

# THE JURISPRUDENCE OF BUSING

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School desegregation decrees have become a familiar part of the contemporary judicial landscape, and yet they remain enmeshed in controversy. These decrees have engendered two types of criticism. One is addressed to the merits and asserts that segregation is not sufficiently harmful to warrant the costs of busing. Another type of criticism, and the subject of this article, is institutional. It focuses on the predicate of decision—the judgment that segregation is sufficiently harmful to warrant the remedial costs; it notes the controversial character of that judgment; and it then asserts that a court should not coerce corrective action whenever its decision rests on such an uncertain basis.

This strain of institutional criticism has its roots in the attacks on *Brown v. Board of Education* that claimed that the decision was “sociology, not law,” seizing on footnote eleven of that opinion, in which the Court referred to certain social science studies.<sup>1</sup> It is a line of criticism that has gained additional momentum as the nature of the school desegregation problem has changed and as the uncertainty has become more acute. My intent is to evaluate this criticism. As a first step, and in order to locate the sources of uncertainty, I will try to structure a desegregation decision.

## I

### THE STRUCTURE OF DECISION

A decree imposes a legal obligation to take corrective action. It must be predicated on the proposition (referred to as the underlying proposition) that the practice to be corrected or eliminated is sufficiently harmful that it justifies the consequent costs entailed in complying with the order. Other conditions might also have to be satisfied—for example, the judge must also find that the state is responsible for the harmful practice—but the proposition asserting that the harm is sufficient to justify the remedial costs is the necessary decisional predicate. This is a statement of ideal and expectation: what should be the basis of the decision and what usually is.

The underlying proposition can, in turn, be divided into three components that identify the range of judgments a court must make before relief is granted. First, the judge must identify and assess the harmfulness of the prac-

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1. See 347 U.S. 483, 494 (1954). For an extensive bibliography and useful discussion of the footnote eleven attack, see P. ROSEN, *THE SUPREME COURT AND SOCIAL SCIENCE* (1972); Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 278-83 (1972).

tice to be corrected (the harmfulness component); second, he must identify and assess the remedial costs (the remedial-cost component); and third, he must determine whether the harm is sufficient to justify the remedial costs (the relational component).

These are the judgments that must be made in every injunctive suit, even one based on the Constitution. The Constitution does not restrict the range of judgments. It does not make any of the components superfluous. Rather the Constitution operates within each component. It requires that the harm be of a certain character, it precludes the consideration of certain remedial costs, and it defines the nature of the relationship that must exist between the harm and the costs.

#### A. The Character of the Harm

Since a school decree seeks to implement the Equal Protection Clause, the target practice must not just be harmful, but particularly harmful to some identifiable class. It is this class-oriented quality of the harm that enables it to be perceived as a form of unequal treatment, and thus a subject of concern under the Equal Protection Clause.

There is some dispute as to which social classes are to be so shielded by the Equal Protection Clause. For example, should the Clause protect such classes as the "poor" or "illegitimate children" from particularly disadvantaging practices? But there is no dispute that wherever the line is drawn, blacks—the class allegedly injured in a desegregation suit—must be included. Both the historical origins of the Equal Protection Clause and the identity of blacks as a discrete class—indeed, as the perpetual underclass—suggest that blacks should be considered the prime beneficiary of that Clause.<sup>2</sup>

#### B. The Relevance of Remedial Costs

The relevance of remedial costs is often obscured in constitutional litigation. It is commonly asserted that violation of a "constitutional right" must be corrected regardless of the cost. Indeed, vindication-at-any-cost is often thought to be one of the special attributes of a right deemed "constitutional." This conceptualization may be appropriate for a narrow band of constitutional provisions, those that specifically confer a readily discernible right—such as the provision guaranteeing trial by jury—though even then a court may take account of the remedial costs in defining the incidents of the right—such as the number of jurors required<sup>3</sup> or the unanimity requirement.<sup>4</sup> But for constitutional provi-

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2. The classic statement of this position is contained in the Slaughter House Cases, 83 U.S. (16 Wall.) 36, 71-72 (1873), and has been repeated on many occasions. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 126-27 (1970); Shelley v. Kraemer, 334 U.S. 1, 23 (1948).

3. *See, e.g.*, Williams v. Florida, 399 U.S. 78 (1970).

4. *See, e.g.*, Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).

sions like the due process or equal protection clauses the remedial costs are clearly relevant in determining whether there is a violation. With these provisions, the judiciary has considerable latitude in shaping the contours of a "constitutional right"—in determining whether segregation is to be deemed a denial of the equal protection of the laws and whether blacks have a "constitutional right" to have the system integrated. In making that judgment, the court must not only consider the harmfulness of the particular practice being challenged but also whether it is sufficiently harmful to warrant the costs of eliminating it.

Not all costs should be taken into consideration in deciding whether to invalidate a particular practice. A distinction must be made between allowable and non-allowable costs. The paradigmatic instance of an allowable cost would be the time and money consumed in busing. The psychic costs imposed on white racists who wish to keep blacks in a position of subordination would be a paradigmatic instance of a non-allowable cost.<sup>5</sup> A non-allowable cost has two defining features: (a) allowance would, as a practical matter, result in the continued subordination of the racial minority; and (b) the existence and magnitude of these costs are subject to individual control. The recognition of costs that have such qualities would be inconsistent with a central purpose of the Equal Protection Clause, and for that matter would also be inconsistent with the very idea of a constitutional restraint. The restraint would become dependent on the consent of those being restrained. If the psychic costs of the racist, for example, were considered an allowable cost and thus a restraint on remedial efforts, an incentive would be created for the racist to constantly escalate his hostility to blacks, at least until it is sufficient to stop the remedial effort.

The remedial costs of a busing decree, of course, do not categorize themselves as "allowable" and "non-allowable." That task of categorization is for the court, and often it is exceedingly difficult. This is particularly true of the remedial cost of greatest concern to those most interested in preserving the value of community—the disruptive impact of a busing decree on a neighborhood. For the community may be in part defined in terms of racial antipathy, an associational preference that, if it were standing alone, should be deemed non-allowable. In such a situation, the court must try to disaggregate the interests and preferences served by the demand to preserve the integrity of the community, determine which are allowable and which non-allowable, and make an assessment of the role that each one performs—obviously a treacherous task.

The distinction between allowable and non-allowable remedial costs is further blurred by the fact that the latter costs cannot be totally ignored. The frustration of racist associational preferences may, for example, result in temporary boycotts, permanent withdrawal from the public school system, and

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5. See generally *Watson v. City of Memphis*, 373 U.S. 526 (1963); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Buchanan v. Warley*, 245 U.S. 60 (1917).

violence—activities that limit the capacity of the court to eliminate the practice. Perhaps the most that can be said is that these non-allowable costs have a practical relevance, not a normative one. Non-allowable costs should not bear upon the creation and enforcement of rights and duties, although they may do so out of sheer necessity.

