

CAN THE COURTS ERASE THE COLOR LINE?

JOHN P. FRANK*

Eighty-six years ago Representative Bingham of Ohio offered to the Joint Committee of Congress on Reconstruction language which has become the vital part of the Fourteenth Amendment to the Constitution of the United States. Historians have called the Civil War the Second American Revolution. The Fourteenth Amendment, as Bingham proposed it and as the country adopted it, was a vital part of the Second American Constitution which that second American revolution had engendered.

The Thirteenth Amendment had given a formal freedom to the slaves. It was the great purpose of the first section of the Fourteenth Amendment¹ to carry on the task which the Thirteenth Amendment had begun; in the popular phrase of the time, it sought to transform the recently freed men into genuine free men, enjoying the basic prerogatives of human status. To this end, the Amendment ordained that all men should be entitled to the great basic rights: to the privileges and immunities of citizens of the United States, to due process of law, and to the equal protection of the laws.

In the thinking of 1866, equal protection of the laws was the most vital portion of the new constitutional mandate. Equal protection meant the equality of the races. Insofar as a mighty ordinance could ordain it, it meant that thereafter there should be no discrimination because of race.

Yet behind this ultimatum there was imprecision. The Congress of 1866 was legislating for the world which it knew, and it was no more gifted than any other Congress in its power to anticipate wholly new situations. And so on the great issue of segregation, the Amendment was inevitably unclear. Note that this lack of clarity was truly inevitable. Segregation, or the device of so-called "separate but equal" treatment of the races, is a by-product of the Civil War Amendments. It is a device for escaping the force of the mandate that all shall be entitled to equal protection. Before that provision was written into the basic law, there

* Associate Professor of Law, Yale University. These remarks were presented as a paper at the Howard University Conference on Racial Integration in Education in 1952, and were printed as part of the proceedings of that meeting in 21 *JOUR. NEGRO EDUC.* 304 (1952).

1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

CAN THE COURTS ERASE THE COLOR LINE?

was nothing to escape and hence no need for segregation. To put it another way, segregation is a refinement in the history of racial discrimination. A society does not need an elaborate caste system to distinguish slaves from their masters.

There were of course forms of separation between the pre-1866 free Negroes and the white population. But that generation thought of race relations as a series of separate problems—a transportation problem, an education problem, a marriage problem. There was then no generalized conception of a broad principle of race relations covering the access of the population to every convenience of life or death from drinking fountains to cemeteries. The conception of segregation, separate-but-equal style, was an intellectual wrinkle to escape the simple command of equality.

American society did seek to escape that command because the command had never represented the voice of more than a passing group in power. Wars commonly know a period of moral fervor followed by a moral lapse as interests shift. Our various ventures to save the world for democracy are familiar evidence. So it was in the '60s and '70s. Reform in race relations proved far more onerous and far more expensive than was anticipated; the spirit of resistance to change deepened, and the spirit of social regeneration ebbed.

The shifting conception of public policy was nowhere more evident than on the United States Supreme Court. In 1873 that Court held, in interpreting a statute, that the device of segregating white and colored passengers into separate but identical railroad cars on the same train amounted to exclusion from the cars and was a denial of equality.² In 1896, the Court in effect completed the reversal of its principles in the noted case of *Plessy v. Ferguson*³ and held that a state might validly require the separation of the races in transportation.

What is important about each of these decisions is that each reflects the dominant social, moral, and political spirit of its times. In 1873 the Court sensed that the dominant element of the country wanted real equality. By 1896 the Court very accurately recognized that this was no longer so.

The transformation suggests the inherent limitation on the judicial process as a maker of basic social policy. On the ultimate questions of policy, courts have a way of accommodating the

2. *Railroad Company v. Brown*, 17 Wall. 445 (1873).

3. 163 U. S. 537.

Constitution to what the country will tolerate. And yet the judicial process is more than a mere echo of popular demand; for the judges help to make the symbols by which the country lives. *Plessy v. Ferguson* was thus at once both an acquiescence in, and a spur to, the growing practice of segregation. By the early twentieth century the pattern of racial separation was firmly established in the United States.

