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COMMENTS

WHAT REMEDIES ARE AVAILABLE TO ENFORCE THE SUPREME COURT'S MANDATE TO DESEGREGATE AND WHO MAY USE THEM*

By DONALD A. WAY† and RICHARD M. SCHULZE†

Since the decision in *Brown v. Board of Education*,¹ in which the Supreme Court of the United States held that segregation by races in public schools is in violation of the equal protection clause of the fourteenth amendment, there has been little progress toward desegregation in most Southern states.² In some there has been no progress at all.³ This has been due to simple inaction on the part of state and local education officials, to attempts at legalized evasion and to acts bordering on open rebellion. The nature of the rights created by the *Brown* decision, the progress toward its implementation, the means of evasion heretofore employed and those likely to be employed in the future have been treated at length in a companion article.⁴ There remain, however, the additional problems of determining what judicial remedies are available to implement desegregation and what persons or organizations as parties plaintiff are qualified to make use of them.

It is generally conceded and it will be assumed for the purpose of this comment, that any new legislation along remedial lines by the Congress of the United States will be slow in coming if it is to come at all. A Southern filibuster in the Senate is always a distinct probability whenever states' rights matters are at issue and such a stumbling-block is a virtual certainty when the proposed legislation is directed toward desegregation. Relief, then, must be obtained from the already existing remedies available in the federal courts. These remedies, discussed below, provide tools which if used with diligence, wisdom and patience will be adequate to ultimately provide segregation-free public schools in those states in which resistance has thus far been encountered. The tools are in the form of injunctions, declaratory judgments, suits for damages and even criminal prosecutions. They are available to individual students who have been excluded, to parents or guardians suing in the student's behalf, to organizations such as school boards and to governmental officials such as United States attorneys.

* Companion Comment to 9 HASTINGS L.J. 42 (1957), *The Segregation Decisions and the Resulting Problems of Enforcement*.

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¹ *Brown v. Board of Education*, 347 U.S. 483 (1954); see also *Bolling v. Sharpe*, 347 U.S. 497 (1954).

² *Time*, Vol. LXXX, No. 13, p.16 (Sept. 23, 1957).

³ *Ibid.*

⁴ 9 HASTINGS L.J. 42 (1957).

The Need for More Brown Decisions

The actions in *Brown v. Board of Education*, *Briggs v. Elliott* and the other cases decided by the Supreme Court in the same opinion, hereinafter referred to as the "Segregation Cases," were brought against boards of education praying relief in the form of injunctions and declaratory judgments on the grounds that the action of the school boards, in denying admission to colored students, deprived those students of their right to equal protection of the laws as guaranteed by the fourteenth amendment.⁵ Some of the school boards were acting under state statutes which provided that segregation must be maintained.⁶ The *Brown* decision rendered these statutes unconstitutional. But even where there is no such statute, there seems to be little if any doubt but that the action of a school board in denying admission to a student because of race constitutes state action so as to bring it within the proscription of the fourteenth amendment. It has been held that the action of the curators of a state university in refusing admission to an applicant on account of race is state action.⁷ There is little dissimilarity between the curators of a state university and a board which administers a state public school.

Unfortunately, the decrees in the Segregation Cases are binding only upon the school boards named in the actions as the decree of a federal district court is binding only upon immediate defendants in any particular suit. "Strangers to a decree are not bound by it."⁸ Hence excluded students in other school districts in the same state as well as those in other states will probably find it necessary to bring similar actions in order to have the declarations made universally binding.

The necessity for bringing these separate suits to obtain decrees declaring each instance of school segregation unconstitutional means unavoidable delay. But the delay should be short and the actions mere formalities. Although, as in the "Segregation Cases," no mandatory injunction ordering desegregation is likely to be granted since the second *Brown* decision allows a reasonable time for administrative difficulties to be removed,⁹ the district courts will find it hard not to issue declaratory judgments following the *Brown* precedent.

Once there is no further question as to the unconstitutionality of any state law or practice which keeps public school segregation in force then the further remedies discussed *infra* may be utilized to make integration a reality.

The Civil Rights Acts

A potential means of enforcing the *Brown* decision is derived from that body of legislation known as the Civil Rights Acts.¹⁰ These laws have been

⁵ *Brown v. Board of Education*, *supra* note 1.

⁶ *Briggs v. Elliot*, 347 U.S. 483 (1954); S.C. CONST. ART. XI § 7; S.C. CODE § 5377 (1942).

