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Recent Decision: With All Deliberate Speed - A Changing Concept in Desegregation

in its very attempt to foster neutrality, the Court has taken a side? Doesn't it appear that in attempting to accommodate all religions, the Court has favored the few? And while we need not fear a raging torrent of control by the secularists, doesn't it appear that in attempting to stop the "trickling stream of breached neutrality," the Supreme Court has actually created a *steady* stream of support for non-theistic religions?

Recent Decision: *With All Deliberate Speed*— A Changing Concept In Desegregation

> But a State cannot be expected to move with the celerity of a private business man; it is enough if it proceeds in the language of the English Chancery with all deliberate speed.[1]

Petitioners commenced this action against the City of Memphis seeking declaratory and injunctive relief directing the immediate desegregation of those recreational facilities from which Negroes were being excluded. The City did not deny that the facilities were being operated on a segregated basis, but defended on the ground that a delay was required in order to effectuate desegregation without violence and hostility. The district court, relying on *Brown v. Board of Educ.*[2] [hereinafter referred to as the *Brown* decree] which had allowed delay in the desegregation of public schools under certain conditions, denied petitioner's relief and ordered the City to submit a plan providing for the desegregation of the relevant facilities with deliberate speed. Having granted certiorari, the Supreme Court reversed and *held* that the City had failed to bring itself within the purview of the *Brown* decree since desegregation in public recreational facilities did not involve the difficulties justifying delay which were inherent in school desegregation. *Watson v. City of Memphis*, 31 U.S.L. WEEK 4498 (U.S. May 27, 1963).

The *Brown* decree was the implementation of the Supreme Court's decision in the first *Brown* case which held that since separate educational facilities were inherently unequal, racial segregation by the states in their public school facilities was prohibited by the fourteenth amendment.[3] The decree afforded considerable leeway in the manner and speed with which desegregation was to be effectuated. Recognizing that school desegregation involved serious administrative problems, the Court vested primary responsibility for their solution in the local school authorities. The federal district courts were to consider whether or not the actions of the local school boards constituted a "good faith implementation of the governing constitutional principles."[4] While these governing principles were not to be sacrificed merely because of disagreement

[1] Virginia v. West Virginia, 122 U.S. 17, 19-20 (1911).

[2] 349 U.S. 294 (1955).

[3] Brown v. Board of Educ., 347 U.S. 483 (1954). While the Court relied on the equal protection clause of the fourteenth amendment, in Bolling v. Sharpe, 347 U.S. 497 (1954), it was held that segregation in the District of Columbia's public schools constituted a deprivation of due process under the fifth amendment.

[4] Brown v. Board of Educ., 349 U.S. 294, 299 (1955).

with them, the "public interest" might permit some delay. The burden of establishing any need for delay was on the local school authorities. The district courts were to retain jurisdiction during the transitional period, thereby hopefully insuring that desegregation would be brought about *with all deliberate speed.*

The *Brown* decree recognized essentially five administrative problems which might justify delay in desegregation: physical condition of the school plant, school transportation system, personnel, revision of school districts, and revision of local laws and regulations.[5] Despite the *Brown* decree, the district courts have held that these administrative difficulties would not excuse the failure of a school board to submit a plan.[6] In addition, since the administrative difficulties enumerated are not as severe in higher levels of education as in public elementary and secondary school systems, the Court has been unwilling to allow any delay in this area and has ordered immediate admission to the schools in question.[7]

Beyond these decisions there has been great diversity among the district courts as to the weight to be given to the factors which would warrant delay. Part of this diversity can be accounted for by the fact that, in each case, the question of deliberate speed was decided with reference to the existing local conditions.[8] However, the major problem in this area appears to be the varying opinions concerning the correct weight to be given to the factor of public hostility as an excuse for delay. This question was not apparently answered by the *Brown* decree, for although the Court stated that hostility alone could not prevent ultimate enforcement, it did not indicate whether hostility could justify a delay.

