thought, "If I can only get there I will be safe." I don't know why the bench seemed a safe place to me, but I started walking toward it. I tried to close my mind to what they were shouting, and kept saying to myself, "If I can only make it to the bench I will be safe."

When I finally got there, I don't think I could have gone another step. I sat down and the mob crowded up and began shouting all over again. Someone hollered, "Drag her over to this tree! Let's take care of that nigger." Just then a white man sat down beside me, put his arm around me and patted my shoulder. He raised my chin and said, "Don't let them see you cry."

3.6

David L. Kirp

Retreat into Legalism: The Little Rock School Desegregation Case in Historic Perspective

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> *Law and order are not here to be preserved by depriving the Negro children of their constitutional rights. . . . The right of a student not to be segregated on racial grounds is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.*
>
> —Cooper v. Aaron *(1958)*

> *During the 1970s and 1980s, a word disappeared from the American vocabulary. That word is segregation.*
>
> —*Douglas Massey and Nancy Denton,* American Apartheid *(1993)*

In the waning days of the summer of 1957, the nation's attention was riveted on an unfolding drama in Little Rock, Arkansas. There, Governor Orval Faubus, who earlier had cultivated a reputation as a racial moderate, had declared in flat contradiction of a federal court order that nine black students—the first black students to be admitted to a white school in Little Rock—would not be permitted to enroll in Central High School. "Blood will run in the streets," Faubus warned, if the youngsters tried to enter the school, and the first intrepid black student was driven off, the vengeful crowd shouting "Get her! Lynch her! . . . Get a rope and drag her over to this tree."

Although the impasse was broken when, after three weeks of violence, President Eisenhower finally ordered army paratroopers to escort the black youngsters into Central High, the military presence didn't mean peace. When harassment of the nine students continued unabated, the federal trial judge, fearful of yet more "chaos, bedlam and turmoil," shifted course, agreeing to postpone integration for two years, until 1960; meanwhile, the nine black students who had survived a year at Central High would be reassigned to the all-black high school (Irons 1988, 111).

It was this order, appealed by the NAACP, that the Supreme Court took up in special session in September 1958. This was four weeks before the Court Term was scheduled to begin, and the timing of the oral argument was meant to dramatize the significance of the case: only three times before in the Court's history had the justices convened during a recess (Irons and Guitton 1993, 249–263). While this was not the first occasion on which a Dixie official had vowed to perpetuate the regime of school segregation struck down in *Brown v. Board of Education* (1954), it represented the most direct and frontal defiance of the federal judiciary, and so the Court felt compelled to respond swiftly. Barely 24 hours after oral arguments, the justices ordered that integration in Little Rock proceed without delay; two weeks later, it issued a more detailed decree in *Cooper v. Aaron* (1958).

The opinion in the Little Rock case is remarkable neither for its rhetorical flourishes nor for its constitutional boldness. Unlike the Segregation Cases, there is no heartstrings-tugging plea to end segregation in order not to inflict damage upon the "hearts and minds" of the young, no tacit overruling of a sixty-year-old precedent. Instead, what makes *Cooper* memorable is the declaration of judicial will that is so palpably on display, the jurists' insistence on their right to the last word in matters of constitutional law. This is less *Brown* revisited than *Marbury v. Madison* (1803) *redux*.

Often in its history, the Supreme Court has been called upon to act as "teacher in a vital national seminar" (Rostow 1952); so too here. Each of the justices individually signed the opinion in *Cooper v. Aaron*, and that remarkable gesture—Earl Warren as John Hancock in this declaration of judicial independence—was a tangible manifestation of the justices' determination to prevail. The Segregation Cases, the Court insisted, embodied the law of the land to which government officials and ordinary citizens alike owed allegiance.

Fast Forward

Shift time and geography some 30 years to DeKalb County, Georgia; then, a few years later, shift once more to Kansas City, Missouri (*Freeman v. Pitts* 1992; *Missouri v. Jenkins* 1995). These are the most recent school desegregation cases to be heard by the Supreme Court, and their contrast with *Cooper v. Aaron* could not be plainer. The justices, so pointedly unanimous about the right course of action in Little Rock, have become badly split and publicly querulous, disinclined even to conceal their disdain for their colleagues' opposing views. The issues to be decided have much less to do with great principles—simple justice (Kluger 1976)—than with the details of political and judicial management. Whatever the Supreme Court may subsequently say about desegregation, these opinions confirm what has been apparent for years: that an era during which the Court embraced an integrationist vision of racial fairness has ended. The persistence of segregation, it seems, no longer troubles the sleep of the justices.

