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Legal Framework of Desegregation

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THE LEGAL FRAMEWORK OF DESEGREGATION

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(718)
I. THE RECOGNITION OF A CONSTITUTIONAL RIGHT

The ebb and flow of American constitutional law on the legal segregation of races has produced many and varied marks on our society. In that law have been reflected the great goals of a generation that bled to attain them, and the loss of those goals as the interest of men was attracted elsewhere. Today those goals have again been adopted by the organs of our federal society, not as the result of a great passion, but as the end product of a long process of critical self-examination and re-evaluation. In our legal history, intervention in aid of the negro minority has, as often as not, been associated with the problems of federalism, and indeed, as we shall shortly see, that intervention must often wait until the needs of the Negro have been recognized as existing within the framework of a federal problem.

The first great tide of concern in the federal courts for the welfare of the negro minority in this country came in the years following the War Between the States. Speaking for the Supreme Court in 1879 in *Strauder v. West Virginia*, Mr. Justice Strong articulated the conception of the fourteenth amendment as affording the negro race “the right to exemption from unfriendly legislation against them distinctively as colored, — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race.” In *Strauder*, a statute which provided that only white males could serve as jurors was being challenged on the ground that it constituted a denial of due process, and the attack was successful. The Court indicated that the law amounted to “an assertion of their inferiority and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.”

These two passages, the first of which, significantly, is quoted in a footnote to *Brown v. Board of Educ.*, represent the approximate position of the law today. We are, as a nation, now officially concerned in our law with the racial problems to an extent unknown for generations. In this section of our survey we will first examine how the law left the bold position which it assumed shortly after the Civil War, and how it came to assume its present posture.

The first step in this history was *Plessy v. Ferguson*, which rejected the broad prospectus outline for the fourteenth amendment in *Strauder* and sought to deny the

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1 100 U.S. (10 Otto.) 303 (1879).
2 Id. at 308. See the adoption of this statement of the purpose of the amendment by the text writers: COOLEY, CONSTITUTIONAL LIMITATIONS 14 n. 1 (5th ed. 1883); BLACK, CONSTITUTIONAL LAW 405 (1st ed. 1895).
3 100 U.S. at 308.
5 Speaking of the colored race in *Strauder v. West Virginia*, 100 U.S. (10 Otto.) 303 (1879), Justice Strong said at 306: Their training had left them mere children and as such they needed the protection which a wise government extends to those who are unable to protect themselves. . . . It [the fourteenth amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.
6 163 U.S. 537 (1896). The case involved the constitutionality of a Louisiana statute requiring railroads to maintain separate but equal facilities for the white and negro races. The railroad involved operated entirely within the state, so that the inter-state commerce rule of *Hall v. De Cuir*, 95 U.S. (5 Otto.) 485 (1877), did not control. In the opinion an argument based on the thirteenth amendment was rejected on the ground that it had not been shown that the statute resulted in an involuntary
amendment any deep social significance. *Strauder* apparently was distinguished as dealing with political equality, a matter not to be confused in legal consideration with the separation of races in schools, theaters or (as was the case in *Plessy*) intra-state transportation.\(^7\) While such a result was admittedly possible by the use of the "dictum-holding" distinction, it was evident that the broad principle enunciated in *Strauder* could not be so easily restricted. Justice Brown, writing for the majority in *Plessy*, apparently realized this, for later in the opinion a strenuous effort is made to answer the objection that the allegedly discriminatory statute implied inferiority of the Negro. The reply was a simple flat that a law separating the races where they are likely to come into contact does not necessarily imply such inferiority; if the Negro supposes that it does, he alone entertains such an opinion.\(^8\) Years later, that same problem of inferiority, raised in *Strauder* and found in a new context, was to prove the great lever which overthrew *Plessy*.

On a broader plane, *Plessy v. Ferguson* represents a disengagement of federal law from the problem of racial separation. Justice Brown indicated the retreat by noting the inability of the law itself to eliminate racial prejudice\(^9\) so long as the device used could be found to be reasonable.\(^10\) This reasoning was facilitated by the suggestion that the mores of the community were relevant in determining the issue.\(^11\) If there were any who, after *Strauder*,\(^12\) believed that the Negro would be a quasi-ward of the federal government, *Plessy* demonstrated that such a belief was untenable.

Justice Harlan, dissenting in *Plessy*, developed a theme which was to be expounded again and again six decades later. He expressed the conviction that the post-war amendments were designed to eliminate from state law color-based distinctions, which had existed when slavery was an institution, and argued that a statute such as the one involved in the case would make peace between the races unattainable.\(^13\)

Through the first thirty years of this century, the Court adhered to the interpretation that *Plessy* had placed on the fourteenth amendment. The case had spoken broadly on the whole field of race relations outside "political rights," and had a special pertinence to the school problem in that Justice Brown had relied on several school cases to buttress the Court's finding that the distinctions of the statute were reasonable.\(^14\) Two subsequent cases established the fine contours of the *Plessy* doctrine in the school segregation field, drawing lines which are still being painfully erased and reset.

Three years after *Plessy*, in *Cumming v. Board of Educ.*\(^15\) where a negro high school had been closed to enable the county to provide facilities for a negro grammar school, Justice Harlan, this time writing for the majority, held that the state court was justified in its refusal to enjoin the operation of the white high school until comparable facilities could be supplied for colored children. He could see no logic in action which would only harm the white students while failing to aid their negro counterparts.\(^16\)

\(^7\) The Court described the distinction as an established one but offered no citation supporting the proposition. Note the language in another jury-selection case (decided the same day that *Plessy* was argued, April 13, 1896), that discrimination in either political or civil rights was forbidden by the Constitution. *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896). Justice Harlan wrote the opinion in *Gibson* and dissented in *Plessy*.

\(^8\) 163 U.S. at 551.

\(^9\) *Id.* at 551-52.

\(^10\) The "reasonableness" had been examined earlier. *Id.* at 550-51.

\(^11\) *Id.* at 550.

\(^12\) See note 5, supra.

\(^13\) 163 U.S. at 555, 560 (dissenting opinion).

\(^14\) The best known of these cases was *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849). The Court in *Plessy* also cited the District of Columbia Statutes, D.C. REV. STAT. §§ 281, 282, 283, 310, 319 (1875), providing for segregated schools, as an expression of congressional opinion on the matter. 163 U.S. at 545.

\(^15\) 175 U.S. 528 (1899).

\(^16\) *Id.* at 544.
Supporting the decision was the rationale that state-tax-supported education is a matter of purely local concern, in which federal interference is justified only where there has been a "clear and unmistakable" violation of the Constitution. While some hope was extended to the petitioners by the suggestion that proof that existing funds were withheld because of prejudice would raise different issues, the Negro could find little other comfort from the opinion, which had placed a heavy burden on minorities going outside their communities to seek protection against discrimination from within. The abandonment of substantial solicitude for the Negro's rights, noted in Plessy, continued.

The implications arising from the use of school cases in Plessy were confirmed in Gong Lum v. Rice, which raised the issue of the power of a local school board to establish separate school districts for colored and white children, while providing them with equal facilities. To answer the question, Chief Justice Taft quoted the rationale developed by Harlan in Cumming, laying its weighty burden on the plaintiff. But recognizing that the problem was not so easily disposed of, the opinion went on to observe that the issue was not a new one. If it had been, it might have merited a fuller consideration. Since the constitutionality of such a practice had been affirmed in a dozen lower federal and state court decisions, the Court chose not to re-open the question. The case concluded with a reference to the school cases cited in Plessy.

Taft's finding that the issue was closed tempts analysis. Surely a handful of lower federal court decisions does not preclude the Supreme Court from reviewing an issue. It would seem, therefore, that what led the Court to avoid the problem was the weight of state authority coupled with a deference to local law in the manner of Cumming.

Decided in 1927, Gong Lum marks the low tide of concern in the Supreme Court for the Negro in the schools. Yet despite such an attitude there appeared within the opinion a distaste for the prevailing doctrine. During the next two decades, Negro litigants seeking to attend non-segregated schools learned to work successfully with the doctrine which had been set up against them, and eventually to destroy it.

The first successful thrust came in 1938, with Missouri ex rel. Gaines v. Canada. Missouri maintained within its borders a law school for whites, but none for Negroses. A statute provided monetary assistance to Negroses for study in whatever adjoining state law schools would admit them. A significant fact for our purposes was that there had been little demand from the Negroses for legal education. Here, then, was what appeared to be a fair attempt to solve a difficult problem; arguably, there was no "clear and unmistakable" denial of equal protection. If the standards of the past had been used, there is little doubt that the Court would have found no constitutional violation. But Chief Justice Hughes, for the majority, rejected those standards and held that forcing the Negro to travel out of the state, while permitting whites to study within it, was unconstitutional. The Negro was held entitled to be educated at the state school until equal facilities were provided for him. Thus, while the Court continued outwardly to bow to tradition by retaining the "separate but equal" test (forced travel was characterized as "unequal"), it is clear that a departure from the extreme positions of Cumming and Gong Lum had been made.

This case became an "Alamein" for the negro plaintiff, for after it he never had a real defeat where his cause could be brought squarely into issue. The local nature of education problems had been measurably decreased as a matter of constitutional significance. After Gaines, the Court was free to examine extensively the educational

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17 Id. at 545. For a suggestion as to what Justice Harlan would have considered as a proper occasion for intervention, see Berea College v. Kentucky, 211 U.S. 45, 58 (1908) (dissenting opinion).
18 275 U.S. 78 (1927).
19 Id. at 85-86.
20 305 U.S. 337 (1938).
21 Speaking of the defeat of Rommel by the Eighth Army in 1942, Churchill has written: "It may almost be said, 'Before Alamein we never had a victory. After Alamein we never had a defeat.'" CHURCHILL, THE Hinge OF FATE 603 (1950).
22 In 1946 the Court ordered that a writ of mandamus issue for the admittance of a colored plaintiff to the state school of law in a case where a state had made no provision within or without the state for the legal education of the Negro. Sipuel v. Board of Regents, 332 U.S. 625 (1946).
situation before it, without too much regard for the requirement that an extreme situation exist before action could be taken. This change in emphasis made possible *Sweatt v. Painter*,23 *McLaurin v. Oklahoma State Regents*,24 and finally *Brown*, all three decisions ultimately resting on the actualities of the educational system under consideration.

*Gaines* represents the kind of attack which was waged on discriminatory legislation prior to World War II. It was simply claimed that the facilities provided to the Negro were not equal to those afforded similarly situated whites. After the war, the NAACP, which directed many of these efforts, altered the focus of its challenge. Segregation itself was claimed to violate the Constitution.25

The first cases to reach the Supreme Court involved the effect of segregation on higher education. The *Sweatt* case concerned the law school which Texas had recently established for Negroes. The Court found that the facilities were in fact unequal.26 Prior to 1940, such a finding would have been dispositive of the case. But to this holding the Court added a discussion of certain facets of a legal education which, while incapable of precise detection under the test of equality which was limited solely to physical facilities, nevertheless made it impossible in any event to provide separate but completely equal facilities for professional education. The Court observed that the practice of law is highly practical, and preparatory training for it cannot be carried on in isolation from the individuals and institutions with which the law deals. The practice is posited on an exchange and interplay of ideas, and on contact with people as a whole. A legal training which cut its students off from these necessary contacts and experiences was not the constitutional equal of one that did not.27

In the companion case of *McLaurin v. Oklahoma State Regents*, the Court found that there might be a violation of the fourteenth amendment even where the same physical facilities (the same classes, classrooms, library and cafeteria) were available to the Negro. For even the minor discriminations28 practiced here handicapped the student in his training, inhibited his ability to engage in discussion with his white fellow students, and therefore failed to provide him with truly and completely equal facilities.29 Of true significance was the Court's disregard of a previously relevant factor — the law's inability to produce unaided a happily integrated society. Chief Justice Vinson acknowledged that the removal of state-enforced discriminations could not end prejudice, but declared that the law ought not deprive the Negro of the opportunity to establish himself in the white community.30 Thus, the Court rejected the rationale of *Plessy* and assumed approximately the same position it had taken some seventy years before in *Strauder*, that the Constitution prohibits legal encouragement of racial prejudice.

One final step remained to be taken. In *Sweatt*, the Court had refused to reconsider *Plessy* in light of the recent learning on the purposes of the fourteenth amendment and the effects of segregation on the negro race. The framework for the ultimate attack had been developed in the advanced education cases: define the nature and purposes of the educational system in question and examine the effects of segregation on the fulfillment of those purposes. If the effect is deleterious, then the Constitution has been violated. In those cases interference with communication between the students had been the touchstone of decision. For the final effort a new concept was to be utilized by counsel for the NAACP, a concept which had originated in other disciplines — per-

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26 339 U.S. at 633.
27 *Id.* at 634.
28 *E.g.*, assignment to a seat in a classroom row reserved for Negroes, assignment to a special seat in the cafeteria. *Id.* at 640.
29 The opinion observed that the harm done might be multiplied in its effects on future pupils of the plaintiff, who was an education student. *Id.* at 641.
30 *Id.* at 641-42.
sonality development. For our purposes the term seems to have been given its particular denotation by the fact-finding report submitted in conjunction with the Midcentury White House Conference on Children and Youth, a study which the Supreme Court cites twice in Brown v. Board of Educ. The Conference Report describes personality development as that process by which the child attains the character which makes him the adult person he is to be. Two stages of personality development are particularly relevant to school segregation, because they occur during the period of lower formal education, and because the study has linked them with the educational process. The first stage is the attainment of a sense of duty, which begins about the sixth year and continues through the next six. The child at this time is engaged in learning how to do things and learning how to do them well, in addition to learning to cooperate with others and to follow the rules of society. The greatest threat to successful development at this time is a situation which induces a feeling of inadequacy and inferiority in the child. Other institutions have a responsibility here, but the main burden falls upon the schools.

As the student begins his formal schooling the attributes which he has previously developed, i.e., a sense of trust (his basic outlook on the world around him), a sense of autonomy, and a sense of initiative, can be strengthened by a reconfirmation of what he has previously attained, or by rehabilitation from the results of unfortunate experiences.

The inception of adolescence brings the problems of attaining a sense of identity, the idea of the role that the youth is to have in society, and a questioning of the possibilities of his success. It is a time when the person is acutely conscious of and concerned with the opinion of society. Proper personality development here is in great part dependent upon the self-esteem which has been previously developed in the child. The report insists that if we are to successfully bring our youth through this period our society must make good its promises to youth. Prior unhappy experience as a member of a minority group may have made the preparation faulty and the proper result difficult, although not impossible, to attain.

This information provided a framework within which the attorneys for the Negro were able to work out an attack on segregation.

The Conference Report contained an analysis of the effect of discrimination on the personalities of the members of the minority group, based on then-current knowledge. The Negro's sense of trust and of autonomy seemed to be under continuous assault from childhood. The report indicated that negro children were trained to avoid offense to the whites, with the result that their sense of initiative was retarded. The effects of discrimination were found to weigh especially heavily on the adolescent, who is passing through an independently difficult period. Not all of the minority-group children become emotionally maladjusted; in fact, most of them do not. But they seem to have paid a high price for their well-balanced personalities.

The study admitted that there had been little scientific investigation of the effects of segregation, but the authors insisted that what had been done supported their

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81 For a full discussion see Wittmer & Kotinsky, Personality in the Making 3-162 (1952).
82 347 U.S. at 494, n. 11.
83 Wittmer & Kotinsky, op. cit. supra note 31 at 17-19. Cf., the statement in Brown v. Board of Educ., 347 U.S. 483, 494 (1954): "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."
84 Wittmer & Kotinsky, op. cit. supra note 31 at 19.
85 Id. at 19-22; see also the statement from Brown v. Board of Educ., 347 U.S. 483, 494 (1954), note 33, supra.
86 Cf., Weaver, Racial Sensitivity Among Negro Children, 17 Phylon 52 (1956), a study based on statements taken from negro school children on the incidents which led them to discover that they were "Negroes."
87 Wittmer & Kotinsky, op. cit. supra note 31 at 136-38.
88 Ibid.
hypotheses.\textsuperscript{39} The Deutscher-Chein study, cited both by the authors of the Conference Report and by the Court in \textit{Brown}, was a survey of the opinions of social scientists on the effects of enforced segregation.\textsuperscript{40} Appropriately enough, the purpose of the research was to gather relevant material for use in a court attack on segregation. The focal point was the detrimental effects, if any, of enforced segregation in schools where the facilities were otherwise equal. The methods of the study were elaborately documented,\textsuperscript{41} but are far too detailed for discussion here. Most of the social scientists based their answers on their own professional experience; over one-fourth on their own research. Ninety percent of those who answered the questionnaire (53\% of those questioned) expressed the opinion that enforced segregation has a detrimental psychological effect on the segregated groups. Many thought that it was impossible to maintain separate but (truly) equal schools. Others noted that the discrepancy between democratic aspirations and the practice of segregation caused damage to the personality of the Negro. Significantly, warning came from one group that any change must be effectuated cautiously and with extensive preparations. Failure properly to effect the change could produce detrimental long-term results.\textsuperscript{42}

A legal device was needed to put this information before the Court. Courts are generally composed of professional men who can speak from their own experiences on the requirements of professional training. Normally they do not possess an intimate knowledge of the problems of elementary education. The device which was used was that of the social scientist as an expert witness.

In 1950 the NAACP launched a series of lower court attacks on the separate-but-equal doctrine as it applied to education. These cases were ultimately united before the Supreme Court in \textit{Brown}. Testimony by psychologists and sociologists was offered in several of them. Dr. Kenneth B. Clark has prepared the following summary of this testimony:

1. That racial segregation for the purposes of educational segregation was arbitrary and irrelevant since the available scientific evidence indicates that there are no innate racial differences in intelligence or other psychological characteristics. (Otto Klineberg-Wilmington trial) (Robert Redfield — South Carolina). This line of testimony was consistently unchallenged by the attorneys for the states.

2. That contemporary social science interpretations of racial segregation indicate that it blocks communication and increases mutual hostility and suspicion; it reinforces prejudices and facilitates rather than inhibits outbreaks of racial violence.

39 See their discussion of the sources. \textit{Id.} at 139-51.


41 Deutscher & Chein, \textit{op. cit. supra} note 40.

42 \textit{Ibid.} The Deutscher-Chein study while it has never been superseded has been supplemented. The general area has been the subject of a recent book KARON, \textit{THE NEGRO PERSONALITY} (1958), which is reviewed in this issue. See also Hindeman, \textit{The Emotional Problems of Negro High School Youths Which Are Related to Segregation and Discrimination in a Southern Urban Community}, 27 \textit{JOURNAL OF EDUCATION AND SOCIETY} 115 (1953). Here, seventy-one percent of negro students examined (Miami, Florida) mentioned abolition of segregation as one of the three most desired changes in their way of life. Exclusion, both public and private, was the second most frequently listed occasion of unpleasant contacts with whites. The first was personal contact.

See Prothro & Smith, \textit{The Psychic Cost of Segregation}, 15 \textit{PHYLON} 393 (1954). The investigation here claimed to have verified the propositions expressed by the Supreme Court in \textit{Brown}. The method employed was to measure the degree of authoritarianism in selected groups of whites and negroes. Using the tests developed by Adorno in \textit{Authoritarian Personality} (1950), and taking a score range of 7 maximum and 1 minimum, the mean score for 102 Negroes was 4.68 and for 94 whites was 3.86. The authors expressed an opinion that the only factor which could be identified as a cause was the southern pattern of segregation.

See also Weaver, \textit{Racial Sensitivity Among Negro Children}, 17 \textit{PHYLON} 52 (1956), a study based on statements taken from negro school children on the incidents which led them to discover that they were "Negroes." Most of the incidents involved social contacts, while some concerned schools or public facilities.

3. That segregation has detrimental personality effects upon Negro children which impair their ability to profit from the available education facilities. Segregation also has certain complex and detrimental effects upon the personality and moral development of white children. (Kenneth Clark — South Carolina, Delaware and Virginia).

4. That the consequences of desegregation are in the direction of the improvement of interracial relations and an increase in social stability. (Practically all the witnesses in each case).

5. That, if non-segregation can work on the graduate and professional level, it can work equally well on the elementary and high school level since children at this stage of development are more flexible in their attitudes and behavior. (Mamie Phipps Clark at Virginia).43

Note that the prophecy of Justice Harlan in Plessy, that laws effecting discrimination would contribute to the impossibility of peace between the races,44 is repeated by these experts decades later.

Particularly interesting is the testimony in the Delaware cases concerning the results of tests administered to the school children of the area involved. Dr. Frederick Wertham, a psychiatrist, testified that in examining a group of negro students selected at random he learned that they interpreted segregation "in one way only, as punishment."45 Segregation, he found, produced an anxiety in these children which in turn produced social disorientation. He specified that the fact of state enforcement intensified the problem.

Dr. Clark testified46 that, in a test administered to forty-one students of the Wilmington negro high school, he had discovered damage to the self-esteem of the Negro as a result of segregation, and he asserted that the findings were corroborated by the results of tests conducted elsewhere. The lower court opinions under review in Brown, insofar as they handle the validity of segregation per se, do so on the basis of information such as this.

Chancellor Seitz of Delaware made a finding based on the psychological data and conclusions put before him, concluding that the mental health and educational development of negro children were adversely affected by state-enforced segregation.47 The result of the segregated school system was an education for the Negro which was substantially inferior to that provided for whites. Despite this finding, however, the Chancellor declined to base his decision in the case on it, for the reason that such a position would be inconsistent with the separate but equal doctrine. He reasoned that the implications raised by the application of that doctrine in Gong Lum required admitting the possibility of separate but equal facilities which meet constitutional requirements. Thus, the evidence before the court to the effect that segregation is harmful per se could not control the case as showing an inequality which violated constitutional guarantees. While the Chancellor could and did hold that the existing facilities for Negroes were not equal to those provided for whites, any change in the separate but equal doctrine itself would have to come from the Supreme Court.48

43 Clark, The Social Scientist as an Expert Witness in Civil Rights Litigation, 1 SOCIAL PROBLEMS 5, 7 (1953).
44 See note 13, supra, and accompanying text.
48 Ibid.
If the Court were to consider such a change, what would be some pertinent reasons for adhering to the Gong Lum rule and refusing to apply the advanced-education rationale to the lower-school situation? Judge Parker in Briggs v. Elliott, the South Carolina case, began his answer to that question with a reference to the "local problem" rationale of Cumming. Graduate and professional schools, he argued, are designed to train mature individuals who have made the decision to enter themselves. The expense of maintaining separate schools, combined with the necessity of contact with other students, does in fact make it virtually impossible to maintain equal facilities on a segregated basis. On the other hand, grammar school education involves minors, who are present in the schools under state compulsion. In its activity the elementary school serves to supplement the training given to the child by its parents. Consequently, the law must consider the wishes of the parent in formulating educational policy if it is to enjoy the public support necessary for the existence of public education. "The equal protection of the laws does not require that the child must be treated as the property of the state and the wishes of his family as to his upbringing be disregarded." The weighing of the advantages of segregation is properly a legislative task. The judiciary should not interfere, for its members have "no more right to read their ideas of sociology into the Constitution than their ideas of economics."