The twenty-five years just passed have seen an amazing reestablishment of moral opposition to racial discrimination in the United States. Indeed, though it would be impossible to prove, I suspect that in the past fifteen years the proportion of the whole population which has shared a sense of deep objection, on moral grounds, to mistreatment of Negroes is quantitatively greater than the proportion of the population which felt that objection in 1866. Once again, the courts have both gone along with and promoted this moral objection, and a series of judicial decisions has substantially broadened the modern meaning of equal protection of the laws.

This course of events raises the precise question of this paper: to what extent *can* courts erase the color line? The dominant note of *Plessy v. Ferguson* is one of despair at judicial powerlessness to surmount the forces of discrimination. Judges, thought the Court, were incapable of overriding the "usages, customs and traditions" of the people of a community. Since the precise purpose of the Fourteenth Amendment was to override discriminatory local usages, customs and traditions, *Plessy v. Ferguson* was thus a weary abdication from the very policy the Amendment was meant to secure. Are judges thus powerless? What can they do, and what can they not do?

II

Before analyzing the limitations of law as a force for equality, we may consider some of its accomplishments. During the judicial administration of Chief Justice Charles Evans Hughes, the law became less timorous than it had been thirty years earlier. Hughes was a man of profound convictions concerning civil liberty, and he wrote the basic opinions resulting in improved treatment of Negroes in railroad transportation⁴ and in education.⁵ More than anyone else he was responsible for the effort to stop the extraction of forced confessions, particularly from Negro defendants.⁶

4. See his opinions in *McCabe v. Atchison, T. & S.-F. Ry.*, 235 U. S. 151 (1914) *Mitchell v. United States*, 313 U. S. 80 (1941).

5. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337 (1938).

6. *Brown v. Mississippi*, 297 U. S. 278 (1936).

CAN THE COURTS ERASE THE COLOR LINE?

The law school story is worth telling in some detail. In the 1930's Negroes in some states either had no opportunity for legal education or were compelled to go to other states to seek it. In the leading case,⁷ Chief Justice Hughes ordered the state of Missouri to provide legal education at home, whether in the white university law school or in a separate law school of substantial equality. There followed the establishment of colored law schools of sorts in a number of Southern states. Those separate institutions were expensive—"Prejudice comes high," as one dean told the Texas legislature. Some of them were also very poor in quality. A series of lower court⁸ and Supreme Court opinions⁹ kept up the constant pressure to secure improved legal education for Negroes; and finally the Supreme Court recognized that separate legal education could never be equal legal education; that it was utterly impossible to create overnight special Negro law schools which could match the accomplishments of the great state universities of the South. Thus came the final mandate: qualified Negroes must be admitted on an unsegregated basis to the state law schools.¹⁰

In this development, the Supreme Court has simultaneously marched in step with the times and promoted the drift of events. Members of the law-teaching profession take justifiable pride in the record of the profession in this connection. Two hundred professors joined in the argument for unsegregated legal education. But, in all candor, this was a cheap virtue since most of them taught in schools already unsegregated. A greater accolade is owing to those teachers in the Southern schools, and particularly to those deans, who are doing so much to make the new system work. There has not been, so far as I know, a single instance of discrimination against Negro students by any faculty once the Negro secured admission.

Top credit must go to the white students themselves. In repeated instances, theirs has been the most influential pressure toward eliminating discrimination. Detailed reports show that non-segregation has been accepted either passively or enthusiastically by overwhelming majorities of the white students involved. There have been moments of friction; an ugly situation almost developed in connection with the use of one law school library by

7. *Missouri ex rel. Gaines v. Canada*, *supra* n. 5.

8. See, e.g., *Wrighten v. Board of Trustees*, 72 F. Supp. 948 (E.D. So. Car. 1947).

9. *Sipuel v. Board of Regents*, 332 U. S. 631 (1948).

10. *Sweatt v. Painter*, 339 U. S. 629 (1950).

a Negro girl. There has also been, I am informed, some needless strain at the University of North Carolina, precipitated, perhaps, by bad judgment on the part of the Negro students.

But on the whole the Negro students, like the white students, have done their part more than well. There has been no over-aggressiveness on either side. If anything there has been a tendency to lean over backwards to prevent friction. Let me quote from some reports from deans of the schools involved.