⁷ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 343 (1938).

⁸ 2 BLACK, JUDGMENTS 718 (1891).

⁹ 349 U.S. 294 (1955).

¹⁰ 42 U.S.C. §§ 1981-94 (1952); 18 U.S.C. §§ 241-44 (1952).

on the books with little change since shortly after the Civil War. They were designed to protect from infringement the rights guaranteed by the newly adopted fourteenth and fifteenth amendments and provide both civil and criminal remedies.¹¹

The application of the statutes providing civil remedies will be discussed. The first of these is section 1983 of Title 42 U.S.C. which provides for damages in a civil suit against a person who, under color of state law, denies to another person any of the rights secured by the federal Constitution.

Would the members of a public school board who denied a student admission to a public school solely on the ground that he was colored be subject to a suit under this section? The answer is not clear. The first requisite is an act under color of state law. It is not necessary that the act in question be authorized by state law in order that it constitute an act under color of state law.¹² Thus, the action of a school board, acting of its own volition, in promulgating a segregation rule, will still be action under color of state law as long as it is acting pursuant to its authority derived from the state (in this case the authority to regulate admission to public schools). Where the board is merely carrying out the terms of a state statute which requires segregation it would clearly be acting under color of state law.

Another requisite is the denial of a right secured by the federal Constitution. The *Brown* decision has established that there is a denial of the equal protection of the laws under the fourteenth amendment where a student is denied admission to a public school on the basis of his color. Such conduct by the school board would apparently come within this requisite.

However, there is one problem which might prevent a recovery in a civil suit instituted under the Civil Rights Acts. That is the common law tort immunity which has traditionally been afforded to public officials. On reading the act one would conclude that Congress had intended it to apply to all officers of the states. As the act is directed at persons who act "under color of any statute," the reasonable inference is that it would apply to any state officer for he is in a particularly suitable position to act under a state statute. But this is not the case. Some public officials have been permitted to plead, as a defense in a civil suit under the Civil Rights Acts, the common law doctrine of tort immunity which has been afforded public officers in tort actions at common law. In the leading case of *Tenney v. Brandhove*¹³ the Supreme Court held that members of a legislative investigating committee were immune from a civil suit under the Civil Rights Acts for an alleged deprivation of constitutional rights by wrongfully having a witness sentenced for contempt. This conclusion was reached on the assumption that the Civil Rights Acts were not intended to abrogate the common law immunity doctrine. On the same theory the courts of appeal have held judges

¹¹ *Ibid.*

¹² *Refoule v. Ellis*, 74 F. Supp. 336 (D.C. Ga. 1947).

¹³ *Tenney v. Brandhove*, 341 U.S. 369 (1951).

and prosecuting attorneys immune.¹⁴ Unless the courts change this interpretation of the Civil Rights Acts, any suit under it will be fruitless when brought against a legislator, judge or prosecuting attorney who is acting within the scope of his office. Of course, if he is acting outside his authority he is only "colorably" in office and it would seem the immunity doctrine will be inapplicable.

As to state legislators and judges it might be sound policy to afford them complete freedom of action without fear of harassment by civil suits arising out of each exercise of discretion. But the need for such tort immunity is not as appealing in the case of administrative bodies such as school boards. This view was taken in *Cobb v. City of Malden*,¹⁵ where it was held that aldermen were not immune from suit under the Civil Rights Acts. But there seems to be a qualification to this holding. The *Cobb* case merely held a cause of action was stated. Judge Magruder established a test by which the tort immunity doctrine would apply unless defendants "realized" their conduct amounted to a violation of a constitutional right (in that case it was impairment of contract). Until there is a more definite ruling the test then seems to be one of good faith. Therefore, a student denied admission to a public school by the school board might, in order to avoid the consequences of the tort immunity doctrine and have relief under the Civil Rights Acts, be required to show a lack of good faith by the board members, or possibly an express intent to deprive him of his constitutional rights.

