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The Litigious Future of Desegregation

This article discusses several stratagems of resistance or avoidance which may possibly be adopted by some communities attempting to circumvent the Supreme Court's mandate bringing segregation to an end in public schools.

DURING ONE of the earlier arguments on the school cases before the Supreme Court, the late Justice Jackson remarked that he foresaw a "generation of litigation" if the court should ever attempt to invalidate segregation. But the court did just that on May 17, 1954, and it seems apparent that Justice Jackson's prediction about a litigious future will soon materialize.

The outcome of some of this litigation will be decisive in shaping the yet unwritten history of "desegregation." It may conceivably produce changes in the administrative organization of public schools in the South; it will be significant in determining whether desegregation will ever become an accomplished fact throughout this section of the country; and if so, how soon.

The May 31 decision gives only the outlines of a formula to be followed by school boards and by the courts if the boards do not act on their own. The boards are to begin with a "prompt and reasonable" start and finish as soon as practicable; there can be "geographical variation" between states and within each state; and in deciding on what must be done and how soon in any given area we must determine the scope of the "administrative" problems confronting the board and perhaps, too, the scope of the "community attitude" problems. The magnitude of these "obstacles" in any given locality will determine the rate of progress to be made in that locality toward the ultimate objective. If a local board can do enough to satisfy a court of its good faith in its "assessment" and proposed solution of these; i.e., if it can demonstrate the intent to effect compliance by overcoming the "obstacles" to desegregation within a reasonable time, then the court may be reluctant to interfere with the board's desegregation program although asked to do so by some group of dissatisfied parent plaintiffs.

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Techniques of Avoidance

Under the two decisions local school boards have a legal duty to proceed. But legal duties do not always coincide with deep-felt notions of moral

or civic duty. And in some places officials, and indeed a majority of citizens, may determine to resist or evade the mandate of the court. To that end various tactics have been proposed. Specifically, it has been proposed in one state or another that: (a) the local boards simply refuse, even in the face of court orders, to desegregate; or (b) that the state re-enact its segregation laws and also that it cut off state funds to boards who act in compliance; or (c) that it adopt what has been sometimes called the "assignment system" of enrollment; or (d) that it create a system of free "private" education; or finally, (e) that if no other escape from mixed schooling is found, that all state supported education be abolished. Let us look at these various proposed techniques of avoidance.

Resistance

First, resistance: of course, a local board right now, despite its legal obligations, could adopt a "sit tight with the status quo" policy, and it could continue it for a relatively indefinite time, too, until and unless Negro parents launched a successful lawsuit. For while all boards do, as noted, have a present legal obligation to desegregate, probably the only immediate sanction to coerce compliance in the absence of voluntary effort is for parents to start litigating. Such suits if brought in the federal courts will usually be class suits—where whole groups of parents join in a single complaint. Absent procedural difficulties the plaintiffs should be able to get a decree calling for desegregation. Of course, all of the law's leaden footed delays will be available to the school board defendants — pleas for continuances;

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i.e., delays in the district court prior to a decision on the merits, defenses on procedural points and, after a decision on the merits, then appeals. But where appeals are taken on frivolous issues or where procedural defenses are groundless, the use of such stratagems may prove of little value; for the proceedings here will be in equity and the courts may find ways of speeding suits along to a decision on whether a decree should be entered, and if so, what should it say. And similarly, the courts may refuse stay orders (holding their decrees in abeyance) pending the litigation of groundless appeals. So we reach a point where the school boards can preserve the status quo only by disobeying the order of the district court. At that point the board members might resign their offices to avoid the horns of this dilemma; but there would be few technical difficulties in making their subordinates and successors immediately subject to the same decrees; also it is possible that the ex-officials, out of office though they might be, could find themselves on the receiving end of a second suit by the parents—a civil action for damages—if they had dallied too long in the face of their legal obligations. So the efficacy of the "resistance" proposal comes down to the matter of deciding whether the federal judges can enforce their orders.

To secure obedience the district courts could invoke their contempt powers; they could jail or fine recalcitrant officials. There is no maximum

for such punishment; the judge could keep piling it on until he was assured of compliance by the officials. Of course, if the federal marshals who sought to enforce these punishments were forcibly resisted we would have a situation bordering on revolution; the question "what next" can only be answered in terms of power politics, not law. But absent the matter of dealing with organized physical defiance, it is probably safe to say that the federal judges have ample power to enforce their orders.

