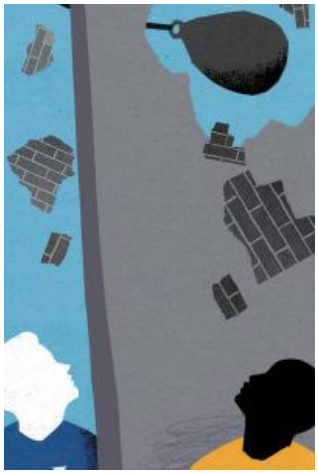
Commentary

April 14, 2014

In the Courts, an Imperfect Solution to Segregation's Long Shadow



Justin Rentoria for The Chronicle Review

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By Carlos A. González

Alabama, Tennessee, Mississippi, and Louisiana have paid more than $1.5-billion to resolve decades-long cases challenging the existence of segregative policies in their systems of public higher education. These cases were a victory for the plaintiffs and brought about, in part, by the Supreme Court's 1992 landmark decision in *United States v. Fordice*. That ruling requires states that maintained dual systems of higher education to eliminate or reform policies traceable to the segregated past if those policies continue to foster separation and persist without sound educational justification.

When the court announced its decision, Justice Antonin Scalia wrote a partial dissent, saying that "nothing good" for students or institutions would come from *Fordice* but "years of litigation-driven confusion and destabilization in the university systems of all the formally *de jure* States." He was not entirely wrong.

These cases invariably create tensions within postsecondary systems when supporters of historically black colleges and universities vie for increased appropriations and expanded programmatic missions through the courts because in their view the systems will not address longstanding deficiencies within their established procedures. Given the success supporters of HBCUs have thus far enjoyed, it is understandable that they turn to the courts. In every instance in which a lawsuit has gone to trial challenging continuing segregative effects, the postsecondary system has been found liable, and costly remedies primarily focused on enhancements to historically black colleges have been the result.

Maryland is the latest state whose public higher-education system has undergone the rigors of a *Fordice* challenge. Late last year, the court determined that the state's system had failed to divest itself of segregationist policies that encourage unnecessary program duplication between Maryland's historically black colleges and nearby majority-white institutions. The court and the parties are now wrestling with the nature of the remedy to be imposed.

States that seek to avoid the perils and uncertainty of litigation over past racially tainted practices should actively confront the unfortunate legacy of segregation. Doing so ensures that those responsible for a system's management maintain some control over the inevitable changes that will come.

Judicially required remedies generally include mission and curricular expansions and new and refurbished facilities as well as faculty and student recruitment and retention programs. Additionally, majority-white institutions in geographic proximity to historically black colleges have been either merged with those institutions—as happened even before the *Fordice* decision with the University of Tennessee at Nashville and Tennessee State University, an HBCU—or restricted in the development of new academic programs and the expansion of some existing programs.

Not surprisingly, these remedial approaches have come under attack as either exceeding the requirements of *Fordice* or propping up traditionally black institutions that are better closed than enhanced. Maintaining an HBCU within a postsecondary system is not required by the law, but as Justice Clarence Thomas observed in *Fordice*, it would be ironic indeed "if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges." No court has yet ordered the closure of a historically black college as a remedy in a desegregation case.

Formulating workable remedies is complicated, since the racial imbalance of an institution's enrollment is not itself a violation of the Constitution, and since the traditional tool of school desegregation—student reassignment—is not available in the higher-education context. A successful *Fordice* remedy is one that eliminates tainted policies and expands student choice by creating welcoming educational environments and establishing unique high-demand programs within institutions consistent with sound policy and planning.

Crafting a remedy to eliminate vestiges of segregation is a daunting task, and doing it within the confines of continuing litigation compounds the difficulty. Courts may be ill-equipped to devise comprehensive remedies that have a reasonable prospect of rallying the broad base of support essential for a workable solution. Governing boards and administrators resent the loss of policy and budget control. Legislatures chafe at loss of appropriation oversight. Plaintiffs are often distressed that their efforts result in marginal and inconsequential change.

Add to this mixture of discontent a federal court that is required to act, and soon the destabilization Justice Scalia predicted develops. To avoid that scenario, systems threatened with litigation should confront the issue directly; the alternative is to leave critical aspects of public higher education to lawyers and judges.

The key to a well-crafted remedy is that its obligations are unambiguous. If new academic programs are to be established, those must be explicitly stated. If facilities are to be built or refurbished, they, too, must be specified, as must new faculty development and student recruitment and retention efforts. Failing to be clear will create uncertainty, and uncertainty will create suspicion and litigation. All of this clarity will fail, however, if financial support is not forthcoming. A remedy that is beyond the funding capacity of a state will get nowhere.

And bear in mind that the best remedies are no better than their ability to be put in place. Desegregation lawsuits are preceded by decades of mistrust that will not be readily overcome. Successful remedies include procedures for monitoring compliance, facilitating implementation, and providing periodic progress reports. A monitoring regime tied to specific remedial requirements is the best method for ensuring timely and on-budget policies.

Fordice has created a legal landscape that cannot be ignored. Systems with a history of *de jure* segregation should confront the past and take charge of the changes necessary to bring the system into compliance with the Constitution. Designing a remedial plan intended to remove vestigial policies that impede desegregation is best left to the people who understand the system and the reforms needed. Leaving the job to a judicial process poorly suited to conceive and enact public educational policy does a disservice to the taxpayers who support the system and to the students it was meant to serve.

Carlos A. González, a lawyer in Atlanta, was the federally appointed special master in the Alabama and Tennessee statewide higher-education desegregation cases.

into compliance with the Constitution"

But what does that really mean?

If we proceed to "remove vestigial policies that impede desegregation" then wouldn't that necessarily lead us to consider the elimination of the very institutions which defined and continue to define themselves as segregated entities (e.g. HBCU's) even if current admissions policies do not explicitly segregate (except as measured by the results so obtained)? And....If we are so concerned about the costs and enrollment implications of program duplication, then wouldn't that also compel us to pursue program consolidation?

What if all that happened?

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