# DESEGREGATION:

## The Boston Orders and Their Origin

*Written by*

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*Katherine Seay*


*Boston Bar Association*

*Committee on Desegregation*

*August 1975*

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# *Preface*

The Boston Bar Association Committee on Desegregation was organized with the intention that its members would act as a source of information for individuals and groups involved in and affected by the desegregation orders. Its members have familiarized themselves with all of the orders and the background law, and are available, upon request, to meet with anyone interested in an objective commentary on the law as well as our understanding of the Phase II plan. As lawyers, we are committed to the Rule of Law as we are committed to this community which must live under the Rule of Law.

We believe that this document carefully presents in layman's language what the orders and our constitution are all about. Our hope is that it will make a contribution to a better understanding of the background and of the orders, for we believe that with understanding will come greater support for the Rule of Law.

This book was prepared by three members of our committee, John F. Adkins, James F. McHugh, and Katherine W. Seay, who devoted scores of hours to this important project. We are indebted to them for a highly instructive and professional job.

Edward I. Masterman
*Chairman*

# I *Introduction*

On June 21, 1974, the United States District Court for the District of Massachusetts concluded that, over a number of years, the School Committee of the City of Boston intentionally and purposely had maintained a system of racial segregation in the Boston Public Schools. Because of that conclusion, the Court, on the same day, issued an order prohibiting the members of the Boston School Committee and the Superintendent of Schools for the City of Boston from discriminating on the basis of race in any aspect of the operation of the Boston Public Schools and requiring them "to begin forthwith" to put into effect plans which would eliminate every form of racial discrimination in those schools.

June 21, 1974, of course, was not the first date on which a United States District Court had issued such an order. During the twenty-year period beginning in 1954, numerous other United States District Courts had reached similar conclusions about the operation of public schools in various cities throughout the United States and had issued similar orders. June 21, however, was the first time a federal court had issued such an order concerning Boston Public Schools and the effect of that order was indeed significant. In its wake came much change, some violence and, above all, extensive public debate and questioning.

Unfortunately, the reasons for the District Court's order and opinion of June 21, 1974 are not always understood. Equally often misunderstood are the nature of the power possessed by the District Court, the role played by that Court and similar courts in governmental affairs and the source of the law applied by the District Court in reaching the conclusions it reached both on June 21 and thereafter. Unfortunately, too, without at least some understanding of those matters, meaningful discussion, debate and criticism are virtually impossible.

The purpose of this pamphlet is basically threefold. First is to outline both the power of the United States District Court for the District of Massachusetts and the source of the law it applied in its opinion of June 21, 1974 as well as in those opinions and orders which followed. Second is to discuss briefly the contents of the opinions and orders of the Court concerning segregation in the Boston public schools. Third is to provide a list of various resources which are available to help in resolving specific problems which may arise with respect to implementation of the various court orders or for further explanation of those orders themselves.

Obviously, in a pamphlet of this size it would be impossible to repeat all that has been written about school desegregation, the Constitution of the United States and the role of the federal courts in governmental affairs. The volumes of material written on those subjects fill many bookshelves and,

indeed, many libraries. All that this pamphlet can hope to achieve is the presentation, basically in outline form, of various matters which may help to understand the recent orders of the District Court. The Boston Bar Association, as well as other groups within the City of Boston, are prepared to discuss additional aspects of the Court's order, and the reasons for them, upon request.

## II *The Power of the United States District Courts*

The United States District Court for the District of Massachusetts is one of 94 United States District Courts currently operating in the United States and its territories. Approximately 490 judges sit on — that is, are employed by — those 94 courts. Judge W. Arthur Garrity, Jr. is one of those 490. Sitting on the United States District Court for the District of Massachusets along with Judge Garrity are five other judges plus two "senior", or retired, judges who decide cases from time to time. Those five are Judges Caffrey, Murray, Freedman, Tauro (whose father is Chief Justice of the Supreme Judicial Court, the highest state court in the Commonwealth) and Skinner. The two Senior Judges are Judges Wyzanski and Julian.

The power of all of the United States District Courts comes basically from the Constitution of the United States, a relatively short document, copies of which may be purchased for $.70 in the U. S. Government Bookstore in the basement of the J. F. K. Federal Building on Cambridge Street in downtown Boston.

The Constitution is an agreement — a kind of contract — among all of the people of the United States. It was written by representatives of 12 of the 13 original states, including 2 representatives from Massachusetts. Those representatives — called the "framers" of the Constitution — first gathered in Philadelphia on May 25, 1787 in the Constitutional Convention. Four months later, on September 17, 1787, they presented to the states a proposed Constitution to be put into effect as soon as 9 of the 13 states approved it. By June 21, 1788, less than one year later, 9 states had approved the proposed Constitution. George Washington was inaugurated as the first President on April 30, 1789 to formally begin operation of the Constitution as the framework for government of the United States.

Essentially, the Constitution contains two kinds of provisions or terms. One is what might be called the organizational terms — that is, those terms which organize and divide the Government of the United States into its three principal branches. The other is what might be called the operational terms — that is, those terms which state the fundamental rules which must be followed by state and federal governments in the course of their operations.

The first three Articles, or chapters, contain the basic organizational terms of the Constitution. The first Article, and the longest in the entire Constitution, describes the powers of the Congress of the United States. The Congress, says the first Article, consists of the House of Representatives and the Senate. The first Article also provides that the House and Senate together have all of the "legislative" powers of the Government of the United States. While the Constitution does not contain a specific definition of the term "legislative" power, it appears both from history and from the language of Article I as a whole that the "legislative" power essentially is the power to pass laws of broad and general application throughout the United States.

The second Article of the Constitution describes the function of the President of the United States as well as the method — since changed by amendment — by which he was to be elected and the method and reasons for his removal from office. The second Article also states that the "executive" power of the Government of the United States is placed in the President. Again, the term "executive" is not specifically defined in the Constitution but it appears nonetheless that that power essentially is the power to carry out the day-to-day operations of the Government of the United States and includes the power and duty to enforce all of the laws of the United States.

Article III of the Constitution deals with the organization and power of the courts of the United States and is the shortest of the first three Articles. The courts described in Article III are federal courts only. It is important to understand that neither Article III, nor any other part of the Constitution, has anything to do with the organization of the state courts of Massachusetts such as the Supreme Judicial Court, the Suffolk Superior Court, the Boston Municipal Court, the South Boston District Court or the Roxbury District Court, nor does it have anything to do with the organization of any other court of any other state. Those state courts are organized, and operate, under rules contained in state constitutions and laws.

Article III of the Constitution says only that there must be one Supreme Court. It says that all other federal courts shall be those that the Congress sees fit to establish from time to time. Thus, the United States Supreme Court exists because it is required to by the Constitution but all other federal courts, including the United States District Court for the District of Massachusetts, exist only because Congress has passed a law creating them.

Congress has created a number of different kinds of courts under the power given to it by Article III, but 2 are of more general importance than the rest. First are the Federal Courts of Appeals, sometimes called Circuit Courts, and Congress has created 11 of those. Second are the United States District Courts and Congress has created 94 of those. In every state, there is at least one Federal District Court and some of the larger states have as many as 4. Appeals from those District Courts go to one of the 11 Circuit Courts and then, if necessary, to the Supreme Court of the United States.

Even though Article III of the Constitution says that Congress should decide whether to set up federal courts other than the Supreme Court, the Constitution itself contains a number of terms which apply to the judges who sit on those courts Congress does decide to establish. First of all, Article II of the Constitution, which deals with the powers of the President, says that the President has the power to nominate all federal judges and that his nominations are to be submitted to the Senate for its approval. Every judge on the Supreme Court of the United States, on a Federal Court of Appeals, or on a Federal District Court has been nominated by a President and has been approved by the Senate. Judge Garrity, for example, was nominated for his position by President Johnson. The Senate approved that nomination and he was sworn in as a judge on June 24, 1966. Second, Article III of the Constitution says that all federal judges "shall hold their Offices during good Behaviour." That means that all federal judges are appointed for life and may be removed from office only under a very limited set of circumstances, generally involving commission of serious crimes or other improprieties. Removal of a federal judge from office can be ordered only after an impeachment proceeding similar to the one begun in the Summer of 1974 with respect to former President Nixon. Third, Article III of the Constitution says that the salary paid to a federal judge may not be reduced while he remains in office.

The provisions of Article III dealing with the lifetime terms of judges and their pay while in office were intended by the framers of the Constitution to insure that, insofar as was possible, judges would be wholly independent of the legislative and executive branches of the Government. The framers feared, for example, that, without a provision in the Constitution prohibiting reduction of the salary of a judge while he was in office, a Congress which became angry at the decisions of a particular judge could reduce his salary to the point where he would have to resign and find another job simply to support himself. Similarly, they felt that if a judge was appointed to his office by the President only for a limited number of years, pressure could be brought to bear on him to decide cases in a certain way by those who had the power to prevent his reappointment when his term expired. In order to insure that the courts were a branch of Government equal to the other two, then, the Constitution gave all federal judges a large amount of freedom from external pressure.

Just as Article I says that the "legislative" power is given to the Congress, and Article II says that the "executive" power is given to the President, Article III says that the "judicial" power of the United States is given to the federal courts. Basically, the judicial power is limited to the power to resolve certain kinds of disputes which arise either between citizens of the United States or between citizens of the United States and the Government. The "judicial" power does not include, for example, the power to declare war or the power to pass a broad Civil Rights Act. The Constitution says that both of those powers are "legislative" and specifically give them to the Congress. Similarly, the "judicial" power does not include the power to

direct operations of the Army or Navy or the power to arrest people suspected of committing crimes. Both of those powers are said by the Constitution to be "executive" in nature and are given to the President.

In essence, the dispute-resolving power of the federal courts is the power to referee the conduct both of citizens of the United States and of governmental organizations and thus to decide when rules governing that conduct have been broken. Some of the most basic rules concerning governmental conduct are found in the Constitution itself. If the Congress passes a law which some citizen believes Congress has no power to pass because of the terms of the Constitution, it is the job of the federal courts to resolve the dispute between citizen and government thus created. The court will resolve that dispute by determining whether the rules contained in the Constitution do or do not permit Congress to pass the law in question. Since many parts of the Constitution are written in very broad language, the court often must interpret that language in order to determine the appropriate constitutional rule for resolution of the dispute presented to it.

Rules contained in the Constitution are not the only rules with which the federal courts ordinarily deal. Others are found in laws passed by Congress, in laws passed by state legislatures, and even in private contracts between various people. When it deals with rules found in laws passed by Congress, or even in private contracts, the job of the federal court is essentially the same as it is when it deals with rules found in the Constitution. Congress, for example, has passed a law which says simply that industrial "monopolies" are unlawful and forbidden. For another example, private contracts between two people for construction of a house often say that the house must be built of "first quality" materials. Both the prohibition against monopolies and the requirement that the house be constructed of first quality materials are rules which must be followed by the persons to whom they apply. If disputes arise concerning whether an individual has followed those rules, it is often the job of the federal court to decide whether he has.

The "judicial" power given to the federal courts by Article III of the Constitution, however, goes beyond the power simply to decide which of the disputing parties before it has followed the proper rules of conduct. That power also includes the power to decide what should be done if the court decides that one party or the other in fact broke an applicable rule. In other words, the judicial power to resolve disputes necessarily includes the power to order an appropriate remedy. If, for example, the federal court determines that a law passed by Congress violates the Constitution, its remedy often may be simply an order that that law may not be enforced by any agent or official of the Government. Similarly, if it finds that rules contained in a contract have been broken, it may order the person who broke the rule to pay damages to another person to compensate him for the harm he suffered as a result.

Once the federal court has made a determination that a rule has been broken, has ordered the remedy which is to be applied for violation of that rule, and all appeals are over, no one can change that order. If, for example,

the court decides that a rule contained in a contract was broken and that the person who broke it should pay damages to another person, Congress cannot pass a law saying that the contract was not broken and no damages are owed. If the Congress could pass such a law, then the courts would not be truly an independent branch of Government for everything they did could be undone by Congress if it chose to do so. Under some circumstances, it might be possible to alter a final decision and order of a federal court by passing a constitutional amendment. Since the Constitution says that an amendment requires approval of 38 of the 50 states, however, passage would be extremely difficult to accomplish. Indeed, in the 186 years that our Constitution has been in effect, it has been amended on only 17 occasions. Moreover, only a carefully-drawn amendment could do anything more than prohibit a federal court from reaching the same decision or promulgating the same kind of order *after* the amendment became effective.

