

RESPONSE TO GARY ORFIELD

NATHAN GLAZER†

Gary Orfield is to be commended for his indefatigability, indeed his relentlessness, in continuing to pursue an issue of enormous importance on which most of us—analysts, governments, federal, state, and local officials, lawyers, bureaucrats, scholars, and even many erstwhile civil rights activists—have given up.¹ That issue is the desegregation of the American public school and the American neighborhood. No one need argue the importance of this end. Blacks are by far the most segregated of ethnic and racial groups, as Douglas Massey and Nancy Denton demonstrated in their important book *American Apartheid: Segregation and the Making of the Underclass*.²

I feel a special responsibility for bearing with this issue because many years ago I took the position that black separation from whites would in time be mitigated just the way the concentration of first-generation immigrants in urban ghettos was diluted, that indeed the degree of separation of blacks from whites in northern multi-ethnic cities was not much greater than that of European ethnic groups from native whites of longer antecedents.³ I believed—and still in measure do—that black concentration and segregation was based not only on discrimination, public and private, but on the same factors that had created first-generation and maintained second- and third-generation concentrations of European ethnic groups in northern cities. It could be argued in the 1960s and

† Professor of Education and Sociology, Emeritus, Harvard University.

¹ The discussion that follows is a response to Orfield's contribution to the *University of Pennsylvania Law Review* Symposium, *Shaping American Communities: Segregation, Housing & the Urban Poor*, 143 U. PA. L. REV. 1191 (1995). See Gary Orfield, *Housing as a Justification for Resegregating Schools: Consequences of Changing Judicial Interpretations* (April 1995) (unpublished manuscript, on file with author) [hereinafter Orfield, *Housing*]; Gary Orfield, *Housing and the Justification of School Segregation*, 143 U. PA. L. REV. 1397 (1995) [hereinafter Orfield, *Abstract*] (summarizing as an abstract, for the purposes of publishing the Symposium in which this Paper is a part, Orfield's unpublished paper).

² DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

³ See NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* 153-55 (1975). I made my points relying on arguments presented in NATHAN KANTROWITZ, *ETHNIC AND RACIAL SEGREGATION IN THE NEW YORK METROPOLIS: RESIDENTIAL PATTERNS AMONG WHITE ETHNIC GROUPS, BLACKS, AND PUERTO RICANS* 54-77 (1973).

1970s that blacks in northern cities were roughly in the same position as European ethnic groups thirty or forty years earlier.⁴ After all, although there had been blacks in northern cities from their founding, the mass migration of blacks into northern cities did not take place until the 1920s, as mass European immigration was coming to an end. It was not unreasonable to believe in the 1960s, with black migration still going on and with long-established discriminatory patterns being broken by law and social change, that black concentration was a reflection of the recency of their migration. From the northern urban point of view, blacks were still a first- and second-generation ethnic group.⁵

History has shown that this point of view was wrong. In fact, the degree of residential separation of African-Americans is quite out of the ballpark when we compare it with the more modest and temporary concentrations of European ethnic groups.⁶ Perhaps I can defend the error: no one of good will could have predicted in 1965, in the wake of the passage of a major civil rights bill, that thirty years later blacks would be so fully separated from whites. Certainly this situation, responsible for so many ills—the creation in poor black areas of a distinctive and dysgenic culture, even of a separation in language—demands our most intense concern. I agree with Gary Orfield that we have no more serious domestic problem.

I agree, too, with his argument that residential concentration and school concentration are closely related. One leads to the other, and both lead to the same disturbing results. If a school goes mostly black, whites will not be willing to move into the neighborhood, and the school is on the road to becoming all black. If a neighborhood goes mostly black, whites will not be as interested in sending their children to a school in that neighborhood.

There are, nevertheless, a number of points on which I take issue with Orfield. The first is on responsibility, public and private, for segregation. (Decades ago, I tried to reserve the term "segregation" for direct state- or community-ordered or imposed segregation

⁴ See, e.g., Irving Kristol, *The Negro Today Is Like the Immigrant Yesterday*, N.Y. TIMES, Sept. 11, 1966, § 6 (Magazine) at 50, 124 (arguing that, although the "American Negro" suffers problems not faced by "previous 'immigrant' groups," his arrival in the American city gave rise to the same resentment, anxiety, and anger as the arrival of European immigrants did).

⁵ See GLAZER, *supra* note 3, at 133, 138; see also Nathan Glazer, *On "Opening up" the Suburbs*, 37 PUB. INTEREST 89, 94-95 (1974).

⁶ See STANLEY LIEBERSON, *A PIECE OF THE PIE: BLACK AND WHITE IMMIGRANTS IN AMERICAN CITIES* 253-77 (1980).

and to use "concentration" or some other word for those concentrations, often reaching 100%, which were not ordered by any public authority.⁷ This is the distinction that was once made between *de jure* and *de facto* segregation. But we can't argue with word usage. Both "segregation" and "concentration" are now simply "segregation," *tout court.*) Responsibility is important legally because it determines whether and what kinds of remedies can be ordered. It is also important politically and socially. It determines whether those on whom the burden for correcting this matter is placed will view that burden as fair.

