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BOOK REVIEW

PART OF THE SOLUTION RATHER THAN PART OF THE PROBLEM: A ROLE FOR AMERICAN PRIVATE ELEMENTARY AND SECONDARY SCHOOLS IN THE 1990s

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Marshall-Wythe School of Law Professor Neal Devins has assembled a baker's dozen of essays around the title *Public Values, Private Schools*, a new volume in the Stanford Series on Education and Public Policy.¹ The main public value discussed throughout the book is racial integration, although several authors see the elimination of discrimination and the enhancement of educational opportunity for African-Americans as illustrative of even broader public goals that go to the very core of what it means to be a democracy.

Although the authors disagree sharply on many issues, a majority of the contributors view the main theme this way: Public elementary and secondary schools are committed to important public values that private schools undercut. In other words, private schools are seen as part of the problem. I argue here that this vision has things backwards. Rather, in ways preliminarily explored by Stephen Arons in chapter 4 of Devins' book,² I show that private schools can be part of the solution by describing new litigation recently brought in Kansas City, Missouri.

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1. PUBLIC VALUES, PRIVATE SCHOOLS (The Stanford Series on Education and Public Policy, N. Devins ed. 1989).

2. Arons, *Educational Choice as a Civil Rights Strategy*, in PUBLIC VALUES, PRIVATE SCHOOLS, *supra* note 1, at 77.

I. OVERVIEW

Simply put, many of Devins' authors believe that private schools threaten our public values both in the specific (racial integration) and in the general (our democratic consensus). In chapter 9, for example, Robert Crain and Christine Rossell criticize the earlier work of James Coleman and others who have extolled the benefits Catholic schools provide to minority and disadvantaged children, and argue instead that the Catholic school system is not only itself significantly segregated, but that it serves also as a white flight haven for families seeking to escape desegregation in central cities.³ As another example, Henry Levin in chapter 10, while recognizing certain shortcomings of American public education, belittles Coleman's findings on public/parochial school achievement differences⁴ and argues strongly against the further "privatization" of the system.⁵

To be sure, most of the contributors who are worried about what they see as the negative effects of private schools also recognize that society faces something of a dilemma over the degree of autonomy it should allow private schools and their users. They acknowledge that other important values are also at stake, especially the religious values of those who support private education and, in some of the essays, the broader values of parents who want to teach their way of life to their children. Nonetheless, the picture of private schools that many of the contributors paint is one in which those schools—they have, not Catholic schools, but Protestant fundamentalist schools that call themselves "Christian academies," primarily in mind—seek to discriminate on grounds of race, sex or other generally disapproved criteria, or otherwise seek to foster values that society at large considers intolerant.

Given this clash of values, the critical questions to be addressed for several of the contributors are of the following sort: How much and through what means should the state insist that private schools not discriminate against minority student applicants? How

3. Crain & Rossell, *Catholic Schools and Racial Segregation*, in PUBLIC VALUES, PRIVATE SCHOOLS, *supra* note 1, at 203.

4. Levin, *Education as a Public and Private Good*, in PUBLIC VALUES, PRIVATE SCHOOLS, *supra* note 1, at 222.

5. *Id.* at 229.

much should and may the state insist that private schools actually achieve racially integrated student bodies? And to what extent should and may other important basic constitutional values, like free speech, freedom of association and procedural due process, be imposed on private schools?

Erwin Chemerinsky considers these matters in chapter 13.⁶ He argues that the fourteenth amendment's "state action" doctrine should be refashioned so that "private schools [that] have become havens for white students fleeing school desegregation"⁷ not only become fully covered by the anti-race-discrimination principle of the Constitution, but also become subject to the core constitutional restrictions generally applicable to other institutions that perform essential public functions.⁸

Robert Fullinwider concludes in chapter 2, however, that "[d]espite the social harm of discriminatory policies and segregated education, church schools do not contribute enough to that harm to warrant further action against them, in light of the high value we place on religious freedom."⁹ In chapter 7, Jeremy Rabkin seconds this basic outlook and concludes that "[w]e can afford to be much more tolerant of diversity and deviance than the generation that fought the Civil War over slavery."¹⁰ Rabkin further notes that "[i]t is at least arguable that neither racial minorities nor the country at large any longer need to force the remaining handful of [openly racially exclusionary] places to conform to national standards of fair treatment."¹¹

Another issue dealt with in the book is the extent to which private schools may be forbidden to use discriminatory hiring criteria for faculty and other employees. This issue is addressed by William Marshall and Joanne Brant in chapter 5¹² and Carl Esbeck in

6. Chemerinsky, *The Constitution and Private Schools*, in PUBLIC VALUES, PRIVATE SCHOOLS, *supra* note 1, at 274.

7. *Id.* at 275.