From the foregoing, it is clear that the Consitution gives to the federal courts a great deal of power. Moreover, by giving that power to the courts, the Constitution gives it to individuals who are not elected and who, once appointed, ordinarily stay in their position for the remainder of their lives. The Constitution also insulates those individuals from the pressure and influence to which those in other branches of Government commonly are exposed. This does not mean, however, that the power of the federal courts, or of the judges who sit on them, is unlimited. Indeed, those powers are limited in at least six important ways.

First of all, the Constitution limits the kinds of disputes which the federal courts may resolve to nine basic categories. For present purposes, the most important of those categories concern disputes which can be resolved only by interpreting and applying rules contained in either the Constitution of the United States itself or in laws passed by Congress. In addition, Congress has passed laws which limit in a variety of ways the kinds of disputes involving the Constitution or federal laws which may be heard and resolved by a federal court. The federal courts thus have a relatively narrow range of jurisdiction and a very large number of disputes are simply beyond their power to resolve.

Second, unlike the Congress or executive, the courts are passive agencies. They do not have the power to go out on their own, discover apparent violations of the Constitution or laws of the United States, bring the allege violators into court and then devise appropriate remedies for the violations they have found. Instead, they must wait until some citizen or agency of the Government decides that a rule apparently has been violated and brin the alleged violation to the attention of the court by beginning a law suit. The Congress and the President, of course, can, and often do, start their own investigations and propose solutions to the problems which those investigations uncover. The courts, however, must wait until others come to the with an apparent violation of applicable rules.

Third, the courts are not wholly free to resolve the disputes presented to them based on their own ideas of what the applicable rules are. Instead, they must follow precedent — that is, they must look to see whether a similar kind of dispute was resolved by a court at some time in the past and, if it was, generally they must resolve the current dispute in the same way. If the relevant precedent was a decision of the Supreme Court of the United States or of a Federal Court of Appeals, then a Federal District Court must follow that decision. If, however, the relevant precedent was a decision of a Federal District Court, then a District Court may refuse to follow it but will only do so under extraordinary circumstances.

The rule that courts must follow precedent is essentially a rule designed to insure that all people with the same kind of dispute are treated alike by the courts and that, once a controversy is resolved by a court in a certain way, others can rely on that resolution to plan their own conduct. Of course, the Supreme Court can, and sometimes does, overrule its own precedent by resolving a dispute in a manner completely different from the manner in which it resolved a similar dispute earlier. It does so extremely infrequently, however. In its history the Court has decided about 30,000 cases and only about 150 of those overruled earlier decisions. Even when the Court does overrule an earlier decision, it is not thereby setting up a new set of rules purely to suit its own fancy. Instead, it is giving frank recognition to the fact that, as times change, so do conditions in the society and thus the considerations which ought to bear on interpretation of the sometimes ambiguous language of the Constitution.

Fourth, the courts have no power to do anything unless they determine that a rule contained in the Constitution, in the laws of the United States or in some other appropriate place has been violated. If some one comes into a federal court, for example, complaining that various automobile manufacturers are making cars which pollute the atmosphere, the court cannot order the automobile manufacturers to build different kinds of cars which pollute less simply because it does not like pollution and thinks that less would be better for society. Instead, the court must determine whether any law passed by Congress requires the manufacturers of automobiles to build cars which create less pollution than the cars which they in fact are making. If it finds that there is such a law and that the manufacturers have violated it then it can order them to comply and may be able to award the person who started the law suit damages because they did not do so earlier. Until the court finds such a violation, however, it is powerless to do anything regardless of its own preferences.

Fifth, the court, in ordering a particular kind of remedy after finding that a rule has been broken, generally has the power only to put an individual in as good a position as the one in which he would have been if the applicable rule had not been broken in the first place. Everyone knows, for example, the general rule that you cannot build a house on property you do not own. Suppose, however, that Smith builds a house on property owned by Jones and Jones, when he discovers what Smith has done, sues

him. After the court decides that Smith had no right to build his house on Jones' property, it can order Smith to tear the house down, remove the foundation and replant whatever grass and trees he dug up in the course of building it. That remedy is designed to place Jones in just as good a position as he would have been if Smith had not built the house in the first place. The court cannot go further, however, and order Smith to tear down all of his other houses or to build a new house for Jones, for to do so would be to do more than simply restore Jones to his old position.

Sixth and finally, the court, in general, has limited means to enforce the orders it issues. Usually, it must rely either on voluntary compliance with those orders by the individuals whom they affect or on the President and executive branch of Government to take affirmative action to see that the orders are carried out. The court can hold people in contempt under appropriate circumstances if they fail to carry out its orders and does have available to it a few marshals who can physically go out to find the person held in contempt, bring him before the court and then take him to a jail. The number of marshals the court has available to it, however, is very small and, by themselves, they cannot effectively enforce any complicated order affecting more than a handful of people. If there is no voluntary compliance, the main source of enforcement must come from the executive branch of the Government.

The fact that the executive branch of Government enforces orders made by the courts is a primary example of the dedication to the rule of law which has been an essential element of our system of government since its beginning. It was that dedication which led President Eisenhower to send federal troops into Little Rock, Arkansas to prevent interference with court-ordered desegregation of Central High School in 1957. It was that dedication which led President Kennedy to send federal troops to Oxford, Mississippi to prevent interference with court-ordered desegregation of the University of Mississippi in 1962. It is that dedication which will lead any President to use federal troops again in the unfortunate event that there is substantial interference with court-ordered desegregation anywhere else.

In sum, the Constitution gives the "judicial" powers to the federal courts in a careful and thoughtful fashion. It limits those powers by limiting the jurisdiction of the courts, by denying to them a "self-starting" function, by limiting the manner in which they may exercise their powers and by entrusting enforcement of their orders to another branch of Government. Once having limited those powers, however, the Constitution insures that they can be exercised effectively by insulating federal judges from the normal political pressures felt by others who occupy offices in the federal government and by prohibiting anyone from revising or annulling final orders they issue. The Constitution thus insures that the power of the courts, though limited, is indeed an effective part of the system of "checks and balances" mandated by the Constitution as a whole.

## III *The Equal Protection Clause*

As stated earlier, in addition to setting forth an outline of the organization of the Government of the United States, the Constitution also contains the broad rules for operation of the Government it organizes. Many of the most important of those rules are contained in the first ten Amendments to the Constitution, better known as the "Bill of Rights". The Constitution, as initially written, approved and put into effect, contained none of the provisions of the Bill of Rights. Many of the framers believed that it was not necessary to list all of the guarantees of those Amendments, believing as they did that the principles contained in them would be recognized and observed by everyone even if they were not listed in the Constitution. Many of the states which approved the Constitution were not so sure, however, and several expressed their approval only with the qualification that a Bill of Rights be added immediately. As a result, on December 15, 1791, about two years after the Constitution became effective, the first ten Amendments were added to it. The 11th and 12th Amendments were adopted in 1798 and 1804 respectively.

After adoption of the 12th Amendment, no further amendments to the Constitution were added until after the Civil War, some 61 years later. Then, three Amendments were adopted in relatively quick succession. The 13th Amendment, prohibiting slavery or involuntary servitude, was adopted on December 18, 1865. Approximately three years later, on July 28, 1868, the 14th Amendment was adopted. Finally, on March 30, 1870, the 15th Amendment, prohibiting denial of the right to vote on account of race or color, became part of the Constitution.

While the 13th and 15th Amendments were directed to relatively specific practices which the states decided to prohibit, the 14th Amendment was written in very broad terms and dealt with a number of problems which had arisen before and after the Civil War. Today, however, only the 1st and 5th sections of the 14th Amendment are of significant continuing importance. In part the 1st section provides that

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; *or deny to any person in its jurisdiction the equal protection of the laws.*

The italicized portion of Section 1 of the 14th Amendment has become known as the "Equal Protection Clause" of the 14th Amendment and is perhaps the most important substantive, or rule-making, clause of the entire Constitution for resolution of disputes concerning racial segregation of public schools in the United States.

Section 5 of the 14th Amendment gives to the Congress the power to enforce the provisions of the 14th Amendment, including the Equal Protection Clause, by "appropriate legislation". Soon after the amendment was

adopted, Congress passed a number of laws designed to eliminate state laws, as well as the acts of private persons, which denied equal protection of the laws to citizens of various states. Some of those early laws were held unconstitutional by the Supreme Court. Others survived and are in operation today. More recently, Congress has enacted a series of laws designed to eliminate various forms of racial segregation in public accommodations, housing, employment and other areas. Nevertheless, the federal courts have been the primary branch of the Government of the United States involved in application of the guarantees of the 14th Amendment to a wide variety of circumstances, including, but not limited to, racial segregation.

As interpreted by the courts, the basic meaning of the Equal Protection Clause of the 14th Amendment is fairly simple. In essence, that clause means no state — and the term "state" has been interpreted to mean any governmental organization in any state, whether that organization be the state legislature, a city council, a school committee or a board of county commissioners — can pass a law or regulation which arbitrarily denies to some state citizens benefits which it gives to others.

The word "arbitrarily" is an important one, for the Equal Protection Clause does not mean that every law passed in a state must treat every person in that state exactly alike. Instead, the Clause means simply that, if a state passes a law treating various classes of people differently, the state must have a valid reason for doing so. Under the Equal Protection Clause, for example, the Commonwealth of Massachusetts cannot pass a law which says that only persons with blond hair are entitled to obtain driver's licenses. The fact that a person has blond hair does not necessarily mean that that person will be a better or a worse driver than a person who does not. Accordingly, the Commonwealth cannot use blond hair as a factor on which it bases decisions concerning whether it should issue licenses. On the other hand, it would not violate the Equal Protection Clause for the Commonwealth to pass a law, as it has, that a blind person may not be issued a driver's license. The ability to see obviously has a great deal to do with an individual's ability to drive safely on the highways. Thus, there is a good reason for the Commonwealth to distinguish between people who can see and people who are blind when it comes to issuing driver's licenses. Although the two groups are treated differently by the licensing law, the Equal Protection Clause does not prohibit that different treatment.

Obviously, a state can apply its laws unequally not only by arbitrarily refusing to extend to some of its citizens those privileges it extends to others, but also by arbitrarily refusing to extend to some citizens exactly the same privileges it extends to others. For example, a law which said that driver's licenses issued to people with blond hair were good for all roads in the Commonwealth while licenses issued to all others were good only for interstate highways would violate the Equal Protection Clause just as much as a law which said that only blonds could drive. For a number of years beginning in the late 1800's, however, many states did have numerous laws which distinguished between people, not on the basis of hair color, but on

the basis of skin color. People who happened to have black skin often were not prohibited absolutely from attending theatres, for example, but state laws provided that, if they did attend, they had to sit in sections different from those in which people with white skin sat. People with black skin were not prohibited absolutely from riding on trains, buses and carriages, but, if they did, state laws provided again that they had to sit in sections different from those in which people with white skin sat. Most important for present purposes is that the laws of many states also said that people with black skin had to attend schools which were separate from the schools attended by people with white skin. Primarily those laws were the result of illogical beliefs that people with black skin — many of whom had been slaves until the Civil War — were inherently inferior to people with white skin and should be dealt with in a manner which both recognized and perpetuated that inferiority.

In 1892, a man named Homer A. Plessy challenged the constitutionality of those segregative laws. Mr. Plessy bought a railroad ticket for a ride on a train from New Orleans, Louisiana to Covington, Louisiana. At that time, Louisiana was one of the numerous states which had laws like those just described requiring black people to ride in different parts of the trains from those parts in which white people rode. The law also required, however, that the two parts of the train be "equal". Mr. Plessy — who, incidentally, was described by the Supreme Court of the United States as being "of mixed descent, in the proportion of seven-eighths Caucasian and one-eighth African blood"—refused to sit in that portion of the train which had been set aside for blacks. Accordingly, he was arrested and charged by the New Orleans police with violating the laws of Louisiana requiring separate seating for blacks and whites.

