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PREFACE: FIFTIETH ANNIVERSARY VOLUME

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I note with considerable satisfaction both the fiftieth anniversary of the *Notre Dame Lawyer* and the twentieth anniversary of the Supreme Court's momentous decision in *Brown v. Board of Education.*[1] Anniversaries are significant events because they afford us an opportunity to reflect upon the past and chart our course for the future. During the half-century the *Lawyer* has been in existence, one of the dominant themes of our time has been the growing realization of the importance of civil and human rights.

I commend the *Lawyer* for its dedication to legal scholarship and, more appropriately for this issue, for its contribution as a forum for civil rights. Fifteen years ago, in a preface to a symposium on desegregation published by the *Lawyer,* I wrote:

> I personally do not know of any problem of our time that is more complicated, more involved, more emotional, and perhaps more unsolved than the problem of civil rights in our society.[2]

Other civil rights symposiums include violence in the streets[3] and the recent annual civil and human rights issue each October.[4] The *Lawyer* has also published the proceedings of the 1959 Notre Dame Conference on Civil Rights, one of a series of conferences on public law subjects sponsored by the Notre Dame Law School.[5] In these and in other articles, the *Lawyer* has explored and probed, in a critical fashion, the crucial issues of civil rights in our society in a continuing effort to make the law a more effective instrument of social justice.

The *Lawyer* has not only made a general commitment to civil and human rights but also attempted to expand the discussion of civil and human rights beyond the more familiar categories, such as school desegregation and job discrimination. While these problems remain before us the *Lawyer* has pushed its investigation further and has examined, for example, the civil rights of the mentally retarded and, in this issue, criminal defense systems for the poor. The *Lawyer* has admirably begun this task and I am confident that the *Lawyer* will sustain its excellence in the field of civil rights.

One aspect of the *Brown* decision most relevant to law reviews is that decision's appreciation of the increasingly important relationship between law and the social sciences. This relationship has important implications for any law

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1 347 U.S. 483 (1954).

2 Hesburgh, *Foreword to the Symposium on the Problems and Responsibilities of Desegregation,* 34 NOTRE DAME LAWYER, preliminary page (1959).

3 *Violence in the Streets,* 40 NOTRE DAME LAWYER 497 (1965).

4 *Civil and Human Rights—Reflections in 1972,* 48 NOTRE DAME LAWYER 5 (1972); *Civil and Human Rights—Reflections in 1973,* 49 NOTRE DAME LAWYER 5 (1973).

5 Wofford, *Notre Dame Conference on Civil Rights: A Contribution to the Development of Public Law,* 35 NOTRE DAME LAWYER 328 (1960).

review interested in contributing to public policy in the field of civil rights. A footnote[6] in *Brown* referred to studies made by sociologists and psychologists who had studied the detrimental effects of racism and segregation on black children. That footnote represents, in one sense, a culmination of the collective hopes and efforts of a distinguished group of progressive jurists. Men like Roscoe Pound and Louis D. Brandeis, who were closely associated with the development of the sociological school of jurisprudence, saw the importance of the relationship between law and social science in a rapidly changing democratic society. The early work of these men, and others like them, prepared the way for the Court's use of social science in *Brown*.

While that footnote was in one sense a culmination, it was in another sense a beginning. The *Brown* decision was one of the most important decisions handed down by the Court in this century and its reference to social science studies paved the way for a further extension of the possibilities inherent in the relationship between civil rights and the social sciences. It is safe to assume that social science data will continue to be accepted and utilized by the courts. If law reviews are to respond to the civil rights challenge, they must become more innovative than they have been in the past.

Brown forged a marriage between the social sciences and the law. The evolution from the few brief references to social science studies in *Brown* to a massive social study like the Coleman Report[7] indicates how far this relationship has come. Whether we like it or not, and I suspect there are many who do not, social science knowledge will be utilized increasingly in the legislative formulation of social policy. The law must go to social science as it becomes more and more involved in the complex issues facing American society. An understanding of the intricate relationship among law, social science, and public policy is absolutely essential if we are to pursue both justice and effective policy in the field of civil rights.

The implementation of the *Brown* decision is itself an interesting example of the interaction between law, social science and public policy. Many conflicts have developed in the years since *Brown*, and the promise implicit in that decision has not yet been fulfilled. To be sure, there has been some progress and some success, but there has not been enough. In light of the time, energy and resources invested, progress in school desegregation has been dishearteningly slow. After twenty years of litigation, congressional enactments, and administrative guidelines, Department of Health, Education and Welfare statistics indicate more progress in school desegregation being made in the South than in the North and West.[8] Even in some of those school systems that have been desegregated, invidious and blatant racial discrimination persists. How is this possible twenty years after *Brown*?

