IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 667

HEMAN MARION SWEATT, *Petitioner,*

v.

THEOPHILUS SHICKEL PAINTER ET AL.

On Petition for Writ of Certiorari to the Supreme Court of the State of Texas.

MOTION AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

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FOR THE COMMITTEE OF LAW TEACHERS AGAINST SEGREGATION IN LEGAL EDUCATION

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INDEX.

TABLE OF CITATIONS.

CASES:

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for the Committee of Law Teachers Against Segregation in Legal Education, respectfully move this Court for leave to file the accompanying brief as Amicus Curiae.

The Committee of Law Teachers Against Segregation in Legal Education was formed for the purpose of expressing the conviction of many law teachers that segregation in legal education is unconstitutional. Membership in the Committee has for the time been restricted to one or two members of each of several law school faculties in addition to those directly responsible for the brief. The membership at the present time is:

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Frederick K. Beutel, Lincoln, Neb.
Thomas C. Billig, Washington, D. C.
Clark M. Byse, Philadelphia, Pa.
Julius Cohen, Lincoln, Neb.
John P. Dawson, Ann Arbor, Mich.
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Harrop A. Freeman, Ithaca, N. Y.
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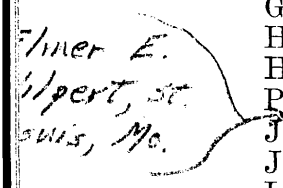

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Willard Wirtz, Chicago, Ill.
Donald Wollett, Seattle, Wash.

The issue presented to this Court in this case is the constitutional validity of segregation in legal education. Teachers of law have so vital an interest in this question that the Committee asks permission to express its views to the Court. To this end the attached brief has been prepared for the Committee.

We have sought the consent of the parties to the filing of this brief. The consent of the counsel for petitioner has been received. The consent of counsel for respondent has not been received. The papers concerning the consents have been filed with the clerk.

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for the Committee of Law Teachers Against Segregation in Legal Education

Washington, D. C., March 30, 1949.

IN THE

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT

This is an amicus brief in support of a petition for a writ of certiorari to review the judgment of the Texas Court of Civil Appeals (R. 465) affirming a judgment of the District Court of Travis County denying petitioner's request for a writ of mandamus (R. 438, 444). Review has been denied by the Texas Supreme Court (R. 466). The jurisdictional details are contained in the petitioner's brief, and the procedural history of the case appears at R. 438-440.

The essential facts are as follows:

The courts below have denied petitioner's application for a writ of mandamus to compel the appropriate officials of the University of Texas to admit him to its law school. He is concededly in all respects qualified for admission to that school except for the disqualification of race, for Texas bars Negroes from this University (R. 425, 445). The courts below have rejected petitioner's contention that this exclusion, and petitioner's consequent relegation to a state "colored law school", violate his rights under the 14th Amendment.

At the time the record below was made, the colored school was located in Austin, Texas. It has since been moved to Houston (R. 51-52). Petitioner contends however that, for the decision of the issues on which he petitions, the location is immaterial. A principal consequence of the transfer is that the use of the University of Texas (white) faculty members was contemplated while the school was in Austin (R. 454), but a separate faculty is to be recruited for Houston (R. 364, 366, and R. 28-29).

The Texas law school (colored) was set up in response to the order of the district court at an earlier stage of this same litigation (R. 424-433), and it does not appear that there have ever actually been any students in it, either in Austin or in Houston. Sweatt was the first Negro to apply for admission to the Texas law school (white) (R. 451), and in any case Texas concedes that if the colored school ever does operate, it will have very few students (R. 77), starting with a maximum of five or six.

ARGUMENT

The conclusion of the courts below moved from two simple premises. The first is the premise that a state does not violate the 14th Amendment if it segregates the students in its law schools so long as the educational opportunity is "separate but equal". The second is that the

educational opportunity offered the petitioner at Texas (colored) was in fact equal to that which he would have received at Texas (white).

We believe that both these premises are wrong and that the decision below should be reviewed for the following reasons:

1. Segregation violates the 14th Amendment. *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), on which the court below rests, should be overruled.

2. If the *Plessy* case is accepted as good law but is properly interpreted, the decision below conflicts with it. The validity of segregation in education, as distinguished from segregation in transportation with which *Plessy* was concerned, has never been squarely considered by this Court, and should be.

3. Without necessary reference to the foregoing arguments, segregated legal education, with which we are principally concerned, can not possibly meet the test of "separate but equal", no matter what kind of segregated law school Texas may offer its Negro citizens.

4. The central issue, whether broadly viewed as raising the legitimacy of segregation in education, or narrowly as a problem only in the validity of segregation in legal education, is important and should be considered by this Court.

I. Segregation Violates the 14th Amendment.

In the whole sorry history of man's treachery to his own ideals there is no blacker episode than the frittering away of freedmen's rights after the Civil War. That War, granted, represents a composite of a great many motives, some noble and some not. Yet, among those motives was a high moral aspiration, a desire to secure justice to the Negro people. There was real meaning in the observation of Mr. Lincoln to Harriet Beecher Stowe when he said,

upon meeting her, "So you're the little woman who wrote the book that made this great War."[1]

The Constitutional culmination of the Civil War was the Thirteenth, Fourteenth, and Fifteenth Amendments. Again, motives are mixed and we need not define them all. Suffice it to say that among the objects of those Amendments was the maintenance of Negro liberty—a full, complete and practical liberty, to be put beyond the reach of sophistry. Thus, a social revolution, begun by the sword and President Lincoln's Proclamation, was to be carried on by force of law.

So colossal a work took determination.

