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THE SEGREGATION DECISIONS AND THE RESULTING PROBLEMS OF ENFORCEMENT

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> "Today, education is perhaps the most important function of State and local governments . . . It is the very foundation of good citizenship . . . In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms."[1]

Thus the Negro student was given the right to attend public schools without discrimination because of race.

Educational Status of Southern Negro Prior to *Brown* Decision

In the South, prior to the Civil War, there existed few common schools supported by general taxation.[2]

> "Education of Negroes was extremely limited and practically all of the race was illiterate. In fact the education of Negroes was forbidden by law in some states."[3]

The Civil War shattered the promising beginnings of free schools in the South. After the catastrophe of war the efforts to develop public school systems began anew, with impoverished resources and the great burden of a bi-racial system.

The doctrine of "separate but equal" did not find its way into the courts until 1896 with the case of *Plessy v. Ferguson.*[4] The court stated in its opinion that a "statute which implies merely a legal distinction between White and colored races . . . has no tendency to destroy the legal equality of the two races."[5] In effect the court held that the Fourteenth Amendment was not designed to achieve social and legal equality for the Negro, and that segregation was permissible if facilities were equal. However, the *Plessy* case involved transportation and did not deal directly with segregation in education. The reference to it was purely by way of dicta.

> "The most common instance of this [segregation] is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of

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[1] Brown v. Board of Education, 347 U.S. 483, 493 (1954).

[2] The only southern states that made noticeable progress in founding free public schools prior to the Civil War were Kentucky and North Carolina. See EATON, A HISTORY OF THE OLD SOUTH 476 (1949).

[3] De Lacy, George L., *The Segregation Cases: A Judicial Problem Judicially Solved,* 43 A.B.A. JOUR. 518 (June, 1957).

[4] 163 U.S. 537 (1896).

[5] *Id.* at 543.

states where the political rights of colored races have been longest and most earnestly enforced."[6]

By analogy the courts subsequently applied the *Plessy* decision to the field of education. Where such an analogy was not made some form of relief was granted to the Negroes on other bases, thus avoiding the issue of the constitutionality of the doctrine. The proposition was never actually tested in the Supreme Court of the United States until *Brown v. Bd. of Education*[7] was litigated in 1954 since the doctrine had never been directly put in issue.

In the first United States Supreme Court case involving segregation in education, *Cummings v. Bd. of Education*,[8] petitioners sought to enjoin the Board from using public funds for support of an all-White high school where the portion of the funds allocated for Negroes was spent only on an elementary school. The court denied the injunction and evaded consideration of the segregation question saying: ". . . we need not consider that question in this case. No such issue was made in the pleadings . . ."[9]

In 1903 the validity of a Kentucky school segregation statute was reviewed in *Berea College v. Kentucky*.[10] The statute[11] prohibited any person or corporation from operating an educational institution where both White and Negro students were in attendance. Berea College being a corporate entity, the court, in upholding the statute, again found a means of evading the question of segregation. The validity of the statute was tested only as it applied to a corporation. The court held that since Kentucky had reserved the power to alter, amend, or repeal the corporate charter there was no denial of due process or other violation of the Federal Constitution.

While the United States Supreme Court was evading the segregation issue, the state courts and federal courts were building up a series of decisions in support of segregation in the schools.[12]

But in *Missouri ex rel. Gaines v. Canada*,[13] the University of Missouri refused to admit a Negro to its Law School, solely on the basis of his color. Since the state's Negro university did not offer a law course the Board offered to send the Negro plaintiff out of state and to pay his tuition fees. This position was upheld by the state courts. In overruling the state court, the United States Supreme Court declared that whatever opportunities

[6] *Id.* at 544.

[7] *Supra* note 1.

[8] 175 U.S. 528 (1899).

[9] *Id.* at 543.

[10] 211 U.S. 45 (1903).

[11] ACTS OF KENTUCKY, c. 85 (1905).