Re-enacting Segregation Laws

As a second alternative, a state legislature, fixing a "preserve the status quo" policy for its local school boards might re-enact the school segregation laws and also pass a statute cutting off state revenue from any board which attempted mixed attendance. It has been suggested that this re-enactment process would somehow alter the states' legal position, that by specifically invoking its "police power" rights under the 10th Amendment, the state could legalize segregation in the face of two Supreme Court decisions to the contrary. But the courts would make short shrift of this, I believe, for the test cases were decided precisely on the principle that school segregation is an illegal usage of the admitted power reposed in the states to preserve public peace; and thus the 10th Amendment gives no right to any state to enact such laws precisely because the 14th overrides it to the extent of making such laws unconstitutional. Nor should a school fund withholding statute be able to withstand legal attack very long; Negro parents could probably sue the state officer, whatever his title, who disburses the public revenue to the schools as a defendant in a local desegregation suit; and they could secure a court order directing him to abstain from compliance with the withholding statute; and this could be done on the theory that a state's refusal to support mixed schools while still supporting segregated schools is simply another form of legislation providing for segregation—legislation of a type which the Court has already declared invalid. Thus a single, local "desegregation" suit might knock out the "withdrawal" statute and put local boards right back in the legal position they would occupy in the absence of such a statute.

The Assignment System

A third proposal for avoiding desegregation is the "assignment system." Legislation to implement this proposal has been introduced in a number of states and enacted in some. It is quite possible that assignment may become a widely used method of enrolling school children, especially if the results of future litigation over this system demonstrate its value as a technique to reduce or delay the impact of mixed attendance in reluctant communities.

The assignment method provides that each local school board, or some special board in the nature of an adjunct of the local board, will select for each child in that particular district an appropriate school and enroll him in it. Thus each assignment will be, theoretically anyway, a separate individual decision on the part of the assigning authority; the designation of the appropriate school for each child will be based on rather general criteria

set out in the assignment statute. For example, the statute might provide, as some do, that the board is to select a school which will protect the "general welfare," the "best interests," the "health" and the "academic attainment" of the child to be enrolled as well as all other children in the school system. These criteria are certainly broad, and though it is plainly now the law of the land that the race of the child to be enrolled cannot be considered in applying them, nevertheless the very vagueness of the assignment standards may suggest or impel the assigning officials to use race in many instances as implicit criteria. And, of course, some proponents of assignment plans have frankly avowed that purpose.

But to impede legal attack against any local school board's administration of the assignment program, most of the statutes have set up elaborate review procedures, and dissatisfied parents are, supposedly, required to follow them if they choose to dispute their board's authority. Thus each dissatisfied parent is first required to apply for a hearing before the assignment board, and at this hearing the parent is given the opportunity to prove why he thinks the board's assignment of his particular child was illegal. If the parent secures no favorable decision from this "administrative remedy," then he is authorized to go into a state court and litigate the question of where his child shall go to school. But the statutes provide that this lawsuit shall be tried before a jury (not in "equity" before a judge as is the case in federal courts), and the jury will make the decision of whether the assignment should be set aside. If the jury trial proves unsuccessful the parents' recourse is to appeal to the state supreme court. Obviously this would be a costly and cumbersome process for parents in communities where the assignment system is used simply as a device to preserve segregation. For each Negro parent fighting for the right of his child to attend non-segregated schools will face the prospect of costly and time consuming litigation. And one of the most important legal problems of the future is whether Negro parents, faced with such a situation, will be able to bypass the administrative and state court review provisions of the assignment statutes and go directly to the federal courts where they can join together as a group of plaintiffs and bring a single suit to secure desegregation. The future disposition of this problem by the courts is extremely important, because much time and money can be saved by Negro plaintiffs if they can, legally, avoid the elaborate review procedures contemplated by the state statutes. On the other hand, if the federal courts rule that these plaintiffs must first exhaust their administrative remedies before the local school boards and their state court remedies, then the assignment system could prove to be an effective device to preserve a great deal of segregation through its strength-through-depth attrition procedures which contemplate so much interminable litigation.

It is hard to hazard any generalization on how the federal courts will treat with the assignment system. In somewhat analogous situations; e.g., cases involving alleged discrimination

in the voting field, the federal courts have insisted that plaintiffs exhaust their administrative remedies. Similarly there have been cases (but not, of course, in the school segregation field) where the Supreme Court has ruled that if state court remedies are plainly available to a person complaining of a violation of his constitutional rights, he must use those remedies instead of litigating in the federal district courts. But there are no hard and rigid rules here; the refusal of the federal courts to hear civil rights suits has been purely a matter of "discretion," and that discretion has been based upon whether there exists a "speedy" and "adequate" remedy in the state courts. Thus, the federal courts may well conclude that the state court remedy here is too burdensome and permit Negro plaintiffs to bypass them. Similarly with the business of exhausting administrative remedies; if these are set up and administered by the school officials in such a way that it is manifest that the administrative review is purely an illusory process, where the parent can get no fair and proper determination of his complaint, regardless of its merit, then the courts may well permit him to bypass this step too. Thus if the assignment system is used to preserve total segregation for any lengthy period, the state laws may not prevent the federal courts from proceeding to entertain class action (multiple plaintiffs suing as a unit) desegregation suits and forcing change pursuant to the formula laid down by the Supreme Court. On the other hand, if some desegregation is achieved through use of the system, then the federal courts may refuse to entertain class suits brought by dissatisfied parents; instead they might remand these plaintiffs to the remedies created for them by state law.