6 347 U.S. 483, 494 (1954).

7 J. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966). The origins of this report, popularly known as the Coleman Report, are to be found in the Civil Rights Act of 1964, which provided that a survey be conducted and a report made concerning the lack of availability of educational opportunities in public schools because of race, color, religion, or national origin. The Report was the second largest social science research project in history and it documented the lack of equal educational opportunity in American society.

8 U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, DIRECTORY OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS IN SELECTED DISTRICTS, Table III (1972).

Until 1954, seventeen states and the District of Columbia mandated racial segregation in the public schools. In the twenty years prior to 1954, the Supreme Court rendered decisions which chipped away at the doctrine of "separate but equal."[9] The end of the "separate but equal" doctrine came in 1954 when the Supreme Court in *Brown v. Board of Education*[10] ruled that racial segregation in the nation's public schools was unconstitutional because separate facilities were inherently unequal. The Court put it this way:

> We conclude that 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.[11]

The Court did not determine *how* the states were to dismantle their dual school systems or *what* deadlines would be imposed. Instead the Court invited the interested parties to prepare briefs on how its decision should be implemented.

Southern state officials argued against specific instructions or set guidelines by the Court. Instead, they recommended that the United States district courts make the determination of whether or not school districts complied with *Brown*. Thurgood Marshall, chief legal spokesman for the National Association for the Advancement of Colored People, asked the Court to set September of 1956 as the deadline for ending segregation in the public schools; he also asked the Court to issue firm and explicit instructions to the district court judges. Marshall argued that the Supreme Court had to arm the district judges with authority to carry out its decision, otherwise there would be untold delay.[12] Unfortunately, the Court rejected Marshall's advice. Southern state officials obtained most of what they wanted. They did so because the guidelines handed down by the Court were too flexible, giving district court judges virtually unlimited discretion in dealing with desegregation. The Court said:

> The judgments below . . . are reversed and the cases are remanded to the district courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit the parties to these cases to public schools on a racially nondiscriminatory basis with all deliberate speed.[13]

With very few exceptions, the South initially made no voluntary effort to comply with Brown. In the District of Columbia and in the border states of Delaware, Maryland, West Virginia, Kentucky, Missouri, and Oklahoma, however, immediate progress was made. Despite many difficult problems that had

9 *See, e.g.*, Sipuel v. Board of Regents, 332 U.S. 681 (1948); 1 Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

10 347 U.S. 483 (1954).

11 *Id.* at 495.

12 J. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 15 (1961).

13 *Brown v. Board of Education*, 349 U.S. 294, 301 (1955).

to be overcome, school districts in the Border States moved steadily toward desegregation. Southern States not only failed to make school desegregation progress but made every effort to fight and blatantly defy the Supreme Court's decision.

In the Deep South the chosen path was one of massive resistance—a policy implemented by enacting law after law deliberately designed to "legalize" the circumvention of *Brown*. This crude but effective strategy forced extended litigation of each of the questionable statutes. In resisting the *Brown* decision, Southern lawmakers displayed far more ingenuity, energy and boldness than they ever expended in attempting to solve the problems of poverty and illiteracy which have plagued the region for generations. A plethora of laws encompassing everything from Calhoun's thoroughly discredited doctrine of nullification to the self-destructive proposal that the public schools be permanently closed were quickly enacted by Southern state legislatures. States offered tuition grants to parents of white children who wished to send their children to private schools to avoid desegregation. In some instances, where desegregation had been ordered by the courts, the public schools were closed and children of both races were denied an education. These laws were passed with full knowledge that they contravened federal law and were therefore unconstitutional.

Defiance achieved new levels of respectability in 1956 when 101 members of the United States Congress, 19 Senators and 82 House members, signed the Southern Manifesto. This document condemned the *Brown* decision; it commended those Southern States that had announced a policy of total resistance to desegregation. In addition, the Manifesto declared an intention to use "all lawful means" to bring about a reversal of the Court's decision.[14] That so many members of the Congress signed such a document was nothing less than a national disgrace. Quasi-official acts such as these gave the trappings of legitimacy to this massive resistance movement; by placing ends above means, Southern officials encouraged the worst elements in Southern society to take any steps perceived necessary, including violence, to stop desegregation.