8. *Id.* at 286.

9. Fullinwider, *The State's Interest in Racially Nondiscriminatory Education*, in PUBLIC VALUES, PRIVATE SCHOOLS, *supra* note 1, at 32.

10. Rabkin, *Taxing Discrimination: Federal Regulation of Private Education by the Internal Revenue Service*, in PUBLIC VALUES, PRIVATE SCHOOLS, *supra* note 1, at 151-52.

11. *Id.* at 152.

12. Marshall & Brant, *Employment Discrimination in Religious Schools: A Constitutional Analysis*, in PUBLIC VALUES, PRIVATE SCHOOLS, *supra* note 1, at 91.

chapter 6.¹³ Marshall and Brant conclude that even religious schools have no blanket constitutional right to exclude from employment those applicants they find objectionable on grounds rooted in church doctrine.¹⁴ Rather, they argue, the courts must apply a balancing test that protects a school's core religious doctrinal interests and basic "sectarian character," but that otherwise values the state's antidiscrimination interests.¹⁵ Esbeck argues, however, that, race discrimination aside, the Constitution should be read to give "pervasively sectarian schools" wider wagon room to use employment criteria, such as gender, marital status and sexual preference, that need not be otherwise tolerated in the private sector.¹⁶

Finally, in chapter 12, Tyll van Geel deals with the question of how much the public should and may police the curriculum of private schools in order to root out racist teaching. Van Geel argues that, despite Professor Ronald Dworkin's earlier and general assertions to the contrary, this question has no philosophically determinate answer and, as a result, unresolved legal conflict is likely to persist in this area.¹⁷

As to what we should make of these conflicting public values, Devins concludes in his introductory chapter that "Christian educators ultimately prevail on programmatic matters; the state ultimately prevails on nondiscrimination matters."¹⁸

As I read these essays, I sensed that several of the chapters adopted an outlook toward private schools that seems to me more fitting of the headier days of the early 1970s. At that time, the Supreme Court's firmer resolve and, probably more importantly, the federal executive agencies' growing enforcement of the 1964 Civil Rights Act, gave real hope that not only would the back of official discrimination in schools be broken, but that, as a result,

13. Esbeck, *The Establishment Clause as a Limit on Governmental Regulation of Religious Schools*, in PUBLIC VALUES, PRIVATE SCHOOLS, *supra* note 1, at 114.

14. Marshall & Brant, *supra* note 12, at 108.

15. *Id.*

16. Esbeck, *supra* note 13, at 126.

17. Van Geel, *State Control of the Private School's Curriculum: An Essay in Law, Jurisprudence and Political Philosophy*, in PUBLIC VALUES, PRIVATE SCHOOLS, *supra* note 1, at 267.

18. Devins, *Introduction: Private Schools and Public Values*, in PUBLIC VALUES, PRIVATE SCHOOLS, *supra* note 1, at 5.

our nation's children would actually attend integrated schools. In this Book Review, I argue that those concerned about race and private education need a different outlook in the 1990s.

II. A BRIEF REVIEW OF THE LEGAL BATTLE AGAINST SEGREGATION IN SCHOOLS

A. *Through 1973*

Think back to 1973. In the few years previous to 1973, the Supreme Court firmly rejected two tactics that many de jure segregated public school districts in the South had hoped to use in order to avoid the mandate of *Brown v. Board of Education*.¹⁹ In 1968, in *Green v. County School Board*,²⁰ the Court struck down a scheme that assigned children to their formerly all white or all black schools and gave them the "choice" to enroll in what was plainly still the other race's school.²¹ Even more important, in 1971 in *Swann v. Charlotte-Mecklenburg Board of Education*,²² the Court said that a segregated school district could not simply adopt a neighborhood school assignment plan when that would leave the district with schools that were largely identifiable as black or white schools.²³ Furthermore, in 1973 in *Keyes v. School District No. 1*,²⁴ the Court appeared to be spreading its desegregation vision out of the South and to the North and West as well.

Early on, civil rights advocates understandably feared that whites in the South would seek to evade *Brown* by establishing private "white only" school systems. In one version, white political power would close the public schools, and individual families would be left to fund their children's schooling on their own, with whites banding together to form their own schools, and African-Americans left even worse off than they were under a regime of "separate but [un]equal" public schools. In 1964, the Supreme Court cut off that strategy in *Griffin v. County School Board*.²⁵

19. 349 U.S. 294 (1955).

20. 391 U.S. 430 (1968).

21. *Id.* at 441.

22. 402 U.S. 1 (1971).

23. *Id.* at 21.

24. 413 U.S. 189 (1973).

25. 377 U.S. 218 (1964).

