

## Exploded Dream: Desegregation in the Memphis City Schools

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*What happens to a dream deferred?*

*Does it dry up*

*like a raisin in the sun?*

*Or fester like a sore—*

*And then run?*

*Does it stink like rotten meat?*

*Or crust and sugar over—*

*like a syrupy sweet?*

*Maybe it just sags*

*like a heavy load.*

*Or does it explode?*

— Langston Hughes<sup>1</sup>

### Introduction

For Gerald Young, the first day of school in 1958 was not quite ordinary. Eight-year-old Gerald was supposed to begin fourth grade that morning at Hyde Park Elementary.<sup>2</sup> Like every other Black student in the Memphis City Schools, Gerald was to attend an all-Black school even though the United States Supreme Court had declared four years earlier that “separate [schools] are inherently unequal.”<sup>3</sup>

However, on the morning of September 3, 1958, Gerald’s

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1. Langston Hughes, *Harlem [2]* (1951), reprinted in *THE COLLECTED POEMS OF LANGSTON HUGHES* 426, 426 (Arnold Rampersad & David Roessel eds. 1995).

2. *Integration Move Fails in Memphis, Negro Child Turned Away at Vollentine: Parent Is Undecided About Lawsuit*, MEMPHIS PRESS-SCIMITAR, Sept. 4, 1958 [hereinafter *Negro Child Turned Away*] (on file with Memphis Public Library).

3. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954) (holding that “separate educational facilities are inherently unequal”).

mother had other plans.<sup>4</sup> Rather than traversing the ten blocks to Hyde Park, Gerald and his mother attempted to enroll on that first day of school at Vollentine Elementary, an all-White school more than five blocks closer.<sup>5</sup> Their enrollment was denied.<sup>6</sup> The Tennessee Pupil Assignment Law, which governed all transfer requests, did not permit transfers for mere convenience.<sup>7</sup> So denied, Gerald was left to return to Hyde Park and school segregation lived on in the Memphis City Schools.

The refusal to admit Gerald Young to Vollentine marked the beginning of the struggle to bring the spirit of the *Brown v. Board of Education*<sup>8</sup> decision to Memphis. In many ways, that struggle continues today.<sup>9</sup> Nearly half a century after Gerald was sent back to attend fourth grade at an all-Black elementary school, integrated education is elusive for most students in Memphis.<sup>10</sup> This Article traces the story of the litigation that formally desegregated the Memphis City Schools. It examines an era, 1961–74, in which the schools, and the city around them, stepped out of Jim Crow segregation and into a new age of racial difficulties.<sup>11</sup> The racial divisions that plague Memphis today are rooted in this time.<sup>12</sup> The present is not so different from the past and the successes, and failures of this episode in civic history offer Memphians today a valuable perspective.

This Article follows the case of *Northcross v. Board of Education of the Memphis City Schools* from its origins<sup>13</sup> through a period of slow but peaceful desegregation in the 1960s and into the more confrontational busing debates of the early 1970s. The Memphis school desegregation is typical of desegregation during this period in many ways. The familiar themes of initial

4. *Negro Child Turned Away*, *supra* note 2.

5. *Id.*

6. *Id.*

7. See 1957 Tenn. Pub. Acts 13, 41 (listing all factors a local board may consider in determining whether a student may be transferred); *Placement Law Cited in Retort to School Suit*, COM. APPEAL (Memphis, Tenn.), May 7, 1960 (on file with Memphis Public Library).

8. 347 U.S. 483 (1954).

9. See *infra* Part III (discussing the racial makeup of Memphis schools today).

10. See *infra* Part III.

11. See CHRISTOPHER SILVER & JOHN V. MOESER, *THE SEPARATE CITY: BLACK COMMUNITIES IN THE URBAN SOUTH, 1940–1968*, at 97–101 (1995) (discussing the racial conflict that emerged following the first judgment in the *Northcross* litigation in 1961).

12. See *infra* Part III.

13. *Northcross v. Bd. of Educ. (Northcross D-1)*, 6 Race Rel. L. Rep. 428 (W.D. Tenn. 1961).

resistance, reluctant and token desegregation, contentious busing, and White flight all appear in the Memphis narrative. However, Memphis is unique in the degree to which racially-identifiable school systems survived the desegregation litigation. Unlike in Nashville, Tennessee and Charlotte, North Carolina, the city schools were never consolidated with the neighboring county district, leaving two public school systems—one largely White, the other largely Black—in a single metropolitan area.<sup>14</sup> Further, the private schools in Memphis, some of which were created to accommodate the massive White flight of the mid-1970s, succeeded to an extraordinary degree in providing an affordable permanent alternative to the city schools.<sup>15</sup> By 1990, Memphis's private schools were found to be the most segregated in the nation.<sup>16</sup> Despite its tortuous history and its continued effect on the nation's 21st largest school district,<sup>17</sup> no scholar has yet fully examined the *Northcross* case in its historical context. This Article seeks to begin filling that void.

In addition to providing insight into how *Brown* impacted Memphis, this detailed case study provides guidance for both civic groups seeking to litigate for social change and for civic leaders seeking to move communities toward embracing diversity in education. For the civic groups, Memphis provides a cautionary tale riddled with examples of litigation's limits in substantially altering entrenched social structures. For civic leaders, Memphis illustrates how hope and progressive judicial policies are easily thwarted by unwelcoming communities and leaders. As school districts across the country seek to embrace diversity voluntarily

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14. Richard E. Day, *North Carolina*, in CIVIL RIGHTS U.S.A.: PUBLIC SCHOOLS, SOUTHERN STATES 57, 86 (U.S. Comm'n on Civil Rights ed., Greenwood Press 1968) (1962) [hereinafter CIVIL RIGHTS U.S.A.] (explaining that the Charlotte School District merged with the surrounding county school district); Eugene Wyatt, *Tennessee*, in CIVIL RIGHTS U.S.A. *supra*, at 105, 118 (explaining the same as to Nashville).

15. See generally SEAN F. REARDON & JOHN T. YUN, THE CIVIL RIGHTS PROJECT, PRIVATE SCHOOL RACIAL ENROLLMENTS AND SEGREGATION 42–44 (2002). “White private school enrollment rates increased sharply in the years immediately following the *Brown* decision and peaked at roughly 16% from 1958 to 1965 . . . .” *Id.* at 17. The parents chose to do this so their children would be kept out of the desegregated schools. See *id.* at 43.

16. See *id.* at 27 tbl.12. Table 12 details “the racial composition and private school rates of the 40 largest school districts for the 1989–90 school year.” *Id.* at 26. During this time period, 13% of all students in Memphis enrolled in private schools. Of those students, 38% were White and 3% were Black. At 13.6:1, this was the highest ratio of White students to Black students in the study.

17. Memphis City Schools Facts, <http://www.mcsk12.net/admin/communications/facts.htm> (last visited Feb. 7, 2008).

without running afoul of the new constitutional landscape announced in *Parents Involved in Community Schools v. Seattle School District*,<sup>18</sup> the Memphis case study is a model for what may happen when large segments of a community abandon a school district. Finally, the current inequities in school quality among the schools in the Memphis metropolitan area<sup>19</sup> suggest that the courts' focus on a school's racial makeup to the exclusion of its educational quality may have been a failed strategy. Ultimately, though, this is a story about how a single community dealt with decades of Supreme Court mandates in the wake of *Brown* and ultimately avoided offering more than a handful of students an education in a diverse environment.

## I. Initial Inaction: 1954–61

### A. *The Brown Decisions and the Memphis City Schools*

In 1869, the fourth city school charter for the City of Memphis established the Board of Education of the Memphis City Schools and declared that the "Board of Education shall provide and maintain separate schools for the use and accommodation of the [W]hite and colored youths of the city."<sup>20</sup> The Memphis City Schools had functioned under this charter segregating school facilities for eighty-five years when, on May 17, 1954, the U.S. Supreme Court unanimously declared that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."<sup>21</sup>

The *Brown* decision effectively declared the Memphis school system, and many others across the country, to be unconstitutional. Capping a long struggle by attorneys for the National Association for the Advancement of Colored People ("NAACP") to legally dismantle the doctrine of "separate but equal" endorsed by the Supreme Court in *Plessy v. Ferguson*,<sup>22</sup> the

18. 127 S. Ct. 2738 (2007) (holding that plans in Louisville and Seattle using racial classifications among other factors to allocate students to district high schools violated the Fourteenth Amendment, as they failed to justify the use of racial classifications with a compelling state interest).

19. See *infra* notes 277–89 and accompanying text.

20. 1869 Tenn. Pub. Acts 142. Chapter 30 of the 1868–69 Tennessee Public Acts placed the Memphis City Schools under the management and control of the Board of Education, detailed the duties of the Board, and explained how to choose its members.

21. *Brown I*, 347 U.S. 483, 495 (1954).

22. *Plessy v. Ferguson*, 163 U.S. 537 (1896). The Court held that "the enforced separation of the races . . . neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies

decision shifted the field of legitimacy away from segregationists and provided a new tool with which to fight to end segregated schools and facilities. In Memphis and elsewhere, local attorneys began using that tool.

Some themes dominating the school desegregation struggle in Memphis over the next two decades became evident on that first day after *Brown*. Milton Bowers, Sr., president of the city Board of Education, insisted that no changes would be made in *Brown*'s wake.<sup>23</sup> "We believe our Negroes will continue using their own facilities since most of them are in the center of Negro population areas."<sup>24</sup> Over the next twenty years, federal courts struggled with ways to integrate schools in this residentially-segregated city—a problem identified immediately in Bowers's comments.<sup>25</sup> Further, the city repeatedly cited the equality of the schools as a reason to resist increased integration.<sup>26</sup> On this point, the Supreme Court's message from *Brown* could not have been more clear: "[s]eparate educational facilities are inherently unequal."<sup>27</sup> Yet, the city would consistently focus on the *equality* rather than the separation in resisting desegregation even as repeated mandates from the courts focused on racial makeup.

Likewise, the Black community immediately recognized the enormous difficulty of the task presented by *Brown*. "This will take time, much time," an editorial in the local Black newspaper

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him the equal protection of the laws, within the meaning of the Fourteenth Amendment." *Id.* at 548.

23. *Ruling Fails to Shock City; Officials See Little Difficulty*, COM. APPEAL (Memphis, Tenn.), May 18, 1954 (on file with Memphis Public Library) (summarizing the Memphis Board of Education's response to the Supreme Court decision outlawing racial segregation in public schools).

24. *Id.*

25. See Thomas W. Collins, *From Courtrooms to Classrooms: Managing School Desegregation in a Deep South High School*, in *DESEGREGATED SCHOOLS: APPRAISALS OF AN AMERICAN EXPERIMENT* 89, 91–93 (Ray C. Rist ed., 1979) (detailing the development of racially segregated neighborhoods in Memphis); see also Willie W. Herenton, *A Historical Study of School Desegregation in the Memphis City Schools, 1954–1970*, at 48 (Aug. 1971) (unpublished Ph.D. dissertation, Southern Illinois University) (on file with author) ("It is a fact that the Negro population of Memphis is concentrated in certain confined areas in the western, northern, and southern sections of the city which surround the [W]hite center city area. It is of interest to note that the school system's zone lines appear to have been drawn to conform to the configuration of the Negro communities.").

26. See Herenton, *supra* note 25, at 44 ("Negro schools are fully equal to and in some instances better than [W]hite schools." (quoting *Ruling Fails to Shock City: Officials See Little Difficulty*, COM. APPEAL (Memphis, Tenn.), May 18, 1954 (on file with Memphis Public Library))).

27. *Brown I*, 347 U.S. 483, 495 (1954).

*The Tri-State Defender* explained.<sup>28</sup> "There will be no place for bitterness and rancor, balking and stubbornness, if the job is to be done right."<sup>29</sup> But, as the Memphis reaction and litigation unfolded, there was much bitterness, rancor, balking, and stubbornness, each of which worked as the newspaper predicted to hamper the desegregation process and limit the effectiveness of achieving social change through federal litigation.