The Supreme Court began to show increasing impatience with the lack of progress in school desegregation. In 1964, in the case involving the Prince Edward County, Virginia, school system,[15] the Court warned that desegregation had proceeded with entirely too much deliberation and not enough speed. "The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying . . . to school children their constitutional rights. . . ."[16] In this case the Court held that the closing of the public schools in Prince Edward County, while other schools remained open in the state, denied black students the equal protection of the laws guaranteed by the fourteenth amendment. The Court also struck down various state statutes giving tuition grants and other tax breaks to parents who sent their children to private segregated schools to avoid attending public desegregated ones.

The Supreme Court's failure to formulate specific standards to guide en-

14 J. FRANKLIN & I. STARR, eds., THE NEGRO IN TWENTIETH-CENTURY AMERICA 284 (1967).
15 Griffin v. School Board, 377 U.S. 218, 234 (1964).
16 *Id.* at 234.

forcement of its decisions was an understandable but serious error. The South was quick to realize that it had won a substantial victory when the Court failed to establish specific guidelines with precise standards for desegregating the public schools. Problems of implementation were compounded by charging the United States district courts with the task of applying and enforcing the decision. The courts were poorly suited to make and enforce unpopular policy decisions. Many of the district court judges shared the biases of the region they served and many times those biases were reflected in their decisions.[17] It is likely that clear guidelines and directives from the Supreme Court would have resulted in more rapid and uniform enforcement by the district courts. In a lapse of political and administrative judgment, however, the Supreme Court passed the pressure on to the district courts who either were not able or were not willing to handle it.

Those spirited district judges who did attempt to enforce *Brown* were subjected to extreme pressures. In many cases, threats of physical violence and social ostracism were the rewards received for efforts to enforce the law. Little support came from the Eisenhower Administration. President Eisenhower neither provided moral leadership nor used his powers as Chief Executive to enforce the *Brown* decision. By refusing to express public support for *Brown,* the Eisenhower Administration fueled the hopes of segregationists. It was only after Arkansas Governor Orval Faubus used the National Guard to block black students sent by court order to a previously all-white high school that President Eisenhower finally acted by sending federal troops to Little Rock.

In 1964, with the passage of the Civil Rights Act, Congress became meaningfully involved in the school desegregation struggle. For the first ten years after *Brown,* the federal judiciary had assumed virtually total responsibility for effectuating school desegregation. Unfortunately, the success achieved by the judiciary was extremely limited.

In retrospect, it was unfortunate that the first branch of the national government to recognize the right of black Americans to equal educational opportunities had to be the Supreme Court. For several reasons, the Supreme Court was a less desirable vehicle for this new policy than either the legislative or executive branches of government. First, while the *Brown* decision represented a significant shift in public policy and while it may be obvious to academicians that policy-making is one of the Court's primary functions, it is not so obvious to the general public. The public tends to perceive the Court's function as one of simply interpreting the law. In interpreting the law, however, the Court almost always has considerable latitude in making decisions. There are few laws so specific that a judge has no discretion in deciding a new problem subsumed under a particular law. The public becomes aware of the Court's policy-making role in landmark cases like *Brown;* in cases like this, many citizens question the Court's authority to make such a significant policy change. The traditional theory of representative government is that important policy decisions should be made by the more representative branches of government. When doubt exists as to the Court's right to make a significant policy decision, problems of legitimacy arise which may eventually diminish compliance with the decision.

17 J. PELTASON, *supra* note 12, at 20.

This is precisely what happened in the *Brown* case. A considerable segment of the population of the South was led to believe that the Court went beyond its authority; they therefore felt justified in refusing to obey the decision. Congress would have been a more effective policy-maker simply because there would have been less doubt about the legitimacy of the decision.[18]

Congress also would have been a more appropriate agent of social change since it can better formulate uniform standards for all school districts and use its financial resources to supervise and regulate individual school boards. Courts are not readily suited to initiating and enforcing new and controversial policies. But because of congressional and executive inaction, the Supreme Court took the initiative and forged a new, courageous and just social policy.

