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## Racial Discrimination in "Private" Schools

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## RACIAL DISCRIMINATION IN "PRIVATE" SCHOOLS

NORMAN DORSEN\*

The national struggle to secure equal rights for black Americans persists unabated and perhaps intensified as the thirteenth year since the Supreme Court decision in *Brown v. Board of Education*<sup>1</sup> draws to a close. Conflict rages in the streets and in the courts, and it touches all aspects of civic life. The docket of the Supreme Court may not be the surest touchstone to the problems of the nation, but it is not by chance that within the past year the Court has been called upon to act on important cases involving the problems of Negro citizens in the areas of voting, education, housing, physical violence, protest demonstrations, the right to hold elective office, freedom to marry, and actions for damages against judges and legislators.<sup>2</sup>

It is folly, in my view, to try to identify a single key to racial discrimination. Equality is indivisible, and the American dilemma will not be resolved until all channels of opportunity are cleared for citizens irrespective of their origins, beliefs and color. It does not seem inconsistent with this unitary view to focus special attention on the blight of segregated education. This condition led to the massive legal and public effort culminating in the *Brown* case, and success in that litigation opened the modern era of race relations. Ever since a high proportion of civil rights energy has been expended in trying to fulfill the noble promises of that decision.

The record is not uplifting. In the 1965-1966 school year but six per

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1. 347 U.S. 483 (1954), 349 U.S. 294 (1955).

2. See, e.g. *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (voting); *Board of Supervisors of Prince Edward County, cert. den.* 87 S. Ct. 395 (1966) (education); *Reitman v. Mulkey*, 87 S. Ct. 1167, (1967) (housing); *United States v. Price*, 383 U.S. 787 (1966) (physical violence); *Walker v. City of Birmingham*, 35 U.S.L.W. 4584 (U.S. June 12, 1967) and *Adderly v. State of Florida*, 87 S. Ct. 242 (1967) (protest demonstrations); *Bond v. Floyd*, 87 S. Ct. 339 (right to hold elective office); *Loving v. Virginia*, 35 U.S.L.W. 4679 (U.S. June 12, 1967) (freedom to marry); *Pierson v. Ray*, 87 S. Ct. 1213 (1967) and *Dombrowski v. Eastland*, 87 S. Ct. 1425 (1967) (judicial and legislative immunity in actions under the Civil Rights Act of 1871).

cent of the Negro children in the South attended public school with white children, and although the record is improving, only a small percentage of black children in the South receive an integrated education.<sup>3</sup>

In the North, too, there is a severe problem of racial isolation, and there the problem is getting worse rather than better. The figures are that seventy-two percent of all Negro first graders in the North attend schools that have a majority of Negroes, and in some cities there is virtually total segregation. For example, in Buffalo seventy-seven per cent of Negro children attend elementary schools that are more than ninety per cent Negro, while eighty-one per cent of the white children are in almost all-white schools. In Gary, Indiana, the figures are ninety per cent and seventy-five per cent, respectively. The evidence shows that this pattern does not vary much whether it is a large Northern city or a small one, or whether the Negro proportion of the population is large or small.<sup>4</sup>

The legal war to rectify this sad condition is being pressed on many fronts. In the South, the United States Court of Appeals for the Fifth Circuit recently ruled that the Constitution requires all school grades, including kindergarten, to be desegregated by the 1967-68 school year.<sup>5</sup> If the past is any guide, however, there will be many cases of tokenism and even of outright defiance of this decision, and it would be foolish to conclude that the battle is won.<sup>6</sup> In the North the legal situation is more complex, reflecting the fact that segregated housing patterns and historic school district lines are often the cause of segregation. Civil rights leaders are presently trying to induce school boards to eliminate this "de facto segregation" by redrawing district lines and locating new schools at points which would lead to an integrated student body.<sup>7</sup> If

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3. Statistics recently released by the Southern Education Reporting Service show that 16% of the 3,000,000 Negro students in the South are now attending desegregated schools. This figure includes an additional 305,000 pupils in such schools for the first time in 1966-67. See N.Y. Times, April 3, 1967, at 21, col. 2. Integration has not kept pace with the growing number of school children. More Negro children were in all black schools in 1967 (2.5 million) than in 1954 (2.2 million). N.Y. Times, Aug. 8, 1967, at 1, col. 6.

4. RACIAL ISOLATION IN THE PUBLIC SCHOOLS, A Report of the United States Commission on Civil Rights 2-10 (1967). See also COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966), a study conducted pursuant to Title IV of the Civil Rights Act of 1964.

5. United States v. Jefferson County Board of Education, 372 F.2d 836, (5th Cir. 1966), *aff'd en banc*, 35 U.S.L.W. 2569 (5th Cir., March 29, 1967) (8-4).

