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In this twentieth anniversary year of the *Brown*[1] decision, two court rulings have starkly pointed up the contradictions inherent in our national approach to public school desegregation. One is *Bradley* v. *Milliken*,[2] in which the Supreme Court by a five-to-four majority overturned a lower court decision ordering busing of children across district lines as the only practicable means of achieving meaningful system-wide desegregation. The other is *Hart* v. *Community School Board of Brooklyn, N.Y. School Dist. No. 21*,[3] in which District Judge Jack B. Weinstein ordered federal, state, and city housing authorities to tell him how they might develop programs to attract middle-income white families to the Coney Island areas in order to end segregation of a public junior high school.

Each of these cases grew out of the recognition that increasingly segregated residential patterns are rendering school desegregation efforts an impotent gesture, particularly in the large metropolitan areas. It is not uncommon for a single metropolitan area to have forty or more school districts with a vastly disproportionate concentration of blacks in the central city.[4] Washington, D.C., is the most extreme case, with a black school population in 1972 of 95.5 percent. Similar imbalances are found in Detroit, Atlanta, Philadelphia, and the other big metropolises across the country.

When the *Brown* decision was handed down, of course, this predominantly Northern and Western phenomenon was viewed as a de facto pattern beyond the reach of the Supreme Court's ruling. Segregation was seen as a simple denial of access to be eliminated, rather than as an intricate negative process for which an affirmative process, no less intricate, needed to be substituted. If only the South could be stopped from carrying out actions that were impermissible in the rest of the nation—so the reasoning went—the basic problem would be solved. Any informed and reasonable observer would have conceded that segregated housing was a problem, in the North and West perhaps even more than the South. But it was assumed generally that once the back of legal segregation was broken, one could look forward to incremental progress toward a racially integrated society.

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[1] Brown v. Board of Educ., 347 U.S. 483 (1954).

[2] 42 U.S.L.W. 5249 (U.S. July 25, 1974).

[3] __ F. Supp. __ ( ).

[4] U.S. COMM'N ON CIVIL RIGHTS, 1 RACIAL ISOLATION IN THE PUBLIC SCHOOLS 17 (1967).

Thus, no great public surprise or outcry occurred on July 15, 1955, when a three-judge court presided over by Circuit Judge John J. Parker issued what was to be one of the most influential early interpretations of the *Brown* decision. Ordering desegregation of the Clarendon County, S. C., schools without fixing a date, the court said:

> It [the Supreme Court] has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, is that a state may not deny any person on account of race the right to attend any school that it maintains.... Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental machinery to enforce segregation.[5]

Under this construction, all that was required of the theretofore legally segregated school districts in the South was to cease governmental action demonstrably intended to exclude black children from public schools they would, if race were not a factor, be eligible to attend. As for de facto school districts, where segregation reigned as a result of residential patterns, nothing was required at all. In short, those blacks who mustered enough courage and enterprise to assert their right to attend a previously all-white school would have to be admitted, thus presumably providing for a very gradual and painless assimilation of blacks into school systems controlled by and responsive to the white majority.

From the perspective of 1974, such a view of desegregation appears simplistic in the extreme. One must bear in mind, however, the social and political climate which surrounded these events in the middle to late 1950's. Governors, legislators, and other prominent spokesmen in the "hard core" states of the deep South—soon joined by such supposedly moderate states as Arkansas and Virginia—were trumpeting defiance of the Supreme Court. The question that preoccupied the courts and the public at large was not how to achieve broadscale desegregation, but whether and how soon absolute resistance to the very principle of desegregation could be overcome.

At the beginning of 1957, segregation was still wholly intact in the elementary and secondary schools of eight Southern states.[6] Four states—Alabama, Georgia, Mississippi, and South Carolina—had abolished state constitutional provisions that required the maintenance of a public school system, and two of them had authorized state funded tuition grants to enable children to attend private schools if public schools were closed. In addition, there were pupil assignment laws, to put the appearance of legality on segregated placements, and, later, "interposition" statutes declaring the *Brown* decision of no effect. Between 1955 and 1957, at least 120 state statutes were passed in an effort to nullify the Supreme Court's desegregation ruling.[7]

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[5] 1 Race Relations Law Rptr. 73 (1956).