1. Our policy of accepting Negroes who meet our standards for admission and our policy of treating all students alike, regardless of race, has worked out very well in practice. It has been accepted without friction by all concerned. As will be noted below, we have but two Negro students. Both have been courteously accepted by their student colleagues and have been treated as equals in every respect. The white students of their own volition have seen to it that the Negro students were invited to all Law School functions, social and otherwise.
2. During (his) stay in the Law School, he was housed in Hatcher Hall, in the section occupied by law students, and was privileged to take his meals in the cafeteria of Hatcher Hall, like all other residents of this dormitory. The student body of the Law School accepted (him) passively, and there have been no incidents of any sort following his attendance at law classes, lectures, and other activities of the Law School. There was, of course, a very considerable amount of opposition to (his) presence in this university from large segments of the white population of the state. During (his) stay in this law school, he never attempted to participate in any student social functions.
3. The Negro students have conducted themselves with courtesy and tact and have apparently been careful to avoid provoking antagonism. Similarly, the white students, whether or not in favor of the new policy of non-segregation, have displayed the same qualities. The result has been that no unpleasant incidents have been reported to the faculty. Negro students are seated alphabetically in class in the ordinary way and have used all of the facilities of the school. At the beginning of the year, one of the white students seated next to a Negro student in a particular class asked to have his seat assignment changed and this request was granted. The reason for

CAN THE COURTS ERASE THE COLOR LINE?

the request was not asked, and the incident did not come to the attention of the Negro student. So far as I know, this has been the only incident which might show any antagonism. None of the Negro students requested University housing or dormitory space, but it is assumed that such requests would be handled by University officials in the normal way. Some of them take their meals regularly at the University cafeteria, but we have heard of no unpleasant incidents arising from this. Few extracurricular activities are open to first-year students, and the Negro students have shown no disposition to enter them. . . . In general, it can be said that the first year under the policy has been without incident and that the Negro students have been met by a general attitude of tolerance.

And yet all is not well. The basic hypothesis of those who have supported the attack on segregation from the top of the educational structure down—that is, by beginning with the graduate schools—is an assumption that Negro applicants to these graduate schools would be capable of carrying on the work. This, in repeated instances, is proving false. Just as some of the separate colored law schools proved inferior to their white counterparts, so some of the separate colored colleges are proving inferior to their white opposite numbers. Law school experience on several Southern campuses is proving that fair treatment at this level comes too late to save the typical student who has been subjected to segregated education from infancy through his college years. Some colored students are failing out of white law schools solely because of inadequate pre-law training and, I am morally certain, without any discrimination against them whatsoever. The result is a new lease on life for the colored law schools which, I confess, I had hoped would be extinguished altogether. On the contrary, they are growing in enrollment.

What of the role of the courts in this development? The end result is that the situation as to Negro legal education is improved but not perfected. To this end, the judiciary has applied the element of legal compulsion to a situation already ripe for change. What white students, colored students, and educators could not have accomplished for themselves, the courts have accomplished for them; although, of course, without this combined cooperation, the legal force would not have had even limited success, and might never have been attempted. Yet not even the whole cooperative team can carry the day at one sweep, and overcome the inheritance which poor preliminary education leaves to the Negro graduate student.

III

What *Plessy v. Ferguson* properly recognized is that there is a limit to what the judiciary can accomplish in our society. Indeed, if one were to measure or to give comparative weight as forces affecting American life to the executive, the legislative, and the judicial branches of the state or Federal government, the judiciary would stand as the least effective of the three. For example, the lives of each of us are more affected by what the President does or by what the Congress does than by what the courts do. Of the three, the judiciary has the weakest leverage on the whole social structure. Courts have no roving commission to suppress evil, and must wait for concrete cases to come before them. In important matters of social policy, even assuming that courts get cases to decide, the effect of their decisions may be softened by polite evasions.

There are three limitations to effective judicial action in the area of race relations of which much is spoken. They are: *first*, the fear of engendering violence; *second*, the fear of precipitating unfortunate political consequences; and *third*, a group of limitations which can be lumped together as the restraint of practicality.