6. See, Dunn, *Title IV Guidelines and School Desegregation in the South*, 52 VA. L. REV. 42 (1967).

7. There has been some success in this effort. See Note, *Racial Imbalance in the*

board action is not forthcoming, the next step is litigation. There is some legal support for the proposition that the board has a constitutional obligation to take steps to eliminate even defacto segregation, but the prospect for success in the courts is at best uncertain.<sup>8</sup>

It is against this background of a still unfulfilled constitutional promise that the situation of the nonpublic school must be considered. My broad thesis is that a great opportunity awaits the independent school, that these institutions have a chance to prove to the nation that the quality education for which they are known can be sustained, and indeed enhanced, with an integrated student body. If this opportunity is grasped, these schools will both improve their moral position and provide the kind of education that will be most relevant for national leaders of the next century.

In this paper I shall discuss four other subjects. First, the role that private schools have played in the general southern resistance to *Brown v. Board of Education*. Secondly, the judicial power under the Constitution to force private schools to integrate racially. Thirdly, some legal problems a private school could confront that desires to accept Negroes for the first time. And, finally, the special situation of parochial schools.

#### I.

First the South. The "massive resistance" of that region to integrated public education is well known, as is the fact that the means chosen to assure the perpetuation of lily-white schools ran the gamut from pure violence to sophisticated constitutional arguments of "interposition" and "nullification". Less well-known is the fact that "private" schools were and are being used as an important instrument of state policy to achieve the same end.

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*Public Schools: Constitutional Dimensions and Judicial Response*, 18 VAND. L. REV. 1290, n.180 at 1319-1321 (1965).

An alternative approach is illustrated by a Massachusetts statute requiring board action to eliminate de facto segregation. The constitutionality of this statute was upheld. *School Committee of Boston v. Board of Education*, 35 U.S.L.W. 2743 (Mass., June 9, 1967).

8. Two circuits have found that the school board has no affirmative obligation to eliminate de facto segregation. *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963). *But see*, *Hobson v. Hansen*, 35 U.S.L.W. 2761 (D.C. Dist. Ct., June 19, 1967), a broad decision condemning administrative and educational policies that produce de facto segregation. *Also see Barksdale v. Springfield School Committee*, 237 F. Supp. 543 (D. Mass. 1965), *rev'd on other grounds*, 348 F.2d. 261 (1st Cir. 1965).

Despite the weight of authority to the contrary, the Supreme Court of Illinois recently found that a self-initiated school board policy of eliminating de facto segre-

Most southern states, at one time or another, provided for the closing of public schools when these were under court order to integrate, and simultaneously passed laws making available state funds to white parents who wanted to send their children to segregated private institutions. The state aid took many forms, including scholarships, tuition grants and tax credits for private donations to the schools.<sup>9</sup> Thus, Alabama provided for grants or loans to persons for "educational purposes," while authorizing payments to parents who desired their children to attend schools "provided for their own race."<sup>10</sup> Georgia provided for suspension of state funds to closed schools and allowed the Governor to make grants to school boards in districts where schools were closed in the same amount as when the public schools were open; the State also provided for grants of state and local funds directly to parents of a child going to a private non-sectarian school.<sup>11</sup> The net effect, of course, was the use of public moneys for segregated and ostensibly "private" education.

These efforts to circumvent the command of the Constitution naturally found their way into court. The judicial experience of Virginia and Louisiana is most instructive.

In Virginia the controversy centered on the school system of Prince Edward County, which was brought into litigation as far back as 1951 and was one of the constituent cases handed down with *Brown v. Board of Education*. Efforts to desegregate following *Brown* met with resistance from the white community, and in 1956 the Virginia Constitution was amended to permit the General Assembly or local governing bodies to appropriate funds to assist students to go to non-sectarian private schools. The Assembly responded promptly by enact-

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tion created an unconstitutional classification based on race. *Tometz v. Board of Education*, 36 U.S.L.W. 2011 (Ill., June 22, 1967).

9. For a rundown of the pertinent statutory provisions, see 2 EMERSON, HABER AND DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, 1652-1654 and 1659-1662* (3d ed. 1967). See also LEESON, *PRIVATE SCHOOLS CONTINUE TO INCREASE IN THE SOUTH*, 2 SOUTHERN EDUCATION REPORT 22-25 (Nov. 1966).

10. Ala. Acts 1956, Spec. Sess., Act. No. 82, p. 119, 1 RACE REL. L. REP. 417 (1956). See also Ala. Acts 1959, Act No. 652, p. 1576, and Ala. Acts 1959, 2d Spec. Sess., Act No. 127, p. 378, 4 RACE REL. L. REP. 1056 (1959).

11. Ga. Acts 1959, No. 8, p. 18, 4 RACE REL. L. REP. 180 (1959), Ga. Acts 1961, No. 13, p. 31, 6 RACE REL. L. REP. 289 (1961), Ga. Acts 1961, No. 14, p. 35, 6 RACE REL. L. REP. 290 (1961).

