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are diminished considerably.[28] Furthermore, the problems that do exist seem capable of the kind of solution that will enable the fairness doctrine to deal fairly with the public as well as the licensee.

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Constitutional Law—STATE ACTION—CLOSING RATHER THAN DESEGREGATING RECREATIONAL FACILITIES. *Palmer v. Thompson*, 91 S. Ct. 1940 (1971).

In 1963 the City of Jackson, Mississippi, reacting to a declaratory judgment,[1] closed four city-owned swimming pools and surrendered the lease on another,[2] rather than operate the pools on a desegregated basis. Black citizens of Jackson brought a class action to compel the city to reopen the pools on an integrated basis.[3] The court of appeals, in a divided opinion, affirmed the district court's finding that the closing was in the interest of peace, order, safety, and economy, and that the closing of the pools was not a denial of equal protection of the laws to Negroes.[4]

reconsideration denied, 21 P & F RADIO REG. 2d 22, *appeal pending*, D.C. Cir., No. 71-8181, *noted in* 71 COLUM. L. REV. 452 (1971). *Brandywine* marks the first instance of the Commission's willingness to deal severely with a fairness violator. In *Brandywine*, the licensee was cited for failure to comply with general obligations of fairness as well as other administrative infractions. 24 F.C.C.2d 18, 22 (1970).

28. Additionally, the licensee's obligation is merely one of good faith discretion, and reasonable judgment. *See* note 10 *supra*. But the burden of proof of good faith compliance with the doctrine is on the licensee. Complainants have the burden of presenting evidence that tends to show non-compliance, but once a prima facie showing of failure is made, the burden shifts to the licensee. *See* Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969), *noted in* 83 HARV. L. REV. 1412 (1970).

1. Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962), *aff'd per curiam*, 313 F.2d 637 (5th Cir.), *cert. denied*, 375 U.S. 951 (1963). The district court ruled that Jackson's enforced segregation in the operation of its public parks, golf courses, swimming pools, zoos, libraries, auditoriums and other recreational facilities constituted a denial of equal protection of the laws. However, the court noted with approval the policy of voluntary separation of the races in Jackson and declined to issue an injunction forbidding the discriminatory practices. 206 F. Supp. at 543.

2. This pool, in Leavell Woods Park, was subsequently operated on a "whites only" basis by the original lessor, the Jackson Y.M.C.A. Another pool, initially sold to the Y.M.C.A., was later bought by Jackson State College and used by members and guests of its predominantly black student body. Palmer v. Thompson, 91 S. Ct. 1940, 1943 (1971).

3. This decision is not officially reported.

4. Palmer v. Thompson, 391 F.2d 324 (5th Cir.), *rehearing*, 419 F.2d 1222 (5th Cir. 1970).

The Supreme Court affirmed,[5] finding no continuing state involvement in the segregated private operation of pools. The Court held that Jackson had "completely ceased running swimming pools"[6] and that "no state action affected blacks differently from whites" since the pools were closed to blacks and whites alike.[7] The Court concluded that in the absence of state action, even a "sole" or "dominant" motive to avoid integration is insufficient to invalidate the closing.[8]

Since *Brown v. Board of Education*,[9] the Supreme Court has reaffirmed the principle that official segregation of public facilities, including recreational facilities and services,[10] violates the fourteenth amendment.[11] *Brown* precipitated complying court orders[12] as well as evasive state responses.[13] But attempts to evade desegregation by action

5. Palmer v. Thompson, 91 S. Ct. 1940 (1971).

6. *Id.* at 1943. *See* Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964). In *Griffin* the county's efforts to close its schools to avoid integration and its attempts to finance and operate segregated "private" schools were found to constitute state actions which denied equal protection of the law.

7. 91 S. Ct. at 1945.

8. *Id.*

9. 347 U.S. 483 (1954). Therein it was held that "separate educational facilities were inherently unequal." *Id.* at 495.

