Unwillingly to School*

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The school busing crisis has been continuing for over ten years, and it shows no signs of abating. Massive mandatory busing has been ordered recently by courts in Los Angeles, Columbus (Ohio), and St. Louis; and major busing lawsuits are still pending in San Diego, Cincinnati, Kansas City (Missouri), and Indianapolis. Clearly, court-ordered busing is alive and well. This is a remarkable achievement for perhaps the most unpopular, least successful, and most harmful national policy since Prohibition.

Few would disagree with the Supreme Court's judgment that intentional segregation of the schools is prohibited by the United States Constitution. Moreover, racial isolation and discrimination do exist in American society and in the schools; and these conditions should be combated wherever they are found. But there is disagreement with mandatory busing, the method chosen by the courts to remedy segregation. Just as Prohibition was not a feasible and equitable remedy for alcohol abuse, so mandatory busing is not a feasible and equitable remedy for school segregation. Like Prohibition, the policy is not merely ineffective; it is counterproductive.

How did the courts come to adopt such a disastrous policy? Although court-ordered busing is only one example of the trend toward an activist judiciary aiming for social reform, there is no question that studies and testimony by social science experts have played a crucial role in its evolution. Social science evidence was used to arrive at early court findings that segregation was harmful to the basic educational and psychological development of children. Social science evidence was also used in later decisions to support desegregation and racial balance as proper remedies for the past harms of segregation—remedies that would improve race relations and offer educational advantages for minority students. Finally, following the failure of early voluntary methods, social

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science evidence was used to argue that housing and school segregation were inextricably bound together, that a neighborhood school policy consequently furthered segregation, and that mandatory busing was the only effective way to achieve desegregation.

Unfortunately for the American public, much of this social science evidence and testimony was based on unsound or incomplete research. All too often desegregation experts were strong political advocates of mandatory busing, and, in their zeal to convince courts to order busing, they overlooked serious flaws in their research.

At this point, however, there is overwhelming social science evidence that mandatory busing has failed as a feasible remedy for school segregation. It has done so, first, because public opposition and white flight have been so extensive as to increase, rather than to decrease, racial isolation in many cities. Second, desegregation has not produced the educational and social benefits that were promised. Not only does it fail to truly desegregate, it also fails to remedy the presumed effects of segregation.

Mandatory busing fails, third, simply because it is not an equitable remedy. By rejecting a neighborhood school policy on the grounds of housing segregation, the courts deprive parents of their traditional right to choose schools close to home. Since it is unreasonable to hold schools accountable for housing patterns, the extent of the remedy far exceeds the scope of the violation.

The basic problem is that the courts have not yet accepted this evidence. Known facts are frequently obscured by social scientists and civil rights leaders who equate any criticism of mandatory busing with racism. Has not the time come to acknowledge these facts, to admit the failure of mandatory busing, and to find ways to end this harmful policy? Let us therefore review recent evidence on the effects of mandatory busing policy.

Los Angeles and White Flight

After some ten years of legal battle in the state courts, mandatory busing began in Los Angeles in the Fall of 1978. The plan was limited to grades 4 through 8 and the effects were devastating on those schools in the plan. An astonishing 60 percent of the 20,000 white students to be bused never showed up at their minority receiving school, and some individual minority schools lost over 80 percent of the bused white students. Most of these white students moved to the suburbs or transferred to private schools. As a result, most of the minority receiving schools remained seg-

regated. If these figures sound shocking, consider the geography of Los Angeles: white and minority concentrations live so far apart that the average bus ride was nearly fifty minutes one way, and some bus rides actually lasted ninety minutes!

In 1980 the state court ordered an expanded busing plan to include grades 1 through 9 in spite of this white flight (which I documented for a state court in 1979), and in spite of state law requiring only "reasonable and feasible" desegregation plans. The court acknowledged the existence of white flight by allowing for a white flight factor of *up to 50 percent* when designing the 1980 plan. This led to one of the more bizarre desegregation plans in the history of school busing: in some cases, five or more white schools had to be clustered with a single minority school in order to end up with a projected white enrollment of at least 40 percent, which was the desegregation definition used by the court.