At the appropriate time, Mr. Plessy started a law suit to challenge the constitutionality of the Louisiana law he was charged with violating. He claimed, among other things, that state laws which required separate seating in public accommodations for blacks and whites violated the Equal Protection Clause of the Constitution. When his case reached the Supreme Court of the United States, the Court disagreed with him.

The Court decided that the equal protection of the laws required by the 14th Amendment to the Constitution related only to "political equality" and not to social equality. Thus, in the Court's view, the 14th Amendment prohibited states from passing laws which kept black people from sitting on juries while permitting white people to sit on them since the right to sit on a jury was a "political" right. In the Court's opinion, however, the right of a black individual to sit in the same railroad car as a white individual was a "social" right and thus was one not guaranteed by the 14th Amendment. In the course of its opinion, the Court appeared to say that the right of a black person to go to a school attended by a white person also was a "social" right and thus also was one not guaranteed by the 14th Amendment.

From the Supreme Court's decision in Mr. Plessy's case came the doctrine of "separate but equal". That doctrine, simply stated, meant that with re-

spect to a whole class of rights or privileges, the Equal Protection Clause of the 14th Amendment, as then interpreted by the Supreme Court, was not violated by a state if the state provided equal, although separate, accommodations for blacks and whites. Schools which by law were for whites only or for blacks only thus did not violate the Equal Protection Clause as long as they were "equal".

In deciding Mr. Plessy's case, however, one judge, John Marshall Harlan, dissented and wrote his own opinion rejecting in ringing terms the reasoning employed by other members of the court. His dissent is worth quoting at some length. "Everyone knows," said Justice Harlan,

> that the [law requiring separate seating on railroad trains] had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . The thing to accomplish was, under the guise of giving equal accommodations for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.
>
> . . . [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. . . .
>
> . . . The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state [laws], which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.
>
> . . . .
>
> The arbitrary separation of citizens on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.
>
> If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with the state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done.

Despite Justice Harlan's powerful statements, the Supreme Court's decision in Mr. Plessy's case, along with the notion of "separate but equal" derived from it, remained generally the accepted construction of the 14th Amendment for years. On May 17, 1954, however, the Supreme Court of the United States said that its earlier opinion in Mr. Plessy's case had been a mistake and no longer could be followed. It said so in a case called *Brown v. Board of Education*, the landmark case dealing with desegregation in public schools in the United States. *Brown* involved four groups of people who had started law suits to challenge the constitutionality of laws of the States of Kansas, South Carolina, Virginia and Delaware which required white and black children to attend separate public schools. That forced separation, they argued, much as Mr. Plessy had argued 58 years earlier, violated the Equal Protection Clause of the Constitution. This time the Court agreed.

The Court first noted that times had changed since the decision in Mr. Plessy's case had been written. Unlike the situation in 1892, the Court said, in 1954 public education was "perhaps the most important function of state and local government." Moreover, given the complexity of society in 1954, the Court believed that it was "doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." The Court then said that "[t]o separate [black 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." That separation necessarily had an impact on the educational opportunities of black children, in the Court's view, because

> 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 a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

In light of all that, the Court wound up its opinion by concluding "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

Having found that the States of Kansas, South Carolina, Virginia and Delaware had violated the rule of equality contained in the Equal Protection Clause, the Court then turned its attention to the remedy which should be ordered for violation of that rule. The Court decided that no one universal remedy would be proper for all segregated school systems in the United States. Instead, it said that, while "[a]ll provisions of federal, state or local law requiring or permitting" segregation in public education were unconstitutional, "[f]ull implementation of [that] constitutional [principle] may require solution of varied local school problems." Local school authorities, the Court said, had the "primary responsibility for . . . solving [those] problems; courts will have to consider whether the action of the school authori-

ties constitutes good faith implementation of the governing constitutional principles" prohibiting segregation by race. Moreover, the Court held, the task of desegregating the public schools had to go forward "with all deliberate speed." While it recognized that local problems might, in some cases, cause some delay in what it hoped would otherwise be a prompt elimination of segregation, the Court said that the "burden rests upon the [school board] to establish that such [delay] is necessary in the public interest and is consistent with good faith compliance at the earliest practical date" with its decision outlawing segregation.

The Court's decision in *Brown* was not greeted with overwhelming enthusiasm in those states which had laws requiring that black children and white children attend different schools. Indeed, in many states, the first reaction to the Supreme Court's decision in *Brown* was creation of a series of laws which, while not explicitly requiring that black children and white children continue to attend different schools, had the same effect. Laws were passed in some states forbidding busing to achieve integration, or closing all public schools, thus leaving previously public education in the hands of "private" groups. Almost without exception, the Supreme Court ruled that those laws were unconstitutional because they helped to perpetuate the segregation of school children in public schools which it had outlawed in *Brown*. Nevertheless, progress toward fully integrated education was slow.

Fourteen years after *Brown* was decided, the Court unanimously expressed in strong language its dissatisfaction with the progress of school desegregation efforts in those school systems which had operated under state laws requiring separation of the races. In a case called *Green v. County School Board*, the Court was presented with a challenge to a so-called "freedom-of-choice" law which had been set up in a school system in New Kent County, Virginia. Under that plan, each pupil in the school system was permitted to chose between attendance at what was then an all white or what was then an all black school. Under the plan, then, the New Kent County school board appeared to be taking a simple "hands off" approach to pupil placement in schools within its school system. In the Court's view, however, apparent "hands off" by the New Kent County school board was not enough. The board had created a racially segregated school system while operating under prior Virginia laws. It could not, 14 years after *Brown* was decided, simply take its hands off pupil assignments and hope that the segregated system it had created eventually would disappear. Instead, under the Equal Protection Clause, it had the burden of coming forward with a plan which realistically promised to eliminate segregation *immediately* as well as to eliminate, as far as possible, the effects of past segregation. While the Court did not say that "freedom of choice" never could be permissible under the Equal Protection Clause as a means of eliminating segregation, if there were quicker and more effective ways to convert a segregated school system to one which was integrated, simple freedom of choice plans would not be permitted. To use a rough analogy, the Court's decision in *Green* was similar to the common-sense notion that, if you break the law by driving

your car at 100 m.p.h. on Route 128, it is not sufficient for you simply to take your foot off the accelerator and hope that the car will coast to a stop. Instead, you must step on the brake.

Until June 21, 1973, all of the major cases decided by the Supreme Court in the field of public school segregation dealt with school systems in those states where there had been state laws requiring separate education for black children and white children at the time *Brown* was decided in 1954. On June 21, 1973, however, the Court decided a case involving the public schools in Denver, Colorado. Those schools never had been operated under state laws *requiring* black children and white children to attend different schools. Nevertheless, it was clear to the Court from the evidence which was presented at trial that pupil assignments to schools in Denver often were made by the Denver School Board on the basis of race. As a result, there were a significant number of schools in the school system which were predominantly black, predominantly white, or predominantly hispanic.

Even though there had never been in Colorado, laws requiring children of different races to attend different schools, the Court held that, because Denver pupil assignments had been made on the basis of race and had resulted in segregated schools, the resulting segregation was just as much a violation of the Equal Protection Clause as racial assignments made because of state laws. Accordingly, it ordered the Denver School Board to take affirmative steps to eradicate promptly the segregated school system it had created just as it earlier had ordered predominantly Southern school systems to eradicate segregated school systems created by state law.

The ruling of the Court in the Denver school case that intentional segregation by a school board was illegal whether or not a state law specifically required it to segregate was not a new kind of ruling. At least as early as 1886, in a case involving Chinese operators of laundries in San Francisco, the Court had held that even though a state law appears to be fair and equal to all, if state officials enforce it in a manner which is clearly unfair and unequal, those state officials violate the command of the Equal Protection Clause. To return for a minute to the example of the driver's license discussed earlier, you will recall that, if the Commonwealth of Massachusetts had a law stating that only people with blond hair could receive a driver's license, that law would violate the Equal Protection Clause. Suppose, however, that the law only said that no person could receive a driver's license until he had passed a written examination. Suppose further that, although a great number of people with a wide variety of hair colors passed written examinations, only those with blond hair in fact were given a driver's license by the Registrar of Motor Vehicles. Under those circumstances, it cannot be doubted that the state, acting through its agent, the Registrar of Motor Vehicles, would be discriminating against people who did not have blond hair just as clearly and just as effectively as if the state itself had passed a law saying that only blonds could drive. That kind of discrimination also is forbidden by the Equal Protection

Clause. That kind of discrimination is essentially the kind of discrimination the Court found to exist in Denver, Colorado.

By the time that the United States District Court for the District of Massachusetts issued its opinion and order on June 21, 1974, then, a number of principles concerning application of the Equal Protection Clause in the context of racial segregation had been made quite clear by the Supreme Court of the United States. Any racial segregation in the public schools expressly required by state law was flatly prohibited. Moreover, even if racial segregation in the schools was not, and never had been, required by state law, racial segregation in those schools resulting from intentional acts and practices of a school board which were designed to keep black school children separate from white school children also violated the Equal Protection Clause. If impermissible racial segregation in the public school systems was found by a court to exist, then the remedy ordered had to include the requirement that every form of racial segregation in the school system be eliminated. While the school board had the primary responsibility for proposing and implementing plans designed to eliminate racial segregation once the court issued an order, the court itself was required to issue appropriate supplementary orders if the school board failed to meet its responsibility. Finally, since 20 years had passed since the Court first explicitly outlawed racial segregation in the public schools, speed in eliminating impermissible segregation now was of the essence. The time for "all deliberate speed" long since had passed, and the burden of justifying any delay whatsoever rested squarely on the shoulders of those who sought it. These principles were absolutely binding on all federal district courts faced with law suits commenced by individuals who claimed that the schools which they attended were impermissibly segregated by race; they could not be changed, altered or abolished by any person or organization save the Supreme Court itself or the people of the United States acting collectively to amend the Constitution. In fact, those principles were the ones applied by the United States District Court for the District of Massachusetts on June 21, 1974 and thereafter.

## IV *The Decisions of the United States District Court for the District of Massachusetts*

### A *The Findings and Conclusions*

In March of 1972, attorneys for Mrs. Tallulah Morgan, her children and a number of other black parents and children, filed with the Clerk of the United States District Court for the District of Massachusetts a document called a Complaint. "Complaint" is the title of the first document an individual files with the clerk of the court when he desires to start a law

suit and, basically, it contains an outline or summary of a dispute which the individual wishes to have the court resolve. The person who files the Complaint is called the plaintiff and the individuals about whose conduct the plaintiff complains are called the defendants.

In essence, Mrs. Morgan's Complaint alleged that her children, as well as all black children enrolled in the Boston public schools, had been denied equal protection of the laws by the Boston School Committee which, she claimed, intentionally had brought about and maintained racial segregation in the public schools of Boston. The Committee had done so, according to the Complaint, by various means. The principal means included adoption and maintenance of discriminatory pupil assignment procedures, manipulation of attendance areas and district lines for various schools in the system, establishment of grade structures and feeder patterns which had a discriminatory intent and effect, manipulation of construction policies and school capacity plans, and unreasonably failing to take steps which were reasonably designed to eliminate segregation found within the school system. The Complaint also made certain allegations concerning the conduct of the Board of Education for the Commonwealth. Since the Court later determined that the Board had acted properly, however, the allegations concerning its conduct are not of significant importance for present purposes.

After the Complaint was filed, the Boston School Committee filed with the Clerk of the Court a document called an Answer. The Answer usually is the second document filed in a law suit and the first one filed by the defendant. In essence, the Answer contains, also in outline form, a reply to each of the statements contained in the plaintiffs' Complaint. In addition to denying many of the statements contained in Mrs. Morgan's Complaint, the School Committee said in its Answer that, to the extent that some schools in the Boston school system contained disproportionate numbers of either black children or white children, that result came from residential segregation over which the School Committee had no control. According to the Committee, that circumstance also was due to a "neighborhood school" policy which the Committee claimed was permitted under the Equal Protection Clause of the 14th Amendment. Finally, in its Answer the School Committee said that, in effect, it had attempted to eliminate racial segregation in the City of Boston schools and could do nothing more than it had done to bring about that result.