[12] Wong Him v. Callahan, 119 F. 381 (N.D. Calif. 1902); U.S. v. Buntin, 10 F. 730 (S.D. Ohio 1882); Bertonneau v. Bd. of Directors of City Schools, Fed. Cas. No. 1,361 (3 Woods 177) (1878); Harrison v. Riddle, 44 Ariz. 331, 36 P.2d 984 (1934); Greathouse v. Bd. of School Comr's of City of Indianapolis, 198 Ind. 95, 151 N.E. 411 (1929); State v. Board of Directors of School Dist., 154 Ark. 176, 242 S.W. 545 (1922); Ward v. Flood, 48 Cal. 36 (1874); Dallas v. Fosdick, 40 How. Prac. 249 (N.Y. 1869); Lewis v. Henley, 2 Ind. (2 Cart.) 332 (1850); Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849).

[13] 305 U.S. 337 (1938). *Accord,* Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

were offered to Whites must be made available to Negroes. Since the Negro university had no law school the state school must be open to Negroes. The court did not determine whether a separate law school for Negroes would satisfy the Federal Constitution.

The *Gaines* case opened the way to desegregation on the graduate school level. The *Brown* decision seemed but a logical subsequent step.

Era of the *Brown* Decision

Mr. Chief Justice Earl Warren, speaking for the court in the *Brown* decision, emphatically declared: "In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[14] The court reasoned that to allow states to segregate in the field of education would deprive the Negro of the equal protection of the laws as guaranteed under the Fourteenth Amendment. The legal effect of the *Brown* decision was that in the field of education the Fourteenth Amendment acts to impose a duty upon the state not to discriminate because of a person's race or color. Thus, the far-reaching doctrine espoused under the *Plessy* case became null and void as applied to the field of public education.

It cannot be asserted that the Negro's rights under the Fourteenth Amendment are positive ones. It does not call for a sanction against a state's failure, either advertently or inadvertently, to act affirmatively.[15] There seems to be no positive duty imposed upon a state to provide its citizens with public education, nor is there a duty to provide the Negro with education in an integrated school.[16] The only duty upon the state is not to discriminate if it provides public education.

At the time of the *Brown* decision at least 18 states had statutes requiring segregation in their public schools.[17] It is obvious that these statutes, by force of the *Brown* decision, became invalid upon their face.

A major problem in enforcement of the Supreme Court's decree was that of time—by what date must the states abolish segregation in public schools? Another problem was that of ascertaining what, in fact, is dis-

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[14] See note 1 *supra* at 495.

[15] Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

[16] Thompson v. County Bd. of Arlington County, 144 F. Supp. 239 (E.D. Va. 1956).

[17] ALA. CONST. art. XIV, § 256, ALA. CODE ANN. tit. 52, § 93 (1940); ARIZ. CODE ANN. § 54-416 (1939); ARK. STATE ANN. §§ 80-509 (1941); DEL. REV. CODE § 2631 (1935); FLA. CONST. art. XII, § 12, FLA. STAT. § 228.09 (1941); GA. CONST. art. VIII, § 1, GA. CODE ANN. § 2-6601 (Park, 1933), as amended Ga. Laws (1945), p. 137; KY. CONST. § 187, KY. REV. STAT. § 158.020 (Cullen, 1944); LA. CONST. art. XII, § 1, MD. ANN. CODE, Gen. Laws, art. 77, § III (Flack, 1939); MISS. CONST. art. VIII § 207, MISS. CODE ANN. § 6276 (1942); MO. CONST. art. XI § 3, MO. REV. STAT. ANN. § 10349 (1939); N.C. CONST. art. IX § 2, N.C. GEN. STAT. ANN. §§ 115-2, 115-30, 115-60, 115-97 (Mechie, 1943); OKLA. CONST. art. I, § 5; S.C. CONST. art. XI, § 7, S.C. CODE ANN. § 5377 (1942); TENN. CODE ANN. §§ 2377, 2393.9, 11395 (Mechie, 1938); TEX. CONST. art. VII, § 7, TEX. REV. STAT. art. 2900 (Vernon, 1936); VA. CONST. art. IX, § 140, VA. CODE ANN. § 22-221 (1950); W. VA. CONST. art. XII, § 8, W. VA. CODE § 1775 (1949).

crimination within the field of education. This latter problem will be more fully discussed below.

