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Implementing *Brown*: A Lawyer’s View

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At its core, Brown v. Board of Education\(^1\) was not a case about racially integrated schools or even about education. At its core, Brown was a case about dismantling the system of state-imposed racial segregation in the American south; a system that inflicted daily humiliation upon African-American citizens and relegated them to a condition of societal subordination and inequality.\(^2\) Brown was the culmination of a quarter-century effort by the NAACP to overturn the separate but equal doctrine of Plessy v. Ferguson\(^3\) and the legal structure of state-imposed racial segregation that followed in its wake. The strategy was "top-down," starting with the graduate school level, where the glaring disparities of separate but equal were most apparent, working down to the college level, and from there to primary and secondary education. Once the Supreme Court declared that it was unconstitutional for the states to maintain racially separate public schools, it was believed by the NAACP legal strategists that it would logically follow that the rest of the state-imposed segregation would fall of its own force.\(^4\)

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\(^1\) Distinguished Professor of Law and Gibbs Chair in Civil Rights and Civil Liberties, Wayne State University. A.B., 1956, University of Pittsburgh; J.D., 1959, University of Pittsburgh.

\(^2\) One speaks in terms of the most familiar and universally accepted standards of right and wrong when one remarks (1) that racial segregation under government auspices inevitably inflicts humiliation, and (2) that official humiliation of innocent, law-abiding citizens is psychologically injurious and morally evil."


\(^4\) See infra notes 11-15 and accompanying text (supporting the accuracy of this belief).
Richard Kluger’s book, *Simple Justice*, details this struggle and demonstrates the very careful lawyering that went into it. The NAACP lawyers, led by Thurgood Marshall, litigating in what were often very hostile and difficult venues, developed very powerful legal arguments and surmounted numerous procedural hurdles in order to get *Brown* and earlier cases before the Supreme Court. As I wrote in a book review of *Simple Justice* in 1976:

What stands out most clearly from these portrayals is the very careful “lawyering” that went into the segregation cases, and the author demonstrates most cogently how legal victories in the struggle for social change are achieved not by oratorical bombast or by railing against injustice, no matter how patent it may be, but by utilizing the lawyer’s skills to make the legal process responsive to the claim of injustice.  

The first case in the progression was *Missouri ex rel. Gaines v. Canada,* decided in 1938. Many southern states did not provide law schools or medical schools or other graduate schools for African-Americans, opting instead to pay their tuition at schools in other states. The Supreme Court held that “separate but equal” meant that the separate school had to be provided in the same state where one was provided for whites. Then came *Sweatt v. Painter,* decided in 1950, where the Court held that “separate but equal” could not apply to law schools and graduate schools, because it was necessary for African-American students to interact with white students during professional and graduate training. These cases set the stage for *Brown* and its holding that segregation in the

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7. 305 U.S. 337 (1938).

8. Id. at 351-52.


10. Id. at 634-36. See also McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637, 640-42 (1950) (holding unconstitutional a state university’s efforts to internally segregate an African-American graduate student by requiring him to sit at a separate desk outside of the classroom, a separate desk outside the library reading room, and a separate table in the cafeteria).
public schools was "inherently unequal," and therefore unconstitutional.\textsuperscript{11}

Armed with the \textit{Brown} precedent, the NAACP lawyers went back to court to complete the overriding objective of fully dismantling the legal structure of state-imposed segregation. In the years after \textit{Brown}, the Supreme Court, in a series of per curium opinions, citing only \textit{Brown}, held unconstitutional state-imposed segregation in all public facilities and activities, such as transportation,\textsuperscript{12} parks,\textsuperscript{13} and athletic competition.\textsuperscript{14} The process culminated in the most aptly-named case in constitutional law, \textit{Loving v. Virginia},\textsuperscript{15} where the Court struck down state laws prohibiting interracial marriage. From a constitutional standpoint, the legal structure of state-imposed segregation had come to an ignominious end.

At the same time, it must be remembered that \textit{Brown} itself involved state-imposed segregation in the public school systems of seventeen southern and border states. Implementation of that part of \textit{Brown} involved many years of arduous and frustrating litigation by NAACP and other civil rights lawyers. Cases had to be brought in every school system in these states, and the desegregation effort met with what those states proudly called "massive resistance." My own introduction to civil rights litigation began when I was a young assistant professor at St. Louis University in 1962. I was a volunteer lawyer for the NAACP in a school desegregation case in Charleston, Missouri, along with a more experienced African-American lawyer who was later to become a federal judge.\textsuperscript{16} Because this

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11. \textit{Brown}, 347 U.S. at 495. The cases prior to \textit{Brown} culminated in the Supreme Court's holding in \textit{Brown} that:

\begin{quote}
[1]In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.
\end{quote}

\textit{Id.} at 495. \textit{See also} \textit{Bolling v. Sharpe}, 347 U.S. 497, 499-500 (1954) (holding that federally-required segregation of the District of Columbia schools constituted "discrimination... so unjustifiable as to be violative of due process," and consequently violated the "equal protection" component of the Fifth Amendment's due process clause).