The results of the first round of litigation showed little definite progress toward a new statement of the law. No court had found segregation to be invalid per se under the law as it stood, although two of them had intimated that a change seemed imminent. Only Delaware had found that there was such inequality in the existing facilities that an end to segregation was immediately justified. One court found that the facilities were equal, and two more held that equality was being achieved and for that reason refused to end segregation in the schools. In the District of Columbia, relief had been denied altogether.

The Supreme Court viewed these cases as squarely raising the question of the constitutionality of segregation in public education where the physical facilities provided for the Negro were equal to those provided for whites. The Court held that "in the field of public education the doctrine of 'separate-but-equal' has no place. Separate educational facilities are inherently unequal."

How did the Court reach this conclusion? It employed the technique developed in the professional cases: an examination of the nature and purpose of the educational system in question, and a consideration of the effects of segregation on its goals — considering education as a federal as well as a local problem. Chief Justice Warren, for the majority, insisted, as had Judge Parker in Briggs, that the problem of education

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49 The following arguments advanced by Justice Parker are substantially those advanced in the Supreme Court in behalf of the Gong Lum rule by counsel, particularly John W. Davis. He argued that the question was essentially a legislative one and that integrated education would lack public support. N.Y. Times, Dec. 10, 1952, p. 42, col. 4. The weight of authority did not favor change. Id., Dec. 11, 1952, p. 1, col. 3. A parent's wishes ought to be respected in the matter. Id., Dec. 11, 1952, p. 44, col. 3.


51 In the Virginia case, C. W. Darden, former governor of the state and then President of the University of Virginia, testified that in his opinion the people would not support integrated education. N.Y. Times, Feb. 29, 1952, p. 21, col. 2. The court in Davis v. County School Board, 103 F. Supp. 337 (E.D. Va. 1952), attached great weight to this statement in making its decision.


53 Id. at 537.


must be considered in light of its place in our life today; whatever it may once have been is of no importance.60

He said:

Today, education is perhaps the most important function of state and local governments. . . . It is required for the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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.61

Are segregated facilities inherently unequal? They had been found so on a graduate and professional level, and the rationale of those cases was found to be even more appropriate on the level of elementary education. Just as it had done in these earlier cases, the Court again turned to the intangible factors which make segregated education inherently unequal.62

The extent to which the findings of sociologists as embodied in the expert testimony in the lower courts was necessary to the disposition in Brown has been the subject of a certain amount of debate. The Court did place some reliance on the findings which had been made by the Kansas and Delaware courts on the basis of expert testimony. It also referred in a footnote to a number of sociological texts as constituting "ample modern authority" for its position.63 On the other hand, Professor Cahn argues that the decision turns on the "common sense" of the Justices:

...one speaks in terms of the most familiar and universally accepted standards of right and wrong when one remarks (1) that racial segregation under government auspices inevitably inflicts humiliation, and (2) that official humiliation of innocent, law-abiding citizens is psychologically injurious and morally evil. Mr. Justice Harlan and many other Americans with responsive consciences recognized these simple elementary propositions before, during, and after the rise of "separate but equal". For at least twenty years hardly any cultivated person has questioned that segregation is cruel to Negro school children. The cruelty is obvious and evident. Fortunately, it is so very obvious that the Justices of the Supreme Court could see it and act on it even after reading the labored attempts by plaintiffs' experts to demonstrate it "scientifically."64

The language of the opinions seems to give Cahn's thesis a good deal of support.

Be that as it may, Brown held the equal protection clause of the fourteenth amendment to outlaw segregation in the public schools per se. In a companion case, the court

60 The Court had propounded certain questions to counsel during the argument on what light the history of the fourteenth amendment could throw on the issues before it. After hearing their arguments, the Court found the information advanced to be inconclusive. This was due partly to the fact that at the time of the adoption of the amendment public education was practically unknown in the South, and the effect of the provision on northern education was not debated. Id. at 489-90.
61 Id. at 493.
62 Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. Id. at 494.
63 347 U.S. at 495n. The authorities do support the propositions for which they are cited. However, only one of them, Deutscher & Chein, op. cit. supra note 40, is the result of original research. Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, INT. J. OPINION AND ATTITUDE RESEARCH 229 (1949), is a report of the same research, with some interesting reflections on the validity of the method employed there. Brameld, Educational Costs in Discrimination and National Welfare 44-48 (MacIver ed. 1949), and Frazier, The Negro in the United States 674-81 (1949), are undocumented, but the latter contains a bibliography of pre-World War II texts. Wittmer & Kotinsky, op. cit. supra note 31, and Clark, op. cit. supra note 43, have already been discussed. The footnote in Brown closes with a general reference to Myrdal, An American Dilemma (1944).
held segregation in the District of Columbia schools to violate the due process clause of the fifth amendment since segregation "was not reasonably related to any proper governmental objective," and thus deprived the Negro of his liberty as guaranteed by the Bill of Rights.

The reversal of *Plessy v. Ferguson* by *Brown* did not purport to be complete. The rationale of *Brown* had been written in terms of the educational systems and problems that were before the Court, and the validity of legal segregation in the use of other public facilities was still an open question. The extension of the *Brown* decision into those fields was explored in several lower federal court cases shortly thereafter. The most significant decision came from the Fourth Circuit in *Dawson v. Baltimore*. The case involved segregation in the use of public beaches. Counsel for the city argued that the separation of the races was necessary to maintain order. The court, however, reasoned that since the necessity of maintaining order could not be interposed to segregate the races in schools where attendance was compulsory, it could likewise not be invoked to separate them where their use of the public facilities was voluntary. The Supreme Court affirmed without opinion, and also reversed a lower court decision which had sustained segregation in the use of a municipal golf course.

In 1955 the Fourth Circuit considered a case involving a factual situation similar to the one presented in *Plessy* — segregation in intra-state transportation. The court held that since *Plessy* had been based on school cases it could have no validity after *Brown*, and the segregation was forbidden. The reasoning employed was soon followed by a district court in Alabama in *Browder v. Gayle*, which the Supreme Court affirmed, again without opinion, citing *Brown* and the two cases discussed above.

The *Brown* case was the last occasion on which the Supreme Court found it necessary to analyze the peculiar factual situation involved in order to strike down legally enforced segregation where it was shown to exist. Hereafter the problems that were to face the federal courts would lie in determining where such segregation did exist and in devising remedies which could bring it to an end.

II Implementation

A. The Concept of State Action

In the *Civil Rights Cases* of 1883, the Supreme Court held that the fourteenth amendment protected only against "state action." While this doctrine has been criticized, it seems firmly entrenched today. This section of the survey will concern itself with the application of this doctrine in the area of race segregation.

The earliest form of state action to engage the attention of the Supreme Court under the fourteenth amendment was the enactment of a law. In *Strauder v. West Vir-
ginia, a Negro convicted of murder successfully challenged the constitutionality of a West Virginia statute which declared that only white males were eligible to serve as jurors. The Supreme Court placed on the fourteenth amendment a basic construction that has remained to the present time. The amendment says "no state shall . . . deny to any person . . . the equal protection of the laws;" by enacting and enforcing a statute discriminating against a person on the basis of race, a state is denying such equal protection. Simultaneously, the Court, through dictum in another jury exclusion case, elaborated more fully the principle that "state action" embraces acts by legislative, executive and judicial authorities and that the prohibition of the fourteenth amendment extends to all such action.

Where the discrimination the individual complains of is inflicted without specific statutory approval, the problem becomes the more difficult one of deciding whether there is in some other way sufficient presence of the state in its legislative, executive, or judicial capacities to mark the discriminatory act as attributable to state, rather than to private, action. The initial division of the problem will be made among situations involving a) actions of state officials and agencies, b) actions of quasi-public agencies exercising functions under some degree of control by the state, c) actions of individuals which can be reached because they are made possible by state inaction.

1. Actions of State Officers.

If an official who has a clear and direct connection with the state orders or puts into effect actions which violate individual rights existing under state law, the individual may theoretically be able to seek redress under the laws of the state, but often must find his remedy in federal judicial and legislative relief under the fourteenth amendment. The presence of state action in this situation is more difficult to find than in earlier cases where the action was expressly authorized by state law. In Virginia v. Rives, a state judge, on his own initiative, had excluded Negroes from jury service even though the state statute made all males over 21 eligible for such service. The judge was prosecuted under a federal criminal statute which made it a misdemeanor for any officer charged with the duty of selecting jurors to exclude citizens qualified under law from jury duty because of race, color, or previous condition of servitude. The constitutionality of the federal statute was upheld under section five of the fourteenth amendment on the grounds that when one who is clothed with state power acts in the name of the state, his actions are those of the state.

This situation is not entirely similar to that which exists when state agents or officials are clearly violating state laws because the judge in this case was vested with a certain amount of discretion. The state law merely instructed him to select jurors and did not specifically instruct him to select both colored and white jurors. The Court in applying the state action test reasoned that a state could not escape the restriction

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3 100 U.S. 303 (1879).
4 In view of these considerations the fourteenth amendment was framed and adopted. It was designed to assure the colored race enjoyment of all the civil rights the same that are enjoyed under law by white persons and to give them the protection of the federal government, so that that enjoyment would not be denied by the state. 100 U.S. at 306-08.
5 Virginia v. Rives, 100 U.S. 313 (1879). In this case however, the Court found the removal action premature under the particular statute involved. The opinion in Ex parte Virginia, 100 U.S. 339, 347 (1879) states: The constitutional provision therefore must mean that no agency of the state or of its officers or agents by whom its powers are executed shall deny to any person within its jurisdiction equal protection of the laws.
6 The question of state action is not difficult when a state agency is clearly involved. Chicago, Burlington, and Quincy R.R. v. Chicago, 166 U.S. 226, 234 (1896). For any unit operating under express authority of the state or through delegation of state power is expressly engaged in state action. Abernathy, supra note 1, at 378.
7 100 U.S. 313 (1879).
of the Constitution by placing discretionary power in the hands of an official. The Court placed emphasis on the constitutional purposes and the need to prevent frustration of these purposes.

An analogous result was reached in *Raymond v. Chicago Traction Co.*\(^9\) where the Supreme Court struck down excessive tax assessments by a State Board of Equalization against a corporation. Even though the action of the board was not authorized under the laws and constitution of Illinois, the Court found "state action," on the basis of the difficulty in obtaining redress in the state courts. This approach would seem to have legitimate value in those situations where there is an existing state remedy but the individual would be forced to pursue a long and possibly fruitless tour through the state agencies or courts.

In cases such as those involving police brutality, the problem is more difficult as the action complained of is clearly violative of state law. Such a case was presented by *Screws v. United States*,\(^{10a}\) decided in 1945. There the offense could have been punished under applicable state law but it is doubtful whether there was any real intention to bring state criminal proceedings against the defendant. Screws, a Georgia sheriff, and three others, had taken Robert Hall, a Negro charged with tire theft, into custody. Upon arrival at the courthouse, Hall was brutally beaten by the four men and died as a result of the injuries inflicted. The four were indicted under the Federal Civil Rights Act\(^{10b}\) for depriving Hall of his constitutional rights under color of law, more specifically, the right to be tried by due process of law, and not to be deprived of life without due process of law. The Court rejected the argument that the federal statute as construed was unconstitutional.

The importance of this case for our present purposes is found in the Court's expansion of the concept of state action. The Court reasoned that since the defendants were officers of the law, and since the assault had arisen out of an effort to make an arrest effective, they had operated under color of state law.\(^{11}\)

The *Screws* case and cases like it seem to present a legitimate application of the principle of state action. When an officer makes an arrest or engages in the performance of a state function, the individual against whom the action is directed knows that the officer represents the state. The individual is not in the same position as he is when being assaulted by a private citizen, even though the officer is flagrantly overstepping his authority. The actions, though in excess of authority, are clearly the direct result of the state's giving the officer the duties to perform and vesting its official power of the state in the officer. It cannot be maintained either by the rules of agency law or realistically by theories of constitutional policy that state participation in the acts of an official ends the instant the official violates state law.

The concept developed in *Screws* was further extended in *Crews v. United States*,\(^{12}\) where the defendant, a municipal police officer, was convicted of violating a Negro's constitutional rights by beating him and later causing his death by forcing him to jump into a river and drown. The defense asserted that the defendant had a personal

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9 207 U.S. 21 (1907) See also Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278 (1913).
10a 325 U.S. 91 (1945).
11 Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea. 325 U.S. at 111.
While the Supreme Court did find the requisite state action in the conduct of the officers, the case was reversed for a defect in the instructions to the jury. The Court held that it was necessary that there be a willful intent to violate the victim's constitutional rights.
While Screws was acquitted on his retrial, the Court in *Williams v. United States*, 341 U.S. 97 (1950) upheld the conviction of a special police officer under the Civil Rights Acts. See generally Abernathy, *State Action*, 43 CORNELL L.Q. 375, 381 (1958).
12 160 F.2d 746 (5th Cir. 1947).
animosity toward his victim based on a long-standing quarrel between them; since the defendant had acted out of personal malice, his action could not be considered state action. The jury in the lower court, however, found that the defendant acted under color of law in the course of his duties as a municipal officer and the court of appeals affirmed. It appears, then, that brutality by a policeman while on duty can be a criminal violation of constitutional rights even though the relationship to his duties is, to say the least, ambiguous.\footnote{A case to be discussed later in connection with state inaction holds that an officer may violate the constitution by intentionally allowing a mob to assault a person in his presence. Catlette v. United States, 132 F.2d 902 (4th Cir. 1943).}

It is possible, however, for a police officer to act in an entirely private capacity. In \textit{Watkins v. Oaklawn Jockey Club},\footnote{86 F. Supp. 1006 (W.D. Ark. 1949). An analogous result was reached under the fifth amendment in Mitchell v. Boys Club, 157 F. Supp. 101 (D.C. 1957). See 3 Race Rel. L. Rep. 252 (1958), also Roak v. West, 251 F.2d 956 (5th Cir. 1958); Simmons v. Whitaker, 252 F.2d 224 (5th Cir. 1958).} a civil action was brought against a sheriff, his deputy and a racing club on the grounds that the three parties had conspired to deprive the plaintiff of his civil rights as guaranteed by the fourteenth amendment. After paying his admission and entering the race park, the plaintiff was conducting himself in a lawful manner, when he was forced to leave by a deputy sheriff who was employed by the club. The deputy, who was known to the plaintiff as such, had threatened to place plaintiff under arrest if he did not leave.

The district court found that, even though the deputy's actions in removing the plaintiff from the premises may have constituted false imprisonment and arrest, they were of the same nature as those any other agent of the club could have performed. Despite the fact the deputy was a state officer, his actions were done purely in the capacity of his private employment and could not constitute a violation of constitutional rights.

\textbf{2. Activities Under State Auspices.}

It is now clear that any activity directly carried on by a state or its political subdivisions is "state action," within the meaning of the fourteenth amendment. Thus it has been consistently held that state or municipal recreational facilities must be open to Negroes on the same basis as whites,\footnote{Holmes v. Atlanta, 350 U.S. 879 (1955); City of St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956); Dawson v. Baltimore, 220 F.2d 386 (4th Cir. 1955), aff'd per curiam, 350 U.S. 877 (1955). New Orleans City Park Improvement Ass'n v. Peltge, 252 F. 2d 122 (5th Cir. 1958). See also several older cases decided in the "separate but equal" era. Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W.Va. 1948); Beal v. Holcombe, 193 F.2d 384 (5th Cir. 1951). Kansas City v. Williams, 205 F.2d 47 (8th Cir. 1953). See also Sharp v. Lucky, 252 F.2d 910 (5th Cir. 1958) where the maintenance of segregated voting registration offices was enjoined.} even though for purposes of tort law these may be characterized as "proprietary" rather than "governmental" functions.\footnote{A state cannot by judicial decision or otherwise, remove any of its activities from the inhibitions of the fourteenth amendment. It is doubtful whether a municipality may ever engage in purely private action that would not be action of the state. City of St. Petersburg v. Alsup, 238 F.2d 830, 832 (5th Cir. 1956).}

Where activities of this kind are carried out by private agencies under some kind of state auspices, the holdings have been less unanimous. In \textit{Derrington v. Plummer},\footnote{240 F.2d 922 (5th Cir. 1957), cert. denied, 353 U.S. 924 (1957).} the Fifth Circuit affirmed a district court order enjoining Harris County, Texas, from extending a lease of a courthouse cafeteria to tenants who excluded Negroes. The county's connection with the cafeteria was that of a lessor who supplied the premises and utilities to private parties who operated the restaurant. The court held that because of the facilities supplied by the county, the public funds used and the public purpose of the building and the cafeteria, the action of the lessee was the same as the action of the county and therefore state action. The injunction ordered the county not to lease unless specific assurance were included that equal facilities would be made available to Negroes and further ordered the tenant himself in 90 days to stop excluding Negroes. The implications of this case are far reaching in that the court seems to hold that if a state
attempts to divest itself of certain activities, the individuals acting in its place may be subject to injunction.

On the other hand, in *Tonkins v. Greensboro*, negro citizens were not allowed to enjoin the city from disposing of a city owned swimming pool in order to avoid the necessity of desegregating it. The court conceded that the city could not operate a segregated pool, but concluded that because the city was under no obligation to operate a swimming pool, the city could dispose of it. The opinion hinted that if any attempt were made to lease the pool or to sell it in collusion with the future lessee or owners in order to promote segregation, a different result would be reached.

The problem raised by private agencies performing more or less public functions under some kind of public auspices is particularly complex in the field of public housing. In *Dorsey v. Stuyvesant Town Corp.*, decided in 1949, the City of New York had contracted with the Metropolitan Life Insurance Company for the development of a housing project. The project was to be operated by Metropolitan's wholly owned subsidiary, Stuyvesant Town Corporation. The land used in the project was acquired by the city through the exercise of its powers of eminent domain. Stuyvesant then purchased the land from the city, assuming all costs of construction. The terms of the contract provided a tax exemption for 25 years and the city reserved the right to maintain rent regulation and to control any further sale or mortgage of the property.

Stuyvesant Corporation, according to a plan made known to the city before the contract was entered into, operated the completed housing project on a segregated basis. As a result of this policy, plaintiffs, members of the negro race, were refused admission. The action was brought alleging violation of the state constitution and the fourteenth amendment to the United States Constitution.

These contentions were rejected by the New York Court of Appeals, which held that there was not sufficient state action to invoke the fourteenth amendment because the public nature of the project had ended when the corporation assumed control according to the contract.

The state court discussed the applicable cases which had arisen under the fourteenth amendment, but held that the *Dorsey* situation did not meet even an extended definition of the term "state action." The extension contended for was that such action should include acts of discrimination by private individuals if such acts of discrimination had been aided by or made possible by the state. The court reasoned that the public purpose of a housing project was complete when the state had initiated the rehabilitation of the area and since the state had taken no part in the discrimination, no state action was present. The court felt that:

... to say that... helpful cooperation between the State and the respondent (Housing Corporation) transforms the activities of the latter into State Action, comes perilously close to asserting that any State assistance to an organization that discriminates necessarily violates the fourteenth amendment.

While it is still a valid question to ask how the Supreme Court might rule in a case similar to *Dorsey*, a large number of lower federal court and state court opinions indicate that racial segregation in a public housing project is unconstitutional.

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20 87 N.E.2d at 550.
The carrying out of private dispositions by state agencies — as in the area of charitable trusts — presents another area of controversy. In 1837, a philanthropist had left a trust fund to the city of Philadelphia for the purpose of maintaining a school for the benefit of poor, white, male orphans. Negro children who had been denied admission because of their failure to qualify under the trust terms, brought an action for admittance in the state court against the city trustee in charge of administering the school. Both the lower court and the Pennsylvania Supreme Court refused to admit the children. The United States Supreme Court found that the administration of the school by the city constituted state action, regardless of the fact that the discrimination was dictated by terms of the private trust instrument, and under the Brown rationale reversed and remanded. On remand, the Pennsylvania court did not order an integrated school, but instead allowed the creation of a new Board of Trustees who had no relation to the city. This action was affirmed by the Pennsylvania Supreme Court and the United States Supreme Court denied certiorari. The Pennsylvania Supreme Court relied on the fact that the trust created a private charitable bequest and held that although the control exercised by the trustees constituted state action, their removal would satisfy constitutional objections.

Concerning state action, the Pennsylvania Supreme Court had pointed out that a will is without force if it is not probated and that state law is necessary to effectuate any will. If this was state action, no private charity created by a will could dispose of its benefits on the basis of race, creed, or color as its settlor had stipulated. The court, therefore, rejected the implication that objectionable state action could be present whenever the state allowed probate of a will. This reasoning should be evaluated in the light of the holding in Shelley v. Kraemer that a state court cannot constitutionally enforce a racially restrictive covenant in a deed.

The fact of state financial support of private institutions creates a problem in determining state action. This consideration was of great importance in Kerr v. Enoch Pratt Free Library, decided in 1945, in which a Negro was awarded damages and an injunction because she was refused admission to a city library's training classes. The library had been founded by a private individual who created a trust fund and donated property for the library, though it required public funds to continue operation. No provision was made in the trust instrument for racial discrimination. The trustees were appointed under a Maryland statute and had all title to and control of the property.

The Fourth Circuit held that the operation of the library constituted state action. The court holding was based on the control by the city and the fact that the city's appropriations were necessary to accomplish the library purpose. The public purpose of the library was an important factor in this case. This case is distinguishable from Girard, where segregation reflected the settlor's policy, whereas here it was existing by virtue of city policy.

A different result was reached in Norris v. Baltimore, a 1948 case involving a private art institute. The federal district court found no state action in spite of numerous financial appropriations that were made to the institute. The court was undoubtedly influenced by the lack of direct control by the city over the operation and policies of the school.

The problem of segregated transportation facilities demonstrates another aspect of the state participation necessary to constitute state action. These facilities are often controlled by private corporations. However, to the extent that these corporations are acting
pursuant to the mandates of state regulatory authorities, state action is found. The 1958 case of *Baldwin v. Morgan* involved a railroad terminal in Birmingham where city and state authorities required segregation to be maintained. An action for damages and injunction was brought under the Civil Rights Statute and the fourteenth amendment charging the city, the Public Service Commission, and the terminal authority with discrimination against the negro race.

