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MISSOURI v. JENKINS: ARE WE REALLY A DESEGREGATED SOCIETY?

THEODORE M. SHAW*

The Brown decision bucked a centuries-old tradition of discrimination in America, but that tradition has not been easily overcome. Professor Shaw discusses Missouri v. Jenkins and questions whether society has really changed in its attitude towards segregated schools.

IN considering where the issue of school desegregation stands today, it occurs to me that when *Brown v. Board of Education*¹ was decided in 1954, some thirty-seven years ago, the issues, although not simple for that time, seem relatively very simple.

At home I have a reproduction of a lithograph by Norman Rockwell, called "The Problem We All Live With." It shows a young, Black girl being escorted by federal marshals into a school. The wall behind them is smeared with tomatoes; the ugly racial epithet "nigger" is written on the wall. It is a very powerful portrait, but very simple in the picture it presents. The issues were very simple.

In retrospect, I think the issues were much more complex than we thought, even a decade or two ago in the middle of the struggle to implement *Brown*. The issue of school desegregation is really a story of race relations in this country. We view schools as a contained environment—a laboratory of sorts—where we have children gathered together as students. We can inculcate them with norms and values in a way that we cannot with the rest of society; society is not as contained. It is in the public schools that we attempt to remake America and to wipe away the ugly stain of segregation and racism. I want to talk about two cases here: one that illustrates how difficult it is to clear away racism, and one that exemplifies where we are today.

The first case, *Missouri v. Jenkins*,² comes out of Kansas City, Missouri. It is a suit that was filed in 1977, but that had its roots in the pre-*Brown* days of "separate but equal."³ It was filed after many years of investigation by the Office of Civil Rights and the efforts of community people to implement the *Brown* mandate.

After the *Brown* decision, the Kansas City School District, which was primarily White at the time, took a number of actions to maintain and to reinforce segregation—the same kinds of actions that took place in countless other cities throughout the country. The school district redrew its boundary lines to mirror residential segregation. It ceded a school to a Black community only when the community had become predomi-

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1. 347 U.S. 483 (1954).

2. 495 U.S. 33 (1990).

3. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896).

nantly Black, thereby tracking the pattern of "White flight." It would assign Black children to overcrowded schools rather than to schools with available space to avoid any measure of integration.⁴ In other words, throughout the 1960s, the Kansas City School District, like many other school districts, engaged in the tactics of delay and resistance.

Finally, as the demographic patterns that had been set in motion decades ago continued to operate, and were aggravated by the actions of the school district, the school district became predominantly Black in the 1970s.⁵ What were these demographic-affecting actions that had preceded *Brown v. Board of Education*?⁶ The State of Missouri, of course, required segregation in public schools.⁷ But there were also actions taken by other state actors—housing officials that encouraged and produced segregation in housing,⁸ and real estate brokers licensed without any scrutiny of their discriminatory and segregative practices.⁹ There were also discriminatory practices by the federal government in the construction and placement of public housing which was segregated at one time by federal mandate.¹⁰ The federal government also segregated federally subsidized housing. Moreover, during the post-World War II "suburbanization" of America, the federal government refused to insure mortgages in racially heterogeneous areas and neighborhoods.¹¹

There were restrictive covenants.¹² I bought a house in Ann Arbor last month and looked through the history of all the deeds. I found a restrictive covenant running in the deeds; it had remained in place, or at least had been recorded, through the 1950s until the 1960s, even though the enforcement of racially restrictive covenants were declared unconstitutional in *Shelley v. Kraemer*¹³ in 1948.

In sum, Kansas City, like many other metropolitan areas where school desegregation cases have been litigated, is fairly typical of what happened in this country. We are a very ahistorical society. Segregation in this country is not fortuitous. It is the result of decades and decades of local, state, federal, and private actions, all of which have interacted to produce the segregative patterns that exist now. We take these patterns for granted, and we assume them to be the result of choice, or merit, or some other kind of factor that ignores the history of racism and segregation.

In *Jenkins*, we put that evidence before the district court judge in Kansas City. He rejected it.¹⁴ He rejected the arguments regarding inter-

4. *Jenkins v. Missouri*, 593 F. Supp. 1485, 1492-93 (W.D. Mo. 1984).

5. *Jenkins v. Missouri*, 639 F. Supp. 19, 35 (W.D. Mo. 1985).

6. 347 U.S. 483 (1954).

7. *Jenkins*, 593 F. Supp. at 1503.

8. *See id.* at 1501-02.

9. *See id.* at 1502-03.

10. *See id.* at 1497-98.

11. *See id.* at 1497.

12. *See id.* at 1491.

13. 334 U.S. 1 (1948).

14. *Jenkins*, 593 F. Supp. at 1490-91.

district segregation (similar to those advanced unsuccessfully by the plaintiffs in *Milliken v. Bradley*¹⁵), and he rejected them in much the same way that the Supreme Court rejected the evidence in *Milliken*.¹⁶ It was an adjudication of the merits that was determined by a preordained outcome. The judge appeared to know, from day one in my view, that he was not going to allow inter-district desegregation as a remedy; he was not going to get suburban school districts involved. He ignored all kinds of evidence and jumped through all kinds of hoops, did all kinds of contortions, to reach the final result.

