SCHOOL INTEGRATION:

RECONSTRUCTION REVISITED, OR

A MATTER OF BLACK AND WHITE

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The current legal struggle over public school integration began with **Brown** seventeen years ago. The Supreme Court found that "separate educational facilities are inherently unequal."[1] They said that since the state undertakes to provide education for all children it must provide it to all on equal terms. Even though the "tangible" factors may be equal, segregation of blacks "solely because of their race generates a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone," and that the "sense of inferiority affects the motivation of the child to learn."[2]

As the subsequent history has shown, the **Brown** decision left many questions unanswered. The only mention of **de jure,** as opposed to **de facto,** segregation came in a quote from the lower court, which had said that segregation "with the sanction of law" was of greater psychological harm than that without.[3] The Supreme Court itself spoke only of the inherent unconstitutionality of segregation and the necessity for its elimination with "all deliberate speed."

Most of the other difficulties that have plagued school integration were foreshadowed in **Brown** as well. The lower courts were ordered to appraise school board plans and to retain jurisdiction until a workable plan was put into effect. The burden to show good faith compliance was put on defendant school boards. The courts in their appraisals of plans were to consider the physical condition of the school plant, the transportation system, personnel, revision of attendance zones and school districts, and local laws and regulations. The unconstitutional discrimination was to cease; but the law had embarked on one more treacherous quagmire of definition, and the Pandora's box of methods was opened wide.

Busing

Recent cases are in agreement on one vital point. The time for deliberate speed has passed; integration is required **now.**[4] Most other questions, including how to accomplish desegregation, remain in conflict. The one criterion consistently applied has been simply, "Does it work?,"[5] but some courts have refused to make this their prime consideration.[7]

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The most controversial method urged has been busing. Some courts have refused to order busing to achieve integration even when no other method was possible.[8] The anti-busing provision of the Civil Rights Act of 1964[9] has been largely ignored. One court recently construed that statute as refusing any new power to the courts, but not as precluding their ordering desegregation plans which happen to include busing.[10] Other courts have ordered busing plans without reference to the statute, including the Eastern District of Virginia.[11]

The Supreme Court's unanimous decision in **Swann**[12] supports these orders. The **Swann** decision's strong call for elimination of all vestiges of state-imposed segregation in public education plus its statement that busing is not unreasonable can be construed as a mandate that busing be ordered when necessary to eliminate vestigial segregation.

While Nixon's recent statements opposing busing may reduce the vigor of H.E.W.'s insistence on busing plans, the courts are less likely to bow to the President's wishes. Even if Nixon acceded to the demonstrators' demands to order an end to busing for integration purposes, which is highly unlikely, black parents would doubtless bring new court actions, and

courts would make the same kinds of orders they have been making. Faced with a choice between contempt of court and disobedience of Nixon, school boards would obey court orders, since the President could not enforce his order effectively and the courts can. Nixon's views and Governor Wallace's proposed legislation in Alabama may delay integration by busing, but are not likely to stop it. A constitutional amendment could of course, but seems unlikely to be adopted. In any event, integration and busing need not, in most cases, rise or fall together. Redrawing school districts, for example, can have the same effect

De Jure and **De Facto**

Despite the current furor over busing, the methods of integration raise far less important legal questions than the definition of what, exactly, is unconstitutional. No one yet has answered the question clearly for **de facto** segregation. If all-black schools are inherently unequal, is public support of an all-black school discriminatory state action in itself? If not,

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what activities of state and local governments — such as residential zoning, placement of public assistance housing, and site choices for schools — are to be considered legal causes of segregated schools?