Notwithstanding these extreme steps, the 1980 plan still failed to desegregate most minority schools included in it. More than half ended up with white enrollments under 30 percent, and most of the rest had less than 40 percent white enrollments. A high price was paid for this token increase in integration. Between 1976 (when the controversy started) and 1980, Los Angeles enrollment declined from 219,000 white students (37 percent) to 125,000 white students (24 percent). About half of this loss was due to normal demographic factors, such as declining white births. But nearly 40,000 white students fled the district because of busing.

Fortunately, this new plan did not last. On April 20 of this year, mandatory busing came to an end in Los Angeles, the first time this has happened in a major city with court-ordered busing. Los Angeles had been operating under a state Supreme Court order requiring desegregation regardless of the cause of segregation. In 1979 the voters of California passed Proposition 1, which prohibits court-ordered busing except when ordered as a remedy for violating the federal Constitution. A state appeals court has ruled that Proposition 1 is constitutional and, moreover, that Los Angeles had not violated the federal Constitution by intentional segregation policies. Many experts were shocked when the state Supreme Court, which is responsible for California's busing policy in the first place, let the appellate ruling stand—no one more so than the trial court judge who had fashioned the Los Angeles plan. He promptly resigned.

Unfortunately, this does not end the matter. A new lawsuit has been filed in the federal courts by the NAACP and, if recent cases

are any indication, the federal courts could very well reinstate busing in Los Angeles in the future. In fact, the federal district judge who will hear this new case tried to prevent the dismantling of busing just two days before it was to end, on the grounds that the NAACP's claim of intentional segregation "had merit." The trial court was overruled by the 9th Circuit Court of Appeals on procedural grounds, but a final determination will not be made until a full hearing is held.

White flight from mandatory busing is not confined to Los Angeles. Indeed, massive white flight has occurred in nearly every central city undergoing court-ordered mandatory busing. But the federal courts have paid little attention. White enrollment in Boston public schools, which began busing in 1974, has dropped from 57 percent to only 35 percent today; white enrollment in Denver schools has likewise declined from 57 to 41 percent over a similar period. Although some of this white decline is due to natural demographic factors, analysis shows that about half of it has been caused by the busing.[1]

These facts were before the Supreme Court prior to their recent decisions in Columbus and Dayton (Ohio); but mandatory busing plans were approved for these cities nonetheless. Dayton public schools have dropped from 53 percent white to 43 percent since busing began; Columbus is headed in the same direction, having lost 17,000 white students (out of 64,000) in the three years since they were ordered to begin busing.