The second of the Civil Rights Acts providing for civil remedy is 42 U.S.C. 1985(3). It provides for the award of civil damages to an injured party where "two or more persons in any state or territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws. . . ."¹⁶

It is to be noted that this section contains no requirement that defendants act under color of state law. It might be assumed, therefore, that such action was not required. However, the Supreme Court has cast doubt on this assumption. In *Collins v. Hardyman*¹⁷ the court failed to find an actionable suit for conspiracy where private citizens forcibly broke up a meeting called by the plaintiffs to petition the United States government. It held defendants must in some way "influence the law" in order to come within this statute. The court quoted dictum from *United States v. Cruikshank*¹⁸ which said the fourteenth amendment protects the individual from state action only and not from action by individuals. The import of this decision is that Congress is without power to pass such a statute without requiring state action. But this result may not be such a handicap to the solution of the segregation problem; for usually segregation in schools is

¹⁴ *Kennedy v. Fox*, 232 F.2d 288 (6th Cir. 1956); *Skinner v. Nehrt*, 242 F.2d 573 (7th Cir. 1957).

¹⁵ 202 F.2d 701 (1st Cir. 1953).

¹⁶ 17 STAT. 13 (1871), 42 U.S.C. § 1985(3) (1952).

¹⁷ 341 U.S. 651 (1951).

¹⁸ 92 U.S. 542 (1875).

brought about by public officials who, due to their offices, would be acting under color of state law and, therefore, be amenable to the act specifically under section 1983. However, it leaves unredressed by the Civil Rights Acts certain public pressures such as groups of individuals physically barring students from schools.

The Civil Rights Acts specifically provide for money damages. This may be an adequate means of establishing a plaintiff's legal rights and if damages can be shown to be substantial it may act as a deterrent to future infringements. However, plaintiff in a suit under the Civil Rights Acts may also be granted an injunction to restrain any future interference with his rights.¹⁹ But plaintiff must satisfy the usual equity requirements by a showing of irreparable injury.²⁰ A threat of continued deprivation of rights could satisfy equity requirements.

The remaining sections dealing with civil rights under Title 42 U.S.C. are not of great importance in the solution of segregation cases. However, there remains to be discussed the criminal sanctions under the civil rights legislation.

The criminal sections afford the Attorney General a means to discourage segregation. The important sections here are 18 U.S.C. 241 and 18 U.S.C. 242 which roughly correspond in substance to 42 U.S.C. 1985(3) and 42 U.S.C. 1983, respectively.

Under the present construction given section 241, it will be of little help in the segregation area. It provides for a fine or imprisonment (up to \$5000 or 10 years) where two or more persons conspire to injure any citizen in the exercise of any right secured by the Constitution or laws of the United States. In *United States v. Williams*,²¹ the Supreme Court held that section 241 protected only those rights arising from the substantive powers of the federal government and not rights which the federal Constitution guarantees against abridgment by the states. Thus, a violation of the equal protection of the laws provision of the fourteenth amendment would not be actionable under this section.

However, it has been held that section 242 was enacted to enforce the fourteenth amendment.²² This section provides for fine or imprisonment for one who, under color of any statute, willfully subjects another to the deprivation of any right, privilege, or immunity secured by the Constitution. It should be noted here that a specific intent is required, *viz.*, to willfully deprive one of a federally protected right.²³ Except for this added requirement of willfulness the requisites for liability would be the same for criminal liability under this section as were necessary under 42 U.S.C. 1983. Of course, the tort immunity of public officials would not arise in

¹⁹ *Morrison v. Williams*, 149 F.2d 703 (8th Cir. 1945).

²⁰ *Whisler v. City of West Plains*, 137 F.2d 938 (8th Cir. 1943).

²¹ 341 U.S. 70 (1951).

²² *Screws v. United States*, 325 U.S. 91, 98 (1945).

²³ *Ibid.*

criminal prosecutions as it does in civil suits under the Civil Rights Acts. Under pressure of the threat of a criminal prosecution school board members would tend to act honestly where their conduct could deprive a student of his constitutional rights.

The Civil Rights Act of 1957²⁴ has added little toward an immediate solution of the segregation problem. It provides for the appointment of a committee to study the civil rights problem, including present laws and specific denials of equal protection under the Constitution. However, it gives the federal district courts jurisdiction of civil suits “. . . to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights. . . .” This provision expressly gives the power to grant injunctions but, as was mentioned above, it already possessed such power. It might, however, obviate the requirement that plaintiff make a showing of irreparable injury or the like to satisfy the equity requirements usually required for the granting of an injunction.

