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LAW AS A CATALYST FOR CHANGE: THE MISSISSIPPI EXPERIENCE

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Can law transform this nation into a civilized society? If so, which legal institutions and methods offered are best employed to produce change? What are the proper roles for the judicial, executive, and legislative branches of government? These questions underlie many of the major political crusades of our time—the efforts to eradicate poverty and blight in the cities, to preserve and restore the environment, to protect the health and safety of coal miners, to establish corporate honesty in dealings with consumers, and to eliminate discrimination against women.

Yet, curiously, little systematic attention has been devoted to the results obtained in the most intensive effort in recent times to employ law as an instrument of social change—the struggle to dismantle the racist laws and practices that have contained and subjugated black citizens in the South. During the 1950's and 1960's desegregation decrees and racial conflict in the South were daily grist for the mills of headline writers. When passions appeared to have cooled, the national media and the general public became preoccupied with other crises, and the task of assessing the impact of law upon race relations in the South was consigned largely to the realm of scholarly journals.

Two recent books, Willie Morris' *Yazoo*[1] and Frederick Wirt's *Politics of Southern Equality*,[2] attempt to shed light on the subject. In 1970 Morris traveled to Yazoo City, Mississippi to observe the process of school desegregation after the Supreme Court's order in *Alexander v. Holmes*[3] that Mississippi school systems "desegregate now." With his perceptions heightened by the fact that it was also for him a memory-filled journey "down home" to the place where he was born and raised, he brought the tools of a creative journalist to the task. Wirt brought the paraphenalia of the social scientist to his selected assign-

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[1]W. MORRIS, YAZOO (1971).

[2]F. WIRT, POLITICS OF SOUTHERN EQUALITY (1970).

[3]396 U.S. 19 (1969).

ment, an examination of the impact of civil rights law upon the citizens of Panola County, another area in the Mississippi Delta that is located about one hundred miles north of Yazoo. The two books, although very different in approach and methodology, reach similar, tentatively optimistic, conclusions. The law in several areas has significantly altered behavior and practices. It has also begun to work changes in attitudes—changes that have come more rapidly for blacks than whites.[4]

The process of change, of course, is complex. A capsule history of the past seventeen years might read as follows:

Brown v. Board of Education[5] was for Negroes a new birth of freedom, a promise to release them from the bondage of a rigid system of segregation and caste. But with the doctrine of "all deliberate speed," the Court gave the white South a reprieve, and, when both President Eisenhower and the Congress failed to support the Court's decision, it became not a period for working out constructive solutions but an invitation to massive resistance.

John Kennedy's campaign for the Presidency in 1960, by promising strong executive action to back court decisions, rekindled the hopes of black citizens. But Kennedy, elected by a narrow margin, failed to deliver. Suggestions that school integration, fair housing, and equal employment opportunity could be advanced by attaching civil rights conditions to rapidly expanding grant-in-aid programs were shelved. So were proposals for new legislation. Instead, the Kennedy Administration decided (1) that its civil rights goals would be limited largely to securing the right to vote (on the theory that once the franchise was gained other rights would flow easily) and (2) that litigation brought by the Department of Justice—not administrative action or other techniques—would be the principal means of enforcing voting rights. Any

[4]Each book has its limitations. Morris did not set out explicitly to determine how law influenced the attitudes and actions of the citizens of Yazoo and he has little to say about how much the changes he sees were influenced for better or for worse by the actions of the federal government during the past fifteen years. Wirt, in contrast, sets himself an ambitious task—to test in one county the Sumnerian thesis that "stateways cannot change folkways." His approach is a classic case of social science overkill, overflowing with census data charts, factor analysis and the rest. In the end, he arrives at few principles of general applicability or lasting importance—other than the obvious conclusion that vigorous law enforcement with tools suited to the end to be achieved is indispensable. He is weakest in trying to set forth the dynamics of political change in Washington and at best when he acts as a journalist seeking to understand what external forces made a difference in the lives of Mississippians.