[6] J. B. MARTIN, THE DEEP SOUTH SAYS NEVER 6 (1957).

[7] *Id.* at 11.

The politicians' rush to the barricades was infectious. It reached epidemic proportions when the overwhelming majority of Southern members of Congress joined in issuing the "Southern Manifesto." This remarkable document condemned the Supreme Court for exercising "naked judicial power" and substituting "personal political and social ideas for the established law of the land." It went on to commend "the motives of those states which have declared the intention to resist forced integration by any lawful means" and to pledge its signers to work for a reversal of the decision. Nineteen out of 22 Southern senators and 82 out of 106 Southern representatives lent their names to the manifesto, some with obvious reluctance. In doing so, they signed away all hope of a peaceful and statesmanlike accommodation to the vast social change facing the South.[8]

There is considerable evidence to support the view that the Southern politicians were shaping rather than responding to the will of the people. Many observers at the time noted that the initial reaction of the white public to the Supreme Court rulings was surprisingly mild, characterized more by unhappy resignation than by uncontrollable anger. By mid-1956, however, the inflamed rhetoric of the hustings and the state houses had stirred the passions of those amenable to defiance, and reduced to silence most of those who were not. In the areas of heaviest black population, white citizens councils and similar groups were formed with the stated purpose of applying economic and social pressure on blacks who petitioned for desegregation and on any whites who might be foolhardy enough to abet them. Many of those who scorned such intimidation found themselves the victims of threats, harassment, and sometimes violence.

The Eisenhower Administration adopted a "hands-off" attitude. The President himself declined to state publicly his personal view of the *Brown* decision, thus giving rise to speculation that he disapproved of compulsory desegregation. Attorneys General Brownell and Rogers, on various occasions, committed the Department of Justice to support of desegregation in the courts. But the President's ambiguity and the administration's general inactivity on this front encouraged white Southern leadership to believe that the federal executive branch would take no forceful action to enforce the courts' orders.

Public disturbances marked the reluctant beginnings of school desegregation in a number of communities. For several years, school opening time was punctuated by outbreaks of mob action in such cities as Milford, Delaware; Mansfield, Texas; Clinton, Tennessee; and New Orleans, Louisiana. The most prolonged and historic display of violence occurred in Little Rock following Governor Orval Faubus's use of national guardsmen to block the admission of black students to Central High School. This outright defiance and the rioting it engendered posed a supreme test of the enforceability of federal court orders. If President Eisenhower was indecisive until the eleventh hour of the Little Rock crisis, once the confrontation was inescapable he acted firmly and un-

[8] B. MUSE, TEN YEARS OF PRELUDE 63–65 (1964).

equivocally. Order was restored and the court ruling enforced by the 101st Airborne Infantry Division. A major precedent was set for the use of federal troops when necessary to quell forceful resistance to the orders of a federal court.

The problems of overt and sometimes violent resistance, for a time including the closing of schools in Arkansas and Virginia, were to continue in various forms well into the sixties. But by the beginning of the 1959 school term, it was clear that a corner had been turned. Outright state defiance, the abolition of public education, private intimidation, and violence had each been tried and had failed as a means of rolling back the Supreme Court's judgment. Though further battles remained to be fought, political and public resistance to the *principle* of the *Brown* decision had clearly failed.

But victory for desegregation in *practice* was another matter. Court-ordered compliance moved at a glacial pace, and even when long-fought victories were won, the results in terms of black children in hitherto all-white schools were counted in token handfuls. Between 1959 and 1961, for example, the number of blacks attending schools with whites in ten Southern states, Texas excluded, increased from 350 to about 2600, reflecting an increase of desegregated districts from 26 to 60. (Texas, which had started the process earlier, moved from approximately 3300 to 5000 blacks in desegregated situations.)

So matters stood when John F. Kennedy assumed the presidency in 1961. For various reasons, school desegregation was not an area on which the more vigorous civil rights policies of the Kennedy Administration had any dramatic impact. Attorney General Robert F. Kennedy and his lieutenants used both their authority and their negotiating skills to ensure orderly compliance with court orders. In the absence of Congressional action, however, the pace of change still depended on the interminable processes of litigation or voluntary local decision. Thus, as late as 1963, the Attorney General announced that more than 2,000 school districts in the South still operated totally desegregated school systems.