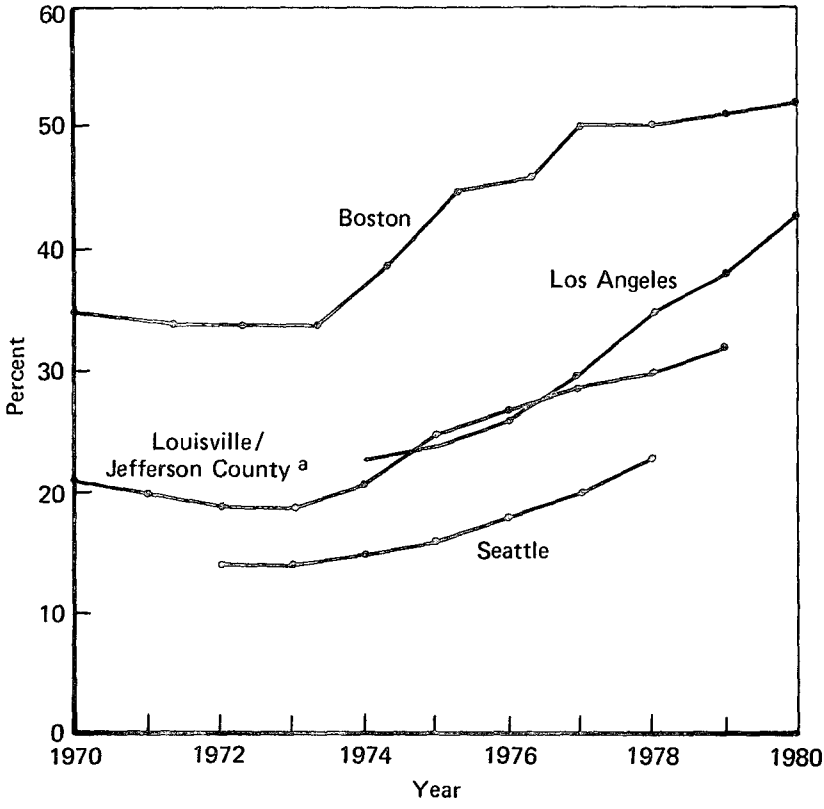
In recent years a significant fraction of fleeing students, perhaps up to half, have done so by transferring to private schools. In some instances this has contributed to a reversal in the decline in private school enrollment, and in some cities it has produced significant increases in the share of all white students enrolled in private schools (see Figure 1). In Los Angeles, for example, the proportion of all white students in private schools increased from 23 percent in 1974 to 43 percent in 1980. Between 1978 and 1980, the first three years of busing in Los Angeles, private schools experienced a massive increase of over 20,000 students. In Boston, the share of all white students enrolled in private schools has reached 52 percent, up from 34 percent before busing.

The trends in private school enrollment can only be reinforced by Professor James Coleman's new study, which finds that even

1. *See* David J. Armor, "White Flight and the Future of School Desegregation," in Stephan and Feagin, *School Desegregation* (New York; Plenum, 1980).

Figure One

Percent of all white students in private schools



[a]Metropolitan plan

after controlling for the socio-economic background of parents,[2] private schools produce more academic gains than public schools. The danger of continued mandatory busing therefore is an acceleration of racial segregation, not only between city and suburb, but between predominantly minority public schools and predominantly white private schools.

Alas, a number of social scientists have contributed to confusion about the white flight phenomenon. When Professor Coleman published a major study concluding that school desegregation

2. James Coleman, Thomas Hoffer, and Sally Kilgore, *High School and Beyond: Public and Private Schools* (The National Opinion Research Center; Chicago, March 1981).

policy was increasing white flight and resegregation, Reynolds Farley of the University of Michigan and Christene Rossell of Boston University issued immediate attacks claiming that their data refuted Professor Coleman. When Mr. Farley and Miss Rossell had time to re-analyze their data with more careful techniques, they both concluded that there was white flight after all, but it was limited to a one-year effect. The Los Angeles experience will surely put to rest the fallacious claim that white flight is only a minor phenomenon, limited to a small one-time impact.

Busing and Remedy

To justify mandatory busing as a feasible remedy for school segregation, the courts must demonstrate that it has two properties. First, it must truly desegregate by reducing segregation where other methods fail. It is clear from the experience of Los Angeles and many other school districts that white flight nullifies the first justification.

The second major justification for mandatory busing plans is to eliminate the *effects* of past discrimination and isolation, and to provide equality of educational opportunity for minority students. According to most court findings, which are backed up by numerous social science studies, equality of opportunity can only be accomplished by providing a desegregated education. The predominant view here, from the Brown decision to the present day, is that segregated schools were harmful for black students by perpetuating prejudice and by leading to a poor self-concept and lower academic performance. Desegregation and school busing were intended not only to remedy racial isolation itself, but to remedy the *effects* of isolation by improving both race relations and the educational performance of minority students.