[5]Brown v. Board of Education I, 347 U.S. 483 (1954); Brown v. Board of Education II, 349 U.S. 294 (1955).

prospect that this limited program would bring results was dimmed when the President appointed segregationist judges to the southern bench.[6]

But hope once rekindled did not easily die. The pace of the civil rights protest movement led by Martin Luther King accelerated in the form of boycotts, sit-ins, and freedom rides. The white response to protest in many places was violence, sometimes led or connived in by law enforcement officers and encouraged by political leaders. Violence in 1963—particularly the repression of peaceful demonstrations by police in Birmingham, Alabama, and the murder of NAACP leader Medgar Evers by a sniper in Jackson, Mississippi—touched the national conscience and produced demands for stronger federal action. President Kennedy responded by asking for a strong civil rights law. When the law was enacted following Kennedy's assassination and President Johnson's appeal to Congress, it contained not only Title VI,[7] directing all federal agencies to terminate financial assistance to recipients who would not end discriminatory practices but also Title VII,[8] a fair employment measure tacked on by Congress. A year later, the excesses of George Wallace and Sheriff Jim Clark at Selma, Alabama, helped produce another landmark law[9] outlawing literacy tests and authorizing the appointment of federal voting examiners to take over the registration process from recalcitrant southern registrars.

In Mississippi the critical period was the summer of 1964. White students from the North, joining black civil rights workers in aiding voting registration efforts, added a volatile element to the mixture. They served, quite unintentionally, as a catalytic agent in breaking up the monolithic structure of white resistance. First, the Klan elements broke loose and unleashed a campaign of terror against civil rights workers and Negro residents. Their violence produced a major change in stance on the part of the other wing of resistance—the business and political leadership of the state. The shift was motivated by practical economic reasons: businessmen feared that Mississippi's deteriorating image would impair their ability to attract new industry and bank loans, critical needs for an impoverished state; they were also afraid of a loss of federal financial help, which accounted for more than one-quarter of the

[6]*See, e.g.*, V. NAVASKY, KENNEDY JUSTICE 269-70 (1970).
[7]Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6.
[8]*Id.* § 20000e.
[9]Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973p.

state's entire budget; and, recognizing that business ordinarily thrives only in stable surroundings, they were alarmed by what might happen if violence "got out of hand." In addition, when 150 FBI agents were sent into the state, Mississippi's leaders recognized that for the first time the Administration was prepared to discard it's self-imposed constraints of "federalism" and act to protect fundamental rights.

(The change in position was brought home to me in striking fashion. In the spring of 1964, when the United States Commission on Civil Rights was preparing for a hearing in Mississippi, most businessmen and other leaders of the establishment refused even to talk to our investigating lawyers. By the late fall, their position had altered dramatically. They were not only willing to talk but were also prepared to use the hearings as a forum to urge upon their fellow Mississippians restraint and a recognition that Negroes should be granted some rights. They persuaded Governor Johnson to come to the hearings and do likewise. The hearings in February 1965, dealing with physical violence and voting discrimination, were televised "live" throughout much of the state. Afterwards, white Mississippians told us that they had not realized how bad things were. Perhaps one has to have lived in Mississippi's closed society to understand that many were undoubtedly telling the truth.)

What have been the results of all the blood, sacrifice, and effort? For one thing, fear no longer is the constant companion of black citizens and white sympathizers who assert their rights. Although violence still can flare unexpectedly, there is some assurance that the great bulk of Mississippi's law enforcement officers will seek to protect all citizens from physical harm and will make arrests if crime occurs.[10] In voting, where less than seven percent of the black population of voting age was registered in 1964, more than two-thirds are registered now. As Wirt reports, in Panola County this accumulation of a modicum of political power has brought some modest gains—paved or gravelled roads for Negro neighborhoods, the employment of a few black policemen, and better treatment for the black community in the local press. The gains are severely limited, however, by continuing white control of the election processes and political machinery, by the economic dependence of blacks, and by educational deprivation. But if the black community cannot often elect its own candidates to office (as witness the defeat of

[10]When I returned to Natchez, Mississippi to speak to an NAACP conference some three years after the hearing, it was pleasing to note that the local police, who had been justly feared by civil rights workers and black citizens, were politely directing traffic to the meeting.

most of the people who ran for office with Charles Evers in November 1971), it can now exact from white candidates promises that "everyone will be treated fairly." The era in Mississippi and the South when the way to win was by "outseging" one's opponent appears to be over.

