The Promise of Justice

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In May, 1954, I was in the United States Army at Fort Richardson, Alaska. I had been deferred from service to attend law school. My dear friend and barracks roommate, a nonblack from North Carolina, having completed a graduate degree, similarly was fulfilling his military obligation. We were together the afternoon of May 17, 1954, when we heard about the decision in *Brown v. Board of Education*.\(^1\) I remarked that the decision was a critically important fundamental change in the law which will be good for America. He responded that the decision would be unacceptable to most white people, and that it would be hard to make it work. We were both right. Certainly, in 1954, no prescience would have ever allowed me to imagine that I, an African American, would become a United States District Judge and preside over a full-fledged school desegregation case.

In 1948, after graduating from The Ohio State University College of Education, I wanted to live in Columbus and become a public school teacher at the secondary level. However, getting a position at Champion Junior High School, the only secondary school in the District where African American teachers were employed, seemed virtually impossible.

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1. 347 U.S. 483 (1954)
There was a long waiting list. Ironically, after examining alternatives, I decided to go to law school.

Fate would have it that after my appointment as a federal judge in July 1974, I inherited a docket of cases which included Penick, et al. v. Columbus Board of Education. Fourteen students filed suit against the Columbus Board of Education and various other defendants alleging that the defendants’ purposeful conduct caused and was perpetuating racial segregation in the public schools. To the best of my knowledge, the Columbus case was one of the last desegregation cases involving a large urban school district to be litigated. There was a large body of relevant case law available which was instructive. Also before the trial, I had the opportunity to attend a seminar on “Education and the Courts” sponsored by the Danforth Foundation. There I met a number of federal judges who presided over well-known school desegregation cases including some from northern communities. I benefited from hearing comments from school superintendents from urban areas that had been required to implement desegregation remedies. The seminar provoked critical thinking about a broad range of extremely important legal and social issues arising from and related to school desegregation. I will always be grateful to the Danforth Foundation for sponsoring the seminar.

II

The trial to the Court in Penick, et al. v. Columbus Board of Education began on April 19, 1976 and concluded June 17, 1976. There were 70 witnesses, over 600 exhibits, and 6,600 pages of transcript. All the lawyers in the case represented their clients in a very professional manner and certainly were among the best ever to appear before me. Accordingly, the issues were sharply and feverishly contested.

In the process of making findings of fact and conclusions of law, I first reviewed the evidence regarding activities and events that took place before Brown was decided, and then post-Brown evidence.

If the District had been unlawfully segregated by race, after the May 1954 decision, the duty to desegregate arose. The evidence clearly indicated that prior to Brown, over the years Columbus officials—using race-based student school attendance assignment, optional attendance zones, zone boundary changes, placement of faculty and staff based on race and

2. 429F. Supp. 229 (1977)
other strategies—intentionally caused an enclave of east side schools to effectively be maintained as one race: African American. Predecessors of the Columbus defendants had caused some black children to be educated in schools that were predominantly white; however, the officials also deliberately caused at least five schools to be overwhelmingly black schools. These schools remained one race until the remedial order was effective in 1979.

Post-Brown, not only was there a responsibility to desegregate but also a clear mandate not to intentionally cause more segregation. Nevertheless, the board’s school construction site decisions increased racial impaction.

After World War II, Columbus experienced meteoric growth. By the end of the 1960s there were more than 110,000 students in the district. Large increases in school population required that more schools be built. Despite objections from citizens and civic and community groups, the school board majority, adhering to a neighborhood school policy, decided to build a number of new schools in areas where they would be one race: white. Alternative building sites available in other areas would have lessened the district’s segregation of students by race.

Drawing reasonable inferences from the facts, there was sufficient proof that the intentional acts and omissions of school officials resulted in furtherance and continuance of segregation. The Washington v. Davis “discriminatory purpose” standard proof was met and the Columbus School District was judged to be a “dual” system—one that was intentionally organized and operated by school officials as part white and part black.

The defendants were permanently enjoined from discriminating on the basis of race and from promoting or maintaining unconstitutional racial segregation in the Columbus school facilities. A Board proposed a

3. One race school: one in which 90 percent or more of the students are of a single race.
5. 426 U.S. 229.
6. While the term “dual” is comparatively well understood in school desegregation matters, the use of the word “unitary” is not. In Board of Education Oklahoma City Schools v. Dowell [498 U.S. 237, 245 (1991)], Chief Justice Rehnquist noted that the use of the term “unitary” has been used inconsistently by lower courts. Some courts have used it to identify a school district that has completely remedied all vestiges of past discrimination. Other courts have used “unitary” to describe any school district that has currently desegregated student assignments. Under that interpretation a school district could be called “unitary” and, nevertheless, still contain vestiges of past discrimination. The Chief Justice declined to define the term more precisely.
system-wide remedial plan that was approved by October 7, 1977. The remedy order included pupil reassignment to achieve racial balance. A subsequent round of appellate litigation left the same remedies intact. Busing began in September 1979.