Despite the questionable constitutionality of the statutes, Governor Maddox of Georgia recently called for increased state aid to "private" segregated schools. Other leading state officials disapproved the Governor's proposals. N.Y. Times, Aug. 26, 1967, at 26, col. 6.

ing legislation to close any public schools where white and colored children were enrolled together, to cut off funds to such schools, and to pay tuition grants to children choosing to enter the new private schools.<sup>12</sup> This legislation was struck down in 1959 by the Supreme Court of Virginia as inconsistent with the State Constitutional requirement of compulsory public education.<sup>13</sup> The General Assembly then enacted a new tuition grant program and made school attendance a matter of local option by repealing the State's compulsory attendance laws. A federal court immediately ruled that this plan was invalid and ordered the Prince Edward County schools to open as integrated institutions.<sup>14</sup> But the supervisors of the County refused to levy school taxes. As a result the county's public schools did not reopen in the fall of 1959, although the public schools of every other county in Virginia continued to operate. At the same time a private group, the Prince Edward School Foundation, was formed to operate private schools for white children, who were aided by the tuition grants.

This scheme continued for five long years, during most of which the Negro children of Prince Edward County received no formal education at all. Eventually, in May 1964, the Supreme Court ruled that the school children of the county were deprived of equal protection of the laws because they were treated differently from the school children of all other Virginia counties.<sup>15</sup> In ordering the reopening of public schools in the county, the Court said:

Prince Edward children must go to a private school or none at all; all other Virginia children can go to public schools. Closing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend. . . . [T]he result is that Prince Edward County school children, if they go to school in their own county, must go to racially segregated schools which, although designated as private, are beneficiaries of county and state support.

"A State, of course, has a wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties. . . . But the record in the present case could not be clearer

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12. Va. Code, §§ 22-188.3-.15, 51-111.38:1.

13. *Harrison v. Day*, 200 Va. 439, 406 S.E.2d 636 (1959).

14. *Allen v. County School Board of Prince Edward County*, 266 F.2d 507 (4th Cir. 1959).

15. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964).

that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.<sup>16</sup>

The decision had a profound impact on every southern state that had authorized the closing of public schools. But it remained for litigation arising in Louisiana to administer the *coup de grace* to private school programs transparently designed to avoid integration.

There are two cases. First, in 1961 a federal court invalidated a 1958 Louisiana statute which provided a way by which public schools under desegregation orders could be changed to "private" schools operated in the same way, in the same buildings, with the same furnishings, with the same money, and under the same supervision as the public schools.<sup>17</sup> Louisiana was not through yet, however. Its legislature immediately enacted a simpler plan to replace the 1958 law. The new act did away with provisions for closing public schools; it provided for payments to be made to students and parents rather than directly to the "private" schools, and it transferred administration of the program from the State Board of Education to the Financial Assistance Commission.<sup>18</sup>

In August 1966 a federal court in the case of *Poindexter v. Louisiana Financial Assistance Comm'n*<sup>19</sup> dashed the hopes of any who thought that this version of the "private" school technique would succeed. Terming the tuition grant program merely "a refined sophisticated substitute" for the earlier program, the court struck it down, using the following reasoning. In the first place, public payment of tuition

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16. *Id.* at 230-231.

This summer the Prince Edward County Supervisors finally completed repayment to the county treasury of \$180,000 which had been given to white parents to send their children to private schools. Contempt citations against them were lifted and sixteen years of litigation came to an end. Most white students remain in private schools. *N.Y. Times*, July 9, 1967, at 53, col. 2.

17. *Hall v. St. Helena Parish School Board*, 197 F.Supp. 649 (E.D. La. 1961), *aff'd* 368 U.S. 515 (1962).

18. Act 147 of 1962, La. Rev. Stat. 17:2959.

19. 258 F.Supp. 158 (E.D. La. 1966).

grants was state action under the Fourteenth Amendment. Second, the funds provided a "stimulus" in the founding of the "quasi-public" segregated schools and were used to support these schools. Third, the court noted the Negro plaintiffs' allegation that these state-supported schools deprive them of equal protection rights not only because they were denied admission to these schools but because the very existence of a second and "quasi-public" school system endangers bona fide public schools and damages Negro pupils. The reason for this is that it drains teachers, students and funds into a competitive system, putting the stamp of state approval on Negro inferiority and perpetuating the humiliation of Negroes implicit in segregated education.

A vital aspect of this decision is the test used by the court to determine when a "private" school comes within the ban of the Constitution. It referred to an earlier decision by another federal court that held segregated private schools invalid under the Fourteenth Amendment if they are "predominantly maintained" by the state.<sup>20</sup> The earlier ruling was based in part on § 401(c) of the Civil Rights Act of 1964, which defines "public school" as any school "operated wholly or predominantly from and through the use of governmental funds."<sup>21</sup> Despite this statutory language, the court in *Poindexter* rejected the test of whether private schools are "predominantly maintained" by the State. It instead held that "*any amount* of state support to help found segregated schools or to help maintain such schools is sufficient to give standing to Negro school children."<sup>22</sup> Louisiana interpreted the decision as requiring only that the State refrain from supplying more than half of a "private" school's income through tuition grants. The court condemned this half-way compliance saying, "Any affirmative and purposeful aid promoting private discrimination violates the equal protection clause. There is no such thing as the State's legitimately being just a little bit discriminatory."<sup>23</sup>

The importance of this holding should not be underestimated. If not

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20. *Griffin v. State Board of Education*, 239 F.Supp. 560, 565-566 (E.D. Va. 1965), *cert. den.* 385 U.S. 960 (1966). This case is a later version of the Virginia School Closing Litigation, discussed at pages 44-45 of the text.