### C. The Nature of the Relational Judgment

The judge must consider not only allowable remedial costs but, more importantly, he must conclude that they are justified by the eradication of the harm (the benefit). Two factors make this relational judgment particularly difficult. First, it calls for a comparison between the costs of the harm and those of the remedy even though these costs are not reducible to a single currency. Without a rate of exchange, a judge is faced with an apples-and-orange situation: how does he compare, for example, the dignitary harm of segregation with the costs of a school busing program?<sup>6</sup> Second, there is no clear understanding of the relationship that must exist between the harm and the remedial costs. It is clear that the harm must be “sufficient to justify” the remedial costs; but this concept is notably open-ended and susceptible to several interpretations.

If the harm is greater than the remedial costs, then the decree would seem justified. That would make a “greater-than” relationship a sufficient condition. The troublesome question is whether it is also a necessary condition.<sup>7</sup> Three features of the school desegregation problem lead me to a negative answer: (1) The claim is not merely that the practice is harmful, but that it is particularly harmful to one of our worst-off classes, blacks. (2) The remedial costs are spread generally through society, borne by both the minority and the majority.<sup>8</sup> (3) The decrees are predicated on the Equal Protection Clause whose guarantee seems to have constitutionalized a distributional preference. It prohibits the maximization of total welfare at the expense of the racial minority, or, to put the same point somewhat differently, it requires—in addition to

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6. An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan . . . . It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30-31 (1971).

7. Although these factors are not quantifiable, assume that the remedial costs were 300. There seems little doubt that a decree would be justified if the harm of the challenged practice were 500. The question posed here is whether the harm *must* be greater than 300 (the amount assigned to the remedial costs) in order for the decree to be justified.

8. The Supreme Court, by generally limiting the remedy to within-district busing, *Milliken v. Bradley*, 418 U.S. 717 (1974), may have introduced an economic bias into the remedy—its costs fall on those not wealthy enough to move out of the district into the suburbs.

the non-allowance of certain costs—the elimination of practices harmful to a racial minority, even at the expense of the polity as a whole.

For these reasons, the controlling standard should be one that requires not that the harm be greater than the remedial costs, but that the remedial costs not be “excessive”—not out of proportion to the harm.<sup>9</sup> Under this standard of proportionality, the visual image of the structure of the judicial decision is not one of “balancing,” but rather one of having the harm—the fact that the challenged practice particularly disadvantages blacks—serve as a triggering mechanism, the impetus for relief, and having the remedial costs serve as the restraining force. The remedial effort is not brought to a halt when the remedial costs become greater than the harm but only when those costs become “excessive.”

The judgment as to whether the remedial costs are excessive turns on the quality and quantity of harm, but not exclusively so. A judgment must also be made about alternative remedies. The judge must have some sense of the relationship between the harm and the remedial costs of alternative remedies before he decides whether the remedial costs of a decree he is contemplating are out of proportion to the harm. If an alternative remedy would eliminate the same amount of harm at less cost, then that remedy seems preferable.<sup>10</sup> The court need not choose the remedy that has the best cost-benefit relationship since it may eliminate a smaller portion of the harm. But, on the other hand, the cost-benefit relationship of alternative remedies is not rendered totally irrelevant by the Equal Protection Clause. An enormous saving in remedial costs might be worth a slight decrease in the total amount of harm eliminated.<sup>11</sup>

In making these judgments about alternative remedies, the judge must

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9. The same general point could be accommodated under a “greater-than” standard if the minority interests were weighted, or if some value equal to the benefit society would receive from the elimination of the harm were either added to the minority-harm side or subtracted from the remedial-cost side. I am not sure that there are any advantages to be gained from these alternatives, and indeed, explicit weighting might have undesirable symbolic consequences.

10. For example, suppose the harm were 100; the remedial costs of one decree (decree A) were 300; but of another one (decree B) were 200. If both eliminate the same 100 harm, obviously B would be preferable. Similarly, if a cash payment of \$150 (the gilded-ghetto strategy) truly compensated for the 100 units of harm and if it were less costly than either decree A or B—with no monetary value as yet placed on either decree—then the cash payment would be preferable. Of course, it is doubtful that the remedial costs could be translated into monetary terms, or that money would adequately compensate for the harm.

11. In *Carr v. Montgomery County Bd. of Educ.*, 377 F. Supp. 1123 (M.D. Ala. 1974), *aff'd per curiam*, 511 F.2d 1374 (5th Cir. 1975), District Judge Frank Johnson rejected plaintiff's plea for greater desegregation, citing to “an excessive and unnecessarily heavy administrative burden” that the plan would place on the school system. 377 F. Supp. at 1129. In *Northercross v. Board of Educ. of Memphis Schools*, 489 F.2d 15 (6th Cir. 1973), *cert. denied*, 414 U.S. 1022 (1974), the additional transportation time required for 100 per cent desegregation led the court to affirm approval of a plan that left nineteen all-black or predominantly black schools, including some that were all-black at the inception of the litigation in 1960. *See also Goss v. Knoxville Bd. of Educ.*, 482 F.2d 1044 (6th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974); *Mapp v. Board of Educ.*, 477 F.2d 851 (6th Cir. 1973), *cert. denied*, 414 U.S. 1022 (1974).

consider alternative decrees. He must consider different types of school decrees (for example, pairing versus rezoning) and perhaps even decrees that seek to eliminate the segregated residential patterns themselves.<sup>12</sup> In addition, the judge might even consider the possibility of relying upon remedies that are within the control of other agencies, such as the state education authority. In such an instance, where the alternative remedy is beyond his control, the judge must speculate both about the efficacy of the alternative remedy and the probability of it being utilized.

## II

### THE GROWING UNCERTAINTY

The uncertainty that surrounds desegregation decrees is introduced primarily at two points in the judicial decision—in the harmfulness component and the relational component. How harmful is the challenged practice? Is it sufficiently harmful to justify the remedial costs? Twenty years ago those judgments might have been difficult enough. In recent years the difficulty has only grown.

#### A. The New Harmful Practice

In *Brown* there were two possible candidates for the harmful practice—the assignment of students to schools on the basis of race, and the segregated pattern of student assignment itself. Both phenomena were present in the dual school system. Today, the typical situation is one in which students are assigned not on the basis of race but on the basis of geographic proximity—yet the resulting pattern of student attendance is segregated.<sup>13</sup> Hence there

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12. See, for example, Judge Weinstein's initial order in *Hart v. Community School Bd. of Brooklyn*, 383 F. Supp. 699 (E.D.N.Y.), *appeal dismissed*, 497 F.2d 1027 (2d Cir.), *order amended*, 383 F. Supp. 769 (E.D.N.Y. 1974). In that case, Judge Weinstein ordered that the school be desegregated and referred the matter to a special master. The responsibility for racial segregation was thought to be two-fold:

[A]ction or inaction by the school board; and action by the housing authorities which greatly increased the proportion of black and Puerto Rican families, particularly as a proportion of families with children in what had been a predominantly white neighborhood. Because of this the court, although finding "liability" solely on the part of the school authorities, considered it appropriate to impose duties on the housing officials as well, and indeed in addition on the Police Commissioner, the Commissioner of Recreation, and the Metropolitan Transit Authority . . . . Housing officials of the city, state, and federal governments were directed to provide a joint plan so designed that . . . the area would be "refertilized with new families."