Although the initial *Brown* decision laid out a new constitutional standard, it did not spell out remedies with which states, cities, and towns were supposed to make the necessary changes to comply with this new standard. The implementation decision came a year later on May 31, 1955.<sup>30</sup> *Brown v. Board of Education (Brown II)* did not contain the original decision's rhetoric of equal rights, but it laid out broad guidelines for school authorities and district courts to begin the process of school desegregation. *Brown II* gave primary responsibility of reform to local authorities, but it gave district courts jurisdiction to consider whether the action of those authorities constituted good-faith implementation of the *Brown* principles.<sup>31</sup> The long-term goal, according to the Court, was for Black students to be admitted "to public schools as soon as practicable on a nondiscriminatory basis."<sup>32</sup> The immediate order was for school authorities to make a "prompt and reasonable start toward full compliance"<sup>33</sup> with the *Brown I* ruling.<sup>34</sup>

These mandates—"as soon as practicable," "prompt and reasonable start," and "full compliance"—lacked any precise milestones. The Court was more specific, however, in laying out potential reasons for delay, including

problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary

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28. Op-Ed., *One History-Making Step Forward*, TRI-STATE DEFENDER (Memphis, Tenn.), May 29, 1954 (on file with the Memphis Public Library).

29. *Id.*

30. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955). In *Brown II* the Court considered "the complexities arising from the transition to a system of public education freed from racial discrimination." *Id.* at 299.

31. *See id.* at 299.

32. *Id.* at 300.

33. *Id.*

34. *Brown I*, 347 U.S. 483, 495 (1954) (holding segregation in public education unconstitutional).

in solving the foregoing problems.<sup>35</sup>

The Court thus provided practical flexibility for implementation and allowed the local district courts to take local public interests into account. In Memphis and elsewhere, this flexibility was used by opponents of desegregation to delay implementation as courts and communities wrestled with the issues the Supreme Court failed to define in the *Brown II*.<sup>36</sup> The Court's reliance on district courts proved a significant flaw in implementing *Brown*, as local communities used the adversarial and gradual nature of litigation to delay action and stir public opposition to desegregation. This was done with particular effectiveness in Memphis.<sup>37</sup>

### *B. Widespread Resistance and the Tennessee Pupil Assignment Law*

Displeasure with the *Brown* decisions reigned throughout the southern states most affected by them. In March 1956, that displeasure produced the Southern Manifesto, a document endorsed by ninety-six members of Congress, calling *Brown* "a clear abuse of judicial power."<sup>38</sup> The Manifesto was a clear signal to the local communities charged with implementing *Brown* that resistance to desegregation would be acceptable to and supported by representatives in the federal government, opening the door to local resistance throughout the South. Although neither of Tennessee's Senators (Estes Kefauver and Al Gore, Sr.) and less than half of the State's House delegation signed the Southern Manifesto, U.S. Representative Clifford Davis of Memphis did sign it, along with all of the other representatives from western Tennessee.<sup>39</sup>

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35. *Brown II*, 349 U.S. at 300-01.

36. See Herenton, *supra* note 25, at 53-54 (quoting Memphis Board of Education member Mrs. Lawrence Coe as saying "[b]etween 1954 and 1959 the board took no steps voluntarily to desegregate the schools").

37. See, e.g., *Mayor Mulls Boycott Option*, COM. APPEAL (Memphis, Tenn.), Sept. 2, 1972 (on file with Memphis Public Library) ("Uncertainty still hangs over just when or if there will be court-ordered busing in Memphis schools. School board members voted 6-1 Thursday to appeal a court-ordered busing decision and seek a further stay order pending the appeal. 'If this thing (busing) eventually is to be defeated, it is going to be through legal channels,' Mayor Chandler said yesterday." (alteration in original)).

38. See 102 CONG. REC. 4255, 4460 (1956).

39. *Id.* Memphis sits in the extreme southwest corner of Tennessee and is far both geographically and culturally from other parts of the state. Indeed, Tennessee is often divided into three "Grand Divisions"—east, middle, and west—that share little in common. See Profile to the State of Tennessee, <http://www.tn.gov/tourdev/pdf/stateprofile.pdf> (last visited Apr. 3, 2008). Thus, it is unsurprising that the representatives from west Tennessee would vote so

Soon, the sentiment of the Manifesto led to legislation in Tennessee and elsewhere intended specifically to curtail, or at least delay, the desegregation process. Tennessee required racial organizations to register with the state in order to prevent the type of organizing by groups, such as the NAACP, that led to the *Brown* suits in the first place.<sup>40</sup> More significantly, the Tennessee Pupil Assignment Law, passed in 1957, governed the desegregation process by placing control in the hands of local boards of education.<sup>41</sup>

The Pupil Assignment Law permitted students to transfer from one school to another without regard to race, subject to approval of local boards of education.<sup>42</sup> In determining whether to grant a transfer, local boards were to consider twenty-two factors, including

- school capacities;
- student and school's geographical locations;
- transportation;
- effect on the school and the student;
- adequacy of academic preparedness;
- student's scholastic aptitude and relative intelligence or mental energy;
- effect on other students;
- socioeconomic status;
- possibility of threat of friction or disorder among pupils or others;
- possibility of breaches of the peace;
- any and other factors the board may consider pertinent.<sup>43</sup>

As is apparent from this list, local school boards were left with enormous discretion in granting transfers.<sup>44</sup> Many of these factors provided a facially non-racial justification for board members eager to prevent the integration of any schools to do so, thus

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differently from their colleagues from other parts of the state.

40. 1957 Tenn. Pub. Acts 508. This Act was written "to promote racial harmony and tranquility" through the "registration of persons and organizations engaged in promoting or opposing legislation in behalf of or in opposition to a race or color . . ." *Id.*

41. 1957 Tenn. Pub. Acts 40.

42. *See id.* at 44. To transfer a child out of his or her assigned school, parents were required to submit a written request to the school board within ten days of the original assignment. *Id.*

43. *Id.* at 41-42.

44. *See, e.g., id.* at 45. The school board was not "bound by the rules of evidence applicable in a court" but could instead admit any evidence which would be accepted by a "reasonable and prudent man." *Id.*



allowing local boards to comply with the letter of *Brown* while subverting its spirit.<sup>45</sup>

In Memphis, pupil assignment played out exactly as the law intended, resulting in no desegregation whatsoever.<sup>46</sup> Elementary schools in Memphis had gerrymandered geographical attendance zones with Black schools zoned on one map and White schools on another.<sup>47</sup> Thus, it was not only the residential segregation initially referred to by Board president Bowers, but also deliberate attendance zoning that maintained segregation in the years immediately following *Brown*.<sup>48</sup> Residentially segregated elementary schools fed into junior high schools, which fed in turn into high schools, all the while preserving the separate racial character.<sup>49</sup> Continuing students were automatically assigned to the same school or to the corresponding feeder school with a right to appeal under the Pupil Assignment Law.<sup>50</sup> The predictable effect of this was a perpetuation of the patterns of racial segregation that already existed with the only relief provided by appeals for reassignment.<sup>51</sup> Considering the discretion given to the local boards by the Pupil Assignment Law, it is unsurprising that such appeals were futile.<sup>52</sup> According to a member of the Board of Education, the superintendent was an "open segregationist" who "believed in and enforced second class citizenship for the Negro pupils, teachers, and principals."<sup>53</sup>

Using the Pupil Assignment Law as cover, the Memphis City Schools remained entirely segregated through the end of the

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45. *See id.* In addition to providing a facially non-racial justification for segregation, this Act further protected the individual school members from public scrutiny by exempting them from charges of "libel, slander or other action, whether civil or criminal . . ." *Id.* at 51.

46. G.W. Foster, Jr., *Memphis*, in *CIVIL RIGHTS U.S.A*, *supra* note 14, at 131, 142 ("All 50 Negro pupils who enrolled in [W]hite schools . . . were initially assigned to the schools of their own race in the attendance zone of which they resided.").

47. *See id.* ("Each elementary school had a distinctive geographic attendance zone, with Negro schools in effect zoned on one map of the city and [W]hite schools on another.").

48. *Id.* at 140 (noting that, as late as 1962, Memphis Public Schools were still largely segregated).

49. *Id.* at 142.

50. *See id.* at 143. For the whole text of the law, see 1957 Tennessee Public Acts 40.

51. *See Foster*, *supra* note 46, at 143 (explaining that the method of reassignment employed by the board "perpetuate[d] whatever methods of racial segregation already exist[ed] . . .").

52. *See id.* at 144 (showing that of 200 appeals, only thirteen Black pupils were granted a transfer to a White schools).

53. Herenton, *supra* note 25, at 53-54 (quoting Board Member Mrs. Lawrence Coe).

1960–61 school year (see Chart 1 below).

**CHART 1: Memphis City Schools Student Population, 1954–60<sup>54</sup>**

School Year	Total Enrollment	# of White	% of White	# of Black	% of Black	# of Blacks in White Schools
1954–55	79,781	46,265	58.0%	33,516	42.0%	0
1955–56	83,704	48,268	57.7%	35,436	42.3%	0
1956–57	87,711	49,587	56.5%	38,124	43.5%	0
1957–58	92,429	51,621	55.9%	40,808	44.2%	0
1958–59	103,240	59,518	57.7%	43,722	42.4%	0
1959–60	95,203	53,142	55.8%	42,061	44.2%	0
1960–61	98,408	53,596	54.5%	44,812	45.5%	0

To combat this delay, those seeking desegregation returned to the venue that delivered the *Brown* decision. Federal courtrooms across the South, including the district court in Memphis, began the work of implementing the *Brown* decisions within their own communities.<sup>55</sup> The life of Memphis litigation, however, proved just how difficult using litigation to pursue social change could be.

## II. Passive Resistance: 1961–66

The unsuccessful attempt to enroll Gerald Young at all-White Volland Elementary in September 1958 was the first step toward litigation in Memphis.<sup>56</sup> After several attempts to convince the Board of Education to voluntarily desegregate the schools were ignored, Gerald Young and seventeen other Black school children filed suit on March 31, 1960 in the federal district court in Memphis.<sup>57</sup> Represented by eight African-American lawyers from the NAACP—Thurgood Marshall and Constance Baker Motley from New York and A.W. Willis, Russell Sugarmon, Rev. Ben Hooks, and three others from Memphis<sup>58</sup>—the plaintiffs contended

54. See *id.* at 53 tbl.III (compiling data from the Memphis City Schools Division of Educational Research and Planning).

55. See Foster, *supra* note 46, at 131, 149–152 for a discussion on the federal desegregation legislation that took place in Memphis starting in 1960.

56. See generally SILVER & MOESER, *supra* note 11, at 84–96 (explaining the history leading to Gerald Young's suit).

57. *Id.* at 97.

58. See *Northcross v. Bd. of Educ. (Northcross A-1)*, 302 F.2d 818, 818 (6th Cir. 1962) (listing Plaintiffs-Appellants' counsel).

that the city operated a dual-race school system and that the Tennessee Pupil Assignment Law provided no effective remedy to segregated schools.<sup>59</sup>

The case, entitled *Northcross v. Board of Education*,<sup>60</sup> was heard more than a year later. On May 2, 1961, the judgment from District Judge Marion Boyd delivered a victory for the Board of Education, denying the requested injunction and plan for compulsory integration. He reasoned that the Board did not "operate a compulsory bi-racial school system," and found that the plaintiffs had not yet exhausted their administrative remedies under the Pupil Assignment Law.<sup>61</sup> Although the Memphis City Schools remained entirely segregated, Judge Boyd proclaimed that the Board "ha[d] evidenced all good faith to [the public and to] this [c]ourt of its intention to comply with the decision of the United States Supreme Court."<sup>62</sup> The court held that the Pupil Assignment Law constituted an effective race-neutral desegregation plan for the city.<sup>63</sup> Faced with a judicial endorsement of the Board's delay tactics, the plaintiffs appealed the decision to the Sixth Circuit Court of Appeals.<sup>64</sup>

#### A. *Breaking the Color Line*

Although the district court rejected the specific requests made by the plaintiffs, the decision placed the Board in an awkward position. On one hand, the Board hoped to maintain the credibility of the Pupil Assignment Law as a valid desegregation plan when the case reached the Sixth Circuit—a panel of judges from far beyond Memphis's borders.<sup>65</sup> In order to show its good faith to the appellate court, the Board calculated that some desegregation must occur.<sup>66</sup> On the other hand, the Board was

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59. SILVER & MOESER, *supra* note 11, at 97.

60. *Northcross D-1*, 6 Race Rel. L. Rep. 428 (W.D. Tenn. 1961).

61. *Id.* at 429, 432.

62. *Id.* at 430.

63. *See id.* at 430, 432 (noting that the Pupil Assignment Law afforded the relief sought by the plaintiffs).

64. *See Foster, supra* note 46, at 131, 150.

65. *See id.* at 147. The Court of Appeals for the Sixth Circuit, known earlier as simply the Sixth Circuit, has consisted of Tennessee, Kentucky, Ohio, and Michigan since 1866. *See Act of July 23, 1866*, 39 Cong. Ch. 211, 14 Stat. 209 (establishing which states would be in which circuits, and stating "that the districts of Ohio, Michigan, Kentucky, and Tennessee shall constitute the Sixth Circuit"); *Act of March 3, 1891*, 51 Cong. Ch. 517, 26 Stat. 826 (establishing the Courts of Appeal in the same boundaries as the then-existing circuits).