21. 42 U.S.C. § 2000(c). Apparently unaware of the *Poindexter* decision, the Internal Revenue Commission granted tax exemptions to forty-two private southern schools which receive tuition aid from the state in amounts less than 50%. N.Y. Times, Aug. 3, 1967, at 24, col. 3.

22. 258 F.Supp. at 164.

23. *Poindexter v. Louisiana Financial Assistance Comm'n*, 36 U.S.L.W. 2150 (5th Cir. Aug. 26, 1967).



disturbed by a higher court, it could mark the end of circumvention of the Brown decision by southern states through the use of phony private schools. Secondly, the decision could have important ramifications for independent schools in all parts of the nation. These will be explored shortly.

## II.

We turn now to the general problem of civil rights in private schools: that is, to the issue uncomplicated by, or perhaps I should say unsimplified by, public payments as an inducement to maintain the races in separate institutions. But I shall exclude from consideration for the present problems especially pertinent to integration in elementary and secondary schools.

The private school tradition is strong in certain parts of the country, and there is evidence that it is growing stronger. Nevertheless, I have been able to obtain no accurate count of the number of pupils enrolled in such schools. Apart from my own research, the National Association of Independent Schools, which has 780 member institutions with about a quarter of a million pupils, has informed me that no reliable figures exist for the total national enrollment in private secondary or elementary schools.

In connection with enrollment of Negro students, we are fortunate, however, to have available the results of a survey conducted earlier this year by NAIS. Of the 780 member schools, 740 responded to a questionnaire, and 462 (over sixty per cent) reported at least one Negro enrolled for the 1966-67 school year. Several of these schools had several Negro pupils: 239 schools reported five or more and 109 reported 10 or more. All told there were 3,720 Negro students, or one and a half per cent of the total student population in NAIS member schools.<sup>24</sup>

This figure of one and a half per cent plainly means that there is some way to go before racial balance is achieved in independent schools. I do not think it unfair to add that, because NAIS members include some of the most enlightened schools in the country, it would not surprise me to learn, if comprehensive figures were available that Negro enrollment in *all* private elementary schools fell below one and a half per cent. This is not racial balance.

What is to be done? At once I reject one possible answer—doing nothing. Needless to say, this conclusion reflects not only a personal

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24. NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, SUMMARY REPORT ON ENROLLMENT OF NEGRO STUDENTS (March 1967).

preference but, more importantly, the fact that the nation as a whole has made a profound commitment to remedy its great and longstanding debt to the Negro people. The independent schools must do their share, along with all other public and private institutions.

We, therefore, must inspect potential solutions under existing law. First to be considered are the Fair Educational Practices Acts. Six states have enacted such a statute—Indiana, Massachusetts, New Jersey, New York, Pennsylvania and Washington. These laws are enforced by administrative commissions, and each is part of omnibus state anti-discrimination legislation which also prohibits discrimination in private employment, housing and accommodations.<sup>25</sup> Typical provisions of such laws are found in the recently promulgated Model Anti-Discrimination Act of the Commissioners on Uniform State Laws. The Model Act provides in Section 502 that it is a discriminatory practice for a private or public educational institution:

- (1) to exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student, in the terms, conditions, and privileges of the institution, because of race, color, religion, or national origin; or
- (2) to make or use a written or oral inquiry or form of application for admission that elicits or attempts to elicit information, or to make or keep a record, concerning the race, color, religion, or national origin of an applicant for admission, except as permitted by regulations of the Commission; or
- (3) to print or publish or cause to be printed or published a catalogue or other notice or advertisement indicating a preference, limitation, specification, or discrimination based on the race, color, religion, or national origin of an applicant for admission.

Such a statute is comprehensive in its prohibitions. Further, there is little question about its constitutionality,<sup>26</sup> or of the fact that the legislature and especially the administrative agency can be flexible in establishing and carrying out the enforcement process. Why, then, are such laws not an ideal solution to racial discrimination in private schools?

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25. Citations to these statutes can be found in 2 EMERSON, HABER AND DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1793 (3d ed. 1967).

26. There is no record of a state fair educational practice act being invalidated on federal or state constitutional grounds, and such an argument appears far-fetched. See Fox, *Discrimination and Antidiscrimination in Massachusetts Law*, 44 B.U. L. REV. 30, 71 (1964). See generally Note, *Fair Educational Practices Acts: A Solution to Discrimination?* 64 HARV. L. REV. 307 (1950).

The answer is a practical one. Despite the early high hopes for anti-discrimination commissions, more than two decades of experience reveals that they promise more than they deliver. Timid administrators, niggardly budgets, and insufficient statutory powers all have played a part.<sup>27</sup> While critics have focused on the failures of enforcement against discrimination in employment, it is fair to say that the six education laws have hardly been implemented at all.<sup>28</sup> Whatever the reasons, and whatever their potential, the fact is that they have become something of a dead letter, except to the extent that they exercise a salutary if vague influence on the policies of school administrators. Fair education laws thus do not appear to be a promising solution, at least for the present.