After preliminary proceedings were completed, the case went to trial before Federal District Court Judge W. Arthur Garrity, Jr., who had been chosen to preside by a random selection process used for all law suits started in the Federal Court. At that trial, the law imposed on the plaintiffs the burden of proving that the statements they had made in their Complaint concerning racial segregation in Boston were true. Judge Garrity's task was to listen to the witnesses who testified at the trial, to review any documents or other exhibits introduced at trial and then to decide whether the plaintiffs had met their burden of proving the truth of the allegations

of their Complaint. There was no jury present at the trial because, generally, juries are only present at trials where the plaintiff is seeking money damages from the defendant. Here, Mrs. Morgan and the other representatives of the black parents and school children were seeking, not money, but an order requiring the defendants to take steps designed to eliminate segregation in Boston public schools.

The trial before Judge Garrity lasted for approximately 15 days and involved the testimony of a great number of witnesses plus presentation to him of several hundred exhibits. During the course of the trial, Judge Garrity left the courtroom on one occasion, along with the attorneys for both the plaintiffs and the defendants, to actually look at several of the schools in the City of Boston which were being described in the testimony and the exhibits presented to him.

On June 21, 1974, the judge filed with the clerk of the court a lengthy opinion containing his findings of fact and conclusions of law based on the testimony he had heard and the exhibits he had reviewed. Boiled down to their bare essentials, those findings and conclusions said one thing: Mrs. Morgan and the other plaintiffs were right. The School Committee of the City of Boston intentionally had brought about and maintained racial segregation in the Boston public schools.

In reaching that ultimate conclusion, Judge Garrity considered several factors. First, he considered prior law suits in which the School Committee had been involved concerning the issue of racial segregation in the public schools. Secondly, he considered the extent of school segregation in the City of Boston as revealed by statistics showing the racial composition of various schools in the City. Thirdly, he considered what the School Committee had done with respect to segregation existing in the Boston schools and, in particular, focused on six areas of the School Committee's conduct. Those areas involved (1) the School Committee's use of existing schools in the City, (2) the method by which the School Committee divided the Boston public school system into districts, (3) the operation of so-called feeder patterns, (4) the policies of the School Committee concerning transfers between various schools, (5) the assignment of faculty and staff to various schools, and (6) the School Committee's policies with respect to vocational and examination schools.

Judge Garrity's opinion quickly presented facts which indicated that the Boston public schools were "characterized by heavy concentrations of black students in some schools and heavy concentrations of white pupils in other schools." While black children accounted for 32% of all children attending Boston public schools, more than half of those black children attended schools that were more than 70% black. White children accounted for approximately 61% of all children in the school system, but 84% of them attended schools that were more than 80% white. In light of those facts, Judge Garrity's opinion stated that "at least 80% of Boston's schools are segregated in the sense that their racial compositions are sharply out of line with the racial composition of the Boston public school system as a whole.

. . . Racial segregation permeates schools in all areas of the city, all grade levels and all types of schools."

The real issue in the case was not whether the City of Boston's public schools were characterized by racial segregation. Even the School Committee agreed that they were. Instead, the question was how they got that way; that is, whether the existing segregation was simply something which had happened despite best efforts to keep it from happening or whether the School Committee had "intentionally and purposely" caused it to happen. On the basis of evidence presented to him, Judge Garrity reached the conclusion that the School Committee indeed had caused it to happen.

First of all, he looked at the School Committee's use of existing school buildings in the City of Boston and its activities with respect to new construction. He found that, in general, some existing schools were badly overcrowded while others had significant excess available space. He also found, however, that the overcrowded schools were predominantly white while the underutilized schools were predominantly black. He further found that, while overcrowding in the predominantly white schools could have been cured by transferring some of the students in those school to underutilized schools which were predominantly black, the School Committee did not do so on many occasions when it believed that such transfers would cause "problems" with white parents. On other occasions, however, when transfers from overcrowded to underutilized schools would not significantly affect the racial composition of either, such transfers had been approved by the Committee. Furthermore, Judge Garrity found that, in some instances, portable classrooms had been used to help relieve overcrowding but, in large part, had been used only at predominantly white schools. Use of those classrooms, he found, thus perpetuated the racial concentration in overcrowded white schools as well as the racial concentration in undercrowded black schools to which the overflow white students could have been sent. In addition, the judge stated that construction of new facilities by the School Committee was carried out in a manner which had the "overwhelming effect" of increasing racial segregation. In effect, Judge Garrity found that, instead of building new schools in areas where they would have been "neighborhood schools" for both black children and white children, the School Committee had placed new buildings in either predominantly black or predominantly white areas of the City and had done little to attract black students to schools built in the white areas or to attract white students to schools built in the black areas.

The second aspect of the Committee's actions considered by Judge Garrity concerned the creation and maintenance of various school districts in the City of Boston. While he did not find that, in general, the School Committee had drawn school district lines to create black districts and white districts, he did find that, on numerous occasions when it could have done otherwise, the Committee intentionally had refused to change existing districts so that predominantly black or predominantly white districts would be avoided. Judge Garrity did find, however, that on one occasion

in 1968, the School Committee had drawn new district lines to relieve some of the overcrowding at the Cleveland Junior High School which, at the time, was 91% white. In redrawing the district lines to relieve overcrowding, some of the students then attending Cleveland were transferred to the Russell Junior High School district, which was 85% white, and some to South Boston High School which was then 99% white. This was done even though Russell Junior High and South Boston High were then themselves overcrowded and were further away from Cleveland than the King, Burke and Girls High Schools which had available seats but which were predominantly black.

The third area considered by Judge Garrity concerned so-called "feeder patterns", a complex system for assigning students to the City's various high schools. In theory, there were no district high schools in the City of Boston, at least in the sense that the students living in a certain geographic area are assigned automatically to a high school in that area. Instead, Judge Garrity's opinion stated that "[e]nrollment at high schools is determined by a combination of seat assignments, preferences and options collectively called feeder patterns" which are announced in February of each year by the Superintendent of Schools. While the actual operation of the feeder pattern system is too complicated for detailed examination here, Judge Garrity found that the intended and actual consequences of that operation were that the students from predominantly black elementary and junior high schools were channeled into predominantly black high schools. Similarly, students at predominantly white elementary and junior high schools were channeled into predominantly white high schools, even though many of these high schools were overcrowded. White students, Judge Garrity found, generally were given certain kinds of options which allowed them to escape from predominantly black schools if they were assigned to those schools while black students generally were without those options. The effects of the Committee's policies, according to Judge Garrity's opinion, often were swift and severe. For example, in the 1967-68 school year, black students at English High School accounted for 18.5% of the student body. In the 1968-69 school year, shortly after certain feeder patterns had been changed by the School Committee, the entering class at English High School was 56.5% black and the following year the entering class was 76% black and 18.5% other minority. As a result, the Judge found, by the 1972-73 school year, the student body at English High School as a whole was 81% black.

The fourth area considered by Judge Garrity's opinion was the School Committee's management of a policy of open enrollment and controlled transfer between schools. While the general assignment of students to elementary and middle schools was governed by the district in which the students lived and while the general assignment of students to high schools was determined by feeder patterns, beginning in 1961, the School Committee had adopted a so-called "open enrollment" policy. That policy permitted students, on an individual basis, to go to a school other than the

one called for by the district in which they lived or by the feeder pattern applicable to them. Initially thought of by the School Committee as a device to aid racial balance because it enabled black students to attend predominantly white schools, Judge Garrity found that, in practice, the "open enrollment" policy soon became an aid to segregation because it was used primarily by white students to transfer from schools which were predominantly black to those which were predominantly white. Moreover, he found that various state agencies had attempted to get the School Committee to limit the open enrollment policy so that it would not have a segregating effect. In August of 1971, under agency prodding, the Committee appeared to limit the open enrollment policy by substituting for it a so-called "controlled transfer" policy. In essence, the new policy provided that transfers between schools would be allowed if, but only if, the transfer tended to decrease racial imbalance in the school into which the student transferred. In fact, however, the Committee worked into the controlled transfer policy so many exceptions that it became little different from the old open enrollment policy. After reviewing the operation of those policies, Judge Garrity concluded that "the open enrollment and controlled transfer policies were managed under the direction of the [School Committee] with a singular intention to discriminate on the basis of race. . . . The result of the [School Committee's] maneuvering was to encourage and facilitate the abandonment by white students and parents of schools which appeared to be in the process of becoming predominantly non-white."

The fifth area considered by Judge Garrity pertained to assignment of faculty and staff to various schools in the city. Teachers as well as students, Judge Garrity concluded, were segregated by race in the Boston public schools. Indeed, 40% of all of the schools in Boston never in their history had had a single black teacher. About 17% had had only one black teacher in any year since the 1967-68 school year. In the 1971-72 school year, 74% of the black classroom teachers in the Boston school system were teaching at predominantly black schools. Administrators, too, the judge found, were segregated by race. In the 1972-73 school year, there were five black principals in the Boston School system and all five of those were assigned to predominantly black schools. During the same year, there were 14 black assistant principals and assistant headmasters and all of them were assigned to predominantly black schools as well. His opinion also stated that predominantly black schools had higher percentages of provisional teachers than did predominantly white schools. Provisional teachers, Judge Garrity said, were not simply teachers who were new to the system but also teachers who lacked the basic qualifications necessary to enable them to be employed as regular teachers. Finally, Judge Garrity found that the School Committee discriminated intentionally in its hiring and promotion of black teachers and administrators in the system. Indeed, in the 1972-73 school year there were 4,243 permanent teachers in the entire Boston school system of whom only 231, or 5.4% were black. Of the 509 senior administrative positions in the school year 1970-71, only 18, or 3.5%, were occupied by blacks.

The final specific area considered by Judge Garrity concerned the School Committee's practices with respect to the examination and vocational schools and programs. He found that the three examination schools, Boston Latin, Girls Latin (now called Boston Latin Academy) and Boston Technical, were predominantly white during each of the school years 1967 through 1972. He also found that two trade schools, Boston Trade and Girls Trade, were predominantly black during the same period. Judge Garrity's opinion did not specifically state that the evidence received at trial showed that the segregated results just described flowed from intentional acts on the part of the School Committee. Given the other evidence of intentional segregation presented in the case, however, he stated that decisions of the Supreme Court of the United States required him to presume that those segregated results were the consequences of specific intentional practices on the part of the School Committee unless the School Committee proved otherwise. He concluded that the School Committee had failed to meet its burden of proof in that regard.

After reviewing the six areas just discussed, Judge Garrity's opinion turned to the primary defenses or explanations for the segregated school system that the School Committee had offered. The first of those was that the segregation found to exist in the schools was the result of neighborhood residential patterns over which the School Committee had no control. Secondly, the School Committee said that the segregation the Judge had found also resulted from the Committee's "neighborhood school" policy which, in the School Committee's view, was permitted by the Constitution even though it had the effect of creating segregated schools.

Judge Garrity rejected both arguments. Residential segregation, he said, did not explain the findings he had made with respect to the School Committee's discriminatory intent concerning assignment of faculty and staff to various schools, open enrollment and controlled transfer of students or feeder patterns. Moreover, he concluded that the School Committee's actions over the past 10 years with respect to segregation in the schools may have helped to create the segregated residential patterns which the School Committee now sought to use in an attempt to justify the segregation found to exist in the schools. Even beyond that, Judge Garrity found that the School Committee "with awareness of the racial segregation of Boston's neighborhoods, had deliberately incorporated that segregation into the school system" both in its practices with respect to construction of schools and in its practices with respect to utilization of existing facilities.

Judge Garrity then concluded that the so-called "neighborhood school policy" "was so selective as hardly to have amounted to a policy at all." Specifically, his opinion stated that a number of conditions tended to eliminate the effectivenesss of any neighborhood school policy. 30,000 students, he found, used public transportation to get to school in 1973. Some 4th graders walked up to 3/4 of a mile to get to school. High school students were assigned to schools on a citywide basis. Busing, multi-school districts, magnet schools and feeder patterns all were educational tools employed by

the School Committee, Judge Garrity found, and all were inconsistent with a desire for strictly neighborhood schools. Moreover, many so-called "neighborhoood" schools, according to the opinion, were farther away from the homes of students attending them than were other schools. Attendance at those distant schools was required nonetheless, he found, because of the segregative intent of the School Committee.