A second fear was that public schools would continue, but whites would largely abandon them for racially exclusive private schools that would be promoted through public funding. The Supreme Court, however, waylaid this gambit in 1964 in *Griffin* and in 1968 in *Poindexter v. Louisiana Financial Assistance Commission*.²⁶ In 1973, the Court finally put the issue to rest in *Norwood v. Harrison*.²⁷

But what if whites merely went their own way, forming "white academies" and paying for them with their own money? Civil rights groups employed two main legal strategies to attack this development. First, they sought to bar federal tax benefits to private schools that discriminated on the basis of race. This successful effort, which received its main boost through a 1970 federal district court decision in *Green v. Kennedy*,²⁸ is discussed at several points in Devins' book, especially in Jeremy Rabkin's thoughtful chapter.²⁹ Today, a private school must advertise clearly that it does not discriminate on the basis of race in order to qualify as a federally tax exempt organization.

A step down that same line failed, however. As Rabkin explains, in the late 1970s civil rights groups convinced the Carter Administration that the Internal Revenue Service should deny tax exempt status to a private school unless it could show that it either actually attained certain racially balanced targets or had tried very hard but failed to attract an integrated student body.³⁰ This approach generated tremendous opposition, however, and was never implemented.³¹

Yet even if the Carter Administration had stuck to its guns, whether the IRS's aggressive approach would have had an important impact in integrating private schools is by no means clear. Put most simply, many private schools that were not integrated could

26. 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968).

27. 413 U.S. 455 (1973).

28. 309 F. Supp. 1127 (D.D.C. 1970).

29. Rabkin, *supra* note 10, at 140-47.

30. *Id.* at 143-44.

31. *Id.* at 144-45. According to Rabkin, Rev. Jerry Falwell's "Moral Majority" got off the ground by leading a letter-writing campaign against the proposed IRS regulations. *Id.* at 144. When the Reagan Administration withdrew its support for *Green*, as Rabkin reminds us, this too ran into a storm of opposition from Congress and the public.

have merely forfeited their tax exempt status. The main advantage of that status is that donors can take income tax deductions for their donations to the school, thereby having Uncle Sam shoulder part of the cost of their contributions. While this is clearly an advantage that most private schools seek to exploit, there is little reason to think that it is absolutely critical for the new private schools that sprang up in response to *Brown*.

The second prong of the attack on white academies seeking to run around *Brown* was to try to block their very right to exclude on the basis of race. This approach was also generally successful. In 1976, the Supreme Court in *Runyon v. McCrary*³² concluded that an 1866 civil rights statute should be read to preclude private schools from refusing to enter into contracts with parents of applicants on the basis of their race.³³

Even though individual African-American families now have the legal right to force their way into schools that do not want them, and can pin substantial financial penalties on schools that refuse them for racial reasons, the fact remains that the mere existence of this legal right cannot result in substantially integrated private schools unless significant numbers of minority families actually apply. So, even if some white academies are exposed and embarrassed, actual integration in the private sector depends on voluntary behavior by private schools and minority families. Furthermore, although many private schools probably still discriminate secretly, or would if presented with the opportunity, notwithstanding formal representations they make, surely most schools in the private sector today do not exclude African-Americans intentionally.

This state of legal and social affairs reveals why, at least as of 1973, one might see private schools as a critical part of the problem of educational discrimination. So long as African-Americans do not knock on the doors of largely white private schools in sub-

32. 427 U.S. 160 (1976) (adopting the position taken by the federal district court that first decided the question in *Gonzales v. Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200 (E.D. Va. 1973), a companion case before the Court with *Runyon*).

33. 427 U.S. at 172. The Court reserved the question of whether religious schools have a constitutional defense to the statute based on the free exercise clause. See generally Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 Tex. L. Rev. 259 (1982).

stantial numbers, significant racial integration in private schools will not occur. And to the extent that whites flee or have fled public schools for private schools, these factors together threaten to mar badly what in the early 1970s was taken by many in the civil rights community to be the real vision of *Brown*: well integrated education for all Americans.

B. Since 1973

It is no longer 1973. Whatever the breadth of that vision then, it appears well beyond our grasp today for reasons that, in my judgment, have little to do with private schools. Indeed, in 1974 the Supreme Court itself dealt that vision a blow from which it shows no signs of recovery.

Whatever the perception of racial demographics might have been in 1954 when *Brown* was decided, it was clear by 1974 when the Court decided *Milliken v. Bradley*³⁴ that, in many large metropolitan areas, whites with young children were living increasingly in the suburbs and the city's schools were becoming increasingly black. Indeed, in Detroit, the scene of *Milliken*, the public schools were so overwhelmingly black that to spread the few remaining whites around, in the view of the federal district court, would have given African-American children at best only a token proportion of white classmates. Besides, that strategy might well have driven many of those few whites from the Detroit schools altogether.