66. *See Foster, supra* note 46, at 131, 150 ("[T]he allowance of some reassignments could be used as evidence of the board's good faith in operating

well aware of the highly publicized and confrontational desegregation occurring in cities, such as Little Rock and New Orleans, and it wanted desperately to avoid similar confrontations in Memphis.<sup>67</sup> During the late summer of 1961, the Board quietly began developing general policies for desegregation, acknowledging for the first time that desegregation was imminent.<sup>68</sup> The Board decided that the schools to be integrated would not be in the lowest socioeconomic White neighborhoods but would instead be spread geographically across the city; the Board further hesitated to place fewer than three Black students in any one school.<sup>69</sup>

Meanwhile, the NAACP spent the summer of 1961 recruiting Black parents willing to apply for their children's transfer into White schools.<sup>70</sup> For the 1961-62 school year, the parents of thirty-nine Black students attended hearings to seek transfers to all-White schools.<sup>71</sup> On September 30, 1961, while *Northcross* awaited hearing at the Sixth Circuit, thirteen such transfer requests were granted, sending thirteen Black first-graders to desegregate four White elementary schools.<sup>72</sup>

The primary goal of Memphis leaders during this historic time was to avoid negative national publicity by maintaining law and order.<sup>73</sup> To this end, the Board withheld the announcement of when and in which schools desegregation would take place.<sup>74</sup> City officials enlisted compliance from the local media, convincing news outlets to withhold coverage until *after* the Black students had entered the schools.<sup>75</sup> Any Memphians privy to the desegregation plan who hoped to stir confrontation were discouraged by a highly conspicuous police force.<sup>76</sup>

These efforts to maintain order, deny segregationists the opportunity to organize resistance, and prevent the national press

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under the placement law as a desegregation 'plan.'")

67. *Id.* at 147.

68. *Id.*

69. *Id.* at 145.

70. See Herenton, *supra* note 25, at 59.

71. See Foster, *supra* note 46, at 131, 150.

72. *Id.*

73. See *id.* at 145 (discussing police protection); *id.* at 147-48 (discussing publicity).

74. *Id.* at 147.

75. Roger Biles, *A Bittersweet Victory: Public School Desegregation in Memphis*, 55 J. NEGRO EDUC. 470, 474 (1987).

76. *Id.* at 475.

from flocking to Memphis were largely successful.<sup>77</sup> Some of the parents of the Black children reported that they received a few threatening phone calls and one received a picture of a rebel flag in the mail, but the city's action to defuse resistance helped to avoid further disruption.<sup>78</sup> The color line in the Memphis City Schools was broken quietly, peacefully, and successfully thanks to careful control of the process and the bravery of thirteen of the city's smallest racial pioneers. The efforts to avoid turbulence were so successful that President John F. Kennedy "lauded Memphis for its peaceful toppling of [school] segregation, . . . [saying] the city 'reflected credit on the United States throughout the world.'"<sup>79</sup>

President Kennedy's praise for Memphis's calm "integration" disregarded the fact that of 51,815 African-American students, only 13 were attending formerly all-White schools.<sup>80</sup> Still, various leaders in the city—on the Board, in politics, in the media, in the police, and throughout the Black community—had worked together to ensure that this minimal desegregation would occur as smoothly as possible and, largely, it did.<sup>81</sup> It was the type of unified effort to nudge the city forward, however slowly, that would dissipate as the desegregation litigation continued.<sup>82</sup> Such dissipation may have been inevitable because beneath the leadership's success lurked the resistance that would emerge once more-than-token desegregation became imminent.<sup>83</sup> Although the leadership avoided disruption in 1961, their actions did nothing to prepare the community for truly desegregated schools.<sup>84</sup>

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77. Foster, *supra* note 46, at 131, 148.

78. 'Normal Week' for 13 Integrated Children, TRI-STATE DEFENDER (Memphis, Tenn.), Oct. 14, 1961, at 1.

79. Biles, *supra* note 75, at 471 (quoting President John F. Kennedy).

80. See *infra* Part II.C chart 2.

81. See Foster, *supra* note 46, at 131, 145–48 (discussing events leading up to placing the thirteen Black students in White schools); Biles, *supra* note 75, at 474 ("[T]he total absence of violence to the breach of the color line in Memphis was due to the meticulous planning in advance of the event by the community elite.").

82. See generally Biles, *supra* note 75, at 476–78 (listing examples of Memphis city officials, such as school board members, the school board president, and the Mayor, who advocated against busing and encouraged delay in further segregation).

83. See, e.g., *id.* (noting the school board's opposition to busing).

84. See *id.* at 477 (noting that public disapproval of desegregation led to threats against the judge who issued the order to bus 13,800 students to effect school desegregation, causing armed guards to be stationed outside his office).

### B. *The End of the Pupil Assignment Law*

Unlike the school desegregation decisions in neighboring Georgia, Alabama, and Mississippi, which were reviewed by the Fifth Circuit, a circuit consisting entirely of southern states,<sup>85</sup> the *Northcross* case was reviewed by the Sixth Circuit, which included Ohio, Michigan, Kentucky, and Tennessee.<sup>86</sup> Memphis is in the extreme southwest corner of Tennessee, as far from Kentucky, Ohio, and Michigan as is possible within the Sixth Circuit. This geographical quirk meant that a very Southern city would have its school desegregation practices reviewed by a very un-Southern panel of judges.

Satisfied that the enrollment of the thirteen Black first-graders in formerly all-White schools successfully proved the Board's good faith in operating under the Pupil Assignment Law as a desegregation plan, the Board moved to dismiss *Northcross* even before the Sixth Circuit could rule.<sup>87</sup> The Sixth Circuit denied the motion and on March 23, 1962 rebuked the Board, declaring the Pupil Assignment Law inadequate as a desegregation plan.<sup>88</sup>

The Sixth Circuit decision was nearly as resounding a victory for the plaintiffs as the district court opinion had been for the city. "The Pupil Assignment Law might serve some purpose in the administration of a school system," the court said, "but it will not serve as a plan to convert a biracial system into a nonracial one."<sup>89</sup> The court noted that more than four years had passed since the enactment of the Pupil Assignment Law, but as of the initiation of the *Northcross* suit, "the schools of Memphis were as biracial as they had been."<sup>90</sup> Commenting on the token desegregation

85. The Court of Appeals for the Fifth Circuit, known earlier as simply the Fifth Circuit, consisted of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas from 1866 to 1981, when Georgia, Florida, and Alabama split off to form the Eleventh Circuit. See Act of July 23, 1866, 39 Cong. Ch. 211, 14 Stat. 209 (establishing which states would be in which circuits and stating "that the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas shall constitute the fifth circuit"); Act of March 3, 1891, 51 Cong. Ch. 517, 26 Stat. 826 (establishing the Courts of Appeal in the same boundaries as the then-existing circuits); Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1981) (reassigning Georgia, Florida, and Alabama to the new Eleventh Circuit).

86. See *supra* note 65 and accompanying text.

87. See Foster, *supra* note 46, at 131, 150.

88. See *Northcross A-1*, 302 F.2d 818, 824 (6th Cir. 1962) (stating that the defendant's belief that full compliance as required by the Supreme Court could be had under the Pupil Assignment Law was mistaken).

89. *Id.* at 821.

90. *Id.* at 822.

accomplished in September 1961, the court wrote: "The admission of thirteen Negro pupils . . . is not desegregation, nor is it the institution of a plan for a non-racial organization of the Memphis school system."<sup>91</sup> The Sixth Circuit declined to define "desegregation" beyond the meaning given by the Supreme Court in *Brown*. Whatever "desegregation" meant, the Sixth Circuit was clear that placing thirteen out of 51,000 Black students in formerly all-White schools was insufficient.

The Sixth Circuit ordered the city to restrain from operating a biracial school system, noting that "[m]inimal requirements for non-racial schools are geographic zoning . . . and admission to a school according to residence as a matter of right."<sup>92</sup> This was a minor tightening of the vague *Brown II* implementation requirements, but the Sixth Circuit offered no time line for the Board to submit a plan, effectively leaving the Board again to take action of its own accord toward desegregation.<sup>93</sup>

This time, the Board did not delay. Three months later on August 31, 1962, it submitted its new desegregation plan, calling for grade-a-year desegregation similar to the plan underway in Nashville.<sup>94</sup> Grades one through three were to be desegregated immediately for the 1962-63 school year.<sup>95</sup> Grade four would be desegregated in 1963-64 and one grade would be desegregated each year after that until all twelve grades would be desegregated at the beginning of the 1971-72 school year.<sup>96</sup> The plan also incorporated minimal alterations to the geographic zoning of school districts, but it allowed for minority-to-majority transfers by which a White student could transfer out of a majority-Black school into a majority-White one.<sup>97</sup> The minority-to-majority transfers substituted individual choice for de jure segregation with similar effects. On May 25, 1963, Judge Boyd approved the plan and the NAACP attorneys again appealed to the Sixth Circuit.<sup>98</sup>

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91. *Id.* at 824.

92. *Id.* at 823.

93. *See id.* at 824 (instructing the defendants to refrain "from operating a biracial school system in Memphis, or in the alternative to adopt a plan looking toward the reorganization of the schools" with no time constraints).

94. Herenton, *supra* note 25, at 71.

95. *Id.*

96. *Id.*

97. *Northcross v. Bd. of Educ. (Northcross A-2)*, 333 F.2d 661, 662, 667-68 app. (6th Cir. 1964).

98. Herenton, *supra* note 25, at 71.

### C. *Memphis Desegregation Outside the Classroom*

Two months before the NAACP attorneys filed the *Northcross* suit, other NAACP attorneys filed a parallel case against the Memphis Park Commission for desegregation of city parks, swimming pools, golf courses, and other public recreational facilities.<sup>99</sup> The Park Commission argued for gradual desegregation, claiming that immediate desegregation would produce "interracial disturbances, violence, riots and community confusion."<sup>100</sup> Desegregation of these facilities, the Park Commission insisted, would be complete by 1971—a decade later.<sup>101</sup> As *Northcross* bounced back and forth from the district court to the court of appeals, the *Watson* case made its way to the United States Supreme Court.<sup>102</sup> Just two days after Judge Boyd approved the Board's grade-a-year plan in *Northcross* on remand,<sup>103</sup> the Supreme Court in *Watson* declared the Park Commission's similarly gradual plan to be unconstitutional.<sup>104</sup> In that decision, Justice Goldberg, writing for the unanimous Court, repeatedly insisted that inconvenience was not a valid excuse for delaying implementation of constitutionally-guaranteed rights.<sup>105</sup> The City's claims that interracial violence would follow desegregation were met with the declaration that "constitutional rights may not be denied simply because of hostility to their assertion or exercise."<sup>106</sup> More strongly, the Court stated: "The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic

99. *Watson v. City of Memphis (Watson District Court)*, 6 Race Rel. L. Rep. 828 (W.D. Tenn. 1961). At the time of suit, these public facilities were actually more desegregated than the schools—25 of 131 city parks, about 21 of 61 playgrounds, 0 of 12 municipal community centers, 0 of 56 city-operated playgrounds on private property, 2 of 7 city golf courses, a zoo, and 1 art gallery were desegregated. *Id.* at 829–30.

100. *Watson v. City of Memphis (Watson Supreme Court)*, 373 U.S. 526, 535 (1963).

101. *Id.* at 528 n.1.

102. *Watson v. City of Memphis*, 371 U.S. 919 (1962) (granting certiorari).

103. See *Northcross A-2*, 333 F.2d 661, 662, 667–68 (6th Cir. 1964) (discussing Judge Boyd's decision at the District Court and including the desegregation plan he approved as an appendix to the Sixth Circuit's decision).

104. *Watson Supreme Court*, 373 U.S. at 539.

105. See generally *id.* at 531, 533, 537 (noting that the city has a heavy burden to show that any delay in desegregation is warranted, and that inconvenience falls far short of that burden).