And then, when the start had just been made, this Court was confronted with the counsel of the men of little courage, the compromisers. The Court was persuaded, and in place of the determination in the 14th Amendment to establish *new* liberties came the deification of "the established usages, customs, and traditions of the people", the solemn denial "that social prejudices may be overcome by legislation." The result was *Plessy* v. *Ferguson,* 163 U.S. 537, 550, 551 (1896), from which these quotations are taken, and a number of similarly dispirited decisions of this Court. With such obeissance to "tradition", a primary part of the 14th Amendment necessarily fell, for if the "tradition" of 250 years of slavery had not been overthrown by a War, a Proclamation, and three Amendments to the Constitution, it had not been overthrown at all.

Plessy v. *Ferguson* held valid against the objection that it violated the Equal Protection clause a Louisiana statute which required separate accommodations for white and colored railroad passengers. Justice Brown for the majority held that this segregation did not stamp "the colored race with a badge of inferiority." If it did so, said he, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." (*Id.,* 551).

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[1] 2 Sandburg, *Abraham Lincoln, The War Years,* 201.

Justice Harlan had another view of the liberty protected by the 14th Amendment. Because we rest so heavily on the view he expressed, we quote it extensively (pp. 556-559):

> "It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Everyone knows that the statute in question 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 fundamental objection, therefore, to the statute is that it interferes with the personal freedom of citizens. 'Personal liberty,' it has been well said, 'consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law.' 1 Bl. Com. *134 . . . .
>
> "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in 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. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.
>
> "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case.*"

Plessy v. *Ferguson* cannot be squared with the purposes of the 60's and 70's which created the 14th Amendment. It is in fundamental conflict, for example, with *Railroad Co.* v. *Brown,* 17 Wall. 445 (1873). Brown, a Negro, sued for damages for exclusion from a railroad car in the District of Columbia. The authorizing statute for the company, as passed by Congress, provided that "no person shall be excluded from the cars on account of color." The railroad ran two identical cars on the same train, one for Negroes and the other, from which it excluded Brown, for whites. The trial court specifically refused to instruct, as the railroad requested, that if the cars were "equally safe, clean, and comfortable", the railroad should pervail, and Brown won substantial damages for the exclusion.

This Court affirmed, terming the segregation "an ingenious attempt to evade a compliance with the obvious meaning of the requirement." It held that to force the Negro passengers into separate cars was "discrimination", incompatible with the "equality" which Congress had demanded. In short, this Court held that separate but equal accommodations were identical in legal effect with total exclusion of Negroes from transportation. We submit that the *Brown* case is incompatible with the *Plessy* case, and that the *Brown* case is correct.

The *Brown* case, although it does not directly invoke it, reflects the true meaning of the 14th Amendment. Those responsible for the Amendment's enactment rejected the interpretation that Negroes might be segregated. To understand this purpose, not only the direct antecedents of the Amendment but the immediately subsequent Congressional expressions must be studied; and taken together, they give a clear picture:

Laws which give equal protection are those which make no *discrimination* because of race in the sense that they make no *distinction* because of race. As soon as laws make a right or a responsibility dependent solely on race, they violate the 14th Amendment. Reasonable classifications

may be made, but one basis of classification is completely precluded; for the Equal Protection clause makes racial classifications unreasonable per se.

To this interpretation of the 14th Amendment, three episodes are relevant: the enactment of the Civil Rights Act of 1866; the enactment of the 14th Amendment; and the enactment of the Civil Rights Act of 1875.

During the post-Appomattox months of 1865, Southern governments enacted Black Codes which, in the eyes of Northern Congressmen, did much to vitiate the 13th Amendment. These Codes, among other provisions, placed limitations on Negro rights to own property, to institute law suits, or to testify in any proceedings, and applied greatly different penalties to Negroes than to whites for the same offenses.[2]

To prevent these distinctions, Sen. Trumbull of Illinois introduced a Civil Rights Bill forbidding these and related practices and forbidding also in a general phrase all discrimination as to civil rights.[3] He relied on the 13th Amendment as the base of the Act. Sen. Howard, one of the draftsmen of the 13th Amendment, supported the bill. "In respect to all civil rights", said Howard, "there is to be hereafter no distinction between the white race and the black race."[4] And Trumbull said, ". . . the very object of the bill is to break down all discrimination between black men and white men."[5] The bill passed the Senate, but the House worried about the meaning of the general reference to "civil rights". Neither branch of Congress was ready to grant suffrage to the Negroes, and it was explained that this was a "political" and not a 'civil" right. By similar refinement, some thought the school problem and the intermarriage problem involved rights other than "civil".[6]

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2 For a collection of the early post-War state legislation, see McPherson, *Political History of the United States During Reconstruction*, ch. IV.

3 S. No. 61, 39th Cong., 1st Sess.

4 Cong. Globe, 39th Cong., 1st Sess., 504.

5 Id., 599.

6 See, e. g., discussion id., 1117.

These refinements seemed insubstantial to Rep. Bingham, Ohio Republican and member of the Joint Committee on Reconstruction. Bingham thought that "civil rights" included an indeterminate range of rights, and that the 13th Amendment was not sufficient base for such reform. He therefore opposed solely because he felt a further Constitutional Amendment was necessary which would eliminate all "discrimination between citizens on account of race or color in civil rights."[7] Perhaps in part because of his opposition, the bill as finally passed was limited to the named abuses, with the general and vague reference to civil rights omitted. 14 Stat. 27.

The manner in which the Congress, immediately upon passing the Civil Rights Act of 1866, enacted the 14th Amendment is detailed in Flack, *The Fourteenth Amendment,* and was recently considered in connection with other problems under that Amendment in *Adamson* v. *California,* 332 U. S. 46 (1947). All this may be put aside with one observation: Bingham did not repeat the error he thought Trumbull had made in using terms so refined as "civil rights". He carefully chose a more comprehensive term, "equal protection of the laws."