Violence—A dominant fear of those who would restrain legal action to secure equality is that it will cause a reaction of physical violence against the Negro minority. This assertion has been current since the end of the Civil War. In some particular situations where the abolition of segregation has conflicted with strong local custom, there has in fact been violence. The bombings, North and South, which have accompanied Negro entrance into what had been white housing areas are generally familiar. The difficulties at the Anacostic swimming pool in Washington and at the municipal pool in St. Louis show the ugly situations which can develop. The threats of the Bilbos, the Talmadges, and the Wrights show that the spirit of violence can reach the highest levels of the political structure.

A judge cannot be blamed if he shrinks from precipitating a race riot. I believe that the cases of the 1920's appearing to condone restrictive covenants¹¹ were a direct retreat because of the racial violence which shortly preceded them. Yet no argument against judicial action has been so abused and so exaggerated as this one. In the first place, violence remains the exception rather than the rule in the community response to mandates for more nearly equal race relations. In the second place, since the judiciary

11. See, e.g., *Corrigan v. Buckley*, 271 U. S. 323 (1926).

CAN THE COURTS ERASE THE COLOR LINE?

has very little effect against overwhelming public opposition, a point to be developed later, the need for violence as a tactic of resistance seldom arises. In the third place, the whole argument is morally insufferable.

What experience does show is that occasional situations of violence can be handled, and could have been avoided, by governmental firmness and effective police work. The important lesson of the St. Louis swimming pool experience is that while the Mayor yielded to mob fears and reestablished segregation, subsequent court orders terminating the segregation could be and were carried out. The experience of the Park Service in the Department of Interior shows what can be done. The Park Service has knocked out compulsory segregation in those parks under its sole control by a policy of unyielding firmness. It has on occasion been frustrated in the District of Columbia by a separate agency, the District of Columbia Recreation Board, which has had an opposite policy as to parks and swimming pools in the District. The resistance of that board and, I believe, some Communist agitation, precipitated the altercation at one pool in 1949. However, the Interior Department, refusing to yield at all to local pressure, instituted a program of skilled police instruction and this year will continue to operate an unsegregated pool program, which appears to be a complete success. While one of the pools in a white neighborhood and two in colored neighborhoods are of course used almost exclusively by those living about them, the East Potomac and McKinley pools are largely integrated; and in only one of the pools does there appear to be any likelihood that an integrated policy has resulted in driving off the white users.

What the Interior Department's experience shows, and what the belated firmness of Chicago's City Administration in connection with housing disorders in that city shows are that two elements are absolutely required to minimize the likelihood of violence. One is the use of skilled police, trained to race relations work in difficult situations. The other is a policy of unremitting firmness. Divided counsel or twisting and turning administration invite hooliganism.

Violence as a response to racial integration is more of a mirage because violence is unnecessary as a tactic of community resistance. As will be developed later, the judiciary is incapable of hitting with firm blows which score immediate knockouts against social institutions. The judicial right hook even at its strongest is usually no more than a blow into a pillow, its effect softened and diffused before practical consequences are felt. To anticipate an example, the Supreme Court has outlawed restrictive

covenants¹² and forbidden segregation in interstate travel.¹³ Yet no one supposes either the black ghettos have in fact been exterminated or that travel between Southern points is in fact unsegregated. There are smoother ways to frustrate judicial decisions than by force.

But the crowning weakness of the argument that fear of violence should restrain legal action is that it is a yielding to lawlessness. Appeasement is no prettier a word as applied to race relations than it is as applied to foreign policy. It is unthinkable that the country should yield to the aggression of Communism from without. It is equally unthinkable that it should yield to ruffianism from within. What is worse, the very admission of the possibility puts a premium not on discouraging violence, but on encouraging it.

The result of a policy of non-appeasement may indeed be disaster. If we stand up to the Communists, we may lose. If we stand up to the hooligans, we may also lose. This is no reason for yielding. No good answer has yet been contrived to the observations by former President Garfield, then a member of the House of Representatives, in 1875. The issue was the passage of the Civil Rights Act of 1875,¹⁴ and Mr. Garfield was responding to observations of those who believed that the Act would hurt the Republican Party and the Negro, in part because "a conflict of the races must be the inevitable result of such a policy." Mr. Garfield said:

The warnings uttered today are not new. During the last twelve years it has often been rung in our ears that by doing justice to the Negro we shall pull down the pillars of our political temple and bury ourselves in its ruins.