With the passage of the Civil Rights Act of 1964, the Department of Health, Education, and Welfare was charged with the responsibility of enforcing Title VI of that Act. Title VI provided that recipients of federal financial assistance who practiced racial discrimination could have those funds cut off. The threat of a fund cutoff was strengthened by the passage of the Elementary and Secondary Education Act of 1965, which infused large new sums of federal money into education. HEW formulated guidelines which were to be followed in enforcing Title VI. The guidelines set 1967 as the target date for complete desegregation of the public school systems. School districts were required to make a substantial start toward desegregation by September 1965. At first, progress was painfully slow; but despite cautious use of the Title VI enforcement mechanism, HEW secured substantial school desegregation within five years after passage of the Civil Rights Act.[19]

With the change in administrations in 1969, the emphasis in government enforcement of school desegregation shifted.[20] In his 1968 campaign for the presidency, Richard Nixon made it clear that he opposed busing and that he favored preservation of the neighborhood school. Strom Thurmond, United States Senator from South Carolina, stumped the South spreading the word that Nixon would soften HEW guidelines if Nixon were elected to the presidency. Nixon was elected and the Nixon touch on school desegregation was felt in July 1969 when the administration announced new procedures for the federal effort to desegregate public schools. Equivocation and backsliding constituted the core of the new administration's approach. Fifteen years after the *Brown* decision, the Nixon administration announced that it would allow school districts to get "limited delays" in implementing desegregation plans. The administration's new approach also deemphasized fund cutoffs as a means of gaining compliance with the law.

In the summer of 1969, HEW and the Justice Department went into court on behalf of a number of Mississippi school districts, already under court orders to desegregate that September, asking that these school districts be allowed an-

18 For an interesting application of this argument see P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 158 (1970).

19 Edelman, *Southern School Desegregation, 1954-1973: A Judicial-Political Overview*, 407 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 32, 39 (1973).

20 Mitchell, *Moods and Changes: The Civil Rights Record of the Nixon Administration*, 49 NOTRE DAME LAWYER 63, 64 (1973).

other year before they implemented their desegregation plans. The administration argued that immediate implementation of the desegregation plans would produce educational chaos and confusion. These delaying tactics were severely criticized by many of the attorneys in the Civil Rights Division of the Justice Department and a number of resignations followed.[21] Clearly the administration was subordinating well-defined legal mandates to narrow partisan considerations. One perceptive observer has written:

> The goal was to undermine the effective administrative fund cutoff requirements and return the burden, politically as well as actually, to the courts for effective compliance—a slower and less effective method.[22]

The administration's proposed delays for the Mississippi school districts were challenged in court by black plaintiffs. In *Alexander v. Holmes County Board of Education,*[23] the Supreme Court refused to permit any further delays and ordered immediate desegregation. The Court said:

> [T]he Court of Appeals should have denied all motions for additional time because continued operation of segregated schools under a standard of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court, the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.[24]

Even after *Alexander,* however, HEW continued to emphasize bargaining with school districts to secure voluntary compliance. Very few enforcement proceedings were begun and those that were under way did not result in fund cutoffs after determinations of noncompliance. After 1969, very few school districts had their funds terminated.[25]

By January 1970, the busing of schoolchildren to achieve racial balance had become a subject of heated controversy. For the Nixon Administration, the busing issue became a convenient smoke screen to hide its enforcement failures and create a political basis for inaction. Unfortunately, the politicizing of the busing issue diverted attention from the urgent need to eradicate the nation's segregated school systems; the administration succeeded in making busing an emotionally charged issue.

Although the percentage of pupils transported to school nationally increased steadily from 1920 to 1970, less than three percent of all pupils bused were bused for purposes of desegregation. Former Secretary of Transportation John Volpe has stated that less than one percent of the increase in busing in 1972 was attributable to desegregation.[26] Nor was the busing of schoolchildren

21 H. RODGERS & C. BULLOCK, *Law and Social Change: Civil Rights Laws and Their Consequences* 90 (1972). The administration also was criticized by the Commission on Civil Rights. *See* U.S. COMMISSION ON CIVIL RIGHTS, FEDERAL ENFORCEMENT OF SCHOOL DESEGREGATION (1969).

22 Edelman, *supra* note 19, at 40.

23 396 U.S. 19 (1969).

24 *Id.* at 20.

25 When the Johnson Administration left office in January 1969, more than two hundred Title VI fund terminations had occurred. Edelman at 39.

