

THE FEDERAL COURTS AND SCHOOL DESEGREGATION IN THE 1970s

DAVID J. GARROW

Paul R. Dimond. *Beyond Busing: Inside the Challenge to Urban Segregation*. (Ann Arbor: University of Michigan Press, 1985). xii + 411 pp. Bibliography. \$29.95.

Bernard Schwartz. *Swann's Way: The School Busing Case and the Supreme Court*. (Oxford: Oxford University Press, 1986). 245 pp. Notes, appendix, index. \$19.95.

Swann v. Charlotte-Mecklenburg Board of Education (402 U.S. 1 (1971)) was the Supreme Court's most significant constitutional holding on race and equal protection since the two *Brown v. Board of Education of Topeka* opinions some seventeen years earlier (347 U.S. 483 (1954); 349 U.S. 294 (1955)). *Swann* is most widely known as the first Supreme Court ruling to sanction busing of students for the purpose of racial desegregation, but its constitutional significance reaches well beyond that simple fact, for it forcefully brought to bear upon race cases a constitutional principle whose roots go back as far as John Marshall's landmark opinion in *Marbury v. Madison* (1 Cranch 137 (1803)), which holds that when a constitutional right has been violated, an affirmative duty to remedy that violation is also thereby created.

Busing in *Swann*, the Supreme Court held, was simply one among several remedies that could be employed to de-establish the racially separate schools that had been mandated by state statute prior to *Brown* and never meaningfully integrated in its wake. *Brown II* had called for the desegregation of the South's schools with "all deliberate speed" (349 U.S. 294, 301), but for well over a decade that standard resulted in only the most token integration, as Southern school boards employed a variety of student assignment plans that advertised the fiction of nonracial criteria while quite successfully keeping over three-fourths of the South's black students in schools that were ninety percent or more black (Orfield, 1983: 4). By 1968 the Supreme Court's tolerance for such slow and minimal compliance was running out; in its important opinion in *Green v. County School Board of New Kent County* (391 U.S. 430 (1968)), the Court unanimously spelled out for all once-segregated school systems "the affirmative duty to take whatever

steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”

Swann became the first major opportunity for the Court to give practical meaning to its command in *Green*, and Bernard Schwartz’s modest volume, *Swann’s Way*, is a detailed and painstaking study of the intra-Court discussions and disagreements that, after much drafting and redrafting, eventually resulted in the entire Court speaking in one opinion bearing the name of Chief Justice Warren E. Burger. Schwartz devotes little attention (only one brief chapter) to the pre-Supreme Court events in *Swann* and Charlotte-Mecklenburg’s schools, and concentrates instead simply upon describing, almost day-by-day and sentence-by-sentence, how the high court moved from its first conference discussion of *Swann* to the eventual opinion-by-committee that was handed down in the chief justice’s name.

Schwartz does not seek to hide his deep respect for Associate Justice William J. Brennan, who along with former Associate Justice Potter Stewart, emerges as the central figure in an intricately layered story that finally resulted in a Court opinion that was much more forcefully probusing than the chief justice himself wanted or initially intended. Although Schwartz’s portrait of Burger is far from favorable, readers who already are familiar with the account of the *Swann* deliberations given by Woodward and Armstrong (1979: 95–112) will realize that Schwartz’s far lengthier narrative adds little that is notable or surprising to the story.

Paul Dimond’s *Beyond Busing* picks up the story of the Supreme Court and school desegregation somewhat after *Swann’s Way* and the first important non-Southern schools case, *Keyes v. Denver School District No. 1* (413 U.S. 189 (1973)). *Keyes* represented the first expansion of *Swann’s* remedy principle to a school situation where the racial separation of students had not been mandated by statute but nonetheless had been the product of school authorities’ actions. *Keyes* thus imposed a far-reaching standard upon non-Southern school systems: Just because racial separation of students never had been a formal, written policy did not mean that those systems were immune from constitutional challenge if it could be shown that such separation, which was especially prevalent in large, urban school systems, had been created, magnified, or maintained by school officials’ actions.

Dimond served as the plaintiffs’ attorney in three of the most significant Northern schools cases of the 1970s (those involving Detroit, Dayton, and Columbus, Ohio) and worked closely with the NAACP Legal Defense and Educational Fund litigators who shepherded these and similar challenges to Northern school segregation through the federal courts. Dimond thus warns at the outset that his book “is not a disinterested account nor a dispassionate discourse” (p. vi), but believes that it thereby “avoids the false certainty that many pundits seem to find with certainty of hindsight

and the dubious objectivity of others who claim to be neutral observers” (p. 395).*

Although Dimond’s failure to footnote much of his material may inconvenience a careful reader who wants to locate precisely which decision he is quoting or referring to at any given point, *Beyond Busing* does provide a valuable account of the histories of the Detroit, Dayton, and Columbus cases (plus the Wilmington, Delaware, schools case and the Chicago-area housing litigation that culminated in *Hills v. Gautreaux* [425 U.S. 284 (1976)] and *Village of Arlington Heights v. Metropolitan Housing Development Corporation* [429 U.S. 252 (1977)]) as well as an insightful analysis of the doctrinal strategies that underlay that litigation.