Under these circumstances, it is not surprising that, during the first decade after *Brown*, federal executive authority was aimed at containing federal-state confrontation and public disorder, rather than achieving truly unitary school systems. Not until passage of the Civil Rights Act of 1964 was there either the machinery or the will to require a serious start on the dismantling of segregation in the resistant states. In the second half of the sixties, a combination of increasingly stern federal court orders and enforcement of Title VI of the Civil Rights Act began moving the South toward compliance with the Supreme Court's mandate. Even then, de facto segregation in the schools of the North and West continued to grow, virtually free of intervention by the courts or the executive branch.

The ironic result was that by 1974 the eleven states of the old Confederacy (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia) had the highest degree of school desegregation in the nation. In those states, only 29.9 percent of the black students were attending schools that were 80 percent or more black. By contrast, in Northern and Western states, 55.9 percent were in 80 percent black

schools and there was every indication that the percentage would continue to rise.[9]

Even satisfaction in the Southern progress is tainted by the possibility that it soon may peak and begin to decline. Albeit slowly and belatedly, the same forces of urbanization and industrialization that have produced racial isolation in the North are at work in the spreading metropolises of the South. More than one large Southern city has experienced desegregation and then resegregation within the past decade.[10] Moreover, both Congress and the Supreme Court have served notice that busing may not be relied on as a major remedy for the geographical and jurisdictional divisions that foster economic and racial isolation in the public schools.[11]

The future of school desegregation thus seems inextricably tied to racial patterns of residence. And the prospects are unpromising indeed, unless there is an early and major reversal of the existing trend toward greater racial concentration. By 1973, 75 per cent of the black Americans lived in metropolitan areas, and of those more than three out of four lived in central cities. By contrast, approximately 66 percent of white Americans lived in metropolitan areas, and of those only two out of five lived in central cities. Comparison with population data as recent as that of 1970 shows that these processes of white suburbanization and black concentration in the central cities are still proceeding apace.[12]

Even if cross-district busing and the redrawing of district lines had enthusiastic political and judicial blessing, it would be difficult, in some cases impossible, to overcome the effects of such unbalanced population distribution. Given the political realities of the day, there appears to be no chance at all. This is not to argue that there are not more desegregation battles that can and should be waged in particular communities. But without a radical shift away from residential segregation, the winning of scattered local battles will not prevent the loss of the war.

The difficulties involved in dealing with the housing-schools complex by piecemeal litigation are illustrated by the *Hart* case, mentioned above. The district judge in that case, persuaded that school segregation in Coney Island was a direct result of housing policies, appointed a master to report on the situation. He found the main cause of increasing minority concentration to be the low income limits required of would-be residents of subsidized housing—limits that effectively excluded families (often white) at or just above the limits prescribed. In the ensuing hearings, the judge asked city, state, and federal housing officials what they could do to integrate housing in the community. In the words of one observer, "Their responses were predictably disagreeable and contradictory, and so the judge, in apparent confusion and frustration, curtailed his journey into

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[9] U.S. DEPT. OF HEALTH, EDUC. AND WELFARE, OFFICE FOR CIVIL RIGHTS, DIRECTORY.

[10] *See* J. EGERTON, THE AMERICANIZATION OF DIXIE (1974).

[11] Bradley v. Milliken, *supra* note 2 and H.R. 69, *Elementary and Secondary Education Act of 1974.*

[12] U.S. BUREAU OF THE CENSUS, SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION, 1973.

the housing field and dealt more conventionally with school desegregation via busing and 'magnet-school' solutions." [13]

The conclusion to be drawn from the Coney Island case is discouraging but inescapable: The tangled web of housing and school segregation cannot be unsnarled on a case-by-case basis; the complex system of policy and practice that governs housing supply and location must be overhauled from the federal level down if apartheid is not to become the settled way of life in the United States.