Bell v. Hood

In addition to the civil rights legislation there is another remedy available to those seeking to prevent avoidance of the *Brown* decision. Under the authority of *Bell v. Hood*,²⁵ decided in 1945, injunctive and declaratory relief can be obtained to prevent infringement of constitutionally protected rights without the necessity of reliance upon a statute. The relief may be obtained in a suit directly under the Constitution and, unlike a suit under the Civil Rights Acts, there is no need to show a conspiracy or action under color of state law. The action in *Bell v. Hood* was brought in the federal district court under 28 U.S.C. 24, which authorizes federal district courts to try suits of a civil nature where the matter in controversy “arises under the Constitution or laws of the United States” whether these suits are at equity or law. The plaintiffs alleged that their rights under the fourth and fifth amendments to the United States Constitution had been invaded by agents of the F.B.I. The complaint sought money damages in excess of the \$3000 required for federal jurisdiction and grounded the right of recovery on the Constitution unimplemented by statute. The district court dismissed the action for want of jurisdiction and the circuit court of appeals affirmed. The United States Supreme Court reversed and remanded. It was held that where a complaint is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal district court must entertain the suit except where the claim appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where it is wholly insubstantial and frivolous. The question of whether or not the federal courts can grant money damages for violation of rights guaranteed by the Constitution even though there is no act of Congress expressly authorizing such relief had never been before the court and was not presented by this appeal.

²⁴ 71 STAT. 638 (1957).

²⁵ 327 U.S. 678 (1945).

But the court ruled that the complaint stated a cause of action upon which relief could be granted saying:

“ . . . [W]here federally protected rights have been invaded, it has been the rule from the beginning that the courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled, that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”²⁶

On remand, the district court again dismissed the action but this time on the ground that it could not grant money damages in the absence of a federal statute authorizing such relief.²⁷ The suit was against F.B.I. agents acting outside the scope of their authority and the court said that violations of the fourth and fifth amendments cannot be the basis of any cause of action for damages against individuals unless Congress provides for it.

Though the plaintiffs in *Bell v. Hood* failed to recover civil damages, nonetheless they did establish a basis for declaratory and injunctive relief directly under the Constitution. This can be of vital importance in stopping the means of evasion which cannot be handled under the Civil Rights Acts due to the requisite of action under color of state law. Under the authority of *Bell v. Hood*, school boards and persons injured by segregation in public educational institutions may proceed free from economic coercion and other public pressures such as those mentioned in the companion article at page 54 of this volume. These pressures and coercive practices could proceed with impunity were the Civil Rights Acts the only means of relief. However, under the authority of *Bell v. Hood*, individuals, not acting under color of state law and not acting in concert, may still be enjoined or have declaratory judgments rendered against them when they interfere with the right of Negro students to attend desegregated public schools. Since *Brown*, this right should be deemed federally protected and as such, a proper subject of protection by the federal courts.

The Contempt Power

In order to combat the more serious forms of evasion, it may be necessary to resort to the potent contempt power of the federal courts. Where persons against whom decrees have been rendered fail to heed them, where persons against whom no decree has been rendered but who have full knowledge of an existing decree act in a manner clearly calculated to defeat the aim of a court's mandate or where local federal district judges procrastinate in granting relief in the spirit of the *Brown* decision upon facts which clearly indicate that such relief is appropriate, a contempt citation may be a useful coercive tool. Few persons will be unmoved by the imminent threat of harsh fines or humiliating imprisonment. It should be noted that the im-

²⁶ *Ibid.*

²⁷ 71 F. Supp. 813 (S.D. Cal. 1947).

munity which may or may not be available to governmental officials in suits for damages under the Civil Rights Acts is clearly unavailable to protect them from a contempt citation.²⁸ Any policy reasons which may uphold the tort immunity doctrine under the Civil Rights Acts are outweighed by the stronger necessity for having the lawful order and process of the courts carried out.

The power of the federal courts to punish for contempt is set out in the United States code.²⁹ It is available in two forms, *viz.*, civil and criminal. Civil contempt is generally available to a successful plaintiff in order to enforce his decree against a defendant who is reluctant to obey. A contempt is considered civil when the punishment is wholly remedial, *i.e.*, serves only the purposes of the complainant and is not intended as a deterrent to offenses against the public.³⁰ A plaintiff is more likely to choose civil contempt as a remedy than criminal, since in the former the evidence requirement is merely clear and convincing³¹ rather than the more difficult beyond a reasonable doubt needed for the latter.³²

In the typical segregation situation, the threat of civil contempt should be more than adequate to induce a reluctant school board to admit a student after a declaratory judgment or decree has been rendered in his favor or to effectively prevent hindrance from the public when a school board decides to carry out integration on its own initiative. It has been held that a school board is entitled to an injunction to enable it to proceed with integration free from interference³³ and a civil contempt citation should readily issue against any of the named defendants who subsequently do so interfere.

