal crime.<sup>9</sup> For over 100 years it has been a federal crime to violate the thirteenth, fourteenth and fifteenth amendments. Yet, an impartial national commission concludes that the mischief that these amendments were designed to remove still exists.

If a resident of Cook County files a claim in circuit court tomorrow and asks for a jury trial, he will get his case in front of a jury sometime in 1975, as court scheduling now exists. This is a de-

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5. For a comprehensive discussion of the history of this period, see CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS* (1947).

6. For a contemporaneous interpretation of the Equal Protection Clause by the Court, see *Strauder v. West Virginia*, 100 U.S. 303 (1880):

"It ordains that no State shall . . . deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory but they contain a necessary implication of a positive immunity, or right, most valued to the colored race—the right to exemption from unfriendly legislation—against them distinctively as colored, exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

7. See generally TEN BROEK, *THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1952).

8. The most significant legislation from this period that remains is: 42 U.S.C.A. §§ 1981, 1982, 1983, 1985, 1986, 1988 (1970).

9. The most significant penal statutes carried over from the past Civil War period are: 18 U.S.C.A. §§ 241, 242 (1969).

plorable and inexcusable state of affairs. In 1866, the Congress of the United States passed two statutes which read:

All persons . . . shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishments, pains, penalties, taxes, licenses and exactions of every kind, and to no other.<sup>10</sup>

All citizens of the United States shall have the same right, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.<sup>11</sup>

If it is deplorable and inexcusable to make a person wait five years to be compensated for personal injuries, what form of words can be used to describe a legal system's failure to guarantee equal opportunity to millions of black Americans for over 100 years?

#### IV

The legal system has been inexcusably deficient in enforcing the promises of the fourteenth amendment. One reason for this has been the Supreme Court's failure to establish a workable conceptual system for ascribing responsibility to public officials under federal penal and civil statutes. When the Supreme Court interprets a constitutional provision such as the equal protection clause of the fourteenth amendment, in addition to resolving a conflict in a particular case, the Court is also setting down a standard for criminal and civil responsibility. This is so because of the interconnection between the fourteenth amendment and federal penal statutes, and statutes creating federal civil remedies. Section 241 of Title 18 of the U.S. Code<sup>12</sup>

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10. 42 U.S.C.A. § 1981 (1970).

11. 42 U.S.C.A. § 1982 (1970) §§ 1981 and 1982 have never been found unconstitutional by the Supreme Court. These statutes were virtually unused from 1866 to 1968, when the Supreme Court upheld a discrimination suit brought under § 1982 against a private property owner in *Jones v. Alford Mayer Co.*, 342 U.S. 409 (1968).

12. § 241 reads:

"If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life."

makes it a crime to conspire to violate federal law; Section 242 of the same Title<sup>13</sup> makes it a crime to deprive someone of constitutional rights under color of state law. Section 1983 of Title 42<sup>14</sup> provides for damages and injunctive relief against anyone who deprives an individual of a constitutional right under color of state law. These civil and criminal statutes incorporate the fourteenth amendment and are the fundamental enforcement vehicles for accomplishing the national goals contained in the amendment.

I would like to address myself briefly to one of the methods<sup>15</sup> the court has utilized to ascribe responsibility under the fourteenth amendment which has proved to be particularly unworkable—namely, an impact analysis such as operated under the separate but equal rule.<sup>16</sup> Criticism of the separate but equal rule has largely evolved around the injustice inherent in segregation: the unworkability of the rule

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13. § 242 reads:

"Whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any State, Territory or District to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."

14. § 1983 reads:

"every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured on an action at law, suit on equity, or other proper proceeding for redress."

15. From 1890 to 1897, 7,372 criminal prosecutions were brought under the forerunners to §§ 241 and 242; see CARR, *supra* note 5, at 55-77; since that time prosecutions under the statute against public officials for violation of the fourteenth amendment have been scarce.