Dimond begins the main body of his book with an examination of the Detroit schools case, *Milliken v. Bradley* (418 U.S. 717 (1974)), which resulted in a Supreme Court holding that was fundamentally disappointing to the plaintiffs. *Swann* had emphasized that “the nature of the violation determines the scope of the remedy” (402 U.S. 1, 16 (1971)), but in its wake—as in the wake of other decisions involving busing—public debate and discourse focused almost exclusively upon the remedy options, such as busing, rather than upon the nature of the prior violations. *Keyes*, *Milliken*, and the other subsequent Northern cases shifted that focus, at least for the litigators involved. *Milliken* exemplified the crucial issue. Dimond and his Legal Defense Fund colleagues overwhelmingly convinced United States District Judge Stephen Roth that Detroit school authorities had long been complicit in creating and perpetuating, even in the wake of *Brown*, a school system that had successfully segregated its dwindling minority of white students from sharing their public education with significant numbers of black students. Although Detroit officials clearly were guilty of extensive violations of students’ post-*Brown* right to an education in a unitary system free from racial discrimination, no truly extensive integration could be achieved within the bounds of a city school system that was by then over two-thirds black. Numerically meaningful integration, Dimond and his colleagues (as well as Detroit school officials) came to believe, could be achieved only if the virtually all-white suburban school districts lying just outside the city limits could be included in a metropolitan-wide desegregation plan. Indeed, Dimond realized, not only had longstanding housing discrimination, including such state-sanctioned devices as racially restrictive covenants and racially exclusive zoning, contributed to the segregation of Detroit area schools, but the racially conscious actions of Detroit school authorities in school-siting decisions and student attendance zones had themselves contributed to an expanding pattern of housing segregation in the metropolitan area.

* See, e.g., Wolters, 1984; see also Garrow, 1985.

The insuperable problem, however, within the right-violation-remedy analytical format, was that violations of the plaintiffs' rights to a nondiscriminatory education could be proved against only city school officials—not against suburban school districts and not, despite Dimond's hopes, against Michigan state authorities. Hence, the Supreme Court ruled in *Milliken*, remedy measures, such as busing, could be mandated only within the city school district itself.

That outcome in *Milliken*, and the strenuously painstaking evidentiary efforts that the plaintiffs had to make in the Dayton and Columbus cases to show successfully that school authorities in each of those cities had, post-*Brown*, worked to maintain rather than de-establish the racially separate schools that had existed in 1954, leads Dimond (p. 395) to criticize how the courts' post-*Swann* applications of the right-violation-remedy format have simplistically treated every school segregation case as "a bipolar controversy in which a court decides a dispute between two parties and then provides a complete remedy to the plaintiff victim to overcome the precise effects of any particular wrong committed by the defendant." This approach limits the courts to wrestling with only what Wolf (1981: 244), in her own excellent book on the Detroit case, termed "the legal fiction that school racial concentrations are substantially caused by school authorities." As Dimond (p. 396) explains, restricting the conceptualization of "violation" to only a search for "intentionally segregative acts of particular local officials" leaves urban America's pervasive racial separation largely insulated from any constitutionally based challenges in the federal courts.

"We are not well served by a Court," Dimond (p. 400) writes in closing, that insists that "the judiciary ought not to hear claims of general social injustice unless specific judicially manageable remedies running against particular wrongdoers are apparent." Writing elsewhere, Dimond (1983: 3) has made his case for a broader conceptualization of violation, one that would cover "a continuing impact of a group wrong" in more extensive detail. "All official causes of racial conditions, not just a particular public defendant's incremental contribution" (*ibid.*, p. 6), ought to be weighed by a court in considering appropriate remedies. "The inquiry into violation should extend beyond the official motive for the particular challenged action to a broader evaluation of the institutional bias or majoritarian insensitivity that led to the decision and the extent to which the practice perpetuates an unremedied caste system of racial ghettoization" (*ibid.*, p. 58). As Lawrence (1980: 50) has more succinctly argued that same point, "blacks are injured by the existence of the *system* or *institution* of segregation rather than by particular segregating acts."

Dimond (1983: 60) acknowledges "the complexity of this inquiry" that his position calls upon the courts to undertake, but

contends in constitutional terms that it is nonetheless a required task, for “no state that fosters or condones the subjugation of a minority could be said to afford the equal protection of its laws to all persons within its jurisdiction” (ibid., p. 11). “The wrong inhering in such pervasive racial segregation” as exists in schools and housing in much of modern-day urban America, he writes in *Beyond Busing* (p. 402), is so substantial and constitutionally cognizable that “all possible sources of the invidious discrimination—a pre-existing caste system and the resulting institutional bias or segregative impact, as well as the discriminatory purposes of a particular current decision maker who claims total blindness to race and, hence, to any persisting effects of caste discrimination”—must be surveyed and studied by the courts (Dimond, 1983: 59).

Lawrence (1980: 53) has articulated the same argument—“any state action that results in the maintenance of the segregated system is a direct and proximate cause of the injuries suffered by black children in segregated schools and is in violation of the equal protection clause of the fourteenth amendment”—but Dimond, at the close of his book, betrays at least a clear signal of doubt that the federal courts actually could assume the mission that he and Lawrence contend they should not forsake. Racial conditions in urban America may well constitute what Dimond (p. 402) terms “our contemporary, albeit substantially sanitized, form of apartheid,” but he nonetheless acknowledges that “the courts alone cannot implement any remedy, but can only stimulate thought by the people and action by the other institutions in our society” (p. 399). This piece of level-headed realism leavens a constitutional vision that otherwise would entrap the courts in a reconstruction of modern American life far beyond the capacity of any one governmental institution.

DAVID J. GARROW is a Professor of Political Science at the City College of New York and the City University Graduate Center. He earned his B.A. at Wesleyan University, Middletown, and his M.A. and Ph.D. at Duke University, Durham. His third and most recent book is *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* (New York: William Morrow & Co., 1986), for which he won the Pulitzer Prize.

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