For the advocates of school integration, the solution clearly lay in metropolitan integration. But the Burger Court balked, with the Chief Justice providing the one-vote majority and writing the Court's opinion. Given that the plaintiffs had not proved that the suburbs engaged in official segregation, the Court concluded that it could not force the suburbs to participate in a metropolitan racial balance plan that would send some suburban pupils into the Detroit schools and would bring minority schoolchildren from Detroit into the suburban schools.³⁵

The negative consequences of *Milliken* to the racial balance vision of *Brown* cannot be exaggerated. The dream was dashed, period.

34. 418 U.S. 717 (1974).

35. *Id.* at 745.

In a few places during the subsequent sixteen years, some lawyers have tried to show that the suburbs were party to the school segregation under attack, but they have been basically unsuccessful. In other communities, efforts to achieve racial balance within individual school districts have continued. The realization that largely white suburbs would remain exempt from the solution, however, necessarily and dramatically changed the terms of the desegregation effort.

Simultaneously, we began to see a declining enthusiasm in the African-American community for integration per se and for the busing needed to achieve it. For one thing, busing all too often seemed to mean one-way busing: from the black to the white community. Moreover, even if the burden of attending school out of one's neighborhood was shared fairly by all races, what coerced racial balance would actually achieve became less clear. To be received with hostility in the name of "body-count" integration surely must have begun to seem less appealing to many who had assumed that racial balance, at a minimum, would promote racial tolerance. For another thing, even the most optimistic of the social science evidence that began pouring in cast grave doubts on the idea that racial balance alone might somehow eliminate black-white school achievement differences.

In short, with the battle against official racism won, attention turned to the far less tractable problem that is increasingly called "institutional racism." In that climate, many African-Americans began to suggest that if they only had a decent amount of money and could run the schools in their own neighborhoods, they would find that more satisfactory than what integration promised realistically. Therefore, although a few celebrated school districts were in the national news during the 1980s as a result of their school integration controversies, to argue that we have made significant overall progress toward racial balance in the public schools during the past decade would be very difficult. Moreover, we now show little appetite as a nation for further movement in that direction.

In 1990, we are in an altogether different situation than in 1973. White flight to white academies, looming then as a key barrier to racial balance, is just no longer the scale of problem that it seemed

then.³⁶ Indeed, during the last few decades private schools have never accounted for as many as one in five children nationally, and so far there is little reason to imagine that they will in the future. To the contrary, although fundamentalist Christian schools in many locales have experienced enormous growth over the past twenty-five years, the sharp downward trend in enrollment in Catholic schools has left the private sector throughout much of the nation with a declining share of the market.

This does not mean that formal racial discrimination in private schools should be ignored. But as Devins points out, we can hardly hold private schools "more accountable for attaining the goals of compulsory education than . . . public schools."³⁷ And because, as we have seen, suburban public schools in general are not being required to be racially balanced in ways that reflect metropolitan demographics, the end of the legal line today for both those public and private schools is the need for cooperation rather than coercion. Or, as Rabkin put it, "[I]f the Court was unwilling or unable to pursue the ultimate logic of integration in public education, it should not be surprising, after all, that private schools continued to be treated very cautiously."³⁸

In this light, it seems much more valuable to think about how we can encourage private schools to be part of the solution rather than working on ways to bludgeon them on the theory that they are an important part of the problem. Put differently, what we need at this juncture is the creative use of carrots instead of sticks.³⁹

Three of Devins' authors see the role of private schools broadly in this way. I will mention briefly here the interesting perspectives two essays offer. In chapter 3, Michael Rebell analyzes

the dilemma of how to reconcile the schools' responsibility for inculcating the "fundamental values necessary to the mainte-

36. As Rabkin notes, "In northern cities . . . more white parents deserted the public schools for the suburbs than for private schools." Rabkin, *supra* note 10, at 148.

37. Devins, *supra* note 18, at 14.

38. Rabkin, *supra* note 10, at 149.

39. For some suggestions my colleague John Coons and I have made previously along these lines, see Sugarman & Coons, *Choice and Integration: A Model Statute*, in PARENTS, TEACHERS AND CHILDREN: PROSPECTS FOR CHOICE IN AMERICAN EDUCATION 279 app. A (1977), and Abrams, Coons & Sugarman, *School Integration Through Carrots, Not Sticks*, 17 THEORY INTO PRACTICE 23 (1978).

nance of a democratic political system" with the critical need in a liberal democratic society not to have the state impose values that "may conflict with the private beliefs of the student and his or her family."⁴⁰