In DeKalb County, a leafy Atlanta suburb, school officials sought an end to pupil busing mandated by the trial court which, decades after the original litigants had graduated from high school, was still issuing supplementary orders. These officials insisted that they had done their job. The public schools were "unitary" according to the standards laid down by the Court. The fact that some schools in the county remained mostly black while others were mainly white was not government's fault, but rather a matter of housing prices and individual preferences—factors entirely outside public officials' control. It was time, they believed—long past time, really—to be freed from court oversight.

In Kansas City, a quarrel over money had broken out between the city and the state over who should pay for enticements to integration. Missouri objected to having to underwrite the costs of magnet schools, specially designed institutions which offered everything from Olympic size swimming pools to the latest in electronic gadgetry in order to lure white suburbanites to the almost entirely black urban school system.

In the DeKalb County litigation, the school board prevailed; and the state got its way in Missouri. The array of opinions in these two cases reveals desegregation to be in full retreat. The integrationist-minded justices who once ruled the Court became fixated on the minutiae of school board behavior in DeKalb County and the precise terms of the legal complaint in Kansas City. It was the opponents who displayed passion and summoned principle to defend individual liberty and assail judicial paternalism. As a matter of rhetoric, these moments belong to Clarence Thomas, who has gentrified Orval Faubus' angry sentiments, rendering them the stuff of constitutional law.

How could the death of the integrationist ideal have happened so swiftly?

Just Schools

"No single issue has more moral force than *Brown*," wrote J. Harvie Wilkinson, III a generation ago in *From Brown to Bakke*. "Few struggles have been morally more significant than the one for racial integation of American life. Yet school integration may be the most political item on the Court's agenda" (Wilkinson 1979, 151). From a matter of high principle in *Brown*, desegregation rapidly descended into the swamp of defiance (as in Little Rock), evasion, avoidance, and delay. The Court, frustrated by the success of these tactics, sought a clear standard against which to measure compliance with its orders. It settled upon a numerical standard which took racial balance as its starting point.

In *Green v. County School Board* (1968), freedom of choice, the justification the rural Virginia district proferred for having accomplished only token integration, was simply a euphemism for evading *Brown*. It made obvious sense to order that the district's two elementary schools reflect the racial composition of the school district—that there be "a system without a 'white' school and a 'Negro' school, but just schools." However, when in the *Swann* (1971) case this same "just schools" standard was applied in formulaic fashion to urban, residentially segregated Charlotte, North Carolina, thousands of students had to be bused to school over substantial distances.

Until *Swann*, desegregation occupied the unchallenged moral high ground in national discourse. *Brown* enjoyed near-iconic status; while justices might disagree among themselves about the constitutional status of civil rights demonstrations, to

dissent in a school case was a sacrilege. But *Swann* changed all that. The ruling evoked a national chorus of complaint, whipped up by chief chorister Richard Nixon. It didn't matter that pupils had been bused to school since Henry Ford's time—that, as the NAACP pithily and accurately pointed out, "It's Not the Distance, It's the Niggers" (Mills 1973, 322) which best explained the anti-busing sentiment. The Supreme Court's decision to discuss the issue entirely in terms of numbers—racial balance substituting for historically-rooted understandings of racial justice, on the one hand and educationally rooted understandings of equal opportunity on the other—proved to be a fatal misrepresentation of the problem.

Just one year after *Swann*, and nearly twenty years after *Brown*, the first dissents were registered in a Supreme Court desegregation case (*Wright v. City Council of Emporia* 1972), when Nixon's appointees voted as a bloc to loosen judicial control. A year later, in the Denver case, the justices, again divided made numbers rather than principle the heart of their first ruling on segregation in the North (*Keyes v. Denver School District* 1973).

An incautious Supreme Court, willing to confront the full measure of school segregation, might have advanced "a sweeping and interconnected view of American racial history. It might have seen school segregation as a product of prejudice in jobs, housing, politics, public facilities, the military, with discrimination and segregation in each part of American life reverberating through the whole" (Wilkinson 1979, 140; see generally, Myrdal 1972). With much less strain on their constitutional role as interpreters of the law, the justices could have decided that fixing a single national standard for school segregation was both legally and morally right (Hochschild 1984).

In 1954, when the opinion in the Segregation Cases was announced, North and South seemed to occupy different moral universes, and merging those universes required a second Reconstruction (Orfield 1969; Rodgers and Bullock 1976). The Supreme Court refused even to hear a desegregation case from the North throughout the 1960s, as if waiting for the apparently intractable legal and political issues posed by those lawsuits to be tamed in lower court opinions.