The Supreme Court declared in the second *Brown* decision[18] that public officials must make "a prompt and reasonable start toward full compliance" with the desegregation ruling. The court also said that a proper test for courts to consider in the pacific settlement of these problems would be the good faith implementation of desegregation by the states. The court meant, here, that before a state official could be held in contempt for failure to comply with the desegregation ruling in the first *Brown* decision it would be necessary to consider his good faith efforts toward implementation of the new doctrine. Time, then, became another factor to consider within the meaning of the term "good faith."

Inevitably any Supreme Court case of first impression which so greatly affects the social, psychological and educational well-being of such great masses of people must necessarily require the court to consider the momentous problem of an effective means of enforcement. Basically, the problem is centered around historical tradition rather than factual reasoning. Constitutional rights are being pitted against a deep-rooted feeling of White supremacy and states' rights.

As pointed out earlier the "separate but equal" doctrine entered our law through mere incorporation and became so imbedded as a general rule that the courts tried every way possible to avoid discussion of the problem.[19] With the courts in many parts of the country supporting segregation in the public schools, as well as in other facets of public facilities, the tradition became a pattern, a mode of living, so to speak.

Any change in living conditions oftentimes brings about a public barrage of protest. Immediate comments by public officials in the South indicated that it would take more than a Supreme Court decision to change what they considered "existing legal principles." The governor of Virginia in addressing the General Assembly at a Special Session on August 2, 1956, said:

> " 'We have an excellent system of public schools . . . for both White and Negro pupils. We have invested many millions . . . in it and have vastly increased appropriations . . . for its maintenance and operation . . . because we realize the importance of education to all our citizens. We want to preserve this system and the opportunities it offers, without discrimination to members of all races. *We are convinced that it can be preserved and operated as an efficient state-wide system only by segregation of the races.* We likewise are satisfied that we are within our rights, historically and legally, in taking every honorable and constitutional step to retain control and jurisdiction over this cherished system of public education. Our position was confirmed and encouraged by every decision of the Supreme Court

[18] Brown v. Bd. of Education, 349 U.S. 294 (1955). Since the first *Brown* decision did not allow for implementation of desegregation a second decree was necessary.

[19] See notes 10, 13 *supra.*

of the United States over a period of nearly sixty years prior to 1954.' " [Emphasis added.][20]

As a contemporary backdrop to the aftermath of the opinion of the second *Brown* decision[21] we have the recent riots and pupil-harassing in Arkansas on the opening day of school. This problem will be more fully discussed below.

Associated Press and United Press news releases on September 3, 1957, the first day of school in the South, pointed out that integration in high schools in both Kentucky and Tennessee met with violence of a lesser degree than that in Arkansas. The news services also reported that North Carolina appeared to be free of any major violence although Greensboro, North Carolina, elementary and junior high schools were surrounded by noisy, jeering crowds.

The scope of this comment shall be limited to a discussion of the means already employed or those contemplated by state officials or pressure groups to evade the legal effect of the segregation cases.

Attempted Evasion Through Legislation

Since the segregation cases became the established law with regard to education various means have been employed to either limit or completely nullify their legal effect. Legislation coupled with an announced state policy of continued segregation has been the most obvious and daring.

In *Adkins v. School Board of the City of Newport News,*[22] it was held that the Virginia Pupil Placement Act was unconstitutional on its face because it was discriminatory in nature and hence in outright violation of the Fourteenth Amendment as interpreted by the United States Supreme Court in the first *Brown* decision.

The Pupil Placement Act authorized the Virginia school boards to take into consideration, in the placement of pupils, such factors as availability of facilities, health, aptitude of the child and the availability of transportation. The Act further provided that children who had heretofore attended a particular public school would not be reassigned to a different one except for good cause shown. This latter provision would have the effect of perpetuating segregation which existed openly prior to the Act.

Virginia defended the Act on the ground that Negroes were not being discriminated against as a class. District Judge Hoffman, speaking for the court, declared:

"Courts cannot be blind to the obvious, and the mere fact that Chapter 70 [Pupil Placement Act] makes no mention of white or colored children is immaterial when we consider the clear intent of the legislative body."[23]

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[20] Adkins v. School Bd. of City of Newport News, 148 F. Supp. 430, 435 (E.D. Va. 1957).
[21] *Supra* note 18.
[22] *Supra* note 20.
[23] *Id.* at 442, *cert. denied,* 18 C.C.H. S. Ct. Bull., No. 3 (Oct. 21, 1957).