Based on all of the findings of fact discussed above, Judge Garrity concluded that the School Committee of the City of Boston intentionally and purposely had created and maintained a segregated school system in Boston over a number of years. Obviously, his conclusions were not based on any single phase of the Committee's activity or any single action the Committee had taken. Instead, he carefully reviewed the course of the Committee's conduct over an extensive period before his decision was issued. On the basis of his findings of fact, when those findings are considered in light of earlier decisions of the United States Supreme Court, there clearly was no other conclusion he could have reached. Accordingly, it became necessary to devise a remedy to eliminate the effects of what he found to be the School Committee's illegal action.

## B *The Remedy*

As stated, Judge Garrity's initial findings were issued on June 21, 1974. School, which was in recess for the summer at the time, was to begin again in Boston the following September. Because of the very short time involved, it was obvious that any remedy ordered by the Court had to take into account the amount of time remaining during the summer for both planning and implementation. Accordingly, as a temporary measure, Judge Garrity ordered the School Committee to comply with the Racial Imbalance Act plan which the Committee earlier had been ordered by the Supreme Judicial Court of Massachusetts to implement on or before opening day of school in September, 1974. In addition, Judge Garrity ordered the School Committee not to begin construction of any new school or expansion of an existing school or the use of any new portable classrooms, not to grant transfers of white teachers from schools with majority black enrollments or black teachers from schools with majority white enrollments and not to grant transfers of students under existing exceptions to the so-called "controlled transfer" policy discussed above until a final plan had been devised.

The initial or Phase I desegregation plan ordered by Judge Garrity — the plan which was put into effect during the 1974-75 school year — thus was not a plan which Judge Garrity himself created. Instead, it was a plan which the Supreme Judicial Court of Massachusetts previously had ordered the School Committee to follow. As Judge Garrity noted in his opinion, in 1965 a so-called "Racial Imbalance Act" had been passed by the Legislature of the Commonwealth of Massachusetts. That law required the school committees in Massachusetts cities and towns to file with the state Board of Education each year racial statistics concerning students in their school

systems. If, on the basis of those statistics, the state Board determined that "racial imbalance" existed in any school in the school system, the law required that it notify the school committee. After notification, the local school committee was then required to file with the state Board of Education a plan designed to eliminate that racial imbalance.

Soon after the Racial Imbalance Act was passed in 1965, the Boston School Committee filed a law suit in state court seeking to have the Act held unconstitutional. It lost. The state Supreme Judicial Court ruled that the Act was a fully constitutional law and the Supreme Court of the United States later, in effect, agreed. Then, on June 25, 1973, the state Board of Education, after various hearings and law suits, issued an order requiring elimination of the racial imbalance it had found to exist in various Boston public schools. The School Committee started another law suit seeking to invalidate the state Board's order. That law suit, too, the Committee lost. On November 14, 1973, the Supreme Judicial Court ordered the Committee to file with the state Board of Education a detailed plan for implementation of the Board's order. On December 11, 1973, the Committee filed a proposed plan with the Board. On December 26, 1973, the Board disapproved a portion of the Committee's proposed plan and, in addition, ordered that specific steps be taken to insure implementation of the Board's earlier order by September, 1974. On January 16, 1974, the Massachusetts Supreme Judicial Court ordered the School Committee to comply with the Board's order by January 21, 1974. On April 17, 1974, the Supreme Judicial Court ordered the School Committee to complete staff assignments in compliance with the state Board's plan by May 1, 1974 and also ordered that safety and transportation plans for students be completed, adopted by the Committee and submitted to the state Board by May 15, 1974.

The plan which Judge Garrity ordered the School Committee to use as a temporary plan on June 21, 1974, thus was a plan wholly created by Massachusetts state agencies, a plan which the School Committee had been offered a role in creating, and a plan which the Committee not only had been aware of for some time but also had been under orders to comply with for some time. That plan never was considered by Judge Garrity or the School Committee or the plaintiffs to be a satisfactory permanent remedy for the violations Judge Garrity had found but it was considered to be a workable temporary solution. Accordingly, that plan was put into effect during the 1974-75 school year.

After the 1974-75 school year began, work started on creation of the permanent or Phase II plan for remedying the violations Judge Garrity had found on June 21. On October 31, 1974, after several hearings on the general terms and contents of a new plan, Judge Garrity entered an order requiring the School Committee to present a plan by December 16, 1974. The order required the plan to be approved by vote of the School Committee prior to filing, and the general contents were described in the order. The overall guiding principle was to be the following:

Taking into account the safety of students and the practicalities of the situation, the student desegregation plan shall provide for the greatest possible degree of actual desegregation of all grades in all schools in all parts of the city.

A plan was developed by the Boston School Department at the School Committee's direction, but the School Committee, by a vote 3-2, refused to approve it primarily because it contained provisions for mandatory busing. As a result, the plaintiffs asked that the three School Committee members who had voted against the plan be held in contempt of court for violating the court's October 31 order. At hearings on that request, it became clear that those members would obey future orders of the court, but would take no affirmative action inconsistent with their conscientious opposition to any form of mandatory busing of students. All three members adhered to this view, even though they understood that there might be no desegregation without mandatory busing. In the words of Chairman Kerrigan:

It is unfortunate that is the way our society exists, the way the housing patterns are laid out, but the only way you are going to desegregate city schools is through forced busing.

In the end, the court did not impose sanctions on the three School Committee members for contempt, but allowed them to authorize a new plan, which they did. Their new plan, with no provisions for mandatory busing, was submitted to the court on January 27, 1975. In addition, around that time, the plaintiffs filed an alternative plan, as did the Home and School Association, with the permission of the court. Criticism of and comment on the various plans were filed by numerous community groups and individuals, as well as by the plaintiffs and defendants.

As a result of the contempt hearings and a review of the contents of the School Committee's January 27 plan, the court concluded that the Committee had not fulfilled its responsibility and obligation to remedy the effects of segregation by coming up with an adequate desegregation plan. The court's duty was to insure actual desegregation of Boston schools in order to protect the constitutional rights of the plaintiffs; the court and Chairman Kerrigan agreed that this could not be done without mandatory busing; a School Committee majority had committed itself in court and on paper to taking no affirmative steps in the desegregation process which would include mandatory busing; and the court thus had no choice except to assume a more active role in the formulation of a desegregation remedy. As Judge Garrity said in the opinion he issued on June 5, 1975 to explain the remedial order issued on May 10, 1975:

Education is a matter entrusted initially to elected local authorities and appointed state authorities. Even after unlawful segregation has been found, responsibility falls initially upon the local school authorities to remedy the effects of this segregation. . . . Only the default of the School Committee in this case has obliged the court to employ the help of the appointed experts and masters and to draw an adequate plan.

The masters mentioned by Judge Garrity often are used to aid the court in sorting out complex factual situations and legal issues in all different

types of legal proceedings. Masters are appointed by the court, and a judge may refer either all or some portion of a case to them for consideration. Masters are paid for their services by one or more of the persons involved in the law suit referred to them as the court directs. Masters have many of the same powers as a judge, for example, to compel attendance of witnesses and to decide whether or not evidence is admissible, but their findings and conclusions are never final. The master usually submits a report to the judge, who will ordinarily give considerable weight to the facts reported by the master, since the master (and not the judge) has heard the witnesses and reviewed the other evidence. But the inferences and conclusions to be drawn from those facts and the ultimate disposition of the case are entirely up to the judge.

In this case, the various plans, together with supporting and explanatory memoranda as well as criticism, were submitted to a panel of masters and experts for consideration. The judge considered that submission advisable because of the complexity and multiplicity of the proposed plans and responses to them. The masters reviewed all proposed plans and held hearings in which they heard testimony relative to them. They then submitted a report to the court on March 31, 1975, in which they recommended a plan drawn up by them which incorporated some elements of the plans they had reviewed and some proposals of their own. The court heard objections to and criticism of the masters' plan, and finally adopted a plan somewhat modifying the masters' plan. This was the Phase II plan which was announced by Judge Garrity on May 10, 1975, for implementation he concluded in September, 1975.

It is important to remember that the court issued its plan on May 10, 1975 because that of the School Committee had failed to fulfill the responsibility which was originally its own — the responsibility to formulate a constitutionally adequate plan for desegregation of public schools in Boston in September, 1975. The January 27 plan filed by the School Committee was considered to be constitutionally inadequate because it relied almost entirely upon parental choice to accomplish desegregation. Although Judge Garrity recognized the importance of parental choice among options within the school system, he found that experience in other communities and past experience in Boston itself bore out the inadequacy of primary reliance upon parental choice to realistically accomplish desegregation. The Judge's May 10, 1975 plan is intended, however, to provide the maximum degree of parental choice which is realistically consistent with a plan designed to achieve maximum desegregation. Under the plan, though, the overall goal remains, as it is required by the Supreme Court of the United States to remain, desegregation and desegregation now.

## 1 GENERAL PRINCIPLES

While achievement of prompt desegregation was the overall goal of the Phase II plan issued by Judge Garrity on May 10, 1975, necessarily, that plan focused on certain subsidiary goals which were designed to aid in achieve-

ment of the ultimate one. Principally, the subsidiary goals were four in number: (1) elimination of racially identifiable schools to the greatest extent practically possible; (2) elimination of discriminatory practices in the administration and operation of the public schools, coupled with the removal of effects of past discriminatory practices; (3) equalization of educational opportunity and services at schools throughout the city; and (4) minimization of mandatory busing.

Under the plan, full desegregation in the City of Boston school system does not require that each school be attended by the specific percentage of each ethnic group in the system as a whole or that all schools have the same exact percentage. It does require, however, that conditions and assignment patterns which leave some schools so disproportionate in their ethnic make-up as to make them racially identifiable must be eliminated. The racial composition of the system as a whole is a reference point and not a formula which must be applied to each school in the system. Of course, under the plan, the School Committee is prohibited from taking any action which affirmatively discriminates on the basis of race. No minority students may be excluded, either directly or indirectly from any public school, from any public school program or from any public school activity on the basis of race.

Since the primary goal of the plan announced on May 10, and indeed of any plan designed to eliminate school segregation, is equal educational opportunity, redistribution of students is merely the first step. The plan must also address itself to the specific problems of transition and adjustment which accompany desegregation. One such problem is effective implementation of the plan through responsible administration. The plan issued by Judge Garrity on May 10 provides for an administrative network of district superintendents, councils of principals within each district, and a principal or headmaster at each school. That administrative network, with the aid of colleges and universities, is designed to insure equalization of services which have been unequal in the past as well as to insure non-discriminatory curricula and programs of instruction. The May 10 plan relies on school personnel to insure non-discriminatory instruction and services, and their efforts are to be monitored by citizen groups established under the plan. Desegregation is encouraged through voluntary choice by the inclusion of magnet programs — specialized and distinctive programs at different schools which will be strengthened through the expert aid of colleges and universities and the business and cultural communities.

Taking the City of Boston as it is today, however, virtually everyone involved in the law suit generaly agreed that redistribution of students, full utilization of special programs and equalization of administrative services throughout the school system simply could not be achieved without busing. Busing, it is important to understand, is not an end in itself but is only a tool which must be used when needed to achieve prompt desegregation. The opinion issued by Judge Garrity on May 10, 1975, focused at some length on the question of busing and stated:

[T]he court does not favor forced busing. Nor, for that matter, have the plaintiffs advocated forced busing. What the plaintiffs seek, and what the law of the land as interpreted by the Supreme Court of the United States commands, is that plaintiffs' right to attend desegregated schools be realized. This right cannot lawfully be limited to walk-in schools. . . . If there were a way to accomplish desegregation in Boston without transporting students to schools beyond walking distance, the court and all parties would much prefer that alternative. In the past years, feasible proposals that would have substantially lessened segregation through redistricting without busing were made by various public agencies and uniformly rejected or evaded by the Boston School Committee. The harvest of these years of obstruction and of maintenance of segregated schools is that today, given the locations and capacities of its school buildings and the racial concentrations of its population, Boston is simply not a city that can provide its black schoolchildren with a desegregated education absent considerable mandatory transportation.