By the 1970s, however, it could plausibly be said that the racial situation in Denver was not so different from Charlotte, either in fact or law. On both sides of Mason's and Dixon's line, the constitutional injustice stemmed from government-sanctioned—indeed, government-promoted—segregation in housing, which combined with school boards' use of racially distinct neighborhoods to define attendance zones, resulting in segregated public schools. While Northern officials piously contended that such segregation was *de facto*—that it just happened—since government officials drew these attendance zones, the government was always a player, never an innocent party. As Justice Douglas bluntly pointed out in *Keyes*, the Denver case, "the State is barred from creating by one device or another ghettoes that determine the school one is compelled to attend" (*Keyes v. Denver School District* 1973, 205).

A few years earlier, in the Charlotte case, the justices had come close to adopting such a nationwide standard, but when it became clear that such an opinion would not command unanimous assent the majority, still bewitched by unanimity, backed off. Never again would there be a majority on the high court for such a ruling.

To cobble together a solid majority in the Denver case, Justice Brennan, the avatar of racial liberalism, wrote an opinion that combined the by-now familiar

fixation on numbers with a hyper-legalist analysis. Before a federal court could order desegregation in the North, Brennan announced, there had to be proof of intentional past wrongdoing on the part of local school officials which substantially affected the racial composition of the schools. Even as the segregation-promoting character of housing policy was ignored in this equation, burdens of pleading and burdens of proof became the order of the day. The result was Dickensian litigation, daunting to all but the most experienced and best-financed litigants. The outcomes of such litigation varied from place to place in the North—what to one judge was illicit official behavior seemed entirely innocent to another—and this inconsistency made for more popular unhappiness with the courts. Why us, the citizens of San Francisco asked, and not them, referring to San Jose, and the question was really unanswerable (Kirp 1982; Kirp and Jensen 1984).

Brown had deliberately been written in language fit for the Sunday newspaper supplements. In *Keyes*, by contrast, the lack of a persuasive rationale anchored in a morally-driven conceptualization of official wrong-doing made the decision seem a crude imposition of judicial will, not necessarily the right thing to do.

The triumph of artlessly executed hyper-legalism over simple justice became complete in *Milliken v. Bradley* (1975). In that case, the justices overturned, by a 5-4 vote, an order requiring desegregation, not just for the city of Detroit but for the surrounding suburbs as well. This opinion ignored mountains of evidence concerning the complicity of state and suburban officials in walling off Detroit from the surrounding suburbs, evidence on which the trial judge based his decree. *Milliken* sent an unmistakable message—urban apartheid would not be overcome through judicial decree.

The Detroit decision effectively spelled the end of judicial activism in public school desegregation. The constitutional war was over. DeKalb County, Georgia and Kansas City, Missouri were merely mopping-up operations.

Back to the Future

Racial justice acquired meaning outside as well as inside the courtroom during these years. What had seemed so simple in Little Rock in 1957—that nine intrepid black adolescents should not be turned away from a public high school because of their race—had become more complicated by the 1970s. In both the South and the North, residential segregation had increased, making school desegregation logistically harder to accomplish. Nor was it so clear that, in terms of educational outcomes, busing was worth the political and social price (St. John 1975). New black voices were being heard, many of them unsympathetic to the desegregation project. Some black leaders had come to reject integration in favor of black-run schools (Levin 1970; Fantini, Gittell and Magat 1970), even as others grew impatient while waiting, seemingly forever, for the promise of *Brown* to be realized in their communities (Bell 1978). Anyplace where desegregation landed on the agenda, it became *the* issue, demanding massive amounts of time, energy and money. During the past generation, issues having more to do with pedagogy and educational philosophy, less to do with racial justice—the back-to-basics movement; the push for educational excellence; the demand, through vouchers or charter schools, for greater choice of school—have seized the spotlight.

The Supreme Court cannot be faulted for failing to make good on its promise, implicit in Little Rock and spelled out a decade later in *Green*, that state-inflicted

segregation would be eliminated "root and branch." To accomplish this would have required the active support of other branches of government and ultimately the citizenry (Hochschild 1995; Kirp 1984; Kirp, Dwyer, and Rosenthal 1996). But the Court can fairly be criticized for announcing a universal obligation to desegregate America's schools, then through its busing decrees imposing the burden selectively; as well as for failing to risk greatly to preserve its integrationist ideal of racial justice, instead bowing (in *Keyes, Milliken* and the later cases) to the pragmatics of politics in a way the justices had rejected in *Cooper v. Aaron*. If the achievement of a unitary society was really beyond the capacity of justices, the past generation's desegregation decisions have nonetheless undercut the moral authority of constitutional law.

The 40 year-old story of Little Rock has come full circle—like parent, like child. Even as the children of Linda Brown, the named plaintiff in the Segregation Cases, went to segregated schools in Topeka, it's unlikely that the offspring of those nine remarkable teenagers in Little Rock attended integrated public schools. There is a difference between then and now, though: Now hardly any voices are raised in protest.

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