106. *Id.* at 535; see also *Wright v. Georgia*, 373 U.S. 284, 284 (1963) (holding that convictions of African Americans "cannot be sustained on the ground that [their] conduct was likely to cause a breach of the peace by others, since the possibility of disorder by others cannot justify" denial of a constitutional right).



constitutional promise."<sup>107</sup>

Though school desegregation was not the issue in *Watson*, the Memphis Board of Education could see where the logical path of Justice Goldberg's opinion might lead. "[L]aw and order are not . . . to be preserved by depriving the Negro children of their constitutional rights."<sup>108</sup> The Court went on to level its annoyance with the widespread delay in implementing *Brown*, noting that "*Brown* never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools, let alone other public facilities."<sup>109</sup>

With such clear guidance from the Supreme Court, the Sixth Circuit again reversed Judge Boyd on June 12, 1964, declaring the grade-a-year plan inadequate to meet constitutional requirements.<sup>110</sup> In place of the grade-a-year plan, the Sixth Circuit imposed its own accelerated plan that would desegregate all grades for the beginning of the 1966-67 school year—four years faster than the Board's plan.<sup>111</sup> "The argument that a more gradual change will avoid interracial disturbances, confusion and turmoil," the Sixth Circuit held, "was answered in *Watson* . . . . '(C)onstitutional rights may not be denied simply because of hostility to their assertion or exercise."<sup>112</sup>

**CHART 2: Memphis City Schools Student Population, 1961-66**<sup>113</sup>

School Year	Total Enrollment	# of White	% of White	# of Black	% of Black	# of Blacks in White Schools (%)	# of Desegregated Schools
1961-62	112,359	60,544	53.8%	51,815	46.1%	13 (0.03%)	4
1962-63	115,432	60,658	52.6%	54,664	47.4%	42 (0.08%)	6
1963-64	119,687	61,227	51.1%	58,460	48.8%	283 (0.48%)	12
1964-65	121,933	60,090	49.3%	61,841	50.7%	<b>344 (0.56%)</b>	15
1965-66	131,637	66,144	50.3%	65,493	49.8%	<b>1,695 (2.59%)</b>	20

107. *Watson Supreme Court*, 373 U.S. at 533.

108. *Id.* at 535 (quoting *Cooper v. Aaron*, 358 U.S. 1, 16 (1958)).

109. *Id.* at 530.

110. See *Northcross A-2*, 333 F.2d 661, 664-65 (6th Cir. 1964) (stating that "[i]n light of the *Watson* case . . . we are of the opinion that desegregation of the Memphis schools should be completed before 1970" and thus holding the grade-a-year plan to be insufficient).

111. *Id.* at 661.

112. *Id.* at 665 (quoting *Watson Supreme Court*, 373 U.S. at 535).

113. Herenton, *supra* note 25, at 93 tbl.IV (compiling data from the Memphis City Schools Division of Educational Research and Planning).

#### D. What Is "Desegregation?"

It was fairly straightforward as to whether a city park had been desegregated: either citizens of different races were allowed in the park or they were not. It was far more difficult to know when a school or a grade, much less an entire school system, had been desegregated.<sup>114</sup> The courts, the Board, and the community were left wondering after the *Brown* implementation decision—what did it mean for a school district to be "desegregated?"<sup>115</sup>

The obvious first step was to remove the formal barriers to entry on the basis of race. That was the easy part; even the Tennessee Pupil Assignment Law accomplished this.<sup>116</sup> Far less clear was what was to happen after that. According to the Board's definition, the first grade of the Memphis City Schools was desegregated when thirteen students broke the color line in four elementary schools.<sup>117</sup> Ten years after *Brown* was decided, fewer than one-half of one percent of Memphis's African-American students were learning in even minimally desegregated schools.<sup>118</sup> The NAACP, on behalf of its clients, felt that this situation was wholly inadequate, and the Sixth Circuit agreed in *Northcross A-2*.<sup>119</sup> By the end of the 1965–66 school year, a year after implementation of the Sixth Circuit's accelerated plan, 1,695 Black students—still less than three percent of the African-American student population—were in twenty different formerly all-White schools.<sup>120</sup> Was this enough? Could a system be "desegregated" if some schools remained all-White or all-Black? Was a school with only one Black student "desegregated"? And where, if anywhere, was educational quality to fit into this analysis? By the end of 1966, appellate courts were grappling with these questions on a

114. See, e.g., NANCY H. ST. JOHN, SCHOOL DESEGREGATION OUTCOMES FOR CHILDREN 88 (1975) ("[D]esegregation is not a simple phenomenon[;] . . . there are a number of dimensions. . . .").

115. See generally CIVIL RIGHTS U.S.A., *supra* note 14, at 2–3, 11–18 (discussing various interpretations of, and outcomes based on, the requirements of the *Brown* implementation decision).

116. See *Northcross D-1*, 6 Race Rel. L. Rep. 428, 430 (W.D. Tenn. 1961) (explaining that under the Pupil Assignment Act, parents could apply for assignment or transfer to a different school).

117. See Foster, *supra* note 46, at 131, 150 (explaining that the Board filed an affidavit in the Court of Appeals claiming that desegregation had taken place because the board had approved the reassignment of thirteen Black students to White schools).

118. See *supra* Part II.C chart 2 (noting that, by the end of the 1963–64 school year, 0.48% of Blacks were attending White schools).

119. See *supra* notes 110–12 and accompanying text for a discussion of *Northcross A-2*.

120. See *supra* Part II.C chart 2.

case-by-case basis with no guidance from the Supreme Court.<sup>121</sup> It was clear that relying on local school boards to answer these questions produced unsatisfactory progress.<sup>122</sup>

The Supreme Court spoke soon enough, finally beginning to fill in some of the holes it left in the *Brown* implementation decision.<sup>123</sup> Meanwhile, during the latter part of the 1960s, Memphis was consumed by events outside the classroom and the courtroom; the city's racial relations were brought to the world stage in a bloody way—despite previous efforts to make Memphis a model of law and order through a peaceful, if gradual, desegregation.

### III. Tensions Rise: 1967–70

#### A. *Confrontation and Cataclysm*

February 1, 1968 was a rainy day in Memphis.<sup>124</sup> To avoid being drenched, two city sanitation workers—Echol Cole and Robert Walker—decided to ride in their truck's basin rather than use the steps and handholds on the outside of the truck.<sup>125</sup> Cole and Walker had not been sanitation workers very long;<sup>126</sup> they were likely unaware of the complaints of faulty vehicles and equipment that had been lodged by individuals attempting to create better working conditions for the city's sanitation force.<sup>127</sup> As Cole and Walker stood inside, the electrical apparatus that operated the garbage compressor shorted out and the truck's mashing mechanism began to work.<sup>128</sup> Neither man could reach the stop button on the outside of the truck,<sup>129</sup> Cole and Walker

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121. See Biles, *supra* note 75, at 476 (noting that after the slowing of integration in the late 1960s, “[t]he stimulus for change . . . [came] in a series of U.S. Supreme Court decisions destined to strike at the heart of the Memphis school board’s delaying tactics”).

122. *Id.*

123. *Id.* (“First, the Court ruled freedom-of-choice plans unacceptable if they failed to desegregate as effectively as other plans would. . . . Next, the Court held that the Sixth Circuit Court of Appeals had erred in not insisting on more prompt action to aid integration. . . . Finally and most ominously for segregation stalwarts, in *Swann v. Charlotte-Mecklenburg Board of Education* (1971) the Court ruled in favor of busing to achieve racial balance in the schools.”).

124. JOAN TURNER BEIFUSS, *AT THE RIVER I STAND: MEMPHIS, THE 1968 STRIKE, AND MARTIN LUTHER KING 29* (1989).

125. *Id.* at 30.

126. *Id.*

127. *Id.* at 25–30.

128. *Id.* at 30.

129. *Id.*

were gruesomely crushed to death.<sup>130</sup>

So began a ten-week period that would transform Memphis from an example of peaceful, if slow, progress into an international symbol of American racial conflict.<sup>131</sup> Cole and Walker, like the vast majority of the city's sanitation workers,<sup>132</sup> were Black.<sup>133</sup> Within two weeks of the deaths, the workers went on strike, demanding union representation, higher wages, and safer working conditions.<sup>134</sup> The striking workers found an unreceptive audience in the newly-elected Mayor of Memphis Henry Loeb. Loeb won election the previous fall by carrying less than 2% of the city's sizeable Black vote.<sup>135</sup> Loeb had campaigned as an open segregationist, and his election contributed to Black disillusionment with the slowly-grinding political process.<sup>136</sup> The deaths of the sanitation workers and the resulting strike represented the first opportunity for the Black community to act on that disillusionment.<sup>137</sup>

For two months, the mayor and union leaders engaged in bitter and public negotiations<sup>138</sup> while striking workers held marches through downtown Memphis.<sup>139</sup> The campaign merged worker rights and civil rights, attracting the attention of Dr.

130. *Id.*

131. See generally Collins, *supra* note 25, at 89, 94 ("The image Memphis created in 1968 has been difficult for the city to overcome . . .").

132. See BEIFUSS, *supra* note 124, at 43 (noting that the Memphis Public Works force had a hard time replacing striking workers as most were Black).

133. Teamsters for a Democratic Union, Martin Luther King: 1968 Memphis Sanitation Strike Was Powered by the Rank and File, <http://tdu.org/node/870> (last visited Feb. 7, 2008).

134. See generally BEIFUSS, *supra* note 124, at 37-57 (describing the beginning of the Memphis sanitation workers strike).

135. *Id.* at 57. Memphis Blacks could vote in far greater numbers than most places elsewhere in the South. See MARCUS D. POHLMANN & MICHAEL P. KIRBY, RACIAL POLITICS AT THE CROSSROADS: MEMPHIS ELECTS DR. W.W. HERENTON 62 (1996) ("The only place in the South where the Negro had by 1930 made a real breach in the [W]hite primary system was Memphis." (quoting PAUL LEWINSOHN, RACE, CLASS AND PARTY: A HISTORY OF NEGRO SUFFRAGE AND WHITE POLITICS IN THE SOUTH 162 (1963))).

136. See BEIFUSS, *supra* note 124, at 55-57 (describing Loeb's mayoral appointment in 1967, his opposition to desegregation, and the disappointment that it created among Black community leaders).

137. See Collins, *supra* note 25, at 94 (discussing the frustration felt by the Black community in 1967 and the opportunity to act that came about because of the strike).

138. See BEIFUSS, *supra* note 124, at 38 (noting the public arguments between the mayor and union leaders).

139. See Collins, *supra* note 25, at 94 ("This strike continued for 65 days along with a crippling boycott by [B]lacks of downtown business establishments . . .").

Martin Luther King, Jr.<sup>140</sup> Dr. King had been building support for his Poor People's Campaign,<sup>141</sup> which aimed to address economic inequality with the same direct action utilized so effectively in the civil rights movement.<sup>142</sup> On March 28, Dr. King led a march through downtown Memphis,<sup>143</sup> but the demonstration was interrupted when a group of young African Americans broke from the march's peaceful path and began breaking windows along Beale Street.<sup>144</sup> The resulting police response included mace, tear gas, and gunfire that killed a sixteen-year-old African-American boy.<sup>145</sup> In response to the growing sense of confrontation, a curfew was authorized and the National Guard moved into the city.<sup>146</sup> Despite years of relative calm, Memphis was beginning to provide the same types of images—including the presence of the National Guard on city streets—as those produced in Little Rock more than a decade prior during the desegregation of Little Rock Central High School.<sup>147</sup>

Embarrassed that his march had turned violent and fearful that he was losing control of the nonviolent movement he had led for so long, Dr. King returned to Memphis on April 3rd with plans to hold a second march.<sup>148</sup> Extra precautions were taken to ensure that the second march would truly be a nonviolent one;<sup>149</sup> Dr. King waited while the United States District Court in Memphis considered lifting an injunction that was preventing the march from moving forward.<sup>150</sup> On the evening of April 4, Dr. King stood

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140. See BEIFUSS, *supra* note 124, at 195–96 (“Martin King committed himself to Memphis, an involvement he had originally neither envisioned nor desired.”).

141. See *id.* at 59 (describing Dr. King's attempts to drum up support for the Poor People's Campaign).

142. See *id.* at 15 (discussing the aim of the Poor People's Campaign: bringing representatives of the poor to the attention of Congress and other government agencies).

143. *Id.* at 211.

144. See *generally id.* at 211–42 (discussing the problems with the March 28th Memphis march).

145. See *id.* at 242 (“Larry Payne was pronounced dead at John Gaston Hospital.”).

146. See *id.* at 243–45 (discussing the curfew and the National Guard's response to the violence).

147. For a discussion of the difficulties faced by one of the “Little Rock Nine” when integrating Little Rock Central High School in 1957, see MELBA PATTILLO BEALS, *WARRIORS DON'T CRY: A SEARING MEMOIR OF THE BATTLE TO INTEGRATE LITTLE ROCK'S CENTRAL HIGH* (1994).