He even, for example, ignored the inextricable link between schools and housing¹⁷ that the Supreme Court noted in *Swann v. Charlotte-Mecklenburg Board of Education*¹⁸ in 1971. The *Jenkins* plaintiffs tried to introduce evidence demonstrating that, when people buy houses, one of their primary concerns is the quality and the racial composition of the school district. The district court judge would not hear or credit that evidence.¹⁹ It is difficult to avoid the conclusion that the district court judge rejected evidence because he was engaged in a preordained adjudication of the merits.

The unfortunate and inadequate result is that, as in *Milliken*, the judge limited himself to an intra-district remedy, and then began to use the *Milliken II*-type²⁰ relief. Consequently, in Kansas City we have seen the most extensive and expensive "desegregation" remedy ever ordered by any court—approaching a billion dollars in educational improvements. That may seem like a great deal of money, and indeed it is for a financially strapped school district that has not passed a tax levy or a bond issue since the moment it became a majority Black school district in 1977. Finally, the plaintiffs were able to get financial, if not truly desegregative, relief.

As a result of the remedy implemented in *Missouri v. Jenkins*,²¹ the system is better off than it was before the suit was filed. However, desegregation gains have been modest at best. Whatever accomplishments flowed from the court-ordered remedy may only be of passing significance depending upon when and how the school district and the state are released from court supervision.

What will happen at that point? The Supreme Court, in *Board of Education v. Dowell*,²² has examined the issue of what happens to a school district that is declared unitary because it has eliminated the vestiges of segregation. Can a "unitary" school district abandon its desegregation

15. 418 U.S. 717 (1974).

16. See *Jenkins*, 593 F. Supp. at 1488.

17. See *id.* at 1492.

18. 402 U.S. 1, 14 (1971).

19. See *Jenkins*, 593 F. Supp. at 1491.

20. *Milliken v. Bradley*, 433 U.S. 267 (1977).

21. 495 U.S. 33 (1990).

22. 111 S. Ct. 630 (1991).

plan, usually a busing plan, and return to neighborhood, thereby segregated schools?

School desegregation remedies have not eliminated the vestiges of segregation; at best, they may have neutralized or circumvented the effects of segregative actions. While a desegregation plan that utilizes "busing" may allow students to escape segregated neighborhood schools, it does not desegregate neighborhoods. Once a court releases a school district from jurisdiction, the vestiges of segregation once again become operative, and students may not be able to escape them. What has the nearly four-decade effort to desegregate public schools accomplished? Does it amount to an effort to break the link, the causal connection, between present segregated conditions and de jure segregation, that is, intentional state segregation? If that is all it amounts to, then perhaps we have engaged in a worthwhile struggle, albeit one that has only fleeting results.

That seems to be where the Court is heading, in fact. There are two cases presently in the Supreme Court, one coming out of De Kalb County, Georgia, *Pitts v. Freeman*,²³ and, of course, the Court is going to have the opportunity to look at the Topeka case²⁴ again.

I maintain that many courts, as Judge Jones and Drew Days indicated in their discussions, failed in terms of their duty or responsibility to look at the violation and then provide a remedy simply because the task was too much for them. Some judges did it with a great deal of courage, and we applaud them. But many of the courts failed because they knew they would have to remake society. So they treated, in effect, these issues as if they were nonjusticiable. We are left with a legacy of separate and unequal schools as we enter the twenty-first century. That is tragic.

School districts like Kansas City, Little Rock, and numerous others, once involved in segregating their own students internally, helped to set in motion demographic forces that overwhelmed those school districts and their communities. Belatedly, they have become advocates of desegregation, or even integration. But demographic patterns dictate that their advocacy be on the inter-district level. These late desegregation converts have become plaintiffs in school desegregation cases, seeking *Milliken II* relief against the state in an attempt to circumvent the limitations imposed by the Supreme Court in *San Antonio Independent School District v. Rodriguez*²⁵ and other cases. These attempts have met with limited success, but in the apparent twilight of desegregation, school districts and their patrons cannot be sanguine about the financial and segregation perils they face. Absent a change in judicial direction or national policy, the future is not bright.

This is a tribute to Thurgood Marshall. I was born in 1954, about six

23. 887 F.2d 1438 (11th Cir. 1989), *rev'd and remanded*, *Freeman v. Pitts*, 112 S. Ct. 1430 (1992).

24. *Brown v. Board of Educ.*, 892 F.2d 851 (10th Cir. 1989), *vacated and cert. granted*, 112 S. Ct. 1657 (1992).

25. 411 U.S. 1 (1973).

months after the *Brown*²⁶ decision. Certainly the *Brown* decision changed the world that I was born into, and the world for all of us. I grew up in the shadow of the civil rights movement, and Thurgood Marshall was one of my heroes. I read about him; I read about Constance Baker Motley; I read about the other great lawyers of the Legal Defense Fund. The effort that they were engaged in, that Judge Jones was engaged in with the NAACP, has been a noble and a great effort.

The problem is not that anything was inherently wrong with that effort; the problem is that it was not taken far enough. I think that perhaps that was America at its best moment—certainly the Supreme Court at its best moment, in my view. So they remain heroes to me. I want to close by acknowledging their efforts and the work they have done. To borrow a phrase from Frederick Douglass, in another battle in this war, this discussion about race will go on in spite of those who want to wish it away. We need to replenish the ranks of those engaged in this struggle. I hope that some of you do that.

26. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