Civil contempt has also been suggested as a remedy to possible willful judicial delay caused by reluctance on the part of federal district judges to act in the spirit of the *Brown* decision. Where such a judge unreasonably refuses or unnecessarily delays in granting the relief prayed for in a case where the decision in the "Segregation Cases" clearly calls for the granting of such relief, the plaintiff may appeal to the court of appeals for a writ of mandamus directing the procrastinating judge to act in accordance with the *Brown* holding.³⁴ If the mandamus issues and the judge disregards it he may be cited for civil contempt by the court of appeals. Though such a procedure is possible, the success of such a request for mandamus and a subsequent citation for contempt seems doubtful at the present time. The Supreme Court in the second *Brown* case gave federal district courts discretion in the matter of time, when that court stated that integration was to take place with "all deliberate speed."³⁵ Consequently, an affirmative

²⁸ 62 STAT. 701 (1948), 18 U.S.C. § 401(3) (1952).

²⁹ 62 STAT. 701 (1948), 18 U.S.C. § 401 (1952).

³⁰ *McCrone v. United States*, 307 U.S. 61 (1939).

³¹ *Oriel v. Russell*, 278 U.S. 358 (1929).

³² *Russell v. United States*, 86 F.2d 389 (8th Cir. 1936).

³³ *Brewer v. Hoxie School Dist.*, 238 F.2d 91 (8th Cir. 1956).

³⁴ See note 27 *supra*.

³⁵ 349 U.S. 294 (1955).

showing that, by refusing to grant relief, the judge is abusing his discretion will be difficult to make. Though the passage of time itself may prompt the circuit courts to hold that the "all deliberate speed" directive is not being met, it seems apparent from most of the current cases that as yet sufficient time has not elapsed.³⁶

Criminal contempt, on the other hand, is not used for the purpose of enforcing decrees but rather to vindicate the dignity of the court whose authority the defendant has flouted by refusing to obey or by acting in a manner designed to prevent the carrying out of the decree.³⁷ It can be of special significance in the effort to prevent evasion of the *Brown* decision. It has been held, in contrast to civil contempt where only those persons bound by the decree are subject, that in criminal contempt those who have actual notice of an existing decree may be held in contempt when their actions so warrant.³⁸ Consequently, persons in a community where a decree to integrate has been issued will not be prone to interfere, even though they were not parties to the litigation. And though difficult to foretell just what type of interfering conduct will reward the interferant with a criminal contempt citation, it has been held that acts complained of to constitute contempt of court need not actually obstruct the administration of justice or necessarily have that result if the tendency is of that character.³⁹ Hence, persons who actively work to frustrate an integration decree by such means as economic coercion, threats, intimidation and related means may be forced to pay heavy fines or serve jail sentences.

Though criminal contempt is a crime⁴⁰ and prosecution for it is usually brought by the United States Attorney, it may be prosecuted by the court on its own motion or the court may appoint the plaintiff's attorney for this purpose.⁴¹ The latter situation is desirable when the plaintiff or his attorney are the court's only means of information, as in cases where the contempt is not committed in the presence of the court. This latter procedure can be a convenient and effective implement in the hands of an excluded student with a decree. If the need arises he may avail himself of the benefits of

³⁶ For an illustration of reluctance on the part of a federal district judge to issue injunctive relief to excluded negroes and of the circuit court's refusal to intercede, see Judge Atwell's action in *Bell v. Rippey*, 133 F. Supp. 811 (N.D. Tex. 1955), *reversed* in 233 F.2d 796 (5th Cir. 1956). Rehearing on the merits in 146 F. Supp. 485 (N.D. Tex. 1956). The plaintiffs apparently declined further appeal in view of the decision by the Court of Appeals, in *Avery v. Wichita Falls Indep. School Dist.*, 241 F.2d 230 (5th Cir. 1957), where a similar refusal to issue an injunction was ratified by the court on the ground that the district judge was reasonably exercising his discretion.