So who bears the guilt for this abnormal degree of segregation? Is it public action or private action? If it is private, does that let the public authorities off the hook, does that limit the remedy? For public school segregation, one can almost always make some kind of case that the segregation is the responsibility of public authorities, and this is the kind of case Gary Orfield makes. After all, the school board is a public body, and students are assigned to schools. If the school board uses a simple district-zoning, student-assignment plan and knows that blacks are concentrated, one can argue a case of knowing segregation, even if the plan was in existence long before there were many blacks to be affected by it. If the school board creates a mixed district of blacks and whites, that can also be a case of knowing segregation—they should know, Gary Orfield argues, that black areas expand and whites will leave if there are too many blacks.⁸ If the authorities build a school in a black district because it seems to be needed to relieve overcrowding, that action may be attacked as motivated by a segregatory intent. If they close down schools in black neighborhoods and build only in white neighborhoods because whites won't go to black neighborhood schools (whereas blacks will go to white neighborhood schools), they are clearly discriminating against black neighborhoods, depriving them of schools, and forcing black students to travel further than white students to get to school.

Anyone working in this field will be bemused at the various arguments that have been used to prove public intent to segregate. It is a case of "damned if you do and damned if you don't," in which contradictory actions can both be used to prove segregatory intent. This is not responsibility or fault or blame in the way

⁷ See GLAZER, *supra* note 3, at 130-67.

⁸ See Orfield, *Housing, supra* note 1 (manuscript at 35-50) (discussing the problem of "white flight" and the housing consequences of school location).

ordinary people understand it, and, understandably, if the authorities feel they have been unfairly saddled with responsibility, they will resist remedies that are unpleasant to them.

The legal arguments over school desegregation do not come to grips with the fact that many white parents do want to separate their children from black children, will not be happy if their children go to black majority schools (and this is often, in many school districts, the best one can do in desegregation), and will be worried that, even if blacks are not a majority in schools to which their children are assigned, they will soon become a majority. Their response to attempts to desegregate schools is often to resort to public action, pressuring school boards—in which case, there is a basis for a legal sanction. Far more often, however, they take private action—they move away. Is this a cause for public action? The same motives and fears have led to the same result, but if they act through public bodies, a remedy is available; if they act privately, as they often do, it is harder to see what can be done, but one can go through legal contortions, as described above, to show that the school board should have done something and, if it did nothing, has violated constitutional rights. One might take the position that racist parents should be subjected to some public sanction. But they move away for many reasons. They think the quality of education or discipline in the school will decline. They fear for the physical safety of their children. Or they fear their children will pick up bad language habits. Or maybe they just don't like blacks. How can we separate legitimate reasons for moving away, which make it possible for the black concentration to increase, from purely race-based reasons? Orfield argues we can't, and, therefore, just about anything that creates the black ghetto is constitutionally suspect and some appropriate remedy is required.⁹ That remedy must penalize whites who have moved away. They should not, as a result of moving, have the reward of being able to send their children to public schools with small numbers of, or no, blacks. I think such an argument is far too expansive. It places the responsibility for the expansion of the ghetto, from a legal point of view, entirely on the whites and jumbles together all the reasons they leave some communities and move to the communities they prefer into one reason: racism. It assumes that great consequences—and the separation of blacks is a great consequence—come from great causes

⁹ See Orfield, *Abstract*, *supra* note 1, at 1401-06.

and thus great remedies are appropriate. Orfield knows the intriguing and troubling demonstration many years ago by Thomas Schelling.¹⁰ Schelling showed that relatively small preferences (for example, that a few of one's nearby neighbors should be of one's own ethnic or racial group) could, over time, have the consequence of fully separating two groups.¹¹ This consequence logically follows from the fact that we are a mobile society, with approximately one-fifth of us moving every year. If even a minor degree of racial preference affects our moves, these preferences aggregate very rapidly to ghettoization.¹²

So the weight of responsibility, guilt, and wrong is much less evident to me than in Orfield's presentation. Perhaps an extreme racism requires an extreme remedy (I leave out for the moment the political problem of how to get it if racism is that intense). But, does a modest preference require it?

In addition, I disagree with Orfield's position on the Supreme Court's decision in *Milliken v. Bradley*.¹³ In that case the Supreme Court, as we know, refused to combine central city and suburb for purposes of desegregation, even though the concentration of blacks in the central city, existing or projected, made the creation of white majority schools impossible.¹⁴ Orfield argues with Thurgood Marshall that the school district should have been enlarged to such an extent that there was no feasible way for the parents who did not want to send their children to the desegregated schools to escape.¹⁵ The existence of nearby school districts (how many miles?) not subject to the desegregation plan meant the parents could move away, evading the onus of integration.