The legislative history of the Amendment itself illumines the general purpose of the Equal Protection clause, but not its details. The Amendment passed both Houses quickly, and the principal disputes were over the second, third, and fourth sections, now largely obsolete. The obvious justice of such phrases as "privileges and immunities" or "equal protection", coupled with the novelty of the other sections, kept the first section of the Amendment outside detailed analysis.[8]

Clearly Congress intended to put the Civil Rights Act of 1866 beyond the reach of possible future hostile legislative hands;[9] but equally clearly, more was intended. Sen. How-

[7] Id., 1290, 1293.

[8] A typical example of the generalized treatment of the subject is the statement of Rep. Farnsworth, id. 2539.

[9] See for example the comments of Rep. Stevens in reporting the Amendment to the House, id. 2459.

ard, floor leader for the Amendment in the Senate, said "It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty."[10] He explained that it "abolishes all class legislation in the States." Sen. Howe, Wis., listed the civil rights specified in the 1866 Act, but added, "These are not the only rights."[11] He denounced in detail a discrimination in Florida in education between whites and blacks, though without explicit consideration of segregation, and gave that abuse as the sort of supplemental evil, beyond those specified in the Civil Rights Act, which the Amendment forbade.

Thus the Amendment was enacted with what are today two relevant sections, the first, which made unconstitutional certain practices such as the denial of equal protection; and the fifth, which authorized Congress to legislate in support of the first. As new discriminations began to flourish wide-spread, Congress almost immediately upon ratification of the 14th Amendment began to consider such legislation. The response was the Civil Rights Act of 1875, which Sen. Sumner of Massachusetts sponsored and carried through to the passage it won just after his death.

The core of the bill as Sumner sponsored it was the prohibition of discriminations because of race in conveyances, theaters, inns, and schools.[12] Furthermore, there is no possible doubt but that every person who voted for the bill in its various presentations over a several year period knew exactly that the bill prohibited "separate but equal" accommodations or facilities or schools, for the bill's sponsors were categorically explicit. It would be superrogation to accumulate the number of times the point was clearly made. Sumner's theory was simple: Lord Chief Justice

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10 Id., 2766.

11 Id., App., 217, 219.

12 The measure was proposed by Sumner both as a bill and as an amendment to other bills over a period of years. Its final presentation was in the 43rd Cong., S. 1.

Holt, in *Smith* v. *Gould,* 2 Ld. Ray. 1274 (1706), had said, "The common law takes no notice of Negroes being different from other men."[13] Some pre-civil war judicial decisions had taken another view—Sumner himself had lost the case of *Roberts* v. *Boston,* 5 Cush. 198 (1850), in which he had argued for non-segregated schools in Massachusetts, though he won the same battle by legislation soon after. But the 14th Amendment made Holt's principle the law.

For the argument of equality through separation Sumner had only scorn:

> "Then comes the other excuse, which finds Equality in separation. Separate hotels, separate conveyances, separate theaters, separate schools, separate institutions of learning and science, separate churches, and separate cemeteries—these are the artificial substitutes for Equality; and this is the contrivance by which a transcendent right, involving a transcendent duty, is evaded. . . . Assuming what is most absurd to assume, and what is contradicted by all experience, that a substitute can be an equivalent, it is so in form only and not in reality. Every such attempt is an indignity to the colored race, instinct with the spirit of Slavery, and this decides its character. *It is Slavery in its last appearance.*"[14]

In the debates which followed, the leading cases on which this Court relied in *Plessy* v. *Ferguson* were pressed upon the Senate and rejected as unsound. *Roberts* v. *Boston,* supra, was quoted without avail.[15] A contemporary Ohio decision, *State* v. *McCann,* 21 Ohio St. 198 (1872), which held that separate schools were adequate, was rejected by name before these men who knew the 14th Amendment best.[16]

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[13] Cong. Globe 385, 42nd Cong., 2nd Sess.

[14] Id., 382, 383. Emphasis added.

[15] See remarks of Sen. Casserly, id., 3261.

[16] Sen. Ferry, opposing the bill, relied on the *McCann* case, id., 3257. At the time of its final consideration, Sen. Frelinghuysen, in charge of the bill in the Senate, explained why he thought the *McCann* case should not control. 2 Cong. Rec. 3452, 43rd Cong., 1st Sess.

The debates on the Sumner bill over a period of years caused a searching analysis of the 14th Amendment by some of the leading constitutional lawyers of our history. They made the point over and over again that the Amendment forbade *distinctions* because of race. As Sen. Edmunds of Vermont, later chairman of the Senate Judiciary Committee put it when he rejected separate schools: "This is a matter of inherent right, unless you adopt the slave doctrine that color and race are reasons for distinction among citizens."[17]

The bill started its final road to passage in the 43rd Congress. As Sen. Sumner had died, Sen. Frelinghuysen of New Jersey led the debate for the bill, beginning on April 29, 1874, with an extensive argument that segregation was incompatible with the 14th Amendment. The bill, he said, sought "freedom from all discrimination before the law on account of race, as one of the fundamental rights of United States citizenship."[18] For this he found full warrant in the Equal Protection clause.

Frelinghuysen conceded some difficulty in respect to inns and conveyances because these were not directly state-operated, and the states alone were limited by the Amendment. Cf. The *Civil Rights Cases,* 109 U. S. 3 (1883). But the case of public schools he considered utterly obvious since these were state agencies: Segregation in the schools could only be voluntary, for "The object of the bill is to destroy, not to recognize, the distinctions of race."[19]

There were in the Senate three distinct views on the problem of segregated schools. A minority thought that "separate but equal" schools should be permitted. On May 22, 1874, an amendment to that effect offered by Sen. Sargent of California was rejected, 26 to 21. Thus 26 Senators clearly conceived of separate but equal schools, if established by force of law, as a violation of the 14th

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17 Cong. Globe, 42 Cong., 2d Sess. 3260.