For an example of the questionable use of discretion by a district judge see *Clemons v. Board of Educ. of Hillsborough*, 228 F.2d 853 (6th Cir. 1956). See also *McSwain v. Board of Educ. of Anderson County*, 104 F. Supp. 861 (E.D. Tenn. 1952) (*injunction denied*). Reversed and mandate to comply issued in 214 F.2d 131 (6th Cir. 1954).

³⁷ *Clay v. Waters*, 178 Fed. 385 (8th Cir. 1910).

³⁸ *United States v. Ship*, 302 U.S. 563 (1906).

³⁹ *Conley v. United States*, 59 F.2d 929 (8th Cir. 1932); 62 STAT. 701 (1948), 18 U.S.C. § 401 (1952).

⁴⁰ *United States v. Jacoby*, Fed. Cas. No. 15460 (W.D. Tenn. 1871).

⁴¹ *McCann v. New York Stock Exchange*, 80 F.2d 211 (2d Cir. 1935).

criminal contempt without time-consuming investigation by the United States Attorney.

Under existing law, a defendant in a contempt proceeding is not usually entitled to a jury trial. A jury trial is never afforded in a civil contempt proceeding and is required in criminal contempt only where the act also violates a state or federal criminal statute.⁴² Though Southern congressmen fought long and hard to provide a right to a jury trial in contempt proceedings growing out of civil rights cases, their 1957 jury trial amendment to the Civil Rights Acts was voted down.⁴³ The fact that the right to a jury trial was so ardently desired by segregationists demonstrates their fear of its effectiveness in combatting attempts to avoid integration. Without the aid of a biased local jury there is little doubt but that citations will issue when needed. The life tenure of federal judges is generally considered to render them relatively free from the local pressures which often beset elected officials. Though their own prejudices may deter them it is felt that a judge would be more likely to find a defendant guilty of contempt than would a jury composed of sympathetic segregationists.

The contempt power should prove to be a powerful weapon in cases where the Civil Rights Acts prove to be inadequate or inapplicable. Where the student litigant has a decree ordering his admission, where a school board has an injunction guarding its right to proceed with integration and where an injunction has issued to protect constitutionally guaranteed rights, the ever present threat of punishment for contempt may be the straw that will break the back of die-hard resistance to inevitable compliance with the Supreme Court's mandate in the "Segregation Cases."

Who May Sue

Legal remedies do not enforce themselves and consideration should be given to the problem of which persons or organizations are in a position to take the initiative in defeating attempts to avoid integration.

The right to bring legal action to enforce the *Brown* decision accrues to persons injured by failure to integrate. Of first consideration in this regard is the barred student himself. Since the student who is denied the privilege of enrolling will usually be a minor, the suit must be brought for him by some legally recognized person or organization. A suit in the student's name for damages under the Civil Rights Acts or for equitable relief, in the form of injunction and declaratory judgment, under authority of the Civil Rights Acts, the *Brown* decision itself or *Bell v. Hood*, may be brought by a next friend,⁴⁴ parent or guardian⁴⁵ or even an organization such as a school board.⁴⁶

⁴² 38 STAT. 738 (1914), 18 U.S.C. § 3691 (1952).

⁴³ Time, Vol. LXIX, No. 25, p.25 (June 24, 1957).

⁴⁴ See *Bell v. Rippey*, 133 F. Supp. 811 (2d Cir. 1935).

⁴⁵ *Ibid.*

⁴⁶ *Supra* note 33.

A local school board may bring the suit in a dual capacity. In *Brewer v. Hoxie School District No. 46*,⁴⁷ a school board which had ordered integration in pursuance to what it believed was its duty under the Constitution as construed by the "Segregation Cases," brought a suit for declaratory judgment and injunction against certain persons and organizations actively seeking by threats and intimidation to prevent the planned integration. In granting the relief prayed for, the court held that the school board not only had a right to bring the action in the name of the students on a *loco parentis* theory but also could maintain the action in its own right. The latter holding was justified on the ground that since the school board had a duty to comply with the *Brown* decision, it had a correlative federally protected right to do so free from interference. The case is an important step in the direction of integration as it gives impetus to school boards to proceed on their own to abolish segregation without waiting for time-consuming demands and subsequent litigation by individually aggrieved students or parents. In fact, timely action by a school board, fully confident that its actions can be protected from coercive hindrance, may bring about integration quietly without the widespread publicity usually attendant litigation infected with such deep emotional overtones.