26 U.S. COMMISSION ON CIVIL RIGHTS, YOUR CHILD AND BUSING 7 (1972).

to achieve school desegregation as expensive as some critics suggested, since the latest national figures available showed that less than four percent of all educational expenditures in the United States was spent on pupil transportation of all kinds.[27] The public has generally been unaware of facts like these and the busing debate has been carried on in an emotionally charged atmosphere. In 1973, a national survey revealed not only vast misinformation about busing but also a close relationship between erroneous beliefs about busing and opposition to it.[28]

In March 1970, the President issued a statement on elementary and secondary school desegregation in which the question of busing was again raised. The President sought to convince his critics that he supported school desegregation and that his Administration had every intention of enforcing the law. The President's position was that the Court in *Alexander* had left a number of questions unanswered and in these areas he was free to determine policy. He interpreted the Court as saying that *de jure* segregation was illegal and had to be eradicated, but that *de facto* segregation was not illegal. This simplistic dichotomy[29] allowed the administration to preserve the status quo in much of the country by moving against official segregation on the one hand, while preserving neighborhood schools and avoiding busing on the other.

Following the President's March 1970 statement, a get-tough policy against *de jure* segregation was pursued. During the summer of 1970, officials from HEW and the Justice Department met with school officials from recalcitrant school districts; the school districts were ordered to desegregate or be taken to court. By the end of August the administration had filed suits against a number of these school districts. A month later, the administration was claiming success in school desegregation because of the high percentage of Southern school districts operating under voluntary or court-ordered desegregation plans. While considerable progress toward school desegregation had been made in the South, it was not as spectacular as the administration claimed. A more accurate indicator of the amount of progress made in school desegregation was the number of students attending desegregated schools. In 1964, approximately one percent of the black schoolchildren in the eleven states of the old Confederacy were in schools with whites. As of 1972, the latest year for which comprehensive figures are available from HEW, 46 percent of the black schoolchildren were in schools which were predominantly white. Paradoxically, the gains being made in the South were being offset by the growing *de facto* segregation in the North. The 1972 HEW figures show only twenty-eight percent of the black schoolchildren in the North and West attending predominantly white schools.[30] It is in these

27 *Id.* at 15.
28 Wall, *What the Public Doesn't Know Hurts,* Civil Rights Digest 27 (Summer 1973).
29 The validity of the distinction between *de facto* and *de jure* segregation has been challenged. *See* Statement of the United States Commission on Civil Rights concerning the "Statement by the President on Elementary and Secondary School Desegregation" 6-9 (1970); *see also* the concurring opinion by Justice Powell in Keyes v. School District No. 1, 413 U.S. 189, 217 (1973).
30 U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, DIRECTORY OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS IN SELECTED DISTRICTS, Table III (1972).

rather startling figures that the challenge to the fulfillment of *Brown* lies. It is in the North and West that the struggle for desegregation of the public schools will be won or lost.

Two major political and legal roadblocks stand in the way of school desegregation in the North and West. The first is the *de jure-de facto* distinction; the second is the unnecessary and unrealistic emphasis placed on the boundary between city and suburb. There is little substance to the whole concept of *de facto* segregation. In many cases, school segregation that seemed to result from accidental housing patterns turned out, after close examination, to have resulted from decisions made by public officials. Government at the local, state, and federal levels has been implicated. In many communities, for example, racial zoning ordinances were an important factor in creating and maintaining racially exclusive neighborhoods. This obviously is not *de facto* segregation; it is *de jure* segregation pure and simple. Despite the questionable validity of the distinction, the Supreme Court utilized it in the first Northern school desegregation case it decided.

In *Keyes v. School District No. 1*,[31] the outcome was largely determined by the marshalling of carefully detailed proof of the Denver School Board's actions which resulted in segregation. In *Keyes*, the Court held that even though the state of Colorado never had a school segregation law, the action of the Denver School Board was enough to constitute *de jure* segregation. The Denver School Board, by manipulating student attendance zones and school site selections and by following a neighborhood school policy, created and maintained racially segregated schools throughout the district.[32] The *Keyes* case tells us that even though the *de jure-de facto* distinction is a questionable one, it can be successfully utilized to desegregate Northern public school systems.

The second and more formidable roadblock to school desegregation is the increasing division of our metropolitan areas into predominantly black central cities and almost all-white suburban communities. This trend has presented extreme difficulties to the meaningful desegregation of the public schools in many cities. To meet this problem, law suits have been brought in a number of cities to achieve the consolidation of the central city schools with the surrounding suburban communities.[33] These suits have proceeded on the theory that the

31 413 U.S. 189 (1973).

32 *Id.* at 192.