16. Recently, new life has been injected into the separate but equal rule by Judge Wright in *Hobsen v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967). In *Hobsen* Judge Wright held that the Equal Protection Clause required, *as a minimum*, that the facilities of schools within the district be equal. Judge Wright makes it clear that the decision does not set down maximum conditions required by the Equal Protection Clause and thus does not concede that separation by race in public education is constitutional. The opinion in *Hobsen* takes up 118 pages of the reporter and aptly attests to the complexity of evaluating equal protection education cases in terms of an impact analysis. It is quite likely that a form of the separate but equal rule will come to be used in equal protection cases involving alleged discriminatory activity by public authority against women.

as a standard for ascribing responsibility has received little notice. In fact, the separate but equal rule is unmanageable. To fully understand this, a brief description of the mechanics of the rule is necessary.

In 1896, the Supreme Court upheld state imposed racial isolation in railroad cars in *Plessy v. Ferguson*.<sup>17</sup> *Plessy*, which spawned the separate but equal rule, represented a departure from the analysis that had been used in equal protection cases. Criticism of the public activity under the Equal Protection Clause had turned on whether the activity was reasonable or motivated by racial hostility. Under the separate but equal rule, the focal point of judicial inquiry shifted from evaluating the nature or motivation of the public activity to evaluating its impact. In addition to the question of reasonableness and discriminatory motive, the Court in *Plessy* injected a new one in equal protection cases: what is the actual effect of the public activity on the opportunity to exercise the privilege in question? Under the analysis established after *Plessy*, the constitutionality of public activity under the Equal Protection Clause turned on measurement of the *impact of such activity*. Such measurement in turn was equated with matching up the facilities involved—except that the condition of separation was not to be considered. If the facilities were equal, then the impact was equal. It is important to recognize that the separate but equal rule emerging after *Plessy* consisted of these two interlocking parts: (1) the court was to evaluate each case on its facts to determine whether the impact of public activity was equal for blacks and whites, and (2) the condition of separation was not to be considered in evaluating the equality of the impact.

In 1954, the Supreme Court in *Brown v. Board of Education*<sup>18</sup> found state imposed racial isolation in public schools unconstitutional. If the two part aspect of the separate but equal rule is kept in mind, the rationale of *Brown* and the confusion it has caused is easily understandable. The failure of the Court in *Brown* to set down a rule which will serve as a useful guide for ascribing responsibility in situations beyond the facts of the case, can be traced to the fact that the Court addressed itself to only one part of the separate but equal rule. In *Brown*, the Court repudiated the built-in finding contained

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17. 163 U.S. 537 (1896).

18. 347 U.S. 483 (1954).

in the separate but equal rule that the condition of separation does not affect the equality of the impact of public activity. *Brown* found that the condition of separation makes the facilities "inherently unequal"; but *Brown* did not rule on whether the other aspect of the separate but equal rule—making constitutionality under the Equal Protection Clause turn upon a factual finding of the equality of the impact—was still operative. If the Court had explicitly adopted an impact analysis in *Brown* then, of course, "de facto" segregation would be unconstitutional. This would result from a combination of the Court's view that the condition of separation makes public education "inherently unequal" and the fact that separation by race in de facto situations is caused by state action through compulsory attendance and neighborhood pupil assignment rules.

The *Brown* decision has been criticized for many reasons. Some writers have pointed out that the reasoning in the case is inadequate as a guide for future decision-making.<sup>19</sup> Most often, however, the decision is criticized because the Court cited psychological and sociological writings to back up its claim that the condition of separation has deleterious effects on black students.<sup>20</sup> Critics of the Court's use of sociological and psychological writings in footnote 11 of the first *Brown* opinion, emphasize that the Court broke precedent by the use of such evidence and that such evidence is unreliable. In respect to the first objection, it has often been pointed out that "extra-legal" psychological and sociological data has been used in argument before the Court since 1908 when Brandeis used such evidence to show the damaging effect of long working hours on women in *Muller v. Oregon*.<sup>21</sup> What is not mentioned in respect to this objection, however, is the fact that the separate but equal rule was based upon a sociological premise: that the condition of separation has no deleterious effect on access to the privilege in question. *Brown did not break with the tradition of the separate but equal rule evolving after Plessy*; it simply reversed the factual foundation of that tradition. There is no new question asked in *Brown*; there

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19. See Wechler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15, 31-34 (1959).