There is a second statutory alternative. Several states include private schools in their laws prohibiting discrimination in public accommodations. Thus, the Pennsylvania Public Accommodations Act<sup>29</sup> covers "kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses, and all educational institutions under the supervision of this Commonwealth." There is an exception in the statute for places of public accommodation that are "in their nature distinctly private," and this provision is currently in litigation in the latest installment of the Girard College case, about which I shall have more to say later. The important point now is that these general public accommodations laws, which can be found in several states,<sup>30</sup> have never proved a satisfactory vehicle for desegregation of private schools, or for that matter of anything else. They are, assuredly, not the answer here.

This brings us to the Federal Constitution. The Fourteenth Amendment in its terms prohibits arbitrary action by the "state." Can this provision be interpreted to ban racial discrimination by independent schools? In my view the Fourteenth Amendment *can* properly be interpreted by courts to reach this result, and I suggest that private school administrators should immediately act on the implications of this fact, *before* courts are called upon to render decision.

Two constitutional theories support this conclusion. The first has been partially developed above in the context of the southern problem.

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27. See the criticisms contained in Symposium, *Fair Employment Practices Acts*, 14 BUFFALO L. REV. 1 (1964).

28. The annual reports of the antidiscrimination commissions in states having fair educational practices acts bear this out.

29. Act of May 19, 1887, P.L. 130, § 1, as amended, 18 P.S. § 4654.

30. For example, Illinois and Minnesota.

It will be recalled that in the *Louisiana PoinDEXTER* case Judge Wisdom stated that "any amount of state support to help found segregated schools or to help maintain such schools is sufficient to give standing to Negro school children." This line of reasoning traces back to the important *Little Rock* case, where the Supreme Court said:

State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws.<sup>31</sup>

This theory of "state support" has been applied in the analogous area of discrimination by private hospitals. In 1963, a Federal Court of Appeals ruled that a so-called "private" hospital which received a portion of its funds from the federal government was subject to the constitutional requirement of equal protection.<sup>32</sup> The Supreme Court declined to review the decision, and it has been accepted ever since.

The "support" necessary to fulfill the constitutional test of the *PoinDEXTER* case can be found in the financial aid now provided private schools through many federal programs, including the National School Lunch Act, the National Defense Education Act, the Economic Opportunity Act of 1964, and particularly the Elementary and Secondary Education Act of 1965.<sup>33</sup> Likewise, at least in some jurisdictions, there is much state aid to independent schools. If the test is "any support", there would seem ample basis for a judicial decision that private schools are subject to the Fourteenth Amendment.

The second route to the same result is premised on the theory, now well established in its general outline, that where private individuals are allowed to perform a function ordinarily undertaken by the state, they are to be treated as agents of the state for constitutional purposes, and their discriminatory acts therefore prohibited. This theory has been applied where private bodies conducted a primary election, ad-

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31. *Cooper v. Aaron*, 358 U.S. 1, 4 (1958).

32. *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), cert. den. 376 U.S. 938 (1964). Also see *Cypress v. Newport News General & Non-sectarian Hosp. Assn.*, 375 F.2d 648 (4th Cir. 1967), requiring a "private" hospital to allow Negro physicians to use the facilities.

33. See PFEFFER, CHURCH, STATE AND FREEDOM 596-604 (Rev. ed. 1967). Also see, *Hearings Before the Committee on Education & Labor, House of Representatives on The Elementary & Secondary Education Amendments of 1967*, 19th Cong., 1st Sess., 1967.

ministered a company town, or operated a park.<sup>34</sup> Its potential application to an elementary or secondary school is obvious. At least one federal judge, J. Skelly Wright, has made the point forcefully. In a desegregation case involving Tulane University, a "private" institution, he said:

. . . one may question whether any school or college can ever be so "private" as to escape the reach of the Fourteenth Amendment. . . . [I]nstitutions of learning are not things of purely private concern. . . . Clearly the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes? And, if so, are they not agents of the state, subject to the constraints on governmental action, to the same extent as private persons who govern a company town . . . or control a political party. . . . Reason and authority strongly suggest that the Constitution never sanctions racial discrimination in our schools and colleges, no matter how "private" they may claim to be.<sup>35</sup>

Although Judge Wright's judgment in the Tulane case was vacated on a procedural ground,<sup>36</sup> the above language was not disapproved; moreover, since he spoke in 1962, additional judicial support for his views has appeared.<sup>37</sup>

In short, I believe that the "law" is there and waiting under which an enterprising court could rule that private schools are subject to the constitutional command to desegregate.<sup>38</sup> Whether it will be so employed is perhaps less a legal than a political question, less a matter of principle than of timing. In this respect the issue resembles the already much litigated question of whether public school boards are under an affirmative obligation to eliminate segregation in schools under

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34. See *Terry v. Adams*, 345 F.2d 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Evans v. Newton*, 382 U.S. 296 (1966).

35. *Guillory v. Administrators of Tulane Univ.*, 203 F.Supp. 855, 858 859 (E.D. La. 1962).

36. 207 F. Supp. 554 (E.D. La. 1962), *aff'd*, 306 F.2d 489 (5th Cir. 1962).