There was no question that the city and the commission were acting under color of law even though a misuse of authority may have existed. Concerning the Terminal Company, the Court stated that it was assisting in carrying out the unlawful action by maintaining the segregated terminal and therefore its action would be classified as state action. Once again an important factor in the determination of state action was that the private person was reflecting state policy — the Court stated:

> ... since a private person or party *"* takes its character from the duties imposed by state statutes; the duties do not become a matter of private law because they are performed by *"* a private person ... **

The area of control and regulation of primary elections presents similar problems of private agencies carrying out public functions. If the state runs the election, be it primary or general, there is no problem; but primary elections conducted by political parties have presented a difficult question. The Supreme Court, however, has extended the state action concept to meet the situation by relying on the theory of public purpose or function to override the technical difference between state and private agencies.

These cases have, for the most part, arisen in the southern states, where political parties exclude members of the negro race. Since the primaries conducted by the Democratic Party generally control the general elections, the Supreme Court has been quick to see that discrimination in a primary seriously restricts the Negro's constitutional right to vote.

In *Nixon v. Herndon* and *Nixon v. Condon*, the Court found state action in the conduct of the political party which regulated the primary election. The *Condon* court stated:

> The test is not whether they are to be classified as representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the restraints of the Constitution set limits to their action.

This is a broad test putting emphasis on the nature of the act rather than the control by the state, and even though the courts in these cases were strongly influenced by the delegation to the political party of power previously exercised by the state, the applicability of the broad test is demonstrated by the subsequent cases.

In *Rice v. Elmore* all state statutes regarding primary elections had been repealed and still the Court found state action. This decision was based on the result of discrimination in the primary elections in question. Private individuals, by the control they exercised over these primaries, were able to deprive the Negro of the right to cast a useful vote in the general election. To say that this was not state action would be to frustrate completely the constitutional protections.

The line of cases on political parties and negro voting rights was climaxed, and possibly ended, by *Terry v. Adams*. In this case, a political club which barred Negroes from membership made it a practice to hold its own primary election before the state-established party primary. Since the winner of the private primary would normally win

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34 251 F.2d 780 (5th Cir. 1958).
For a discussion of these acts see pp. 760-61 infra.
36 251 F.2d at 790.
38 273 U.S. 536 (1927).
39 286 U.S. 73 (1932).
40 Id. at 89.
41 165 F.2d 387 (4th Cir. 1947), cert. denied, 353 U.S. 875 (1948).
43 345 U.S. 461 (1953).
the regular primary and the general election, the Court found state action. This finding seems to be based on result rather than on actual action. The effect of the practice was a denial, for all practical purposes of the Negroes’ voting right. Since the state should be protecting this right, and should be conducting a meaningful primary, the Court took the position that the actions of the club were the same as the actions of the state. When a function so directly related to the nature of a state is completely assumed by a private group and a valuable political right seriously infringed, to deny the existence of state action would be to nullify the constitutional guarantee.

3. Inaction by the State

The word “action” is defined as “an act; a deed; a thing done; enterprise," and it is this ordinary connotation that is usually applicable in describing constitutionally objectionable state action. For example, a state acts by passing a statute, by beating citizens, by enforcing a reality covenant. However, a broad connotation of the term could also include “the act of not doing something,” and in this sense the acts of failing to protect citizens from brutality, of refusing to place citizens on jury rolls.

The semantic pursuit of distinctions between action and inaction on this level seems of minimal value when the reflection is made that the essence of unconstitutionality is discrimination, which term necessarily contemplates both action and inaction co-existing in one situation. For example, under the old separate but equal doctrine as applied to education, unconstitutionality ultimately could rest upon a failure to provide equal facilities for Negroes even though this would depend on the state’s act of providing educational facilities in the first place. State “inaction,” however, can be predicated not only on the state’s failure to treat equally under the rights and the laws it has created, but also of the state’s failure to provide laws protecting citizens from the harms of private individuals. In either sense, cases concerned with “state inaction” apparently represent the crumbling edges of the concept “state action” as it has been implied in the prohibition that “No State . . . shall . . . deny any person within its jurisdiction the equal protection of the laws.”

Police brutality, as we have seen, fits within the concept of state action even though the activity is illegal under state law. It does not take much constitutional imagination to include also the situation where, by “inaction” police officials intentionally allow persons to be harmed by mob violence. In Catlette v. United States in 1943, a deputy sheriff was found to be acting under color of law when he organized a mob to inflict indignities on a group of Jehovah’s Witnesses, even though he took off his badge and stated “What is done from here on will not be done in the name of the law.” And although there were no specific provisions in the state constitution or statutes making his actions illegal, the court took judicial notice of the common law duty of a sheriff to protect persons from assault in his presence. Similarly in Lynch v. United States in

44 WEBSTERS NEW INT. DICT. (2d ed. 1953).
45 Strauder v. West Virginia, 100 U.S. 303 (1879).
49 Lynch v. United States, 189 F.2d 476 (5th Cir. 1951).
50 Virginia v. Rives, 100 U.S. 313 (1879).
53 U.S. CONST. Amend. XIV, § 1.
56 132 F.2d at 904.
57 189 F.2d 476 (5th Cir. 1951).
1951, a sheriff and deputy sheriff were convicted for turning over negro prisoners to a Ku Klux Klan mob, the court stating:

There was a time when the denial of equal protection of the law was confined to affirmative acts, but the law now is that culpable inaction may also be a denial of equal protection.\(^{58}\)

The question is whether the existence of a duty to act on the part of a single police officer can be made the basis for relief against state inaction on a larger scale, and especially whether, in either case, federal injunctions, prosecutions, and damages can be made to operate against the individuals proximately responsible, rather than the state officials who failed to act. Wherever federal remedies are made available to protect against the acts of private individuals, no matter what the theory, there is a departure from the strict concepts established in the \textit{Civil Rights Cases}.

Indications of this are present in many of the cases previously discussed. In \textit{Shelley v. Kraemer},\(^{59}\) the nullification of the state's policy of enforcing racially restrictive covenants operated with direct effect on private individuals who used "neutral" state law to engage in discrimination. In the primary election cases, the injunctive remedies were used against private groups because they had assumed a function so completely attributable to the state that they were acting in place of the state and could be made subject to the same sanctions as state officials. Again in the case involving the lease of the courthouse cafeteria, part of the court order operated directly against the private lessee on the same theory. In all these instances, the state's duty actively to curtail discrimination began to emerge as the basis for giving relief against individual activity.

Another indication of the breakup of the concept of state action is the degree to which court orders operating against the state are being used in contravention of the principle that the federal power cannot force the states to correct evils outside the area of activity they have undertaken to deal with. In \textit{Holloyd v. Board of Public Instruction},\(^{60}\) the findings are not clear as to whether school district lines had been artfully drawn to maintain segregation, or responded to a pronounced natural geographical division between the white and negro sections of the community as to allow it. Without reversing the district court finding that the school district had not been deliberately gerrymandered, the Fifth Circuit started with the fact of a segregated public school, concluded unconstitutional state action, and ordered integration. Also, the attempt to set up three schools,\(^{61}\) one white, one Negro and one integrated met with similar defeat, despite the theory that any resulting discrimination would be private. These examples indicate that present constitutional theory does not allow a state to disclaim the responsibility for segregation in public schools because that segregation is produced by forces it does not undertake to deal with.

\textit{Brewer v. Hoxie School District}\(^{62}\) illustrates the fact that there are possible situations in which the rights of citizens may be protected against individual action. The Eighth Circuit held that a local school board could obtain an injunction against a group of private individuals who were interfering with the school board's attempt at integration. The court's jurisdiction and the cause of action under federal statutes were founded in the federal duty of the school board to uphold the constitution and the corollary federal right to be free from interference in executing that duty. The court thus sidestepped the issue of state action by bringing the case into an area where the constitution protects against individual action. However, the court went on to find additional grounds for the cause of action in the fact that the school board was in \textit{loco parentis} asserting the negro childrens' right to equal protection of the law. But with the same breath the court admitted that any rights in the Negroes standing alone existed against state action alone. The court gave only a cryptic, unsatisfactory answer to this apparent contradiction:

... if defendant's illegal conduct succeeds in coercing the school board to rescind its desegregation order, such recission can be accomplished only through "state action."

\(^{58}\) \textit{Id.} at 479.
\(^{59}\) \textit{344 U.S.} 1 (1948).
\(^{60}\) \textit{258 F.2d} 730 (5th Cir. 1958).
\(^{62}\) \textit{238 F.2d} 91 (8th Cir. 1958).
The school board having the duty to afford the children the equal protection of the law has the correlative right, as has been pointed out, to protection in performance of its function. Its right is thus intimately identified with the right of the children themselves. The right does not arise solely from the interest of the parties concerned, but from the necessity of government itself.63

4. Conclusion

The development of the legal concept of state action has varied according to the factual situation in which the issue arises. In situations where the state is patently in control, state action is often found by principles analogous to those of agency law. Therefore it was not difficult for the courts to find state action whenever the activity was directed by the state, involved state officers who exceeded their authority or who acted under their own discretion. Under this approach, it becomes irrelevant whether the function involved is governmental or proprietary.

However, the tests of control become difficult of application when both the state and private groups join together to achieve goals thought to be good in the community. Here the courts must evaluate the degree of control held by the state, the amount of state financial assistance to the operation of the activity, and the relationship of the activity to public purposes. The courts search to find the presence of the state, and if the state's presence is sufficiently noticeable its passivity in allowing discrimination to exist in the area of the activity will be made the basis for concluding that there is state as well as private discrimination.

Other considerations arise when the state completely removes itself from the activity and relinquishes all control to private individuals. Though the ordinary elements of state action are not present, if the activity is sufficiently intermingled with the necessities of government, the private control will be made equivalent to state action.

The decisions seem to have established a hierarchy of rights in relation to which the Court is willing to expand or contract the concept of state action. Political rights and physical security have ranked high. Rights in public education now seem established temporarily as of prime importance above the related rights in housing, transportation, recreational facilities, and economic opportunities. Wherever public education is involved the court will use the most liberal test possible in order to determine state action. In Cooper v. Aaron,64 the Court forbade the states to use governmental powers barring children from school because of race by any arrangement. Any is the vital word. The importance of a broad understanding of the term "state action" is therefore necessary in evaluating the constitutionality of the imaginative attempts by the southern states to avoid the decision in Brown. For if any state departs from a system of public education in order to uphold segregation, any support given to private school systems by the state will have to undergo the oft-repeated query: is it discriminatory state action?

B. JUDICIAL DECREES

1. Procedure

Suits in the federal courts to compel desegregation of public schools are governed by the Federal Rules of Civil Procedure. However, in order to understand more fully the disposition of such suits certain procedural problems peculiar to these suits should be considered.

Since segregation is a group phenomenon aimed at a clearly ascertainable segment of society,65 most suits to compel desegregation are brought in the form of class

63 238 F.2d at 104.
64 358 U.S. 1 (1958).
65 In Frazier v. Board of Trustees, 134 F. Supp. 589 (M.D.N.C.), aff'd per curiam, 350 U.S. 979 (1955) it was argued that a suit by three negro youths could not be maintained as a class action. The court, however, stated that: "The action in this instance is within the provisions of Rule 23(a) of Federal Rules of Civil Procedure because the attitude of the university affects the rights of all Negro citizens of the State who are qualified for admission to the undergraduate schools." 134 F. Supp. at 593. See generally, Comment, The Class Action in Anti-Segregation Cases, 20 U. CHI. L. REV. 577 (1953).
actions.\textsuperscript{66} There seems to be little doubt that the use of the class action device is proper especially since the suits passed on in\textit{Brown} were all brought in the form, of class actions,\textsuperscript{67} and the lower courts since\textit{Brown} have been unanimous in approving the use of the class action in such suits.\textsuperscript{68}

Where relief by interlocutory or permanent injunction is sought in a federal district court to restrain the enforcement, operation, or execution of any state statute or administrative order on the grounds that it is violative of the United States Constitution, convening of a three-judge district court is required by statute.\textsuperscript{69} Expeditious review, by direct appeal to the Supreme Court, is afforded irrespective of the outcome.\textsuperscript{70} Subsequent to\textit{Brown} (where all the federal cases had been heard by three-judge courts), the district courts have on many occasions been requested to convene three-judge courts to determine the validity of state constitutional provisions or statutes requiring the maintenance of segregated schools. In general, such requests have been unsuccessful. In some cases the denial was based on a finding that the decision of the\textit{Brown} case removed any substantial constitutional issue and any state law requiring segregated educational facilities is clearly invalid.\textsuperscript{71} In other cases three-judge courts were not convened because the defendants conceded the unconstitutionality of the assailed statute,\textsuperscript{72} or the plaintiff sought to enjoin discriminatory actions of state officials rather than to attack the statute as unconstitutional.\textsuperscript{73} This device will probably be employed only infrequently in future desegregation suits.

The federal district courts, in ruling on requests to order desegregation in a public school system, are faced with the more difficult procedural problem of what state and local administrative remedies must be exhausted before a plaintiff is entitled to equitable relief. This problem has become increasingly important with the passage of many pupil-assignment laws in the southern states.\textsuperscript{74} Closely allied with this question is that of the proper function of the school authorities who have been charged with the primary responsibility for implementing the constitutional requirement of a desegregated public school system.\textsuperscript{75}

Exhaustion of state and local administrative remedies, if the remedies are not provided by a statute unconstitutional on its face and are not in some other manner inadequate, has generally been held a prerequisite to federal intervention in school desegregation cases.\textsuperscript{76} Where exhaustion is required, fairly strict compliance with the administrative procedures seems necessary. In\textit{Carson v. Warlick},\textsuperscript{77} an "en masse"

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\textsuperscript{66} Class actions in the federal courts are governed by\textsuperscript{Fed. R. Civ. P. 23(b).}


\textsuperscript{74} See pp. 768–73,\textit{infra}.\textsuperscript{66}


administrative appeal on behalf of a number of negro children who had unsuccessfully completed the first step of their administrative remedy was held not to amount to exhaustion where individual appeals were required. In *Holt v. Raleigh City Board of Educ.* the plaintiffs' failure to appear personally at a hearing required under a pupil placement law, although they were represented by counsel at the hearing, caused the district court to dismiss for failure to exhaust the applicable administrative remedies.

The federal courts in dealing with the exhaustion requirement have given the administrative remedies in question a rigorous examination. Thus, resort to the pupil assignment laws of Louisiana and Virginia has been held unnecessary because of the inadequacy of the administrative remedies provided. The Fifth Circuit in *Orleans Parish School Bd. v. Bush* held that the Louisiana statute lacked an "ascertainable standard" to guide officials in placing school children. The court felt the lack of a standard, in light of past practices in Louisiana, "implied as its only basis . . . for placement the prohibited standard of race." Similarly, the Fourth Circuit in *Atkins v. School Bd.* found that the Virginia statute failed to provide adequate standards to guide the local officials. Both opinions viewed the statutes in question in the context of their legislative histories and in conjunction with associated statutes, and pointed out the futility of requiring a litigant to pursue an administrative remedy when the final success would be rewarded by the closing of the school pursuant to other legislation.

Further, the administrative remedies have been found fatally defective where they would be too time-consuming to furnish adequate relief. This ground was relied on in *Atkins*, where the court found that it could take as much as 105 days to pursue the administrative remedy to a final determination, and in *Thompson v. County School Bd.* where the court termed the provided remedy "too sluggish and prolix to constitute a reasonable remedial process." Thus, the administrative remedy must actually be capable of resulting in an education in the school applied for, beginning reasonably soon after the administrative machinery is set in motion.

The policy of the local school authorities regarding desegregation is gaining prominence as a justification for short-circuiting local administrative processes. Several courts have held that it would serve no useful purpose to require negro students to seek relief from a school board, or even to apply for admission to any particular school, before seeking a court desegregation order, in the face of a practice or policy of the local school authorities to maintain a segregated school system. These cases all involved an announced board policy to this effect, but it may be that such an open stand would not be required.

Somewhat akin to the problem of exhaustion of administrative remedies is that of exhaustion of state judicial remedies, or equitable abstention. All of the pupil assignment laws provide for appeals to state courts, but these have been held judicial,

83 242 F.2d 156 (5th Cir.), cert. denied, 354 U.S. 921 (1957).
84 Id. at 165.
91 See pp. 768-73, infra.
rather than administrative, remedies. While a federal court has occasionally abstained from granting equitable relief from allegedly unconstitutional state statutes in this general area on the ground that construction by a state court first may avoid the constitutional issue, plaintiffs in school desegregation cases have not been required to seek redress in the state judiciary before requesting the aid of a federal court. In reversing a district court which had applied the doctrine of equitable abstention to a school desegregation case on the ground that the conduct complained of was also contrary to state law forbidding segregation in public education, the Ninth Circuit pointed out that the "obvious purpose" in vesting civil rights jurisdiction in the federal courts was to enable members of a minority to be heard in a forum presided over by an appointed federal judge rather than an elected state judge. The same result was reached when this argument was presented as one of comity in a bus segregation case, the court stating that the responsibility of the federal courts to protect civil rights is as great as that of the state courts. With desegregation in public education now firmly established as a civil right, there is little likelihood that equitable abstention will receive much attention in this area.

2. Scope

The Supreme Court, in its second opinion in *Brown v. Board of Educ.*, recognized the widely varying situations to which the principle of desegregation in the schools would be applied. Accordingly, considerable leeway was permitted regarding the manner in which this principle was to be enforced in practice. Primary responsibility was conferred upon the school authorities; the courts were to insure that it was exercised in good faith. The courts were to exercise a practical flexibility in eliminating obstacles in a systematic and effective manner, but were to require that a prompt and reasonable start be made. These governing principles were not to yield merely because of disagreement with them. After such a start, and if the school authorities were to show its necessity, additional time might be granted to overcome administrative problems. These problems might concern the school plant, transportation system, personnel, or the revision of attendance districts and local laws and regulations. The lower courts were to retain jurisdiction during the transition from a segregated to a nonsegregated school system insuring that it be brought about with all deliberate speed.

Local school authorities are primarily responsible for effecting desegregation in the public schools, but even if they are wholeheartedly accepting this responsibility, plaintiffs aggrieved by a segregated school system are entitled to have a federal district court take jurisdiction and watch over the transition from start to finish. District courts have occasionally dismissed desegregation cases upon a finding that local authorities were already proceeding towards a good faith implementation of *Brown*, but such dismissals have uniformly been reversed. While it may be within the lower court's discretion to

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84 Romero v. Weakley, 226 F.2d 399, 400 (9th Cir. 1955), reversing 131 F. Supp. 818 (S.D. Cal.).
87 Id. at 299-301.
withhold positive action under such circumstances,\textsuperscript{99} the plaintiffs are still entitled to have their constitutional rights under \textit{Brown}\textsuperscript{100} declared, and to have the lower court "retain jurisdiction to ascertain and to require actual good faith compliance" with \textit{Brown}.\textsuperscript{101} As \textit{Avery v. Wichita Falls Independent School Dist.}\textsuperscript{102} demonstrates, only a finding by the lower court that desegregation in the schools is complete and that there is "no reasonable probability of a return" to segregation could justify a dismissal.

Probably the most extreme case requiring a local court to take and retain jurisdiction when a segregated school system was challenged is \textit{Holland v. Board of Public Instruction}.\textsuperscript{103} This was not a class action, and the district court, in denying relief, had specifically found that the single plaintiff involved was in fact going to the school nearest his home, that his application to a school in another district was rejected because he did not live in this other school district and not because of race, and that the applications of white children to this other school had been rejected for this same reason.\textsuperscript{104} The Fifth Circuit reversed and remanded, stating that the plaintiff's ineligibility to attend that particular school does not excuse a failure to provide non-segregated schools. Review of the district court's findings was unnecessary because the record as a whole was said to show that, however it was done, segregation was in fact being accomplished in the public schools. The court may have been influenced by the unsuccessful attempts of a sizeable number of other negro residents of the area to intervene in the appeal. If this decision is followed it may result in an almost automatic issuance of a general desegregation order and retention of jurisdiction by the district courts merely upon proof that no public schools in a given locale are attended by both white and negro pupils. Such questions as exhaustion of administrative remedies would become pertinent only in subsequent proceedings to enforce the general order.

Once a district court has a desegregation case properly before it, circumstances may justify denying immediate injunctive relief while retaining jurisdiction.\textsuperscript{105} \textit{Kelley v. Board of Educ.}\textsuperscript{106} illustrates a proper use of this procedure. There, upon finding that the local board was proceeding in good faith to draft a desegregation plan and was presently awaiting the taking of a school census to this end, the district court granted a continuance to the next term of court. \textit{Matthews v. Lanius}\textsuperscript{107} rests upon more dubious grounds. Lack of finances, crowded conditions in the schools, and the "necessity to readjust" the long-followed system caused the court to delay consideration of a motion for summary judgment, although the school authorities could merely show "some consideration" of the problem resulting in "little progress." Both overcrowding and, in the sociological sense, readjustment, have come in for heavy criticism in subsequent cases when advanced as reasons for delaying integration.\textsuperscript{108} The continuance granted here, even if not clearly warranted, may have been sufficiently offset by the court's direction at this time that the board make a prompt and reasonable start and report on the progress of desegregation by the beginning of the next school year, eleven months away. Whatever procedural distinctions may exist, there is little practical difference between this type of order and the "all deliberate speed" injunctions next to be discussed.

The least definite type of injunction by which the lower courts have required desegregation in the public schools is one which paraphrases the language in the second


\textsuperscript{100} \textit{Jackson v. Rawdon}, \textit{supra} note 99.

\textsuperscript{101} \textit{Borders v. Rippy}, 247 F.2d 268 (5th Cir. 1957).

\textsuperscript{102} 241 F.2d 230 (5th Cir.), \textit{cert. denied}, 353 U.S. 938 (1957).

\textsuperscript{103} 238 F.2d 730 (5th Cir. 1958).

\textsuperscript{104} \textit{Holland v. Board of Public Instruction}, 2 \textit{RACE REL. L. REP.} 785 (S.D. Fla. 1957).


\textsuperscript{106} 139 F. Supp. 578 (M.D. Tenn. 1956).


Brown decision. Typically, such an order will enjoin the defendants from requiring and permitting segregation in their schools "from and after such time as may be necessary to make arrangements for admission of children to such schools on a non-discriminating basis with all deliberate speed as required ... [by Brown]." In reversing a district court dismissal of a desegregation case, the Fifth Circuit stated that a plaintiff challenging a segregated public school system is "at least" entitled to this form of order.