18 Id., 3451.

19 Id., 3452.

Amendment. That 26 included Sens. Morrill, Conkling and Boutwell who had been on the Committee which had drafted the Amendment.

The 26 were not themselves of one mind. Sen. Boutwell represented a small minority view that separate schools necessarily bred intolerance and therefore should not be allowed to exist even if both races desired it.[20] However the dominant Senate opinion was that separate schools should be forbidden by law, as the Amendment and this bill forbade them; but that if the entire population were content in particular instances to accept separate schools, it might do so. Sen. Pratt of Indiana, one of the most vigorous supporters of the bill, noted that Congress was continuing separate schools in the District of Columbia because both races were content with them; and at the same time he pointed out that where there were very few colored students, they would have to be intermingled.[21] Sen. Howe put it most concretely when he observed that if, by law, schools were permitted to be separate, they would never in fact be equal. He believed in prohibiting separate schools and then letting people do as they chose: "Let the individuals and not the superintendent of schools judge of the comparative merits of the schools."[22]

We conclude that the Senators who voted for this bill, which had been completely discussed in terms of the very constitutional issue now presented, thought that "separate but equal" violated the 14th Amendment. This was a contemporary judgment by those who framed the Amendment, and their associates. That contemporaneous judgment is entitled to great weight here. *McPherson* v. *Blacker,* 146 U. S. 1, 27 (1892).

The House record is less clear. The bill passed there

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20 "If it were possible, as in the large cities it is possible, to establish separate schools for black children and for white children, it is in the highest degree inexpedient to either establish or tolerate such schools." From speech of Sen. Boutwell, id. 4116.

21 Id., 4081, 4082.

22 Id., 4151.

with the clauses as to carriers, inns, and non-discrimination as to jurors intact, thus attempting to eliminate segregation as to them; but the school clause was deleted. 18 Stat. 335. The various elements of opinion responsible for the deletion were so commingled as to make it difficult to know which dominated. There were in the first place the same three blocs as in the Senate: (a) those who wished to permit separate schools; (b) those who wished to forbid separate schools except where they were voluntarily accepted by both races; and (c) those who wished to forbid separate schools even where they were desired. In addition Southerners repeatedly told the House that if common schools were required by law, with heavy penalties attached for violation, public schooling would come to an end in the South.[23] Such schooling was a post-war phenomenon entirely in most of the South, which had previously relied on private academies; and it would have been simple to abandon public schools.

Faced with this division of opinion, Rep. Cain, a South Carolina Negro, in a crucial address which dominated the debate, stated that he was willing to eliminate the school clause to insure getting the rest of the bill. He explained that he strongly preferred the original Sumner proposal, but that on the other hand he would prefer elimination of the entire subject to any statutory approval of "separate but equal". Since in his judgment the Negroes in his state were satisfied for the moment with their own schools and did not at the moment want mixed education "except the state college," he preferred not to risk a vote on separation.[24]

Rep. Monroe supported the Cain position, and purported to summarize what his colored advisers had told him: "They think their chances for good schools will be better

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23 See typically remarks of Rep. Roberts, who stated that he preferred to include a prohibition of segregated schools in the bill, but would vote to omit the clause for fear that all schools might be abolished. 3 Cong. Rec. 981, 43rd Cong., 2d Sess.

24 Id., 981.

under the Constitution with the protection of the courts than under'' such legislation as that permitting separate schools.[25]

The House of Representatives thus chose as a matter of policy not to pass the Senate bill which attached criminal penalties to the maintenance of segregated schools as well as segregated carriers and inns. But though it eliminated the schools, it kept the same judgment as the Senate that segregation denied equal protection, for the House forbade it as to some of the same objects. The rest, as Rep. Monroe put it, was left to the courts without criminal penalties.

We ask that this Court extend the same judgment as these authors of the Amendment: that the Equal Protection clause obliterates distinctions based on race.

In view of *Railroad Co.* v. *Brown,* supra, and the contemporary interpretation of the Amendment, how account for *Plessy* v. *Ferguson?*

The *Plessy* case was an integral part of a group of cases which had as their object the deliberately narrow construction of the War Amendments. There is no need to repeat here the story of the process by which the Negro was largely read out of the Negro's Amendments. Certainly what the Court did has been often applauded. As Warren puts it of the entire group of such cases, ''. . . the decisions in these cases were most fortunate. They largely eliminated from National politics the Negro question which had so long embittered Congressional debates; they relegated the burden and the duty of protecting the Negro to the States, to whom they properly belonged; and they served to restore confidence in the National Court in the Southern States.'' 2 Warren, *The Supreme Court in United States History,* 608.

We challenge the basis of policy which earns such applause. This Court was not free to relegate the Negro to the mercies of the states of his slavery, nor to restore confidence in itself by any such means. The Court was not

[25] Id., 997, 998.

free to substitute a different policy for that written into the 14th Amendment.

In any case, the Court's policy judgment was unsound. The obvious underlying theory of *Plessy* was that it was "impossible" to prevent segregation if the dominant community group desired it, and that the Constitution must bow to the inevitable. See particularly pp. 551, 552. Time has proved that judgment unsound:

(a) This Court is not as ineffective as the *Plessy* Court assumed. Where this Court has acted against discriminations, it has usually had at least some beneficial effect. Of course a judgment from this tribunal is not a magic wand before which tensions vanish, but with such judgments, progress can be made. *Buchanan* v. *Warley,* 245 U. S. 60 (1917), had some substantial effects though new devices were utilized to cause some of the same results. Cf. *Shelley* v. *Kraemer,* 334 U. S. 1 (1948). *Morgan* v. *Virginia,* 328 U. S. 373 (1946), has made at least some contribution toward an end closely related to the instant case;[26] and *Smith* v. *Allwright,* 321 U. S. 649 (1944), announced a rule which has operated with substantial success. As the record in the instant case shows, segregation in the law school at the University of Maryland ended because of judicial compulsion, and the subsequent experience has been satisfactory (R. 290).