497 F.2d at 1029-30. Judge Weinstein, however, subsequently amended his order with respect to housing and other non-school authorities, albeit leaving open the possibility of post-judgment orders in this area. 383 F. Supp. at 775.

13. I do not deny the possibility of gerrymandering (assignments purporting to be made on the basis of geographic criteria, but in truth made on the basis of race). Nor do I deny that gerrymandering might exist in many school systems throughout the nation. On the other hand, I do not believe that in any single district in which there is residential segregation will gerrymandering be the cause—in any direct contemporary sense—of the overall demographic school pattern of segregation in that district. In such a situation, gerrymandering usually accounts for the racial composition of the schools along the borders of the residential neighborhoods.

is only one candidate for the harmful practice that is the target of the contemporary school desegregation decree—the segregated pattern of student attendance, not racial assignment.

The courts still talk about racial assignment, but that is not the harmful practice that is the predicate of the corrective obligation. The courts are referring to past racial assignment and by definition that practice is at an end. Admittedly, a contemporary vestige of a harmful practice can be the target of a corrective order and whenever the Supreme Court has affirmed busing decrees it has spoken of segregation as a vestige of past racial assignment.<sup>14</sup> But even if this language were to be taken at face value,<sup>15</sup> and the judge were to deem the segregation of a particular district a vestige of past racial assignment, he must still decide whether that segregation is harmful. If it is not, there is no point in eradicating it. A practice that is itself a vestige of another harmful but earlier practice can indeed get some “help” from that earlier practice—perhaps the later practice need not be as harmful as it might otherwise have to be were it standing alone, and it might not itself have to constitute a form of unequal treatment since the violation of the Equal Protection Clause would be the earlier, sufficiently harmful practice of which it is a vestige. But the present practice that is the target of the decree must to some degree also be regarded as harmful in and of itself in order that the corrective obligation be intelligible.

#### B. The Sources of Doubt—The Harmfulness Component

A theory can be articulated to explain why segregation is particularly harmful to blacks, and that theory need not be dependent upon a claim that race is the criterion of assignment, or that it is *believed* to be the criterion of assignment. That theory consists of three propositions: (1) Segregation is a badge of inferiority—it stigmatizes blacks. The assertion is that this stigmatization occurs regardless of the method of assignment. Racial assignment would give rise to it, but so would the use of geographic criteria when segregation is the foreseeable and avoidable result. (2) Segregation deprives blacks of valuable contacts with the educationally, socially, and economically dominant group, and thereby perpetuates their subordinate position. (3) Segregation has the inevitable effect of reducing the financial and physical resources available to all-black schools because these schools are attended only by members of the least powerful group.

The question, of course, is whether these assertions are true. We seem to have increasing doubts that they are, and thus we have grown more uncertain in our belief that segregation is harmful. Part of this change may be based on

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14. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

15. I have argued elsewhere that this language should not be taken at face value. Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 *PHILOSOPHY AND PUB. AFFAIRS* 3, 19-26 (1974).

the merits—a systematic review of the evidence reveals that our previous beliefs were mistaken. But I suspect that other, more extraneous factors have been controlling.

First, there is no longer a consensus in the relevant academic professions as to the harmfulness of segregation, and that change may not be attributable primarily to the state of the evidence. As Robert Crain recently stated:<sup>16</sup> twenty years ago there was no respectable social science evidence tending to show that segregation was harmful, and yet social scientists were nearly unanimous in believing that it was. Today there is respectable evidence tending to show that it *is* harmful, but no one in the profession believes it. This phenomenon, Crain speculated, is due to an increasing concern in the profession for methodological perfection, almost for its own sake, and also to the growing disbelief in the possibility of social betterment through government intervention—a disbelief not confined to social scientists nor to the problem of school desegregation.

Second, the escalation of the remedial costs has caused us to scrutinize our beliefs about the harmfulness of the challenged practice with greater care. When the harmful practice was racial assignment, or the segregation caused by racial assignment, the remedial costs were essentially non-allowable. The remedial order—prohibiting the use of race as the basis for assigning pupils to schools—would do no more than frustrate the associational desires served by the use of the racial criterion and require the school board to adopt an alternative, non-racial method of student assignment. But once the perceived harmful practice became segregation attributable to the use of neighborhood school assignment policies, the typical (though by no means the only) remedial order had to be a busing decree. This remedy consumes fiscal resources of the community (including those that otherwise might be spent on education), exposes children to safety hazards, reduces the time available for classes, and loses whatever psychological or emotional advantages might arise from having all the children in a neighborhood attend the school identified with that neighborhood.<sup>17</sup> An awareness of these allowable costs gives rise to some second thoughts about the harmfulness of segregation. We naturally tend to ask whether segregation is *that* harmful, and begin to wonder if it is harmful at all.

Third, there is no longer a consensus in the black community itself that segregation (or to put it more neutrally, that the all-black school) is harmful. Once again this may be traced to factors other than social science evidence. Some blacks have raised their voices against integration because of its conflict with the ideal of self-determination—most concretely embodied in the demand for community-controlled schools, which would leave the segregation of the

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16. Statement made at The Courts, Social Science, and School Desegregation Conference, Hilton Head Island, S.C., Aug. 20, 1974, on file at *Law and Contemporary Problems* office.

17. There may be some doubt as to whether these costs to the community are allowable, see text at p. 196, *supra*, and that, too, may be another source of the growing uncertainty.

all-black school intact, albeit within a school district that blacks controlled.<sup>18</sup> Others are concerned with the racist strains inherent in the typical method of achieving integration—one-way busing—by which blacks are bused to the traditional white schools without a reciprocal obligation being imposed on whites.<sup>19</sup> Others are offended by the racist implication of one strand of the theory against segregation—that blacks will learn better when they are in a setting dominated by the more academically advantaged and ambitious whites.<sup>20</sup> And still other members of the black community may be concerned with the diversion of resources inherent in any busing program, and insist that those resources be used for more traditional academic purposes.<sup>21</sup>

Fourth, the increased doubts about the harmfulness of school desegregation can be linked to the proliferation of antidiscrimination remedies in other areas, such as housing and employment. Federal fair housing and employment laws now apply to the private sector, and are being enforced more vigorously than before. These laws enhance residential mobility for blacks, and thus lend credence to the claim that many blacks *choose* to live in all-black neighborhoods.<sup>22</sup> That supposition in turn calls into question some aspects of the traditional theory against segregation. If, for example, the all-black residential pattern

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18. See, e.g., Brief for CORE as Amicus Curiae, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Oliver v. Donovan*, 293 F. Supp. 958 (E.D.N.Y. 1968) (Ocean Hill-Brownsville); Hamilton, *Race and Education: A Search for Legitimacy*, 38 HARV. ED. REV. 671 (1968); Bell, *School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools*, 1970 WIS. L. REV. 257.

