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Beyond Busing: Inside the Challenge to Urban Segregation

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BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION. By Paul R. Dimond. Ann Arbor: University of Michigan Press. 1985. Pp. xii, 411. \$29.95.

Beyond Busing, Paul Dimond's excellent and informative book on the major urban desegregation cases of the 1970s, is an exquisitely well-timed contribution to the debate on the effectiveness and propriety of busing elementary and secondary school students to achieve school desegregation. Dimond litigated some of the decade's most important busing cases, and this book focuses on the trial and appellate histories of *Bradley v. Milliken*,¹ *Brinkman v. Dayton Board of Education*,² *Evans v. Buchanan*,³ and *Penick v. Columbus Board of Education*.⁴ Dimond's accounts of these cases and his imperfectly linked description of two important housing cases add up to a powerful argument that, in the words of National Association for the Advancement of Colored People (NAACP) general counsel Nathaniel Jones, "what most judges and the public perceived as *de facto* or adventitious segregation was . . . *de jure* or official segregation and intentional discrimination, public and private" (p. 30).

Dimond's description of the landmark Detroit cross-district busing case, *Bradley v. Milliken*, is especially compelling. *Bradley* grew out of a desegregation plan that died. In April 1970, Detroit school board president Abraham Zwerdling persuaded the school board to pass a school decentralization plan that called for "regional boundaries maximizing the limited potential for desegregation within the city and redrawing attendance boundaries for twelve of the twenty-two regular high schools across the color line of residential segregation" (p. 27). Two days later the Michigan House of Representatives reversed the board's plan. The Detroit Branch of the NAACP filed suit in federal district court to challenge the rescission of the April desegregation

1. 433 F.2d 897 (6th Cir. 1970), 438 F.2d 945 (6th Cir.), *on remand*, 338 F. Supp. 582 (E.D. Mich. 1971), 345 F. Supp. 914 (E.D. Mich. 1972), *affid. in part and revd. in part*, 484 F.2d 215 (6th Cir. 1973), *revd.*, 418 U.S. 717 (1974), *on remand*, 402 F. Supp. 1096 (E.D. Mich.), 411 F. Supp. 943 (E.D. Mich. 1975), *affid.*, 540 F.2d 229 (6th Cir. 1976), *affid.*, 433 U.S. 267 (1977).

2. *Brinkman v. Gilligan*, 503 F.2d 684 (6th Cir. 1974), 518 F.2d 853 (6th Cir. 1975), *cert. denied*, 423 U.S. 1000 (1975), 539 F.2d 1084 (6th Cir. 1976), *vacated sub nom.* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, *on remand*, *Brinkman v. Gilligan*, 446 F. Supp. 1232 (S.D. Ohio 1977), *revd.*, 583 F.2d 243 (6th Cir. 1978), *affid. sub nom.* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

3. 379 F. Supp. 1218 (D. Del. 1974), 393 F. Supp. 428 (D. Del.), *affid. mem.*, 423 U.S. 962 (1975), 416 F. Supp. 328 (D. Del.), *appeal dismissed sub nom.* Delaware State Bd. of Educ. v. Evans, 429 U.S. 973 (1976), *affid.*, 555 F.2d 373 (3d Cir. 1977), *cert. denied*, 434 U.S. 880, 435 F. Supp. 832 (D. Del. 1977), 447 F. Supp. 982 (D. Del.), *affid.*, 582 F.2d 750 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980).

4. 429 F. Supp. 229 (S.D. Ohio 1977), *affid. in part, vacated and remanded in part*, 583 F.2d 787 (6th Cir. 1978), *affid.*, 443 U.S. 449 (1979), *on remand*, 519 F. Supp. 925 (S.D. Ohio), *affid.*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982).

plan and to require the Detroit school board to go further and completely eliminate illegal racial segregation in Detroit schools.