15. 388 U.S. 1 (1967).

16. The more experienced African-American lawyer, Clyde S. Cahill, was appointed
was a relatively small school system, the school board was unable to obtain any delay, and we succeeded in getting the court to order implementation of a desegregation plan at the start of the 1963 school year. In most school districts unfortunately, the process was much more drawn out. But, by the end of the decade, desegregation had been accomplished in most rural and smaller school districts in the South. This meant that white parents wanting to avoid desegregation in those districts had to form "white only" private schools, as some of them did.

The situation in larger urban and consolidated districts was more complex. In southern cities, as in northern ones, there was a high degree of residential racial segregation, which continues to this day. Since school attendance zones were drawn according to geographic attendance zoning, many schools, particularly at the elementary level, would in fact have been factually segregated, even in the absence of state-imposed segregation. The school districts argued that they satisfied the obligation to convert from a dual system to a unitary one by substituting geographic attendance zoning for race as the basis of school assignment, even though this would result in a very large number of factually segregated schools.

In 1971, the Supreme Court resolved this issue and rendered a very important decision in *Swann v. Charlotte-Mecklenburg Board of Education,* the "busing" case. The Court rejected the "geographic zoning is neutral" argument. It observed that, "all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation." As a result, the entire school system was deemed to be de jure segregated, and the school district was required to desegregate the entire system to the maximum extent feasible, including where necessary, by busing African-American students to formerly white schools and white.


20. Id. at 28.
21. Id.
students to formerly African-American schools. The busing order would include schools that had been constructed after *Brown*, since they were a part of what was still a *de jure* segregated school system. Thus, desegregation would be required in all of the urban school districts in the south, and again white parents could avoid desegregation only by enrolling their children in segregated private schools.

Whenever the Supreme Court decides a major case, it thereby provides a precedent that lawyers can use in other cases. *Swann* now made it possible to bring a new round of desegregation suits in all the urban school districts that were segregated by state law pre-*Brown* in order to "achieve the great possible degree of actual segregation." At the time of *Swann*, I was teaching at the University of Kentucky. As a volunteer lawyer for the Kentucky ACLU, I brought a suit on behalf of African-American and white parents against the school system in Lexington-Fayette County, where the University was located. The Fayette County school system had closed the one African-American high school after *Brown* and assigned the African-American students to the formerly white high schools. But it continued to use geographic attendance zoning for the junior high and elementary schools, which meant that most of them were factually segregated schools. In light of *Swann*, we could now argue that Fayette County was still operating an unconstitutional dual school system. The court agreed, and a court-ordered desegregation plan went into effect in the fall of 1972. That was the easy case.

The much more difficult case involved Louisville and Jefferson County, which had the largest African-American population in the state. Most of the African-American population resided in the City of Louisville. In 1972, Louisville was a separate school district, with about 50,000 students, over half of whom were African-American. While the Louisville district desegregated somewhat after *Brown*, it did not do much, and in 1972 most

22. *Id.* at 15-16, 26-31.

23. *Id.* at 20-21. See *Wright v. Council of Emporia*, 407 U.S. 451 (1972) (holding that until the system had been fully desegregated and unitary status had been achieved, the school authorities had the affirmative duty not to take any action that had the effect of increasing or perpetuating segregation); *see also* United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972). Thus, the school board could not construct any schools that opened as a racially identifiable school or permit any other school to become racially identifiable.


of its schools were still factually segregated. The larger, suburban Jefferson County school district had about 100,000 students, only 4% of whom were African-American. It operated one combined elementary-junior high school for its African-American students. In addition, pre-Brown, the school bused its African-American high school students to Central High School, Louisville's pre-Brown African-American high school. I led a team of lawyers in an ACLU-NAACP-Kentucky Commission on Civil Rights joint venture in which we filed two suits on behalf of African-American and white parents residing in both districts. In 1973, the United States Court of Appeals for the Sixth Circuit, which covers Michigan, Kentucky, Ohio and Tennessee, ruled that both systems were de jure segregated. It also ordered that the desegregation plan cross school district lines, so that there would be cross-district busing between the African-American schools in Louisville and the white schools in Jefferson County. As I will discuss shortly, the same kind of cross-district busing order had been issued in the Detroit desegregation case.