Nevertheless, the plan issued by Judge Garrity on May 10 reflects a concern that busing be minimized. For example, because of the location of East Boston and the problems involved in transporting students there, many students in that area will remain in racially identifiable "white" schools. In addition, the boundaries of the school districts drawn under the plan have been laid out so as to minimize the number of students bused and the distances traveled. A flexible approach to the racial composition of schools within each district also serves to minimize busing.

With the foregoing general principles in mind, the court's plan provides for the division of the Boston public school system into nine districts — eight of which are geographically delineated and a ninth which is citywide. The purpose of this arrangement is to maximize voluntary choice of school programs and curricula within a framework designed to achieve full desegregation. The most important features of the plan can be divided into five categories: (1) the citywide school district; (2) community school districts; (3) administration and supervision; (4) school closings; and (5) student assignment policies. Each of these categories merits brief discussion.

### 2 THE CITYWIDE SCHOOL DISTRICT

The citywide school district contains schools at each grade level throughout the city. Each school in the citywide district has distinctive programs or features designed to attract students of all races who have common interests, including the magnet programs described briefly above and more extensively in a booklet distributed by the Boston School Department in late May of 1975. To enhance these magnet programs, each school in the citywide district has been paired with a college or university, and high schools will also have the aid and cooperation of various businesses. To the greatest extent possible, attendance at these schools will be the student's choice, but each school's student body will be desegregated and will closely reflect the ethnic composition of the student population of the city as a whole. Thus if insufficient numbers of students apply to citywide schools, some students will be assigned to them. Citywide schools include the three examination schools with special entrance requirements as well as other

schools which have achieved distinction in offering unique programs at all levels. Under the plan, all citywide schools except the examination schools and the English Language Center (for the teaching of English as a second language) will reserve twenty-five percent of their seats for students residing in the district in which the school is located.

Of particular concern to the court and the parties was desegregation of the examination schools — Boston Latin School, Boston Latin Academy and Boston Technical High — since students in those schools follow programs which are different from the general high school curriculum and which build upon themselves year after year. The solution contained in the plan is to desegregate only the entering grades in those schools in 1975-76, with at least thirty-five percent of each entering class to be composed of black and hispanic students. The court has left to the school department for that school year the task of setting appropriate admission criteria which will obtain the desegregated results. Programs to prepare students to apply to the examination schools, and programs within the schools themselves, are to be conducted on a desegregated basis. The portion of the court's plan dealing with the examination schools is not final. The court has specifically left open the question whether the seventh and eighth grades should be eliminated at the examination schools, as well as whether any other modifications might be necessary to insure their eventual complete desegregation.

### 3 COMMUNITY SCHOOL DISTRICTS

Under the plan, the eight Community School Districts represent communities of schools designed to serve a defined geographical body of students from kindergarten through grade thirteen. The district concept recognizes the desire of many parents for their children to attend school within the defined geographical area in which they reside. The manner of drawing the district boundaries limits travel distance to an average of 2.5 miles each way within the district, while still accomplishing a rough equality of racial composition among all districts with the exception of East Boston. The schools at all levels are designed to provide a variety of educational opportunities which will be responsive to the needs of the residents of each district, and high schools will be paired with colleges and universities in a manner similar to those in the citywide district. Community district schools will be equal in educational offerings to citywide schools, although citywide schools will provide some specialized programs not offered within the district. Bilingual instruction and facilities for special needs students will be provided wherever necessary in both district and citywide schools.

### 4 ADMINISTRATION AND SUPERVISION

Under the plan, each district, including the citywide district, will have a Community Superintendent, and each school will have a headmaster or principal, organized for overall administration into a Council of Principals chaired by the Community Superintendent. The Racial-Ethnic Parent

Councils (RPC) and Racial-Ethnic Student Councils (RSC) in each school, as provided for in the Phase I plan, will continue, and schools involved in desegregation for the first time in 1975 will set up such councils. The RPC and the RSC are the primary mechanisms through which concerned parents and students may address racial problems in their schools. The Citywide Parents' Advisory Council (CPAC), composed entirely of parents, will also continue, expanded to include all districts under the new plan, and will continue to provide support and liaison between and among local RPCs.

A new feature of the court's plan is the formation of Community District Advisory Councils in each district. These councils will be composed of ten parent representatives elected at a meeting of all the districts' Racial-Ethnic Parent Councils, two student representatives elected by the Racial-Ethnic Student Councils of all the districts' schools, and the balance of the members (the total membership not to exceed twenty) nominated by the Citywide Coordinating Council (CCC) and appointed by the Court. The CCC itself is made up of approximately forty members appointed by the court. The members are drawn from various segments of the community, including two members from CPAC and two student members selected by the RSCs. These councils are to monitor implementation of the plan on various levels and to act as advisory groups to school administrative personnel. The following chart indicates the organizational structure of the councils just described: (See chart to right)

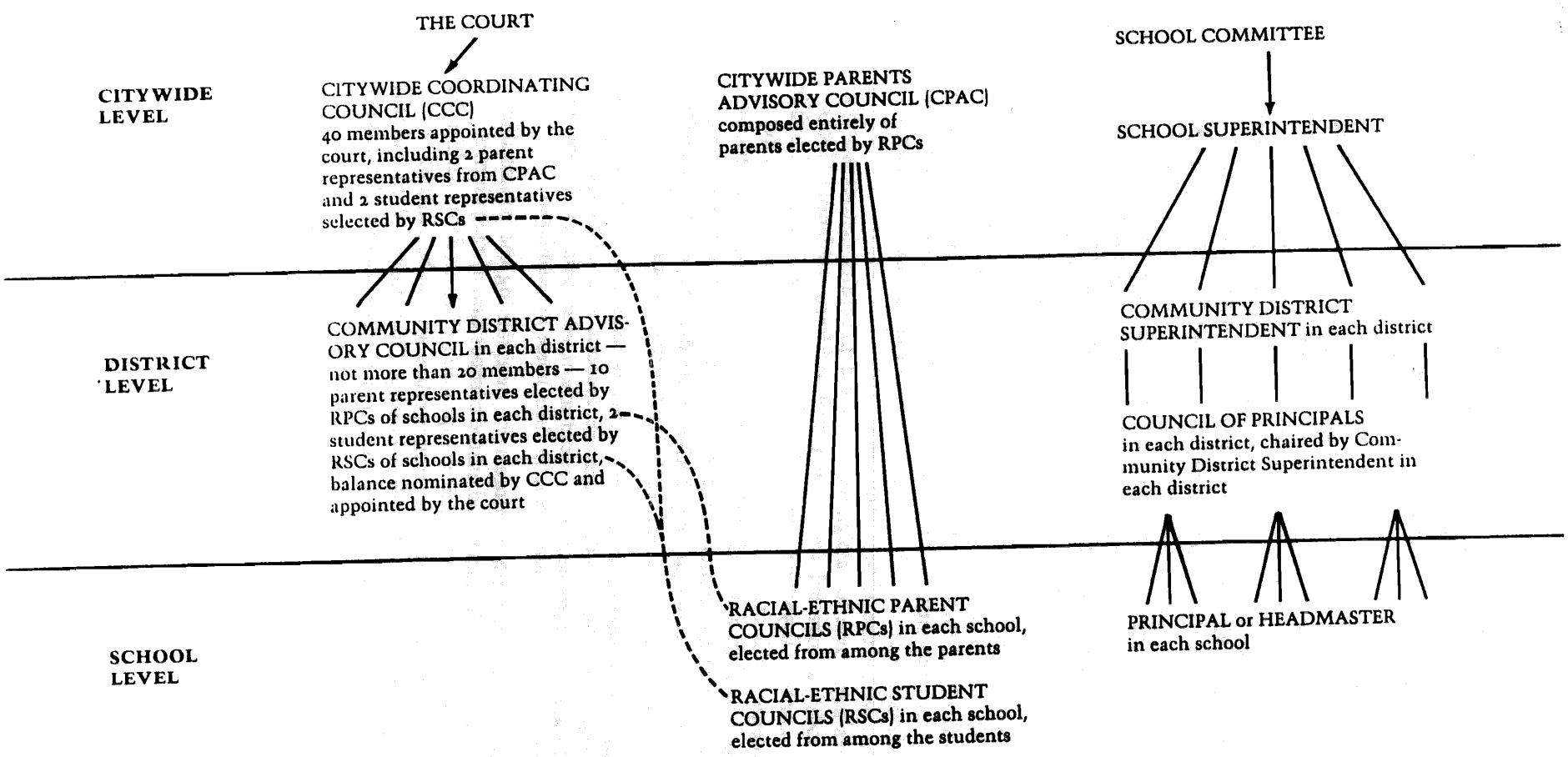
The plan thus provides for an interlocking network of input and participation between students, parents, school personnel, community and business groups, and the court, designed to provide accurate information back and forth between all interested parties and to identify and resolve all types of problems which will be associated with the implementation of the plan.

## 5 SCHOOL CLOSINGS

As a general statement, Judge Garrity's opinion of June 5, 1975, said:

> Closing schools is always a difficult decision, especially since some schools whose location and physical condition compel their closing have promising educational programs. Attempts have been made to close schools that are in poor condition or unsafe in both black, other minority and white areas to avoid burdening any one group unfairly.

The plan does order the closing of several schools, most at elementary level. Many of those schools have long been considered unfit for school use by various agencies and city and state officials. Since desegregation is accomplished most efficiently through the consolidation of student bodies, Judge Garrity believed that closing schools and using newer and better facilities and resources also would aid desegregation. In addition, schools to be closed were selected from areas with excess seating capacity where closing would result in more efficient assignments to other schools and the


THE COURT
CITYWIDE LEVEL
CITYWIDE COORDINATING COUNCIL (CCC) 40 members appointed by the court, including 2 parent representatives from CPAC and 2 student representatives selected by RSCs
CITYWIDE PARENTS ADVISORY COUNCIL (CPAC) composed entirely of parents elected by RPCs
SCHOOL COMMITTEE
SCHOOL SUPERINTENDENT
DISTRICT LEVEL
COMMUNITY DISTRICT ADVISORY COUNCIL in each district — not more than 20 members — 10 parent representatives elected by RPCs of schools in each district, 2 student representatives elected by RSCs of schools in each district, balance nominated by CCC and appointed by the court
COMMUNITY DISTRICT SUPERINTENDENT in each district
COUNCIL OF PRINCIPALS in each district, chaired by Community District Superintendent in each district
SCHOOL LEVEL
RACIAL-ETHNIC PARENT COUNCILS (RPCs) in each school, elected from among the parents
RACIAL-ETHNIC STUDENT COUNCILS (RSCs) in each school, elected from among the students
PRINCIPAL or HEADMASTER in each school

minimization of overall busing. Based on the information received by the experts and masters, seating capacities have been set in the plan for those schools which remain open, and no condition of overcrowding is anticipated, nor will any overcrowding be permitted. If overcrowding should develop, schools previously ordered closed may be reopened.

6 STUDENT ASSIGNMENTS

The student assignment process is a complex one designed to eliminate racially identifiable schools, to guard against disproportionate racial isolation in any school, either black, white, or other minority and to permit as much parental choice as possible consistent with overall desegregation. An informational booklet along with an application form was sent to all parents of children in the school system in late May of 1975. Under the plan, applications for various schools were required to indicate an order of preference for placement in a school in the district of residence without naming a specific school, and/or for placement in one or more specific citywide schools. Although the plan said that those preferences would be honored to the greatest extent possible, citywide preferences were not guaranteed at any level, nor was assignment to a community district school guaranteed at the high school level. One important aspect of the plan is that no elementary or middle school student was to be forced to attend a school outside of his own residential district unless attendance outside the district was the student's or parent's own preference. The plan provided the school department with the power to assign the applicant to a specific school, either within the district or citywide.

The plan's basic unit for assignment to the community district schools is the "geocode", a bounded area of from five to fifteen residential blocks which may contain anywhere from half a dozen to several hundred public school students. Each community district school has a set of geocodes assigned to it in such a way that the school's student population reflects generally the racial and ethnic composition of the district students as a whole and in such a way that neighborhoods are divided as little as possible and transportation is minimized. In Judge Garrity's words,

> [g]eocode assignments offer the advantage of fostering contact of students in school with their neighbors at home within a geocode. Students who are transported to school will travel with their neighbors, attend school with them, and be able to maintain ties developed in school while in their home neighborhoods.