148. See BEIFUSS, *supra* note 124, at 255–56 (discussing Dr. King's plans to return to Memphis).

149. See *id.* at 253–55 (noting that Dr. King spoke with a group of militants about maintaining his non-violent approach for another march in Memphis).

150. See *id.* at 267–74 (discussing the ten day march injunction and Dr. King's

talking with friends on the balcony of the Lorraine Motel in downtown Memphis.<sup>151</sup> As Dr. King joked with a band standing below in the motel parking lot, bullets ripped open wounds in his neck, and he collapsed on the balcony.<sup>152</sup> Within an hour, Dr. King was pronounced dead.<sup>153</sup>

In the instant of Dr. King's assassination, all the city's efforts to maintain law and order to achieve a peaceful—if slow—transition to desegregate came undone. Rioting ensued in the wake of Dr. King's death, and the top that had been kept on Memphis' racial tensions was blown off.<sup>154</sup> With the veneer of civility and order removed, the city soon returned its attention to the desegregation of its city schools, and an era of greater polarization and confrontation between the increasingly impatient *Northcross* plaintiffs and the increasingly obstructionist city leadership followed.<sup>155</sup>

### B. *Patience Running Thin*

Outside of Memphis, the desegregation debate was growing increasingly confrontational as well. The Supreme Court voiced its frustration with the glacial pace of school desegregation in *Green v. New Kent County School Board*.<sup>156</sup> In its clearest directive yet on implementation of *Brown*, the Court rejected a freedom-of-choice desegregation plan, declaring: "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now."<sup>157</sup>

As *Green* was handed down, the Memphis City Schools were operating under a freedom-of-choice plan similar to that rejected by the Supreme Court.<sup>158</sup> In July 1966, the *Northcross* plaintiffs

lawyers' attempt to get it lifted).

151. See *id.* at 290–92 (discussing Dr. King's final moments at the Lorraine Hotel).

152. See *id.* at 292–93 (discussing Dr. King's final conversation with musician Ben Branch and the gunshot that killed him).

153. See *id.* at 299 ("Dr. Martin Luther King, Jr., was dead.").

154. See POHLMANN & KIRBY, *supra* note 135, at 58 ("[F]ollowing the assassination of Reverend King, the city exploded into days of looting, burning, sniping, and other forms of mass unrest . . .").

155. See BEIFUSS, *supra* note 124, at 55 (noting that Loeb was against integration and describing the outrage Black community leaders felt towards that stance).

156. 391 U.S. 430 (1968).

157. *Id.* at 439.

158. See ROBERT M. MCRAE, ORAL HISTORY OF THE DESEGREGATION OF MEMPHIS CITY SCHOOLS 1954–1974, at 45 (1997) (discussing the desegregation plan of Memphis city schools); see also *Green*, 391 U.S. at 433–34 (discussing the freedom-of-choice plan the Court rejected).

and the Board settled on a compromised plan without going to court.<sup>159</sup> The plan revised geographic zones and allowed for free transfers subject only to space limitations.<sup>160</sup> The 1966 compromise, which came before the election of Mayor Loeb, the sanitation strike, and the assassination of Dr. King, was perhaps the final instance of stable and agreeable action taken by the *Northcross* plaintiffs and the Board.

Emboldened by the *Green* directive and more militant in the aftermath of the sanitation strike, the *Northcross* plaintiffs returned to the district court seeking modifications to the city's freedom-of-choice plan.<sup>161</sup> The plaintiffs' requests were heard by Judge Robert McRae, who replaced the retired Judge Boyd.<sup>162</sup> In his first ruling, Judge McRae appeared to tread carefully, calling on the Board to appoint a Director of Desegregation and to file revised zone lines to supplement the agreed upon freedom-of-choice plan.<sup>163</sup> Judge McRae's cautious order was affirmed by the Sixth Circuit, as the appeals court found "no need at [that] time for precipitous action."<sup>164</sup>

Apparently dissatisfied with the continuing slow progress fifteen years after *Brown*, the plaintiffs pushed the case to the United States Supreme Court.<sup>165</sup> The Court in *Alexander v. Holmes County Board of Education*<sup>166</sup> had recently introduced the term "unitary schools" as the goal of the *Brown*-inspired desegregation processes taking place across the country.<sup>167</sup> "Under explicit holdings of this Court," the Court wrote in *Alexander*, "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."<sup>168</sup> Relying largely on *Alexander*, the Supreme Court, in its only opinion on the *Northcross* litigation, determined that the Sixth Circuit's conclusion that the Board's compliance with Judge McRae's order for a revised freedom-of-choice plan would

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159. See MCRAE, *supra* note 158, at 45.

160. *Id.*

161. See *Northcross v. Bd. of Educ. (Northcross A-3)*, 420 F.2d 546, 547 (6th Cir. 1969) (discussing the plaintiffs' attempt to modify Memphis's school desegregation plan).

162. MCRAE, *supra* note 158, at 45.

163. *Northcross A-3*, 420 F.2d at 547.

164. *Id.*

165. *Northcross v. Bd. of Educ. (Northcross S-1)*, 397 U.S. 232 (1970).

166. 396 U.S. 19 (1969).

167. *Id.* at 20.

168. *Id.* (citing *Green v. New Kent County Sch. Bd.*, 391 U.S. 430, 438-39, 442 (1968) and *Griffin v. County Sch. Bd.*, 377 U.S. 218, 234 (1964)).

ultimately produce a unitary system was premature.<sup>169</sup> The Court remanded the case to Judge McRae in the district court with instructions to rule consistently with *Alexander's* directive<sup>170</sup> to "terminate dual school systems at once."<sup>171</sup>

As *Northcross* wormed through the judicial system, Memphis's move towards racial confrontation accelerated. Though *Watson* had desegregated the libraries in 1963,<sup>172</sup> the library restrooms remained segregated<sup>173</sup>—so did city water fountains and privately-owned theaters, hotels, restaurants, and lunch-counters.<sup>174</sup> To counter this continued delay, the NAACP built upon the community-wide activism of the sanitation workers' strike and initiated a direct action campaign of weekly marches, daily picketing, nightly mass meetings, selective boycotts, and targeted economic sanctions of downtown stores.<sup>175</sup>

In October 1969, the NAACP's campaign moved to the schools. Black parents, teachers, and students were encouraged to strike in protest of the continued segregation of the schools.<sup>176</sup> On October 9th and 10th, 40,000 of the city's Black students either did not attend school or left early in protest.<sup>177</sup> The following Monday, October 13th, 63,000 students were absent in the first of five "Black Mondays."<sup>178</sup> The Black Monday movement peaked at 68,000 absent students and 675 absent teachers on October 27th.<sup>179</sup>

In November 1969, the NAACP, having partnered with its union allies,<sup>180</sup> marched in demand of totally integrated schools and better African-American representation on the five-member Board of Education.<sup>181</sup> In a replay of the violence that marred Dr. King's initial march in March 1968, some marchers hurled bricks and bottles at downtown store windows.<sup>182</sup> Wary of inviting

169. *Northcross S-1*, 397 U.S. at 235.

170. *Id.*

171. *Id.* (citing *Alexander*, 396 U.S. at 20).

172. *Watson Supreme Court*, 373 U.S. 526 (1963).

173. See BEIFUSS, *supra* note 124, at 53.

174. *Id.*

175. See Herenton, *supra* note 25, at 90.

176. *Id.* at 88.

177. *Id.*

178. *Id.*

179. *Id.* at 90.

180. See Collins, *supra* note 25, at 95–96 (discussing the combined efforts of the sanitation workers' union and the NAACP).

181. Biles, *supra* note 75, at 476.

182. *Id.*



negative publicity and losing control of its own campaign, the NAACP halted Black Mondays following the march.<sup>183</sup> However, the campaign contributed to significant changes in the makeup of the city's School Board, with some members being chosen in district-by-district voting—to assure representation of Black neighborhoods—instead of the previous at-large system.<sup>184</sup> In 1971, the Board expanded from five to nine members.<sup>185</sup> Three of the new members, including Maxine Smith, the executive secretary of the local NAACP,<sup>186</sup> were Black.<sup>187</sup>

### C. *An Impossible Situation*

In 1970, Memphis had the tenth largest school district in the United States, educating 147,290 students, 55% of whom were Black.<sup>188</sup> Sixteen years after the *Brown* decision, the Board considered 101 of the city's 155 schools to be "desegregated."<sup>189</sup> The Board's definition of a desegregated school was a school with at least one student of a different race attending.<sup>190</sup> A different definition would have told a different story; for example, were desegregation achieved by having a school with less than 90% of the majority race, such a definition would lead to a vastly different conclusion than did the Board's definition.<sup>191</sup> Of the 155 schools, 130 had populations of one race at greater than 90%, and fifty-four schools remained entirely of one race—thirty-one were all-Black, twenty-three all-White.<sup>192</sup>

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183. See Collins, *supra* note 25, at 96 (stating that the NAACP gave an order to "send the students back to school on November 17").

184. See *id.* (noting that six members are elected by district with only three members chosen at large).

185. See *id.*

186. See Biles, *supra* note 75, at 481.

187. See Herenton, *supra* note 25, at 97.

188. *Id.*

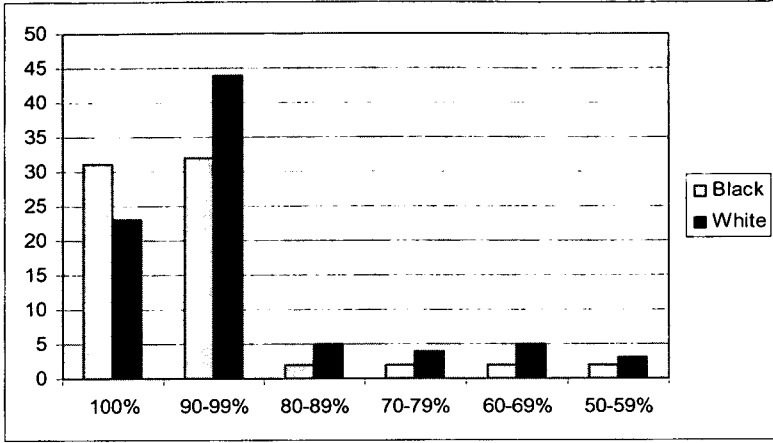
189. See Bill Evans, *City Schools' Integration Speeding up*, MEMPHIS PRESS-CIMITAR, Oct. 20, 1970, at 1 (on file with Memphis Public Library) (stating that 62.5% of Memphis students were considered to be in a "bi-racial situation" in 1970).

190. *Northcross v. Bd. of Educ. (Northcross D-4)*, 312 F. Supp. 1150, 1153 n.1 (W.D. Tenn. 1970) (noting that the School Board defendants presented statistics differently from the *Northcross* plaintiffs in terms of the integration of city schools).