At page 446 of the opinion the court further emphasized:

> "The pattern is plain—the Legislature has adopted procedures to defeat the Brown decision. In doing so it is safe to say that Chapter 70 is invalid on its face."

This case points out the proposition that if a legislative enactment involving education is shown to be a mere subterfuge or cloudy method of avoiding and side-stepping the *Brown* decisions it may be held invalid upon its face.

We find, then, that the federal courts in testing the validity of these statutes, enacted subsequent to the *Brown* decisions and allegedly in compliance therewith, will look into legislative policy behind the enactments. Courts will also examine the practical results as well as possible unconstitutional developments even before the act is put into operation. This is made clear in the *Adkins* case where the court declared the legislation invalid before the parties plaintiff exhausted the available administrative remedies on the ground that no adequate remedy was, in fact, provided for aggrieved parties.

Exercise of Police Power to Avoid Integration

In 1954, following the *Brown* decision, Louisiana enacted a statute which provided that the parish superintendent annually assign each pupil to particular schools pursuant to standards established by an existing statute calling for segregated schools. The Legislature emphasized that the enactment was made in the exercise of the state police power to promote and protect health, morals, better education and the peace and good order in the state, and not because of race. The Legislature was given the necessary implementing power to enact laws necessary to enforce the state police power in this regard.

In *Orleans Parish School Board v. Bush et al*,[24] the above case, the Federal Court held that the state constitutional provisions with regard to maintaining segregated schools and the implementing statute were void. The court declared:

> "The use of the term police power works no magic in itself. Undeniably the States retain an extremely broad police power. This power, however, as everyone knows, is itself limited by the protective shield of the Federal Constitution."[25]

The validity of the Louisiana Pupil Assignment Law was also considered by the court. In this regard, the court held that the Assignment Law was invalid as "a further effort to stave off the effect of the Supreme Court's school decisions." The court felt that this was "sufficient of itself to condemn it as part of the illegal legislative plan" comprehended by the Legislature.

[24] 242 F.2d 156 (5th Cir. 1957).
[25] *Id.* at 163.

The court further concluded that an arbitrary classification of students to schools by race because of more frequent identification of undesirable qualities with one race more than another is an unreasonable classification. This classification was invalid because it denied equal protection of the laws.

As a parallel to this situation, we have the recent incident in Little Rock, Arkansas, which has stirred up international notoriety. Governor Faubus' order to call out the state guard to quell disorders and prevent wholesale breaches of the public peace had the practical effect of momentarily preventing compliance with the Supreme Court's order of desegregation. Negro children were prevented at gun point from entering a previously all-white school despite a federal court order to the contrary.

The Governor backed his action by asserting his authority under the wide principle of a state's police power. It is easy to speculate that a head of a state who desires to forestall the advance of integration could easily employ the troops at his disposal to place a cordon around public schools and thereby close them off to all Negro children under the pretext of a necessary and proper exercise of a state's powers of police. This can be achieved more easily in areas where some form of public spectacle has been displayed over the integration of pupils.

The courts must closely scrutinize the fact situation prompting a state official to use armed forces to encircle public schools on alleged grounds of a threat of breaches of the peace.

A federal court said, regarding such situations:

> "However undesirable it may be for courts to invoke federal power to stay action under state authority, it was precisely to require such interposition that the Fourteenth Amendment was adopted by the people of the United States. Its adoption implies that there are matters of fundamental justice that the citizens of the United States consider so essentially an ingredient of human rights as to require a restraint on action on behalf of any state that appears to ignore them."[26]

As will be shown below this misuse of state power cannot persist for too long a period where individual rights are concerned. The public interest would require the President to invoke his authority as a last resort.

Delays Caused by Administrative Provisions

The Southern states, in setting up the machinery to effect desegregation, have provided for administrative remedies for aggrieved parties as required by law. In some cases, however, these administrative remedies are but another means of denying Negro children enrollment in schools of their choice. For example, the administrative remedy provided by the Virginia Pupil

[26] *Id.* at 166.