While this type of injunction does not tell the school authorities anything regarding their duties that they should not already be aware of, it does reaffirm the primary responsibility of the local officials in implementing desegregation. These decrees, issuing from the local federal court, undoubtedly make the school officials more conscious of this responsibility than would knowledge of the abstract legal principle alone. Such an order leaves the board considerable leeway in fulfilling its responsibility. The district court in Bush v. Orleans Parish School Bd. indicated that it did not require desegregation "overnight, or even in a year or more." Furthermore, a continuance may serve as a springboard for future court action should the school authorities prove recalcitrant. This form of decree has also withstood subsequent legislative attempts to evade compliance by shifting responsibility for pupil admissions.

A more definite approach taken at the outset by some courts is to require local boards to make a prompt and reasonable start toward desegregation and to submit plans for total desegregation by a certain date. While primary responsibility in these situations still remains with the local school authorities, it is evident that the exercise of this responsibility is under close surveillance. In contrasting these orders with the "all deliberate speed" injunctions discussed above, it is interesting to note that the latter were used in Louisiana, South Carolina, and Virginia, while the former involved three "border states" and Arkansas. The court in Evans v. Members of the State Board of Educ. required that the local board submit a plan to the state board in thirty days and that the state board submit it to the court in another thirty days; factors which might justify delay under the second Brown decision were not considered at this time since the court held them inapplicable where only a reasonable start was in issue. The other district courts were more liberal, allowing local boards four, eight, and

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108 Borders v. Rippy, 247 F.2d 268, 272 (5th Cir. 1957).
111 This court may actually have allowed too much leeway since it takes into consideration the "problem of changing a people's mores" in forming its decree, the sort of factor which has been rejected elsewhere.
112 See Allen v. County School Bd., 249 F.2d 462 (4th Cir. 1957), which directed a district court to set a time for compliance when the board had taken no steps to comply with an earlier "all deliberate speed" decree.
fifteen\textsuperscript{128} months to arrive at a plan. This may have been caused by the attitude of the local authorities. However, subsequent litigation indicates that those involved in the Evans case were uncooperative,\textsuperscript{127} while in two of the other cases the boards had submitted plans at the outset\textsuperscript{128} and in one of these desegregation had already begun.\textsuperscript{128}

The most direct course of action open to a court with a school desegregation case before it is to issue an order, enjoining discrimination on a basis of race, effective immediately or at a set date in the very near future. This type of order has been thought proper at the very outset of the proceedings in many cases;\textsuperscript{130} it has also been used to follow up orders to desegregate "with all deliberate speed,"\textsuperscript{131} or to submit desegregation plans by a given date when local authorities have proved uncooperative,\textsuperscript{132} or when plans submitted have been unacceptable.\textsuperscript{133} Delay must be justified by the school officials; it is not automatically excused under the rationale of the second Brown decision.\textsuperscript{134} Nevertheless, the local boards are charged with primary responsibility for implementing school desegregation. Accordingly, the district courts must exercise judgment and discretion in reviewing their actions and cannot arbitrarily issue desegregation orders.\textsuperscript{135}

Such orders are clearly proper where the school boards do nothing.\textsuperscript{136} They have also been used, though, in cases where sizeable strides had already been made or were being made toward desegregation, but the courts found no justification for further delay.\textsuperscript{137}

Overcrowding, often coupled with future expansion plans, is a reason frequently put forth by school boards seeking delays, but it is rejected just as frequently by the courts.\textsuperscript{138} This is plainly correct regarding incoming classes; a school may limit or expand the size of its classes, but there can be no justification for using race as a basis for deciding who must be sacrificed to maintain reasonably uncrowded classrooms. As far as intermediate classes are concerned, it may be that children already attending a particular school under crowded conditions would suffer from a large influx of new pupils, thus presenting a more legitimate interest to protect. In practice, few negro children may choose to transfer. More important, there is no indication that children


\textsuperscript{135} Rippy v. Borders, 250 F.2d 690 (5th Cir. 1957).


\textsuperscript{137} Shedd v. Board of Educ., 1 RACE REL. L. REP. 521 (S.D. W.Va. 1956) (the board here had already agreed to desegregate grades one through six at the beginning of the coming school year); Clemons v. Board of Educ., 228 F.2d 853 (6th Cir.), \textit{cert. denied}, 350 U.S. 1006 (1956) (only the first six grades remained segregated).

already attending a particular school might not validly be given preference in filling class quotas over those attempting to transfer in, obviating any necessity for maintaining the illegal standard of race.\textsuperscript{139}

The local climate of opinion\textsuperscript{140} and uncooperative action of other local governmental agencies\textsuperscript{141} have also been unsuccessfully advanced by school authorities seeking delay; these factors will be discussed below.

Courts issuing orders requiring school officials to set a date for integration have usually allowed a short period of time, normally less than a year, in setting their effective date. This is done in order to promote a more orderly transition. Most have been effective as of the start of a particular semester to avoid mid-semester or mid-year transfers at the outset of desegregation.\textsuperscript{142}

\textit{Thompson v. County School Bd.}\textsuperscript{143} specifically considered the number of children involved, the smallness and urban character of the community, the time that might be needed to comply with any procedures prescribed by an impending special session of the legislature, and similar factors. Construction presently in progress caused a district court in West Virginia to allow a delay for one semester in desegregating grades seven to twelve,\textsuperscript{144} but was not a sufficient reason to permit an Ohio school district a one-year stay in desegregating grades one to six.\textsuperscript{145} In a unique 1958 opinion, a district court in Virginia set September, 1965, as the date by which segregation in the public schools of Prince Edward County must be terminated; this court based its order on the "some-what comparable situations" involved in Solon's experiences, the Reconstruction, and Prohibition.\textsuperscript{146} In general, though, these cases reflect the attitude that education "is a thing that cannot wait and pupils of the proper age are entitled to immediate consideration."\textsuperscript{147}

Between the vague but flexible "all deliberate speed" orders and the strict, immediate injunctions against public school segregation lie the orders based on a school board plan for gradual desegregation over a number of years. Thus far, these orders have been relatively rare, but because of the notoriety which one of these, the Little Rock plan, has received, and because of the role community sentiment plays, they will be considered separately. The primary responsibility of the local school authorities in implementing desegregation is especially evident here, although in at least one instance a court put forth its own plan, which was then embodied in a consent decree.\textsuperscript{148}

Plans formulated by local authorities, however good their intentions may be, have not always been favorably received by the courts. In \textit{Booker v. State of Tennessee Bd. of Educ.},\textsuperscript{149} the state board had submitted a plan to desegregate immediately a Memphis college at the graduate level and work down year-by-year; total desegregation to be accomplished by the start of the 1959-60 school year. The district court held this to be a good faith compliance with \textit{Brown} and one having a greater possibility of eventual


\textsuperscript{140} Mitchell v. Pollock, 2 RACE REL. L. REP. 305 (W.D. Ky. 1957); Jackson v. Rawdon, 235 F.2d 93 (5th Cir.), \textit{cert. denied}, 352 U.S. 925 (1956).


\textsuperscript{143} \textit{Supra} note 142.

\textsuperscript{144} \textit{Shedd v. Board of Educ.}, 1 RACE REL. L. REP. 521 (S.D. W.Va. 1956).


\textsuperscript{148} \textit{Dunn v. Board of Educ.}, 1 RACE REL. L. REP. 319 (S.D. W.Va. 1956).

\textsuperscript{149} 240 F.2d 689 (6th Cir.), \textit{cert. denied}, 353 U.S. 965 (1957).
complete acceptance by both races than would an abrupt change. The court of appeals reversed notwithstanding protestations by the board that the college was underfinanced and overcrowded to the point of being in danger of losing its accreditation. The school could, the court replied, simply limit its number of applicants, although not on a basis of race; as it was, the college was attended by a sizeable number of non-local and out-of-state students. This was not a class suit; the plaintiffs involved wanted to enroll in the freshman class, and to make them wait five years was found to be a non-compliance with the Supreme Court's declaration that desegregation was to be accomplished "with all deliberate speed."

Technically, this case is easily distinguishable from cases such as that approving the Little Rock plan. Administrative difficulties in desegregating a college would probably not be as serious as those involved in desegregating a public elementary and high school system, and, as far as overcrowding is concerned, a college can more easily limit its enrollment. It was also not a class action, although the tenor of the opinion suggests that the same result would have been reached even if it had been. It has been relied upon in rejecting a plan submitted in a class action which would have accomplished complete desegregation in local grade and high schools in four years. At least those desegregation cases arising in the Sixth Circuit are likely to be strongly influenced by it.

Both the Fourth Circuit and the Eighth Circuit have allowed school boards considerably more leeway in formulating desegregation plans. The Little Rock plan, approved in Aaron v. Cooper, called for integration of grades ten to twelve in September, 1957, grades seven to nine in 1959 or 1960, and grades one to six by 1963. The appellate court rejected the challenge that the plan was too slow, relying on the school board's good faith and the emphasis placed on local factors in the second Brown decision. Mention was made of problems regarding facilities, teachers, the creation of teachable groups, curriculum, the maintenance of educational quality, and, significantly, of the long history of school segregation in the community. In Moore v. Board of Educ. a plan was approved providing for the desegregation of eleven elementary schools (grades one to six) in 1957, three in 1958, and the remaining four in 1959. Desegregation in the seventh grade was to take place in 1958 and move progressively upward, providing a completely desegregated school system by 1963.

Without a doubt, serious administrative problems had to be solved in the Aaron and Moore situations. But the question remains as to what type of administrative problem cannot be solved in appreciably less time than seven years. Though unexpressed in the opinions, the answer seems to be community hostility to desegregation. Apparently, some courts hope for better community adjustment through gradual desegregation. While this factor was not mentioned in these two cases, unless it was indirectly referred to in Aaron v. Cooper by the mention of the long-standing community practice of school segregation, it has been voiced more openly in some desegregation cases as a factor to be weighed. Other courts, however, have firmly rejected com-

151 The courts have been more strict with institutions of higher learning. The graduate school cases arising before Brown required immediate admission into the schools in question. See, e.g., Sweatt v. Painter, 339 U.S. 629 (1950). The Supreme Court of Florida, in State v. Board of Control, 83 So. 2d 20 (Fla. 1955), requested findings on the factors mentioned in the second Brown decision in a case involving admission to a law school. These factors were held inapplicable here by the United States Supreme Court, however, and no reason for delay was found to exist where admission to a graduate professional school was sought. Florida ex. rel. Hawkins v. Board of Control, 350 U.S. 413 (1956).
154 Id. at 860-61.
munity opinion\textsuperscript{157} or racial tension\textsuperscript{158} as factors to be considered in desegregation cases. Some of the variance between the courts in guiding desegregation may be traceable to their differing views on the propriety of acknowledging community feelings, at least to the extent of trying to work the change gradually, as well as to the strength of these feelings in the communities that are concerned. The directions of the second \textit{Brown} case are of little assistance in this regard. Neither the advice that courts may properly regard the public interest in the "systematic" elimination of obstacles, nor the caveat that "disagreement" may not force the constitutional principles to yield, squarely meets this problem.\textsuperscript{159} Subsequently, the Court employed language in \textit{Cooper v. Aaron} that indicates disapproval of this factor as a consideration. Hostility to racial desegregation was termed irrelevant in determining whether conditions would justify delaying immediate general desegregation.\textsuperscript{160} Paradoxically, this was written while defending a seven-year plan from delay. However, the opinion was directed primarily to the hostility of state officials and the delay sought was contrary to the terms of a definite court order already in effect. Therefore, the propriety of plans for gradual desegregation within well-defined limits, which are designed to soothe community sentiment, remains an open question.\textsuperscript{161}

After a court has issued a definite order embodying a plan or setting a date for desegregation, the problem of implementing it remains. It remains for us to consider briefly the grounds for granting delays or exceptions.\textsuperscript{162} Attempts to delay desegregation are viewed more harshly when the enforcement of an existing order, rather than the propriety of making an original decree, is in issue.\textsuperscript{163} The possibility of allowing a subsequent delay because of adverse conditions created by the state or local government itself has been firmly denied by the Supreme Court in \textit{Aaron}. Even before this decision, time-consuming pupil assignment legislation was ignored when negro students were denied admission to a white public school in the wake of a court desegregation order.\textsuperscript{164} The probability that schools would be closed pursuant to state legislation if integration took place\textsuperscript{165} or disputes between state and local school boards\textsuperscript{166} had, likewise, been held to be no reason for delay in formulating an original order. Community feelings should have no influence in slowing down the implementation of a desegregation order; a school board was denied a year's delay to "educate the adults" in preparation for desegregation, the court stating that "racial tension as a defense has been effectively disposed of by \textit{Cooper v. Aaron}".\textsuperscript{167}

An interesting situation has developed regarding the rights of individual children after a plan has been adopted. A district court in Maryland, while approving a plan, ordered the immediate admission of two children then before the court, although these children were not yet entitled to admission under the plan.\textsuperscript{168} The following year the same court ordered a single plaintiff admitted in another county, although he was not

eligible under the plan there in effect, which was apparently proceeding well.\textsuperscript{160} The administrative problems which might justify a delay in general desegregation were held inapplicable when only one child was concerned, and the court stressed the personal nature of the constitutional right involved. If sizeable numbers of children choose to exercise their personal rights in any one area, the concept of “planned” desegregation may be stretched to the breaking point, but such problems have so far remained largely theoretical.

3. Enforcement

(a) Contempt

In a number of cases, attempts to bring about school desegregation have met with forceful resistance. We will now consider the resources available for meeting such resistance. Although the contempt power has been employed only twice in connection with the desegregation of public schools,\textsuperscript{170} it nevertheless looms large as a potent and capable judicial sanction.

The traditional contempt power of the federal courts is presently embodied in and to some extent limited by statute.\textsuperscript{171} Under this statute, acts of contempt — other than those committed in the physical presence of the court, which can be punished summarily — are classified as either civil or criminal. The proceeding in cases of civil contempt is remedial and coercive in its nature, instituted to preserve and enforce the rights of a successful litigant.\textsuperscript{172} Civil contempt is usually punished either by a compensatory fine payable to the complainant\textsuperscript{173} or by imprisonment until the order involved is complied with.\textsuperscript{174} Civil contempt proceedings must be commenced by the aggrieved party or someone who has an interest in the right entitled to protection.\textsuperscript{175} The burden of proving the defendant’s contemptuous act for purposes of civil contempt is satisfied by clear and convincing evidence\textsuperscript{176} and it is immaterial that his contemptuous acts

\textsuperscript{171} 18 U.S.C. § 401 (1952): A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as — 1) Misbehaviour of any person in its presence or so near thereto as to obstruct the administration of justice; 2) Misbehaviour of any of its officers in their official transactions; 3) Disobedience or resistance to its lawful writ, process, rule, decree, or command.

See Nye v. United States, 313 U.S. 33 (1941), where the court interpreted the language in a contempt statute similar to § 401 as denying the lower federal courts the traditional power summarily to punish as contempt, acts which do not occur in physical proximity to the court. See also Frankfurter & Landis, Power of Congress Over Procedure in Criminal Contempts in “Inferior” Federal Courts — A Study in Separation of Powers, 37 Harv. L. Rev. 1010 (1924). Other limitations upon the contempt power are found in 18 U.S.C. §§ 402, 3691-92 (1952), which grant a jury trial in certain specified criminal contempt cases. The contempt power is held to be inherent in all courts, although in the federal courts it is subject to congressional regulation. Michaelson v. United States ex rel. Chicago, St.P., M. & O. Ry., 266 U.S. 42, 63 (1924). Contra, Green v. United States, 356 U.S. 165, 196 (1958) (dissenting opinion).

\textsuperscript{172} Nye v. United States, 313 U.S. 33 (1941); McCrone v. United States, 307 U.S. 61, 64 (1939); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441-42 (1911).
\textsuperscript{173} United States v. UMW, 330 U.S. 258, 304 (1947); Gompers v. Bucks Stove & Range Co., supra note 172, at 441.
\textsuperscript{174} Penfield Co. v. SEC, 330 U.S. 585 (1947); Sauber v. Whetstone, 199 F.2d 520 (7th Cir. 1952); In re Nevitt, 117 Fed. 448 (8th Cir. 1902) (county court judges conditionally committed to coerce compliance to a federal district court writ of mandamus).
\textsuperscript{175} FTC v. McLean & Son, 94 F.2d 802 (7th Cir. 1938).
\textsuperscript{176} Oriel v. Russell, 278 U.S. 358 (1929); Fox v. Capital Co., 96 F.2d 684, 686 (3d Cir. 1938); Telling v. Bellows-Claude Neon Co., 77 F.2d 584 (6th Cir. 1935).
were made in good faith or were not in willful disregard of the decree or order.\textsuperscript{177} The fact of disobedience alone is sufficient to establish guilt.

Criminal contempt differs from civil contempt in that criminal contempt proceedings are not remedial, but have as their primary purpose the preservation of the court's power and the vindication of its dignity and authority.\textsuperscript{178} An act, to be characterized as criminal contempt, must therefore be disrespectful of the court, designed to bring the court into disrepute, or of such a nature that it tends to obstruct the administration of justice.\textsuperscript{179} Inasmuch as the public is considered to be the injured party, sanctions for criminal contempt generally consist of punitive fines payable to the government\textsuperscript{180} or unconditional imprisonment for a fixed term,\textsuperscript{181} though on occasion conditional penalties have been inflicted.\textsuperscript{182}

Where the contemptuous act also constitutes a crime under federal or state law, and the accused is a natural person, the punishment imposed cannot exceed six months' confinement or a fine of $1,000 or both,\textsuperscript{183} except where the contempt is of an order entered in a suit brought in the name of or on behalf of the United States.\textsuperscript{184} Criminal contempt proceedings may be initiated upon the court's own motion, by the United States attorney, or by a court-appointed attorney.\textsuperscript{185} In actual practice, the court often appoints the plaintiff's attorney to prosecute the contempt action.\textsuperscript{186} This policy is particularly important since in many cases the plaintiff or his attorney will be the court's only source of information.\textsuperscript{187} In an action for criminal contempt, proof of wilful misbehavior on the part of the defendant is essential,\textsuperscript{188} and guilt must be proven beyond a reasonable doubt.\textsuperscript{189}

\textsuperscript{177} McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949); Morse-Starrett Prod. Co. v. Steccone, 205 F.2d 244, 248 (9th Cir. 1953); NLRB v. Whittier Mills Co., 123 F.2d 725, 727 (5th Cir. 1941). See also Note, 48 Mich. L. Rev. 860 (1950).

\textsuperscript{178} See United States v. UMW, 330 U.S. 258, 302 (1947); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441-42 (1911); Moscovitz, Contempt of Injunctions, Civil and Criminal, 43 Colum. L. Rev. 780 (1943).

\textsuperscript{179} Lopiparo v. United States, 222 F.2d 897, 898 (8th Cir. 1955); Conley v. United States, 59 F.2d 929 (8th Cir. 1932); Juneau Spruce Corp. v. International Longshoremen's Union, 131 F. Supp. 866, 871 (D. Hawaii 1955).


\textsuperscript{181} Duell v. Duell, 178 F.2d 683 (D.C. Cir. 1949); Rapp v. United States, 146 F.2d 548 (9th Cir. 1944).

\textsuperscript{182} See Application of Patterson, 125 F. Supp. 881, 887 (S.D.N.Y. 1954), aff'd, 219 F.2d 659 (2d Cir. 1955) (ninety-day imprisonment conditioned on compliance with order to produce records for federal tax audit).

\textsuperscript{183} United States v. UMW, supra note 188, at 303 (1947); United States ex rel. Porter v. Kroger Grocery & Baking Co., 163 F.2d 168 (7th Cir. 1947). For discussions of the various tests to determine wilfulness, see Moscovitz, Contempt of Injunctions, Civil and Criminal, 43 Colum. L. Rev. 780, 793-96 (1943); Note, 32 Ind. L.J. 514, 520-24 (1957).
Although defendants in contempt proceedings do not have a constitutional right to trial by jury, Congress has provided for a jury in criminal contempt cases where the contempt is an act which also constitutes a state or federal criminal offense. This provision does not apply to direct contempts, that is, those "committed in the presence of the court or so near thereto as to interfere directly with the administration of justice," nor to contempts in disobedience of a lawful court order entered in a suit "prosecuted in the name of, or on behalf of, the United States." In relation to school desegregation, the right to demand a jury trial is of special significance when the accused has allegedly interfered with the efforts of school authorities to comply with a desegregation order. Where such conduct includes inciting others to disregard the court's injunctive order, as well as preventing Negroes from entering the newly integrated school, the acts may also constitute violations of numerous federal and state statutes including breach of the peace and simple assault. It was for this reason that John Kasper and others were tried by a jury for criminal contempt of the permanent injunction entered against them in connection with desegregation of the Clinton High School. The unsuccessful efforts of southern congressmen to include in Part V of the 1957 Civil Rights Act, a provision for jury trials in all criminal contempts probably indicates a feeling that the contempt power in civil rights cases will be less stringently applied in the hands of a southern jury. However, John Kasper's conviction of criminal contempt at the hands of an all-white jury indicates that a southern jury trial is not necessarily a means of escaping criminal liability for violent and willful resistance to valid court orders.

Although the charge of criminal contempt does not afford a person the constitutional guarantees of grand jury indictment and jury trial in the presentation of his defense, he is entitled to all other constitutional safeguards granted to criminal defendants. With the sole exception of cases based on the certification of the judge who saw and heard the contemptuous conduct committed in the actual presence of the court, the federal rules forbid summary punishment for a criminal contempt.

Consequently, punishment for all indirect or constructive contempts, that is, those committed beyond the presence of the court, as well as those direct contempts com-

182 Ibid. The phrase "so near thereto" has been construed to mean misbehavior in the geographical vicinity of the court, that is, there must be a physical proximity to the court, not merely a direct relation to the work of the court. Nye v. United States, 313 U.S. 33 (1941). This would include "every part of the place set apart for its own use, and for the use of its officers, jurors, and witnesses." Ex parte Savin, 131 U.S. 267, 277 (1889). Misbehavior of any person obstructing the administration of justice which does not constitute contempt under 18 U.S.C. § 401 must be prosecuted as a crime under 18 U.S.C. § 1503 (1952), with the attendant constitutional safeguards afforded in the usual criminal prosecutions.
185 See Comment, The Civil Rights Act of 1957 and Contempt of Court, 43 CORNELL L.Q. 661, 674-76 (1958). A compromise measure was ultimately adopted which afforded the right to a jury trial in a limited number of criminal contempts.
187 See Cooke v. United States, 267 U.S. 517, 537 (1925). See also Note, 36 U. DET. L.J. 180, 188 (1958), which enumerates the following: ... (1) the presumption of innocence, (2) the necessity for proof of guilt beyond a reasonable doubt, (3) the privilege against self-incrimination, (4) the right to counsel, (5) the right to be advised of charges against him, (6) the right to make a defense, and (7) the right to compulsory process to obtain defense witnesses.
188 FED. R. CRIM. P. 42.
mitted "so near thereto as to obstruct the administration of justice," may be ordered only after notice and allowance of a reasonable time for the preparation of the defense.