I remember well when it was proposed to put arms in the hands of the black man to help us in the field. I remember in the Army of the Cumberland where there was 20,000 Union men from Kentucky and Missouri and we were told that those men would throw down their arms and abandon our cause if we dared to make the Negro a soldier. Nevertheless the men whose love of country was greater than their prejudice against color stood firm and fought side by side with the Negro to save the union.

12. *Shelley v. Kraemer*, 334 U. S. 1 (1948).

13. *Mitchell v. United States*, *supra* n. 4; *Morgan v. Virginia*, 328 U. S. 373 (1946); *Henderson v. Southern Ry. Company*, 339 U. S. 816 (1950).

14. Now 18 U. S. C. §§ 241-242.

CAN THE COURTS ERASE THE COLOR LINE?

When we were abolishing slavery by adopting the 13th Amendment we were again warned that we were bringing measureless calamity upon the Republic. Did it come? Where are the Cassandras of that day who sang their songs of ruin in this Hall when we passed the 13th Amendment? Again when the 14th Amendment was passed the same wail was heard, the wail of the fearful and the unbelieving. Again when it was proposed to elevate the Negro to citizenship, to give him the ballot as his weapon of self-defense, we were told the cup of our destruction was filled to its brim. But, sir, I have lived long enough to learn that in the long run it is safest for a nation, a political party, or an individual man to dare to do right, and let consequences take care of themselves . . . What is this bill? It is a declaration that every citizen of the United States shall be entitled to the equal enjoyment of all those public chartered privileges granted under State laws to the citizens of the several states. For this act of plain justice we are told that ruin is again staring us in the face. If ruin comes from this, I welcome ruin.¹⁵

Political Considerations—This is the realm of sheer guesswork; but one may suspect that on occasion judicial action is affected by practical political considerations. Professor Roche advanced such a theory as to race relations cases in last year's PENNSYLVANIA LAW REVIEW.¹⁶ A case in point is the Supreme Court's recent avoidance of decision on the issue of South Carolina's segregated primary schools. That case was intended to be the all-out attack on grade school segregation. The trial court divided, two to one, the majority adhering to the doctrine that schools are satisfactory if "separate but equal," the dissenting justice holding that segregation was necessarily discriminatory and unconstitutional.¹⁷ The majority of the trial court ordered immediate steps to improve the local schools and called for a report in six months to show what had been done. The Negroes involved, since they had contended that nothing but integrated schooling would give them their constitutional rights, promptly appealed to the Supreme Court. In any ordinary case that appeal would have been accepted by the Supreme Court and would have been argued in the fall of 1951. The great issue thus would have been decided some time last spring. The Supreme Court took the remarkable step of holding the case without any action at all for six months and then sent it back to the lower court to consider the progress report

15. 3 CONG. REC. 1005 (1875).

16. Roche, *Education, Segregation and the Supreme Court—A Political Analysis*, 99 U. OF PA. L. REV. 949 (1951).

17. *Briggs v. Elliott*, 98 F. Supp. 529 (E.D. So. Car. 1951).

which had been required.¹⁸ In a case raising similar issues brought up from Kansas, the Supreme Court has taken no action at all.

Undoubtedly every other case which was appealed at the same time as these cases has long since been disposed of. Are these cases being given such gingerly treatment because of the election in November? In 1946 the Supreme Court decided the Virginia bus segregation case adversely to segregation,¹⁹ and Governor Talmadge was thereupon elected in Georgia campaigning on a denunciation of the Supreme Court's decision. In 1950 the Supreme Court decided against law school segregation,²⁰ and Senator Willis Smith was thereupon elected to the seat previously held by Senator Graham of North Carolina, a victory largely attributed to Senator Smith's denunciation of this Supreme Court decision. It does not matter that the offices to which Governor Talmadge and Senator Smith were elected carry no particular authority to undo the decisions against which they and their constituents complained; the fact remains that they were elected and on these grounds. If one assumes, and this is only a guess, that the Supreme Court has avoided facing the grade school issue for political reasons, should it be criticized for a desire to postpone the explosive question from the heat of 1952 to the comparative calm of 1953?