Placement Act[27] could have consumed 105 days until final decision by the Governor. The court indicated:

> "A child seeking relief from the original designation of enrollment at the commencement of a school term in September could not, with any degree of confidence, anticipate a decision through administrative channels until the middle of December."[28]

Under Section 9 of the Act, the findings of fact of the Pupil Placement Board[29] are considered final. This determination would have the effect of depriving an aggrieved party of a federal court hearing on the facts. The United States District Court of the Eastern District of Virginia, reviewing this Act, ruled that the administrative remedy provided was inadequate.[30]

The Board of Education in Tennessee in similar compliance with the *Brown* ruling, provided a systematic plan of gradual integration. This program of transition to desegregation provided that for the first year qualified Negro students would be admitted to the previously White colleges at the graduate level only. In each succeeding year those qualified would be admitted to the next lowest class. The application of the plan would deny some Negroes the right to go to the state colleges of their choice for five years. This plan was declared not in accordance with the Supreme Court order requiring deliberate speed in a recent decision from the Sixth Circuit.[31]

In answer to the Board's defense of inadequate physical facilities, the majority of the court stated that the Board was authorized to limit the number of admissions but could not base such limitations upon race or color. They said: "This is a clear discrimination between the races."[32]

Judicial Delays

In the second *Brown* decision[33] Mr. Chief Justice Warren, speaking for the court, declared: "During this period of transition, the courts will retain jurisdiction of these cases."[34] This mandate gave the federal courts full control in determining when a school board had made a "prompt and reasonable start" toward compliance with the first *Brown* decision. The recent case of *Avery v. Wichita Falls Independent School District*[35] involved the question of a federal district court's exercise of discretion in such determination. The United States Circuit Court of Appeals decided that the lower court had not abused its discretion when it declined to enter a decree declaring the rights of the litigants. However, the lower court was held in error for declaring the case moot and dismissing the action on that basis.

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[27] ACTS VA. 1956, EX. SESS., c. 70, §§ 1, 2, 2a, 3 (1–8), 4–11; see note 20 *supra*.
[28] *Supra* note 20 at 443.
[29] Three member board appointed by the Governor.
[30] *Supra* note 20.
[31] Booker v. State Bd. of Ed., 240 F.2d 689 (6th Cir. 1957).
[32] *Id.* at 693.
[33] *Supra* note 18.
[34] *Id.* at 301.
[35] 241 F.2d 230 (5th Cir. 1957).

This judicial action by the lower court had the effect of preventing the parties plaintiff from reopening the controversy later on the issue of "a prompt and reasonable start toward desegregation." This may be a judicial method of temporarily obstructing integration.

Such action could be of a temporary nature only, as the *Avery*[36] case indicates. But, on the other hand, it may develop into a more serious problem. The Court of Appeals ordered that: "The district court should retain jurisdiction for the entry of all judgments and orders necessary to ascertain or else to require 'good faith compliance'."[37]

Brown v. Rippy,[38] a case from the Fifth Circuit, was an appeal from a decision of the District Court for the Northern District of Texas. The Court of Appeals found that an adverse judgment against Negro pupils was entered by the lower court under a complete misapprehension of both law and facts. In an action to require officials to desegregate public schools, the District Court judge declined to hear the evidence presented by the plaintiffs under the mistaken belief that the children had agreed to facts pleaded by the school officials. The record showed the exact opposite. The suit was determined to have been prematurely brought and was ordered dismissed without prejudice.

To assure a proper hearing, the Court of Appeals reversed the judgment and remanded the cause to the lower court with directions to afford the parties a full hearing on the issues tendered in the pleadings.

Once again the United States Courts of Appeal did not allow the overstepping of judicial discretion to hamper the move toward public school integration.

Apparent Compliances

It may be anticipated that in some states school districts will undertake only surface compliance with the desegregation ruling. While asserting conformity, they will at the same time try to keep desegregation to a minimum.