19. See, e.g., *Norwalk CORE v. Norwalk Bd. of Educ.*, 423 F.2d 121 (2d Cir. 1970).

20. See, e.g., the statement made by Roy Innis, Director of the Congress of Racial Equality, that school integration is a "bankrupt, suicidal method . . . based on the false notion that black children are unable to learn unless they are in the same setting as white children." N.Y. Times, Mar. 13, 1972, at 30, col. 4. Cf. *Brunson v. Board of Trustees of School Dist. No. 1*, 429 F.2d 820, 826 (4th Cir. 1970) (concurring opinion), in which Judge Sobeloff rejects the implication that *Brown* stood for the proposition that "association with white pupils helps the blacks," or that "white children are a precious resource which should be fairly apportioned" and that "black children will be improved by association with their betters." See note 21 *infra*.

21. Edmonds, *Judicial Assumptions on the Value of Integrated Education for Blacks*, in D. BELL, RACE, RACISM AND AMERICAN LAW (1973).

22. See also Craven, *The Impact of Social Science Evidence on the Judge: A Personal Comment*, 39 LAW & CONTEMP. PROB. no. 1, at 150, 155 (1975). But see Farley, *Residential Segregation and Its Implications for School Integration*, 39 LAW & CONTEMP. PROB. no. 1, 164, (1975).

Many commentators have argued that the device of zoning has been used to exclude minorities and the poor. See generally R. BABCOCK & F. BOSSELMAN, *EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970S* (1973). See also U.S. COMMISSION ON CIVIL RIGHTS, *EQUAL OPPORTUNITY IN SUBURBIA* (1974); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969). In recent years, exclusionary zoning has come under heavy judicial attack. See, e.g., *Banks v. Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973); *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972); *Providence of St. Mary of the Woods v. City of Evanston*, 335 F. Supp. 396 (N.D. Ill. 1971); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); *Southern Burlington Co. NAACP v. Township of Mt. Laurel*, \_\_\_ N.J. \_\_\_, \_\_\_ A.2d \_\_\_ (1975). All exclusionary land use litigation up to 1974 is summarized in NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING AND THE URBAN LAND INSTITUTE, *FAIR HOUSING & EXCLUSIONARY LAND USE* 13-51 (1974).

were truly voluntary, school segregation would not as readily be perceived as a dignitary harm. Similarly, if blacks chose not to move to an integrated district, it would become increasingly difficult to argue that integrated education is preferable. I do not suggest that these housing and employment laws have now made the choice of residence truly voluntary, or that there are not other non-educational reasons for keeping one's residence in all-black neighborhoods. Instead I am suggesting that the increased availability of housing and employment laws, like the black nationalist assertions, have begun to call into question the earlier assumption that the residential patterns are involuntary, and that the all-black area is a ghetto—an assumption that was a basis for our beliefs that school segregation is particularly harmful to blacks.

### C. The Sources of Doubt—The Relational Component

Much of the uncertainty has developed in connection with the harmfulness component. But several of the factors that generate uncertainty concerning the harmfulness of segregation have also made the relational judgment more difficult. A second locus of uncertainty has thus been created. Even if one agrees that segregation is harmful, the question must then be faced whether it is “sufficiently” harmful to “justify” the costs of eliminating it.

The increase in the allowable remedial costs has not only caused us to be more careful in judgments about the harmfulness of segregation, but also made the relational judgment more problematic. If there are no allowable remedial costs, then the remedial judgment is straightforward. The relief can be predicated exclusively on the conclusion that the challenged practice is harmful. But the situation changes once the remedial costs become allowable. Then the judge must confront the difficulty of weighing noncomparable factors—the harm and the remedial costs—and of applying the ambiguous proportionality standard. The difficulty is further compounded by the increased availability of employment and housing remedies, alternatives that might be less costly than a busing decree. While these remedies are not likely to achieve the same degree of integration within the same time span, they cannot be totally disregarded. Time may be considered as just another cost in the judicial calculus, and in any event the prospect of instant integration by way of a busing decree may be illusory. Whites have the capacity—constitutionally enhanced by the Supreme Court in *Milliken v. Bradley* and *Pierce v. Society of Sisters*—to insulate themselves from the busing decree by enrolling in private schools<sup>23</sup> or by moving to predominantly white school districts. From this perspective, housing and employment remedies become more com-

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23. *Milliken v. Bradley*, 418 U.S. 717 (1974); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *But see* Craven, *supra* note 22, at 155, indicating that “the silence” of the majority in *Milliken*, coupled with Justice Marshall's dissent, may mean “that white flight can never be a relevant factor in considering the appropriate remedy for dismantling a dual school system . . . .”

parable and the choice between them and the busing decree therefore more difficult.

### III

#### THE AVOIDANCE STRATEGY

Although the contemporary context is characterized by a growing doubt as to the harmfulness of segregation and by an increased awareness of both the need to make an explicit relational judgment and the difficulty of that judgment, these factors have not precluded the issuance of desegregation decrees. They have meant, however, that once issued, a significant residue of uncertainty remains. The judge believes the underlying proposition to be true—that the segregation is sufficiently harmful to warrant the remedial costs of busing—but he cannot in good conscience deny the possibility that he may be wrong. Some element of uncertainty is present in every instance of judicial law-making. The argument made by the critics of busing, however, is that in this area of decision the uncertainty is sufficiently “high” to make it inappropriate for a *court*—perceived as a very distinctive social institution—to issue the order.

The initial response to this criticism has not been confrontation, but avoidance. The institutional criticism has not been evaluated; instead, it has uncritically been assumed to be valid, and ways have been sought to make the judgments about the harmfulness of segregation appear more certain. The strategy has been one of deempiricalizing the harmfulness component—of trying to make assertions about the harmfulness of segregation rest on a nonempirical base, divorced from the findings of social scientists. This strategy has taken several forms. One builds on the contemporary consensus that racial assignment to segregate is wrongful and seeks to conceptualize segregation as a “vestige” of past racial assignment.<sup>24</sup> Another has been to postulate a value—such as “universalistic ethic” (making it a good to eliminate barriers among groups)—that is necessarily inconsistent with segregation.<sup>25</sup> I find the avoidance strategy unappealing in either of its guises.

#### A. The Conceptual Flaws

The avoidance strategy seeks to eliminate uncertainty by freeing the harmfulness judgment from a dependence on the outcomes of social science research. As such, it rests on two questionable premises: (1) uncertainty is exclusively, or at least primarily, introduced by the harmfulness judgment; and (2) the truth of assertions concerning the harmfulness of segregation depend on the outcomes of social science research.

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24. This is the strategy chosen by the Supreme Court in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), and *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973). The doctrinal complexities of these cases are analyzed in detail in the article referred to in Fiss, *supra* note 15.