Owing to material procedural and substantive differences in actions for criminal and civil contempt, negro complainants seeking enforcement of a desegregation decree against defendant school authorities committing specific acts of discrimination will not only find it more expedient to initiate civil contempt proceedings, but will in all probability discover that federal judges are more sympathetic to imposing remedial measures than punitive fines or imprisonment. Also, in many instances the alleged wrongful conduct of the school authorities is due to compliance with the mandates of the state legislature, such as school-closing plans or leasing arrangements, making it extremely difficult to establish wilful misconduct. Actually, if the interference originates pursuant to a state statute, the courts would probably prefer to declare the statutes unconstitutional in a proceeding brought for that purpose. But this alternative is not always available, and as a consequence, the school authorities are placed in the awkward position exemplified by the case of Aaron v. Cooper. In this case the governor closed the public schools and intimated that the only method of educating the school children was to close the schools and lease the school property (which would have become "surplus property") to a private agency which in turn would operate the schools on a racially segregated basis. The court stated: "Obstructions to their taking of some step or steps in accordance with the [order] might ... enable them to make defense to a charge of contempt. ... Above all, would it be legally improper for them to take any affirmative step of action or collaboration, which either was intended or manifestly would serve to hamper or thwart the execution of such order." Thus, as this case demonstrates, local school officials are bound as representatives of the state to protect the constitutional rights of negro pupils. Failure to act in good faith in carrying out a desegregation order would render them liable to the contempt power of the court.

Although Rule 65(d) of the Federal Rules of Civil Procedure provides that injunctions "shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the acts sought to be restrained. ..." The court may, under exceptional circumstances, particularly where the public interest is involved, grant a broad injunction. The Supreme Court has, on at least one occasion, made it clear that defendants are not free to disregard a court decree simply because a particular evasive device was not specifically enjoined. Applying these principles to desegregation orders, it is evident that many of the various devices advanced to thwart integration, such as school-closing plans, school-placement laws, school-redistricting statutes, and the lease or sale of school property for the purpose of implementing racial segregation, could theoretically subject the school and various public officials involved to contempt sanctions. To date, however, the courts have understandably pursued other courses of action.

Once it was customary to issue injunctions purportedly binding the whole world.
This is no longer done under modern injunctive practices. Rule 65(d) of the Federal Rules of Civil Procedure, generally thought to embody the general common law doctrine that only parties, their privities, or those subject to their control are bound by an injunction, specifies:

Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

It should be noted, however, that an employee who subsequently terminates his employment is no longer bound by the injunction, provided his termination was not merely a subterfuge, and he does not in fact collude with the enjoined party. An injunction against a corporation, of course, binds its officers, agents, successors and assigns to the extent that such persons abet the corporation-defendant in violating the injunction.

Hence, in the context of public school desegregation, the initial decree ordering desegregation in a particular school district binds not only the named school authorities, but also teachers and administrative officials. Civil contempt proceedings thus would properly lie where named school officials continue to discriminate against negro plaintiffs, and teachers and administrative officials who continue to work in these illegally segregated schools might also be subject to civil contempt sanctions, both as employees of the school board, and by being in active concert with them in violating the decree. For although, under unusual circumstances, obstructions in the path of compliance with an order of the court may enable a person successfully to defend against a charge of civil or criminal contempt, subordinates cannot immunize themselves from civil contempt by asserting merely that their contemptuous conduct resulted from their obligation to obey their superiors. Further, an enjoined school official might be held guilty of civil contempt if he knowingly permits subordinates to disobey or disregard the injunction, since the enjoined officials have the affirmative duty to carry out, to the full extent of their official powers, the supreme law of the land in desegregating the schools under their supervision.

Since the contempt power can be employed against all persons bound by an injunction, the immunity afforded public officials acting as agents of the state under the eleventh amendment probably would not bar the imposition of contempt sanctions.


211 Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945): "In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aides and abettors, although they were not parties to the proceeding."


213 Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930). The obvious basis for this principle is that since the alleged contemner was not a party to the original action, and is asserting an individual right, he has not yet had his day in court. To punish him for violation of the injunction would be to condemn him without a hearing; accord, Hoover Co. v. Exchange Vacuum Cleaner Co., 1 F. Supp. 997 (S.D.N.Y. 1932).


215 See Aaron v. Cooper, 261 F.2d 97, 103-04 (8th Cir. 1958); cf. Maggio v. Zeitz, 333 U.S. 56 (1948); Parker v. United States, 126 F.2d 370 (1st Cir. 1942).

216 Healey v. United States, 186 F.2d 164, 171 (9th Cir. 1950). It is unlikely that the requirement of wilful disobedience demanded in criminal contempt could be met where the subordinate merely carries out orders given to him by his superior.


219 Aaron v. Cooper, 261 F.2d 97, 103-04 (8th Cir. 1958).


221 "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State..."
upon a school board, teachers or administrative officials. Numerous federal decisions have held that where the action of a state official violates the Constitution, immunity does not obtain since, when he so acts, he is not acting in the name of the state.\textsuperscript{222-223} Undoubtedly the most difficult questions in the use of the contempt power center around situations where the persons involved were neither parties to the original action nor in privity with them.\textsuperscript{224} Under Rule 65(d), previously discussed, third parties are bound by an injunction only if they are in active concert with the enjoined party or his privies, and receive actual notice of the order by personal service or otherwise.\textsuperscript{225} The problem, of course, is to define when acts are "done in concert" with the enjoined parties.

Perhaps the most important case defining federal contempt power in this area is \textit{Alemite Mfg. Corp. v. Stoff},\textsuperscript{226} There the court refused to cite for criminal contempt an employee who after terminating his employment proceeded to infringe patents covered in an injunction previously issued against his former employer. For the court, Judge Learned Hand states:

\begin{quote}
[T]he only occasion when a person not a party may be punished [for contempt], is when he has helped to bring about, not merely what the decree has forbidden... but what it has power to forbid, an act of a party. This means that... [he] must either abet the defendant, or must be legally indentified with him.\textsuperscript{227-229}
\end{quote}

If narrowly construed, this language, which is the precursor of Rule 65(d), would unquestionably curtail the court's contempt power. An analysis of the cases in the area, particularly those dealing with the concept of abetting, however, indicates that there are limited situations where a third person, not legally identified with the enjoined party, or actually abetting him, may be held in contempt.

In a case decided prior to the Hand decision, \textit{In re Reese},\textsuperscript{230} a non-party to the original order enjoining interference with certain mines was convicted of criminal contempt for violating the injunction independently of the enjoined parties. Upon appeal from a reversal of the conviction,\textsuperscript{231} it was held that although he could not technical-\textsuperscript{222-223} See \textit{ex parte Young}, 209 U.S. 123 (1908). See generally, \textit{Note, 2 Race Rel. L. Rep. 757} (1957). \textit{But see Gainer v. School Bd.}, 135 F. Supp. 559 (N.D. Ala. 1955), where the court refused to impose a compensatory fine against the school board in an action for civil contempt arising out of the board's disobedience of an order enjoining it from wage discrimination against negro school teachers. The court concluded that the board could not be held to respond in monetary damages either in an action \textit{ex contractu} or \textit{ex delicto}, and thus the court was without power to impose a compensatory fine in favor of the negro petitioners in a civil contempt proceeding. The court made it clear that to do so would be to authorize a suit, proscribed by the eleventh amendment, against the State of Alabama, for the conduct of the individual board members who acted in violation of the fourteenth amendment, and in a manner unauthorized under the laws of the state and the powers conferred upon the board. Ingenious as the court's reasoning might seem, several areas of dispute are apparent in the decision. First, it is highly questionable that a county school board should be considered a state agency within the eleventh amendment's ambit when it acts in violation of the Constitution. Secondly, the decision creates the anomalous situation of a court finding jurisdiction to enjoin illegal action, but having no jurisdiction to enforce the injunction. Finally, the court seemed to feel that the plaintiffs could be equally compensated by bringing contempt proceedings against the school board members individually, thus avoiding an eleventh-fourteenth amendment conflict.

\textsuperscript{224} See generally, Murphy, \textit{The Contempt Power of the Federal Courts}, 18 Fed. B. J. 34 (1958); Comment, \textit{What Remedies are Available to Enforce the Supreme Court's Mandate to Desegregate and Who May Use Them}, 9 Hastings L. J. 167, 173-76 (1958); \textit{Note, Implementation of Desegregation by the Lower Courts}, 71 Harv. L. Rev. 486, 495-98 (1958); \textit{Note, Contempt by Strangers}, 43 Va. L. Rev. 1294 (1957); \textit{Note, Criminal Contempt: Violations of Injunctions in the Federal Courts}, 32 Ind. L. J. 514 (1957); \textit{Note, The Federal Courts and Indirect Criminal Contempt}, 10 Vand. L. Rev. 831 (1957).\textsuperscript{225} \textit{Swetland v. Curry}, 188 F.2d 841 (6th Cir. 1951); \textit{Kean v. Hurley}, 179 F.2d 888 (8th Cir. 1950), \textit{affirming sub. nom. Kean v. Bailey}, 82 F. Supp. 260 (D.Minn. 1949); \textit{Alemite Mfg. Corp. v. Staff}, 42 F.2d 832 (2d Cir. 1930); \textit{Chisolm v. Caines}, 147 F. Supp. 188 (E.D.S.C. 1954); \textit{United States v. Dean Rubber Mfg. Co.}, 71 F. Supp. 96 (W.D. Mo. 1946).\textsuperscript{226} 42 F.2d 832 (2d Cir. 1930).\textsuperscript{227-229} \textit{Id.} at 833.\textsuperscript{230} 98 Fed. 984 (C.C.D. Kan. 1900).\textsuperscript{231} \textit{In re Reese}, 167 Fed. 942, 945 (8th Cir. 1901). Although the reversal of the conviction was upheld because of an error in pleading, the court's language is significant: The word 'disobedience' aptly applies to a party or other person against whom an order is made. The word 'resistance' manifestly is applicable to a party
ly be convicted for violating the injunction, since he was not a party, and did not aid or abet a party, his conviction could be sustained because his actions, done with full knowledge of the injunction, seriously obstructed the administration of justice, and, in effect, nullified the court order.

The reasoning was subsequently interpreted by the court in Chisolm v. Caines as supporting a criminal contempt conviction of a non-party for trespassing in violation of a known injunction. Although Judge Hand in Alemite disapproved of the Reese dictum insofar as it supported the decision in Chisolm, it appears clear that the Reese court only meant to apply its language to situations where a third party actually impeded the court in administering justice between the litigants in a private law suit. In this sense the third party would be “abetting the defendant,” for the court would be frustrated in its attempt to correct or prohibit what it had judicially decided was illegal. The criminal contempt arises from the willful attempt by any person to prevent or frustrate the execution of a valid process of a court.

What appears to be the correct understanding of Reese is illustrated by Gonigon v. United States. There the court reversed a criminal contempt conviction, since no evidence demonstrated that the defendant actually knew of the existence of the injunction. In its opinion the court states:

[The defendant] was bound, alike with other members of the public, to observe... [the] restrictions [of the injunction] when known, to the extent that he must not aid or abet its violation by others, nor set the known command of the court at defiance, by interference with or obstruction of the administration of justice; and the power of the court to proceed against one so offending and punish for the contemptuous conduct is inherent and indisputable. [Citations omitted]. We believe the above mentioned distinction in contempt proceedings, between disobedience of the injunction by parties and privies and the conduct of others in contempt of the authority and commands of the court, to be elementary. ... (Emphasis added.)

Although both Reese and Gonigon arose in the context of labor violence, which gives possible doubt to their general value as precedent, they should prove to be of controlling value in the face of violent resistance to a lawful desegregation order by recalcitrant third parties. Hence, even though a third person is not a party to an injunction proceeding, or in privity with a party, or actually abetting a party, he may be subject to citation for contempt in the limited situation where he has knowledge of the injunction and his actions impede the administration of justice to such an extent that, in effect, they are “done in concert” with a party and annul the intent or purpose of the original decree.

to the suit and may be applicable to other persons. ... Any person, whether a party to a suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or to abstain from doing certain acts, cannot intentionally interfere to thwart the purposes of the court in making such order. Such an act... is a flagrant disrespect to the court which issues it, and an unwarranted interference with and obstruction to the orderly and effective administration of justice, and as such is and ought to be treated as a contempt of the court which issued the order. Such contempts, however, are totally different offenses from those which the parties to the case commit when they disobey a direct order made in a case for the benefit of the complainant. The one is an offense against the majesty and dignity of the law. The other is a violation of the rights of a particular suitor, at whose instance and for whose protection the particular injunctive order disobeyed was issued by the court.

232 121 Fed. 397 (E.D.S.C. 1903). There was no obstruction of justice here as in Reese since the alleged contemners’ conduct in no way interfered with the court’s task of doing justice between the parties. Their action did not bring about the enjoined activity, i.e., trespass on complainant’s property by the enjoined party. The same injunction was held not to support a charge of criminal contempt for trespass by non-parties in Chisolm v. Caines, 147 F. Supp. 188 (E.D.S.C. 1954).

233 163 Fed. 16 (7th Cir. 1908), cert. denied, 214 U.S. 514 (1909).

234 Id. at 20. See also United States v. Murray, 61 F. Supp. 415, 419 (E.D. Mo. 1945): “If the orders of the Court are to be set aside, and their execution prevented by private citizens... then the Court would be powerless to enforce its decrees. That the execution of Court orders shall not be interfered with is the very bedrock of the power of Courts to administer justice.”
(b) Supplementary Injunction.

Owing to the delicate situation existing in much of the South, neither civil nor criminal contempt has been extensively used in the school desegregation cases. Both the courts and litigants seem to prefer other methods of restraining specific state and private attempts to avoid integration, particularly the supplementary injunction.

In a number of cases the federal courts have given supplementary injunctive relief against violence, acting in aid either of a previous judicial order or of a desegregation plan adopted by local authorities without judicial intervention. Several recent cases are illustrative of the use of the supplementary injunction in integration cases. The court in Thompson v. County School Bd. when faced with the issue of citing school authorities for violating a prior injunctive order, found that the defendants had acted in good faith relying on a pupil placement act passed after the entry of the injunctive order, and that they “did not intend any defiance of the injunction.” Rather than hold the school authorities in civil contempt and impose conditional punishment, the court took the milder course of issuing a supplemental decree specifically defining their duties under the prior order, thus giving them the opportunity of avoiding a contempt citation.

The supplementary injunction was also used in connection with the Arkansas school-closing and property-leasing law in Aaron v. Cooper. In issuing an order enjoining school authorities in Little Rock from leasing school property to a private school corporation for the avowed purpose of maintaining racially segregated schools, the court made it clear that the leasing arrangement constituted a violation of the existing decree binding the school officials. The court emphasized that “any attempts, from whatever source occurring, to interfere with or prevent the carrying out of the integration plan, would not release [the school authorities] from the obligation of the judicial order against them.

In Hoxie, Tennessee, a device not unlike the supplementary injunction was used to restrain interference with a desegregation plan adopted by local school authorities without judicial compulsion. The school board had voluntarily begun desegregating its schools upon the assumption that the School Segregation Cases had rendered invalid all state laws imposing racially segregated public education in Tennessee. Through acts of boycott, trespass, picketing, and threats of bodily harm individuals had succeeded in suspending the operation of the schools. In response to a petition by the board, a preliminary injunction was issued enjoining further interference by these persons; the order was subsequently made permanent. On appeal, the Eighth Circuit upheld the permanent injunction against attacks upon the jurisdiction of the district court. Since there had been no prior decree enjoining segregation, the court was unable to utilize its ancillary equity power. However, it found that the school authorities were not only under a constitutional duty to accord equal protection of the law in the operation of the Hoxie schools, but they also possessed a corresponding federal right to be free from direct interference in the performance of their duty.

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236-240 Brewer v. Hoxie School Dist., 238 F.2d 91 (8th Cir. 1956).
242 159 F. Supp. at 571.
243 261 F.2d 97 (8th Cir. 1958). The injunction was subsequently entered by the district court pursuant to mandate of the Eighth Circuit and is reported in Aaron v. Cooper, 169 F. Supp. 369 (E.D. Ark. 1959).
244 261 F.2d at 105.
245 Id. at 103.
248 Brewer v. Hoxie School Dist., 238 F.2d 91 (8th Cir. 1956).
249 Id. at 98-101. In addition to establishing jurisdiction upon the federal right-duty basis, the court also found jurisdiction under Rev. Stat. § 1980 (1875), 42 U.S.C. § 1985(3) (1952), dealing with conspiracy to interfere with civil rights. See pp. 760-61 infra.
These cases aptly demonstrate the convenience and effectiveness of the supplementary injunction in desegregation cases.

(c) Obstruction of Justice

When the conduct of the defendant does not amount to contempt, it may give rise to criminal prosecution for the "obstruction of justice."250 This was the view of the Supreme Court reversing the criminal contempt conviction of the defendant in Nye v. United States.251 In that case the Court refused to uphold as contemptuous the unlawful means used by Nye to procure the dismissal of a suit in the federal court, since such behavior occurred over 100 miles from the courtroom and thus not "in the presence of the court or so near thereto as to obstruct the administration of justice." However, the Court indicated that such conduct need not go unpunished, but that any punishment "must be under the Criminal Code where they [the defendants] will be afforded the normal safeguards surrounding criminal prosecution." Nye was subsequently indicted for willful and corrupt obstruction of justice and his conviction was upheld on appeal.253

The range of activity which could result in prosecution under the code provisions varies widely, including in its coverage obstruction of or assault on process servers;254 resistance to extradition agents of the United States;255 attempts to influence jurors by written communication;256 theft or alteration of records or processes;257 picketing or parading near a building housing a court of the United States or occupied by a judge, juror, witness, or court officer,258 and recording, listening to, or observing proceedings of a grand jury that is in the process of deliberating or voting.259 However, in the context of public school desegregation, the so-called "omnibus provision" of section 1503260 is most pertinent. The language of this provision is broad enough to encompass the activity of third persons who, by threats or force, seek to discourage negro plaintiffs from further prosecuting desegregation suits already instituted against school authorities. Even if the attempt to prevent the prosecution of the suit proves unsuccessful, the defendant could still be charged with obstruction under the statute.261

The statute requires the act charged as obstruction to be done in relation to a proceeding then pending in a federal court.262 A case is considered pending upon the filing of a complaint with a commissioner, charging a violation of the laws of the United States.263 Additionally, this statute can be applied to civil actions in federal courts to which the United States is not a party, since the justice being administered is that of the United States.264 When the case has been finally dismissed, the statute becomes inap-

251 313 U.S. 33 (1941).
252 Id. at 52-53.
255 Id. at § 1502.
256 Id. at § 1504.
257 Id. at § 1505.
258 Id. at § 1507.
261 See United States v. Solow, 138 F. Supp. 812 (S.D.N.Y. 1956). "It [the statute] condemns not only the corrupt obstruction of the administration of justice but also any endeavor to corrupt the due administration of justice." See also United States v. Russell, 255 U.S. 138 (1921), holding that the successful corruption simply aggravates the severity of the offense.
pplicable,\textsuperscript{265} but it is generally recognized that when the court has issued an injunction, the proceedings are not at an end until full performance under the decree has been obtained.\textsuperscript{266} A conviction under this act has been upheld where the defendants destroyed two railroad bridges in violation of an injunction prohibiting the hindrance of the operation of a railroad and destruction of railroad property.\textsuperscript{267} Apparently since violation of this injunction was sufficient to permit a court to find an obstruction of justice, a violation of an injunction in a segregation dispute could be considered equally violative if the execution of a court order is impeded. Also, the defendant, for the same act, could be found guilty both of criminal contempt and of violating this statute without being put in double jeopardy, since the two constitute independent offenses against two separate authorities.\textsuperscript{268} “Obstruction of justice” thus provides the court with an additional judicial sanction to insure the fair administration of justice in the area of segregation.

(d) Military Force

Because the federal judiciary possesses little in the way of sanctions, other than its contempt powers, to insure the enforcement and implementation of its decrees, it must often turn to the state and federal executive authorities and the military power at their disposal for assistance.