Of the various devices looking to this end, gerrymandering of attendance district is the most obvious. In most American cities, and particularly in the South, there is an unofficial residential separation of the races. It has been declared that:

> "By establishing schools in each of these sections and tailoring the attendance districts to fit the separate residential areas, local authorities may be able to retain substantial segregation in some communities without formally disobeying desegregation requirements."[39]

However, where such gerrymandered districts are set up and designed to embrace practically the entire colored population of a city, the plan may be judicially considered a subterfuge to segregate Negro children.[40] When

[36] *Ibid.*
[37] *Id.* at 235.
[38] 233 F.2d 796 (5th Cir. 1956).
[39] LeFlar and Davis, *Segregation in Public Schools*, 67 HARV. L. REV. 377, 410 (1953).
[40] Clemmons v. Board of Ed. of Hillsboro, 228 F.2d 853 (6th Cir. 1956).

new school districts were created by meandering up streets and alleys so that all the Negro children would be within one district, the scheme was struck down as unconstitutional.[41]

The main issue before the courts in these instances will be one of fact—whether the districting is determined by geographic criteria or whether it is based primarily on race without regard to geographical considerations. In most large cities, however, it will be next to impossible to contrive territorial attendance districts which will entirely avoid the inclusion of students of different races.[42] In the rural areas, where Negroes often live and work on farms owned by people of other races, it will be even more difficult.[43]

The excuse of crowded schools is another means used to minimize integration. The Tennessee plan, discussed above, attributed the long delay to limited physical facilities. The United States Court of Appeals, in examining the program, held it did not comply with the requirement of deliberate speed in the integrating process.[44]

In *Clemmons v. Board of Education of Hillsboro*[45] a zoning resolution, adopted on the pretext that the White schools were crowded, was held to be a subterfuge in order to continue segregation. The court, in answering the Board's contention, stated: "The excuse of crowding to justify segregation has no basis in law, nor, in this case, in fact."[46]

Thus, we see that courts have looked with disfavor upon any plan which continues segregation under the pretext of crowded facilities. Where the schools are in fact crowded some proportionate means of enrollment would best fulfill the requirements of the law.

Plain Non-Compliance and Incomplete Compliance

Before turning to legislation as a method of avoiding desegregation, school boards in Virginia had their round with the courts.[47] Several Negro children had attempted to enjoin the enforcement of segregation by school boards and division superintendents of schools.

The court determined that due to the announced policy of the respective school boards, the children's individual application would have been futile; therefore, an individual application would not be required as a condition for injunctive relief.

The school boards of Virginia felt that any attempt to enjoin them would be void as a suit against a state without its consent. The court flatly denied such a claim and found that it could enjoin the exercise of discretion

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41 Webb v. School Dist. No. 90, 167 Kan. 395, 206 P.2d 1066 (1949).

42 *Supra* note 39.

43 *Ibid.*

44 *Supra* note 31.

45 *Supra* note 40.

46 *Id.* at 857.

47 School Bd. of Charlottesville v. Allen, 240 F.2d 59 (4th Cir. 1956).

by a state officer, under authority of his office, where such action would result in a violation of another's constitutional rights.[48]

The United States Court of Appeals in *School Bd. v. Allen,* declared:

> "A state can act only through agents, and whether the agent be an individual officer or a corporate agency, it ceases to represent the state when it attempts to use state power in violation of the Constitution and may be enjoined from such unconstitutional action."[49]

In this case we had an attempt by the school boards to continue to enforce segregation in the public schools in contravention of the *Brown* decision. The boards tried to justify their action upon the false premise that they were not amenable to suit under the terms of the Eleventh Amendment. Such outright defiance was not condoned and the injunction against the school officials was upheld.

A similar situation arose in the city of Dayton, Delaware, where Negroes brought a class suit against the State Board of Education and the local school board because of the latter's refusal to reorganize the public schools on a racially nondiscriminatory basis.[50]

The court deciding this particular case held that the second *Brown* decision must be read as establishing a standard for determining what constitutes a good faith implementation of the governing constitutional principles set forth in the first *Brown* case. The court further declared that the school authorities' so-called "good faith compliance" with the ruling against discrimination, did not fulfill the constitutional right of nondiscrimination in education. The trustees were found to have the burden of justifying their delay in integration by showing that such time was necessary in the public interest and was consistent with a good faith compliance.

Under the authority of the above case[51] federal courts can determine when an asserted good faith compliance with the *Brown* decisions is in fact incomplete or is no compliance at all.