The point is that while this Court cannot bring the millennium by its fiat, it can take short but significant steps in the right direction. The hopeless throwing up of hands typified by the *Plessy* case was unjustified by judicial experience before or since.

(b) The failure to apply the Constitution because of the *Plessy* notion that it is better policy to let events take their course makes the situation worse. Nonaction has its own

[26] For one thoughtful and factual analysis of the consequences of the *Morgan* case, see Houser and Rustin, *Journey of Reconciliation,* a report of a test trip made by the Fellowship Reconciliation in 1947. This is a pamphlet published by the Fellowship.

consequences. The drift is not, as the *Plessy* majority seemed to hope, in the direction of living in brotherhood, but rather away from it. Segregation grows more extreme and progressively more absurd as ingenious minds search for new ways to be "separate but equal."[27] As the most discerning student of the subject has noted, what was merely segregation forty years ago is becoming a caste system today. 1 Myrdal, *An American Dilemma,* 644-650.

The nineteenth century decisions of this Court, though not alone responsible, must bear some responsibility for the degradation of the Negro to the bottom of our society. Cf. Myrdal, supra, 628-630.

The prediction of Justice Harlan in the *Plessy* case has been borne out by the event, p. 560:

> ". . . The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficient purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution. . . . 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 enactments, 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?"

We submit that when the *Plessy* majority "bowed to the inevitable," it bowed too soon. Such decisions by this Court themselves hastened, as Justice Harlan said they would, the very ends to which the Court yielded.

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[27] Cf. *Bunn* v. *Atlanta*, 67 Ga. App. 147, 19 S. E. 2d 553, cert. den. because out of time, 317 U. S. 666 (1942).

The 14th Amendment as a charter of protection for Negroes surely deserved interpretation aimed at securing its objects. This required a full recognition of what those objects were. Decisions like *Plessy* v. *Ferguson* have casually eliminated from the history of the 1860's the drive to eliminate Negro misery symbolized in Mr. Lincoln's comment to Harriet Beecher Stowe. Such a decision made of the 14th Amendment a cosmic mistake. As Sen. Frelinghuysen said in presenting the anti-segregation Civil Rights Bill of 1875 to the Senate.

> "If, sir, we have not the Constitutional right thus to legislate, then the people of this country have perpetrated a blunder amounting to a grim burlesque over which the world might laugh were it not that it is a blunder over which humanity would have occasion to mourn. Sir, we have the right, in the language of the Constitution, to give 'to all persons within the jurisdiction of the United States the equal protection of the laws.' "[28]

We contend that the Equal Protection clause forbids distinctions because of race, and that state-enforced segregation is therefore unconstitutional because it makes such a distinction. As Sen. Edmunds put it, it is "slave doctrine" to make color and race reasons for distinctions among citizens. Segregation *is* discrimination, *Brown* v. *Railroad*, supra.

II. Segregation Should Not Be Extended to Education.

Plessy v. *Ferguson* involved segregation on common carriers. It carefully did not endorse segregation generally. It was urged in argument that if segregation on carriers were valid, states might require white and colored persons to use different sides of the street, or paint their houses or business signs different colors, on the ground that one side of the street or one color was as good as another. Such

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[28] 2 Cong. Dec. 3451, 43rd Cong., 1st Sess.

action, the Court said, would be invalid, holding that even segregation must be "reasonable." p. 550.

Though this court has held that segregation of whites and Negroes to different blocks in a city is unreasonable, *Buchanan* v. *Warley,* 245 U. S. 60 (1917), it has never squarely faced the question whether segregation in education is unreasonable. If segregation laws are to be permitted in the casual affairs of life, such as riding on streetcars, but are invalid when applied to such fundamental matters as establishing a home, the question becomes one of whether the undisputed right to equal education falls within the first category or the second.

This is not to say that the problem of the validity of segregation in education has never been referred to in the opinions of this Court, but rather that it has never been seriously argued or deliberately considered. In *Berea College* v. *Kentucky,* 211 U. S. 45 (1908) the issue was the validity of a Kentucky statute forbidding the teaching of Negroes and whites in the same college. The sole question raised and decided was that such a statute was not a violation of due process as an interference with the property rights of the educational corporation. The question of the rights of individuals was carefully put aside, p. 54, and the equal protection problem was not involved. In *Cumming* v. *Board of Education,* 175 U. S. 528, 543 (1899), the court in so many words excluded the legality of segregation in education from its decision. Yet in *Gong Lum* v. *Rice,* 275 U. S. 78 (1927) the court treated segregation in education as legitimate on the basis of the *Plessy* and *Cumming* cases despite the fact that the basic problem was not argued in the *Gong Lum* case and that it was neither involved in *Plessy* nor decided in *Cumming.*

The result is that if segregation in education is legal, it is a rule of law that came from no place. So vital a matter should not have rested on dicta without either argument or consideration. *Missouri ex rel Gaines* v. *Canada,* 305 U. S. 337, 344 (1938) did observe that segregated education

had been "sustained by our decisions." But the cases cited had not in fact considered the precise point and that matter was not involved in the *Gaines* case, which decided only whether a particular type of separation in education was "equal." Nor does *Sipuel* v. *Bd. of Regents,* 332 U. S. 631, and 333 U. S. 147 (1948), add anything on this point.