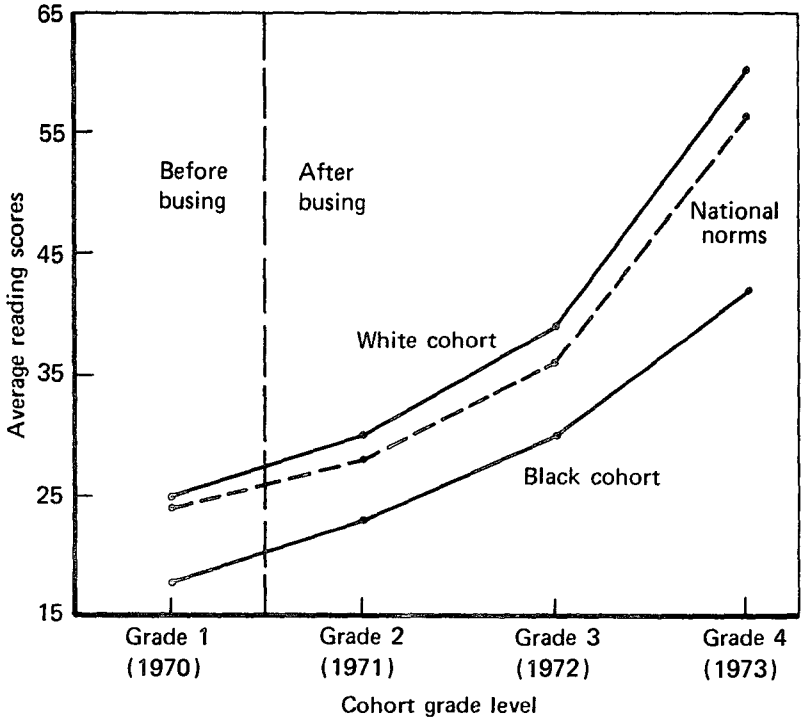
There is no question that minority groups have suffered from prejudice and discrimination and that the academic performance of minority students frequently falls behind that of white students. We certainly need programs to combat these problems. But there is now an abundance of evidence that desegregation *per se* does not improve either race relations or the academic performance of minority students. Again, let us examine the evidence.

A doctoral dissertation by Ronald Krol reviewed 129 studies of the effects of desegregation on minority student achievement.[3]

3. Ronald A. Krol, "A Meta Analysis of the Effects of Desegregation on Academic Achievement", *The Urban Review*, Vol. 12, No. 4, (1980).

Figure Two

Pasedena reading achievement changes after busing



This study differs from several other recent reviews of desegregation and achievement by estimating the *size* of the desegregation effect. For example, one recent review claimed a positive effect of desegregation on achievement but did not estimate the size of the effect.[4] In contrast, Dr. Krol found that for those studies where there was a segregated comparison group, the net achievement gain of desegregated minority students was small and not statistically significant.

One illustration of this lack of effect is shown in Pasadena, California, which was one of the first cities to experience massive court-ordered busing. A 1974 study showed that, after four years of desegregation, the difference in achievement between minority students and white students (and the national norms) remained

4. Robert Crain and Rita Mahard, "Desegregation and Black Achievement: A Review of the Evidence" *Law and Contemporary Problems*, 42 (1980).

relatively constant. Both minority and white students showed normal increases in learning, but desegregation did not close the gap. (See Figure 2.)

School busing is also supposed to remedy the effects of segregation by increasing positive racial contact, reducing prejudice, and thereby improving race relations in general. Again, there is no consistent evidence that this has happened in desegregation programs.

One of the more comprehensive reviews of desegregation and race relations was conducted by Professor Nancy St. John in 1975.[5] She found that the effects of desegregation on several measures of race relations were mixed. Some studies showed positive effects, some negative effects, and some no effect at all. When the studies were restricted to those with more rigorous research designs, a majority of the studies actually showed that desegregation had negative effects on race relations.

Exactly why school desegregation might have harmful effects on race relations is indicated in an important new study of the Indianapolis schools by Professor Martin Patchen.[6] He found that white high school students experienced more unfriendly actions from black students than vice versa, although a majority of students of both races described relations as "fairly" or "very" friendly. For example, during one semester 58 percent of white students reported attempts by black students to extort money; 55 percent reported being blocked in the hallway by black students; and 51 percent experienced threats of harm from black students. The same percentages for black students, reporting unfriendly actions from white students, are 11 percent, 26 percent, and 16 percent, respectively.