Focusing on dissenting public school parents, who lately have sued to ban certain books from the schools and to remove their children from certain courses in the curriculum, Rebell concludes that the best solution lies in providing private school vouchers for "religious values dissenters."⁴¹ Paying for the education of those children at private schools is not only meant to create "an effective escape valve that will release this dissenting pressure to an outside environment"⁴² that is attractive to those parents, but also to permit the public schools to take on a revitalized value-inculcating role that Rebell favors.⁴³

John Chubb and Terry Moe argue in chapter 8 that private schools are more effective than public schools not simply because they generally require more homework and impose more discipline, which they do, but more importantly because they "have more control over their own destinies."⁴⁴ This independence from "direct democratic control" yields schools that "are more oriented toward academic excellence, personal growth and fulfillment, and human relations skills,"⁴⁵ and teachers who "have better relationships with their principals" and who "are much more satisfied with their jobs."⁴⁶ Chubb and Moe conclude that "improvements cannot simply be imposed on schools in the public sector";⁴⁷ new organizational arrangements are necessary.⁴⁸ To that end, they tentatively endorse educational voucher proposals, suggesting that providing vouchers of greater value for difficult-to-educate students might be

40. Rebell, *Values Inculcation and the Schools: The Need for a New Pierce Compromise*, in PUBLIC VALUES, PRIVATE SCHOOLS, *supra* note 1, at 37 (footnotes omitted).

41. *Id.* at 52.

42. *Id.* at 49.

43. *Id.* at 52.

44. Chubb & Moe, *Effective Schools and Equal Opportunity*, in PUBLIC VALUES, PRIVATE SCHOOLS, *supra* note 1, at 167.

45. *Id.* at 170.

46. *Id.* at 171.

47. *Id.* at 178.

48. *Id.* at 179.

wise.⁴⁹ They would insist that participating schools could not discriminate on the basis of race, but, like Rebell, they do not focus their attention or their proposal on the specific goal of racial integration.⁵⁰

This brings me to Stephen Arons' chapter and the Kansas City story. Arons argues that we should think of using private schools as an important part of the civil rights strategy, specifically advocating that education vouchers be offered to victims of segregation.⁵¹ Arons has long been intrigued by the use of family choice mechanisms in support of liberal causes.⁵² His main focus previously has been on those who have objected to public schooling on religious and other value grounds.⁵³ Here he turns specifically to racial minorities, arguing that a carefully regulated voucher plan targeted at African-American families in districts found to have engaged in school segregation holds considerable promise, especially when the African-American children in question have few other prospects of integrated education.⁵⁴

In such settings, Arons proposes: "The vouchers would be usable in complete payment for attendance at any suburban public school, or at any district or suburban private school willing to accept plaintiff children and provide them with an education satisfying minimum standards set by the court and the state's applicable statutes."⁵⁵ Arons specifically mentions Detroit and Kansas City as desirable places in which to try this solution.⁵⁶

As Arons recognizes, he is lending his support to a proposal that my colleague John Coons and I advanced in an amicus brief we prepared in 1977 when a California Superior Court judge appeared

49. *Id.* Compare the text to the views in chapter 11 of John and Shirley Lachs, who argue that those who favor voucher plans "tend to take a romantic view of private schools." Lachs & Lachs, *Education and the Power of the State: Reconceiving Some Problems and Their Solutions*, in *PUBLIC VALUES, PRIVATE SCHOOLS*, *supra* note 1, at 247. The Lachs conclude that the basic problem for most schools today, public and private, is the lack of "immediacy," although they do not offer any policies that might be adopted in order to achieve it. *Id.*

50. Chubb & Moe, *supra* note 44, at 179.

51. Arons, *supra* note 2, at 63-64.

52. See, e.g., Arons, *Equity, Option, and Vouchers*, 72 *TCHRS. C. REC.* 337 (1971).

53. See, e.g., S. ARONS, *COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING* (1983).

54. Arons, *supra* note 2, at 77.

55. *Id.*

56. *Id.* at 76.

to be taking on the job of providing a desegregation remedy to African-American children in the Los Angeles Unified School Districts.⁵⁷ Nothing came of that effort, but, as I will detail in the next section, perhaps now something will come of this idea in Kansas City.