It was good fortune that Dr. LaVerne Cunningham, former Dean of the College of Education at The Ohio State University and a highly regarded expert on schools and race, agreed to serve as the court’s special master in the oversight of the desegregation remedy process. He established excellent working relationships with school officials, who were very professional, and he worked to effectively administer the planning and execution of the many complexities of teacher and parent orientation, student assignments, transportation, extracurricular activities, finances, and many other matters attendant to the remedial order.

The Columbus business community and other civic leaders formed the Metropolitan Columbus Schools Committee (MCSC). The committee had as its mission peaceful desegregation and maintenance of quality education in Columbus. The committee was chaired by Rowland Brown who was wise, hardworking, and dedicated to fairness. MCSC’s efforts were outstanding. Unfortunately, this commission was ended, shortly after the remedy was in place.

One school board member stated, “What we must do, we must do well.” No court orders were disobeyed; no compliance hearings were required; the remedial process was effectively conducted in good faith. The district was peacefully and thoroughly desegregated.

In 1981, the Columbus defendants requested that the injunctive orders be withdrawn—basically claiming that they had faithfully complied with court orders. The request was denied. A few years later the request was made again. Plaintiffs’ counsel vigorously resisted relinquishment of jurisdiction claiming that jurisdiction should be continued until all vestiges of segregation are removed “root and branch,” citing Green v. County Board of New Kent.

Four years later, on April 11, 1985, an order was entered dissolving the injunctions remaining in the case. The defendants had implemented

8. The Ohio State Board of Education and the Ohio Superintendent of Public Instruction also were defendants. They were found then liable for the constitutional violation. The state’s failure to prevent or protect intentional segregative local public school policies renders the state directly liable for such discrimination and accordingly the state must bear a portion of the financial cost incurred pursuant to the desegregation order.


the remedial plan in good faith. Prior concerns about student discipline, mobility, retention, extracurricular activities, academic achievement and participation had been addressed in a fair and unbiased manner. I felt the Green standard had sufficiently been met. The decision to terminate court oversight was extremely challenging. However, I believe that equal protection school desegregation law does not contemplate perpetual court oversight.

Later, in 1991, a majority of the Supreme Court, in *Board of Education Oklahoma City Public Schools v. Dowell*,\(^1\) announced that the standard for the dissolution of remedial injunctions requires a finding that all vestiges of past discrimination have been removed *to the extent practicable*. Although I had reached a theoretically similar conclusion earlier, I find no comfort in a position contra to the dissent of Justice Marshall in Dowell. The narrowing language *to the extent practicable* set forth in the majority opinion, does not really provide much guidance in deciding a motion for the dissolution of injunctions. Deciding what is practicable is fact-driven and always difficult but even more so in school desegregation matters where so many factors and issues are in play.

A factually demonstrated school segregation constitutional violation certainly can be subject to court-ordered remedial action such as student reassignment and transportation, faculty and staff reassignment, orientation, extracurricular matters, academic adjustments, and increased pedagogical resources. Accordingly, over time it is practical and reasonable to identify and purge a number of vestiges of school segregation.

*Brown*’s broader projection is a promised goal of the achievement of egalitarian social justice without regard to race. It is this altruistic promise that courts with limited remedial powers, absent other government and private participation, find so difficult to keep. The Third Branch simply cannot issue orders to bring reality to the promise of curing all the social injustice caused by school segregation. Certain vestiges of segregation are subtle and complex, and it is difficult to establish that they resulted from discrete life experiences. In a society where for so many years racial segregation has been and continues to be alive and active in public and private life experiences, it was impossible to identify all the negative vestiges essentially flowing from school segregation. Some vestiges of school segregation are combined with others resulting from non-school segregated experiences. Other vestiges are mental, emotional, and difficult to identify and remove.

*Brown* and its precedential aftermath show that judicial mandate can

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be a powerful force for social justice. However, the social justice for students promised by Brown—including the removal of all vestiges of school segregation, particularly the emotional ones—possibly may never be achieved, and probably not in the foreseeable future. My experience with a school desegregation case compels me to believe that the Dowell “practicable” standard is appropriate but not easy to apply. In the reality of contemporary urban dynamics, when desegregation remedial injunctions are dissolved, there is a very high risk of resegregation. In dissenting in Dowell, Justice Marshall wrote: “Similarly, avoiding reemergence of the harm condemned in Brown I accounts for the Court’s insistence of remedies that ensure lasting integration of formerly segregated systems.”12 When the court injunctions were removed, I was hopeful that the Columbus Board would not act to return to a substantial system of student assignment based on neighborhood residence which would result in resegregation. The Columbus metropolitan area is a very livable community. It has a history of good government, a steady diverse economy, great institutions of higher education, active civic organizations, and a significantly less than majority African American population. This platform provided a basis for hope for a positive long-term desegregation result.