If we accept arguendo the *Plessy* case, with its distinction between "reasonable" and "unreasonable" types of segregation, we must place segregated education into the category of the "unreasonable." Segregated transportation is at least of shorter duration, and it is fairly easy to determine whether the proffered alternatives in transportation are in fact equal.

Segregated education has more severe consequences. Even if it is equal, it has psychological effects, effects which blast lives forever:

> "Every authority on psychology and sociology is agreed that the students subjected to discrimination and segregation are profoundly affected by this experience. . . . Experience with segregation of Negroes has shown that adjustments may take the form of acceptance, avoidance, direct hostility and aggression, and indirect or deflected hostility. In seeking self expression and finding it blocked by the practices of a society accepting segregation, the child may express hatred or rage which in turn may result in a distortion of normal social behavior by the creation of the defense mechanism of secrecy. The effects of a dual school system force a sense of limitations upon the child, and destroy incentives, produce a sense of inferiority, give rise to mechanisms of escape in fantasy, and discourage racial self-appreciation."[29]

Independently of its consequences on individuals, segregated education belongs in the "unreasonable" category created by *Plessy* because of the impossibility in fact of securing or policing that equality which *Plessy* assumes

[29] Note, 56 Yale L. Jour. 1059, 1061-2 (1947). The Note contains abundant citations to scientific works in support of the passage above.

must exist. Fifty years of experience teaches that separate education virtually never is equal. As the President's Committee on Civil Rights reported:

> "With respect to education, as well as to other public services, the Committee believes that the 'separate but equal' rule has not been obeyed in practice. There is a marked difference in quality between the educational opportunities offered white children and Negro children in the separate schools."[30]

A system which has thus so obviously permitted discrimination in virtually every schoolhouse in which it exists ought to be re-examined from its root.

III. Segregated Legal Education Necessarily Violates the Fourteenth Amendment.

To this point, we have challenged the legality of segregation generally, and particularly in education. But it is perhaps unnecessary to go so far. Petitioner wants to go to the University of Texas Law School. The courts below have concluded that the segregated school is "separate but equal", and therefore legitimate. We contend that Texas can have no such thing as a segregated law school for Negroes which is equal to its white law school.

In making this argument, we are safely within the boundaries of all precedents, and *Plessy* v. *Ferguson* becomes our direct support. In any interpretation, that case requires equality if segregation is to be permitted, and we contend that there could not possibly be equality here.

The precise point has not been decided by this Court. In the *Gaines* case, supra, there was no legal education offered Negroes in Missouri, and the Court therefore was required to hold only, as it did hold, that equal facilities must be furnished within the borders of the State. In the *Sipuel* case, supra, the majority found that the question whether "separate" legal education could be "equal" was not properly presented to it.

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30 "To Secure These Rights", 63, *the Report of the President's Committee on Civil Rights.*

In the *Sipuel* case, supra, sub nom. *Fisher* v. *Hurst,* 333 U. S. 147, Mr. Justice Rutledge disagreed with his brethren on the procedural issue, and thus could reach the question we have here. Mr. Justice Rutledge observed that the equality required is "equality in fact, not in legal fiction. Obviously no separate law school could be established elsewhere overnight capable of giving petitioner a legal education equal to that afforded by the state's long-established and well-known state university law school."

Freed of the procedural barrier in the *Sipuel* case, we reach Mr. Justice Rutledge's point in this case. We contend that if equality is "equality in fact, not in legal fiction", then there is nothing that Texas could possibly show which would establish that this over-night law school, after its sudden appearance in Austin and quick move to Houston, could equal the University of Texas (white). In addition to all the limitations implicit in its "overnight" quality, the school will have almost no students (R. 77), and cannot have any of the other attributes necessary to equality. The testimony of Dean Earl Harrison of the University of Pennsylvania Law School (R. 216-223) and Professor Malcolm Sharp of the University of Chicago Law School (R. 341-351) fully support this contention.

"Though Mark Hopkins and a log needed only a student to make a university, law schools are not created in any such fashion, or with such ease."[31] It is our contention that, if we free ourselves of preoccupation with externals and go to the substance of legal education, a separate school for a handful of Negroes in Texas cannot conceivably, under any circumstances, be equal to the state law school for whites.

In a number of cases, state courts and lower federal courts have reviewed segregated educational systems in particular areas and have decided that particular systems

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[31] Dean B. F. Boyer, Univ. Kans. City Law School, *The Smaller Law Schools: Factors affecting their methods and objectives,* 9 Am. Law School Rev. 1469, 1472 (1942). The Texas view is the opposite (R. 20).

either were or were not equal. From that body of case law, however, emerges only an approach largely inapplicable to legal education. Grade schools and high schools perhaps can be compared on the basis of physical plant, or teachers' salaries, or types of plumbing, or number of students per class, or variety of courses offered;[32] but these mechanical approaches to legal education tell only a partial story. This is not to say that law schools defy comparison, but rather that standards applicable to grade schools or high schools have very little relevance to such comparison.

The necessary factors of inequality can be divided into two types. First are those factors which are limitations always plaguing very small schools but of which Texas could, conceivably but not practically, buy its way free. Second are those factors of limitation from which no amount of money can purchase escape. These might be termed, for easy reference, actual factors of inequality and actual and inescapable factors of inequality. A summary of some of their ingredients, even more apparent at the Houston than at the Austin school, follows:

A. Actual Factors of Inequality.

1. One of the essential ingredients in the rating of a law school is the size of its library. Texas Law School (white) has 65,000 volumes of which 30,000 to 35,000 are not duplicates (R. 455). Texas is obtaining for its colored school 10,000 volumes, the bare minimum permitted by the American Law School Association (R. 456). Utilizing pre-war, pre-inflation standards, it would cost Texas something over $100,000 to obtain a library equivalent in size to the non-duplicate list of the white school.[33] This is $100,000 which Texas shows no present intention of spending, and as a

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[32] For a collection of cases decided for and against Negroes in terms of size of school, value of school property, location of school, length of term, number of teachers, etc., see 103 A. L. R. 713. For a similar approach by Texas in this case, see R. 78.