Professor Patchen notes that these acts of aggression were not necessarily racial in purpose; black students tended to report more aggression toward *both* black and white students. For example, 34 percent of the black students reported hitting a white student first, but 33 percent of the black students also reported hitting a black student first. The comparable figures for white students are 18 percent (hitting a black student first) and 22 percent (hitting a white student first). Thus both races tend to be as aggres-

5. Nancy St. John, *School Desegregation: Outcomes for Children* (New York; C. Wiley & Sons, 1975).

6. Martin Patchen, *Black-White Contact in Schools: Its Social and Academic Effects* (West Lafayette, Inc., Purdue University Press, 1981 [in press]).

sive with their own race as with the other race, but the level of aggression is higher for black students than for white students.

Of course, these findings do not mean that desegregation is inevitably harmful to race relations. There are many settings and circumstances in which racial contact is beneficial. But they do underscore the fact that we do not fully understand the dynamics of racial contact and conflict, suggesting that the way desegregation is being implemented in schools today may well produce more damage than benefit. Those social scientists who encourage courts to order mandatory busing, on the grounds that it will improve race relations, are ignoring the significant number of studies showing negative impact.

Finally, is mandatory busing equitable? This raises the relationship between the scope of the segregative violation and the extent of the remedy.

In the south, where state-mandated dual schools existed, many lower courts concluded that school segregation and other governmental actions had contributed to housing segregation, and that in consequence a neighborhood school policy would rest upon illegal housing segregation. Although the Supreme Court never ruled on this issue explicitly, it was unwilling to give blanket approval to a neighborhood school policy that allowed existing black and white schools to remain segregated. Moreover, voluntary transfer plans proved capable of desegregating white schools but not black schools. So mandatory busing eventually came to be viewed as the only way to desegregate black schools. Of course, in many cities white flight has proved this view wrong; but the extent of white flight was not anticipated when mandatory busing was first proposed.

Some social scientists dispute the courts' view that housing segregation has been influenced significantly by school segregation, and challenge the legal thesis that, but for school segregation, housing segregation would be nonexistent or considerably reduced.[7] The most compelling evidence that housing segregation does not depend on the dual school system comes from many northern and western cities. Housing segregation exists there without any history of state-mandated school segregation. Without the legal and social science thesis connecting school and hous-

7. The most comprehensive critique of this thesis appears in a new book by Professor Eleanor Wolf, *Trial and Error* (Detroit, Wayne State University Press, 1981).

ing segregation, however, the courts have little justification for disapproving a neighborhood school policy.

In northern desegregation cases where state-mandated segregation has not existed, the mismatch between violation and remedy becomes even more extreme. In cases like Denver, Omaha, Milwaukee, or Los Angeles, the courts claim that constitutional violations arise from such policies as voluntary transfers, building schools in expanding neighborhoods that were predominately white or black, gerrymandering attendance boundaries, allowing optimal attendance zones, and so forth. Some of these policies do have significant segregative effects; some do not. But there is no basis whatsoever for assuming that these specific violations are responsible for the extensive housing segregation that exists in these districts. The courts rarely design a remedy that merely corrects those specific violations shown to have segregative effect. Instead, they adopt district-wide mandatory busing on the implausible grounds that these specific violations *might* have had a segregative effect elsewhere in the district or on housing choices. Again, the neighborhood school policy is abandoned in these cases and a remedy imposed that intends far greater desegregation than justified by the known violations.

In citing these studies, I do not mean to imply that social scientists are in agreement about the lack of educational and social benefits from desegregation, the possible harmful effects of desegregation on race relations, or the causes of housing segregation. These controversial issues are still being debated (although the number of scientists critical of mandatory busing is growing). The heat of that controversy is best illustrated by a report from the National Academy of Education, which brought together the views of eighteen distinguished experts, including some critical of mandatory busing.[8] According to a *New York Times* story, the fact that a number of the panelists criticized manadatory busing delayed the publication of the report and prevented its wide distribution by the U.S. Department of Health, Education, and Welfare.[9]

Studies like the ones cited here raise more than a reasonable doubt that mandatory busing is an effective remedy for the past harms of school segregation. In my opinion, the evidence over-

8. "Prejudice and Pride: The Brown Decision after Twenty-five Years." (National Academy of Education, U.S. Department of HEW, 1979).