37. See *Evans v. Newton*, *supra* note 34.

38. For example, the Louisiana Athletic Association was recently required to admit an all-Negro private school, in a decision which relied on both the "state Agency" theory and the fact that the Association received state funds. *St. Augustine High School v. Louisiana High School Athletic Association*, 36 U.S.L.W. 2075 (E.D. La., July 6, 1967).

their jurisdiction, as distinguished from their established duty to refrain from causing such racial separateness.

What lesson should be drawn from this conclusion? Should civil rights lawyers immediately repair to the nearest courthouse and begin suits to force all independent schools in the nation to admit Negroes at once? I hardly think that is the answer, although one day it could come to pass. The vicissitudes and frustrations of litigation are amply illustrated by the Girard College case in Philadelphia. In February 1954 two Negroes applied for admission and were rejected on the ground of race. Now, more than 13 years and many judicial opinions later, there is still no final order requiring a non-discriminatory admissions policy for this school.<sup>39</sup> No, the courts are not the preferable forum to integrate the nation's independent schools.

The right forum, it seems to me, is the offices and boardrooms of the schools themselves. In this forum administrators and directors can act without compulsion, with full regard to the particular problems of each school. They can fulfill their general obligation as citizens and their special obligation as educators by working toward the high civic goal of equal opportunity, and simultaneously they can fulfill their professional responsibilities to their institutions by achieving the goal without the embitterment or the expense or the loss of dignity that has characterized the Girard College litigation.

### III.

The next logical question is whether there is any legal impediment to voluntary integration by independent schools. We first note that the Supreme Court has come a long way since the 1908 *Berea College* case,<sup>40</sup> in which it upheld a Kentucky statute making it "unlawful for any person . . . to operate any college, school or institution where persons of the white and Negro races are both received as pupils for instruction." Recent constitutional doctrine makes the *Berea* case an antique, a legal relic. State or local law is now powerless under the federal constitution to require racial separation.<sup>41</sup>

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39. For a history of the case, see 11 RACE REL. L. REP. 1696-1698 (1966). The District Court has permanently enjoined Girard College from denying admission to Negroes on a "state agency" theory. Enforcement of the order has been stayed pending appeal. *Commonwealth v. Brown*, 36 U.S.L.W. 2027 (E.D. Pa., July 5, 1967).

40. *Berea College v. Kentucky*, 211 U.S. 45 (1908).

41. See, e.g., *Gayle v. Browder*, 352 U.S. 903 (1956) (statute requiring segregation on buses); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (administrative regulation

A more difficult issue is presented for schools that have accepted gifts whose terms specify an all white student body. Girard College, for example, was established by a trust that specified that the school should be maintained for "poor, white, male orphans." Is there a legal means to avoid such anachronistic instruments? In the Girard case the Negro plaintiffs sought to *force* the unwilling school to accept a modification of the trust and admit children irrespective of race or color, in accordance with the grantor's alleged intent to benefit all the citizens of Philadelphia. That question has not yet been resolved, and it is important to see that it involves a different situation from the one now being proposed, where a school administration *desires* to terminate a donor's limitation to white children.

Two recent cases suggest that success can be achieved by such a school but also that obdurate state officials can at least delay a favorable outcome. In 1964 Rice University of Houston, a private institution, brought an action in a Texas court against the Attorney General of Texas, seeking authority to ignore restrictions in its charter which prohibited it from admitting Negroes. The court, rather surprisingly, empaneled a jury, which made special findings of fact that the main purpose of the benefactor of the University was to create an educational institution of the first class; that the restrictions on admitting Negroes now render impracticable the development of the University as such an institution; and that it has now become impractical to carry out the intent of the benefactor. The court thereupon rendered a judgment authorizing the University to admit qualified applicants without regard to color or race.<sup>42</sup>

In this case not only did Rice University wish to eliminate the restriction, but the Attorney General had no apparent objection. In our second case, involving the Sweet Briar Institute of Virginia, a more complex situation is presented, largely because the state officials opposed the petition. After the Rice decision, Sweet Briar, which had been set up by a trust to carry on a school "for the education of white girls and young women," and had operated in that fashion for more than 60 years, brought suit in a Virginia court against the State Attorney General and the County Attorney to eliminate the restriction. A state

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requiring segregation in airport restaurants); *Johnson v. Virginia*, 373 U.S. 61 (1963) (segregated courtroom seating).

42. *William Marsh Rice Univ. Carr*, 9 RACE REL. L. REP. 613 (Harris Cy. Tex. Dist. Ct. (1964), *aff'd sub nom.*, *Coffee v. William Marsh Rice Univ.*, 408 S.W.2d 269 (Tex. Civ. App. 1966).

judge refused to grant relief, ruling that the will was unambiguous and could not be modified under Virginia law.<sup>43</sup> Sweet Briar then went into Federal Court, and in April 1966 a three-judge district court decided to hear the complaint after Sweet Briar claimed it would suffer irreparable harm unless the racial restriction was removed because its ability to attract high caliber faculty and students would be impaired and it would be ineligible to receive federal financial assistance under the Civil Rights Act of 1964.<sup>44</sup>

The case soon became something of a labyrinth. Once the federal suit was begun, the state judge took no further action. But then the federal court also decided to abstain from further action on the grounds that considerations of federalism required deference to the Virginia courts on an issue of Virginia law.<sup>45</sup> Rather than return to an unreceptive state court, counsel for Sweet Briar appealed the decision of the federal court. The Supreme Court found that abstention was inappropriate and remanded the case to the district court for consideration on the merits.<sup>46</sup> This is where the case now rests.