The Supreme Court relied on psychological evidence in finding that segregated schools are inherently unequal.[13] Psychologists, despite the Court's suggestion that **de jure** is worse than **de facto** segregation, agree that segregation impairs self-esteem and motivation to learn no matter what its cause.[14] Some courts have adopted that finding.[15] Most often, however, the law insists on finding some state action beyond the fact of all-black schools.[16]

In a recent Virginia case, the court saw differing requirements directed to formerly **de jure** segregated schools and those segregated only **de facto:** there is a negative mandate to the latter to end "effective exclusion" of blacks from white schools, while the former have an affirmative duty to correct the segregation caused by earlier statutes.[17] The suggestion seems to be that where state action causing segregation was overt, the state must act to integrate the resulting all-black schools, but where it was and is more subtle, the state must only cease its discriminatory policies. The idea seems at best to be very odd. One could easily argue that the result would be an unlawful discrimination against the southern states, and our country's reconstruction policy is, hopefully, a thing of the distant past.

The Supreme Court's **Swann** decision does not settle the question.[18] The opinion does clearly state that one-race school's are not **per se** unconstitutional, but it is not at all clear what constitutes state action. Deliberately maintained "dual school systems" may require "awkward, inconvenient and even bizarre" remedies, but once the damage is undone there may well be no further need for legal measures to enforce integration. On the other hand, the Court expressly declined to decide whether or not other state action than that of school boards can create unconstitutional segregation. If school board action is state action, as the latter clearly implies, then the Court has not said that only states where segregation was once required by law are now obliged to integrate the schools, despite the equally clear implication to the contrary in the former statement.

The executive branch of our government, in the form of the Department of Health, Education, and Welfare, has attempted to fill the gap from another direction.[19] So has Congress.[20] Both provided that no federal financial aid would be given to any program or activity that discriminates on the basis of race. Both clearly apply to schools everywhere in the country, but they are still not as much help as might be expected. Neither the statute, which the courts, of course, must follow, nor the non-binding guidelines define discrimination, but, as usual, leave that task to the courts, and the courts are far from any consensus.

In Congress last spring, Senator Ribicoff proposed establishment of a time-table and suggested methods for metropolitan integration,[21] but he labelled his proposal a "policy," and, even if it is passed, it is unlikely to be more definitive than current law.

The school boards have not done well at taking the initiative required of them by **Brown.**[22] Judicial review of each case on its own merits presents many difficulties. When school board plans are inadequate, the court must retain jurisdiction and rule on the next plan the board devises, a process which can continue for years, and, when a case is appealed, it is sometimes too late to enforce a specific ruling for a specific school year. At least one court has concluded, despite the Civil Rights Act of 1964 and the H.E.W.

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guidelines, that more help is needed from the executive and legislative branches of the federal government; "the courts acting alone have failed."[23] It is little wonder, for no one has defined what they are required to do.

Black and White

There is one distinction which is openly made by scientists, but which the law has shied away from. Psychologists tell us that all-black schools are injurious to the children who attend them. The law finds that separate facilities are inherently unequal. The scientists tell us that the white child's education loses nothing by his attending an all-white school.[24] The courts carefully refer to one-race schools and find no inequality **per se** in such schools.

Is it not time for the law to admit that an all-white school can be perfectly constitutional but that an all-black school denies equal protection of the laws? The law adopted the findings of psychology in 1954; let the law now finish the job it has undertaken by admitting that one-sided harm — unequal protection — demands remedies only for those harmed. Once the law officially recognizes the difference between "one-race" and "all-black," a definition of what has been declared unconstitutional is relatively easy. Until then, definition is impossible.

Every child cannot attend an integrated school. There are not enough black children to go around; there are too many all-white communities in America. It is not impossible, however, to require that every black child attend an integrated school, and that is all that the facts of inequality demand.

Conclusions

There are too many racially mixed school systems in this country for the courts or the federal executive agencies to pass on the sufficiency of every plan for integration that is proposed or put into effect by each school board. The courts have borne the burden essentially alone, and they have succeeded amazingly well. They cannot finish the job alone. The fourteenth amendement is carrying just about all the judicial gloss it will support in this area. Cutting off federal aid, the only genuine weapon available to the executive branch of our government, is a negative and uncertain way to achieve integration. Only Congressional action can solve the problem efficiently.