[33] The calculation is based on Moylan, *Selected List of Books for the Small Law School Library*, 9 Am. Law School Rev. 469 (1939), and the testimony of Hargraves, Texas (white) librarian (R. 142).

practical matter only a large staff of diligent librarians could find such a collection of books during the period in which petitioner would get his legal education.

2. While faculty size is not, once a certain number is obtained, a controlling measure of a school, the size has great relevance when the number is very small. Texas contemplates a faculty of four at the Negro school (R. 454), and in the current year lists 26 faculty members at its white school.[34] Since there will be very few students at the colored school, the proportion of time given by faculty members to students may be higher there; but since each of the four must be a jack of all trades instead of a specialist in any field, his counsel will, by modern standards of legal education, be of less value to his students than would be the case if he were an acknowledged specialist.

3. Apart from faculty size, faculty quality can not be equal. The primary and secondary school cases cited above treat teachers as though they were so many interchangeable units of educational machinery, and hence can compare teachers by quantity. Assuming arguendo the validity of that approach to grade schools, law teachers are certainly not thus fungible. The very small schools do not have the same opportunity as those larger to obtain professors of equal distinction. For one thing, the small library and the elimination of the opportunity for specialization keeps the best prospective teachers—usually—from staying in the smallest schools if they go to them at all.[35] At Texas (white) are many professors with names great in legal education. It is beyond belief that Texas (colored) could at any time in the predictable future acquire the services of their equals.

4. The course offerings at the colored school will necessarily be sharply limited by the size of the faculty and

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[34] Teachers' Directory, Association of American Law Schools, 1948-49, p. 16. The number was 21 when this record was made. (R. 369).

[35] These problems are well discussed in Boyer, supra, n. 31.

the size of the library. Even the staples cannot be offered every year. Texas (white) offers 66 courses in the current year.[36] Texas (colored) would give 16 if each of its proposed four faculty members taught four different subjects.

In fact, the foregoing factors of inequality cannot be surmounted, even with the most lavish expenditure of money, in any short time. But assuming that money could cure those defects, and that Texas will pay without restraint for the luxury of its prejudices, it can still not give separate but equal legal education to Heman Marion Sweatt.

B. Actual and Inescapable Factors of Inequality.

1. Legal education as it is now conducted assumes that classes will be large enough for full discussion of divergent points of view. This does not mean that classes must be large in an absolute sense, but Texas (colored) cannot measure up for two reasons: (a) there must be at least enough students to make a sample large enough to include a few good ones; (b) there must be in the group a divergency of points of view. The very class division which causes Sweatt to be segregated precludes that kind of divergency in at least some areas. Nor can the faculty which will accept posts in a segregated school be expected to represent the range of the spectrum of ideas. As Mr. Walter P. Armstrong, a former president of the American Bar Association, has said of the work of the American Law Institute, "From the thrust and parry, the give and take of earnest but good-natured debate something emerges that in essence at least is satisfactory to all."[37] The present method of legal education depends entirely upon that thrust and parry which cannot exist in a "school" of a handful of segregated students.

2. Education outside the classroom, as in the classroom, depends on the discussion of the group. Michigan and Yale

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[36] University of Texas Law School Catalogue, Aug. 1, 1948, p. 25 et seq.

[37] Armstrong, *A Practicing Lawyer Looks at Legal Education*, 9 Am. Law School Rev. 775, 781 (1940). See R. 217-221, R. 343.

house their law students together and Harvard is proposing a vast new construction program.[38] While other schools may not be able to keep their students in a group twenty-four hours a day, every teacher knows the value of the intense discussions after classes in the corridors and lounges of a modern law school. When Texas consigns Sweatt to a law school in which he has virtually no one else to talk to, it deprives him of one of the most stimulating parts of modern legal education.

3. The lack of a substantial group of fellow students cuts in other directions. One of the most vital parts of modern legal education is a law review. Texas (white) has an excellent review on which its best students may aspire to serve. Texas (colored) cannot possibly have a law review for lack of a sufficient number of topnotch students to man it. Cf. R. 105, 310-313, 347.

4. Modern law schools have moot court programs in which students are trained by actual practice in either appellate work or trial work or both. This program, to a somewhat lesser extent than the law journal, is dependent on the presence of an interested group. The most successful programs are operated as competitions within groups. See R. 102.

5. Other practice work is done through legal aid programs. This cannot be done unless there is a sufficient group of competent students to manage and supervise the novices, after the fashion of the law journal.[39] Texas (white) offers work for credit in legal aid. It will be difficult, if not impossible, for Texas (colored) to emulate that program.

6. The study of legal ethics will be handicapped by the loss of daily association with a substantial number of other

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[38] Dean's Report, The Law School, Harvard University, 1947-48, 2.