25. See Yudof, *Equal Educational Opportunity and the Courts*, 51 TEXAS L. REV. 411, 456-64 (1973).

The first premise, which explains why the avoidance strategy concentrates on the harmfulness component, ignores the large measure of uncertainty introduced by the relational component. Even if segregation can be classified as a vestige of past discrimination or as a wrong because it violates the universalistic ethic, the task of determining whether it is sufficiently harmful to warrant the remedial costs still remains. This determination not only requires an assessment of both the remedial costs and the harm but also a comparison of the two and an application of the vague proportionality standard.

We tended to ignore the relational judgment when the harmful practice was racial assignment—its wrongful quality alone seemed a sufficient basis to grant relief. For that reason, the avoidance effort seeks to construct a theory that would make segregation of the schools as wrongful as assignment to schools on the basis of race. This is done with the hope that the same automatic connection between the harm (or wrong) and the remedy will be created, thereby eliminating the need for the relational judgment. But it won't work. Even if a segregated pattern of school attendance—attributable solely to the assignment of students to schools on the basis of geographic criteria—can be given the same moral status as racial assignments designed to segregate, the parallelism breaks down on the remedial side. In such a system, which is the typical one today, the remedial costs are likely to be pronounced; that fact makes the relational judgment at once necessary and extremely problematic. De-empiricalizing the harmfulness component can make no contribution toward the elimination of that uncertainty.<sup>26</sup>

The second premise—positing that judgments about the harmfulness of segregation depend on the uncertain outcomes of social science research—is also mistaken. It reflects either a misunderstanding of the epistemological character of the assertions underlying the theory of the harmfulness of segregation or an exaggerated notion of the reach of the social sciences. Admittedly the traditional theory embraces assertions that might be susceptible to methods of social science research. The assertion that integration will improve the achievement and aspiration levels of blacks is such an instance. But the theory also includes assertions that are beyond the reach of social science, and in that sense, nonempirical. An example would be the assertion that, regardless of the method of assignment, segregation is a “living insult to blacks.”<sup>27</sup>

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26. Professor Yudof seems to give the remedial costs a role in the choice of competing ethics, but no role once the universalistic ethic is adopted:

Because they [the universalistic ethic, and what is conceived to be the competing value, the racial-neutrality principle] both embody a morality “of excellence, of the fullest realizations of human powers,” these two principles fall within what Fuller terms the “morality of aspiration” rather than within the “morality of duty.” According to Professor Fuller, “[o]n the level of duty, anything like economic calculation is out of place. In a morality of aspiration, it is not only in place, but becomes an integral part of the moral decision itself.”

Yudof, *supra* note 25, at 462 n. 266 (citation omitted).

27. “[S]chool desegregation is forbidden simply because its perpetuation is a living insult to . . .

One can speak of an assertion about dignitary harm as being true or false, but its truth or falsehood cannot conclusively be determined on the basis of discrete, observable events and behavior that are the province of social science research. A dignitary harm may have psychological consequences but it is not reducible to those consequences. Nor can the truth of an assertion about dignitary harm conclusively be determined on the basis of a questionnaire addressed to the alleged victims, even assuming a method can be devised for making certain that the responses to the questionnaire are sincere. Such a questionnaire might be illuminating, but not decisive. I say this for two reasons. First, there is no intellectual mechanism for resolving conflicts in responses that would be able to cope with the likely situation of nonunanimity (where some blacks say that they are insulted and others deny it). Secondly, the concept of a dignitary harm has built into it some understanding of what the appropriate or "reasonable" response should be. The statement "I am insulted" is neither a necessary nor sufficient condition for concluding that a particular practice inflicts dignitary harm: even assuming—unrealistically—that this statement is unanimously made by blacks in the face of segregation, it is always possible to claim, in the style of *Plessy v. Ferguson*,<sup>28</sup> that they are oversensitive; and if the contrary statement is unanimously made, it is always possible to claim that they are undersensitive. The "right" degree of sensitivity cannot be fixed in some conclusive manner by averaging prevailing practices. In the final analysis, it is always possible for the judge, as an impartial spectator, to imagine himself in the place of the alleged victim and to ask whether he would be insulted by the challenged practice.

I do not mean to suggest that the theory against segregation should be reduced to the assertion about dignitary harm, or that the assertion is unquestionably true, but only that it is part of the theory and is as much in doubt as the empirical assertions about achievement levels. Hence it is wrong to think, as those attempting to formulate the avoidance strategy do, that the uncertainty surrounding the traditional theory of segregation stems from a dependence on the outcomes of social science research.

#### B. The Ineffectiveness of the Strategy

The avoidance strategy not only rests on flawed premises but is also ineffective. It does not eliminate the uncertainty introduced by the harmfulness component. I concede that if the avoidance strategy were adopted in either of its

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black children and immeasurably taints the education they receive." *Brunson v. Board of Trustees of School Dist. No. 1*, 429 F.2d 820, 823, 826 (4th Cir. 1970) (Sobeloff, J., concurring).

28. We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two classes stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. 163 U.S. 537, 551 (1896).

guises there would no longer be a need to rely, even in part, on the outcome of social science research aimed at determining whether segregation is harmful. But uncertainty would still arise in determining whether segregation is harmful or wrongful—whether it is a condition that should be corrected.

The effort to categorize segregation as a vestige of past racial assignment seeks to capitalize on the consensus developed over the last twenty years that racial assignment for segregative purposes is wrong. But empirical uncertainty is introduced by the need to rely on factual assertions purporting to connect the past with the present. The fact that these assertions try to explain the present behavior—residential segregation—of an enormous mass of people on the basis of a school board's past and sometimes near-ancient conduct of assigning students to racially-identifiable schools on the basis of their race, makes the uncertainty acute. Indeed, in order to make the issues triable or capable of ever producing relief, the Supreme Court had to create a set of presumptions in favor of the existence of these linkages and those presumptions, especially when viewed as a set, do not seem supported by natural probabilities.

With the other avoidance strategy, postulating an ethic that is necessarily inconsistent with segregation, the uncertainty is introduced at the outset—the choice of value. The traditional theory against segregation starts with a value that is widely shared and, more important, that has a clear constitutional basis: it is wrong to assign students in a manner which makes inferior the education afforded to blacks. The inquiry then centers on whether the particular practice violates that norm. The universalistic-ethic avoidance technique, however, proceeds differently. It confines the controversy to the initial choice of value, though concededly once the ethic is adopted there is little need for further inquiry.

Stated in its most general and abstract form, the universalistic ethic does have great intuitive appeal. Who can be against eliminating barriers among groups? But that is not the proper level of inquiry. The process of choosing the ethic must be seen in its proper context, and when it is, the choice becomes controversial. (1) Controversy will arise when we attempt to apply the ethic to a particular social problem and to determine, for example, what “barriers” must be eliminated. We then must face such troublesome questions as whether a commitment to the universalistic ethic also entails a commitment to eliminating school segregation that results from and parallels residential segregation. (2) Controversy arises when we realize that the process of ethic adoption is a competitive one. The question is not whether the universalistic ethic is “good” or “appealing,” but whether it is more “appealing” or “better” than those ethics that would make us more tolerant of segregation—for example, the community-first ethic, making it desirable to preserve the integrity of communities or neighborhoods, or the libertarian ethic, making any coercion undesirable. (3) Controversy will also arise once we insist upon a constitutional peg for the universalistic ethic. The traditional theory against segregation fits

within the contours of the Equal Protection Clause, viewed as a protection against state practices that disadvantage the racial minority. But I doubt whether this is true for the universalistic ethic since, in order to preserve its separate identity, it cannot be reduced to a view about the betterment of the racial minority.