20. See Cahn, *Jurisprudence*, 31 N.Y.U.L. REV. 182 (1956). Clark, *The Desegregation Cases: Criticising the Social Scientist's Role*, 5 U. ILL. L. REV. 224 (1959).

21. 208 U.S. 412 (1908).

is only a new answer to the question that was asked in applying the separate but equal rule.

Use of sociological and psychological evidence in *Brown* is also objected to because of its non-reliability. This criticism is based upon a distinction between sociological and psychological claims and claims which are "objectively" determinable. The impact analysis of the separate but equal rule is defended on the basis of such a distinction and is contrasted with the ruling in *Brown* on the theory that the latter represented the subjective socio-economic opinions of the nine justices. The argument goes something like this: Under the separate but equal rule, constitutionality turns on examination of objective criteria—the equality of the facilities in question; under the rationale in *Brown*, constitutionality turns on examination of opinion-educated guesses as to the harmful effect of separation on the personality of the student; the inquiry under the separate but equal rule is one which the court is capable of making since it involves observations about the equality of facilities, while the inquiry under the rationale in *Brown* is one which the Court is incapable of making, since symptoms of damages to the personality, such as inferiority complexes, are not observable.

It is the claim that the impact analysis which operated under the separate but equal rule is workable because it involves the judge in the mechanical process of evaluating objective differences in facilities that I want to refute here. A review of the cases involved in applying the separate but equal rule shows that the so-called "objective" factors that may be taken into account in determining equal facilities are so numerous and opinionated that a judicial determination of equal facilities is at least as arbitrary as a finding which employs the rationale of *Brown*. The following factors have been taken into account in applying the separate but equal rule: (1) physical equipment in general,<sup>22</sup> (2) playground facilities,<sup>23</sup> (3) gymnasium,<sup>24</sup> (4) football stadium,<sup>25</sup> (5) auditorium,<sup>26</sup> (6) study hall,<sup>27</sup>

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22. *Carter v. School Bd. of Arlington County*, 182 F.2d 531 (4th Cir. 1950).

23. *Blue v. Durham Pub. School Dist.*, 95 F. Supp. 441 (M.D.N.C. 1951).

24. *Davis v. County School Bd. of Prince Edward County*, 103 F. Supp. 337 (E.D. Va. 1952).

25. *Brown v. Ramsey*, 185 F.2d 225 (8th Cir. 1950).

26. *Moses v. Corning*, 104 F. Supp. 651 (D.D.C. 1952).

27. *Butler v. Wilemon*, 86 F. Supp. 397 (N.D. Tex. 1949).

(7) cafeteria,<sup>28</sup> (8) infirmary, health services,<sup>29</sup> (9) science laboratory,<sup>30</sup> (10) science laboratory equipment,<sup>31</sup> (11) shop equipment,<sup>32</sup> (12) library,<sup>33</sup> (13) swimming pool,<sup>34</sup> (14) toilets, sewerage,<sup>35</sup> (15) drinking fountains,<sup>36</sup> (16) heating plant,<sup>37</sup> (17) fire hazards,<sup>38</sup> (18) worn-out or out-moded desks,<sup>39</sup> (19) overcrowding,<sup>40</sup> (20) dangerous conditions on road to school,<sup>41</sup> (21) distance from residence to school,<sup>42</sup> (22) school outside district or state,<sup>43</sup> (23) bus transportation,<sup>44</sup> (24) number of courses, course content, curriculum,<sup>45</sup> (25) length of school term,<sup>46</sup> (26) scholarship and writing by teachers,<sup>47</sup> (27) number of teachers,<sup>48</sup> (28) teachers' "load,"<sup>49</sup> (29) teachers' tenure,<sup>50</sup> (30) training of teachers,<sup>51</sup> (31)

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28. Carter v. School Bd. of Arlington County, *supra* note 22.