While school desegregation was tortuously being implemented in the southern and border states in the 1960s, the lawyers for the NAACP and other civil rights groups also looked at the situation in metropolitan areas outside the south, such as Detroit, where the overwhelming number of schools were in fact racially segregated. While much of this segregation was due to the use of geographic attendance zoning interacting with patterns of racial residential segregation and concentration, not all of it was. Rather, the civil rights lawyers contended that the school districts built on these patterns of racial residential segregation and concentration to maximize school segregation and bring about the existence of a large number of racially segregated schools instead of racially integrated schools. If a policy of intentional racial segregation could be shown, the resulting segregation of the schools was de jure and unconstitutional in the same manner as segregation required by state law in the southern and border states pre-Brown.

This policy of segregation could be inferred from a pattern of


27. Newburg Area Council, Inc., 489 F.2d at 932.

discretionary decisions made by school authorities. These decisions included the drawing of attendance zones, the setting up of optional zones, school construction and school closure, and teacher assignment, which maximized racial segregation and brought about racially segregated schools instead of racially integrated schools. In the late 1960’s and early 1970’s, the courts were finding that segregative intent was present in case after case on the grounds that (1) the discretionary decisions of the school authorities showed a pattern of maximizing racial segregation and causing schools to become racially identifiable and (2) these decisions could not be explained consistently in terms of racially neutral criteria or the criteria that the school authorities purportedly were applying.29 One of the leading cases involved the Pontiac school district, with the case presided over by then United States District Judge Damon Keith.30 Judge Keith found that the school officials “intentionally utilized the power at their disposal to locate new schools and arrange boundaries in such a way as to perpetuate the pattern of segregation within the city and thereby, deliberately, in contradiction of their announced policies of achieving a racial mixture in the schools, prevented integration.”31 When the school board gave reasons for its discretionary decisions, Judge Keith found that these reasons were not consistent with each other or with the purportedly neutral criteria that the school board was applying.32 Judge Keith thus found a policy of segregation,33 and ordered the school board to desegregate the system.34 In affirming Judge Keith, the Sixth Circuit stated that the school board’s


32. For example, while the Board purportedly had a policy against building small schools, it erected a new all-white elementary school with 167 students, the smallest in the system, rather than send the white students to a new all-black school. Similarly, when a black school became overcrowded, the Board erected a new black school to handle the overflow, although there was excess capacity at a nearby white school. Id.

33. As he stated: “Where a Board of Education has contributed and played a major role in the development and growth of a segregated situation, the Board is guilty of de jure segregation. The fact that such came slowly and surreptitiously rather than by legislative pronouncement makes the situation no less evil.” Id. at 742.

34. Id. at 745.
decisions "more often than not tended to perpetuate segregation," and that any attempt to justify those decisions in terms of purportedly neutral criteria would usually require "inconsistent applications of these criteria." The same policy of segregation was found in Detroit, Lansing, Kalamazoo and Benton Harbor, and was found in many school districts outside of the south. Since these districts were de jure segregated school systems, they were, like school districts in the South, required to desegregate to the maximum extent feasible, including "busing" where necessary.

However, in order to achieve actual desegregation in these school systems, there had to be a sufficient number of white students in the system to integrate with the African-American students. By 1970, there had been a substantial movement of white families from urban school districts to neighboring suburban school districts. It was believed, quite correctly, that if school desegregation was required in an urban school district alone, this would hasten "white flight" to the adjoining suburban school districts, leaving no whites left to integrate. In 1970, when the Detroit litigation was instituted, the Detroit school system was nearly 64% African-American. Therefore, a desegregation plan limited to the Detroit school system alone would produce only a limited degree of actual desegregation, and even that would likely decline in the face of "white flight" to the suburbs. To prevent this from happening, a District Judge ordered a desegregation plan that crossed school district lines and provided for busing between the African-American schools in Detroit and the white schools in the nearby suburbs.

35. Davis, 443 F.2d at 576.
40. See Sedler, supra note 39; Farley, supra note 39.
Circuit held that this cross-district busing was permissible, and ordered similar cross-district busing between Louisville and Jefferson County.

However, in the 1974 case of *Milliken v. Bradley,* the Supreme Court held in a 5-4 decision, that the cross-district busing between Detroit and the suburbs was not constitutionally permissible. The Court took the position that since the constitutional violation had occurred only in the Detroit school district, the remedy for that violation had to be limited to Detroit. A Detroit-only desegregation plan was implemented, the predicted white flight occurred, and for some time now the Detroit school system has been approximately 90% African-American.