Dimond emphasizes that the NAACP lawyers did not originally contemplate the cross-district remedy that would make *Bradley* famous:

The complaint requested that the board submit a plan for the next school year to eliminate racially identifiable schools, but there was no request for a plan that would go beyond the boundaries of the Detroit school district. Given the extreme difficulty of the case . . . there was little inclination among the NAACP legal staff to include a plea for city-suburban integration at the outset. [p. 31]

The idea of a metropolitan remedy evolved from what Dimond calls the "conversion" of Federal District Court Judge Stephen J. Roth. In a pretrial order, Judge Roth rejected plaintiffs' proposal to reinstate the April 1970 integration plan and instead provisionally approved a voluntary "magnet" school plan. At a news conference he called the NAACP lawyers "outsiders [who] should go away and let Detroit solve its own problems" (p. 36). Yet weeks of trial testimony slowly led him to change his mind about the extent and cause of segregation in Detroit. Witness after witness testified that housing and school segregation were widespread and did not result from "free choice" or "economics":

At each family-income and housing-cost level, [Dr. Karl] Tauber demonstrated from the census data how blacks and whites alike in all characteristics save race were still almost completely segregated. Economics did not account for the residential segregation by race. Based on data from many opinion surveys and the continuing black efforts to seek genuinely open and integrated housing, Tauber added, "I don't think the choice factor is very relevant." [p. 47]

Judge Roth concluded that along with government actors from other areas, school authorities actively participated in the maintenance of segregation. He found that the Detroit school board used optional zones in neighborhoods undergoing racial transition, attendance boundaries aimed at containing black students, and an "unmistakably dual pattern" of school construction to keep black and white students in segregated schools (pp. 68-70). After forty-one trial days, Judge Roth had come full circle. He "concluded that plaintiffs had proven all elements of their claim that black families and pupils had been contained in a basically separate set of blacks-only schools and housing" (p. 70). In an interview several months later, Judge Roth said:

We all got an education during the course of the trial. It opened my eyes. . . . I would never have known or understood the meaning and history of racial discrimination and segregation. . . . I hope I get a chance before this case is over to say publicly, from the bench, why I think [integration] has to happen. [p. 72]

As Judge Roth slowly came to accept the plaintiffs' arguments, he

began to question witnesses on whether a Detroit-only remedy could truly desegregate the schools. The judge concluded that the state of Michigan was ultimately responsible for remedying school segregation in Detroit and that only a plan that included the neighboring, largely white suburbs of Detroit could effect such a remedy. He actually rejected plaintiffs' provisional Detroit-only integration plan on the grounds that it "would clearly make the Detroit school system racially identifiable as Black," would "not lend itself as a building block for a metropolitan plan," and would "increase the flight of Whites from the city and the system" (p. 79). Dimond says:

Having sat through forty-one days of trial and having learned how the color line in Detroit had shifted over time and the blacks-only ghetto had expanded virtually all the way to the city limits, Roth was not about to make the boundary of the Detroit school district the new racial divide [p. 80]

Judge Roth ordered instead a cross-district busing plan involving 53 of the 86 school districts in Wayne, Oakland, and Macomb Counties.

Dimond is careful to point out the legal problems with the remedy theory (pp. 63-64). First, there was little case law on state responsibility because post-*Brown* plaintiffs had sued individual school districts rather than southern states. More importantly, the Supreme Court in *Swann* had stated that the "nature of the violation determines the scope of the remedy," and Dimond admits that "our legal vision was not clear" on the question of precisely how the "containment" violation extended beyond the boundaries of Detroit (p. 81). Plaintiffs did present evidence that the dual-system pattern of school construction and faculty assignments extended into the suburbs. Judge Roth used this evidence as a second reason for ordering cross-district busing (pp. 82-83), but Dimond suggests several times that the plaintiffs simply did not have sufficient resources to prepare an adequate theory of metropolitan-wide violation (pp. 40, 64). Finally, the suburban school districts that would be affected by a metropolitan remedy had not been joined as parties and had not been heard in court at all (p. 64).

Dimond traces *Bradley* through the slow, rather agonizing appellate process that finally resulted in a five-to-four Supreme Court decision reversing Judge Roth and the Sixth Circuit Court of Appeals on the question of metropolitan relief. One of the great strengths of this book is that it provides the reader with sufficient information to criticize intelligently the majority's characterization of the trial court record and the choices available to Judge Roth.