I think this is to elevate the objective of integration, important as it is, to a level that justifies almost any discomfort and inconvenience for students, white or black. This remedy chases after the whites on their way to the suburbs in order to create schools in which blacks are a minority. In some places the school districts are already very large, and the central city did not have to be combined with suburban school districts to create white majority districts. For example, this was the situation in 1970 in the Charlotte-

¹⁰ See Thomas C. Schelling, *On the Ecology of Micromotives*, 25 PUB. INTEREST 61 (1971).

¹¹ See *id.* at 79-82.

¹² See *id.*

¹³ 418 U.S. 717 (1974).

¹⁴ See *id.* at 752-53.

¹⁵ See Orfield, Housing, *supra* note 1 (manuscript at 35-38).

Mecklenburg school system which encompasses the city of Charlotte, North Carolina;¹⁶ but in the large northern cities, the Court refused to sanction such a remedy.¹⁷ I believe the Court was right. Whatever the good results in Charlotte-Mecklenburg County (and I would like to know more about that), what would the results have been in Detroit and Wayne County? However one plays it out, I see conflict, vast inconvenience, and no great gains.

But having made his bow to these extreme and forceful measures, which have always been politically unlikely and are now even more unlikely, Orfield proposes at the end of his paper rather narrower remedies, based on incentives to accept integration as opposed to a judicial club to enforce it by requiring school busing.¹⁸ Here he has some very interesting stories to tell, and I would like to know more about them. In Louisville, white neighborhoods were told, if you let in more blacks, you will have naturally desegregated schools, and your children won't have to submit to distant busing.¹⁹ In New Jersey and Massachusetts, court order or legislation requires communities to allow a certain number of subsidized and low-cost units to be built, which will naturally integrate the schools by integrating the communities.²⁰ In the Chicago area, many black families have been assisted, following the *Gautreaux* litigation, in moving into suburbs with very few minorities.²¹ These seem reasonable approaches to me. I do wonder how much they cost—they involve small-scale remedies, such as erecting one very small development after another or moving in families one by one. They require careful selection, counseling, and generally extensive litigation. They strike me as costly programs, and it is hard to believe they can produce large changes in the distribution of the races, but the results may justify the costs.

I end with two questions. So much of this story takes us back to the 1970s, when the major cases that set the pattern on school desegregation for large cities were decided. The country is now transformed by immigration, an immigration that is composed of eighty-five percent Hispanics and Asians.²² What does this do to

¹⁶ See *Swann v. Charlotte-Mecklenburg County Bd. of Educ.*, 402 U.S. 1 (1970) (describing the system's 550-square-mile area).

¹⁷ See, e.g., *Milliken*, 418 U.S. at 752-53.

¹⁸ See Orfield, *Housing*, *supra* note 1 (manuscript at 67-87).

¹⁹ See *id.* (manuscript at 68-70).

²⁰ See *id.* (manuscript at 74-76).

²¹ See *id.* (manuscript at 70-71).

²² See Jeffrey S. Passel & Barry Edmonston, *Immigration and Race: Recent Trends*

the integration story? A Chinese family in San Francisco is now suing for the right of its child to attend a neighborhood school.²³ A 1983 desegregation order requires that the child attend another school because no single ethnic-racial group (the judge has distinguished nine!) may make up more than forty percent of any school.²⁴ What possible sense can an order based on the demography of 1983, itself based on earlier desegregation orders aimed at alleviating black concentration, make for the San Francisco of 1995, transformed by waves of immigration? Shouldn't this affect our thinking about desegregation, which is, after all, an issue for African-Americans? Asians don't want it, and the varied Hispanic groups don't, in general, have any interest in it (instead, they want bilingualism or better education or fewer dropouts—I think integration comes much farther down on their list of concerns).

And a second question. The cities for a while became more black and are now becoming more diverse. The black percentage in our major cities is for the most part no longer increasing. In some, it is declining, under the impact of immigration. Blacks are now joining in large numbers the white movement toward suburbia. Does this voluntary movement, undertaken without public carrots, offer any hope for a less painful and costly means of integration? Or is this simply another stage in ghetto expansion? There are many questions to be answered here, but it is possible that after so many decades a greater measure of integration is on the way.

in Immigration to the United States, in IMMIGRATION AND ETHNICITY: THE INTEGRATION OF AMERICA'S NEWEST ARRIVALS 50 (Barry Edmonston & Jeffrey S. Passel eds., 1994) (displaying U.S. population figures for 1990 by race).

²³ See Mamie Huey, *Chinese Americans Have Bone to Pick with Consent Decree*, *ASIAN WK.*, Jan. 27, 1995, at 5, 8.

²⁴ See *id.* at 5.