191. *Id.*

192. Evans, *supra* note 189, at 1.

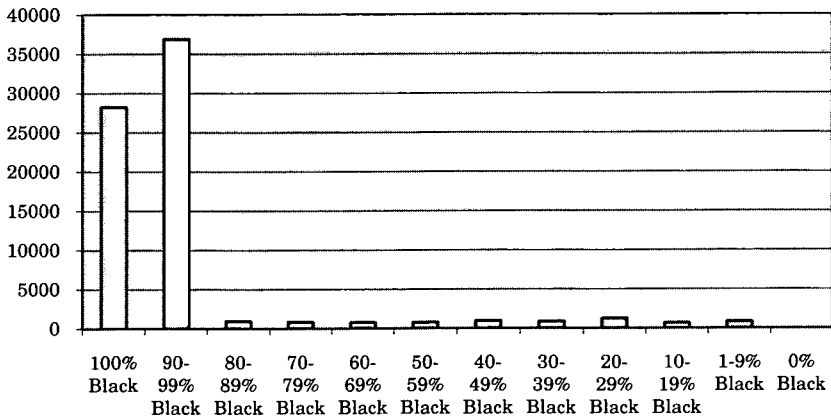
**CHART 5: Number of Memphis City Schools by Racial Makeup, 1970<sup>193</sup>**



The vast majority of Memphis's students were still learning in highly segregated environments—89% of Black students were in schools that were more than 90% Black and 39% of Black students were in all-Black schools.<sup>194</sup>

**CHART 6: Location of African-American Students in the Memphis City Schools, 1970<sup>195</sup>**

*Number of African-American Students in Schools by Racial Makeup*



193. See *id.* at 5 (compiling data from racial composition figures submitted by each school).

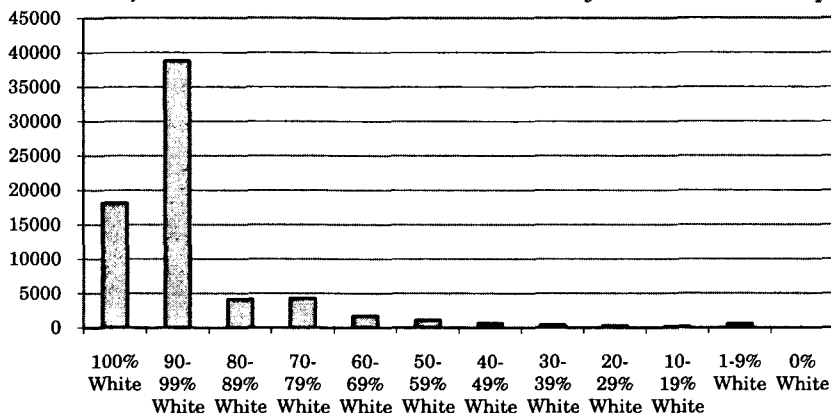
194. See *id.*

195. See *id.*

Similarly, 81% of White students were in schools that were more than 90% White and 26% of White students still attended all-White schools.<sup>196</sup>

**CHART 7: Location of White Students in the Memphis City Schools, 1970<sup>197</sup>**

*Number of White Students in Schools by Racial Makeup*



Segregated schools persisted in Memphis for several reasons. As an initial matter, the city's school zones, even the revised zones mandated by Judge McRae, reflected the city's segregated neighborhoods.<sup>198</sup> Residential segregation in Memphis actually increased between 1950 and 1970.<sup>199</sup> This was not an accident. Between 1934 and 1947, the Federal Housing Authority ("FHA") encouraged racial restrictions, and the Memphis Housing Authority ("MHA"), a state-created agency, practiced outright segregation until 1965.<sup>200</sup> This meant that all public housing was segregated. After 1965, the MHA used its own freedom-of-choice plan, thus allowing city customs to perpetuate residential segregation.<sup>201</sup>

In private housing where choice was unfettered, the situation was no better. Judge McRae observed that Whites continued to move from certain areas as the percentage of Blacks increased.<sup>202</sup>

196. *See id.*

197. *See id.*

198. *See* MCRAE, *supra* note 158, at 63 (stating that Memphis realtors had policies that prohibited racial mixing in housing patterns).

199. *Id.* at 62-63.

200. *Id.* at 63.

201. *Id.*

202. *Northcross D-4*, 312 F. Supp. 1150, 1155 (W.D. Tenn. 1970) ("[T]here has

This pattern of White flight was not solely initiated by school desegregation, but the school desegregation may have accelerated the process. For example, in a period of six years, Hollywood Elementary in central Memphis went from 98% White to 100% Black.<sup>203</sup> In addition to the choices of the community, several lending institutions influenced the "choices" in housing locations by discriminating against Black borrowers, thus preventing many of them from joining Whites in the migration out of the central city.<sup>204</sup>

For its part, the Board of Education did not help in those parts of the city that were not as residentially segregated. The Board gerrymandered school zone lines in less-segregated neighborhoods to undercut any integration that may occur naturally due to geographic proximity.<sup>205</sup> For example, the Lester school zone was adjacent to the zones of both East and Treadwell.<sup>206</sup> Lester, however, was 100% Black, while East and Treadwell were 99% White.<sup>207</sup>

As *Northcross* made its way back into his courtroom in May 1970 against this backdrop, Judge McRae concluded that "the defendants [were] not maintaining a unitary system."<sup>208</sup> While ordering the Board to promptly file a new plan, Judge McRae acknowledged the difficulty White flight created for the Board. "Although the defendants should not refrain from altering zone lines because of possible adverse racial reaction, they can hardly be faulted for factors over which they have no control."<sup>209</sup> Judge McRae concluded that the city's racial residential patterns—made worse by the city's continued annexation of White suburban neighborhoods<sup>210</sup>—meant that "no substantial desegregation [could] be effected without transporting pupils, in some cases many miles."<sup>211</sup> Though Judge McRae could not yet order busing, it had become clear that the kind of desegregation mandated by

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been a tendency for [W]hites to move from certain areas as the percentage of negroes increases in the area.").

203. See *id.* (discussing the changing racial enrollment figures at Hollywood Elementary School).

204. MCRAE, *supra* note 158, at 63.

205. See *id.* at 61 (stating that the Board purposely placed schools in areas where integration would not occur).

206. See *id.* at 60–62.

207. See Evans, *supra* note 189, at 5.

208. *Northcross D-4*, 312 F. Supp. 1150, 1153 (W.D. Tenn. 1970).

209. *Id.* at 1155.

210. See *id.* at 1156.

211. *Id.*

the Supreme Court could not be achieved without solutions involving the transportation of students. By the early 1970s, the time for tolerated delay was ending and the Memphis City Schools were about to embark on a new and highly divisive phase.

#### IV. Busing from A to Z: 1971–74

In his 1970 *Northcross* concurrence, Chief Justice Burger remarked that the Court ought to develop more specific answers to desegregation questions, such as whether any particular racial balance must be achieved in the schools, to what extent school districts and zones can be altered, and to what extent transportation must be provided to achieve desegregation.<sup>212</sup> Although the Court did not provide specific answers in *Northcross*, the Court finally provided more concrete guidelines in the spring of 1971 in *Swann v. Charlotte-Mecklenberg Board of Education*.<sup>213</sup>

##### A. *Swann and the Transformation of the Desegregation Debate*

In *Swann*, the Court declared that the Constitution did not require every school in a school system to reflect the racial makeup of that system.<sup>214</sup> In addition, the Court noted that the persistence of one-race or virtually one-race schools did not necessarily prevent a system from being declared unitary.<sup>215</sup> Such schools were permitted so long as the school system could show that school assignments resulting in one-race schools were genuinely nondiscriminatory.<sup>216</sup> These two holdings began to clarify the definition of “unitary.” The bar that school districts had to meet was not so high that the makeup of every school needed to be balanced uniformly; it was not even so high that the presence of one-race schools automatically rendered a district segregated.<sup>217</sup> On this score, *Swann* was somewhat disappointing to desegregation advocates.<sup>218</sup>

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212. *Northcross S-1*, 397 U.S. 232, 237 (1970) (Burger, C.J., concurring).

213. 402 U.S. 1 (1971).

214. *Id.* at 24.

215. *Id.* at 26.

216. *Id.*

217. *See id.*

218. *See, e.g.,* Kenyon D. Bunch & Grant B. Mindle, *Testing the Limits of Precedent: The Application of Green to the Desegregation of Higher Education*, 2 SETON HALL CONST. L.J. 541, 570 (1992) (“If numerical integration is not duly achieved, nothing else matters. But in *Swann*, the Supreme Court observed that ‘it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that

However, the *Swann* Court also provided guidance as to the tools districts could use to achieve unitary status. The Court held permissible the pairing of noncontiguous attendance zones to greater balance racial composition of schools was permissible.<sup>219</sup> Even more significantly, the Court accepted transportation of students as a proper method of achieving desegregation.<sup>220</sup> If the definition of "unitary" was conservative, the toolbox provided by *Swann* to reach "unitary" status was radical. School boards were given the freedom to transport students to and from all corners of a city to overcome persistent residential and school segregation.

*Swann* turned desegregation debates into busing debates across the country. Whereas the idea of lifting racial restrictions on school assignments had slowly gained some measure of acceptance, the prospect of actually moving young students to schools far from their homes to effect racial balance rekindled the vehement opposition seen in the wake of *Brown*. With *Swann*, as the implementation of *Brown's* rhetoric became a reality, the confrontation that had been building in the late 1960s reached a new height.<sup>221</sup>

In Memphis, the city school system had never provided transportation for its students.<sup>222</sup> Resistance to even the prospect of busing was quick and widespread. Four months after *Swann*, Mayor Loeb introduced a city ordinance that would give the city council line-item veto power over the school budget.<sup>223</sup> The mayor made his purpose in providing the city council this power plain. "The strongest tool we have (against busing) is public opinion. Public opinion can at least be brought to bear on those who spend the money."<sup>224</sup> One of the ordinance's staunchest supporters was City Councilman Wyeth Chandler, who would become mayor as the city's impending busing debate intensified.<sup>225</sup>

The following spring, Judge McRae heard six proposals on how to proceed in the wake of *Swann*.<sup>226</sup> McRae found himself to

still practices segregation by law." (quoting *Swann*, 402 U.S. at 26)).

219. *Swann*, 402 U.S. at 28-29.

220. *Id.* at 30.

221. See, e.g., John E. Lee, *The Rise (and Fall?) of Race-Conscious Remedies and "Benign" Racial Discrimination in Public Education*, 30 SUFFOLK U. L. REV. 153, 168 n.99 (1996) (discussing various instances of violence following busing plans).

222. See *Northcross v. Bd. of Educ. (Northcross A-5)*, 466 F.2d 890, 895 (1972).

223. Joe Dove, *Council Nose Count Stalls Busing*, COM. APPEAL (Memphis, Tenn.), Aug. 25, 1971, at 1 (on file with Memphis Public Library).

224. *Id.* at 2 (alteration in original).

225. *Id.* at 1.

226. *Northcross v. Bd. of Educ. (Northcross D-5)*, 341 F. Supp. 583 (W.D. Tenn.

be the arbiter of what was increasingly becoming the city's most polarizing issue. In his opinion, Judge McRae lectured both sides for advocating without considering the other side's position.

In this case, the Court has been faced with extreme opposite positions taken by the respective parties. On the one hand, it appears to the Court that the defendants have failed to recognize and acknowledge the interpretations of the Constitution which impose upon the defendants the duty to make every effort to achieve the greatest possible degree of actual desegregation. It further appears that the defendants have overemphasized solvable problems as "practicalities" which justify the continued operation of an effectively segregated system. On the other hand, it appears to the Court that the plaintiffs have overemphasized the guidelines of constitutional law, while failing to take into account the practicalities of the situation. Therefore, the Court has been called upon to exercise its equity jurisdiction in favor of a plan between the two extremes.<sup>227</sup>

Given the task of finding a plan "between the two extremes," Judge McRae promptly dismissed any plan that did not involve busing, noting that nothing more could be accomplished through zone changes.<sup>228</sup> But just as plans that did not bus were no good, neither was the NAACP's plan for the transportation of 61,350 students; Judge McRae dismissed this as impractical.<sup>229</sup>

Ultimately, McRae settled on "Plan A," which closely followed the *Swann* guidelines.<sup>230</sup> Plan A did not use any minimum or maximum racial percentages to mandate school composition but instead called for the extensive use of school pairings—where Black schools would be paired with White schools to draw from a desegregated attendance pool.<sup>231</sup> The plan called for the busing of 13,789 students but did not affect every school, thus leaving some schools entirely Black.<sup>232</sup> Judge McRae noted that, given the "practicalities of the situation," he knew of no solution that could desegregate every school. Implementation would begin that fall at the outset of the 1972–73 school year.<sup>233</sup> Both sides appealed to

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1972).

227. *Id.* at 596. The adversarial nature of the American legal system and the difficulty of pursuing social or policy change thereby became cause for indictment by the court of counsel for both sides, for simply doing their jobs—to wit, strongly advocating for their clients. *See id.*

228. MCRAE, *supra* note 158, at 74.

229. *Northcross D-5*, 341 F. Supp. at 592–93.

230. *Id.* at 595.

231. *Id.* at 591.

232. *Id.* at 592–93.

233. *Id.* at 596.

the Sixth Circuit—the Board sought to avoid busing entirely while the NAACP sought a plan that would rid the system of one-race schools.<sup>234</sup>

With busing on the horizon, Citizens Against Busing (“CAB”), a White parent group organized in the aftermath of *Swann*,<sup>235</sup> took a page from the NAACP Black Monday boycotts of three years earlier. CAB-sponsored boycotts in April 1972 resulted in absences of 52,717 and 56,840 White students on successive days.<sup>236</sup> A month later, a thousand parents tore up assignment cards and returned the scraps to the Board of Education.<sup>237</sup> At one particularly enthusiastic demonstration, CAB purchased a bus, painted it yellow, and buried it in an enormous grave.<sup>238</sup>

The path toward busing in Memphis was slowed temporarily when the Sixth Circuit granted a stay delaying Plan A implementation until it heard the Board’s appeal.<sup>239</sup> On August 29, 1972, however, the Sixth Circuit remanded the case to the district court, agreeing with the NAACP that Plan A was inadequate to fully desegregate the system.<sup>240</sup> The Sixth Circuit ordered Plan A to go forward beginning with the second semester and ordered the district court to produce a timetable for a further plan for desegregation.<sup>241</sup>

After the Sixth Circuit made busing inevitable, the reaction from leaders opposed to desegregation was swift. Hugh Bosworth, a Board member, promised to “stand in the schoolhouse door” of White schools to block the entry of Black students.<sup>242</sup> Newly-elected Mayor Wyeth Chandler vowed to participate in a boycott “if busing actually begins in the city.”<sup>243</sup> The resistance from the city leadership only served to fuel the enthusiasm of CAB. At a CAB rally attended by two Board members and the mayor, CAB Chairman Ken Keele wielded a two-by-four, declaring “[t]he very first moment that any bus rolls in front of any schools, we want a

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234. *Northcross A-5*, 466 F.2d 890 (6th Cir. 1972).