III. THE KANSAS CITY STORY

A. Background

The Kansas City, Missouri school district was found guilty of racial segregation in 1984.⁵⁸ At that time, the district's schools, enrolling more than 35,000 pupils, were more than two-thirds African-American. Plaintiffs in the suit sought a compulsory metropolitan racial integration remedy,⁵⁹ but they failed before both the trial court and the Court of Appeals for the Eighth Circuit.⁶⁰ Moreover, as in Detroit some years previously, the trial court concluded that it would be unwise to adopt a racial balance scheme for the Kansas City school district that would simply spread around the white students who made up a little more than one-fourth of the district's total population.⁶¹

Instead, federal district Judge Clark embraced two other important strategies designed to achieve high quality integrated schools for the African-American plaintiff children. First, a series of first class magnet schools would be created in Kansas City that would

57. See *Amicus Brief Supporting Court-Ordered Voluntary Integration Plan* in *Crawford v. Los Angeles Unified School District*, reprinted in *PARENTS, TEACHERS AND CHILDREN: PROSPECTS FOR CHOICE IN AMERICAN EDUCATION* 301 app. B (1977). For an earlier discussion of mine about racial integration under a system of educational vouchers and suggestions as to how integration might be promoted through choice, see Sugarman, *Family Choice: The Next Step in the Quest for Equal Educational Opportunity?*, 38 *LAW & CONTEMP. PROBS.* 513, 544 (1974).

In chapter 9, Crain and Rossell also recognize that, along with what they see to be the negative effects of parochial schools on integration, those schools currently provide some benefits, such as maintaining integrated central city neighborhoods and providing desegregated education for some African-American students. Crain & Rossell, *supra* note 3, at 208. Moreover, they imagine "a private school subsidy plan that would enable more low-income minority students to gain a desegregated education." *Id.* at 209.

58. *Jenkins v. State*, 593 F. Supp. 1485, 1488 (W.D. Mo. 1984).

59. *Id.* at 1489.

60. *Jenkins v. State*, 807 F.2d 657, 682 (8th Cir. 1986).

61. *Jenkins v. State*, 639 F. Supp. 19, 38 (W.D. Mo. 1985).

be required to have racially balanced student bodies.⁶² In addition to white children who might be attracted to these schools from existing Kansas City schools, the court hoped that the schools would attract white children from surrounding suburban school districts and private schools.⁶³

Second, Judge Clark arranged for the creation of a voluntary transfer plan by which African-American students from the Kansas City school district would have their way paid to public schools of their choice in the surrounding school districts.⁶⁴ The financial burden of the interdistrict transfer plan was designed to fall largely on the state, also a defendant in the original case, so that the Kansas City school district would not suffer economically from the loss of its pupils, and the receiving school districts would not find it burdensome to accept new students.⁶⁵

Plainly, if a substantial number of whites could be attracted into Kansas City magnet schools and if a substantial number of African-Americans elected to transfer to the white suburbs, then the chance that African-American children living in the Kansas City school district could obtain an integrated education would be improved greatly.

Unfortunately, this two-pronged strategy has failed thus far. First, although a large number of African-American parents in Kansas City indicated to the district's Desegregation Monitoring Committee that they would like to send their children to schools in surrounding public school districts, those districts have been unwilling to accept any Kansas City pupils. Just why those school districts have been unwilling to cooperate is a mystery. Under the court's plan, the districts would receive reasonable "tuition" payments on behalf of the children they accept,⁶⁶ and many of them surely must have room for at least a few additional pupils. Under the plan, the districts can refuse children with a history of serious discipline problems, although they otherwise must accept those

62. *Id.* at 55.

63. *Id.* at 54.

64. *Id.* at 38-39.

65. *Id.* at 39.

66. *Id.*

students wanting to attend, up to the number of places the districts make available.⁶⁷

Perhaps some of the boards of education in the neighboring districts just do not want an infusion of African-American pupils, although, of course, they are not saying that. Some boards may worry about what sort of students they would get, race aside. Yet, because these students would be from families eager for them to attend, the pupils would seemingly be rather attractive to the district; besides, public schools claim to be well accustomed to taking those students they get. Perhaps the surrounding districts genuinely feared that by cooperating with this part of the remedy, they would be setting themselves up for subsequent coerced participation in arrangements that they and the families residing within their boundaries opposed. Whether such fears are realistic is another question. In any event, the outcome has been that this portion of the remedy simply has not functioned.

The magnet school strategy also has not worked very well. Although some schools with facilities that are said to be state-of-the-art have opened, on the whole these magnet schools have not attracted as many white pupils as had been desired. As a result, the Kansas City school district has been deliberately running many of these schools well below full capacity in order to keep them within the target racial balance norms, hoping that success in these schools will draw in more whites over time. The result in the meantime is that African-American children have significantly fewer integration opportunities than had been anticipated. Indeed, the under-utilization of the magnet schools has created considerable controversy within the African-American community, and the school district has been sued by some African-American families who, given the current situation, would rather have the magnet schools filled up with African-American pupils on waiting lists.