In the Louisville-Jefferson County case, the Supreme Court ordered the Sixth Circuit to reconsider its cross-district desegregation order in light of *Milliken.* I managed to prevail on the remand, primarily because both the Louisville and Jefferson County districts practiced *de jure* segregation, and because they had a history of cooperation pre-*Brown.* At that point, the Louisville district decided to “go out of business,” as it was permitted to do under Kentucky law. The Supreme Court declined to hear the case, and

42. *Bradley,* 484 F.2d at 249.


45. *Id.* at 744-45.

46. See Sedler, *supra* note 39, at 1703-1709 (discussing the situation prevailing in the Detroit Public Schools as of 1987). The situation prevailing in the Detroit Public Schools today is substantially the same as it was at that time.


49. The provisions of Kentucky law establishing the county as the basic educational unit and providing for the merger or consolidation of the Jefferson County and Louisville school districts were set out by the Sixth Circuit in its remand opinion. *Newburg Area Council,* 510 F.2d at 360. Shortly after the Sixth Circuit’s remand decision, the Louisville School District initiated a petition for unconditional merger with the Jefferson County School District, which was approved by the State Board of Education. See the discussion in Sedler, *Metropolitan Desegregation,* *supra* note 48, at 599-600.
the countywide desegregation plan in the now merged system went into effect at the start of the 1975 school year. At that time, the countywide African-American school population was about 20%. The elementary schools were integrated in a range of between 12 and 44% African-American, and the secondary schools at a range between 14 and 24%. There was great resistance at first. For example, the Kentucky National Guard had to be called out to prevent violence and literally rode shotgun on the buses. However, in time the community accepted the idea of desegregation, the school system worked hard to implement the plan, the academic performance of both African-American and white students improved, and the basic structure of the plan remains in effect today.

50. Cunningham v. Grayson, 541 F.2d 538 (6th Cir. 1976) (setting out and approving the desegregation plan).


52. Id. at 1710.

53. Id. at 1718.

54. The Jefferson County Board of Education has made the policy decision to establish racial composition guidelines for each of the schools so that the schools can continue to be racially integrated. The history of the implementation of the original plan and the Board's actions in the succeeding years are set forth in Hampton v. Jefferson County Bd. of Educ., 72 F. Supp. 2d 753, 755-769 (W.D. Ky. 1999). The Board has replaced the mandatory busing of the original decree with a combination of "clustered" and "satellite" attendance zoning, school choice, and magnet schools. Hampton, 72 F. Supp. 2d at 755-769. Under the guidelines, the goal is that each school shall have between 15% and 50% African-American students (the current African-American enrollment in the system is approximately 30%). Id. In that case, the court held that the original decree permitted the Board to use the guidelines to prevent the re-emergence of racially identifiable schools. Id. However, the court subsequently held one year later that the decree should be dissolved and that the racial quota provisions of the guidelines could not be used to deny admission on the basis of race to magnet schools, since this would have the effect of excluding a student from the special benefits provided by those schools. Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358 (W.D. Ky. 2000). At the same time it held that the guidelines could be used as a means of desegregating the regular schools, noting that, "voluntary maintenance of the desegregated school system should be considered a compelling state interest." Id. at 379. A challenge to the continuing use of the racial guidelines brought by white parents whose children were denied admission to certain schools is pending. See Chris Kenning, School Officials Say They Fear Resegregation in the System, LOUISVILLE COURIER JOURNAL, December 11, 2003, at 1B.

It is interesting to note that the challenges to the Board's racial guidelines were first brought by African-American parents whose children were excluded from Central High School, the pre-Brown black high school that had now been converted to a magnet schools.
Similarly, in Lexington-Fayette County, the community accepted desegregation, and the basic structure of the plan remains in effect today.\textsuperscript{55} As a result, according to a recent study by the Harvard University Civil Rights Project, today Kentucky leads the Nation in school integration, with 80.9\% of its African-American students in majority white schools and virtually none in 90-100\% African-American schools.\textsuperscript{56} In Michigan, by contrast, only 18\% of the African-American students are in majority white schools, while 62.7\% are in 90-100\% African-American schools.\textsuperscript{57} The