Many advocates of school desegregation have been unwilling to link that cause to the cause of housing desegregation. It has frequently been observed that few minority spokesmen and organizations involve themselves in the issues surrounding national housing legislation and its implementation. There are understandable reasons why this is so. The question of racial concentration versus dispersion is a controversial one within the minority community itself. And the argument that residential desegregation must be a pre-requisite of school desegretion has been used more than once as an excuse for doing nothing at all.

The U. S. Commission on Civil Rights put the case this way:

> Because of the difficulties of effecting change, it has been tempting to think in terms of remedies which will require a minimum of effort on the part of the schools and least disrupt the educational status quo. So it has been suggested that the problem of securing equal educational opportunity is really a problem of housing, and that if discrimination in housing can be eliminated it will be possible to desegregate the schools without changing existing school patterns. But such a solution would require vast changes in an area where resistance to change is most entrenched. Laws designed to secure an open market in housing are needed now, but the attitudes fostered in segregated schools and neighborhoods make it unlikely that such legislation will be fully effective for years. To make integrated education dependent upon open housing is to consign at least another generation of children to racially isolated schools and to lengthen the time that will be required to overcome housing discrimination.[14]

The policies of the Nixon Administration were a case in point. On March 24, 1970, in a remarkably detailed public statement on school desegregation, then President Nixon committed himself to the "neighborhood school" concept and observed: "With housing patterns what they are in many places in the nation, the sheer numbers of pupils and the distances between schools make full and prompt school integration in every such community impractical—even if there were a sufficient desire on the part of the community to achieve it." [15] From this, it would seem to follow logically that high priority would attach to the use of Federal authority to decrease housing segregation. Later Mr. Nixon posed the central issue this way: "The debate has arisen over the extent to which Federal agencies are either required or authorized to go beyond anti-discrimination efforts, and to use their program money leverage as a means of

[13] A. R. Talbot, *Rules on Subsidies and Spur Housing Segregation in the City,* New York Times, August 4, 1974.

[14] RACIAL ISOLATION IN THE PUBLIC SCHOOLS, *supra* note 4 at 195.

[15] Washington Evening Star, March 24, 1970 § A at 4.

requiring local communities to subordinate their land use policies to the goal either of breaking up racial concentrations or of promoting economic integration." [16] In a subsequent press conference, he stated his position: "On the other hand," he said, "for the Federal Government to go further than the law to force integration in the suburbs, I think is unrealistic. I think it would be counterproductive, and not in the best interest of better race relations." [17]

Thus the rationale for the lack of affirmative Federal action became complete. As if this were not enough, the Administration in early 1973 suspended the federally subsidized low- and moderate-income housing programs, thus eliminating the only mechanisms through which dispersed housing opportunities for most minority group members could realistically be achieved.

In mid-1974, a new President assumed office. Although there is little in his public record to suggest that he will depart from his predecessor's policies with respect to housing opportunity for minorities, he also has recognized the centrality of housing to school desegregation. On July 25, 1974, shortly before his accession to the presidency, Mr. Ford said: "I feel very strongly that to deal with integrated schools by busing is very superficial and counterproductive .... When individuals can move and live where they want to, that's the basic way to deal with the problem." [18] It remains to be seen whether he will approve a meaningful federal role in seeking such a solution.

Meanwhile, the Congress in August 1974 passed a housing bill that could reinstate a significant flow of Federal subsidies for low- and moderate-income housing.[19] Assuming adequate funding and implementation of these programs, once again there will be administrative as well as judicial grounds on which to challenge the exclusionary practices of suburban jurisdictions. The civil rights legislation of both 1964 and 1968 imposes responsibilities on the Federal Executive to take affirmative steps to increase desegregation of housing. How conscientiously those responsibilities are exercised will depend heavily on the energy and effectiveness which public interest groups bring to bear on the process.

In any event, there is every reason for advocates of school desegregation to be in the front ranks of those who challenge the policies that breed segregated housing.

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[16] R. M. Nixon, *Statement on Federal Policies Relative to Equal Housing,* June 11, 1971.

[17] *Nixon's Slow Start on Equal Housing,* Wall Street Journal, January 19, 1971.

[18] New York Times, August 11, 1974 § E at 3.

[19] S. 3066, *Housing and Community Development October of 1974.*