For a period of time after the injunctions were removed in 1985, the basic student assignment plan, which had been ordered, remained substantially in effect. However, in 1990, the board appointed a citizen’s committee whose mission was to recommend a plan which would reduce transportation while maintaining as much racial balance as possible.13 The committee was composed of distinguished citizens of Columbus—fourteen African Americans, thirteen whites and three Asians. The committee met, received legal advice, held public meetings, studied demographic trends, reviewed transportation cost data, and procured a public opinion survey.

13. It is interesting to note the committee’s transportation status report:

C. Current Transportation Status. The specifics of current student transportation are unknown to most Columbus residents. Most would be surprised to learn that 41.4% of Columbus students walk to school. In the 1989–90 school year approximately 64,000 students were enrolled in Columbus Schools. Of those, 26,500 walked to school. Forty-five (45) percent of elementary students and fifty-nine (59) percent of middle and high school students ride buses to school. Of the students bused, 37% are transported for health, safety, distance or other reasons, 17% are bused to alternative schools, 13% are bused for special education and 4% are adjustment transfers and English as a Second Language students. Twenty-nine (29) percent are bused for racial balance purposes.
The committee worked diligently and thoroughly and reported to the Board at page 5 of its statement: “The Committee believes, from all it has learned, that the Board has two options: retain the current plan with modifications to bring all schools within racial balance parameters or design a new plan compromising on racial balance and time distance criteria.” The board chose the latter option. As a result, it is fair to say that since early 1996, the district has been substantially resegregated and, arguably, that this was lawfully accomplished. Such an outcome is not in the best interests of our schools or community.

With hindsight and in agonizing reappraisal, I question whether lifting the injunctions was premature. Perhaps holding on longer would have prevented resegregation. School desegregation oversight is complex and concerns many areas of school administration and pedagogy. The authority and efficiency of courts is limited. For example, the Miliken v. Bradley suburban safe harbor has an abundance of new residents. Coterminous school districts not found liable of intentional segregation cannot be included in a remedial order.\(^{14}\) In his excellent book, Getting around Brown, Desegregation, Development, and the Columbus Public School, Gregory S. Jacobs writes:

> I will argue that the desegregation of the Columbus, Ohio, public school system failed to ensure equal educational opportunity not because it was inherently detrimental to learning, but because it was intrinsically incompatible with the city’s steady geographic and economic growth. Even before the first buses rolled in 1979, the threat of desegregation had redefined the parameters of single-family home building in the city, essentially turning the boundaries of the Columbus school district into a residential development redline. The myriad resources that typically follow new housing were both exiting and avoiding the city schools by desegregation’s implementation; busing simply solidified and intensified this already extant process.

He also concludes that “Between 1970 and 1980, the city school system had gone from being essential to residential development in Columbus to being incompatible with it.”\(^{15}\) It is interesting to note that Jacobs

\(^{14}\) 418 U.S. 732

\(^{15}\) Ohio State University Press 1998, 177. It is also interesting to note, Jacobs relates that “I was a fifth grader in the Columbus schools when desegregation began in 1979, and I can still recall being ordered to evacuate Olde Orchard Elementary one gray October morning. At the time, I did not fully understand that what appeared to be an unexpected recess was actually
observes: “Private schools, vouchers, charter schools, home schooling all provide legal plays to end run court desegregation remedial order.”

As twenty-first-century America becomes more racially diverse, many large cities become populated with more minority residents. For instance, in Franklin County, Ohio, where Columbus is located, the white population continued to decline, even after the transportation to achieve racial balance had been abandoned. Looking forward, if such trends continue, there may well be no nonminority group left in town with whom to integrate.

Even with the benefit of hindsight, I doubt that a longer term of oversight of the Columbus schools would have removed all of the vestiges of segregation or abated the resegregation of the schools through state, local and private acts or omissions.

III

Almost all citizens attest to the belief that school children should be accorded social justice. However, the great majority did not wish to make the changes necessary to accomplish school desegregation and integration. Many citizens did not want it to be successful. Others believed that the process was not worth its trouble. These days there is little articulated support for separate but equal, but in practice many people continue to hold on to that illusion.

Professor William W. Wayson’s 1966 comments in a letter to the editor of a local Columbus newspaper ring true:

Desegregated schooling allows the public or fair-minded educators to effect more improvements than segregated education does. The educational weaknesses of segregated schools are inherent in the segregation. They cannot be corrected in the segregated setting. The so-called deficiencies of desegregation—even the real ones—could all have been overcome if school personnel, school boards, city fathers,
and the nation’s movers and shakers had sincerely intended to educate children who are poor, who are not white, who live in desperate circumstances neither they nor their parents created or control. [Noted Time magazine columnist] Jack White says it well: before we gave up on integration, we should have tried it. The weaknesses of desegregated schools result from lack of will and skill—both of which can be changed and both of which are gradually changed by the dynamics of the setting even if no one is committed to the improvement.