10. *See, e.g.*, Watson v. City of Memphis, 373 U.S. 526 (1963) (parks and playgrounds); New Orleans City Park Improv. Ass'n. v. Detiege, 252 F.2d 122 (5th Cir.), *aff'd per curiam*, 358 U.S. 54 (1958) (city park); Holmes v. City of Atlanta, 223 F.2d 93 (5th Cir.), *aff'd per curiam*, 350 U.S. 879 (1955) (public golf course); Dawson v. Mayor and City Council, 220 F.2d 386 (4th Cir.), *aff'd per curiam*, 350 U.S. 877 (1955) (public beach and bathhouses); Muir v. Louisville Park Theatrical Ass'n., 202 F.2d 275 (6th Cir. 1953), *rev'd per curiam*, 347 U.S. 971 (1954) (golf course, fishing lake, and private amphitheater).

11. U.S. CONST. amend. XIV provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The *Palmer* majority, conceding that "the Equal Protection Clause was principally designed to protect Negroes against discriminatory action by the States," considered the primary question to be whether closing the pools to all races is state action that denies equal protection to Negroes. 91 S. Ct. at 1942.

12. *See, e.g.*, City of St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956) (beach and swimming pool); Shuttlesworth v. Gaylord, 202 F. Supp. 59 (N.D. Ala. 1961), *aff'd sub nom.* Hanes v. Shuttlesworth, 310 F.2d 303 (5th Cir. 1962) (parks, tennis courts, swimming pools, auditorium, museum and other facilities); Moorhead v. City of Fort Lauderdale, 152 F. Supp. 131 (S.D. Fla.), *aff'd*, 248 F.2d 544 (5th Cir. 1957) (golf course); Ward v. City of Miami, 151 F. Supp. 593 (S.D. Fla. 1957) (golf course); Holley v. City of Portsmouth, 150 F. Supp. 6 (E.D. Va. 1957) (golf course); Fayson v. Beard, 134 F. Supp. 379 (E.D. Tex. 1955) (city parks).

13. Regarding educational facilities, the Supreme Court has criticized evasive tactics and, in lieu of the "all-deliberate-speed" guide for desegregation, ordered that segregated school systems be terminated "at once." Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969).

such as leasing municipally owned facilities,[14] resigning public trusteeships to private trustees,[15] and selling facilities subject to a reversionary interest in the state,[16] have been consistently struck down by the Court.

On the other hand, municipal decisions to sell facilities absolutely[17] or to close and retain possession[18] of recreational facilities rather than desegregate have been upheld.

The relevance of state motivation in cases involving closing of public facilities has become a significant but difficult problem for courts.[19]

14. Muir v. Louisville Park and Theatrical Ass'n., 347 U.S. 971 (1954) (segregated operation of a municipally owned amphitheater by a private lessee held subject to the fourteenth amendment). *See also* Wimbish v. Pinellas County, 342 F.2d 804 (5th Cir. 1965) (lessee of segregated state park subject to the fourteenth amendment); Dep't of Conservation & Development v. Tate, 231 F.2d 615 (4th Cir.), *cert. denied*, 352 U.S. 838 (1956) (lessee of segregated state park subject to the fourteenth amendment).

15. Evans v. Newton, 382 U.S. 296 (1966). Therein, a public trusteeship in park lands restricted by will to segregated use was resigned in favor of a private trustee who continued to operate the park on a segregated basis. The private trustee was required to desegregate because the functions of operating a park were held to be governmental in nature and thus cannot evade a state's constitutional limitations. *Id.* at 299.

16. Hampton v. City of Jacksonville, 304 F.2d 319 (5th Cir.), *cert. denied*, 371 U.S. 911 (1962). A reversionary clause in the city's contract for sale of golf courses, sold to avoid their desegregation, was held to constitute sufficient "state involvement" so as to subject private buyers to the requirement of the fourteenth amendment.

17. Tonkins v. City of Greensboro, 162 F. Supp. 549 (M.D. N.C.), *aff'd*, 276 F.2d 890 (4th Cir. 1958). *See also*, Hampton v. City of Jacksonville, 304 F.2d 319 (5th Cir.), *cert. denied*, 371 U.S. 911 (1962), wherein the Supreme Court indicated that an "absolute" sale of public golf courses, even for the purpose of avoiding their desegregation, would not violate the fourteenth amendment.