Congress need not draft a statute telling the school boards how to achieve integration. The possible methods are well-known, much discussed, and well adjudicated. If the courts' mandates to integrate now are to have full meaning and effect, Congress must pass a clearly specific law requiring nationwide elimination of identifiably black schools and imposing effective penalities for school boards that violate the requirements.

The primary problem would be getting such a law passed, but a coalition of northern and western liberals and southern legislators, who object to the focus on segregated public schools only in the South, might accomplish it. It is well worth a try, for the all-black school, with its demoralizing effects and its unconstitutional inequality, must go.

Footnotes

[1]Brown v. Board of Education, 347 U.S. 483, 495 (1954).

[2]**Id.** at 494.

[3]**Id.**

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

[5]Green v. County School Board, 391 U.S. 430, 438 (1968). **See also** Bivins v. Board of Education, 424 F. 2d 97 (5th Cir. 1970); Ellis v. Board of Public Instruction, 423 F. 2d 203 (5th Cir. 1970); Jenkens v. School Board, 421 F. 2d 1339 (5th Cir. 1969); Charles v. School Board, 421 F. 2d 656 (5th Cir. 1969).

[6]**e.g.,** Green v. County School Board, 391 U.S. 430, 440 (1968); United States v. Board of Education, 372 F. 2d 44 (5th Cir.), **cert. denied** 389 U.S. 840, **rehearing denied** 389 U.S. 965 (1968)

[7]Scott v. Board of Education, 317 F. Supp. 453, 474 (M.D.N.C. 1970); Beckett v. School Board, 308 F. Supp. 1274, 1279 (E.D. Va. 1969).

[8]**Id.**

[9]42 **U.S.C.A.** § 2000c-6(a) (1970).

[10]Harvest v. Board of Public Instruction, 312 F. Supp. 269, 272-3 (M.D. Fla.), **aff'd. per curiam** 425 F. 2d 1224 (5th Cir. 1970).

[11]Bradley v. School Board. (E.D.V. 1971).

[12]Swann v. Board of Education, 39 U.S.L.W. 4437 (1971).

[13]Brown v. Board of Education, 347 U.S. 483, 495 (1954).

[14]Beck, Adams, deVilliers, & Williams, **Segregation-Integration: Some Psychological Realities,** 28 **American Journal of Orthopsychiatry** 12, 14 (1958); Coles, **Northern Children under Desegregation,** 31 **Psychiatry** 1, 3 (1968); **S. Coopersmith, The Antecedents of Self Esteem** 128 (1967); Drinan, **Racially Balanced Schools: Psychological and Legal Aspects,** 11 **Catholic Lawyer** 16, 19 (1965); Wise, **Self Reports by Negro and White Adolescents to the Draw-a-Person,** 28 **Perceptual and Motor Skills** 193 (1969).

[15]Keyes v. School District No. One, 313 F. Supp. 61, 313 F. Supp. 90 (D. Colo. 1970); Spangler v. Board of Education, 311 F. Supp. 501 (C.D. Cal. 1970).

[16]**e.g.,** Swann v. Board of Education, 39 U.S.L.W. 4437, 4442 (1971); Barresi v. Browne, 175 S.E. 2d 649 (Ga. 1970).

[17]Beckett v. School Board, 308 F. Supp. 1274, 1276 (E.D. Va. 1969).

[18]Swann v. Board of Education, 39 U.S.L.W. 4437 (1971).

[19]45 C.F.R. § 80 (1970).

[20]42 **U.S.C.A.** § 2000d (1970).

[21]The Wall Street Journal, April 21, 1971, at 2, Col. 4.

[22]Swann v. Board of Education, 39 U.S.L.W. 4437, 4441 (1971); Green v. County School Board, 391 U.S. 430, 441-2 (1968): Rose, **School Desegregation: A Sociologist's View,** 2 **Law & Soc. Rev.** 125, 136-7 (1967).

[23]United States v. Board of Education, 372 F. 2d 836, 847 (1966), 396 F. 2d 44 (5th Cir.), **cert. denied** 389 U.S. 840, **rehearing denied** 389 U.S. 965 (1968).

[24]Coles, **supra** note 14, at 15.