Finally, it is worth noting that as of the fall of 1989, the overall proportion of minorities in the Kansas City school district has increased somewhat in the past five years and is now just under seventy-five percent.⁶⁸

67. *Id.*

68. Mansur, *Integration slowing, school figures indicate*, Kansas City Star, Sept. 21, 1989, at 1A, col. 4.

B. *The Rivarde Suit*

On July 14, 1989, African-American parents filed a complaint in federal district court in Kansas City, on behalf of their children and other similarly situated public school children, seeking to force the defendants, the School District of Kansas City and the State of Missouri, to pay for the claimants' private schooling.⁶⁹

The plaintiffs in *Rivarde v. State*⁷⁰ include some named children who sought to attend Kansas City magnet schools but were denied entrance because the schools had reached their limit of African-American children, other named children who have had to attend school far from home in order to be enrolled in a not mostly African-American school, and other named children who were simply stuck in mostly or completely African-American neighborhood schools with no other apparent opportunities being made available to them by the school district.⁷¹

In preparation for their lawsuit, the plaintiffs and their lawyers contacted and secured promises of cooperation from about fifty private schools in the area; most of these schools are run by religious groups, predominantly Catholic.⁷² These schools have represented to the plaintiffs' counsel that they would be willing to take African-American children on the same terms as the federal court's voluntary interdistrict transfer plan imagines for the surrounding public schools.⁷³ That is, they could refuse certain children with a history of disciplinary problems, but otherwise they would take all applicants up to the number of spaces they made available. The schools would not discriminate on the basis of religion or ability,

69. *Rivarde v. State*, No. 89-0671 (W.D. Mo. Nov. 28, 1989). For news accounts relating to this lawsuit, see Anderson, *Curing Segregation*, A.B.A. J., Nov. 1989, at 22; King, *When Desegregation Backfires: Black parents sue the State to pay for private schools*, NEWSWEEK, July 31, 1989, at 56; Snider, *Voucher Plan for Disadvantaged Pursued in Kansas City Lawsuit*, EDUC. WEEK, Aug. 2, 1989, at 1; Carter, *Professors' Theory Implemented in Missouri Desegregation Case*, Nat'l L.J., Aug. 7, 1989, at 4; *Suit Says Magnet Schools Bar Black Children*, N.Y. Times, Aug. 3, 1989, at A14, col. 5; O'Connor, *Black Pupils want tuition vouchers*, Kansas City Times, July 15, 1989, at A1, col. 5; Mansur, *Black students seek to attend private schools*, Kansas City Star, July 14, 1989, at 3A, col. 1.

70. No. 89-0671 (W.D. Mo. Nov. 28, 1989).

71. See Plaintiffs' Complaint at 10-11.

72. *Id.* at 11-18.

73. *Id.* for discussion of and citation to those terms; see *supra* notes 66-67 and accompanying text.

although applying families would be informed of each school's religious affiliation and academic standards.

The *Rivarde* plaintiffs have asked that the defendants pay the tuition of African-American Kansas City pupils electing to attend these cooperating private schools.⁷⁴ Because the tuition cost of Catholic and most other religious schools is quite low compared with the cost of the suburban public schools, the financial burden on the defendants of supporting this remedy would be considerably less than it would be if the suburbs opened their public schools to these same pupils.

According to the plaintiffs' lawyers, the approximately fifty private schools that had agreed to participate even before the complaint was filed are collectively willing to make about 4,000 places available.⁷⁵ Moreover, the named plaintiffs allege that they have found specific private schools that they wish to attend and that have agreed to accept them.⁷⁶

Most of the schools that have agreed to cooperate currently have few African-American children enrolled: in a large number of cases fewer than five percent, and in several cases between five and twenty percent.⁷⁷ Some of these schools actually have a majority of African-American pupils, and in at least one case the school is already more than ninety percent African-American.⁷⁸

What does this data tell us about Kansas City private schools? We see that many of the private schools in metropolitan Kansas City are very white, broadly reflecting the findings about Cleveland, Boston and Chicago Catholic schools reported by Crain and Rossell in their chapter in Devins' book.⁷⁹ Those with less than five percent African-American pupils would be classified by many as racially isolated, although for the few African-American families sending their children to those schools, this may well qualify as an integrated experience. In any event, even if we include all of the

74. *Id.* at 19-20.

75. *Id.* at 11-17.

76. *Id.* at 17.

77. *Id.* at 11-16.

78. *Id.* at 17. Just how a judge otherwise supportive of the claim would feel about including African-American majority schools as a permissible option, especially racially isolated African-American schools, remains to be seen.

79. Crain & Rossell, *supra* note 3, at 185.

private schools that have up to fifteen percent African-American pupils, we see that opportunities to attend school with large numbers of white children are being provided to few African-American children.