Creation of Free Private Schools

A "fourth" possible course of action to avoid the decision would be the creation of free private schools. The legality of these plans has been widely discussed elsewhere and I will treat the subject only briefly. The theory behind "private" schools is this: the 14th Amendment is a limitation only on "state" and not "private" activities; the Court's non-segregation decision only applies to state, not private schools; thus it has been suggested that the states could somehow turn their public school plants over to private management (e.g., cooperatives or corporations) and this private management would be immune from the requirements of the 14th Amendment. But the trouble is that recent federal court decisions make it pretty clear that the courts will look through form to the substance of these arrangements to determine whether an alleged "private" activity is not, for legal purposes, a "state" operation. Labels mean nothing here, and if the arrangement is such that the so-called "private" school is receiving support from the state either through financial grants or the free use of former public school facilities, then the federal courts will say that these "private" schools are state activities and as much subject to the desegregation law as if they were public schools. It is pretty hard to contrive a lasting system of *free* education in which the public revenue is not used to supply the wherewithal to finance it; thus it is pretty hard to

figure out a free, "private" school system which will enable the schools to practice segregation. But that does not mean that such efforts will not be made in some places, perhaps on the theory that this is at least a way of buying time.

Abolishing the Public Schools

Finally, as a fifth method of evasion, a state might pass legislation authorizing those communities which so desired, simply to abolish their schools. (In many if not all states, a prerequisite to such legislation would be a constitutional amendment, and that may be less easy to secure than will enactment of a statute.) This step contemplates abolition of all state supported education in a community which elects that alternative. The members of the community would have to resort to other, private resources to organize and finance schools; but if this were done on a purely private basis with no semblance of aid from state or local governments, the schools might be immune from legal attack since they would probably not be treated as "state" activities. Nor, presumably, would the federal courts be able to prevent the abandonment of the public schools, for there is nothing in the federal Constitution which prevents a state from doing just that; presumably the 14th Amendment only comes into play if and when state supported educational opportunities are created. This abolition of the schools may be a way to avoid desegregation. But unless a practical, lasting system of private schools, operated at the expense of the parents, were substituted, the result would be educational suicide. In many communities many citizens may doubt whether that game is worth the candle; but still we may see some experimental efforts at abolition coupled with efforts at devising a substitute system of education which will be wholly devoid of any semblance of state support.

An Approach "In Good Faith"

I have discussed five possible devices for avoiding desegregation. The legality of four is dubious, and the practicability of the fifth is debatable. But even if the legality of these stratagems is dubious, they may still be invoked as a way of buying time at the expense of litigation. All of this may make business for the legal profession, albeit the financial condition of both prospective Negro plaintiffs and local school boards may hardly be such that either group can well afford to squander resources on interminable legal wrangling.

Of course, time "with healing on its wings" can be bought by all this outlay for litigation. Many may feel that gradualism may be all important to the future of race relations. But communities contemplating this may do well to be reminded that there are other measures which may secure the time they need to make the administrative and psychological transition; and they at least might be mindful that there are steps which they can legally take to reduce the impact of desegregation. One is to set up a system of enrollment based on free choice: give all students in a particular attendance area the option of selecting one of two schools—perhaps a choice between a formerly all-Negro and a formerly all-white school. It may

be that for a while each race will gravitate to separate schools. Such a result, I think, would not do violence to the Court's principle of May 17, 1954, *if* no coercion whatsoever (from any source) were applied to those who must make the choice. In some communities this system might be both manageable and desirable—at least as an interim, transitional measure.

Also, in many urban areas, redistricting school attendance areas may result in little mixed attendance because of existing residential patterns. Gerrymandering, at least if flagrant, should be illegal; I think a court would enjoin use of non-compact, weirdly patterned attendance areas. But even without gerrymandering much segregation will exist because of existing residential patterns and its existence should not be in violation of the principle of May 17, 1954.

Finally, the Court's second decision, with its vague formula, grants time to school officials who approach the problem in good faith. In a sense, "good faith" is the *quid pro quo* for time to work out "solutions" to the "obstacles." If such a bargain were initially accepted by a community, certainly much would have been accomplished by way of preserving both local control over the schools and a good civic atmosphere to grapple with the problems of the future.

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