Practical Limitations—The foremost practical obstructions to the efficacy of judicial decisions as instruments against racial discrimination are first, the existence of alternative obstacles, and second, the slowness of the judicial procedure.

Some of the alternative obstructions have already been mentioned. The Supreme Court can order that a Negro be admitted to a white law school, but it cannot equip that Negro with the background which will fit him to carry on the work once he gets there. The Supreme Court might order a termination of segregation in the lower schools, and it would not thereby change the underlying geographic situation as a result of which, if the children attend the school closest to their homes, most of the children will end up at all white or all colored schools.

Restrictive covenants are a particularly good case in point. Indianapolis is an example of a city in which the Negro population lives in contiguous and compact areas. Those areas had been

18. 72 S. Ct. 327 (1952).

19. *Morgan v. Virginia*, *supra* n. 13.

20. *Sweatt v. Painter*, *supra* n. 10.

CAN THE COURTS ERASE THE COLOR LINE?

hemmed in by restrictive covenants. But the abolition of the restrictive covenants has almost no practical consequence. The area was still hemmed in by a variety of local pressures; by the refusal of lenders to furnish money for purchases across the color line; by a real estate dealer's code which obstructed such purchases; by an ingrained pattern of neighborhood pressure which would make Negro purchasers buying into white areas feel distinctly uncomfortable. As far as Indianapolis is concerned, the maximum that a Supreme Court decision can do is to open the way to changing community sentiment. This in itself is a tremendous accomplishment and it is not to be minimized; but it is far indeed from achieving the millenium by judicial fiat. In other cities, results are more substantial.

The greatest obstacle to judicial effectiveness in the race relations area is, as was suggested earlier, the inability of the courts to hit clean, decisive blows. Transportation makes one of the best cases in point. In the bus case of 1946 the court held that segregation in interstate busses was an unconstitutional burden on commerce.²¹ Theoretically, segregation on those busses should then and there have stopped. In fact it did not. The bus companies were probably largely indifferent to whether or not there was segregation; their goal was, understandably enough, to satisfy as many of their customers as possible and to obey whichever laws pressed the hardest upon them. One leading company has somewhat relaxed the enforcement of its requirement, though the same requirements remain verbally in effect. The drivers attempt to segregate the passengers. If serious objection is raised the drivers yield, neither evicting the passenger nor asking the assistance of the local police. However the passenger usually yields to the driver's direction. To date the system has worked in the sense that the company has kept out of trouble.

In 1950 the Supreme Court appeared to ban segregation in dining cars.²² The actual system used by the railroad in that case consisted of reserving a group of partitioned-off seats for Negroes. Thereupon the railroad tore out its partitions and issued a new set of instructions to its dining car stewards requiring that white diners be seated from one end of the car and Negroes from the other; and that in any case the races were to be seated at separate tables. This thin evasion has been approved by the Interstate Commerce Commission, four commissioners dissenting.²³ Prior to this dining car decision, another major Southern railroad used

21. *Morgan v. Virginia*, *supra* n. 13.

22. *Henderson v. Southern Ry. Company*, *supra* n. 13.

23. I. C. C. Op. No. 28895, Feb. 4, 1952.

a grille to separate the races in the day coaches and a four-foot high partition extending to the aisle to separate them in its dining cars. It made no changes at all in its practices after the decision.

These experiences do not mean that judicial decisions are inconsequential. What they do mean is that the decisions, though seeming of sweeping significance, take effect slowly and only if there is continued pressure for their application. Otherwise they are mere stones dropped in the water, forgotten as soon as the ripples disappear. Over the period of the last twenty years judicial decisions have insured the right of Negroes to board day coaches and Pullmans under circumstances at least of some comfort. The dining car case at least gets them into the dining car; and eliminating the partition strikes one of the most obvious badges of segregation on one important railroad. It will take years more of effort to clear up the dining car situation completely.