Progress in other, perhaps more vital areas has been painful and is difficult to assess. When school desegregation came to Yazoo in January 1970 (after an HEW fund cut-off and the decision in *Alexander v. Holmes*[11]), it was beset by problems. While all *schools* were integrated (Negro children constituting sixty percent or more of the total enrollment of each), classrooms remained rigidly segregated. About twenty percent of the white children were withdrawn and placed in a segregated private academy. And many extracurricular activities were abolished by school authorities.

By November 1970, however, Yazoo could pride itself in something more than having accomplished integration without violence. Classrooms had been integrated, although there were still all-black remedial classes in the high school, a not surprising result of years of inadequate education. (In 1961-62 local expenditures per pupil in Yazoo County were 245.55 dollars for each white child and 2.92 dollars for each Negro child.) Black teachers constituted forty-five percent of the high school faculty and taught mixed classes. About 140 white children drifted back into the public schools from the segregated academy, providing confirmation of a widespread belief that many felt isolated and unhappy there. Extracurricular activities in the high school, particularly athletics, were integrated. While few friendships had formed and social events were still segregated, overtures were being made. White students had attempted to establish an integrated coffeehouse until the city council condemned the building that they sought to use. Willie Morris concluded: "They [the young people] are groping in pain and innocence toward something new, toward some blurred and previously unheeded awareness of themselves."[12]

Changes in attitudes were also apparent among their elders. In 1955, fifty-three Negroes who signed a petition for school integration had been coerced into withdrawing, in part by the refusal of white grocers to sell food to them. In 1970, an organized black community conducted a partially successful boycott against the same merchants. As the segregationist mayor of Yazoo observed: "Maybe five years ago,

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[11]396 U.S. 19 (1969).

[12]W. MORRIS, *supra* note 1, at 85.

you could've appointed a colored man yourself [to a biracial commission]. Now you simply can't get away with it. They're goin' to have to pick their own leaders. They're not listening' to white people like they used to."[13]

Respect has always been a key goal for southern blacks. Many have always had dignity, waging a courageous struggle for their rights even when they stood alone. Theirs was a remarkable accomplishment, born of some inner strength to persevere through adversity. But now they know that they can *command* respectful treatment from whites too, and it makes a great deal of difference.

For white adults, attitude changes are less striking. But Morris does note that when integration came, it was accepted by some not simply as inevitable or a result of superior federal force, but because it was right—a necessary preparation for "real life" or because people have to learn to live together.[14]

Which specific laws and techniques of implementation have been most effective in bringing progress? Wirt's effort to treat this issue fails because he is overwhelmed by the plethora of statutes and executive orders (for example, he confuses the voting rights provisions of the 1957 and 1960 laws, mistakes the standard of proof in criminal cases involving the intimidation of voting applicants for those in civil cases to enjoin voting discrimination, and states wrongly that contract compliance is enforced by the Equal Employment Opportunity Commission). But he

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[13] *Id.* at 77.

[14] Morris says

> something new was coming to the surface here. . . . There were whites in town who fully intended to keep their children in the public schools, and who not only would say so openly, but . . . would even go further and defend the very notion of integrated education as a positive encouragement to their children's learning. . . . There was the white Baptist preacher who said he could not live with himself if he did not keep his child in the public school; the white businessman who said he thought his son should be educated with as many different kinds of children as possible to prepare himself for "real life"; the white mother who said the two races must learn to live with each other or all of Mississippi would never amount to much of anything; the white Catholic nun who wrote to the newspaper that if white and black children—especially between the ages of kindergarten and junior high—"are not brought together in some way in this country, this state, this city, America will inevitably face deeper problems"; the white father who said he would not send his children to private school because the private school was based less on education than on "pure ole hate"; the white teacher who quoted Tocqueville and said the diversity of American experience demanded the need for integrated schooling; the white lawyer who said the South could show the North a thing or two about whites and blacks getting along together.

W. MORRIS, *supra* note 1, at 33-34.

does realize that litigation was an inadequate tool and that real gains were made principally through the availability and use of the fund cut-off power (Title VI)[15] and through the employment of more direct forms of federal intervention (voting examiners). He does seem to sense the need for lawyers who are principally responsible for enforcing federal laws to have a more sophisticated awareness of the complex process of achieving social change than they ordinarily obtain in law school. And he does point out that the civil rights law alone is inadequate as long as Mississippi remains so desperately poor in economic and educational resources and the federal government finds no alternative to subsidizing the state's plantation system.[16]

What significance do the gains in Mississippi reported by Morris and Wirt have for the struggle for racial iustice in the nation as a whole? Most of the signs now are discouraging. The nation has entered a new era of resistance to school integration degrees, and the current furor over busing jeopardizes not only future progress but even the gains that already have been made.