Abolition of Public Schools

Immediately following the first *Brown* decision shouts of defiance and threats of evading the announced doctrine were heard throughout the southern United States. Several heads of state in the South remarked that they would sooner close their public schools than conform to the Supreme Court's mandate. As yet, no state has taken so drastic a step as to completely abolish public education.

Perhaps one reason for the failure of such a move might be found in the fact that no state is yet willing to completely leave its Negro population without any formal education. The old adage that "Ignorance breeds

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[48] See *Ex parte* Young, 209 U.S. 123 (1908).
[49] *Supra* note 47 at 63.
[50] Evans v. State Bd. of Ed., 145 F. Supp. 873 (D. Del. 1956).
[51] *Ibid.*

contempt" may well create an even greater problem for the South than that which so squarely faces them.

It would seem foolhardy as well as financially impossible for private organizations to undertake the task now handled by our states in the field of public education. Without question the states would have to subsidize the private organizations to some degree. Such a move would give rise to questions of state action. In order for a private school system to operate successfully without any state aid, and in order to avoid questions of state action, some tuition would have to be required. This would leave many white children without any education whatever since, doubtless, not all could meet the tuition fees.

Approaching the problem from a legal point of view it may be argued that the individual states have declined to follow through with their threats of turning over a present state function to private enterprise because such a move might be declared unconstitutional. The Supreme Court, if faced with the problem could, by analogy, apply existing authority.

The 1944 case of *Smith v. Allwright*[52] may be applicable in such a situation. The Supreme Court held that primary elections operated by a political party under the sanction and even direction of state law involved reprehensible state action. The effect of these primaries was the exclusion of Negro voters in an election involving candidates for a federal office. This exclusion clearly violated the Fifteenth Amendment.[53]

In an effort to evade the doctrine of the *Allwright* case, South Carolina repealed all of its statutes which concerned party primaries. The South Carolina Democratic Party then took over the primaries under the guise of a private political organization and excluded Negroes therefrom. The courts refused to accept such a subterfuge and in *Rice v. Elmore*[54] it was held that party officials, while participating in what amounts to a state's election machinery, are in fact performing a state function. In holding these primaries to be a state function, the Circuit Court of Appeals declared that the power of the state could no longer be used in this manner since it was in violation of the Constitution.

The states would act unwisely in deciding to turn over their public schools to private enterprise. It is reasonable to presume that the quality of instruction would decrease since private bodies would be unable to handle the tremendous number of children presently attending public schools. As a result the calibre of its citizenry would degenerate. Inevitably state aid would be given in some form, and by applying the above analogy a court may be led to find that a private body performing a public function with the use of public funds and practicing racial discrimination is invalid under the Fourteenth Amendment.

[52] 321 U.S. 649 (1944), *overruling* Grovey v. Townsend, 295 U.S. 45 (1935).

[53] U.S. CONST., Amend. XV, § 1. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

[54] 165 F.2d 387 (4th Cir. 1947), *cert. denied,* 333 U.S. 875 (1948).

Public Pressures

The tradition of segregation may be a musty relic from the past in the Northern states and Southern border states, which yielded without great pain. However, in the Middle and Deep South, the old customs and ways of life still run deep. With the opening of schools this fall came outraged resistance from the public. The most belligerent troublemakers subjected school officials to abuse by phone and mail. They threw burning bags and paper on the house of William H. Oliver, school superintendent of Nashville. Many petitions were circulated and court orders sought to block integration.[55]

Oliver summed up the situation as follows:

> "It is regrettable to have to do a thing the great majority of people don't want, but since the Federal court ordered it to be done, we will try to comply with the court's order in good faith."[56]

At Little Rock, Arkansas, Charlotte and Greensboro, North Carolina, school officials found themselves swamped by letters and phone calls. Many officials were even turned on by old friends.[57]

Public pressures of this type, unless organized, are only temporary in nature. With reasonable patience and a firm approach they should be overcome in a short time. Pressures from organizations such as the Ku Klux Klan are of a more serious nature.

In such cases school boards, which are in good faith complying with the integration ruling, may seek injunctive relief.[58] Jurisdiction of federal courts to issue an injunction to protect federal substantive rights is well established.[59]

In the *Brewer* case,[60] a school district in Arkansas sought an injunction against further interference with the operation of desegregated schools. Numerous acts of trespass upon school property and acts of annoying, threatening, and intimidating the plaintiffs, were alleged. Inflammatory speeches were made at mass meetings condoning physical violence and calling for mass action in resistance to desegregation. Attempts were made by fear and persuasion to deter the children from attending schools of that district.