33 Bradley v. School Board of the City of Richmond, 338 F. Supp. 67 (E.D. Va. 1972), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *aff'd*, 412 U.S. 92 (1973). (The District Court ordered the merger of the Richmond City school system, 73 percent black, with two surrounding county systems, both more than 90 percent white, to desegregate the Richmond schools. The Court of Appeals reversed the order.); United States v. Board of School Commissioners of the City of Indianapolis, 368 F. Supp. 1191 (S.D. Ind. 1971), *aff'd*, 483 F.2d 1406 (7th Cir. 1973). (The District Court found that the Indianapolis school board had a deliberate policy of segregating minority students from majority students in its schools. This *de jure* segregation was imputed to the state of Indiana. The District Court held that effective desegregation of the Indianapolis public schools could not be achieved within the geographical bounds of the city and that busing from the city to the suburbs would be appropriate. The Court of Appeals affirmed the decision.); Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich. 1972) *aff'd*, 484 F.2d 215 (6th Cir. 1973), *cert. granted*, 414 U.S. 1038 (1973). (The District Court found substantial evidence that the segregation in the Detroit public schools was aided by the Detroit Board of Education and the Michigan Board of Education. Both of these

state has the ultimate responsibility to assure equal educational opportunity to every child within its borders, that equal educational opportunity was not attainable in a segregated environment, that the boundary lines between municipalities were artificial divisions that could be altered under appropriate circumstances, and that the consolidation of school districts to achieve school desegregation presented such circumstances. Unfortunately, this approach to school segregation in metropolitan areas received a severe setback on July 25, 1974, when the Supreme Court decided *Bradley v. Milliken,* the case involving the Detroit public school system and surrounding suburban public school systems.

While not completely ruling out the crossing of city boundaries to achieve school desegregation, the Court, in a 5-4 decision, rejected a metropolitan busing plan that would have substantially reduced public school segregation in the Detroit area. I agree with Justice Marshall's dissenting opinion that this decision represents a giant step backward in the twenty-year struggle to achieve school desegregation. In essence the Court has said that remedies for metropolitan segregation are limited by existing political boundaries. Along with Justice Marshall I feel that "[O]ur nation . . . will be ill-served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together." Fortunately, however, the Court's decision does not foreclose all possibilities of metropolitan school desegregation.

The Court itself left open the possibility of cross-district school desegregation where it could be shown that the district boundaries were somehow devised to maintain segregated communities. In his majority opinion, Chief Justice Burger held that a desegregation plan involving more than one school district could be justified only if discriminatory acts in one district produced segregation in the other or only where district lines had been deliberately drawn to separate black students from white. Admittedly, these conditions will be difficult to meet in future city-suburban merger cases.

Another approach to metropolitan desegregation is through the voluntary cooperation of neighboring school districts. One example of the approach is in Monroe County, New York, which includes the city of Rochester. This city-suburban transfer program is run by the Rochester, Brighton, Pittsford, Penfield, West Irondequoit, Brockport, Wheatland-Chili and Webster school districts, plus nine parochial schools. The program was initiated in 1964 with the dual purpose of improving educational opportunities for minority students from the inner city and ending the racial and cultural isolation of both white and black students. Voluntary metropolitan area projects like the one in Rochester are also in operation in Boston and Hartford. Efforts of this kind to solve the problem of metropolitan school desegregation are encouraging and deserving of federal support.

But perhaps the most effective way of assuring equal educational oppor-

Boards were instrumentalities of the state of Michigan. The District Court also found that desegregation of the Detroit public schools could not be accomplished within the geographical limits of the city and ordered that a metropolitan desegregation plan be submitted. The Court of Appeals affirmed.)

tunity for all of our children is for Congress to enact legislation providing for a national policy on school desegregation.[34] Congressional action affords greater promise for effective relief than any action by the courts. Courts must proceed on a case-by-case basis while Congress can establish a uniform national standard. Equally important is the fact that effective remedies may require expenditures of substantial sums of money and only Congress can provide the needed relief. I recognize the reluctance of Congress concerning the school desegregation process, particularly as it involves student transportation. However, I hope that any hostility will be overcome by an understanding that without metropolitan approaches to school desegregation, the promise of *Brown* will have little chance of being fulfilled. Surely this would be an American tragedy.

34 In 1967, the United States Commission on Civil Rights recommended the passage of federal legislation to provide uniform, national standards for the desegregation of our schools and pointed to the need to develop metropolitan approaches. *See* U.S. COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS, Vol. I, 187-192, 209-212, 239-263 (1967).