Where the order of a federal court is met with flagrant interference and its authority flouted through mob action, the court normally looks to the federal marshall. This procedure failing, the court will then generally turn to the governor of the state wherein the violence is occurring. It is clear that, if the law of the state permits the use of military force,\textsuperscript{269} a governor is empowered to suppress disorder whenever, in his discretion, he determines that the exigencies of the situation require such action.\textsuperscript{270} This discretion, though extremely broad, is still subject to judicial review by the federal courts.\textsuperscript{271} Where the disorder occurs in opposition to a decree of a federal court, the governor’s use of the power is proper only if employed “to aid in making its process effective and not to nullify it; to remove and not to create, obstructions to the exercise by the complainants of their rights as judicially declared.”\textsuperscript{272}

When the use of the state military authority proves inadequate to support and enforce a valid federal court decree, or if state authorities fail to use their power to suppress any violent opposition to a court order which sustains an individual’s federal constitutional rights, the President may employ federal troops to protect these rights. This authority is derived directly from three sections of the United States Code,\textsuperscript{273} which authorize the use of federal troops even in circumstances where the governor of the state has failed or refused to request such aid.\textsuperscript{274}

\begin{itemize}
  \item \textsuperscript{265} United States v. Thomas, 47 Fed. 807 (W.D. Va. 1891) (beating of witness two months after dismissal of case not offense under statute).
  \item \textsuperscript{266} See Kasper v. Britain, 245 F.2d 92 (6th Cir.), cert. denied, 355 U.S. 834 (1957); Taylor v. United States, 2 F.2d 444 (7th Cir. 1924), cert. denied, 266 U.S. 634 (1925).
  \item \textsuperscript{267} Taylor v. United States, supra note 266.
  \item \textsuperscript{268} In re Debs, 158 U.S. 564 (1895); Ex parte Savin, 131 U.S. 267 (1889).
  \item \textsuperscript{269} Whether, and under what circumstances, this military force can be used by the governor is a matter for determination by state courts under local law. See Fairman, The Law of Martial Rule and The National Emergency, 55 Harv. L. Rev. 1253 (1942). See also, Sterling v. Constantin, 287 U.S. 378, 396 (1932).
  \item \textsuperscript{270} Powers Mercantile Co. v. Olson, 7 F. Supp. 865, 867-68 (1934).
  \item \textsuperscript{271} Sterling v. Constantin, 287 U.S. 378 (1932).
  \item \textsuperscript{272} Id. at 404; see also, Aaron v. Cooper, 156 F. Supp. 220 (E.D. Ark. 1957), aff’d sub nom. Faubus v. United States, 254 F.2d 797 (8th Cir.), cert. denied, 358 U.S. 829 (1958). Compare the use of the power by Governor Clement of Tennessee in connection with the desegregation of Clinton High School, reported in Kasper v. Britain, 245 F.2d 92, 94 (6th Cir.), cert. denied, 355 U.S. 834 (1957), with the illegal use of military force by Governor Faubus in connection with the court-ordered desegregation of Little Rock Central High School, reported in Aaron v. Cooper, supra.
  \item \textsuperscript{274} The authority of the President to enforce federal laws by the use of federal troops and state militia has greatly occupied the attention of law review writers since the advent of the desegregation of public schools. For general discussion of this Presidential military power, see Faust, The
4. **Free Speech**

A perennial problem in the development of constitutionally-protected civil rights, and one which underlies the whole problem of the enforcement, has been the necessity for the reconciliation of conflicting liberties. Freedom to express one's opinions on all public issues, no matter how controversial, is one of the most precious rights guaranteed by the Constitution. The segregation decisions have evoked a nationwide, emotionally-charged controversy regarding the proper position of racial minority groups in our society. This raises several questions concerning the extent to which individuals may express their opposition to desegregation without violating the newly found rights of these groups. As yet, there is little authority directly in point. Nevertheless, cases fixing the boundaries of free speech and press in analogous situations embody principles which in most instances would be dispositive of these questions.

It is settled that statements made in a court's presence which impugn its dignity or interfere with its processes may be summarily punished as contumacious without violating the right to freedom of speech.

The degree of criticism and the extent of public comment made out of court concerning a pending case which a judge must endure is no longer a serious issue if, at the time of the statement, only a non-jury question remains to be decided. At common law any comment made while a case is still pending may subject the commentator to contempt proceedings if it has a reasonable tendency to deprive a court of the power to administer justice impartially. The reasonable tendency test of the common law was repudiated in Bridges v. California, where the clear and present danger rule was substituted as the proper criterion for determining whether an out-of-court publication concerning a pending non-jury case constitutes contempt. Neither the threat of a paralyzing dock workers' strike if the judge's decision was not reversed, nor forebodings of evil if certain alleged criminals were not given prison sentences was found to meet the test. This principle was extended in Pennekamp v. Florida, where false charges concerning a judge's conduct in a pending case were held not to constitute a clear and present danger to the fair administration of justice. Although it has been grudgingly conceded that a publication may conceivably be punishable as contemptuous, it seems that as a practical matter judges are defenseless against criticism or prejudicial comment. Thus, in communities where the exponents of segregation are vociferous, and

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276 "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." Cardozo, J. in Palko v. Connecticut, 302 U.S. 319, 327 (1937).

276 Fisher v. Pace, 336 U.S. 155 (1949). This case was decided under the fourteenth rather than the first amendment because state action was involved. Cf., Bridges v. California, 328 U.S. 319 (1946).

277 Rex v. Davies, [1945] 1 K.B. 435. Cf., Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918). Implicit in this rule is the notion that even judges of unimpeachable character may be unduly influenced in their deliberations by out-of-court publications.

278 314 U.S. 252 (1941).

279 "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils. . . ." Schenck v. United States, 249 U.S. 47, 52 (1919).

280 328 U.S. 331 (1946).

281 "Conceivably a campaign could be so managed and aimed at the sensibilities of a particular judge and the matter pending before him as to cross the forbidden line." Craig v. Harney, 331 U.S. 367, 376 (1947) (dictum).

282 See Smotherman v. United States, 186 F.2d 676 (10th Cir. 1950).
at times malicious, the courts must be prepared to withstand great pressure, since the first amendment prevents an effective utilization of the contempt power to silence these voices.

Although some jurists have expressed doubt that attributing stoical qualities to judges results in a just resolution of litigated controversies, nonetheless, the first-amendment freedoms have generally prevailed over conflicting private and public interests. Notwithstanding the threat to the impartial administration of justice, attempting to influence a judge's decision by public comment is now a constitutional right.

In the relatively few instances where a jury trial is afforded in a case involving a segregation issue it remains an open question whether the immunity from contempt proceedings is as extensive as in non-jury cases. Unprejudiced statements concerning a pending case involving a jury trial would in all probability be held privileged under the first amendment. Prejudicial statements which are likely to influence jurors or prospective jurors should not be similarly privileged. A jury trial is not an election to be decided by the free interchange of ideas in the market place. Inflammatory statements concerning a pending segregation case which may be tried to a jury should be punished as contempt. Litigants could be deprived of a fair hearing and an impartial jury if prejudicial out-of-court publications are not prohibited by law.

Implementation of the segregation decisions by judicial decree creates a serious first amendment problem when the decree enjoins interference with desegregation by means of speech or writing. A nearly identical problem arises when those who are bound by the decree are urged to violate it by one who is not bound. These difficulties were highlighted by two significant segregation cases.

In Hoxie School Dist. v. Brewer the defendants, who had engaged in inflammatory speech-making in an attempt forcefully to prevent integration, were enjoined from "attempting to interfere with the lawful administration of the school district, from intimidating, threatening or attempting to visit harm on the plaintiffs to cause them to violate the U.S. Constitution." On appeal the injunction was upheld with the observation that no legitimate issue of free speech was raised.

The conviction of segregationist John Kasper for violating an injunction prohibiting him from "further hindering, obstructing or in any way interfering with the carrying out of the court's order, and from picketing Clinton High School, either by words, acts, or otherwise," was affirmed in Kasper v. Brittain. This injunction was criticized as being too broad, since advocating the violation of an injunction is, in itself, supposedly protected by the first amendment. The injunction was found to be valid, however, on the principle that no one has a right to persuade others to violate the law.

Although the injunctions in the Hoxie and Kasper cases specifically prohibited conduct, including speech, which interfered with desegregation, there is no constitutionally-

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284a But this applies to particular citizens who may currently be on jury panel. See Hoffman v. Perrucci, 117 F. Supp. 38 (E.D. Pa. 1953), appeal dismissed, 222 F.2d 709 (3d Cir. 1955) and Hendrix v. Consolidated Van Lines, 176 Kan. 101, 269 F.2d 435 (1954) where insurance companies were held not liable on indirect contempt charges arising out of advertisements urging lower damage awards by juries on the ground that the advertisements were not directed to a specific jury.
285 "The question whether they [the courts] can now deal with the radio stations or the press in cases where the statements are inflammatory, false, or designed to intimidate, is not before us." Baltimore Radio Show, Inc. v. Maryland, 193 Md. 308, 67 A.2d at 511 (1949).
287 Id. at 375.
288 Hoxie School Dist. v. Brewer, 238 F.2d 91, 102 (8th Cir. 1956).
289 245 F.2d 92, 94 (6th Cir. 1957).
290 AMERICAN CIVIL LIBERTIES UNION, 37TH ANNUAL REPORT 80-81 (1957). "The Union concluded that mere advocacy—in the Clinton case urging the ignoring of the law or judicial orders—should not be prohibited."
291 245 F.2d at 95.
significant difference when one is convicted for urging the violation of a decree which does not, by its terms, prohibit him from speaking. This is implicit in the Kasper decision, because if advocating the violation of an injunction had been privileged free speech, specifically enjoining that advocacy would itself have violated the first amendment.

The constitutionality of contempt proceedings against those who advocate the violation of an injunction has been recognized in other contexts. Labor injunctions have often been framed to prohibit verbal as well as non-verbal conduct. The use of the labor injunction has been deplored by many on policy grounds, but, except in the case of picketing, no impairment of free speech has been found in the application of this device to verbal acts. An analogous principle is found in the rule that one who counsels the violation of a statute may be subjected to criminal prosecution consistently with the first amendment.

Until very recently there was prevailing judicial theory that the only possible justification for restraining speech which criticized legal or political institutions rested on the application of the clear and present danger test. Although this over-simplified formula unfortunately became the basis for the analysis of many complex free-speech cases, the obvious necessity for a more flexible treatment of the problem led to a reformulation of the test in Dennis v. United States. “In each case [courts] must ask whether the gravity of the ‘evil’, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” Under this formula, speech which directly impedes compliance with a decree ordering the desegregation of a state institution should be punishable as contempt if the decree is valid and in accordance with existing law.

It is clear then, that the first amendment confers no right to interfere with the enforcement of the law. Certainly this is a more satisfactory and realistic analysis, because freedom of speech and press does not include a personal or private right of nullification or modification of existing law by individual citizens. The Constitution provides adequate opportunity for one to voice his dissatisfaction with the present legal order without urging violation of the law.

Although speech which actually interferes with or impedes compliance with a desegregation decree should certainly be punishable by contempt proceedings, the extent to which the first amendment protects those who simply advocate violation of a judicial decree is now uncertain due to the decision of Yates v. United States. The conviction of alleged communist conspirators for advocating the overthrow of the government by force and violence was reversed because the instructions to the jury did not charge that the advocacy must be of a kind calculated to incite persons to action. The case involved an interpretation of the Smith Act rather than a constitutional issue, yet the opinion is relevant to the desegregation problem because the free speech question was clearly present in the court’s considerations. The decision rests on the distinction

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292 Minerich v. United States, 29 F.2d 565 (6th Cir. 1928), cert. denied, 279 U.S. 843 (1929) (address before a meeting of strikers urging the violation of a labor injunction).
295 “It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.” Holmes J., dissenting in Hyde v. United States, 225 U.S. 347, 391 (1912).
296 In approaching the statutory interpretation issue the Court stated that “in doing so we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked. . . .” 354 U.S. at 319.
between the advocacy of abstract doctrine and advocacy inciting unlawful action. The Court
implied that the former is protected by the first amendment, but not the latter.\footnote{303}
As the opinion recognized, this distinction is subtle and often difficult to grasp.\footnote{304}

The segregationists clearly have the right to urge the enforced separation of the races through state action. Additionally, the first amendment guarantees the right to
express one’s opinions on controversial subjects and even engage in oratory which stirs
strong emotion,\footnote{305} unless imminent violence is threatened.\footnote{306} On the contrary, counsel-
ing the actual violation of an injunction, as was done by John Kasper, trangresses the
boundaries of constitutionally-protected self-expression. If an intermediate position is
taken, as when a person advocates the necessity of violating a desegregation decree, a
difficult question is posed by *Yates* as to whether the speech is contemptuous incitement
to action or privileged advocacy of belief. The decision in each case may depend on a
number of factors such as the intention of the speaker, the provocative quality of the
ideas expressed, the mood of the listeners, and the manner of delivery. Admittedly,
none of these considerations would be relevant if it were possible to make an essential
psychological distinction between incitement and abstract propagandizing. The real
value of the distinction is that it provides a method of analysis; it avoids an arbitrary
mechanical formula for deciding cases.

Adovcating state action which contravenes the Constitution is essentially similar
to advocating the overthrow of constitutional government by force; therefore, the
*Yates* rationale should apply equally to first-amendment cases arising in the context of
the desegregation problem. This doctrine is a significant refinement in constitutional
theory created in the unending process of reconciling individual freedom with the need
for public order and respect for law in a restless society.

C. THE CIVIL RIGHTS ACTS

Further legal sanctions which might possibly be used in the implementation of
school desegregation are to be found in the long line of federal statutes known as the
Civil Rights Acts.\footnote{307} The laws comprising this series, the first of which was enacted in
1866, were passed pursuant to the last clauses of the thirteenth, fourteenth and fifteenth
amendments, which empower Congress to enact legislation enforcing the provisions of
the amendments. So far these statutes have been greatly restricted in their application
through the process of judicial interpretation,\footnote{308} but there are six provisions, four civil\footnote{309}

\footnote{303} "The essential distinction is that those to whom the advocacy is addressed must be urged to do something now or in the future, rather than to merely believe something." *Id.* at 325-26.

\footnote{304} Justice Holmes was cited for the proposition that in a sense, "Every idea is an incitement." *Id.* at 327. This observation betrays the artificiality of the distinction between the advocacy of activity and the advocacy of beliefs. In fact, every rational act has an idea as its stimulus. Most people probably do not possess sufficient discernment to place ideas which they are only to think about in a separate mental compartment from those upon which they are to act.

\footnote{305} Terminiello v. Chicago, 337 U.S. 1 (1949).


and two criminal, which provide possibilities of aid in the area of school desegregation. The Civil Rights Acts have been exhaustively treated in several recent legal periodicals. Therefore, our treatment will be limited to a brief description of the remedies contained in those six provisions.

The first civil remedy is found in section 1983 of Title 42 U.S.C. This statute imposes civil liability upon one who under color of state law deprives another of any rights, privileges, or immunities secured by the Constitution or laws of the United States. Damages and equitable relief are the forms of redress available under this section. However, the value of this statute is greatly limited by the requirement that state action be involved in some way in the alleged deprivation of rights.

Section 1985 of Title 42 U.S.C. provides the second source of possible civil remedies available to negro school children under the Civil Rights Acts. The terms of this section, unlike those of section 1983, are not limited to defendants acting under color of state law. The statute is divided into three subsections. The first subsection deals with conspiracies to prevent by force, intimidation or threat any officer of the United States from discharging his official duties. Subsection two covers conspiracies to obstruct justice or to coerce parties, witnesses, or jurors. The third subsection holds the most promise of aid in enforcing school desegregation. It provides one who has been the intended object of a conspiracy to deprive him of the equal protection of the laws, or equal privileges and immunities under the laws, with an action for the recovery of damages. Unlike section 1983, this section does not provide for an injunction.

Section 1985 is supplemented by section 1986. This section imposes civil liability upon any person who has knowledge that one of the wrongs mentioned in section 1985 is about to be committed and who has the power to prevent its commission but refuses or neglects to do so. The constitutionality of this provision was upheld by a federal district court in Robeson v. Fanelli.

Sections 241 and 242 of Title 18 U.S.C. provide criminal sanctions to discourage interference with public school desegregation, although neither section has been so employed; section 241 provides for a maximum fine of $5,000 or imprisonment up to ten years or both, where two or more persons conspire to deprive any citizen of the free exercise of any right or privilege secured to him by the Constitution or laws of the United States. Section 242 is concerned with any person who, while acting under color of law, wilfully deprives another of any rights, privileges, or immunities secured by the Constitution of the United States. Violation of this section could result in a maximum fine of $1,000 or imprisonment up to one year or both.

Thus far, these statutes have not been utilized in school desegregation situations. Further, it would seem that under the second Brown opinion adequate relief can be obtained without resorting to them. What role, if any, they will play in the implementation of desegregation remains to be determined.

III. COUNTERMEASURES

This section of our survey will examine the methods employed by some of the southern states to arrest the impact of the Brown decision. The most important of these are the gerrymandering of school districts, the closing of schools — usually with some provision for other education for displaced pupils — and pupil assignment programs. Supplementing these devices is a series of moves calculated to restrict the activities of the National Association for the Advancement of Colored People in assisting litigants who seek desegregation through the courts.

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312 E.g., Civil Rights Cases, 109 U.S. 3. For a thorough discussion of the meaning of the term "state action," see State Action, 1 RACE REL. L. REP. 613 (1956).
A. GERRYMANDERING OF SCHOOL DISTRICTS

It has been proposed that segregation be preserved by a re-alignment of school districts, drawing them along lines which would reflect the racial character of the neighborhoods involved. In theory, any persons along a fringe area could be sent to the "proper" school through application of the pupil assignment law, which does not require children to attend integrated schools.

The advocates of these programs have some precedent to support the position that they will not be struck down by the courts. In Colegrove v. Green,1 the Supreme Court refused to undertake the task of re-mapping the congressional districts of Illinois. A federal district court recently refused to declare invalid as a denial of due process of law an Alabama statute which re-arranged the boundaries of the city of Tuskegee to the detriment of Negroes residing there.2 The court held that the action taken was within the state's power to determine and define its municipal boundaries, and therefore the motives of the legislature were not relevant. Colegrove, however, was decided upon narrower ground. Justice Frankfurter (writing for himself, Justice Reed and Justice Burton) held that the case involved a political question, and cited the traditional refusal of the Supreme Court to interfere in such matters. Historically, this refusal has been based upon discretion rather than a rigid rule of law. It is possible that the Court may decide to address itself to the question if it finds racial discrimination beneath the redistricting plans. The problem does involve "political questions," but it lacks the element of partisan politics which Justice Frankfurter found repugnant to judicial intervention in Colegrove.3 Moreover, the federal courts are already active in this area.

In Webb v. School District,4 a Kansas school district had been gerrymandered to produce segregation in the public schools despite laws forbidding racial discrimination. The court declared the redistricting invalid and ordered all students into one school. Even if redistricting of this kind were permissible, there would be no way to keep the races "in their district." It has long been settled that city ordinances which require separation of the races in certain designated areas are unconstitutional. Moreover, the state cannot enforce racially restrictive covenants.5 Persons in the "wrong" districts might be excluded by operation of the pupil assignment laws, but, as is seen from the discussion above, the courts are closely watching the application of these laws and will not permit any placements made upon the basis of race alone.

It is therefore predicted that redistricting along racial lines will not permanently prevent integration. It may postpone it for an indefinite period and cause expense and delay; but it will not fulfill a goal of total and permanent segregation.

B. SCHOOL CLOSING AND TUITION GRANT PLANS.


Some form of school closing legislation has now been enacted in ten states: Alabama,6 Arkansas,7 Florida,8 Georgia,9 Louisiana,10 Mississippi,11 North Carolina,12

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3 The question is even further from the traditional notion of the "political" question. See Luther v. Borden, 48 U.S. (7 How.) 1 (1849); Pacific Tel. Co. v. Oregon, 223 U.S. 118 (1912).
South Carolina, Texas, and Virginia. Four general types of plans have been adopted, but the statutes are essentially similar. The real question is whether the law will tolerate conduct that allows the states to evade the Supreme Court decision in Brown by permitting only segregated schools to operate. If all these statutes were put into operation at the same time, the injury would be not to "states' rights" or to "federal supremacy," but to thousands of southern children.

Probably the least complicated and simplest plan is that requiring that the schools be closed if military forces or other personnel are used at any school by federal authority. Under the Florida statute, the closing is automatic and the school cannot be reopened until the forces are withdrawn. Provision is made for transfer of pupils to other schools if the parents request it. Compulsory attendance laws are suspended or pupils are regarded as being present and in school. Texas provides for closing of the schools by the school board with proper jurisdiction if either the board or the governor finds that danger of violence exists which can only be remedied by the use of military force. The schools are to remain closed until the military forces withdraw and the school board certifies to the governor that the school no longer needs to be closed. Pupils may be transferred to open schools, but attendance requirements are suspended during the period of closing.

A third state to enact this type of legislation was Virginia. This act, similar to the Florida statute, was invalidated by the highest court of the state in Harrison v. Day, and by a lower federal court in James v. Almond. These decision will be discussed below.

The latest states to enact this type of legislation were Georgia and Arkansas. The Georgia act permits the governor to close the schools when he deems it necessary to preserve "the good order, peace and dignity of the State." The act further provides for transfer of the pupils from the closed schools to other schools, but if it is found that any child cannot be transferred, "he [the governor] shall provide for an educational grant from State and local funds, as authorized by the Act approved February 6, 1956, to each such pupil who cannot be so transferred. . . ." An equivalent measure approved at the same time provides for closing of institutions of the university system by the governor under the same standards. So far, it has been the only state to direct much attention to institutions of higher learning, though South Carolina is also taking steps in that direction.

A second type of statute is one authorizing the closing of public schools under other specified circumstances. Louisiana provides for closing where enforced integration has been ordered or is imminent. Georgia, in addition to its newly-enacted legislation, has previously passed a series of statutes that would close the schools and...
under certain circumstances allow tuition grants.\textsuperscript{29} The other statutes are similar in purpose, but the procedure is somewhat varied.

The third method — withdrawal of public funds — has been adopted by few states. The Georgia General Appropriations Act of 1957\textsuperscript{30} limited state school funds to segregated schools. A recent Georgia bill\textsuperscript{31} would limit powers of taxation given to independent school systems to segregated schools. Louisiana has withdrawn public funds from integrated schools.\textsuperscript{32} South Carolina makes the withdrawal contingent upon any pupil being transferred to another school by a court order.\textsuperscript{33} A Texas statute provides that any school district whose board of trustees shall abolish segregated education without a prior vote by the electors approving integration shall be ineligible for accreditation and certain special financial assistance.\textsuperscript{34}

A fourth method employed by the states has been to repeal or modify the existing compulsory school attendance laws. Most of the modification laws have already been shown. The only purpose this type of legislation seems to have is to allow the different closing plans to operate effectively and to grant the pupil assignment plans a broad scope of operation.

This gives a brief review of the state statutes in this area. It remains for us to consider the constitutionality of these plans. For the time being, the question of tuition grants will be laid to one side, as that raises a separate set of issues — by far the most difficult.

The Supreme Court said in \textit{Cooper v. Aaron}:\textsuperscript{35}

\begin{quote}
In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the \textit{Brown} case, can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously'.
\end{quote}

This statement, it would seem, supplies the answer to the validity of the school-closure plans.