[39] For a description of the work of the Texas (white) legal aid program see Patterson, *The Legal Aid Clinic*, 21 Tex. L. Rev. 423, 426-429 (1943); and for further description of a legal aid program see Bradway, *A Handbook of the Legal Aid Clinic* (S. Cal.), ch. III (1930, mimeo). See also R. 104.

law students. Training in legal ethics involves something more subtle than admonitions against commingling trust funds. As Mr. Lloyd Garrison has observed:

> "Thus in classrooms, dormitories, clubs and playing-fields the student gets to know not a handful of neighborhood acquaintances but a cross-section of his contemporaries, drawn from innumerable localities and environments and varying widely in capacities and tastes. He will note them all, and in the activities and competition of the communal life he will perceive the various gradations of excellence which that life reveals in his fellows, and will desire increasingly to resemble those who stand out as the most admirable. In the same manner he will judge his teachers, and will be drawn slowly but certainly to those whose qualities of mind and character shine the most luminously." Dean Garrison continues to say that: "There is in law school as in college the same health-giving association of student with student, and of student with professor, but the personnel and range of contacts are necessarily smaller, and the absorption and professional study necessarily more confining."[40]

The student of Texas (white) will imbibe the lessons of character from a far larger proportion of that "cross section of his contemporaries" to which Garrison refers than would Sweatt at Texas (colored).

7. By sending Sweatt to a raw, new law school without alumni or prestige, Texas deprives him of economic opportunity which its white students have. Lawyers know that professional opportunities may be the result of the reputation of the institution in which a man is trained, and certainly the alumni are vital links in student placement.[41] Sweatt would graduate from Texas (colored) without equal opportunity in respect to making a living.

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40 Garrison, Address, American Bar Assn. Sec. on Legal Educ., Boston, 1936, in 8 Am. Law School Rev. 592, 594 (1936).

41 Assoc. Dean James P. Gifford, Columbia University School of Law, in an extensive report on placement method observed, "Practically all schools use their alumni as sources of information about openings." 9 Am. Law School Rev. 1063, 1066 (1941). Dean Gifford also discussed the value of moot courts, dinners, and speeches as placement aids.

8. Another economic disadvantage of consigning Sweatt to Texas (colored) is the loss of opportunity to become acquainted with a number of lawyers with whom he must inevitably one day practice. We cannot assume that were Sweatt to be enrolled at Texas (white), all the students would refuse to associate with him, or that, if his merit deserves it, he might not make friends. He is at least entitled to the equal opportunity to try. For the entire remainder of his life he will be in a profession in which business may be referred from a friend in one city to a friend in another, in which stipulations in cases will be made easier because of previous contacts among lawyers—in short, in a profession in which it is an enormous advantage to have a substantial number of classmates scattered about the state. At Texas (colored), Sweatt would lose the opportunity white students have of forming such friendly relationships.

In sum, in countless ways separate legal education cannot be equal legal education. Only if legal education is nothing more than a matter of cubic feet of classroom space, or the possession of a few thousand books, or the presence of four lawyers recently become teachers can Texas (colored) be considered equal to Texas (white). If instead legal education is something alive and vital; if the measure is not cubic feet of air space but the intellectual atmosphere within the walls; if law teachers are appraised as individual men of varying degrees of talent; if education is in large part association; if research and practice are part of the job of legal training—if any of these things, then certainly Texas (colored) is a mockery of legal education and of the equal protection of the laws.

IV. The Question is Important.

The decision below, in addition to being in conflict with the Constitution and with decisions of this Court, is of grave importance.

It is important to avoid the waste, not only in dollars but in human energy, resulting from the creation of the segregated law schools in the South since the *Gaines* case. If petitioner is right, these schools are purposeless. If petitioner is wrong, the doubts concerning those schools should be removed.

It is important that Negroes have an equal opportunity to become lawyers.

1. It is important to the particular Negroes themselves involved, and to their families. If they have the ability to rise above the cotton picking, the manual labor, and the domestic service to which our white society has consigned their race, it is almost as important to them as life itself that they have the opportunity to do so.

2. It is important to the rest of the Negro community. As Myrdal says in 2 *An American Dilemma* 804, 805, of the advantage to the whole group of having Negro business and professional men:

> "... The chief advantage is the tiny Negro business and professional class itself, which lives by providing goods and services to Negroes. It is this class which has the education and leisure necessary to articulate the Negro protest and to take up successful collective bargaining with white society.
>
> "In the long run, this class can be depended upon to voice the interests of the broad masses of Negroes, simply because its own interests are convergent with those of the masses of Negroes. The Negro preacher, doctor, lawyer, journalist, real estate dealer, insurance man, banker, mortician, and retail merchant has his business founded upon Negro purchasing power. If he serves only the upper strata, his interests are, nevertheless, indirectly tied to the interests of the masses, as the majority of his customers live off the common Negroes. He might sometimes exploit the masses mercilessly. But fundamentally he must want the Negroes to get employment and good pay or, if employment shrinks, he must want them to get public relief, because otherwise he will fail himself.

"He must want the common Negroes to have the vote, because otherwise he will be less protected himself. He must want justice, because a prejudiced police and court system is a danger to him too. And when he fights against the humiliations of the Jim Crow system, which hurt him more than the Negro masses, even this is in the long run to the advantage of all Negroes. That there are exceptions and conflicts of interest is not denied. But neither should it be concealed that, in the main, the Negro masses can rely upon their upper class people to wage a fight that is in their interest."

3. It is important to the American people, not only in terms of the application of general principles, but in tangible matters of our moral position in the world. As the Legal Adviser to the Secretary of State advised this Court in connection with the *Restrictive Covenant Cases,* "The United States has been embarrassed in the conduct of foreign relations by acts of discrimination taking place in this country." [42]

The treatment of our Negro minority is a moral responsibility of the white majority, and it is important that the American conscience be freed of wrongdoing. This Court, as the expounder of the Constitution, is one of the custodians of that conscience. As Myrdal, p. 582, says in concluding his discussion of "The Jim Crow Laws", the Negro "has in his demands upon white Americans, the fundamental law of the land on his side. He has even the better conscience of his white compatriots themselves. He knows it; and the white American knows it, too."

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[42] Brief for United States, p. 19, *Shelley* v. *Kraemer,* 334 U. S. 1 (1948).

CONCLUSION

We respectfully submit that the petition for certiorari should be granted.

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