Since they were successful in their suit and the racial guidelines were eliminated, Central has now become a predominantly African-American school and to that extent has returned to its pre-\textit{Brown} composition. See Greg Winter, \textit{Long After Brown v. Board of Education, Sides Switch}, \textit{NEW YORK TIMES}, May 16, 2004, at 27. \textsuperscript{55} However, the Fayette County Board, unlike the Jefferson County Board, has not tried to maintain racial guidelines, with the result that some of the elementary schools are predominantly African-American, in a school system that is 23\% African-American. African-Americans compose 40\% or more of the student population at 21 of the 50 schools. Still, there is a much greater degree of desegregation today that there was in 1972, when the suit was filed. See Linda B. Blackford, \textit{Fayette Disparity Exists Despite ’70s Lawsuit Win}, \textit{LEXINGTON HERALD-LEADER}, May 16, 2004, at A13. \textsuperscript{56} \textsuperscript{57} \textit{Gary Orfield & Chungmei Lee, Brown at 50: King’s Dream or Plessy’s Nightmare} 29-31 (Harvard University 2004).

\textsuperscript{55} \textit{Id.} at 27. In commenting on the situation in Kentucky, the authors state: Kentucky stands out in the list of the most integrated states for black students. It was a state with a history of \textit{de jure} segregation and experienced a bitter struggle over the initiation of desegregation in metropolitan Louisville nearly 30 years ago. Most of the segregated black students in the state were in the city school district, which had a substantial majority of black students. Rather than follow the typical practice, after the Detroit decision, of limiting desegregation to a declining district where desegregation would be limited and short-lived, the Louisville school board voted to go out of existence and, under state law, had to be absorbed into the Jefferson County school district, which contained the city’s suburbs. The federal judge hearing the desegregation case, with the support of the state’s human rights commission, ordered full and immediate desegregation of the resulting metropolitan district. After a period of deep conflict the situation settled down and the district began to move from mandatory reassignment to choice and clustering systems emphasizing both educational options and desegregation. When increasingly conservative high court decisions made it difficult for school districts which were no longer under court order to continue race-conscious desegregation policies, Jefferson County returned to federal court to fight for its right to remain integrated and won. \textsuperscript{56} \textit{Id.} at 31.
extent of actual school desegregation in many other states with a substantial African-American population unfortunately is closer to that in Michigan than to that in Kentucky.\textsuperscript{58} One of the factors contributing to this situation is that practically all of the court orders requiring desegregation have now been set aside on the ground that the school districts have eliminated all vestiges of state-imposed segregation and are now free to return to geographic attendance zoning.\textsuperscript{59} Many have done so. As previously stated, because of patterns of racial residential concentration and segregation, geographic attendance zoning will produce a large number of factually segregated schools within a school district. And, in the major metropolitan areas, such as Detroit, there is typically an urban school district that is predominantly African-American and lower-income, surrounded by the predominantly white and middle and upper-income suburban districts.\textsuperscript{60} As Justice Marshall prophesied in his dissent in \textit{Milliken}, the effect of the decision has been to "allow our great metropolitan areas to be divided up each into two cities—one white, the other black."\textsuperscript{61}

We see then that the education component of \textit{Brown} has been to establish a constitutional right on the part of African-American and white schoolchildren to attend school in a school system in which there exists no vestiges of state-imposed segregation. There is no constitutional right to

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\item 58. According to the Harvard University Civil Rights Project, the percentage of African-American students in 50-100\% minority schools by region as of 2001 was as follows:
\begin{itemize}
\item South 69.8\%
\item Border 67.9\%
\item Northeast 78.4\%
\item Midwest 72.9\%
\item West 75.8\%
\end{itemize}

The percentage of African-American students in 90-100\% minority schools by region as of 2001 was as follows:
\begin{itemize}
\item South 31.0\%
\item Border 41.6\%
\item Northeast 51.2\%
\item Midwest 46.8\%
\item West 30.0\%
\end{itemize}
\textit{Id.} at 20.
\item 60. Sedler, \textit{supra} note 35, at 1703-07.
\end{itemize}
attend schools that are in fact desegregated. There is a substantial amount of actual segregation in public education today, and it is the result of patterns of racial residential segregation and concentration, interacting with geographic attendance zoning and separate urban and suburban school districts. Lawyers have done what they could to prevent the operation of racially segregated schools, but as this example indicates, there are limits to just how far lawyers can go in using the Constitution to bring about societal social change.

But now, as I end, let me come back to the core meaning of Brown. Brown stands as a monument as to how lawyers have used their ability and their commitment to social justice to bring crashing down the system of state-imposed segregation and discrimination that for so long had afflicted African-Americans in the American south. No longer in this nation can there be racial inequality imposed by law. This, in the final analysis, is the enduring legacy of Brown.

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