More substantial results have been obtained in school litigation. Both sides agree that litigation in Virginia over equalization of teachers' salaries has in fact resulted in salary equality in that state. Detailed figures from the city of Norfolk support the statement of the Superintendent of Schools there that substantial efforts are being made to give children of both races equal education; and this is in obvious response to a law suit. Other reports from Virginia show that law suits have resulted in vast improvements in particular Negro schools, although usually the improvement has not brought them to the point of equality. On the other hand in Durham, North Carolina the improvements achieved by litigation are substantially below the level of equality, and the orders in a South Carolina school district case now pending appeal have certainly not yet overcome the enormous disparity between its two school systems.

The principal lesson of the school cases, as of the transportation cases, is that progress is made, but it is made extremely slowly. This is also true of such disparate matters as Negro voting and Negro recreation. Judicial decisions²⁴ have brought some Negroes into the Democratic primary, but certainly not all of them; and in Georgia new devices of gerrymander have evolved to water down the consequence of their presence. On the other hand, it is estimated that 80,000 Negroes in Louisiana voted in the gubernatorial primary this year, with no unpleasantness, and a

24. *Nixon v. Herndon*, 273 U. S. 536 (1927); *Nixon v. Condon*, 286 U. S. 73 (1932); *Smith v. Allwright*, 321 U. S. 649 (1944); *Rice v. Elmore*, 165 F. 2d 387 (4th Cir. 1947), cert. denied, 333 U. S. 875 (1948); *Baskin v. Brown*, 174 F. 2d 391 (4th Cir. 1949).

CAN THE COURTS ERASE THE COLOR LINE?

well-informed person in that state reports a general conviction that Negro voting is there to stay, at least in most parishes. In Baltimore under judicial spur, the Park Board which at first reserved particular days for the exclusive use of Negroes on municipal golf courses, finally in 1951 went over to a system of joint use of the courses without incident. At the same time it still reserves the clumsy special day system on tennis courts. On the other hand litigation in Miami has been indecisively protracted for years and Negroes have access to the municipal golf course there only on Mondays.

The upshot is that those who would restrain the judiciary from action in race relations because of fear of the awesome consequences which might result are indulging in delusions of grandeur about the place of the judiciary in our society. The limitation of judges to the instant case, the routine slowness of legal procedure, and the devices for appearing to comply with judicial orders without quite actually doing it—these factors make judicial decisions important but not stupendous. If the decision happens to coincide with the tide of public opinion, as in the law school cases, then consequences can come more quickly. Community resistance slows results.

IV

As the final question to be considered in this paper, how should the litigation program of the future, particularly in respect to schools, be devised? From our experience with litigation in the past, what shall we plan for the future? What is the legal strategy for a sound antisegregation program?

A. The planning of the antisegregation drive should be made without allowance for the possibility of provoking an excessive reaction. This is so for reasons which are persuasive at two levels. *First*, there is little likelihood of excessive reaction, and even if the likelihood were great, there could be no yielding. *Second*, the fear of provoking excesses will, whether it should or not, operate as something of a deterrent to the judiciary; this is limitation enough without having that same fear enter the scale of justice twice, once in the planning of litigation and a second time in the deciding of it. This much is clear: judicial victories will not be won without asking for them. Specifically, the NAACP should not hesitate in its just demands for fear of reaping the whirlwind. The judges will worry enough, and probably too much, about such results.

Yet, while no long term interest should be sacrificed to expediency, and nothing should be allowed to delay the vigor of the attack, common sense dictates that short-term time allow-

ances be made where necessary to protect other interests. Specifically, it is distinctly for the best interest of NAACP clients that the grade school segregation cases not be pushed to ultimate decision until after the election. The chance of getting an objective determination of that great issue between now and November is too slim to hazard the result in haste.