While some courts and commentators have rejected public hostility or racial tensions as factors to be considered,[9] others have placed direct reliance on hostile community attitudes in order to justify delay.[10] Thus, in *Bush v. Orleans Parish School Bd.*[11] the court enjoined segregation but indicated that:

> The problems attendant desegregation in the deep South are considerably more serious than generally appreciated in some sections of our country. The problem of changing a people's mores, particularly those with an emotional overlay is not to be taken lightly.[12]

Cooper v. Aaron[13] is distinguished from these cases in that the hostility here was not advanced to justify delay in the formulation of a plan, since a plan for gradual integration had already been approved. Rather, the school was attempting to gain additional delay due to the racial outbreaks that occurred at Little Rock when integra-

[5] *Id.* at 300-01.

[6] Evans v. Members of State Bd. of Educ., 149 F. Supp. 376 (D. Del. 1957). See also Dove v. Parham, 181 F. Supp. 504, 519 (E.D. Ark. 1960).

[7] Florida *ex rel.* Hawkins v. Board of Control, 350 U.S. 413 (1956). For a thorough discussion of the legal sanctions available to enforce desegregation, see Note, 65 YALE. L.J. 630 (1956).

[8] Kelly v. Board of Educ., 270 F.2d 209, 225 (6th Cir. 1959).

[9] School Bd. v. Beckett, 260 F.2d 18 (4th Cir. 1958); Jackson v. Rawdon, 235 F.2d 93 (5th Cir.), *cert. denied,* 352 U.S. 925 (1956); McKay, *With All Deliberate Speed,* 31 N.Y.U.L. REV. 991, 1088-90 (1956). See Clemons v. Board of Educ., 228 F.2d 853, 859 (6th Cir.), *cert. denied,* 352 U.S. 925 (1952).

[10] Davis v. County School Bd., 149 F. Supp. 431 (E.D. Va. 1957). See also Evans v. Members of State Bd. of Educ., 149 F. Supp. 376, 379 (D. Del. 1957); Moore v. Board of Educ., 146 F. Supp. 91, 95 (D. Md. 1956).

[11] 138 F. Supp. 337, 341-42 (E.D. La. 1956).

[12] *Ibid.*

[13] 358 U.S. 1 (1958).

tion was enforced. The Court here termed hostility as "irrelevant"[14] in deciding whether conditions would justify delaying immediate desegregation. The concurring opinion emphasized this rationale by stating that permitting hostility to delay the enforcement of an *existing* decree would "enthrone official lawlessness."[15] However, this case did not decide whether plans allowing for delay in order to soothe community opinion were within the purview of the *Brown* decree.

Although the majority of the decisions have not relied directly on public hostility as a ground for delay, many decisions manifest by implication that hostile community attitudes should be taken into account. The enumerated administrative difficulties of the *Brown* decree do not involve a long time lag,[16] but yet some courts have accepted delays in public school integration ranging as high as twelve years.[17] In addition the courts have, by deferring to the school boards' discretion, recognized at least impliedly the factor of community hostility. This deference can occur when a court refuses to interfere with the school boards' action upon a finding that a "reasonable" effort at desegregation has been initiated.[18] It also occurs when a school board has failed to formulate a plan, and a court, in lieu of an order compelling the submission of a plan, has granted an injunction against segregation couched in general terms.[19] This injunction merely reaffirms the duty of the local officials to desegregate the public schools with almost complete discretion being left to the school boards as to the time required to fulfill this responsibility. Since the school officials are peculiarly susceptible to local public opinion, it is not unreasonable to assume that in framing their action, they have given due weight to possible violence. Indeed, some school boards have stated directly that local sentiment is to be considered in determining how and when integration should be accomplished.[20]

In the area of public recreation, although some doubt had originally existed as to whether the doctrine of "separate but equal" was applicable,[21] it was soon settled that the *Brown* decision was not limited in its scope to education but also prohibited state enforced segregation of recreational facilities.[22] In general, little discussion arose

[14] *Id.* at 7.

[15] *Id.* at 22.

[16] McKay, *With All Deliberate Speed,* 31 N.Y.U.L. REV. 991, 1088 (1956).