235. See James Chisum, *Clustering Foes Pledge Victory*, COM. APPEAL (Memphis, Tenn.), Nov. 23, 1971, at 1.

236. *Busing Plan in Protest Second Day*, MEMPHIS PRESS-SCIMITAR, Apr. 28, 1972, at 1 (on file with Memphis Public Library).

237. Jerry Robbins, *Anti-Busing Forces March in Protest*, MEMPHIS PRESS-SCIMITAR, May 17, 1972 (on file with Memphis Public Library).

238. *Id.*

239. *Northcross v. Bd. of Educ.*, 463 F.2d 329 (6th Cir. 1972).

240. *Northcross A-5*, 466 F.2d 890 (6th Cir. 1972).

241. *Id.*

242. Biles, *supra* note 75, at 477.

243. *Mayor Mulls Boycott Option*, COM. APPEAL (Memphis, Tenn.), Sept. 2, 1972 (on file with Memphis Public Library).



phone call and we'll meet those buses and they won't run."<sup>244</sup>

The reaction in the Black community was more pragmatic than enthusiastic, as busing was seen more as a tool to achieve a solution rather than a solution itself.<sup>245</sup> Frances Hall, a Black teacher, endorsed busing as a means of addressing the city's greater problems, summing up the pragmatic attitude: "We simply don't seem willing to accept the other person on his merits when race is involved. And if busing is the means of achieving this, then we have to bus."<sup>246</sup>

In December of 1972, with the Board under a federal court order to implement Plan A for the second semester, the Board took its first step toward compliance by contracting with a bus company.<sup>247</sup> In response, the City of Memphis attempted to further delay busing by suing its own Board of Education, seeking to enforce both a recently-passed state law and city charter amendment forbidding funds to be used for busing.<sup>248</sup>

### B. *The Buses Roll*

Unlike the first school desegregation effort more than a decade before—when thirteen African-American first graders broke the Memphis school system's color line and community outrage was tempered in part by efforts to keep details about the desegregation secret—everyone knew busing was coming as January 1973 rolled around.<sup>249</sup> With busing less than a week away, Mayor Chandler sought to enforce an antiquated city ordinance requiring bus companies to receive certification after a public hearing.<sup>250</sup> On the very morning busing was to begin, the City Council considered enforcing a seat-belt ordinance that would have put the buses in violation of the law, but it ultimately voted against taking such action in the face of the inevitable.<sup>251</sup>

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244. JOHN EGERTON, *PROMISE OF PROGRESS: MEMPHIS SCHOOL DESEGREGATION 1972-73*, at 9 (1974).

245. Art Gilliam, *School Busing: The Black Viewpoint*, COM. APPEAL (Memphis, Tenn.), Oct. 9, 1972 (on file with Memphis Public Library).

246. *Id.*

247. Jimmie Covington, *Board OK's Contract for Busing After Court Rejects Bid for Delay*, MEMPHIS PRESS-SCIMITAR, Oct. 17, 1972, at 1 (on file with Memphis Public Library).

248. *See City Will Sue School Board over Busing*, COM. APPEAL (Memphis, Tenn.), Dec. 19, 1972 (on file with Memphis Public Library).

249. *See supra* text accompanying notes 75-79.

250. *Hearing Is Tomorrow on Busing Ordinance*, COM. APPEAL (Memphis, Tenn.), Jan. 17, 1973 (on file with Memphis Public Library).

251. Clark Porteous, *Ordinance Designed to Stop Busing Rejected by Council*, MEMPHIS PRESS-SCIMITAR, Jan. 24, 1973, at 1-3 (on file with Memphis Public

After a weekend scramble to reorganize books, furniture, and equipment in the 47 schools impacted by Plan A, the city's first buses rolled out on January 23, 1973.<sup>252</sup> Despite the surrounding hysteria, the day was marked by calm in the city and high absenteeism in the schools.<sup>253</sup> On day one, almost 40,000 students stayed away from school; although after a week, three-quarters of the students returned.<sup>254</sup> There was no violence and no standing in the schoolhouse door. Superintendent John Freeman remarked: "We've got to be pleased that things went as smoothly as they did."<sup>255</sup> Even Mayor Chandler seemed pleased despite being unable to stop the buses. "The people in this city have reaffirmed my belief that although bitterly opposed to busing, they are equally committed to maintenance of the law."<sup>256</sup> Just as Memphis had avoided violence and notoriety when its schools first desegregated, the rule of law won out as the city first attempted to achieve greater desegregation through busing.

Judge McRae announced the new plan on May 3, 1973.<sup>257</sup> Judge McRae called the new plan "Plan Z" "in the hope that this will be the terminal plan for this long-standing problem in Memphis."<sup>258</sup> Plan Z ordered the busing of 39,904 students, three times the number under Plan A.<sup>259</sup> To comply with *Swann*, no child would be bused more than forty-five minutes in each direction with more than half of the bused students spending less than thirty minutes on the bus each way.

Like Plan A, and as permitted by *Swann*, Plan Z did not require a fixed racial percentage in the schools. In fact, twenty-five all-Black schools with 22,000 students were not included in the plan at all.<sup>260</sup> Judge McRae responded to criticism in his order.

While this court is fully cognizant . . . that the vitality of constitutional principles cannot be allowed to yield because of

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Library).

252. See Jimmie Covington, *Bus Rides Along Smoothly on First Day*, MEMPHIS PRESS-SCIMITAR, Jan. 24, 1973 (on file with Memphis Public Library) (describing events of that day as experienced by children, bus drivers, and school faculty).

253. EGERTON, *supra* note 244, at 5.

254. See *id.* at 14 (noting that seven days later, only 10,000 students were absent, a number only 3,000 higher than on an ordinary day).

255. See Covington, *supra* note 252.

256. *Id.*

257. MCRAE, *supra* note 158, at 91.

258. *Pros, Cons Weighed in McRae's Statement*, COM. APPEAL (Memphis, Tenn.), May 4, 1973, at 5 (on file with Memphis Public Library).

259. See *Judge Orders Busing of 39,904*, MEMPHIS PRESS-SCIMITAR, May 3, 1973 (on file with Memphis Public Library).

260. See *Pros, Cons Weighed in McRae's Statement*, *supra* note 258, at 1.

disagreement with them, the fact remains that a system cannot effectively desegregate by the practice of involuntarily assigning members of the opposite race to certain schools if there are not sufficient members of the [W]hite race available to assign. . . . The refusal of the [W]hite students to attend school with [B]lack students, particularly at [B]lack schools, results in their leaving the system for private schools or moving to unaffected areas.<sup>261</sup>

The Sixth Circuit affirmed Plan Z, noting that, pursuant to *Swann*, the presence of one-race schools did not necessarily prove the existence of a dual system.<sup>262</sup> On April 22, 1974, the Supreme Court denied certiorari and effectively put an end to the *Northcross* litigation.<sup>263</sup>

After the initial shock of Plan A, absenteeism approached normal levels a week later, but the Memphis City Schools would never be the same after January 23, 1973. The anticipated resistance never materialized in part because many busing opponents had immediately (and permanently) abandoned the city school system, relinquishing their stake in the outcome. Upon Plan Z's implementation at the beginning of the 1973-74 school year, more than 20,000 White students had left the Memphis City Schools.<sup>264</sup> This exodus caused the White percentage of city school students to plummet from 42% to 32% in the span of nine months as nearly a third of the system's White students disappeared.<sup>265</sup> These students left for the adjacent Shelby County schools or to private schools, and Shelby County had trouble building new schools fast enough.<sup>266</sup> Other students attended a new school network organized by CAB using space volunteered by churches.<sup>267</sup> In addition, many students ended up in private schools, some of which were created by churches in direct response to demand created by the desegregation order.<sup>268</sup> Although the implementation of busing, like the first desegregation thirteen years earlier, had been largely peaceful, the massive departure of White students left a lasting and debilitating impact on the

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261. *Id.* at 3 (alterations in original).

262. *Northcross v. Bd. of Educ. (Northcross A-6)*, 489 F.2d 15, 15 (6th Cir. 1973).

263. *Northcross v. Bd. of Educ.*, 416 U.S. 962 (1974) (denying certiorari). Litigation regarding attorneys' fees due to the NAACP from the School Board continued, resulting in continued tension and animosity between the two sides. See *Northcross v. Bd. of Educ.*, 611 F.2d 624 (6th Cir. 1979).

264. Daniel Kiel, *Goal of Diversity Is Elusive*, COM. APPEAL (Memphis, Tenn.), May 16, 2004, at B3.

265. *Id.*

266. See Biles, *supra* note 75, at 479.

267. *Id.*

268. *Id.*

system.<sup>269</sup> The percentage of White students continued to drop over the next three decades, helping to produce a system incapable of ever offering integrated school environments to the majority of its students.<sup>270</sup>

## V. Epilogue: Memphis Schools 50 years After *Brown*

Plan Z remained in effect without modification until April 1982, when a three year desegregation study performed by a twenty-seven member biracial committee proposed several changes to Judge McRae.<sup>271</sup> The new plan eliminated some bus trips that were transporting Black students to schools that had become predominantly Black.<sup>272</sup> In addition, the new plan eliminated all elementary school clustering and brought new bus routes into newly-annexed and mostly White areas of the city.<sup>273</sup> Finally, the Memphis City Schools began to offer "Optional Schools" that would provide advanced programs or alternative educational options for parents.<sup>274</sup> The Optional Schools were the first comprehensive effort to address school quality, as opposed to simply the schools' racial makeup.

The modified Plan Z remained in effect with minor annual changes until November 9, 1992, when the plaintiffs consented to putting *Northcross* on inactive status and federal court supervision of the Memphis City Schools' desegregation effectively ended.<sup>275</sup> On April 23, 1999, the *Northcross* case was formally discharged.<sup>276</sup> The case was not dismissed because the plaintiffs had achieved their initial goals; rather, by the 1990s, it was clear that desegregating the Memphis City Schools was no longer an accomplishable task.

When *Brown* was decided in 1954, the Memphis city school system was rigidly segregated, serving a student population that

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269. See Kiel, *supra* note 264, at B3 (noting that the resulting drop in enrollment by the flight of White students to private schools "led to slashed funding" of Memphis public schools).

270. See *id.* (noting that "[t]he 30 years after busing have seen the trend toward informal segregation continue," with Black students making up 86% of the Memphis City School population, compared to the 9% made up of White students, in 2003).

271. MCRAE, *supra* note 158, at 136.

272. *Id.*

273. *Id.* at 137.

274. *Id.* at 128.

275. *Id.* at 138.

276. *City Schools Integration Timeline*, COM. APPEAL (Memphis, Tenn.), May 16, 2004, at A18.

was 58% White and 42% Black.<sup>277</sup> On the 50th anniversary of *Brown*, the face of the schools looked decidedly different. In 2004, 86.4% of Memphis City Schools students were Black; only 8.9% were White.<sup>278</sup> The overwhelming Black majority has led inevitably to a number of highly segregated schools. In 2004, a full *twenty-five* of the schools had 100% African-American populations.<sup>279</sup> More than half of the schools, serving more than 78,000 of the city's 116,000 students, were more than 90% Black.<sup>280</sup>

Meanwhile, the suburban Shelby County Schools, which ring the city, provide a near-mirror image. The county schools, serving roughly 50,000 students, have a population that is 68.2% White and 26.3% Black.<sup>281</sup> By school ratings under the No Child Left Behind<sup>282</sup> benchmarks and in measurements of student outcomes, such as dropout and graduation rates, the county system outperforms its city counterpart, suggesting that the schools of Memphis in 2004 are not only segregated, but unequal.<sup>283</sup>

A third system operating in Memphis fifty years after *Brown* is a mostly-White private school system. In the wake of Plan Z, new schools were created to serve White students exiting the city school system. These new schools, some of which had been created by anti-busing organizations like CAB, joined the city's already-existing private schools as a haven safe from Judge McRae's busing orders.<sup>284</sup> The CAB schools disappeared very quickly, as was typical for private schools elsewhere created in response to busing; by the end of the first full school year under Plan Z, they

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277. Herenton, *supra* note 25, at 53 tbl.III.