My guess is that Sweet Briar will ultimately prevail, that the Court, if pushed to decision, will hold that it is a violation of the Equal Protection Clause for state courts to apply state rules of law to prevent a private party from disregarding a restriction in a private trust requiring it to discriminate against Negroes. This decision would be patterned on the landmark case of *Shelley v. Kraemer*,<sup>47</sup> in which it was held almost 20 years ago that state courts could not constitutionally enforce private racial restrictive covenants on land against an owner who wished to ignore the restriction and sell to a Negro.

However the litigation comes out, it is plain from the Rice University experience that if state officials do not obstruct willing school officials, integration can be achieved very easily. The *Sweet Briar* case disclosed some of the difficulties when state officials do stand in the way, but perhaps that case—if it is finally disposed of as I have predicted—will be the precedent that clears the path for other institutions seeking to avoid racial restrictions imposed by donors from another era.

Having tried to do justice to some of the legal problems involved in the desegregation of independent schools, I should like to underscore

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43. *Sweet Briar Institute v. McClenny*, 10 RACE REL. L. REP. 1005 (Amherst Cy. Cir. Ct. 1965).

44. *Sweet Briar Institute v. Button*, 11 RACE REL. L. REP. 1176, 1177 (W.D. Va. 1966).

45. *Sweet Briar Institute v. Button*, 12 RACE REL. L. REP. 85 (W.D. Va. 1966).

46. *Sweet Briar Institute v. Button*, 87 S. Ct. 1710 (1967).

47. 334 U.S. 1 (1948). See also *Barrows v. Jackson*, 346 U.S. 249 (1953).



the point that the future will be in the hands not of the legislatures or the courts or the fair education commissions, but rather of the schools themselves. As the NAIS statistics show, many private schools have already accepted this view. Further, as recounted in a recent study, vigorous and sensitive efforts are being made in many schools to recruit and smooth the way for Negro applicants to private schools.<sup>48</sup> The vital ingredient is the will to achieve the end; once that is present, the practical problems—the admittedly difficult practical problems—can be solved, as scores of private schools have already demonstrated. But we should not kid ourselves on this question. The responsibility is the schools', and that is where it should be. John D. Verdery, Headmaster of The Wooster School of Danbury, Connecticut, recognized this fact when he said:

. . . another, more subtle argument is epitomized by the statement that "We would be glad to consider any qualified Negro, but none has ever applied." It took us some years to face the simple fact that Negro parents, like other parents, are not eager to place their children in an environment in which they are not really wanted. . . . It cannot be sheer coincidence that Wooster in fact did not have a single Negro applicant during the first thirty years of its existence, while it has had an average of five or six applicants a year since the first Negroes enrolled six years ago. Nor have all of these students been scholarship candidates by any means. This seems to me, in retrospect, to demolish completely all validity for the argument that it is wrong to go out and seek candidates. From a practical standpoint the institution that wants Negroes must at first *ask them to come*. If it has none, it is really quite fair to say that it simply does not want them. (Emphasis in original).<sup>49</sup>

#### IV.

We must now consider the integration of parochial schools, a matter of particular importance because some very difficult problems of policy and constitutional law are presented against a backdrop of a vast and increasing parochial school population. Church schools are now a formidable bloc in American education, and ninety percent of church education is Roman Catholic. From twenty-five to fifty percent of school-age children in Northern cities attend nonpublic (mostly Catholic) schools; for example, in Philadelphia it is forty per cent and in Pittsburgh

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48. MALLERY, NEGRO STUDENTS IN INDEPENDENT SCHOOLS (NAIS 1963).

49. *Id.* at 69.

forty-six percent.<sup>50</sup> All told about 5.7 million students are enrolled in Catholic elementary and secondary schools; this is one out of every seven students in the nation, double the proportion of 25 years ago.<sup>51</sup>

It is thus plain that if American schools are to be integrated, church-related schools have a major part to play. It is also true that many parochial schools have taken strong steps to achieve racial balance.<sup>52</sup> Nevertheless, the fact that such schools attract a higher proportion of white than Negro students from public school systems tends to upset an already unbalanced racial situation, particularly in the central cities of the nation. The evidence is clear that parochial as well as other schools have a serious problem of racial imbalance.<sup>53</sup>

I should like to raise briefly two sets of questions; first, those that might arise if it is decided to coerce unwilling church schools to integrate, and second, those that could emerge if church schools themselves wish to improve racial balance.

First, coercion. This issue could raise in two ways. Either through legislation requiring all schools, including parochial schools, to refrain from racial discrimination, or through a court action based on the Fourteenth Amendment. The first route would most likely be in the context of a fair educational practice act, and the second route would presuppose all that we have discussed earlier regarding "state action"—the possibility that church schools, like other private schools, are subject to the Fourteenth Amendment because they receive financial aid from the government or because they perform a "public function" which makes them in effect agents of the state.