18. Hampton v. City of Jacksonville, 304 F.2d 319 (5th Cir. 1962) (city terminated operation of swimming pools in reaction to a court desegregation order, held not violative of equal protection and not grounds for contempt); City of Montgomery v. Gilmore, 277 F.2d 364 (5th Cir. 1960) (city closed its public parks in lieu of desegregating them); Clark v. Flory, 237 F.2d 597 (4th Cir. 1956) (state park closed); Walker v. Shaw, 209 F. Supp. 569 (W.D. S.C. 1962) (public skating rink closed to avoid desegregation).

19. A concomitant principle to motivation in *Palmer*, which is not considered in the above discussion, is that the pool closing affected blacks and whites alike. 91 S. Ct. at 1945. This seems but a splinter of the separate but equal interpretation in Plessy v. Ferguson, 163 U.S. 537 (1896). In rejecting the "separate but equal" doctrine, the Court in *Brown I* explained that equal treatment with respect to some areas, for example, school buildings and teaching staffs, did not guarantee equal treatment with respect to intangible, but perhaps more important areas, such as, cultural values, adjustment to environment, and freedom to associate. If it is unconstitutional for a state to attempt, under the *Plessy* doctrine, to provide separate facilities equally, is Jackson's attempt to withdraw facilities equally any less discriminatory? This equal effect argument has been rejected by the Supreme Court in other contexts because it does not recognize the reality of unequal consequences falling on minority groups. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385 (1965) (state legislation authorizing voter approval of

In *Griffin v. County School Board*,[20] the Court held that whatever nonracial grounds might support closing public schools, the justifications must be constitutional and "grounds of race and opposition to desegregation do not qualify as constitutional." [21] The Court earlier had held that legislation providing a governor authority to close any school ordered to desegregate was unconstitutional.[22] More specifically in *Evans v. Abney*[23] where Georgia resigned a state park to private trustees in order to avoid desegregation, the majority tacitly assumed,[24] and the dissent accepted as established law, that "under the Equal Protection Clause a state may not close a public facility solely to avoid its duty to desegregate that facility." [25]

Historically, motivation has not been considered to be a viable criterion in deciding the constitutionality of state legislation. The traditional reasons are (1) that motivation is difficult to ascertain, (2) that unconstitutional motives on the part of some legislators should not be imputed to all legislators, and (3) that the standard of racial content or effect is more objective and therefore more suitable.[26] However, since the litigation over civil rights has increased, the courts have been more willing to consider motivation, especially where the intent behind conduct rather than the intent behind legislation can be scrutinized.[27] The Court in *Griffin* emphasized that the sole purpose in closing the schools was to ensure that black and white children would attend

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any racial housing ordinance); Loving v. Virginia, 388 U.S. 1 (1967) (miscegenation statute); Anderson v. Martin, 375 U.S. 399 (1964) (designation of race on ballots).

20. 377 U.S. 218 (1964).

21. *Id.* at 231. *See also,* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (redistricting to exclude Negro voters).

22. Orleans Parish School Bd. v. Bush, 365 U.S. 569 (1961).

23. 396 U.S. 435 (1970). *See also* cases cited note 12 *supra;* Note, *Constitutional Law —You Can't Take the City Out of the Park, But You Can Take the Park Out of the City*, 49 N.C.L. REV. 148 (1970).

24. 396 U.S. at 445.

25. *Id.* at 453 (dissenting opinion).

26. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (Justice Marshall refused to invalidate a state bill on the basis of corrupt legislative motivation); United States v. O'Brien, 391 U.S. 367 (1968) (statute prohibiting draftcard burning not invalid on the ground that its possible motivation was the stifling of dissent).

27. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1209 (1970). Evidence of unconstitutional motivation could either control the decision, or shift the burden of proof. Analysis under the second approach leads to this sequence: (1) closing after an order of integration, without rebuttal evidence, can be presumed to be motivated by a desire to continue segregation; and (2) such prima facia motivation would therefore necessitate the presentation of a rational, nonracial defense.

separate facilities.[28] The Supreme Court later supported the California Supreme Court's consideration of intent behind an amendment in which the "immediate objective" was to protect a private seller's right to discriminate.[29] More recently, the Court held that an otherwise valid refusal to sell real estate is banned by 42 U.S.C. § 1982, (dealing with racial discrimination in housing) if that refusal is racially motivated.[30] Official conduct also may be unconstitutional under 42 U.S.C. § 1983 (concerning racial discrimination under color of state custom or usage), if it is motivated by invidious discrimination. These are but a few examples of civil conduct that the Court has found actionable "only upon proof of forbidden racial motive or animus." [31]

The Court in *Palmer* was faced with the effects of a closing which was motivated either by the city's alleged justifications, or a desire to evade desegregation, or some combination of the two.[32] The majority disposed of the arguments that the effect of closing the pools encouraged discrimination[33] and established incidents of slavery.[34] The Court held that the consequences of the closing affected citizens of both races equally.[35]

At this point, the Court could have established a clear position on the weight of motivation either by ruling that a municipality cannot close a facility for the predominant reason of avoiding a court expressed duty to desegregate[36] or by ruling that such motivation places on the city

28. 377 U.S. at 231.

29. Reitman v. Mulkey, 387 U.S. 369 (1967).

30. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

31. Palmer v. Thompson, 91 S. Ct. at 1953 (dissenting opinion).

32. The issue in *Palmer* was unique in that the facts evidenced no state involvement in the operation of desegregated facilities. Except for indirect involvement by encouraging or endorsing segregation, the Court was left with an opportunity to consider motivation isolated from the variables which previously had accompanied similar state action. Thus, it was held that "the Court's past cases do not precisely control this one, and the present case, if reversed, would [take] the Court farther than any before." *Id.* at 1947 (concurring opinion).

33. *Id.* at 1944 (majority opinion). In Reitman v. Mulkey, 387 U.S. 369 (1964), the Court found state authorization of private discrimination to be unconstitutional. The *Palmer* Court found no evidence to support a similar conclusion.

34. 91 S. Ct. 1940. In Jones v. Alfred H. Mayer, 392 U.S. 409 (1968), the thirteenth amendment was interpreted to outlaw incidents of slavery. The *Palmer* majority felt that the thirteenth amendment would, without congressional legislation, be severely extended by holding that a denial of the right of Negroes to swim in pools with Caucasians is an impermissible "badge or incident" of slavery. 91 S. Ct. at 1946.

35. 91 S. Ct. at 1945. *See* note 19 *supra.*

36. The *Gomillion, Bush, Griffin, Hunter* series of cases evinces a strong implication that public evasion of integration, without overriding constitutional justification, is a violation of equal protection guarantees. The Court could logically have furthered

the burden of showing a nonracial justification which the courts will test against constitutional standards.[37] Instead, the Court supported its finding of no discriminatory effects by impliedly accepting the relatively weak justifications that the pools could not be operated safely and economically on an integrated basis.[38] Thus, the *Palmer* majority declined to extend the rationale of previous civil rights decisions. The Court distinguished *Griffin* on the grounds that Jackson was not "involved" in any resultant private discrimination; that recreational facilities, unlike schools, were not "essential" public services; and that although the *Griffin* closing was clearly motivated by opposition to integration, the *Palmer* closing considered the impact of public safety and economy.[39]

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this progression by expressly recognizing the relevance of motivation. An order to reopen the pools on an integrated basis, while precedented, would not establish an affirmative duty to provide pools, but "would merely mean that once a public service has been offered . . . it cannot be operated or terminated when the *intent* or effect is to discriminate against and to punish a particular group for the exercise of a constitutional right." (Emphasis supplied). McKnight, *Constitutional Law—Civil Rights—Closing Municipal Swimming Pools in Response to Desegregation Order Does Not Violate Negro Plaintiffs' Thirteenth or Fourteenth Amendment Rights*, 16 WAYNE L. REV. 1434, 1445 (1970).