9. Gene I. Maeroff, "Delay by HEW in Issuing Report on Desegregation is Questioned," *New York Times*, May 23, 1979.

whelmingly supports the conclusion that mandatory busing fails as a feasible and equitable policy.

Remedies For Segregation

Criticism of mandatory busing does not mean, however, that government agencies should abandon desegregation programs, or that parents and children should not participate in them. Basic American values demand that we work for an integrated society. But those same values also determine the legitimate methods for ending segregation. In the absence of evidence that mandatory busing works, it is neither just nor equitable for courts to impose it on those citizens who oppose it, whether minority or white. A court-imposed remedy is stripped of its legitimacy when the facts show that it is not a remedy at all. It then becomes an improper social reform by courts, imposing their own view of how schools should be run.

Few intelligent laymen will dispute the failure of school busing policies. The hard problem is how to stop it. Not many national policies have withstood the degree of sustained public opposition that has been directed at busing. Indeed, a recent Gallup Poll shows that nearly three-quarters of the American public is opposed to mandatory busing for racial balance—a figure that has not budged for ten years.[10]

The first solution that comes to mind is a constitutional amendment to prevent busing. This is a perennial favorite of many members of Congress. But the approach is too narrow and in fact exacerbates the very condition to be corrected. The busing crisis was not created by some clause in the Constitution which now must be removed; it was caused by an activist judiciary that overstepped the proper bounds of judicial review. If we amend the Constitution for every social issue improperly legislated by the courts, the Constitution will become patchwork law rather than statement of basic principles. Since this approach would bypass the legislative process, moreover, it may actually contribute to judicial supremacy by offering yet another amendment for the Court's interpretation. If the Constitution is to be amended, we must address the fundamental issue—the proper limit of judicial authority—rather than any single manifestation.

10. Gallup Poll, "The Gallup Report," No. 185, (Princeton, N.J., February 1981).

Another solution would be for the Supreme Court itself to change its policy on busing. There are several Justices, including Justices Powell and Rhenquist, who seem to want a complete review of school desegregation remedies.[11] But the Court's recent decisions on Columbus and Dayton, Ohio, suggest that the majority is not ready to abandon mandatory desegregation by busing. New appointments by President Reagan could have some impact, but to an unknown degree. After all, long-standing Supreme Court policies tend to have considerable staying power, independent of new justices on the panel. Like Senator Moynihan, I believe that the Supreme Court will eventually correct its mistake on busing.[12] But if it takes the Court as long to correct this mistake as it did to correct its separate-but-equal policy, nearly sixty years, our public schools may never recover.

Some legal scholars claim the courts became involved in school segregation only reluctantly, after legislative bodies had failed to enforce the 14th Amendment. If so, perhaps the best solution is for Congress to take the initiative, and insist that Congress should have a role in enforcing the 14th Amendment, particularly in designing feasible remedies for constitutional violations by school districts. The courts would still determine whether a constitutional violation had occurred and would select a remedy—but only from those remedies that Congress has determined to be feasible and equitable for any given type of violation. This kind of division of power is found in other branches of law, where legislation sets the type of penalty appropriate to a particular infraction, and the courts decide on innocence or guilt and select the penalty.

Some constitutional experts believe that Congress has the authority to pass such legislation under Section 5 of the 14th Amendment, which empowers Congress to enforce the Amendment, and under Article III, Section 2, which states that "The Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such exceptions, and under such regulations, as the Congress shall make."[13] Congress has never attempted to use these combined powers in order to limit the Supreme Court's reformist posture in remedies for 14th Amendment violations.

11. *See* their dissent in Estes *vs.* Metropolitan Branches of Dallas NAACP, 444 U.S. 437, (1980).