The court's plan set forth a formula for determining the permissible ranges of variation of the racial and ethnic composition of each district school based on the racial and ethnic composition of all students within that district as a whole, but no racial or ethnic groups were to be assigned to a particular school in groups of less than twenty. Thus there will undoubtedly be some schools where there will be no bilingual students, special needs students, or "other minority" students in attendance. An exception to the general assignment pattern contained in the plan is that students entering their

senior year of high school and students wishing to continue participation in certain vocational programs may request to be reassigned to the school they attended in the previous year, without regard to its location or their residence.

Assignment and admission of students to schools in the citywide district is not by geocode, but on an individual basis, with student preferences granted to the greatest extent possible consistent with achieving desegregation. In general, the racial composition of citywide schools is permitted to deviate less from overall enrollment percentages than is the racial composition of the district schools. The guidelines with respect to composition of the citywide schools are intended to prevent racial isolation by providing close adherence to the system-wide ethnic composition. In the citywide high schools, as in the district high schools, students entering their year of graduation may, if they wish, attend the school they attended the previous year. The following priorities for entrance to citywide schools have been set by the plan in the event that any citywide school is oversubscribed: (1) applicants residing in the district where the citywide school is located (up to twenty-five percent of the school capacity); (2)applicants who attended the school in the preceding year; (3) high school students whose district school is oversubscribed; and (4) all other applicants. If citywide high schools are undersubscribed, leaving district high schools overcrowded, the district high school will be filled first by random selection from among racial and ethnic groups in the district. The remaining students will be placed in citywide high schools on the basis of stated preference or geographical proximity and in keeping with the citywide student racial and ethnic composition guidelines.

### 7 SUBURBS AND CONTINUING JURISDICTION

Two final words about the content of the plan are appropriate. First, it does not involve Boston suburbs in desegregation of the Boston public schools. It does not do so because there was no showing at the trial that suburban school committees had taken any action which was designed to promote racial segregation within the Boston school system. As you will recall from the discussion in Chapter II of this pamphlet, no federal court has the power to order anyone to do anything unless it finds that a rule contained in the Constitution, in a law passed by Congress or in some other appropriate place has been broken by the person or group to whom it issues the order. Since there was no showing that the suburban school committees had violated applicable rules, the court thus had no power to include the suburbs in the remedy it ordered to cure the effects of intentional segregation within the City of Boston itself.

Second, although Judge Garrity's Phase II order of May 10, 1975 promulgated the "final" plan for desegregation of the Boston public schools, he retains the power or jurisdiction to oversee implementation of the plan to insure that it is carried out and to deal with problems encountered in doing so. This kind of retained and continuing jurisdiction is normal when-

ever a federal court issues a complex order which necessarily must be carried out over an extended period of time. It does not exist only in desegregation cases and, indeed, is frequently encountered in cases dealing with complex commercial transactions. In any event, Judge Garrity's retention of jurisdiction means that he may continue to hold hearings and issue appropriate orders to deal with various aspects of the Phase II plan as implementation continues over the next several years.

### C *The Appeals*

As the Court and the parties were in the process of formulating the final remedy just described, the School Committee also was in the process of appealing Judge Garrity's decision of June 21, 1974. That decision, of course, was the one in which Judge Garrity first found that the School Committee had intentionally and purposely maintained a segregated system of education in the schools of the City of Boston.

The appeal was filed in the United States Court of Appeals for the First Circuit which, like the United States District Court for the District of Massachusetts, is located in the Post Office Building in downtown Boston. The Court of Appeals for the First Circuit hears all appeals from decisions of United States District Courts in Maine, New Hampshire, Massachusetts, Rhode Island and Puerto Rico. In deciding an appeal, however, the Court of Appeals for the First Circuit, like all federal courts of appeals, has a limited role. That Court cannot change, except under the most unusual circumstances, any findings of fact by the District Court on the basis of evidence presented at trial. The Court of Appeals hears no witnesses, receives no exhibits other than those which were introduced at the trial in the District Court and never uses a jury. Instead, it simply receives written documents called briefs from the lawyers for all groups involved in the appeal, listens to oral presentations or arguments from the attorneys for all groups and then, accepting as true the facts found by the District Court, determines whether the District Court properly applied the governing law to those facts. Unlike the case in the District Court where only one judge ordinarily sits during a trial and writes any opinion which is necessary, three judges decide each case presented to the Court of Appeals. The vote of two of those three judges is necessary for the Court to reach a decision.

In the Court of Appeals, the primary argument of the School Committee was not that the public schools in Boston were not segregated, nor was it that Judge Garrity had made mistakes in his findings concerning what the School Committee had or had not done concerning segregation in Boston. While it did argue that some of Judge Garrity's factual findings were inaccurate, the dominant thrust of the School Committee's argument was that, even if one accepted all of Judge Garrity's findings of fact as true, the most that could be said of the School Committee was that it failed to take some affirmative action to eliminate segregation in the school system caused

by residential housing patterns or by its adherence to a policy of providing neighborhood schools. In other words, the School Committee argued that Judge Garrity's findings would not support a conclusion that it had intentionally and purposely created segregated education in Boston and that, at most, those findings would support a conclusion that the School Committee had not eliminated segregation which had created itself. That failure, the Committee argued, was not a violation of the Equal Protection Clause of the Constitution.

Unanimously, the Court of Appeals rejected the School Committe's arguments. First of all, the Court of Appeals said, applicable decisions of the Supreme Court of the United States made clear that the failure to take some affirmative action to remedy the effects of segregation brought about by residential housing patterns or other factors could be evidence of an intent to maintain a segregated system of education. Particularly was this so, in the Court's view, since, in the context of management of the public schools of Boston, the difference between action and inaction often was a difficult one to see. As an analogy, if someone sees a burning cigarette thrown by another into a waste basket full of paper and simply walks away, it cannot be said realistically that his "inaction" has nothing whatsoever to do with a subsequent fire which develops and consumes the house in which the waste basket is located.

Beyond rejecting the School Committee's arguments dealing with "mere inaction", however, the Court of Appeals also agreed with Judge Garrity that, in its use of classroom facilities, in its use of feeder patterns, in its use of controlled and open transfer policies and in its hiring and placement of teachers and administrators, the School Committee went beyond "mere inaction" and intentionally took steps designed to segregate the Boston school system by race. Accordingly, it "affirmed" or upheld Judge Garrity's opinion and order of June 21, 1974, concluding that, in light of the "ample factual record" compiled at the trial and the precedents of the Supreme Court, it did not see how Judge Garrity could have reached any other conclusions than those he did.

The next step in the appellate process was an appeal by the School Committee to the Supreme Court of the United States. Once the Supreme Court decides to hear an appeal, it operates in much the same way as the Federal Courts of Appeals. Thus, the Supreme Court listens to no witnesses, receives no exhibits other than those which were presented to the District Court and never uses a jury. It receives briefs from the lawyers for the parties and hears oral argument from them. Nine judges decide each case argued in the Supreme Court and a simple majority of those judges is sufficient to decide a case in one way or the other.

Appeals to the Supreme Court of the United States, however, are different from appeals to the Federal Courts of Appeals in that, unlike the Courts of Appeals, the Supreme Court is not required to consider the merits of every appeal presented to it. Indeed, approximately 3,000 cases are appealed to the Supreme Court of the United States each year and it actually

hears and decides only about 200 of those. In order for a case to be heard on the merits by the Supreme Court, at least 4 judges must vote in favor of having it heard. Generally, the Supreme Court will only decide cases which either present some new issue which it has never decided before and which is thought by the Court to be of significance for the entire country, or on which various Federal Courts of Appeals have reached opposite conclusions. If it decides not to hear an appeal on the merits, the Supreme Court simply issues a brief order stating that the appeal will not be considered and only in the most extraordinary circumstances does it list any reasons why consideration of the appeal has been denied.

On May 12, 1975, the Supreme Court issued a brief order of the type just described stating that it would not entertain the School Committee's appeal from the decision of the Court of Appeals for the First Circuit. One can only speculate, of course, about the reasons why the Court decided not to hear the appeal, but it is clear that Judge Garrity's opinion of June 21, 1974 followed very closely the Supreme Court's opinion issued in the Spring of 1973 concerning the Denver public schools. Accordingly, the Court may have felt that Judge Garrity's opinion of June 21 contained no new issue of substance which required full examination.

In any event, whatever the Supreme Court's reasons for declining to listen to the appeal in detail, its order of May 12, 1975 ended all possible appeals from the June 21 order. While there presently is pending in the Court of Appeals for the First Circuit an appeal from the Phase II remedial order of May 10, 1975, Judge Garrity's June 21 order is a final one, cannot be changed through any further appellate processes and is absolutely binding on all citizens.

## V *Conclusion*

Even when the power of the Federal Courts is explained, even when the source of the law applied by Judge Garrity both on June 21, 1974 and on May 10, 1975 is examined, and even when his decisions as well as the decision to date of the Court of Appeals for the First Circuit are reviewed, one dominant question tends to linger. Given the fact that we have in the United States a democratic form of government and given the fact that, in a democracy, the majority rules, how is it possible for a federal court to issue an order like Judge Garrity's Phase II order of May 10, 1975 when that order, if put to a vote, might well be defeated at the polls by a majority of those voting? The answer is a simple one. The Constitution does not set up an "absolute" democracy in which the majority rules absolutely no matter what the effect of that rule on various minority members of

the society. Instead, it sets up a democracy which, though primarily operating on the principle of a majority rule, nevertheless guarantees to all citizens certain basic and absolute rights which no majority can take away.

It is not surprising that the framers of the Constitution, many of whom were themselves members of political and religious minority groups, were convinced that the democracy they created had to be kept in check by limitations on the absolute power of a majority to work its will. Nor is it surprising that the basic constitutional limitations on the power of the majority — limitations primarily contained in various amendments to the Constitution including the 14th Amendment — have survived to this day. All of us, at one time or another, are, or have been in some kind of a minority, be it religious, political, social or ideological. All of us, therefore, at one time or another, benefit from limitations imposed by the Constitution on the power of a majority to act in a manner wholly unrestrained by anything save its own ideas of the common good.

The principle that all minorities have certain basic rights which a majority has no power to deny or reduce is the foundation on which a just society is built. Basic fidelity to that principle often requires difficult and unpleasant decisions. Largely voluntary adherence by all to that principle, however, is a fundamental requirement if our society is to remain dedicated to the principle that it provides liberty and justice for all.

Judge Garrity's opinion of June 21, 1974 found that a minority in Boston composed primarily of citizens whose skin is black had been denied a basic right guaranteed by the 14th Amendment to the Constitution of the United States, namely, the right to equal educational opportunity. His Phase II remedy of May 10, 1975 is intended by him to prevent continuation of that denial and to attempt to restore those citizens to the position in which they would have been had that right not been denied in the first place. The remedy may well cause some hardship for citizens of Boston of all racial and ethnic backgrounds who live in all parts of the City. Some citizens may agree with all of it, some with none of it and some with part of it. Some may see it as a cause for hope and some as a cause for despair. But for all citizens of Boston, words quoted by the Court of Appeals for the First Circuit have today a special meaning.

> Deep emotions have . . . been stirred. They will not be calmed by letting violence loose . . . submitting to it under whatever guise employed. Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms.

Judge Garrity's decision and order of June 21, 1974 are the law. His Phase II remedy of May 10, 1975 is the law and will continue to be the law unless reversed or modified during some forthcoming appeal. That law will be enforced, if necessary, by appropriate law enforcement agencies. Nevertheless, only the concerted action of citizens of good-will wherever residing in the City of Boston can make that law fully effective with a minimum of disruption, inconvenience or fear of physical harm. And only

through such action can we remain dedicated to the principle that ours is a just society, that ours is a society in which equality is more than a distant dream and that ours is a society in which the rule of law, and not the might of men, is truly sovereign.

# VI *Appendix*

## Sources for Information and Assistance Relating to Desegregation, Busing, School Regulations, Student Rights and Criminal Procedure

I *Publications*

The following organizations have published materials covering several topics that may be of interest to members of the public. Several of the publications are general in nature; others are limited to the extent that they were written during Phase I. They nevertheless offer background information that should assist the reader in understanding the current situation.