B. Vigor is not recklessness. The most daring army guards its lines of retreat. So should a litigation strategist. It would be a mistake to press the attack on "separate but equal" education so exclusively that the courts are precluded from deciding, even if they desire to do so, that particular separate school systems are in fact unequal. More specifically, it would be error to concede by stipulation that white and colored school systems are in fact equal in every respect except for the discrimination inherent in segregation itself. If the Supreme Court is ready to decide that segregation is inherently discriminatory, it can easily do so in a case in which there are other, more tangible discriminations, as well. The Texas law school case is very much in point, for it could have been decided either on broader or on narrower grounds; for while the Court might have decided for the Negro on the basis that all segregation is unconstitutional, it might also have decided for him on the narrow basis of purely mechanical differences between the white and colored law schools. The Court was thus able to go as far as it desired. Should the Court be pushed inescapably to a decision on the validity of school segregation where no other element of discrimination is present, it may decide in behalf of segregation; and the moral and prestige loss to the antisegregation forces from such a decision would be incalculable. Prudence, not fear, demands that the Supreme Court in particular continue to be given alternative grounds of decision, at the same time that the argument for total abolition of segregation is most vigorously maintained.

C. One aim of the attack on segregation should be to atomize it, to reduce it to its component parts and to secure decisions on each element of it. Remember that segregation as a universal concept of race relations is of comparatively recent origin; that while the 20th Century thinks of "separate but equal" as a formula readily transferable from restaurants to transportation to theaters to schools to recreation, the 19th Century did not. Even *Plessy v. Ferguson* approved only of what is called "reasonable" segregation. A Court, on the basis of solid historical evidence, might term segregation in marital relationships, for example, "reasonable," and segregation on street cars "unreasonable". This atomizing attack should be made in cases now pending, and should be made with a clarity which has never yet been attempted

CAN THE COURTS ERASE THE COLOR LINE?

in any case. In other words, there should be a grand strategy of litigation which includes separate and distinct master plans for the transportation cases, the school cases, the recreation cases, and any others. The cases should be so presented that the courts can decide the transportation cases without thereby necessarily deciding the school cases; and for, somewhat technical reasons too elaborate to set forth here, it may well be that the transportation cases should be pressed ahead of the lower school cases.

D. Reserved for conclusion is by far the most important recommendation of all: In planning antisegregation strategy, litigation should be regarded as only one part of the attack, and by no means the most important part. Far more important than the filing of suits is the encouragement of a public attitude receptive to victory in those suits. This is for the most practical of reasons: in the race relations field law suits are won more by public acceptance of the result than by the actual decree. The restrictive covenant and transportation victories in litigation in recent years have been of casual consequence because there has been no real desire for compliance on the part of the white population; the law school litigation on the other hand has had substantial consequences because of the extremely receptive attitude of the white students and white faculty involved.

Litigation should be seen, not as either an end or a means in itself, but as a part of across-the-boards strategy. Let me give an example of a successful across-the-board operation: In a certain Midwestern but southerly university town a few years ago, the local restaurants consistently refused to serve Negro students. This was in defiance of a weak-toothed state civil rights statute. Negotiations with restaurant owners by the local NAACP were unsuccessful. A faculty-dominated student newspaper refused to carry information of the NAACP's activities to the student body.

At that point the NAACP chapter went to work. It secured an astonishingly large membership on the campus. Faculty members contributed funds to retain counsel to seek injunctions against the restaurants. When no local attorney could be found to take the case, an out-of-town attorney was found, and suit was instituted. The Fellowship of Reconciliation was encouraged to come onto the campus to try its colorful devices. Local ministers brought religious pressures to bear. The student body itself was organized to demand equal treatment. Finally the white residents of the men's dormitories determined not merely to boycott, but also to picket, discriminatory restaurants. The university administration belatedly added its pressure, and the restaurant owners, very shortly before the picketing was due to begin, decided that the time had come to serve all students.

BUFFALO LAW REVIEW

What did it? Was it the litigation, the prayers, the picketing, the community pressure—or was it all together?

Opponents of segregation can not rely solely on courts to do the job for them. Experience teaches that courts, even when they have the will, are incapable of doing the job single-handed. This is not an implied suggestion that the force of the NAACP legal program be in any way abated. It is a suggestion that the superb example set by the NAACP legal staff should be followed by a public relations staff. I give the reader no namby-pamby proposal, no pontifical advice that the litigation program be subordinated in any degree to some long-range job of education. I do say that practical experience overwhelmingly demonstrates that if litigation victories are to be solid and meaningful, they must be won not only in the court room, but in the hearts of men.