[17] For cases involving long delays, see, *e.g.,* Allen v. County School Bd., 164 F. Supp. 786 (E.D. Va. 1958); Kelly v. Board of Educ., 159 F. Supp. 272 (M.D. Tenn. 1958); Moore v. Board of Educ., 152 F. Supp. 114 (D. Md. 1957); Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1956), *aff'd,* 243 F.2d 361 (8th Cir. 1957).

[18] See Kelly v. Board of Educ., 2 RACE REL. L. REP. 21, 24 (M.D. Tenn. 1957).

[19] This type of injunction typically paraphrases the language of the *Brown* decree and orders that admission to schools must take place on a nondiscriminatory basis with all deliberate speed. *E.g.,* Bush v. Orleans Parish School Bd., 138 F. Supp. 337 (E.D. La. 1956); Briggs v. Elliot, 132 F. Supp. 776 (E.D. S.C. 1955). *Contra,* Evans v. Members of State Bd. of Educ., 149 F. Supp. 376 (D. Del. 1957); Banks v. Izzard, 1 RACE REL. L. REP. 299 (W.D. Ark. 1956).

[20] Statement of Chattanooga Board of Education, 1 RACE REL. L. REP 607 (1956). For an expression of a similar viewpoint by a legislative body, see *Report of the Legal and Legislative Subcommittee of the Texas Advisory Committee on Segregation in the Public Schools,* 1 RACE REL. L. REP. 1077 (1956).

[21] McKay, *Segregation and Public Recreation,* 40 VA. L. REV. 697 (1954).

[22] Dawson v. Mayor and City Council of Baltimore, 220 F.2d 386 (4th Cir.), *aff'd,* 350 U.S. 877 (1955); Simkins v. City of Greensboro, 149 F. Supp. 562 (M.D.N.C.), *aff'd,* 246 F.2d 425 (4th Cir. 1957).

on the question of deliberate speed, the courts merely issued immediate injunctions against continued segregation.[23] In *Cummings v. City of Charleston*[24] however, the district court granted a delay of eight months for the desegregation of a municipally-owned golf course since the city anticipated difficulties in "adjusting" to the court order. The court of appeals modified the order by holding that the same administrative problems which justify delay in education were not present here.[25]

There is other opinion writing which would seem to indicate that the courts have at least considered the *Brown* decree in framing their mandates. In *Holly v. City of Portsmouth*,[26] the court refused to supplement its temporary injunction against segregation at a municipally-owned golf course with a permanent injunction, stating that the passage of time would result in the solution of many of the problems. The factor of public hostility,[27] or the possibility that a city would close its recreational facilities if immediate integration were ordered,[28] has also been a consideration in the decisions where the *Brown* decree was influential.

The opinion in the instant case sharply confines the *Brown* decree to public education by indicating that the administrative problems present in school desegregation are not present in public recreation. The Court finds that the City of Memphis has failed to sustain the *extremely heavy burden* of proof required to justify delay.[29] The implication is that integration in all public recreational facilities must take place immediately.

Since education is required by state law, whereas no one is compelled to take advantage of the public recreational facilities, the element of public hostility is far less severe in the recreational area.[30] In addition, it may well be that education, in contrast to public recreation, has acquired a far more unique position in the public mind.[31] Finally, the more burdensome administrative problems in the area of education also justify the distinction which the Court has drawn by limiting the applicability of the *Brown* decree to public education.

The Court denied the City's claim that delay was required in order to avoid violence with language strongly indicating that the administrative factors enumerated in the *Brown* decree were the only legitimate reasons for delay. In asserting that the "best guarantee of civil peace is adherence to, and respect for, the law,"[32] the Court indicated that violence was not to be a legitimate excuse for delay, whether it was advanced in recreation or education. Public hostility cannot be asserted to delay the implementation of an already existing or-

[23] Watson v. City of Memphis, 31 U.S.L. WEEK 4498 (U.S. May 27, 1963). *E.g.*, City of St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956); Moorehead v. City of Fort Lauderdale, 152 F. Supp. 131 (S.D. Fla.), *aff'd*, 248 F.2d 544 (5th Cir. 1957); Fayson v. Beard, 134 F. Supp. 379 (E.D. Tex. 1955).