IV

Since school segregation continues to exist, is it predictable that America will experience another round of K through 12 school desegregation lawsuits?

The ability of skillful legal tacticians to produce new approaches to legal problem solving should never be underestimated. However, existing legal precedent and social indicators do not point to new large-scale lawsuits to desegregate K through 12 urban public schools. Civil rights organizations and civil rights lawyers have taken their efforts and resources to struggles on other fronts. So school desegregation is now, more than ever, merged with a host of other social issues that contend for solutions. Our country’s rapidly increasing diversity, the diminution of the middle class, extensive poverty, high crime rates among people of color, inadequate health care, and other issues have merged and desperately impact those who have been subject to a history of racial injustice.

Generally, Supreme Court case law presents formidable challenges for those who seek racial justice advocating constitutional violation. In 1973, the Supreme Court in Rodriguez v. San Antonio Independent School District18 undervalued the national criticality of education, holding that gross disparities in funding among school districts did not violate the Fourteenth Amendment, concluding that education was not a fundamental right. This result contributes to the institutionalization of inequality of funding of school districts which negatively affects poor people.

The Supreme Court ruling in Regents of the University of California v. Bakke was a devastating blow. Justice Blackmun’s opinion in Bakke stated in part: “In order to get beyond racism, we must first take account of race. . . . There is no other way. And in order to treat some persons

equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.”19 Such fundamental logic in my judgment is sound, but it did not carry the day. The Bakke holding requires that remedial race-based state action must be reviewed with strict scrutiny and found to serve a compelling state interest. Thereafter, the concept of “neo-color-blindness” took on a snowballing hubris for those who seem to be threatened by racial equality. While I am grateful that Justice Powell’s diversity rationale kept the door open for some consideration of race in higher education, unfortunately it did not save the day. Other post-Bakke jurisprudential commitments have established foreboding standards of proof for historical racial discrimination.20 In addition, the Supreme Court has constrained the scope of school desegregation remedial orders.21

My perception is that the African American community remains divided on the academic and social appropriateness of further efforts to avoid predominantly one race schools. In Columbus, currently there is no active initiative to take action regarding school desegregation. It does not look good for a new round of urban school desegregation lawsuits.

V

Harvard Professor Gary Orfield comments on the value of a desegregated education: He says, in an increasingly pluralistic society, lack of familiarity with others’ perspectives will limit the ability of students of all races to compete successfully and live harmoniously when they are adults. “We need to talk to parents. We need a vigorous campaign to tell white parents in particular about why their kids are disadvantaged if they attend a segregated school. We need to give the public a lot of information about why we need this—the benefits of desegregation,” says Orfield.

That reframing of the issue, from the rights of minority students to the best interests of all students, and of society at large, is key to jump-starting the dormant desegregation enforcement system, says Orfield. He cites the Supreme Court’s decision in Grutter v. Bollinger, 539 U.S. 306 (2003), as indicative of the shift in thinking. In Grutter, the court recog-

nized a compelling interest on the part of school authorities for diversity in the classroom in upholding an affirmative action admissions policy at the University of Michigan law school.\textsuperscript{22}

In \textit{Grutter v. Bollinger},\textsuperscript{23} the Court showing deference to the judgment of the law teachers and administrators found permissible the use of race, among other personal and group attributes, in enrolling a “critical mass” of minority students, as necessary for an appropriate educational experience. While I believe that reasoning is sound, I am uncertain of its reach. Is it only another iteration of Justice Powell’s diversity concept set forth in \textit{Bakke}? Or is it a signal of the recognition that the diversity road can lead to social justice?

Judge Harry T. Edwards, in an excellent article in the \textit{Michigan Law Review}, related his hope:

Fifty years after \textit{Brown}, it is apparent that the rejection of “separate but equal” was not enough to fully realize the ideal integration. Nor were the strategies of assimilation or affirmative action. We can only hope that diversity, broadly conceived, will give the pursuit of integration new integrity and vitality in the years to come.\textsuperscript{24}

I share his hope—but my hope light is dim. Born in the 1920s, I have seen major unforeseen positive change in race issues, but we are not even halfway home yet. In the complete history of America viewed in context, achieving racial equality has not even made it anywhere near the top of the agenda of problems that must be addressed with urgency. Perhaps in the twenty-first century a more diverse America, a more diverse Columbus will raise the priority.

\textsuperscript{22} ABA \textit{Journal} 90 (April 2004).
\textsuperscript{24} \textit{Michigan Law Review} 102, no. 5 (March 2004): 944, 978.