It is the belief of the writers of this article that integration can best be brought about by the orderly processes of state administrative machinery. The most troublesome situations seem to arise only where there is an opportunity for rabble-rousing extremists to fan the smoldering issue into an inferno. The recent Little Rock incident bears mute testimony to this proposition. It is believed that persons in administrative capacity will see the handwriting on the wall and act accordingly. The *Brewer* case gives them opportunity, *a fortiori*, the duty to proceed with an integration program without waiting for the inevitable attention getting law suit, the result of which will never be, due to the *Brown* ruling, in doubt.

As a general rule actions will not be brought in the name of one excluded student alone but rather as class actions for the benefit of all students similarly situated.⁴⁸ Ordinarily a court can issue orders and decrees binding only those parties before it. Consequently, a school board might admit the successful litigant to the school and bar all others until they too bring separate suits. But the utility of the class action prevents the separate suit problem from being one of the numerous means of evasion. A single law suit may well settle, once and for all, the segregation question in a given jurisdiction.

Legal action to block attempts at evasion may also be brought by the Justice Department through the United States Attorney General or his assistants. Such action is authorized under the criminal sections of Civil Rights Acts and criminal prosecutions may be brought against persons whose conduct brings them within the statute.⁴⁹

⁴⁷ *Ibid.*

⁴⁸ *Adams v. Lucy*, 228 F.2d 619 (5th Cir. 1955); FED. R. CIV. P. 23(a)(3).

⁴⁹ 62 STAT. 696 (1948); 18 U.S.C. §§ 241, 242 (1942).

As in the Little Rock situation, the Attorney General can also initiate proceedings against state governmental officials or individuals who act in a manner intended to prevent the carrying out of a federal court order. In Arkansas, Governor Faubus who, by the use of National Guard troops, was obstructing Judge Davies' order to integrate Little Rock schools, was ordered to appear and show cause why he should not have an injunction issued against him.⁵⁰ Upon his failure to show good reason for the obstruction a preliminary injunction was issued by Judge Davies.⁵¹ The Justice Department was the moving force behind this action, and though the removal of troops removed the need for a contempt citation the case is a convenient example of the important role the Attorney General can play in similar situations which may arise.

Conclusion

The now existing remedies available in the federal courts appear adequate to cope with the problems of desegregation even though stronger legislation would simplify the solution of these problems considerably. Trials by prejudiced juries in civil actions for damages under the Civil Rights Acts and the obvious fact that damages are not the desired object of excluded students, are factors which indicate that this form of remedy will not be used extensively. Similarly, because of the likelihood of prejudiced juries, it appears unlikely that prosecutions for violations of the criminal sections of the Civil Rights Acts will meet with much success, though the threat of such action may be somewhat of a deterrent. Consequently, equitable relief by way of declaratory judgments and injunctions under the authority of the Civil Rights Acts and *Bell v. Hood* bolstered by possible use of the contempt power should be the most effective and often used tools for preventing a continuance of segregation.

The class action, brought by individually excluded students or their representatives will probably appear much more commonly than actions brought by governmental officials and organizations. Generally the most effective use of legal action by the latter comes after the right to attend the public school has been established and is primarily needed only where hardship is encountered by the private litigants in the form of public pressure and coercion.

The *Brown* decision lays heavy responsibility on local federal district judges. They have discretion to determine whether the locality is proceeding toward integration with "all deliberate speed." If much resistance is encountered on their part, desegregation may lag considerably. But there seems to be no great cause for alarm. In the majority of cases to date, district judges have acted with diligence and alacrity. There is no reason to assume that they will not continue to do so.

⁵⁰ Time, Vol. LXX, No. 14, p.17 (Sept. 30, 1957).

⁵¹ *Ibid.*

"The problems attendant desegregation in the deep South are considerably more serious than generally appreciated in some sections of our country. The problem of changing people's mores, particularly those with an emotional overlay, is not to be taken lightly. It is a problem which will require the utmost patience, understanding, generosity and forbearance from all of us from whatever race. But the magnitude of the problem may not nullify the principle. And that principle is that we are, all of us, freeborn Americans, with a right to make our way unfettered by sanctions imposed by man because of the work of God."⁵²

⁵² J. Skelly Wright, District Judge, in *Bush v. Orleans Parish School Bd.*, 138 F. Supp. 336 (D.C. La. 1956).