Resistance clearly has been spurred by a number of new court decisions that require full implementation of the principles of *Brown v. Board of Education.* The decision of the Supreme Court in the *Swann* case[17] has made it plain that in the South the dismantling of the dual system is not accomplished by steps resulting in only token integration and may require fairly extensive transportation so long as the busing does not jeopardize the health and safety of students. In the North, several courts have found that school segregation is not simply *de facto* or adventitious but the result of conscious policy decisions made by school and other governmental authorities.[18] And in several cities—in

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[15]Civil Rights Act of 1964, 42 U.S.C. §§ 2000 to 2000d-6. Although some government officials continue to belittle the utility of Title VI on grounds that fund cut-offs "hurt the very people they are designed to help," experience shows the contrary. When Title VI was enacted ten years after *Brown* only three percent of black children in the South were attending schools with white children. By 1971, largely due to the threat of administrative enforcement, a majority of black children were in schools with whites.

[16]While federal law requires nondiscrimination in education, welfare and other activities it subsidizes, the bulk of federal assistance to Panola and other Mississippi counties is in the form of price supports to farmers. In fiscal year 1968, Panola farmers received almost $7 million including 31 payments of more than $25,000. F. WIRT, *supra* note 2, at 246.

[17]Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[18]*See, e.g.,* Davis v. School Bd. of Pontiac, 309 F. Supp. 734 (E.D. Mich. 1970) *aff'd,* 443 F.2d 573 (6th Cir. 1971), *cert. denied,* 92 S.Ct. 233 (1971).

both North and South—it is being asserted that once it is demonstrated that black people have been contained in the inner city by discriminatory practices in which government has been involved, the public schools must be reorganized on a metropolitan basis if that is what is needed to accomplish integration.

In short, courts are now reaching the heart of the issue. And prospects for public acceptance of change have become far more difficult for the following reasons:

First, if the Northern decisions are sustained by the Supreme Court, the entire nation, not just one section, would be required to integrate the public schools. Plainly, it will be more difficult to rally support for these new requirements than it was to arouse moral indignation against blatantly racist laws in the South alone.

Secondly, progress in the past was made possible in large part because the nation's conscience was aroused against obvious repression. The factors that cause racial separation in the public schools today are not so patent and are less comprehensible to most people. Such factors include decisions that education officials make about the location of new schools, the drawing of district boundaries, transfer policies, and the like. They also include the use of governmental assistance over the past three decades to develop new suburbs under terms that fostered segregation through the use of racially restrictive covenants and zoning laws. While many discriminatory government practices have ended, their impact upon housing patterns and school segregation continues.[19] Taken as a whole, such policies and practices have contained black people in segregated neighborhoods and schools as effectively as formal segregation laws. But such racial injustice is far more subtle than the older forms of repression and has no Bull Connor or Ross Barnett to dramatize it.

Thirdly, as court decisions have moved from the tokenism of "freedom of choice" to the fuller remedies sanctioned by *Swann*, the interests of white people are more directly threatened. Their resistance is based not solely upon racism but also upon genuine fears that their children would suffer educational harm or physical abuse if required to attend schools in ghetto neighborhoods. These concerns of white parents are not less real for the fact that the problems were caused by white discrimination and neglect. Much of the fear might be allayed if remedies were

[19] *See* Bradley v. School Bd. of City of Richmond, Va., 338 F. Supp. 67, 217 (E.D. Va. 1972), *rev'd*, ___ F.2d ___ (4th Cir. 1972).

devised to assure that integration would be accompanied by an increase in the quality of education available to all children. Such remedies might include the building of new facilities, such as education parks, in locations accessible both to the inner city and the suburbs. But this would require a significant increase in education funds, and new resources are far more the province of legislatures than courts.