37. The burden of persuasion is discussed at note 27 *supra*. Determining motivation which is contrary to constitutional standards is no more difficult or inherently subjective than other analysis accepted by the Court. The following objective or verifiable considerations could be used as a test for discriminatory motives: "(1) the presence or absence of a desegregation order or a similar declaratory judgment; (2) the effect reasonably predictable from a closing in light of community practices; (3) the racial status of the facility at the time of closing; and (4) the bona fides of the city's offered justifications." Comment, *Closing Public Pools to Avoid Desegregation: Treading Water*, 58 GEO. L.J. 1220, 1226 (1970).

38. If violence endangers community safety or if operations prove economically burdensome due to integration, *after* integration has been attempted, there may be a compelling state interest which would justify a closing of the facilities. However, these same considerations cannot be so compelling *before* integration is attempted. In ruling, for example, that an inability to operate desegregated facilities profitably would not justify delaying desegregation, the Supreme Court has stated that "vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." Watson v. City of Memphis, 373 U.S. 526, 537 (1963). Considering the public safety argument the Court has also stated that "constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Id.* at 533. *See also*, Cooper v. Aaron, 358 U.S. 1 (1958) (Negro children cannot be denied constitutional rights simply to preserve law and order); Buchanan v. Warley, 245 U.S. 60 (1917) (unconstitutional ordinances and laws not justified by their resultant preservation of public peace). Thus, the *Palmer* Court could have rejected the alleged justifications of economy and safety. Yet the majority strongly implies that even absent any justification for the closing, unsound motivation would still not support a holding that the closing was unconstitutional. 91 S. Ct. at 1946.

39. 91 S. Ct. at 1943-45.

The decision represents a return to the early position that motivation is perhaps too difficult to ascertain. The emphasis in *Griffin* and *Gomillion v. Lightfoot* was interpreted to focus on effect rather than on motivation. Therefore, the Court held that unless pools supplied to one group are denied to another group, the fact that closing is justified upon unsound hypothesis is not a sufficient ground to order pools reopened on an integrated basis.[40] The *Palmer* decision retreats from the clear implication of a growing relevance of motivation in equal protection litigation. The issue considered has potentially significant ramifications.[41] The decision may be interpreted to permit a locality to "avoid by cynical default its constitutional duty to provide desegregated facilities" or to practice such tactics of delay and evasion as to render meaningless the right to desegregated use of municipal recreational facilities.[42]

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Securities Regulation—INVESTMENT COMPANY ACT OF 1940. *Moses v. Burgin*, 445 F.2d 369 (1st Cir. 1971).

Plaintiff Moses commenced a derivative action against Fidelity Fund, Inc., two of its affiliated directors and its investment adviser.[1] Plaintiff complained that the affiliated directors had failed to act upon relevant information concerning possible methods by which a portion of the fund-paid portfolio commissions could be recaptured to reduce fund expenses rather than to stimulate fund sales.[2] In addition, plaintiff alleged that affiliated directors had consistently withheld this informa-

40. *Id.* at 1945-46.

41. *Id.* at 1947 (concurring opinion).

42. Comment, *supra* note 37, at 1237.

1. A brief overview of the internal operations of mutual funds is outlined in Jaretzki, *Duties and Responsibilities of Directors of Mutual Funds*, 29 LAW & CONTEMP. PROB. 777, 780 (1964).

2. Prior to December 5, 1968 when "customer directed give-ups" were abolished on all stock exchanges, the decision as to alternative uses of brokerage commissions on portfolio transactions was seen as one of the major problems in the mutual fund industry. *See* WHARTON SCHOOL OF FINANCE AND COMMERCE, A STUDY OF MUTUAL FUNDS 3, H.R. REP. No. 2274, 87 Cong., 2d Sess. (1962); Note, *The Use of Brokerage Commissions to Promote Mutual Fund Sales: Time to Give Up the "Give-Up,"* 68 Colum. L. Rev. 334 (1968).