29. Gebhart v. Belton, 33 Del. Ch. 144, 91 A.2d 137; *cert. granted*, 344 U.S. 891 (1952).

30. Freeman v. County School Bd. of Chesterfield County, 82 F. Supp. 167 (E.D. Va. 1948).

31. State *ex rel.* Toliver v. Board of Educ. of St. Louis, 360 Mo. 671, 230 S.W. 2d 724 (1950).

32. *Supra* note 22.

33. Sweatt v. Painter, 339 U.S. 629 (1950).

34. *Supra* note 25.

35. Pitts v. Bd. of Trustees of De Witt Spec. School Dist., 84 F. Supp. 975 (E.D. Ark. 1949).

36. *Id.*

37. *Supra* note 30.

38. Webb v. School Dist. No. 90, Johnson County, 167 Kan. 395, 206 P.2d 1066 (1949).

39. *Supra* note 35.

40. Carr v. Corning, 182 F.2d 14 (D.C. Cir. 1950).

41. *Supra* note 26.

42. Winborne v. Taylor, 195 F.2d 649 (4th Cir. 1952).

43. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

44. Corbin v. County School Bd. of Pulaski County, 177 F.2d 924 (4th Cir. 1949).

45. *Supra* note 22.

46. *Supra* note 35.

47. McKissick v. Carmichael, 187 F.2d 949 (4th Cir.); *cert. denied*, 341 U.S. 951 (1951).

48. Claybrook v. City of Owensboro, 16 F. 297 (D. Ky. 1883).

49. *Supra* note 40.

50. Parker v. Univ. of Del., 31 Del. Ch. 381, 75 A.2d 225 (Ch. 1950).

51. *Supra* note 29.

pupil grading or promotion system,<sup>52</sup> (32) summer school,<sup>53</sup> (33) student association and discussion out of class,<sup>54</sup> (34) compulsory nature of attendance,<sup>55</sup> (35) hours of instruction,<sup>56</sup> (36) special guidance and counseling,<sup>57</sup> (37) availability of public high school instruction,<sup>58</sup> (38) extra-curricular activities,<sup>59</sup> (39) law review,<sup>60</sup> (40) athletic program,<sup>61</sup> (41) school social functions,<sup>62</sup> (42) professional fraternity,<sup>63</sup> (43) national reputation of school,<sup>64</sup> (44) accreditation,<sup>65</sup> (45) opportunity for post graduate employment,<sup>66</sup> (46) position and influence of alumni,<sup>67</sup> (47) school tradition and prestige,<sup>68</sup> (48) associations with fellow students which will have practical post graduate value,<sup>69</sup> (49) teachers' salaries,<sup>70</sup> (50) value of capital assets,<sup>71</sup> (51) apportionment of school funds,<sup>72</sup> (52) voting in school tax or bond election,<sup>73</sup> (53) discriminatory school taxation,<sup>74</sup> (54) expense of school attendance,<sup>75</sup> (55) availability of

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52. *Graham v. Board of Educ. of Topeka*, 153 Kan. 840, 114 P.2d 313 (1941).  
 53. *Supra* note 47.  
 54. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).  
 55. *Supra* note 44.  
 56. *Richardson v. Bd. of Educ. of Kansas City*, 72 Kan. 629, 84 P. 538 (1906).  
 57. *Supra* note 40.  
 58. *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899).  
 59. *Supra* note 22.  
 60. *Supra* note 33.  
 61. *Supra* note 22.  
 62. *Jones v. Newlon*, 81 Colo. 25, 253 P. 386 (1927).  
 63. *Supra* note 33.  
 64. *Supra* note 33.  
 65. *Supra* note 22.  
 66. *Supra* note 50.  
 67. *Supra* note 33.  
 68. *Supra* note 33.  
 69. *Supra* note 33.  
 70. *Morris v. Williams*, 149 F.2d 703 (8th Cir. 1945).  
 71. *Supra* note 35.  
 72. *Supra* note 58.  
 73. *County Bd. of Educ. of Mead County v. Bunger*, 240 Ky. 155, 41 S.W.2d 931 (1931).  
 74. *Davenport v. Cloverport*, 72 F. 689 (D. Ky. 1896).  
 75. *Wichita Falls Junior College Dist. v. Battle*, 204 F.2d 632 (5th Cir. 1953); *cert. denied*, 347 U.S. 974 (1953).