[24] 5 RACE REL. L. REP. 1137, 1139 (E.D.S.C. 1960), *modified*, 288 F.2d 817 (4th Cir. 1961).

[25] Cummings v. City of Charleston, 288 F.2d 817 (4th Cir. 1961).

[26] 150 F. Supp. 6, 9 (E.D. Va. 1957).

[27] Augustus v. City of Pensacola, 1 RACE REL. L. REP. 681 (N.D. Fla. 1956).

[28] *E.g.* City of Montgomery v. Gilmore, 277 F.2d 364 (1963).

[29] Watson v. City of Memphis, 31 U.S.L. WEEK 4498, 4500 (U.S. May 27, 1963).

[30] McKay, *supra* note 21, at 724.

[31] See Murphy, *Desegregation in Public Education*, 15 MD. L. REV. 221, 232 (1955).

[32] See note 29 *supra*, at 4501.

der, or to justify the placing of a plan of long delay before a court. Not only will this decision end any affirmative reliance by the district courts on hostility as a basis for delay, but it will also reach any implied condonations such as those mentioned previously. Acceptance of plans calling for long periods of transition, before desegregation can be effectuated, will no longer be justified if the courts eliminate the possibility of hostility as a factor excusing delay.

The hope that a lengthy period of transition would lessen community opposition has not been fulfilled. The actions in Alabama seven years after Little Rock are reflective of a continuing hostility to desegregation. It has not been shown that lengthy periods of delay are more effective than immediate integration. Recently, desegregation in recreational facilities has occurred without delay or incident.[33] In education, one study has indicated that prolonged efforts to integrate public schools are less effective in reducing racial tension than a clear-cut policy executed with firm resolution.[34]

The Court, however, goes beyond the immediate issues of the principal case and re-examines the *Brown* decree in the light of present-day conditions. The *Brown* decree was written at a time when the Court's decision that racial segregation was violative of the fourteenth amendment was a radical departure from the past. The decree, therefore, allowed for a period of "adjustment." As a result, many states, rather than attempting good faith implementations of the decree, have instead developed tactics designed to delay desegregation. The methods used to delay integration have included the doctrine of nullification, the closing of the schools as they are ordered desegregated, various school transfer systems, public aid to "private" schools, and the gerrymandering of districts in order to place Negroes in the same schools.[35] In the area of public recreation, the more common methods of avoidance have been the selling or closing of the facilities.[36]

In addition, the attitude of the Negro in 1963 is vastly different from that in 1955. In 1955, a decree allowing for equitable delay in implementing desegregation, was somewhat acceptable to a race that had waited many years for the recognition of the right to attend integrated schools. Today, the same patience is understandably absent; the sit-ins and the demonstrations are indicative of a growing dissatisfaction with delay, and demand that desegregation occur in the present.

In light of these developments, the standard of deliberate speed which was acceptable in the past is no longer acceptable today. While, previously, "gradualism" may have been a proper form of compliance with the *Brown* decree, far more promptness in desegregation will be required today in order to satisfy the new standard of deliberate speed. "The basic guarantees of our

[33] N. Y. Times, June 14, 1963, p. 19, col. 1 (city ed.).

[34] McKay, *With All Deliberate Speed*, 31 N.Y.U.L. REV. 991, 1008 (1956).

[35] For a thorough discussion of the methods employed to defeat or delay desegregation, see McKay, *With All Deliberate Speed—Legislative Reaction and Judicial Development 1956-1957+*, 43 VA. L. REV. 1205 (1957); Note, 54 NW. U.L. REV. 354 (1959).

[36] Generally, the courts will not enjoin a state either from making a bona fide sale or from closing the recreational facilities ordered to be integrated; See Survey, 7 RACE REL. L. REP. 995, 997-99 (1962).

Constitution are warrants for the here and now."[37]

[37] Watson v. City of Memphis, *supra* note 29, at 4500.