At the same time, the overall picture, including the African-American majority and African-American isolated private schools, hardly demonstrates that the Kansas City private school sector intentionally discriminates on the basis of race. Like the predominantly white suburban public schools, the main point is surely that most of these private schools simply do not have many African-American applicants. At the other extreme, the explanation for the mostly African-American private elementary schools is also revealing. These, in general, are schools in inner city neighborhoods that white Catholic families largely have abandoned as younger whites have moved away. Rather than closing these schools, Catholic leaders have kept them open to provide an educational alternative to neighborhood children whose parents do not want them to attend public schools. Often, these African-American parents are not Catholic. To criticize these Catholic schools for promoting discrimination when they are providing a preferred, albeit largely African-American, school experience seems odd to me.

Of course, the Catholic schools might engage in a racial balance effort among themselves, for example, by assigning their elementary school children to schools outside their parish, the geographic base upon which Catholic elementary schools are organized. But this, of course, would be contrary to the traditional decentralized Catholic school "system." In any event, the *Rivarde* plaintiffs assert that the Catholic schools in the area are now generally willing to accept African-American voucher-carrying pupils from Kansas City until they fill up their buildings. And if that were to happen, most of these Catholic schools would be very well integrated.

C. Prospects

The *Rivarde* case presents a stunning challenge to the federal judiciary. The claimants, having filed a separate lawsuit seeking further relief not inconsistent with the earlier Kansas City desegregation suit, initially drew federal Judge Stevens. On motion of the defendants, however, Judge Stevens exercised his discretion and on October 13, 1989, transferred the matter to Judge Clark who is

continuing to supervise the Kansas City desegregation effort he previously ordered. On November 28, 1989, Judge Clark dismissed the *Rivarde* complaint on the ground that plaintiffs stated no separate cause of action, but rather sought to modify the remedial plan of the original Kansas City litigation.⁸⁰ He then stated that the proper avenue for the plaintiffs was to seek intervention in the original litigation, but went on to indicate, seemingly in dictum, that he was disinclined to grant either intervention as of right or permissive intervention.⁸¹ If Judge Clark finally so rules, the plaintiffs will almost surely seek review in the Eighth Circuit on both the independent cause of action and intervention as of right theories.

Although the matter is currently tied up in procedural wrangling, the attractiveness of the plaintiffs' case should at once be evident. The initial desegregation remedies have stalled or failed; but now an immediate opportunity is present for many children to obtain what they consider to be an integrated education at a school that is willing to take them. Not only that, but this solution would simultaneously help improve the racial balance in the receiving private schools and diminish the number of African-American pupils for whom the Kansas City school district would have to try to find an integrated education. To boot, the cost to government should decline, perhaps significantly, as compared with the cost of the voluntary interdistrict plan. Furthermore, the adoption of this remedy possibly would be the critical factor needed to win over the cooperation of the white suburban public schools. Although these suburban public schools possibly could use the availability of the private school choice as an excuse not to participate in the voluntary integration plan, over the long haul the suburban public schools surely ought to be embarrassed to witness private schools in their midst volunteering to take on the social responsibility of desegregation that the public schools have rejected for some years now.

80. Order at 2, *Rivarde* (No. 89-067).

81. *Id.* at 5-7; see Defendant's Response to Plaintiffs' Motion to Clarify Court's Nov. 28, 1989 Order at 1 (in which defendant concedes that the question of intervention in the order is dicta).

Notwithstanding all of the obvious advantages, the state and school district defendants, as well as counsel for the plaintiff schoolchildren in the original Kansas City integration case, have opposed the private school choice plan. Some of the objections have been couched in constitutional terms: that this would be an impermissible aid to religion under the first amendment. Although this is not a frivolous argument, I find it unpersuasive in view of recent Supreme Court decisions on the issue.⁸²

Quite apart from this legal question, apparently the state officials are simply uncomfortable with the idea that private schools can have a positive role to play in solving difficult desegregation problems. Probably they fear that this would be the first step toward a full blown system of family choice in education that they perceive as endangering public schools;⁸³ but that, of course, is not a necessary outcome, whether desirable or not, and to sacrifice the interests of African-American children today in the name of that possibility seems rather harsh. Maybe those opposing this new litigation anticipate that, when push comes to shove, few African-American families will actually choose to participate in the plan proposed in *Rivarde*. But then, not a great deal is risked, even if little might be gained.

In the end, I believe that what gets in the way of public officials' good will is that they, like many of Devins' authors, are so accustomed to seeing private schools as part of the problem of racial isolation that they have not yet realized that those schools might become an important part of the solution.

82. See, e.g., *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (On remand, the Washington Supreme Court en banc, struck down the aid in question under the state constitution. 112 Wash. 2d 363, 771 P.2d. 1119, cert. denied, 110 S. Ct. 147 (1989)); *Mueller v. Allen*, 463 U.S. 388 (1983).

83. In my view, the right sort of family choice plan will not only serve children and families better, but also actually improve public education. See generally J. COONS & S. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978).