12. Daniel Patrick Moynihan, "What Do You Do When the Supreme Court is Wrong," *(The Public Interest*, No. 57, Fall, 1979).

13. See Charles S. Rice, *Reagan and the Courts*: *Prospects for Judicial Reform*, (Washington, D.C., Washington Legal Foundation, 1980).

If Congress decides to fashion legislation restricting the Court's remedial authority in school desegregation cases, several features might be incorporated to enhance success.[14] First, Congress should consolidate social science evidence showing the feasibility of various types of remedies for school segregation. This evidence can serve as findings of fact to support new legislation defining remedies. Such remedies as voluntary transfers, neighborhood school policies, special magnet schools, and compensatory programs might be found acceptable; mandatory busing to non-neighborhood schools could be found neither feasible nor equitable. Second, new legislation should represent an affirmative step to acknowledge the existence of constitutional violations and to address the need for feasible remedies, rather than legislation simply opposing mandatory busing. Negative legislation undermines the division of power principle by merely challenging the Supreme Court while ignoring Congress' obligation to enforce the Constitution under Section 5 of the 14th Amendment. Third, the legislation should tailor the remedy to fit actual violations; existence of violations affecting only some schools should not be used as a "trigger" to impose a district-wide desegregation plan. Finally, the legislation should require the courts to use the new law during the remedial phase of a trial, invoking congressional power under Section 2, Article III of the Constitution.

There are likely to be arguments over whether Congress has the authority to regulate remedies for 14th Amendment violations. Some will say that the Supreme Court would declare such a law unconstitutional. But such arguments miss the essential point. At its foundation, the busing crisis amounts to excessive court intervention to eliminate the neighborhood school and to substitute a social policy of racial balance. If Congress devises a fair and reasonable division of powers for enforcing the 14th Amendment, and the Supreme Court declares the law unconstitutional, then Congress has a very strong case for a new amendment putting this division of power into the Constitution. Such an amendment would have the virtue of redressing a fundamental problem—excessive judicial intervention in social policies—rather than merely opposing the Supreme Court on a single issue.

14. Some of these ideas were influenced by discussions with Donald Lincoln, of Jennings, Engstrand, and Henrikson, San Diego; and Professor Mark Yudof, University of Texas Law School, Austin.

Investigating the FBI

DAVID MARTIN

At the end of March 1971, as a result of the burglary of the FBI office in Media, Pennsylvania, the American public heard for the first time of the existence of COINTELPRO, the FBI's secret "Counterintelligence Program" directed against subversive and extremist elements and agents of hostile foreign powers. The burglars, who were never apprehended or identified but who were almost certainly inspired by anti-Vietnam war sentiments, sent copies of documents bearing on COINTELPRO to selected media offices. The program itself was terminated the following month. In 1972 and 1974, as a result of Freedom of Information Act suits filed by NBC-TV reporter Carl Stern, the American media featured further revelations about the activities conducted by the FBI within the context of COINTELPRO.

These and other revelations relating to mail openings, electronic surveillance, and the use of informants, led to extensive hearings by the Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the so-called Church Committee). In time a multi-volume report that ran to thousands of pages was produced. As a result, the FBI was pilloried by Congress and the press, with a serious effect on the FBI's morale and operational capabilities.

Now that the heat and the clamor have died down, perhaps it may be possible to re-examine the entire question of COINTELPRO in a more dispassionate manner. COINTELPRO lasted from 1956 to 1971 and, covering different periods of time, targeted the Communist Party USA; the KKK, the domestic Nazis and other White hate groups; Black extremist organizations; the Trotskyite Socialist Workers' Party; the radical core of the New Left; and certain espionage operations and hostile foreign-based intelligence services. It was an activist program which involved not only the gathering of intelligence, but also infiltration plus a variety of stratagems aimed at the disruption and exposure of targeted organizations and the "neutralization" of targeted individuals—that is, rendering them politically ineffective. Public perception of COINTELPRO was, however, warped by media and committee bias.