A. Massachusetts Research Center
100 Franklin Street
Boston, Massachusetts 02110
426-3075

1. "The Desegregation Packet" (Fall 1974) (Approx. 70 pages, 8½ x 11. A charge of $3 per copy is made to cover the cost of reproduction.)

A collection of reports, including a detailed chronology of events in Boston from 1961 through June, 1974, brief discussions of the constitutional background of desegregation as it relates to Boston, busing in the Boston school system during the 1973-1974 academic year and the busing plans for the 1974-1975 academic year that were under consideration as of July, 1974, the concept of the neighborhood school and its history in Boston, the financial aspects of desegregation, the effects of desegregation on the quality of education, and a brief factual summary of the school desegregation process in four other cities.

2. Desegregation. There's something more to it than busing." (4 pp., 3½ x 8½) (free)

Eleven short questions and answers about the situation in Boston as it existed in September, 1974.

B. Massachusetts Department of Education
Bureau of Educational Information Services
182 Tremont Street
Boston, Massachusetts 02111
727-5792

1. "Balancing the Public Schools, Desegregation in Boston and Springfield" (1975) (25 pp., 5½ x 8½) (free)

A short history of events leading to the desegregation of public schools in Boston and Springfield prepared by the Massachusetts Research Center for the Board of Education. A limited supply is available on a first-come, first-served basis.

C. Freedom House, Institute on Schools and Education
14 Crawford Street
Roxbury, Massachusetts 02121
440-9704

1. "Boston Desegregation: The First Term, 1974-1975 School Year" (Feb. 1975) (22 pp., 8½ x 11) (free)

Over 100 questions and answers on all aspects of the desegregation experience in the Boston school system for the first term of the 1974-1975 academic year.

2. "Boston Desegregation: Questions and Answers" (11 pp., 5½ x 8½) (free)

Over 60 questions and answers on the situation in Boston as it existed in the Summer of 1974.

D. Office of Information and Publications
The United States Commission on Civil Rights
1121 Vermont Avenue, N.W.
Washington, D.C. 20425

The following publications are available free of charge if you mail a request for no more than 50 copies to the Commission at the above address. Many of them are also available for a charge at the U. S. Government Bookstore in the basement of the J. F. K. Federal Building, Government Center, Boston, 223-6071.

1. "School Desegregation in Ten Communities" (Publication No. 43, June 1973) (80 pp., 8½ x 11)

A study of school desegregation in ten communities throughout the United States covering such aspects as the legal history in each community, community involvement in implementation of the desegregation plans, the role of busing, and the effect on the quality of education.

2. "Racial Isolation in the Public Schools" (1968) (Vol. I., 286 pp. GPO Catalog No. CRI.2:Sch6/12v.1. Vol. II (appendix), 295 pp. GPO Catalog No. CRI,2:Sch6/12/v.2.)

Study on the extent of racial isolation in public schools, its deleterious effects, and existing and proposed remedies.

3. "Title IV and School Desegregation: A Study of a Neglected Federal Program" (1973) (187 pp.)

Evaluation of Title IV of the 1964 Civil Rights Act, under which technical assistance is provided to school districts to help them end segregation.

4. "Twenty Years after Brown: The Shadows of the Past" (1974) (119 pp.)

First in a series. Historical background for forthcoming reports examining the extent of civil rights progress in the United States since *Brown v. Board of Education*.

5. "Education Parks" (1967) (109 pp. CHP No. 9)

Appraisals by six educators of an innovative technique of providing quality education for all children on a desegregated basis.

6. "What Students Perceive" (1970) (88 pp. CHP No. 24)

Students of all ethnic groups and from various parts of the country discuss their education and the racial climate in which they received it. Based on a Commission survey of 277 students in 17 communities. Introduction by Dr. Alvin F. Poussaint, Harvard Medical School.

7. "Your Child and Busing" (1972) (20 pp. CHP No. 36)

Reviews historical use of busing in education and legal background of busing for desegregation. Discusses myths and realities of school busing, including safety, cost, and educational effects.

8. "Five Communities: Their Search for Equal Education" (1972) (55 pp. CHP No. 37)

Describes the experience of five areas that have used busing extensively in school desegregation (Pasadena, Calif.; Tampa/Hillsborough County, Fla.; Pontiac, Mich.; Winston-Salem/Forsyth County, N.C.; and Charlotte/Mechlenburg County, N.C.).

9. "Inequality in School Financing: The Role of Law" (1972) (153 pp. CHP No. 39)

Summarizes history of the movement toward equal educational opportunity, reviews court decisions mandating equality in educational expenditures, and raises questions about ramifications of these decisions.

10. "The Diminishing Barrier: A Report on School Desegregation in Nine Communities" (1972) (64 pp. CHP No. 40)

Identifies school desegregation problems and how they have been met in Alachua County (Gainesville), Fla.; Escambia County (Pensacola), Fla.; Evanston, Ill.; Harrisburg, Pa.; Hoke County, N.C.; Jefferson Township, Ohio; Leon County (Tallahassee), Fla.; Moore County, N.C.; and Volusia County (Daytona Beach), Fla.

11. "Public Knowledge and Busing Opposition: An Interpretation of a New National Survey" (1973) (27 pp.)

Based on a survey by Opinion Research Corporation of national attitudes on busing of school children. Finds that those who are well-informed about busing are inclined to support it.

12. "To Ensure Equal Educational Opportunity" (1975) (Vol. III, 396 pp.)

Evaluates enforcement of civil rights laws pertaining to education. Covers Department of Health, Education and Welfare, Internal Revenue Service, and Veterans Administration. Includes findings and recommendations.

13. "Twenty Years After Brown: Equality of Educational Opportunity" (1975) (94 pp.)

Describes desegregation of schools since 1954 and discusses areas where desegregation is lacking. Contains findings and recommendations. Second in a series.

E. Boston Bar Association
16 Beacon Street
Boston, Massachusetts 02108
742-0615

1. Desegregation: The Boston Orders and Their Origin (42 pp.) (free)

F. American Civil Liberties Union
Civil Liberties Union of Massachusetts
3 Joy Street
Boston, Massachusetts 02108
426-3325

1. ACLU handbooks published by Avon Books
   a. The Rights of Suspects, Oliver Rosengart, $.95
   b. The Rights of Teachers, David Rubin, $1.50
   c. The Rights of Students, Alan H. Levine, $.95

These books discuss various topics related to their titles. In addition to being available from the Union, they are also available in many bookstores in Boston.

G. Massachusetts Law Reform Institute
2 Park Square
Boston, Massachusetts 02116
482-0890

1. "Making School Work – An Education Handbook for Students, Parents and Professionals" (1974) (approx. 100 pp. 6" x 9") ($3.95)

A thorough handbook which tells parents what rights their children have under the public laws relating to education, and how to secure their rights.

2. "Parents Rights Manual — Lawyers Edition" (106 pp., 8½ x 11) ($1.00)

A back-up manual to "Making School Work" with legal citations.

H. Massachusetts Bar Association
1 Center Plaza
Boston, Massachusetts 02108
523-4529

1. "Your Rights if Arrested" (4 pp., 3½ x 8½) (free)

A brief description of procedures involved in arrest, searches, obtaining bail and appearing in court in criminal cases. Can be obtained in person or by mail if you enclose with your request a self-addressed stamped envelope.

2. "What Does a Lawyer Do?" (4 pp., 3½ x 8½) (free)

14 general questions and answers about lawyers and the law. Available in English and Spanish. Can be obtained in person or by mail if you enclose with your request a self-addressed envelope.

I. "De Facto School Segregation: A Constitutional and Empirical Analysis." Frank I. Goodman, 60 California Law Review pp. 275-437 (No. 2 March, 1972)

A lengthy legal analysis of de facto segregation. Available in most legal libraries.

J. Massachusetts Commission Against Discrimination
120 Tremont Street
Boston, Massachusetts 02108
727-3990

1. "Route 128: Boston's Road to Segregation" (107 pp., 8½ x 11½) (free)

A report to the U. S. Commission on Civil Rights and the MCAD concerning overall urban-suburban segregation in the Boston area, its causes and effects. Contains a set of findings and recommendations designed to deal with the problem.

## II *Services*

1. Boston School Department Information Center
727-6555

At this number, information is available concerning school assignments, transportation, conditions at a given school or schools, programs at the various schools and virtually every other question you have concerning the operation of the Boston public schools. If the person who answers cannot provide you with an answer to your question, he or she will give you the name and number of a person who can. The Center ordinarily operates from 9:00 to 5:00 but the hours of operation will be expanded as necessary during peak periods.

2. Boston Legal Aid Society
14 Somerset Street
Boston, Massachusetts 02108
227-0200

The Boston Legal Aid Society gives legal advice and representation in Court in all civil matters to those people who cannot afford the services of a private attorney. The services rendered cover all the cities and towns in Greater Boston where the United Way of Massachusetts Bay holds its annual campaign for funds for social agencies.

The Boston Legal Aid Society is a private charitable organization and has been in existence since 1900, and receives its funds from the United Way of Massachusetts Bay, lawyers and law firms, and a number of charitable trusts and foundations. Those clients who are able, pay a $1.00 registration fee. The Society handles approximately 10,000 cases annually for indigent persons.

People seeking assistance must personally apply at the office of the Society; advice by telephone is limited to emergency matters only.

3. Boston Legal Assistance Project — Juvenile Courts Project
Fields Corner — 1486 Dorchester Avenue
Dorchester, Massachusetts 02122
436-6292
South Boston
424 Broadway
South Boston, Massachusetts 02127
269-3700

Attorneys are available to represent juveniles under the age of 17 who are charged with criminal offenses in any District Court Juvenile Session within the city as well as in school suspension proceedings. To be eligible, the juvenile must live in the City of Boston and be unable to afford the services of a private attorney. Services are free.

4. Massachusetts Advocacy Center
2 Park Square
Boston, Massachusetts 02116
357-8431

Provides free advice and representation by attorneys and paralegals to students who are suspended from school for violations of the Disciplinary Code. It also provides free advice and representation to parents and students seeking assistance under Ch. 766, the new Special Education Law, as well as other education laws.

5. Massachusetts Black Lawyers Association
   27 School Street
   Boston, Massachusetts 02108
   227-0750
   Attn: Wayne A. Budd, Esq., President

Has developed a panel of member attorneys available for representing students in criminal matters arising out of school disturbances as well as in the other matter arising out of implementation of the Phase II plan. Services are available both to those who can and those who cannot afford to pay for legal services. The Association also has speakers available on request to explain to groups the desegregation orders and their background.

6. Massachusetts Defenders Committee
   120 Boylston Street
   Boston, Massachusetts 02116
   482-6212

Provides attorneys to represent juveniles charged with criminal offenses in the Boston Juvenile Court and Dorchester District Court. Services are available only to those who cannot afford to pay for legal representation and normally only if a Committee attorney is appointed by a court. Attorneys are available, however, for initial advice on pending criminal matters without court appointment. In the event that a significant number of arrests occur simultaneously in a given geographic area or areas, the Committee has a plan under which it will provide representation to indigent defendants arrested in those areas.

7. Roxbury Defenders Committee
   124 Warren Street
   Roxbury, Massachusetts 02119
   445-5640

On a limited basis, provides attorneys to represent juveniles charged with criminal offenses. Services are free and are available only to those who are unable to pay for legal representation.

8. Boston Bar Association
   Lawyers Reference Service
   16 Beacon Street
   Boston, Massachusetts 02108
   742-0625

Provides referral assistance to anyone who needs a lawyer but does not know one. The Service refers people to lawyers who have special qualifications with respect to the subject on which advice or representation is needed. The Service is available both to those who can and those who are not eligible for assistance from agencies providing legal assistance to the indigent.

9. Massachusetts Bar Association
   Attorney Referral Service
   1 Center Plaza
   Boston, Massachusetts 02108
   523-0595

Provides referral assistance to people who need a lawyer but do not know one. The Service refers people to lawyers who have special qualifications with respect to the subject on which advice or representation is needed. The Service is available only to those who are able to pay for the services of an attorney.