These difficulties inherent in the process of ethic adoption—in deciding whether the universalistic ethic is applicable to school segregation when linked to residential segregation, whether it is superior to competing ethics, and whether it is constitutionally sound—have the effect of reintroducing uncertainty into the harmfulness component. Thus, we remain as uncertain as ever about the harmfulness or wrongfulness of school segregation. Ironically enough, the resolution of our doubts may in part depend on empirical inquiries of a nature similar to the ones this universalistic strategy sought to avoid. As Professor Yudof, author of the strategy, acknowledges:<sup>29</sup>

The problem of course is that the measure and likelihood of symbolic or real benefits [of competing ethics] are unclear, for the causal relationships are largely unknown. . . . Thus, ignorance of causal relationships, which originally made ethical theories seem so attractive, resurfaces as an impediment to rational choice between competing ethical theories.

### C. The Price of Avoidance

Finally one can question the very purpose of any avoidance strategy. To some degree, it may spring from the desire to obtain wider general acceptance of the busing orders. But it remains to be seen why those decrees are entitled to any acceptance beyond that which they can earn on their own terms. Obedience to a decree is not a transcendental value. Once we embark on the questionable mission of camouflaging the grounds for decision in order to enhance the basis for its public acceptance, the possibility of a viable tradition of public accountability is seriously undercut. The strategy will also have a diversionary effect: while obscuring the uncertainty may enhance the acceptability of the decree, it may concurrently make the resolution of that uncertainty more unlikely. Only when the uncertainty is faced in a direct and explicit manner will there be the kind of investment in discussion and research that might—if anything can—either reduce that uncertainty or determine whether this institutional criticism has any validity.

## IV

### THE INSTITUTIONAL CRITICISM EXAMINED

A distinction should be made between two species of the institutional criticism—one is couched in terms of *preference* and the other in terms of *competence*. The preference issue asks whether the judiciary, as opposed to some

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29. Yudof, *supra* note 25, at 463-64.

other government agency<sup>30</sup> such as a legislature or school board, is the *best* institution for making the decision on the merits. The competence issue asks whether the judiciary is *entitled* to issue the decree. The competence critic is willing to assume that the judiciary is the best decisional agency, or for that matter the only one. He argues that, even on such an assumption, the judiciary should refrain from making a decision on the merits.

#### A. The Preference Issue

The preference for non-judicial institutions might be based on the view that these institutions have superior fact-finding tools and that they thereby have the means of eliminating a greater portion of the uncertainty.<sup>31</sup> I cannot agree. The fact-finding processes of the legislature and school board may be more informal and more tolerant of *ex parte* presentations than those of a court, but that does not make them superior for the resolution of any of the relevant questions, including the factual ones. Some of the distinguishing features of the judicial process—for example, the right of cross-examination—enhance rather than impede the inquiry into the truthfulness of whatever opinions witnesses might express.<sup>32</sup> Moreover, the concept of relevancy is flexible enough to permit the judicial hearing to be as broad as the legislative inquiry; and with either institution the ultimate decision is to be made by a non-expert. Admittedly, some school boards may develop more familiarity with a desegregation claim over time, but it is difficult to generalize on this score. Many school boards, particularly the elected ones, have constantly shifting memberships. On the other hand, many federal district judges have developed a great familiarity with the school desegregation problems of the particular communities within the judicial district.

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30. A non-governmental institution, such as the family, might be considered as an alternative decisional agency under a freedom-of-choice system—one in which students are assigned to schools on the basis of their parents' choice. Parents could then judge whether the benefits to be obtained from an integrated education were worth the attendant costs. The difficulty with this decisional system is twofold: (a) It would result in the localization of all remedial costs on the racial minority—which seems inconsistent with the Equal Protection Clause. The only result that realistically could be contemplated is one-way busing—with some blacks choosing to go to white schools, while a substantial proportion remain in all-black schools. A freedom-of-choice system not only permits an informed judgment, but also choices based on prejudice; and even if this freedom were not abused, the same pattern is likely to result. Few would claim that the education of whites would be improved by placement in a predominantly black school. (b) There are likely to be interferences with the choice, thus making the freedom illusory. Some interference may be retaliatory—violence, loss of employment, hostile reception by white teachers and students. Interference may also arise from the system itself: the decisions of some black families may tend to coerce the choice of others, for few enjoy the feeling of isolation.

31. Yudof, *supra* note 25, at 413.

32. Part of the footnote eleven attack stemmed from the judicial reliance on evidence beyond the record, and nothing I have said should be construed as condoning that practice in the busing context. Judicial notice should be kept at a minimum. It should be permitted not simply because a factual assertion can be classified as "legislative," but because of clear and compelling considerations of judicial administration or because the issue is not one that can be illuminated by an evidentiary presentation.

More probably, the preference for non-judicial institutions has an ethical basis: the more uncertain the underlying proposition, the less appropriate it is to impose obligations through the least representative branch. Coercion requires certitude. Decisions of those institutions more directly responsive to the citizenry—such as the legislature or school board—seem more self-imposed, less intrusive, less coercive, and thus are more compatible with a high degree of uncertainty.

Stated in general terms, this argument has great appeal. But it loses some of its force where, as in this case, the benefits of the obligation are to be primarily conferred on a racial minority and the costs imposed on all. There the risk is very high that the decision of the legislature or the school board may not be a conscientious exercise of self-governance, but rather a manifestation of majority self-interest. Once account is taken of that risk, the ethical basis for preferring nonjudicial institutions is substantially weakened, if not destroyed.<sup>33</sup>

Whenever a decision is entrusted to a legislature or any body directly responsible to the citizenry, the risk is high that the outcome will only manifest the interest of the dominant group. It may therefore seem that in raising doubts about the ethical superiority of relying on the legislature or school board, particularly if the board is an elective one, I may also be reflecting doubt—not widely shared—about the superiority of the democratic process in general. But I do not believe so. Society's commitment to the ideal of self governance is not so intense or absolute as to preclude an exception for minority rights. The Equal Protection Clause, primarily a restraint on majoritarian action directed at minorities, is ample evidence of that fact.

The integrity of this claimed exception to our democratic commitment depends on whether the "minority" can be defined so as not to be coextensive with the ordinary loser of the legislative battle. Only then will the exception not eliminate the rule. But I believe that the concept of "minority" can be so defined, and that the racial minority should and would be included in any such definition. The special historical position of the racial minority in this country—two centuries as slaves and a third century as the victims of political,

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33. That is why it is ethically permissible to construe section 5 of the fourteenth amendment as a one-edged sword:

[Section] 5 does not grant Congress power to enact "statutes so as in effect to dilute equal protection and due process discussions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.