278. TENN. DEP'T OF EDUC., MEMPHIS REPORT CARD 2004 (2004) [hereinafter MEMPHIS REPORT CARD 2004], available at <http://www.k-12.state.tn.us/rptcrd04/system.asp>.

279. *Id.* This statistic was determined through a school-by-school search on the Tennessee Department of Education's website.

280. *Id.*

281. TENNESSEE DEP'T OF EDUC., SHELBY COUNTY REPORT CARD 2004 (2004) [hereinafter SHELBY COUNTY REPORT CARD 2004], available at <http://www.k-12.state.tn.us/rptcrd04/system.asp>.

282. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (attempting to improve U.S. primary and secondary schools by increasing the standards of accountability for states, school districts, and schools, requiring frequent testing, setting benchmarks below which a school is deemed "failing," and allowing parents greater flexibility in choosing their child's school).

283. Compare *id.* (showing a dropout rate of 5.9% and a graduation rate of 87.6%), with MEMPHIS REPORT CARD 2004, *supra* note 278 (showing a dropout rate of 19.8% and a graduation rate of 60.4%).

284. See Biles, *supra* note 75, at 479 (noting that twenty-six CAB "education centers" and fifty new private schools sprang up from September 1972 to August 1973).

were out of business.<sup>285</sup> However, a second group of private schools created in busing's wake and directly affiliated with large local churches continued to thrive in Memphis as in no place else. Three brand new private school systems—Southern Baptist Educational Center, Frayser Baptist Schools, and Briarcrest Baptist School System—survived the first few difficult years and quickly became an institutionalized part of the Memphis schooling scene.<sup>286</sup> By combining the schools with churches on a single campus, these systems had little choice but to continue operating.<sup>287</sup> Many of these schools continued to thrive in 2004 as part of what is the most segregated system of private schools in the country.<sup>288</sup> In 1990, the White-to-Black ratio in Memphis private schools (13.6:1) was nearly twice as high as that of the second most segregated private school system.<sup>289</sup>

Thus, even fifty years following *Brown*, the majority of schools in the Memphis area—city, county, and private—remained racially identifiable. The promise of *Brown*, an end to separate and unequal education, seems to have evaded Memphis entirely. However, it is not enough to simply declare that segregation persists in Memphis. The relevant questions are: is persistent segregation a problem?; could Memphis's segregated schools of the 21st century have been avoided?; and what can the Memphis school desegregation narrative teach us today, in Memphis and elsewhere?

### Conclusion & Evaluation

Whereas the primary directive of *Brown* was to end the legal mandate of segregated schools, the issue in 2008 is no longer the eradication of de jure segregation (except in districts still not declared unitary). The legal regime struck down by *Brown* is gone, even if its effects continue to plague society. Thus, the question today is whether school districts ought to pursue diversity with the goal of integrated classrooms and schools. Underlying this is another question: is persistent de facto segregation, such as exists in Memphis, bad?

A multitude of social science and educational research suggests that racially integrated schools provide significant social

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285. *See id.* at 479–80.

286. *See* James E. Ryan, *Brown, School Choice, and the Suburban Veto*, 90 Va. L. Rev. 1635, 1636–38 (2004).

287. *Id.*

288. *See* REARDON & YUN, *supra* note 15, at 27 tbl.12.

289. *Id.*

and educational benefits to students and communities.<sup>290</sup> Among the benefits are more tolerant viewpoints concerning individuals of different racial groups and lower levels of intergroup prejudice.<sup>291</sup> In addition, studies have shown increased academic achievement, higher graduation rates, and even higher adult incomes for African Americans who learn in integrated environments.<sup>292</sup>

In addition, as local schools have a direct impact on the local economy, racially isolated schools can have a negative effect on the economy of a city. As long ago as 1978, the trickledown effect of a large segment of the city abandoning the city's primary school system was identified in an editorial in *The Commercial Appeal*.<sup>293</sup> When Whites leave the school system majority Black, the system loses broad public support. As a result, funding suffers. When the system is underfunded, it is unable to provide as high a quality of education and the city's labor pool is under-educated. Left with an unskilled labor pool, without workers who can be trained quickly and effectively, industry is unlikely to invest in the city. Without investment, the city cannot grow economically or culturally.<sup>294</sup>

By this argument, persistent segregation in the Memphis City Schools is a bad thing for all Memphians. Indeed, as the city lost its White students—and the per pupil funding those students brought with them—the schools lost something less tangible and immeasurably more important: local government's traditional willingness to support public education. Today, the Memphis City

290. See, e.g., Nancy ST. JOHN, SCHOOL DESEGREGATION: OUTCOMES FOR CHILDREN 83 (1975); Sandra B. Damico et al., *Effects of School Organizational Structure on Interracial Friendships in Middle Schools*, 74 J. OF EDUC. RES. 388, 390–92, (1981); Vladimir T. Khmelkov & Maureen T. Hallinan, *Organizational Effects on Race Relations in Schools*, 55 J. OF SOC. ISSUES 627, 639 (1999); Janet Ward Schofield & H. Andrew Sagar, *Peer Interaction Patterns in an Integrated Middle School*, 40 SOCIOLOGY 130, 136 (1977).

291. See, e.g., Damico, *supra* note 290, at 90–92.

292. See LAWRENCE A. CREMIN, POPULAR EDUCATION AND ITS DISCONTENTS 94–95 (1990) (citing a study found in Jomills Henry Braddock II et al., *A Long Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 PHI DELTA KAPPAN 259, 264 (1984)); Kathryn M. Borman et al., *Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools*, 41 AM. EDUC. RES. J. 605, 626–28 (2004); Stephen J. Caldas & Carl Bankston III, *The Inequality of Separation: Racial Composition of Schools and Academic Achievement*, 34 EDUC. ADMIN. Q. 533, 553–54 (1998); Thomas D. Cook, *What Have Black Children Gained Academically from School Integration? Examination of the Meta-Analytic Evidence*, in U.S. DEPT. OF EDUC., SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT 6, 40–41 (1984); Molly Townes O'Brien, *Brown on the Ground: A Journey of Faith in Schooling*, 35 TOL. L. REV. 813, 816, 835 (2004).

293. See *Schools Are a Mirror*, COM. APPEAL (Memphis, Tenn.), Mar. 26, 1978 (on file with Memphis Public Library).

294. *Id.*

Schools serve more than twice the number of students as the Shelby County Schools and local private schools combined.<sup>295</sup> All Memphians, regardless of whether their children attend the city schools, have a stake in seeing these students succeed.

In evaluating the Memphis desegregation narrative, one must ask whether today's racially isolated school situation could have been avoided. Despite a somewhat promising, if slow, beginning, during which leaders from both the White and African-American communities allowed for gradual and peaceful change, the Memphis school desegregation had a variety of factors working against it. Some were unique to Memphis—the city's sprawling geography and failure to consolidate the city and county school systems, for instance, made the practicalities of desegregation extraordinarily difficult. In addition, a low local tax rate enabled many parents to afford private schools, making those schools a more widespread option than in other cities.<sup>296</sup>

Other factors, however, would be relevant to any effort to pursue social change in a reluctant community. Most significantly, the city's most visible leaders never embraced the goal of desegregation and instead consistently alluded to the maintenance of law and order. Any action taken was due to a court directive rather than because the substance of that order was intrinsically right. The concerted effort to keep Memphis from becoming a national symbol of obstruction like nearby Little Rock may have succeeded in a peaceful start to desegregation, but the city's delay in taking action and failure to do any more than minimally required signaled to the greater community that resistance was to be tolerated and even endorsed. Then, as the desegregation era intensified, Memphis was led by Henry Loeb and Wyeth Chandler, two openly segregationist mayors, who made meaningful desegregation even less likely. Rather than preparing Memphians for desegregation and allowing for the progress ordered by the district court, these mayors joined multiple members of the School Board to make compromise impossible, stoking racial conflict. In this context, the crises of the late 1960s seem unavoidable, beginning with the election of Loeb in 1967—with virtually no Black votes—and culminating with the

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295. Compare MEMPHIS REPORT CARD 2004, *supra* note 278 (showing total students of 115,928), with SHELBY COUNTY REPORT CARD 2004, *supra* note 281 (showing total students of 46,886), and Wendi C. Thomas, *Separateness as a Choice Opens Even Wider Gaps*, COM. APPEAL (Memphis, Tenn.), May 16, 2004, at A1 (reporting the student population of private schools in Shelby County to be 28,000).

296. See *id.* at A1.



assassination of Dr. King amidst the sanitation workers' strike. Indeed, those crises uncapped all efforts to move desegregation forward slowly and peacefully by helping to radicalize the African-American community and by removing the incentive of avoiding negative publicity from the White leadership's calculations.

Further, the adversarial imperative of litigation discouraged the sides from seeking common ground. The parties did in fact reach a compromise without court intervention in 1966, but the compromise quickly unraveled when it became clear to the plaintiffs that the Supreme Court would demand more than the token desegregation the Board was willing to offer.<sup>297</sup> As busing became imminent, both sides proposed extreme positions. The district court was forced to settle on a plan that satisfied neither side; the Board thought Judge McRae had gone too far, while the plaintiffs thought he had not gone far enough.<sup>298</sup>

The adversarial positions spilled outside the courtroom and into the community, further impeding positive progress and community reconciliation. Of course, the magnitude of the social change being pursued, coupled with the complexities of the litigation, drowned out the interests of the children most directly impacted by the decision. Not until the movement toward Optional Schools in the 1980s were educational considerations taken into account.<sup>299</sup>

In addition, the Memphis litigation—indeed, school desegregation litigation generally—demonstrates the practical limits of court-ordered social change. Courts are very good at shifting the field of legal legitimacy, and *Brown* is perhaps the most important example of this in American history. However, without the ability to do more than evaluate school board decisions or select among choices proposed by the respective parties, the district courts proved largely impotent in the face of community resistance. This was particularly troublesome in the unavoidably fuzzy area of school desegregation. Whereas in the context of desegregating public facilities, plaintiffs could focus on the legal principle involved—an end to segregation. When it came to schools, desegregation advocates were forced to push for remedies, such as busing. As Memphis demonstrates, the shift in the debate, from one about desegregation to one about busing, proved to be the death knell for effective integration in the Memphis City

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297. See *supra* text accompanying notes 156–64.

298. See *supra* Part IV.

299. See McRae, *supra* note 158, at 128.

Schools.

Finally, the inability of courts to control events occurring outside both the courtroom and classroom further evidenced the limits of litigation. As the district court handed down its orders in a virtual legal vacuum, the community affected by those orders simmered with racial divisiveness. The election of Mayor Loeb in 1967 without any Black support, the sanitation workers' strike in 1968, and the assassination of Dr. King in Memphis probably had more of an impact on the desegregation of the city schools than any court order. Unable to account for these events—events that unfolded more quickly than any litigation could—the district court was prevented from assessing the success of its directives.

As desegregation orders become history, school districts are left to choose one of two routes: either they may take affirmative steps to maintain some level of integration, or they may do nothing and allow schools to “naturally” re-segregate. For those districts seeking to maintain the integration they were required to achieve for a half-century, the Memphis narrative from 1961–74 and the resulting inequities that exist today provide a case study of the difficulties of implementing such policies. Most significantly, the community breakdown over busing in Memphis and the White community's abandonment of the city schools show the dangers of allowing the focus of the debate to shift from the educational, social, and economic benefits of integrated classrooms to the methods of implementation. Busing for the sake of achieving racial balance will always be unpopular among parents. In contrast, integration for the sake of improving educational outcomes is far more likely to be embraced.

Ultimately, the Memphis story returns to obstructionist leaders and a highly racialized community. Perhaps Memphis could have succeeded if it had a leader during the *Northcross* era who was unafraid of embracing the principle of desegregation, even tepidly. This could have only been accomplished through years of calling for not only order, but justice in implementing *Brown*, arguing to the community that desegregation was not only constitutional, but also good for the future of the city.

As Memphis continues to confront issues that tend to divide the community along racial lines, the *Northcross* era provides useful lessons to help prevent a repeat of the breakdown that produced the racially isolated schools of today. First, leadership matters. Second, litigation is limited in its ability to impose social change on an unwilling community. Finally, it takes planning and coordination among parties with disparate interests to move a city

forward sensibly and peacefully.