The federal court, in \textit{James v. Almond},\textsuperscript{36} invalidated the Virginia Closing Act and on the same day the statute met a like fate in the highest state court.\textsuperscript{37} The \textit{James} case clearly stated the principles on which it was based — that closing of non-segregated schools because of attempted integration is both a violation of equal protection and a denial of due process to one who is willing to attend an integrated school. Whether a state must maintain a public educational system is a matter for state determination. In the course of its opinion the district court said:

\begin{quote}
...[N]o one public school or grade in Virginia may be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the state permits other public schools or grades to remain open at the expense of the taxpayers. ...\textsuperscript{38}

The statutes and the action of the ... [state officials] thereunder constitute a clear and unmistakable disregard of rights secured by the Fourteenth Amendment to the Constitution.\textsuperscript{38}

In the event the State of Virginia withdraws from the business of education of its children, and the local governing bodies assume this responsibility, the same principles with respect to equal protection of the laws would be controlling as to that particular county or city. While the county or city, directly or indirectly, maintains and operates a school system with the use of public funds, or participates by arrangement or otherwise in the management of such school system, no one public school or grade in the county or city may be closed to avoid the effect of the law of the land while other public schools or grades remain open at the expense of the taxpayers. Such schemes or devices looking to the cut off of funds for schools or grades affected
\end{quote}

\textsuperscript{29} \textit{GA. CODE ANN. §§ 32-801 to -811 (Supp. 1957).}
\textsuperscript{30} See \textit{I RACE REL. L. REP. 421 (1956).}
\textsuperscript{31} HB No. 5, passed by the Georgia Senate and House in February 1959.
\textsuperscript{32} \textit{LA. REV. STAT. §§ 331-34 (Supp. 1956).}
\textsuperscript{33} \textit{S.C. CODE § 21-2 (Supp. 1956).}
\textsuperscript{34} \textit{TEX. REV. CIV. STAT. ANN. § 2900(a) (Supp. 1958).}
\textsuperscript{35} 358 U.S. 1, 7 (1958).
\textsuperscript{36} 170 F. Supp. 331 (E.D. Va. 1959).
\textsuperscript{38} 170 F. Supp. at 337.
by the mixing of races, or the closing or elimination of specific grades in such schools, are evasive tactics which have no standing under the law.39 This opinion is in harmony with the attitude of the Supreme Court. The states are put in a position of choosing between integrated schools or no schools at all. If other federal courts adopt and use the reasoning of James, they will have answered the dilemma that faced the Dallas School Board in Dallas Independent School Dist. v. Edgar.40 There the school board petitioned the court, stating in substance that by court decree they had been ordered to integrate, but if they did so, the State of Texas would withdraw school funds and the school officers would be subject to penal sanctions. They therefore asked for a declaratory judgment to determine their rights as affected by the local laws and court decrees. It was held that the school board, as a creature of the state, could not maintain suit against the state or complain of unconstitutional state legislation, and there was no claim or justifiable controversy giving the federal court jurisdiction. The suit was therefore dismissed. This decision seems questionable. Certainly a person faced with state penal sanctions for complying with federal law must have some kind of federal remedy. The James rationale would, perhaps, provide such a remedy. Under the James rationale, if funds were withdrawn, a proper suit by a taxpayer or board officer against whom penal sanctions had been taken would result in invalidation of the statute.

The James case does not attempt to answer the question, however, of what could happen if the state withdrew from the field of education. The Supreme Court of Appeals of Virginia, in Harrison v. Day,41 said that in Virginia this could not be done. This case is mainly a study of the interpretation of Article IX of the Virginia Constitution, dealing with public education and instruction. Section 129 requires that free schools be maintained; section 140 prohibits mixed schools, and section 141 provides, in certain instances, that the general assembly may appropriate funds for education of children in private schools. Virginia, by special legislation in 1956,42 closed all integrated schools. The court held, two justices dissenting, that the destruction of section 140 did not invalidate the remaining sections of Article IX. Therefore, section 129 was still the organic law of the state and imposed a duty to operate the schools. Section 141 does not permit the State Board of Education to give grants at the expense of public free schools.

2. Tuition and Private Aid Grants.

Whether Harrison will be followed in other states — the constitutional provisions affecting public education differ widely — remains to be determined. As regards the federal constitution, while Cooper v. Aaron43 and James v. Almond44 indicate that a partial closing of the public schools is not permissible, a complete state-wide closing would not run afoul of any principle thus far enunciated. No southern state, however, has yet been willing to pay the price of complete withdrawal from the function of education. We will now consider two devices that attempt to maintain some state interest in education, consistent with the abolition of the public schools.

By recent constitutional amendment,46 North Carolina has established a system of grants to meet educational expenses at private non-sectarian schools. The system is confined to children who are ordered to attend integrated schools against the wishes of their parents, in cases where there is no reasonable and practicable way of reassigning them to segregated schools. By the terms of the implementing statutes, the school must be private and non-sectarian as required by the amendments and approval must be obtained from the Board of Education in accordance with prescribed statutory mandates:46 (1) the private schools must have a curriculum comparable to the public

39 Id. at 338.
40 255 F.2d 455 (5th Cir. 1958).
42 VA. CODE ANN. §§ 22-188.3 to -188.5 (Supp. 1958).
school system; (2) private teachers are to be governed by the same provisions as are public teachers and must meet the same qualifications; and (3) the state board of education may regulate and supervise all non-public schools serving children of secondary age or younger. An exception is made regarding religious instruction.\(^{47}\) It is further provided that: “Payment of educational expense grants for or on behalf of any child attending such a school shall not vest in the State of North Carolina, the State Board of Education or any agency or political subdivision of the State any supervision or control whatever over such non-public schools, or any responsibility for their conduct or operation.”\(^{48}\) It seems clear that the state is attempting to maintain control over the private schools while at the same time disclaiming control in order to avoid a finding of state action. There is little difference between the private and public schools under the statute except in name. The state is actively engaged in the project, both in its support and in its continuing control.\(^{49}\) Such a scheme is probably evasive and, therefore, within the doctrine enunciated in Cooper v. Aaron.\(^{50}\) There seems to be no practical difference between the North Carolina plan and the discredited Nashville plan,\(^{51}\) for both would create segregated schools by majority will in disregard of minority rights.

This raises a question as to whether a state can establish a tuition-grant system that is immune from constitutional objection. In an effort to create such a system, the Louisiana legislature in the regular 1958 session enacted a provision creating “Education Expense Grants for Private Education.”\(^{52}\) Essentially, it provides a system of education expense grants for children attending non-sectarian non-public schools where no racially-segregated public school is provided. The purpose, enunciated in section 1,\(^{53}\) is to provide schools which conform to the “custom and feelings of the people of each community.” The grants are available to any child of any race who qualifies under the statutory provisions. But in an attempt to remove any possibility of state action it is further stated, “such grants as are provided herein are made to and for the child, and not to the institution furnishing the educational facilities.”\(^{54}\)

The grants are available to any child whose parents object to his attending an integrated school. No segregated school is provided and the private non-sectarian school\(^{55}\) is approved by the state board of education.\(^{56}\) However, the latter section is careful to provide that the state board only approves the schools and has no power or responsibility for their conduct or operation.

The act on its face appears to be constitutional under the prevailing fourteenth amendment state action concept. The public school system would remain and the private schools would operate under no more state control than was heretofore in effect. It must be conceded that a school, like a corporation, is subject to some degree of control, because the state has a substantial interest in the welfare of its people as affected by either institution. As seen in Kerr v. Enoch Pratt Free Library,\(^{57}\) an institution formally a private institution, though in fact a state agency, is subject to the same restraints as the state itself would be, but the fact that some state funds are directed to a private institution will not, without more, make that institution a “state agency.”\(^{58}\)

\(^{49}\) See Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945).
\(^{50}\) 358 U.S. 1 (1958).
\(^{52}\) LA. REV. STAT. §§ 391.1-.16 (Supp. 1958).
\(^{54}\) Ibid. This contention, if valid, would seem to undermine the constitutionality of the requirement that the school attended be non-sectarian. The constitution forbids invidious distinctions between children on the basis of religion as surely as it requires such distinctions between schools. See Pierce v. Society of Sisters, 268 U.S. 510 (1925).
\(^{55}\) Id. § 391.2.
\(^{56}\) Id. § 391.12.
\(^{57}\) 149 F.2d 212 (4th Cir. 1945).
May a state grant public money to private individuals to finance their attending private schools? An attack on such a grant would probably come through the due process clause, charging that the use of the funds was an unconstitutional deflection of public revenue for private purposes. This is similar, however, to the situation in *Everson v. Board of Educ.* There the reimbursement of parents of parochial school children for money spent in transportation to and from school was held not to be a violation of due process of law. Much earlier, the state's right to supply free text books in private and parochial schools was also upheld. Both of these cases centered around the concept of "public purpose." Public funds were directed to private individuals or institutions, but for a public purpose — education of the state's people or aid to those facilities that directly affect education.

In the abstract, then, there would seem to be no constitutional objection to replacing or supplementing the public school system by tuition plans. The question, however, is whether the courts would consider such a plan in the abstract, or would condemn them in the language of *Aaron* as "evasive schemes for segregation." Such a condemnation would invoke some extension of the traditional concepts of state action, but in view of *Terry v. Adams,* this is by no means out of the question.

3. Leasing Public Facilities

Some school-closing plans provide for the leasing of school facilities to private groups. In one case a leasing arrangement under one of these provisions was held to violate an existing segregation decree. Absent such a decree, the leasing plans have not yet been tested in the courts. However, schools operating under such plans will probably meet the same fate as other state or state agency-owned facilities that have been leased to private concerns. One of the earliest leasing cases was *Lawrence v. Hancock.* The city of Montgomery, Alabama, by bond issue, raised funds and built a swimming pool which was then leased to a private concern. The lease provided only nominal consideration for use of the property, and the lessee was required to apply his profits to maintenance and improvement of the pool. It was held that if the pool was to be operated, the city would have to operate it itself, or if leased, the city would have to see to it that it was operated without discrimination. This doctrine has been held applicable to state parks, and to a cafeteria located in a county courthouse. These cases rest upon two basic propositions: (1) all persons have the right to use these facilities without discrimination; and (2) such right cannot be abridged by a leasing arrangement in which ownership is retained by the state. What the state cannot do directly, it cannot do indirectly. The purpose of the leasing arrangement is apparently immaterial; the court directs its attention to the results of the arrangement.

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60 330 U.S. 1 (1947).
63 The states and their agencies have resorted to the lease arrangement to escape the consequences of court decisions holding that any classification based upon race is unconstitutional, whether it be in regard to a golf course, *Holmes v. City of Atlanta,* 350 U.S. 879 (1955), reversing *per curiam* 223 F.2d 93 (5th Cir. 1955), parks, *Department of Conservation & Development v. Tate,* 231 F.2d 830 (5th Cir. 1956), beaches and swimming pools, *City of Petersburg v. Alsup,* 238 F.2d 830 (5th Cir. 1956); *Dawson v. Mayor of Baltimore,* 220 F.2d 386 (4th Cir.), aff'd, 350 U.S. 877 (1955), or busses and streetcars, *Morrison v. Davis,* 252 F.2d 102 (5th Cir. 1958); *Browder v. Gayle,* 142 F. Supp. 707 (M.D. Ala.), aff'd, 352 U.S. 903 (1956).
65 The lease required a $1.00 per year rental fee.
66 The case turned on the assertion that the negro plaintiffs were denied equal protection of the laws under the fourteenth amendment by being denied admission to the pool. The court emphasized that the city could not escape its responsibilities by a lease which purported to divest the city of all control.
67 Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956).
Federal courts have refused to enjoin the bona fide sale of a public swimming pool and a public golf course to a private individual. In the swimming pool case, the court based its decision on the rule that a state is not required by the Constitution to operate such facilities.

Various provisions have been made for the use of abandoned public facilities. South Carolina has made it possible for the property to be transferred to trustees for use as a community center. Arkansas allows the lease and sale of public recreation facilities, and Mississippi has provided for the similar disposition of school property. As long as the state retains ownership, and the plant leased is used for the same purposes, the Hancock rationale would apply. Thus, it does not appear that leasing provides any relief for the southern states. The alternative, closing all facilities, parks, schools, pools, etc., certainly maintains segregation — Negroes are excluded from “white” facilities — but the price is high.

C. PUPIL ASSIGNMENT AND PLACEMENT ACTS.

As contrasted with “school closing plans,” the “pupil placement or assignment plans” may offer a partially effective legal recourse to southern segregationists. They are positive acts which may allow the states employing them to forestall massive integration. Nine states have enacted school placement or pupil assignment acts: Alabama, Arkansas, Florida, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia. For purposes of discussion, the Florida act will be examined in some detail, because it is both concise and exhaustive. This measure was recently upheld by a federal district court which found it to be similar to the Alabama statute upheld by the Supreme Court in Shuttlesworth v. Birmingham Bd. of Educ. The Florida act is typical of legislation in this area, but variations from state to state deserve examination.

Section one of the Florida act confers upon county boards of public instruction exclusive authority to enroll children within the schools of their county. “The authority of each such board in the matter of public schools shall be full and complete.” Section two is the heart of the assignment plan and for that reason is stated in full:

In the exercise of the authority conferred by subsection (1) . . . upon the county boards of public instruction each such board shall provide for the enrollment of pupils in the respective public schools located within such county so as to provide for the orderly and efficient administration of such public schools, the effective instruction of the pupils therein enrolled, and the health, safety, education and general welfare of such pupils. In the exercise of such authority the board shall prescribe school attendance areas and school bus transportation routes and may adopt such reasonable rules and regulations as in the opinion of the board shall best accomplish such pur-

70 Greensboro v. Simkins, 246 F.2d 425 (4th Cir. 1957), affirming 149 F. Supp. 562 (M.D.N.C. 1957). For an interesting epilogue to this case, see State v. Cook, 248 N.C. 485, 103 S.E.2d 846 (1958), where a plaintiff in the federal action was subsequently convicted in a state prosecution for trespassing on the property in question.
72 ARK. ACTS 1959, act. 224.
73 MISS. CONST. art. 8 § 213-B.
75 ALA. CODE tit. 52, §§ 61(1)-(9) (Supp. 1958).
77 FLA. STAT. ANN. § 230.232 (1956).
78 MISS. CODE ANN. §§ 6334-01 to -08 (Supp. 1958).
82 TEX. REV. CIV. STAT. art. 2901(a) (Supp. 1958).
poses. The county boards of public instruction shall prescribe appropriate rules and regulations to implement the provisions of this subsection and other applicable laws of this state and to that end may use all means legitimate, necessary and proper to promote the health, safety, good order, education and welfare of the public school and the pupils enrolling therein or seeking to enroll therein. In the accomplishment of these objectives the rules and regulations to be prescribed by the board may include, but be not limited to, provisions for the conduct of such uniform tests as may be deemed necessary or advisable in classifying the pupils according to intellectual ability and scholastic proficiency to the end that there will be established in each school within the county an environment of equality among pupils of like qualifications and academic attainments. In the preparation and conduct of such tests and in classifying the pupils for assignment to the schools which they will attend, the board shall take into consideration the available facilities and teaching capacity of the several schools within the county, the effect of the admission of new students upon established academic programs, the suitability of established curriculum to the students enrolled or to be enrolled in a given school, the scholastic aptitude, intelligence, mental energy or ability of the pupil applying for admission and the psychological, moral, ethical and cultural background and qualifications of the pupil applying for admission as compared with other pupils previously assigned to the school in which admission is sought. It is the intention of the legislature to hereby delegate to the local school boards all necessary and proper administrative authority to prescribe such rules and regulations and to make such decisions and determinations as may be requisite for such purposes.87

By comparison, the South Carolina act is not as extensive, since it merely provides that the school trustees shall have the power to "transfer any pupil from one school to another so as to promote the best interests of education and determine the school within the district in which any pupil shall enroll."88 It appears from a reading of the Florida statute that the same factors upon which the Supreme Court based its decision in Brown — i.e., sociological and psychological considerations — are now being used to defeat the impact of the Court’s ruling. On the other hand, it is doubtful, in the light of Adkins v. School Board of City of Newport News,89 that the South Carolina statute would be upheld. It prescribes no reasonable standard or guide on which assignment can be made. The basis of assignment would presumably be race alone.

Section 3 of the Florida act deals with the procedure by which children are assigned to schools. Section 3(a) provides that the parent, guardian, or person standing in loco parentis shall apply to the proper school officials. If enrollment is refused, an appeal may be taken to the county board. The board may deny enrollment if suitable grounds exist under section 2. It should be noted that section 2 does not limit the board to the methods and tests specifically enumerated.90 Section 3(b) allows an appeal to the State Board of Education. The remaining provisions of the act allow the board to employ necessary legal counsel, conduct appropriate studies, and appoint citizen committees to aid in the study of school problems. Elaborate standards for pupil placement, coupled with cumbersome and involved procedures for administrative review, are characteristic of the placement statutes. Final judicial determination may be had only by appeal through the several levels of the court system.

There are a few differences worth noting in some of the statutes. Alabama provides that no child is required to attend a school in which the races are commingled, if there is objection and notice given by the parent. The child who turns down integrated public education is entitled to any aid authorized by law.91 Adverse rulings from the board are

87 Ibid.
90 Fla. Stat. Ann. § 230.232 (Supp. 1958). "If the board shall find that such child is entitled to be enrolled."
appealable to a court of equity, and a jury trial may be obtained in accordance with the
equity practice of the state.\textsuperscript{92} Arkansas has passed a similar measure.\textsuperscript{93} Mississippi has
established a Board of Trustees to make assignments, giving to the school principals the
authority to make temporary assignments in proper cases.\textsuperscript{94} An appeal will lie to the
county board of education,\textsuperscript{95} and from there to the circuit court, sitting with a jury.\textsuperscript{96} Tennessee provides for appeal first to the court of chancery, then to the court of
appeals or the supreme court.\textsuperscript{97} Three states, South Carolina, Tennessee, and North
Carolina, declare that each placement or assignment is upon an individual basis, thus
precluding class actions testing the rights of many students at once. The South Carolina
act reads: "When individual children of school age are involved in a matter in con-
troversy, the case of each child shall be heard and disposed of separately."\textsuperscript{98} Tennessee has enacted a similar provision.\textsuperscript{99}

A class action was instituted in North Carolina on behalf of certain negro children
to enforce a statute\textsuperscript{100} providing that application for reassignment could be made by any
parent or guardian. The court held, in \textit{Joyner v. McDowell County Bd. of Educ.,}\textsuperscript{101} that
such an action could not be maintained, since, by the language of the statute, only the
parent can apply on behalf of his own child or children, and each action must be
prosecuted only by the interested parent. Furthermore, it has been held that no parent
can challenge the assignment of other children on the ground that such assignment was
not made in the best interests of his own child. Thus, where certain white parents
brought a class action protesting assignment of colored children to the various schools
to which their children had been assigned, their suit was dismissed.\textsuperscript{102} The court held
that they were not "persons aggrieved" as contemplated by the statute; to give them
the right to be heard would render school administration impossible. A federal district
court has found the administrative procedure required by the North Carolina placement
statute to be adequate and constitutionally valid.\textsuperscript{103}

Two early state assignment plans were struck down by federal courts in the cases of
\textit{Orleans Parish School Bd. v. Bush}\textsuperscript{104} (Louisiana) and \textit{Adkins v. School Bd. of New-
port News}\textsuperscript{105} (Virginia). As an introduction to a fuller discussion of these cases, it
might be noted that neither statute was artfully drawn, or consistent with principles
enunciated in \textit{Brown.}

The Louisiana statute was an attempt to maintain segregation in the public schools
as an incident of state police power. The statute read: "this provision [establishing
segregated schools] is made in the exercise of the State police power to promote and
protect public health, morals, better education and the peace and good order in the
state and not because of race."\textsuperscript{106} Pursuant to this and a companion statute,\textsuperscript{107} segregation
in the schools was ordered. The court found both acts unconstitutional, holding that
state police power cannot serve as a guide for continuing racial segregation. The place-
ment provisions provided no standard for administration, but were based purely upon
race.\textsuperscript{108}

\textsuperscript{92} Id. \S 61(9).
\textsuperscript{93} ARK. STAT. ANN. \S 80-1525 (Supp. 1957).
\textsuperscript{94} MISS. CODE ANN. \S 6334-01 (Supp. 1958). Nothing is said in the statute with respect to the
duration of a "temporary" assignment.
\textsuperscript{95} Id. \S 6334-04.
\textsuperscript{96} Id. \S 6334-05.
\textsuperscript{97} TENN. CODE ANN. \S 49-1759 (Supp. 1958).
\textsuperscript{98} S.C. CODE \S 21-247.2 (Supp. 1958).
\textsuperscript{99} TENN. CODE ANN. \S\S 49-1741, -1761 (Supp. 1958).
\textsuperscript{100} N.C. GEN. STAT. \S 115-178 (Supp. 1957).
\textsuperscript{101} 244 N.C. 164, 92 S.E.2d 795 (1956).
\textsuperscript{102} Applications for Reassignment of Pupils, 247 N.C. 413, 101 S.E.2d 359 (1958).
\textsuperscript{104} 242 F.2d 156 (5th Cir. 1957).
\textsuperscript{105} 148 F. Supp. 430 (E.D. Va. 1957).
\textsuperscript{106} LA. ACTS 1954, No. 555, \S 1.
\textsuperscript{107} LA. ACTS 1954, No. 556, \S 1.
\textsuperscript{108} Orleans Parish School Bd. v. Bush, 242 F.2d 156 (5th Cir. 1957).
The Virginia Pupil Placement Plan of 1956 fared no better. The two essential elements of that act were the criteria used for assigning children to a school and the administrative remedy available if parents were dissatisfied with placement. Assignments by the Pupil Placement Board were to be based, among other factors, upon what were deemed to be the best interests of the child and other children in the school, intangible social factors and other relevant matters that might affect the efficient operation of the school. Section four of this act was unique in that all school children presently enrolled were to remain in the schools they were attending unless good cause could be shown for reassignment. The administrative remedy was designed to be cumbersome and, by practical operation, of little value. When the act was submitted to a federal court test, the first stage of the remedy was found by the court to consume 105 days to a final decision by the governor. The second stage required the litigant to argue his case through the entire state court system. If the whole process were to have begun in September, it could not have been completed before the end of the school year. It was held that the negro litigant was not required to exhaust this procedure before resorting to the federal courts. The court concluded that the act was not a good faith attempt to fulfill the mandate of Brown, but was an attempt to maintain segregation.

Kelly v. Board of Educ. of Nashville presented an analogous situation. The city board of education submitted a plan to the court which would have established three separate schools and would not have required integration. There would have been in each district the usual segregated schools as well as an integrated one. A federal district court held that minority rights could not be so made to depend upon the consent of the majority, nor could a Negro be denied admission to a white school because of his race. The net effect of the plan would have been to continue segregation. The Tennessee Pupil Assignment Act was brought before the court, but the court declined to pass upon its constitutionality, and noted that nothing in that act is inconsistent with a policy of continued segregation.