scholarship funds,<sup>76</sup> (56) voting in school board election,<sup>77</sup> (57) membership on school board,<sup>78</sup> (58) members of supervisory staff,<sup>79</sup> (59) experience of school administration.<sup>80</sup>

Just listing these factors illustrates the unmanageability of an impact analysis in education cases. The task of the judge in determining the equality of different school facilities is almost insurmountable and the job of describing and grading the facilities of each school as to most of these points entails subjective judgments. What criterion do you use to determine the quality of health services, the quality of curriculum, the scholarship and writing of teachers, or the reputation of faculty? And once you have selected a criterion for describing the facilities, how can you defend the use of this criterion if an adversary claims that another criterion is the correct one? The answer is, of course, that you cannot objectively defend the selection of operating criteria. When you accept standards for evaluating school facilities, you are accepting judgments and opinions of men and these judgments and opinions are no more defensible in terms of the distinction between "objective" and "subjective" than the opinions of sociologists and psychologists in *Brown*. As much or more dispute can arise over the grade that is given to one school's health facilities or faculty competence as can arise over evaluation of the psychological impact of the condition of separation by race on school children. Moreover, even if agreement upon grading standards for each school is reached, the problem of determining an overall grade where various factors are used still remains, and once that is determined, the percentage of identicalness that will satisfy the constitutional requirement must still be described. If school *A* gets a grade of .7 for health services, .8 for library and .4 for teacher qualification and school *B* gets a grade of .5 for health services and .5 for teacher qualifications and .7 for library facilities and each factor is given equal weight (there is no reason why that should be so), school *A* would get a score of 1.9 and school *B* a score of 1.7. Would school *A*'s facilities be equal to school *B*'s for equal protection purposes? In order to answer this question, a judge must

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76. *Supra* note 33.

77. *Wright v. Lyddan*, 191 Ky. 58, 229 S.W. 74 (1921).

78. *Moore v. Porterfield*, 113 Okla. 234, 241 P. 346 (1925).

79. *Daviess County Bd. of Educ. v. Johnson*, 179 Ky. 34, 200 S.W. 313 (1918).

80. *Supra* note 33.

select an arbitrary figure which will function as a cut-off point for constitutionality. All this illustrates one basic point—the question of equal facilities is at least as elusive and subjective as the question of the deleterious effect of the condition of separation on school children.

I am not suggesting by what has just preceded that the Supreme Court should junk an impact analysis altogether in fourteenth amendment cases. Sometimes it is necessary to base constitutional policy in part on judicial inquiry into the effect of public activity. In first amendment cases, for example, the chilling effect doctrine has proved to be useful where first amendment activity is restricted by the existence of a statute itself.<sup>81</sup> It is clear, however, from 58 years of usage that an impact analysis like that which operated under the separate but equal rule represents a significant obstacle to the enforcement of constitutional goals through use of the federal criminal process. For the criminal process to be effective, means of enforcement of the process must be available. If it is not clear as to what it is about an activity that involves a protected interest, then it is not clear whether there has been a violation of federal criminal law. And if we do not know who the public wrongdoers are, we cannot hold them responsible. Failure by the Supreme Court to establish a workable standard for ascribing responsibility to public officials under the Equal Protection Clause has contributed to growing dissatisfaction with the administration of justice at the federal level. The articles that follow address themselves primarily to procedural deficiencies or inefficiencies in the administration of justice at the state and federal level. Substantive reform is also needed—especially where the formulation of uncertain standards of civil and criminal responsibility frustrate the accomplishment of national constitutional goals.

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81. See *Dombrowski v. Pfister*, 380 U.S. 486, 487 (1965).