The court, in enjoining further acts by the conspiracy, said:

> "Plaintiffs [School District] are under a duty to obey the constitution . . . It follows that they have a federal right to be free from direct and deliberate interference with the performance of the Constitutionally imposed duty."[61]

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[55] Newsweek, Vol. I, No. 11, p. 35 (Sept. 9, 1957).
[56] *Id.* at 35.
[57] *Ibid.*
[58] Brewer v. Hoxie School Dist., 238 F.2d 91 (8th Cir. 1956).
[59] *Ibid.*
[60] *Ibid.*
[61] *Id.* at 99.

When public pressures and demonstrations reach such proportions that they can no longer be controlled by local or state officials the President may use federal troops to enforce the law, as the recent Little Rock incident showed.

Section 332 of the U.S. Code[62] provides that:

> "Whenever the President considers that unlawful obstructions, combinations or assemblages, for rebellion against the authority of the U. S. make it impracticable to enforce the laws of the U. S. in any State . . . by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State and use such of the armed forces as he considers necessary to enforce those laws or suppress the rebellion."

The President's action indicated that this power may be exercised without a request from state authorities.

Conclusion

It is submitted that effective enforcement of the *Brown* decisions, will allow the Negro to obtain an education without discrimination because of his race in either the public schools or by extension and analogy, in private schools where public schools are abolished.

Only time will tell whether the attitudes of Southern officials as well as Southern people, as previously shown, indicate a concrete bloc to the Supreme Court's mandate.

It seems a sensible conclusion that the matter will resolve itself within reasonable time. Most people are basically law abiding, and although they may offer bitter resistance to this new doctrine, they will eventually see the fairness in integration.

The words of President Eisenhower in a recent address[63] to the nation have indicated this:

> "The overwhelming majority of our people in every section of the country are united in their respect for observation of the law . . . A foundation of our American way of life is our national respect for law."

At the end of the 1955-56 school year, the South had begun desegregation in 442 districts, out of a possible 3,000. By the beginning of the 1956 fall term, the total was 650. With the start of this school year, the number is 705.[64] But whether the motivating force has been court compulsion or free choice, the important fact is that progress is being made.

By the continued exercise of tolerance and patience on the part of federal officials, one of our greatest social problems can be resolved in a rational and proper manner. A doctrine, so much a part of the way of life in the South, should not be expected to yield to change in a relatively short

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[62] 70A STAT. 15 (1956), 10 U.S.C. § 332 (Supp. IV, 1952). See also §§ 333, 334.

[63] President's message on sending troops to Arkansas, September 24, 1957. San Francisco Call-Bulletin, Sept. 25, 1957, p. 9, col. 1.

[64] *Supra* note 55.

time. However, the rights of individuals are basic and must survive if our form of constitutional government is to continue its existence.

Apart from the more immediate problems commented upon above there remains the question of an individual's right to sue. The question of who can sue and who is sueable will be discussed more extensively in a companion article.[65]

For the present it might be noted that any pupil deprived of the equal protection of the laws, through segregation, his parents or legal guardian are recognized as proper parties plaintiff.[66] A school board may also go into a court of equity to seek an injunction against any interference with its policy of integration.[67] On the other hand, a county school board or a city superintendent of schools is sueable even though acting as agent of the state.[68] The courts have held that such suit is not a suit against the state.[69]

[65] See 9 HASTINGS L.J. ..... (1958).

[66] See note 18 *supra*.

[67] Brewer v. Hoxie School Dist., 238 F.2d 91 (8th Cir. 1956).

[68] School Board of City of Charlottesville v. Allen, 240 F.2d 59 (4th Cir. 1956); Thompson v. County Bd. of Arlington County, 144 F. Supp. 239 (E.D. Va. 1956); *Ex parte* Young, 209 U.S. 123 (1908).

[69] School Board of City of Charlottesville v. Allen, note 68 *supra*; Orleans Parish School Bd. v. Bush, 242 F.2d 156 (5th Cir. 1957).