Two significant decisions holding assignment acts to be valid on their face were Carson v. Warlick (North Carolina), and Shuttleworth v. Birmingham Bd. of Educ. (Alabama). In Warlick, only two questions were before the court: exhaustion of administrative remedies and the constitutionality of the North Carolina Pupil Enrollment Act. The complainants had filed joint petitions for admission of their children, an improper procedure under the language of the statute. The court therefore found that administrative remedies were not exhausted. However, it was further urged that the statute by its very terms was invalid, in particular sections 115-177, which required enrollment "so as to provide the orderly and efficient administration of such public schools, the effective instruction of pupils therein enrolled, and the health, safety, and welfare of such pupils." The court could find no patent insufficiency in the standards when the board was given fact-finding and administrative functions to perform. In describing these functions the court said:

Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools, and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied and have failed to give relief should the courts be asked to interfere in school administration. As said by the Supreme Court in Brown v. Board of Education, 349 U.S. 294, 299, . . .:

109 VA. ACTS 1956, ch. 70.
110 VA. ACTS 1956, ch. 70, § 3.
114 238 F.2d 724 (4th Cir. 1956).
School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.\textsuperscript{118}

The court concluded that "the federal courts should not condone dilatory tactics or evasion on the part of state officials in according to citizens ... their rights ...; but it is for the state to prescribe the administrative procedure to be followed so long as this does not violate constitutional requirements."\textsuperscript{119}

The Alabama requirements are very similar to those of the Florida statute. The Alabama School Placement Law of 1955\textsuperscript{120} requires consideration of various factors, including the psychological qualification of the child for the type of teaching and association involved; the physical effect upon the pupil of attendance at a particular school; the possibility or threat of friction or disorder among pupils or others; the possibility of breaches of the peace or ill-will or economic retaliation within the community; the maintenance or severance of established social and psychological relationships with other pupils and with teachers. The constitutionality of this law was upheld \textit{per curiam} by the Supreme Court: "The motion to affirm is granted and the judgment is affirmed upon the limited grounds on which the district court rested its decision, 162 F. Supp. 372, 384."\textsuperscript{121} Page 384 contains the quotation from the \textit{Warlick} case on enrollment of pupils, and concludes by stating that the law is constitutional upon its face, as it provides administrative machinery for maintaining an orderly school system, and the court must presume that it will be administered to qualify pupils upon individual merit and not on the basis of race. "If not, in some future proceeding it is possible that it may be declared unconstitutional in its application. The responsibility rests primarily upon the local school boards, but ultimately upon all the people of the state."\textsuperscript{122}

Some difficulty has arisen in defining the proper scope of intervention by a federal court into the affairs of a local school board. \textit{Board of Education of St. Mary's County v. Groves},\textsuperscript{123} while conceding that a court should not take the plan for integration out of the school board's hands, establishes that, in addition to determining whether the plan is made in good faith, it must also determine whether it is in all aspects reasonable and whether in certain individual situations exceptions should be made.\textsuperscript{124}

If pupil assignment legislation is valid on its face, plaintiffs refused admission must show that they could not have been refused upon legitimate criteria stated in the act.\textsuperscript{125} Courts have carefully scrutinized criteria upon which negro children are denied admission to schools under such laws, to insure that race is not the inarticulated reason for denying Negroes admission to white schools.\textsuperscript{126} Refusal to admit negro students because one or two negro children among many whites would feel a "sense of isolation," and because "peculiar circumstances" would lead to "racial conflicts and grave administrative problems," was not permitted in \textit{School Bd. v. Beckett}.\textsuperscript{127}

In the most thorough case in this area thus far, \textit{Thompson v. County School Bd.}\textsuperscript{128} the court examined the board's rejection of thirty negro applicants on five grounds. Twenty-five of the pupils were refused on a basis of attendance area (proximity of home to school), academic accomplishment, and overcrowding in certain schools (white children were apparently refused transfers on the same grounds). These criteria were

\textsuperscript{118} 238 F.2d 724, 729 (4th Cir. 1956).
\textsuperscript{119} Id. at 729.
\textsuperscript{120} ALA. Const tit. 52, §§ 61(1)-(9) (Supp. 1958).
\textsuperscript{123} 261 F. 2d 527 (4th Cir. 1958).
\textsuperscript{124} See also Slade v. Board of Education of Hartford County, 252 F.2d 291 (4th Cir. 1958).
\textsuperscript{127} 260 F. 2d 18, 19 (4th Cir. 1958).
upheld. Another child was refused on the basis of "psychological problems"; the court doubted the propriety of this standard because it could be closely connected with race. However the board's decision was upheld because the pupil's academic achievement was so low that his success in a school with appreciably higher standards was considered unlikely. The remaining four pupils were turned down because of an "adaptability" factor. The court rejected this standard, holding that it was clearly based on race. Both sides appealed the decision; the Fourth Circuit affirmed the four admissions ordered by the district court, but has deferred consideration of the twenty-six denials that were upheld pending further examination of the relevant circumstances.129-131

The psychological factors mentioned in these cases probably have some factual basis. As the Thompson case indicates, any immediate large-scale shift in the racial make-up of the southern schools seems unlikely. In the areas where attempts to furnish "separate but equal" education to negro children have been made, segregated negro schools are geographically closer to negro residential areas than white schools are, and proximity seems to be a legitimate standard for assignments if it is not applied discriminatorily. There is little doubt that distance factors will present difficulties to the few negro children who finally obtain assignments to all-white schools. If desegregation is to be started, some personal hardship is inevitable. This problem forces a choice of the lesser of two evils: courts may be expected to examine very closely the psychological factors of which assignment boards take cognizance. Race is not a valid criterion; distinctions based on factors traceable to race or to racial tensions will undoubtedly be found invalid as devices to achieve by indirection the unconstitutional objective of maintaining a segregated public school system.

This discussion will serve to illustrate the general concepts the courts are now following. After determining whether the state assignment schemes are valid, the approach of the courts is to examine those plans in operation. As seen, these plans cannot indefinitely preserve segregation; the courts will make sure that schools are constitutionally administered, and this will mean that the races will be eventually integrated.

F. LEGISLATION DIRECTED AGAINST CIVIL RIGHTS ORGANIZATIONS.

Although there are no exact figures available, there is little doubt that the majority of cases involving Negroes attempting to vindicate their constitutionally guaranteed rights are directly aided or indirectly assisted by the National Association for the Advancement of Colored People. Some southern states have now taken steps to deprive the negro litigant of this source of outside aid.

From one point of view, the lasting solution to the integration problem is the termination of NAACP activities within the state, either by absolute prohibition or by the establishment of regulations so stringent that the group is no longer an effective instrument in the struggle for civil rights. Alabama attempted the latter approach by requiring the Association to produce membership records and other information from its files. When it failed to comply with this, the Association was fined $100,000 for contempt by the state supreme court and enjoined from doing all business within the state. However, the United States Supreme Court held that such action was a violation of the due process clause of the fourteenth amendment, since it entailed "the likelihood of a substantial restraint upon the exercise by petitioner's [NAACP] members of their right to freedom of association."132 Upon remand, the Alabama Supreme Court reaffirmed its contempt order, asserting that the United States Supreme Court decision had proceeded on the "mistaken premise" that the NAACP had produced all documents demanded except the membership lists.133 The court said there was nothing in the record to show this, and therefore the Association was still in contempt. The dispute has been returned to the Supreme Court for further action.134

129-131 Hamm v. County School Bd. supra note 128.
133 Ex parte NAACP, 109 So. 2d 138 (Ala. 1959).
A Virginia statute requiring registration of anyone engaging in activities affecting integration or segregation has been declared unconstitutional by the Supreme Court as a violation of freedom of speech.135 Other states have passed similar legislation, including Arkansas136 and Texas.137 The Arkansas measure is directed at organizations "engaged in activities designed to hinder, harass, and interfere with the powers and duties of the State of Arkansas to control and operate its public schools. . . ."138 Such legislation will probably be declared unconstitutional if it is tested in a federal court. It is an open attempt to stop any organization or association from engaging in a legal activity — the securing and maintaining of liberties guaranteed by the federal Constitution.

Other approaches are being taken that present more subtle legal problems. The Georgia Board of Education, for example, threatened revocation of the licenses of teachers who were members of the NAACP,139 but this position was later abandoned and the matter was left in the hands of local school authorities.140 In South Carolina and Louisiana the NAACP appears on a list of organizations to which teachers may not belong.141 Even if these regulations are constitutional,142 they probably will not seriously cripple the effectiveness of the organization as a whole.

If the organization cannot be eliminated from the state and if all persons cannot be prohibited from becoming members, the alternative is legislation barring such groups from engaging in litigation and limiting the scope of their operations. Many states have adopted this course of action by enacting special barratry and maintenance statutes.143 An example is the recent legislation of Arkansas.144 Besides the filing requirements noted above,145 the exemption from unauthorized practice statutes previously afforded to certain organizations whose purpose was charitable or benevolent or "for the purpose of assisting persons without means in the pursuit of any civil remedy"146 has been eliminated.147 A new barratry statute has been enacted which reads in part: "Any person who counsels, proposes, encourages, aids or assists another in the commission of acts tending to breach the peace, with the purpose of, or intention of such acts resulting in litigation between individuals or an individual and the State or an individual and any legal entity shall be guilty of the crime of barratry."148 The act is further aimed toward "any person who has no direct and substantial interest in the relief thereby sought."149 Persons include all corporations150 and punishment may be $5,000 and/or two years imprisonment151 and any corporations guilty of violation "shall be forever barred from doing any business or carrying on any activity" in the

143 See statutes collected in 3 RACE REL. L. REP. 1257-77 (1958).
144 At the time of this writing, many of the state enactments have not yet been officially reported; no attempt is made to compile a complete list. Arkansas has been chosen as it has been very active in this area, and the focus of public attention has been centered there since the Little Rock incident. Supra note 136.
145 Supra note 136.
149 Id. § 1F.
150 Id. § 2.
151 Id. § 4.
state and their charters will be revoked.\(^{152}\) An effort to curb maintenance has been made by requiring that affidavits be filed by both the party litigant and his attorney, stating that no organization or association is maintaining the suit.\(^{153}\) It is worthy of note that the above-mentioned Arkansas statutes are directed against organizations "interfering" with public schools and their operation.\(^{154}\) At this time it is difficult to determine how far the South will attempt to carry this type of legislation.

Little case law has arisen concerning these barratry and maintenance statutes. As noted earlier,\(^{155}\) the Alabama Supreme Court has reaffirmed its contempt finding against the NAACP,\(^ {156}\) and the case is now in the Supreme Court for the second time.\(^ {157}\) A lower federal court consisting of a special three judge panel has declined to pass upon the Arkansas anti-NAACP statutes until the state courts have construed them.\(^ {158}\) Regardless of how these cases are ultimately decided, the NAACP and any other organization supporting integration will face harassment in many southern states. The barratry and maintenance statutes give these states a potent weapon. If the statutes are upheld as constitutional, the operations of these organizations are certain to be seriously hindered. Already the NAACP has admitted that such statutes have reduced its effectiveness.\(^ {159}\)

Do the underlying principles of *Brown, James* and *Cooper* reach far enough to prohibit a state from barring various organizations from aiding litigants in seeking rights that the Supreme Court has emphatically declared exist? It would seem that these statutes have added a new dimension to the law of barratry and maintenance, since the orthodox view is that something must be done that tends to obstruct the cause of justice, or be done against public policy and with a bad motive, before the crime of maintenance is committed.\(^ {160}\) "It has never been violative of law or public policy to give financial aid to a poor suitor who is prosecuting a meritorious cause of action. In the absence of any bargain to share the recovery, no just criticism can attach to one offering such friendly aid."\(^ {161}\) Since these statutes are aimed at litigation in which Negroes are attempting to gain admission to schools, it is believed that the Supreme Court would consider a suit to vindicate an individual's civil rights a "meritorious cause of action." *Cooper v. Aaron*\(^ {162}\) has declared that purely obstructive tactics will not be tolerated.

**IV: PROPOSALS FOR FEDERAL LEGISLATION**

The judiciary has heretofore borne full responsibility for implementing the *School Segregation Cases.*\(^ {1}\) Recently, a number of plans have been suggested whereby the executive and legislative branches of the federal government would assume, in varying degrees, a share of the responsibility for promoting desegregation. Several of the more significant proposals merit discussion because it is possible that Congress in the near future will enact legislation embodying some of these proposals or others which are similar.

\(^{152}\) *Id.* § 3. It is to be noted that this is a mandatory provision.


\(^{154}\) For example, the Barratry Act begins "An Act to assist the administration of the educational programs of the public schools..." Ark. Acts 1958, Nos. 12 & 13.

\(^{155}\) See p. 773 supra.

\(^{156}\) *Ex parte NAACP*, 109 So.2d 138 (Ala. 1959).


\(^{158}\) *Id.* col. 3. Following this ruling, the Arkansas legislature came forth with new filing requirements. Ark. Acts 1959, No. 225.

\(^{159}\) "The NAACP says it is prevented by the new barratry act from helping Negroes financially in school desegregation suits." Chicago Sun Times, March 22, 1959, p. 55, col. 2.


\(^{162}\) *358 U.S. 1* (1953).

\(^{1}\) The Civil Rights Act of 1957, 71 Stat. 634, 42 U.S.C. § 1975 (Supp. V, 1957), established the Civil Rights Commission but this body is authorized only to study and collect information concerning the denial of equal protection of the laws under the Constitution, and to appraise the laws of the federal government in respect thereto.
A. THE JOHNSON BILL

Senate Bill 499,\(^2\) introduced by Senator Johnson at the last session of Congress, provided for the creation of a community relations service as an independent agency of the federal government. It cautiously recognized that the requirements of the Constitution "are giving rise, or may give rise, to disagreements in communities in the various States disruptive to peaceful relations among the citizens of such communities."\(^3\) The purpose of this agency would be to provide assistance in conciliating these community disagreements and eliminating the problems ensuing therefrom.\(^4\) It would cooperate with state, local and private agencies.\(^5\) The staff would consist of a director and five assistants appointed by the President with the advice and consent of the Senate, plus the necessary technical and clerical personnel.\(^6\) The director would be authorized to establish as many as five regional offices.\(^7\)

This proposal is designed to promote domestic peace. The community relations service could ameliorate only those problems that would stem from the lack of satisfactory means of communication between community leaders who hold opposing views regarding desegregation. To the extent that the causes of resistance to desegregation go deeper the proposed agency would be ineffective.

B. THE COLLINS PROPOSAL

Governor Collins of Florida\(^8\) has formulated a plan for the creation of federal commissions in each state with primary responsibility for the direction of desegregation in public schools.\(^9\) The purpose of each commission would be to determine in those localities under its consideration when, where and to what extent desegregation of the public schools may be equitable.\(^10\) It is asserted that the plan would facilitate desegregation when and where it is feasible, while safeguarding against improvident, coerced desegregation when and where it is not feasible.\(^11\)

Each commission would be composed of five members appointed by the President from lists of names submitted by the governors of the states in which the commissions are to be established.\(^12\)

The commissions would perform the following duties:

1. offer counsel to individuals and school officials in resolving desegregation problems;
2. investigate allegations that individuals were being denied admission to public schools because of race;
3. consider problems related to desegregation upon the request of school authorities;
4. consider any plan for desegregation submitted by school authorities;
5. approve, disapprove, direct modification or revision of plans submitted by school authorities; and
6. make such findings and grant such relief as may be appropriate.\(^13\)

\(^3\) Id. § 101.
\(^4\) "It shall be the duty of the Service, subject to the provisions of this title, to provide conciliation assistance in communities where (1) disagreements or difficulties regarding the laws or Constitution of the United States, or (2) disagreements or difficulties which affect or may affect interstate commerce, are disrupting, or are threatening to disrupt, peaceful relations among citizens of such communities." Id. § 102(a).
\(^5\) Id. § 103.
\(^6\) Id. § 104.
\(^7\) Id. § 105.
\(^8\) Former Chairman, National Governors' Conference, and Southern Governors' Conference.
\(^9\) See also Palmer, Resolving a Dilemma: Congress Should Implement Integration, 45 A.B.A.J. 39 (1959) (a similar but less concrete proposal).
\(^12\) Draft bill, supra, note 10, § 3.
\(^13\) Id. § 6.
The commissions would have original jurisdiction to determine cases involving state action allegedly barring the admission of persons to public schools in violation of the fourteenth amendment. The district courts would be deprived of jurisdiction to hear such cases except to review and enforce the orders of the commissions, unless a commission fails to act on a complaint submitted to it. It is said that the commissions would be better equipped as fact finders, and they could give continuing attention to local developments while working with local officials and the public.

Authority for the plan is found in the fourteenth amendment which empowers Congress to enforce its provisions by appropriate legislation.

The proposal is a moderate plan designed to solve desegregation problems by allowing for a high degree of conciliation without implicitly negating the recognized constitutional rights of the minority racial group. This question is also raised by the Johnson Bill. It is not clear how much conciliation could be permitted consistently with the School Segregation Cases. A desire to preserve public peace does not justify state-enforced segregation for “this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.” Delaying desegregation for reasons other than those enumerated in the Brown case would be unconstitutional. Congress must take cognizance of this fact if it attempts to implement desegregation.

C. THE DOUGLAS BILL

The Douglas Bill, which was introduced at the last session of Congress under the co-sponsorship of seventeen members of the Senate, is a comprehensive and far-reaching proposal for the legislative implementation of desegregation.

The first noteworthy feature of the bill is its unequivocal endorsement of the School Segregation Cases as expressing “the moral ideals of the Nation” and “the supreme law of the land.”

The bill provides for technical and financial assistance to state and local communities whose schools are still segregated. This would include the gathering and distribution of information, conducting surveys, holding national and local conferences on segregation problems, and establishing local advisory councils. The services of trained specialists would be offered to school districts in the process of desegregating. In addition, forty million dollars would be appropriated annually to assist local governmental units to meet the costs of additional educational measures undertaken to eliminate segregation in the public schools.

The bill also provides for federal legal assistance in securing the compulsory desegregation of schools. The Secretary of Health, Education and Welfare would be authorized to persuade local governments to begin desegregation. If they refuse, the Secretary could prepare a tentative plan for desegregating a specific school district or other local governmental unit. The Secretary would seek the advice of local officials and private citizens, and take into account local conditions. The plan would be presented to the appropriate local official. If it were not placed into effect, the Secretary would hold a public hearing on the plan. An approved plan would then be published.

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14 Id. § 8.
15 Id. § 10.
16 Address by Gov. Collins, supra, note 11.
17 U.S. Const. amend. XIV, § 5.
18 See pp. 740-47 supra.
19 Buchanan v. Warley, 245 U.S. 60, 81 (1917); see also Aaron v. Cooper, 358 U.S. 1, 16 (1958).
21 Id. § 102. In the five years following the Brown decision Congress gave no clear indication of its approval.
22 Id. § 201.
23 Id. § 202.
24 Id. §§ 301-04.
25 Id. § 401.
26 Id. § 402.
27 Id. § 403.
If a local governmental unit rejected or refused to comply with the Secretary's approved plan, he could certify to the Attorney General that all efforts to secure compliance with the Constitution had failed. The following provision would then become operative:

The Attorney General of the United States is authorized to institute for or in the name of the United States a civil action or other proceeding for preventive relief, including an application for an injunction or other order, against the appropriate officials of the State, municipality, school district, or other local governmental unit, and any individual or individuals acting in concert with such officials to enforce compliance with the approved plan.28

Another provision authorized the Attorney General to institute civil suits without prior administrative action on the complaint of individuals alleging the deprivation of equal protection of the laws because of race. However, the complainants must be unable "for any reason" to seek effective legal protection.29

The Attorney General is further authorized to institute a civil action against any person preventing or threatening to prevent, or conspiring to prevent or hinder:

1. any Federal, State or local official from according any person or group the equal protection of the laws, or
2. the execution of any court order protecting the right to the equal protection of the laws.30

Section 602 would severely test the doctrine that state action is a prerequisite for the invocation of the fourteenth amendment.31 This provision could be assailed as going beyond the power of Congress,32 and it might also be argued that there is a violation of the tenth amendment.

Section 603 embodies the traditional language of federal civil rights legislation. It authorizes the Attorney General to institute proceedings for preventive relief against anyone who, under color of state law, deprives or threatens to deprive any individual of rights guaranteed by the fourteenth amendment.

The most controversial features of Senate Bill 810 are those which empower the Attorney General to institute civil suits which now may be initiated only by private individuals. The bill's opponents consider it a dangerous and unprecedented extension of federal power which would infuriate the people of the states when applied. Its proponents consider it a reasonable proposal for the implementation of desegregation. They urge that poverty, fear of economic retaliation and state anti-barratry laws may prevent the negroes from vindicating their constitutional rights.

D. THE ADMINISTRATION PROPOSALS

The President submitted a special message to Congress at its last session outlining a seven-point proposal for Civil Rights legislation.33 In response, several bills relating to desegregation were introduced.

The most significant of the Administration-supported proposals was Senate Bill 95534 which would have strengthened the law dealing with the obstruction of justice.35

28 Id. § 501(a).
29 "Whenever the Attorney General receives a signed complaint that any person is being deprived of, or is being threatened with the loss of, the right to the equal protection of the laws by reason of race, color, religion, or national origin and whenever the Attorney General certifies that, in his judgment, such person or group of persons is unable for any reason to seek effective legal protection for the right to the equal protection of the laws, the Attorney General is authorized to institute for or in the name of the United States a civil action or other proceeding for preventive relief. . . ." Id. § 601(a).
30 Id. § 602.
31 See pp. 728-29 supra.
32 §§ 501(a) and 601(a), under which private individuals acting in concert with state officials may be subject to an injunction, may also be attacked on this ground.
35 See pp. 755-56 supra. There is some doubt whether the existing obstruction of justice statutes apply to acts occurring after the completion of the court's proceedings; therefore, this proposal would strengthen the judiciary's position in desegregation cases involving violence.
The measure provided that the use of force or the threat of force to obstruct court orders in school-segregation cases would be a crime. It would not apply to peaceful defiance of court orders, or to situations where desegregation was proceeding without judicial compulsion.

Senate Bill 958\textsuperscript{36} provided for technical aid to local agencies to assist them in making the necessary adjustments required by school desegregation. State approval would be a prerequisite for extending this assistance to the local governmental units. This aid would be less extensive than that proposed in the Douglas bill. Senate Bill 958\textsuperscript{37} also declares that "the Constitution as interpreted by the Supreme Court is the supreme law of the land."

Other civil rights legislation was proposed at the last session of Congress but its bearing on the practical problems of desegregation is too remote to merit discussion.

The extent to which Congress will assist in the implementation of the School Segregation Cases is now uncertain. It is nevertheless evident from this survey that the judiciary may expect increasing support from the legislative branch of the federal government.

\textsuperscript{36} S. 958, 86th Cong., 1st Sess. (1959).
\textsuperscript{37} Ibid.