Finally, many black people have become disillusioned, not simply by continued resistance to integration, but by the denial of equal treatment to their children within physically desegregated schools. The problems are manifold: the subordinated status of black administrators and teachers in desegregated schools, the racist or insensitive attitudes of some teachers, segregation in the classroom, the continued neglect of black heritage in the curriculum, and discrimination in extracurricular activities and in the imposition of discipline. Although intra-school discrimination is being attacked in the courts, some of the problems are not easily amenable to judicial solutions. In addition, the disillusionment and genuine concern of black people about failure in the desegregation process has been misconstrued by some whites as constituting mass support for the black separatist movement. This has provided another rationalization ("see, the blacks themselves want separate schools") for whites anxious to avoid having to face up to the issue.

In these new and more difficult circumstances, law can be an instrument for achieving social change only if all three branches of national government play a positive role. The courts must be firm in interpreting the requirements of the Constitution; the Congress must provide the resources to assure that integration will be part of a total program to improve the quality of education for all children; and the President must exert moral and political leadership that demonstrates to the American people how we can resolve our problems without sacrificing the rights or interests of any group of citizens.

The situation appears so bleak now because two of the coordinate branches have abdicated their responsibilities. Faced with resistance to recent court decrees, President Nixon did not content himself with President Eisenhower's stance of refusing to lend support to the judiciary. Instead, Mr. Nixon launched a sweeping and undocumented attack on lower courts, accusing them of exceeding the requirements of the Constitution and of Supreme Court decisions, and followed up with legislation designed to delay and restrict the scope of court orders for desegregation.[20] Congress, while failing to act upon the more extreme

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[20] 118 CONG. REC. 2211 (1972) (message to the Congress of the United States).

Administration proposals, has enacted legislation providing for mandatory stays of court orders[21] and has yet to furnish the resources needed to assure that integration will be supported by a major effort to improve the public schools. In addition, with some national politicians "outsegging" each other in the way that Southern officials once did, it is possible that new legislative restraints will be placed on school integration.

Yet, in the midst of a new, perhaps graver crisis in school desegregation, the Mississippi experience does offer a few cheering clues and parallels. Morris sees a budding affinity between working class whites and blacks who are forced to stick it out in the public school system while wealthier whites send their children to private schools. The situation is not very different in the large cities where generally more affluent whites have their own "public" school system in suburbia. In law suits in Richmond,[22] Detroit,[23] and elsewhere,[24] blacks and whites in the inner city are asserting that the responsibility for school integration should be shared by the entire metropolitan community and not just by the generally less affluent residents of the central city district. Perhaps these suits signify an awakening recognition of some common interests between blacks and whites in the central cities.

Also, as Morris reports, some of the more educated and affluent whites in Mississippi have come to recognize that they have been scarred by segregation and racism and to hope for better for their children. Even in the midst of the furor over busing, there is evidence (for example, the success of voluntary urban-suburban school integration plans in a few Northern communities) that these feelings are shared in other places as well.

Finally, there is the bare, encouraging fact that it is *in the South,* where the roots of racism run so deep and emotions lie so close to the surface, that whites and blacks are making progress. It is in the South, too, that a new brand of leadership, best exemplified by Governor Askew of Florida, is emerging. It encourages people to face their problems and solve them rather than to retreat into racism.

It may be that ultimately the nation will be overwhelmed by the

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[21]Higher Education Amendments of 1972, Pub.L. No. 92-318, § 803 (June 8, 1972).

[22]*See* Bradley v. School Bd. of City of Richmond, Va., 338 F. Supp. 67 (E.D. Va. 1972), *rev'd,* ___ F.2d ___ (4th Cir. 1972).

[23]Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971).

[24]United States v. Bd. of School Comm'rs of the City of Indianapolis, 332 F. Supp. 655 (S.D. Ind. 1971). Other suits have been filed in Wilmington, Delaware; Grand Rapids, Mich.; Dayton, Ohio; Buffalo, N.Y.; and Boston, Mass.

continuing problem of racism and that we will abandon the principles of *Brown* and retreat to the "separate but equal" of *Plessy v. Ferguson.*[25] But the experience of eighteen years makes one thing clear: if this happens it will be not because law was an inadequate instrument for securing social change, but because the men charged with administering it lacked the courage and wisdom to use law to fulfill the promise of equality.

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[25] 163 U.S. 537 (1895).