*Katzenbach v. Morgan*, 384 U.S. 641, 651-52 n. 10 (1968). It also explains why little deference should be paid to the legislative judgments reflected in the recent federal anti-busing legislation embodied in Title II of the Equal Education Opportunities Act of 1974, 20 U.S.C.A. 1701 (Supp. 1975). See generally Comment, *Interpreting the Anti-Busing Provisions of the Education Amendments of 1972*, 10 HARV. J. LEGIS. 256 (1973); Note, *Nixon Busing Bills and Congressional Power*, 81 YALE L.J. 1542 (1972).

social, educational and economic discrimination—gave it a discrete set of interests and diminished its power in a way that cannot be corrected simply by the extension of the franchise. That is why we needed not just the thirteenth and fifteenth amendments, but also the fourteenth; and that is why, true to the intent of the framers of that amendment, black citizens have long been deemed its prime beneficiaries.

### B. The Competence Issue

The claim of institutional competence does not contend that it is better to leave the resolution of this uncertainty to another more appropriate branch of government, but rather that the uncertainty of the underlying proposition makes judicial law-making illegitimate. The desegregation decree cannot properly be called “law.” It is called law because it issues from a legal authority, but it is not entitled to that status. It should not be issued by a judge.

Three different types of arguments have been made to support this claim, all of which stem from the uncertainty of the underlying proposition.<sup>34</sup> That uncertainty (1) differentiates the busing decree from the usual decree issued by a court; (2) prevents the obligation emanating from a busing decree from attaining two characteristics deemed essential to a constitutional obligation—timelessness and community-invariance; and (3) creates too much latitude for the individual judge. Implicit in all three arguments is a common conception of law, one which aspires for legal obligations and legal rules the same degree of certainty that marks objective reality; and that is why I use the term “objectivist” to refer to the competence critic.

#### 1. *Departure From the Usual*

The competence critic may allow the prevailing practices to define the appropriate bounds of proper judicial law-making and then assert that the uncertainty of the underlying proposition differentiates the busing order from other judgments or decrees. The normative premise of this argument is obviously troubling—I fail to see why “what is” should determine “what ought to be.” But so is the factual premise—namely, that the uncertainty of a busing decree is “unusual.”

In the typical case, there may be little doubt about the existence of harm. But there are many exceptions—the tort suit providing recovery for injury to reputation or for a dignitary harm is such an instance. And even where there is no uncertainty about the harm, uncertainty is introduced in the typical case by the need for a relational judgment. The Hand formula in torts (is the cost of avoidance less than the discounted harm?) is such an example.<sup>35</sup> So are the

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34. Some of the arguments that support the competence criticism also may be used to support the preference position; thus there is some overlap and I hope that my evaluation of an argument in one context will carry over to the next.

35. See *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 192 (1941); *United States v. Carroll Towing Co.*, 159 F.2d 169 (1947).

recent constitutional cases declaring a right to an adversary hearing before the termination of welfare benefits (is the increased procedural protection worth the diminution of substantive benefits?).<sup>36</sup> In these cases, the uncertainty is introduced by the relational component rather than the harmfulness one, but the precise point at which this uncertainty interjects itself does not seem significant. One might argue that there is more uncertainty inherent in the proposition underlying a school decree than in the comparable propositions of these other cases to which I have referred. But without having some way of measuring the amount of uncertainty, it is impossible to give that claim much weight.<sup>37</sup>

## 2. *Departure From the Ideal*

Alternatively, the objectivist may postulate the proper characteristics of a legal or constitutional obligation, and then express a dissatisfaction with the obligation emanating from a busing decree because it does not incorporate those features. It is not uncertainty itself but the very basis of decision—the underlying proposition—that prevents the attainment of them. Uncertainty is antithetical to the postulated characteristics and arises from that decisional predicate. As the uncertainty becomes more pronounced so do the limitations of that predicate and the unlikelihood of achieving the ideal of the objectivist.

One characteristic postulated by the objectivist is permanence or near-timelessness. The obligation of a busing decree is time bound. It may cease to exist if, as the argument is stated, the latest social science experiment demonstrates that segregation is not harmful or not “that” harmful.<sup>38</sup> A second characteristic postulated by the objectivist is community-invariance. If the obligation is dependent on assessment—at this time and in this place—of the harmfulness of segregation and of the remedial costs, a school board in one community may have an obligation to eliminate the segregation either because, given the general social setting, segregation is particularly harmful, or because,

36. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970).

37. In this context, a confession of Justice Cardozo seems appropriate:

I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. . . . As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable.

B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 166 (1921).

38. This proposition is suggested by Edmund Cahn's well-known comment:

I would not have the constitutional rights of Negroes—or of other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records . . . . [S]ince the behavioral sciences are so very young, imprecise, and changeful, their findings have an uncertain expectancy of life. Today's sanguine asseveration may be cancelled by tomorrow's new revelation—or new technical fad. It is one thing to use the current scien-

given the geographic configurations, it is easier to correct. A school board in another community, on the other hand, may well not have such an obligation.<sup>39</sup>

It is not a sufficient response to the objectivist to produce counter-examples by pointing to existing instances of a legal or constitutional obligation which do not meet the two postulated criteria. The objectivist's answer would be that these counter-examples, like the obligation imposed by a desegregation decree, are not properly "law." Nevertheless the existence of these counter-examples is not without some ethical significance. The objectivist must explain why his notion of law should be applied to the duty to desegregate and not to the counter-examples. Without an explanation, it appears as though a double standard is being applied.

The objectivist might explain that his standard is being applied to busing decrees only as a starting point, and that in time it will be applied to all the counter-examples. The sufficiency of that explanation, of course, depends upon the sincerity of the commitment to apply the standard thoroughly to all other situations where legal or constitutional obligations are predicated on a comparable proposition. Without that commitment, the explanation is wanting. However, with it, the full sweep of the institutional criticism becomes apparent, and that in turn may cause one to recoil. One might accept the objectivist standard if it is to be applied to one corner of the law, the duty to desegregate, but not if it meant a wholesale rejection of commonly acknowledged legal obligations.

Aside from the problem of using a double standard in different areas of the law and of applying the higher standard only to the duty to desegregate, the value preference inherent in the objectivist position should be made explicit: the good to be achieved by confining legal obligations to those that meet the criteria of objectivity is greater than the good to be achieved by imposing a duty to desegregate. This value preference is, of course, not a flaw in the objectivist's position; but the explication of the preference does illustrate what is entailed in accepting that position. It also shows that one can reject the position either by (a) denying that the law-notion desired by the objectivist is good at all, or by (b) claiming that the good to be achieved by the duty to desegregate outweighs the evil that might be involved in imposing a legal obligation that cannot achieve

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tific findings, however ephemeral they may be, in order to ascertain whether the legislature has acted reasonably in adopting some scheme of social or economic regulation; deference here is shown not so much to the findings as to the legislature. It would be quite another thing to have our fundamental rights rise, fall, or change along with the latest fashions of psychological literature.

Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150, 157-58, 167 (1955). For a general consideration of timelessness value, see Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965).

39. This was first suggested in a discussion with Professor Alexander M. Bickel, during which he criticized the approach to de facto school desegregation that I had first articulated in *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965). In retrospect, it is not clear to me whether Professor Bickel was making a competence or a preference argument.

the criteria postulated by the objectivist. (A commitment to position (a) also includes a commitment to position (b), but not the other way around.)

Either of these anti-objectivist positions is logically coherent, and I believe that both positions are more attractive than that of the objectivist. This assertion is not predicated on a belief in the overwhelming good to be achieved by desegregation—a belief that I remain dubious about and that would, in any event, only support the second, more limited position. Instead, it is based on the view that the aspirations of the objectivist are ill-founded, that the postulated characteristics are not an ideal. They are not an evil, but neither are they a good. We should not in the least be concerned by our failure to attain them.

I fail to see any value to be served by having timeless legal obligations. Of course, if I have a right today, I would hate for the court to decide tomorrow—having, for example, changed its view about the harmfulness of segregation—that I no longer have that right. But I am objecting to the merits of the decision—the denial of the right—and not the fact that the right was so short lived. If the court is correct in deciding that segregation is not harmful, then the right should cease to exist. Similarly, one can complain if the determination of rights turns on the results of the most recent social science study, such as, for example, a study which measures the impact of segregation on achievement levels. But once again, the objection here is to the basis of the decision—the harmfulness of segregation is denied on the basis of one study which may be methodologically flawed and which, in any event, only measures one possible type of harm. The force of the complaint does not derive from the fact that the right is short-lived.

In this context, the goal of timelessness is not rooted in the norm of consistency nor in the norm of protecting reasonable expectations (the norms underlying the doctrine of *stare decisis*). By hypothesis, the predicate for change lies in the assessment a judge makes of the harmfulness of segregation or of the remedial costs. That means that the change does not violate the norm of consistency; the case is no longer a like case, and hence need not have the same outcome.

Attention to the predicate of the change also bears on the problem of disappointment. What one is entitled to expect in the future is not the imposition of the obligation to desegregate, but rather that an obligation will be imposed if segregation is deemed sufficiently harmful to warrant the remedial costs. *Stare decisis* attaches to the rule rather than its applications, and a context where there is little need for predictability, there is no evil in permitting that rule to be stated at a high level of generality or abstractness.

A similar point can be made with the demand that the legal obligation be community-invariant—that a practice held unconstitutional shall be deemed unconstitutional throughout the United States. The ideal of a uniform, nationwide rule follows from the notion of a single constitution for the entire nation. But we must be careful about what has to be uniform. It is not that the

percentage of white and black students in each class must be exactly the same, or even that there shall be no all-black schools in the United States. Instead, what is constitutionally mandated is the uniformity of the rule of law. That rule can be stated with a high degree of generality: whenever segregation is deemed sufficiently harmful to warrant the remedial costs, an obligation will be imposed to eliminate it. There may be a natural tendency to gravitate away from such an abstract statement of the rule and to search for a more concrete one; for example, there shall be no all-black schools. But that tendency, regardless of how natural it might be, cannot be rooted in the theory of a "single constitution." The Constitution does not establish the appropriate degree of abstractness. Once severed from its constitutional roots, the community-invariant ideal is thus as unappealing as the alleged ideal of timelessness.

### 3. *Permitting Excessive Latitude*

Finally, there is the problem of judicial abuse. The objectivist may complain, not about the qualities of the obligation, but about the risk of a judge deciding the case on the basis of his personal bias rather than on the merits. Arguably, this risk arises from two circumstances: (a) the underlying proposition gives the judge great latitude, and (b) the truth value of that proposition is so much in doubt that the controlling institutions—appellate courts or citizen-critics—have no basis for scrutinizing an individual judge's decision—anything he says goes.

I doubt, however, whether we have reached this situation. The truth value of the underlying proposition may be uncertain, but not that uncertain. Moreover, in assessing this objection, it is important to separate, on the one hand, the alleged evil of judicial latitude itself and, on the other hand, our views about the merits of the case. Very often an objection to judicial latitude or discretion springs from a prediction as to how this power will be used, and from an implicit value preference as to what is a right decision. Usually we object to judicial latitude because we fear it might not be exercised in the manner that we deem proper. For example, our views about the permissibility of the pardoning power—to take the most discretionary power—in large part depends on whether we believe it will be used to dispense mercy to the weak or unfortunate or whether it will be used to dispense favors to the politically rich and powerful. The judicial latitude itself is in large part ethically neutral.

One evil can, nevertheless, be tied to judicial latitude or discretion and that is the increased likelihood of a differential decisional pattern that cannot be explained in terms of the governing rule of law. The greater the latitude left to individual judges and the less central the control, the more non-rule-based diversity in outcome is likely to result. The segregation of two communities might be identical in every relevant respect (*i.e.*, in the harm and the remedial costs); yet an obligation to desegregate is imposed in one but not in the other. The only explanation is the difference in the judges.

I readily admit this decisional pattern offends my sense of equal treatment and the idea of a single constitution. But the objectivist not only wants to eliminate this pattern; he also wants to eliminate judicial latitude altogether—either by denying the courts the power to decide the merits at all or by establishing a *per se* rule. This position is based in part on two premises: (a) a differential decisional pattern flows from the fact that the judiciary has wide latitude, and (b) the pattern cannot easily be eliminated by the ordinary methods of appellate review. I am willing to accept both premises, but still not accept the objectivist conclusion which fails to take sufficient account of the price to be paid by the elimination of judicial latitude. The differential decisional pattern would be avoided, but only at the cost of forcing us to live with an indeterminate number of decisions or outcomes in school cases that are necessarily incorrect.

Suppose, for example, judicial latitude were abolished by establishing a *per se* rule always requiring the elimination of segregation—that there can be no all-black schools in America. Then the differential pattern would be eliminated, but at the expense of requiring busing in some situations where none should be required. Or suppose that the *per se* rule that the objectivist wants to establish required the school boards to stop making racial assignments but never required them to eliminate segregation. Once again the differential pattern would be eliminated, but at the expense of withholding relief when it is due.

Recognition of either contingency is a sufficient basis for parting company with the objectivist. But, quite frankly, it is the second contingency that gives me the greatest pause, for two reasons. First, it is the contingency most likely to materialize: such a prophecy is based on the fact that we are dealing with the claim of the racial minority, and that the decisional power is generally in the hands of members of the dominant racial class and thus sensitive to the interests of that class. It is not realistic to expect elites—even judicial ones—to be too counter-majoritarian. Second, the kind of erroneous decision produced under the second contingency—no remedial obligation even when one should be imposed—is no ordinary mistake. It is, by definition, a denial of a constitutional right. The concept of a single national constitution (or the Equal Protection Clause itself) may give a constitutional basis to the value of eliminating the differential decisional pattern. But the desegregation claim is also based on the Constitution and there is no basis for preferring the constitutional value of singleness over the constitutional value of not disadvantaging blacks.