Chief Justice Burger's central argument is superficially plausible: To approve the remedy ordered by the courts [below] would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court. . . . The constitutional

right of the Negro [children] residing in Detroit is to attend a unitary school system in that district. [pp. 110-11]

Yet this argument, without more, does not withstand much scrutiny. As then-Judge Wade McCree pointed out during oral argument before the Sixth Circuit, the fourteenth amendment probably does not require a finding of wrongdoing against every subdivision affected by a remedy plan. "Take, for example, a reapportionment case where the people of Detroit have less than one-man, one-vote but its immediate suburbs are not malapportioned. In providing a remedy for the injured Detroit voters by redrawing election districts, the suburbs are not immune, are they?" (p. 92). Burger's conclusion that school districts in Michigan are completely autonomous may distinguish school segregation cases from voting cases, but again Dimond's account of the district/state relation is detailed enough to raise serious questions about Burger's analysis.

Dimond's account of the Dayton school case, *Brinkman v. Dayton Board of Education*,⁵ shows even more clearly the difficulties in proving that apparently *de facto* segregation is actually *de jure* (pp. 121-46). Like *Bradley*, *Brinkman* can be said to begin with a rescinded desegregation plan. In December 1971, the Dayton school board admitted that Dayton schools were racially segregated because of school board actions and inaction, and ordered the superintendent to develop a pupil reassignment plan; in January 1972, a new board reimposed the old attendance zones and assignment policy.

Dimond begins his story with the words of black students and teachers who had suffered years of discrimination in Dayton:

Q. Mrs. Greer, could you describe for us when you first experienced what you considered to be discriminatory acts in the Dayton Public Schools?

A. I can remember in my second year at Weaver Elementary School. . . . There was a Christmas play. . . . I . . . tried out . . . and wanted to take the part of an angel. [T]he teacher who was in charge of the play indicated that I could not be an angel in the play because there were no colored angels. [p. 7]

Another witness, Ella Taylor Lowrey, described the structure in which she taught:

This small frame [building] . . . being very fragile, was soon dilapidated, in bad condition. The walls were bad; the windows were bad and broken out, and the heating unit became bad. The [board] finally built what I would call a permanent building behind this frame house . . . [with] four rooms. Then the two-room portable was torn down. At that time, we had eight black classrooms with eight black teachers. . . . I had 62 children in the sixth grade room. . . . The white teacher in the brick building with all white children had 20. [p. 4]

These statements were made at trial to bolster plaintiffs' legal the-

5. See note 2 *supra*.

ory that Dayton had a dual school system in 1954 and was required to dismantle it. Like plaintiffs' broader theory of *de jure* segregation — that school board authorities encouraged and exacerbated existing housing segregation both before and after *Brown* — the "affirmative duty" theory ran into a hostile trial judge and a complicated set of facts. Here and elsewhere Dimond is painfully honest about the weaknesses in his case. He admits that *Brinkman* suffered in the Supreme Court in part because

the Dayton brief had to turn, again and again, to the underlying facts of the case and the record evidence of official discrimination if we were to prevail. . . . "Racial imbalance," "optional zones," and "recent rescission" [of a desegregation plan] may amount to a constitutional violation of some sort, but the extent of their segregative impact was not clear and had never been determined by the courts below. . . . Our best hope was to convince the Court that the record evidence showed a long-standing and continuing pattern of pervasive, intentional segregation. Our problem was that the Supreme Court sits to review the law, not to evaluate masses of evidence. [pp. 168-69]

In contrast, the trial record in the Columbus school case⁶ was much stronger, and neither the Sixth Circuit nor the Supreme Court had much trouble finding that desegregation was required (pp. 274-76, 376-79).

The *Brinkman* testimony is powerful in its own right, and *Beyond Busing* is rich in other ways as well. Dimond is particularly good at relating his slice of legal history to the broader developments of the 1970s, and his occasional remarks about trial tactics are amusing and instructive. Dimond's honesty about both his successes and failures makes his book required reading for civil rights lawyers seeking loopholes in the busing cases he describes. But the book's real importance extends beyond the cases he discusses and beyond even the issue of school desegregation. Judicial opinions work in part by changing our understanding of the problems that give rise to lawsuits.⁷ *Beyond Busing* works by showing in great detail how some trial and appellate court judges shaped legal materials to produce five very important decisions that changed our understanding of the roots and tractability of racial segregation. Implicit in Dimond's book is the message that the process of redefinition and the struggle for desegregation will continue.

— Lawrence T. Gresser

6. See note 4 *supra*.

7. I owe this idea to Professor James B. White of the University of Michigan Law School.