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50. Cronin, *Negroes in Catholic Schools*, 85 COMMONWEAL MAGAZINE 13-14 (Oct. 7, 1966).

51. *The Changing World of Catholic Education*, 14 COLUMBIA COLLEGE TODAY 19 (Fall 1966).

52. Cognizant of the fact that parochial schools, like public schools, "reflect segregated housing patterns," the United States Catholic Conference, comprising all American Bishops, has called a nation-wide conference on "racial isolation." N.Y. Times, March 27, 1967, at 41, col. 1. Similar measures have been called for by: the 64th Annual Convention of the National Catholic Education Association (N.Y. Times, April 2, 1967, Sec. IV, at 9, col. 5); the Chicago Association of Roman Catholic Priests (N.Y. Times, May 2, 1967, at 10, col. 1); the Boston Archdiocese (N.Y. Times, July 14, 1967, at 12, col. 2); and the Dioceses of Brooklyn and New York (N.Y. Times, April 20, 1967, at 32, col. 2.)

53. See, e.g., the statistics contained in the 1964 INTERCULTURAL SURVEY OF ROMAN CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS IN MANHATTAN AND THE BRONX, NEW YORK CITY. See also the exchange in THE CATHOLIC NEWS for Aug. 18, 1966, and Oct. 6, 1966, between Msgr. George A. Kelly and Mr. Aryeh Neier, Executive Director of the New York Civil Liberties Union.

For purposes of simplicity, I shall consider the issue in the context of a legislative policy decision whether or not to include parochial schools in any general prohibition against racial discrimination. The specific question that emerges is whether it is an unwarranted interference with the autonomy of church schools, and perhaps a violation of their right to free exercise of religion, to require them to integrate against their will. For example, could a statute validly provide that it was unlawful for a parochial school to prefer applicants of the same religion? While I know of no directly applicable case,<sup>54</sup> it appears to me that such a statute would be gravely suspect from a constitutional standpoint, as well as unwise in policy.

But does this mean that a church school can not be ordered to end discrimination on *racial* grounds? The Commissioners on Uniform State Laws recently wrestled with that problem in the preparation of its Model Anti-Discrimination Act and concluded that there was no good reason to permit such discrimination unrelated to the religious purposes of the institution.<sup>55</sup> On the other hand, Title VII of the federal Civil Rights Act of 1964, which prohibits discrimination in employment, grants a total exemption for religious educational institutions.<sup>56</sup> The Act does not deal with private school education, but Title VII reflects a policy choice different from that of the Commissioners, and I should say different from my own.

The final question in this series will perhaps be of interest only to law professors who must strive each year to prepare imaginative examination questions. Suppose that a parochial school discriminates on the ground of race and does this because of some religious belief associated with the religion. Black Muslims might so exclude white children from their schools, and there may be white religious groups that exclude Negroes on doctrinal grounds. Should this be forbidden by the state, and if so is it an interference with religious freedom? I must confess I have not thought the problem through, but my tentative solution is to resolve the issue in favor of prohibiting the discrimination, even if it apparently flows from a bona fide religious belief, because of the opportunity for disingenuous racial exclusion that a contrary decision would permit.

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54. See generally the materials in PFEFFER, CHURCH, STATE AND FREEDOM 696-721 (Rev. ed. 1967); 1 EMERSON, HABER AND DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1167-74 (3d ed. 1967).

55. Section 503(1).

56. Section 703(e), 42 U.S.C. § 2000e-2(e)(2).

Now to the second broad question. Suppose that a parochial school desires to integrate and achieve a healthy racial balance. What problems can be expected? For present purposes I put to one side strictly educational matters. Obviously, the church school can aggressively recruit Negro students, and indeed it can do so without problems of divided control that might plague a public institution. It can also arrange for redrawing of parochial school district lines and provide for bussing between, say, a predominantly white suburban school and a Negro neighborhood in the central city. It can even close some or all of the parochial schools in an area where this would lead to reduction of racial imbalance in the public schools. All of these steps can be taken by the school system of a particular denomination, without difficulty, assuming the policy is accepted by the church leaders.<sup>57</sup>

But these efforts may be insufficient. There just may be too few Negroes of the same religious faith to achieve more than token integration. In response to this problem, a writer in *Commonweal Magazine* has recently proposed that public and parochial schools share their facilities so that children from the two systems could attend certain classes together, and thus to that extent eliminate racial isolation.<sup>58</sup>

Here we encounter an authentic constitutional problem. "Shared time" programs have a long history, and it is much mooted whether the Establishment Clause of the First Amendment forbids children to divide their school day by taking such "neutral" subjects as languages, mathematics and gymnasium in the public school and subjects with some religious orientation—literature, history, etc.—in the parochial school.

This is not the occasion to delve deeply into the controversy. Suffice it to say that strong arguments have been mounted on both sides. Shared time proponents say that it will break the deadlock on federal aid to public schools; will help breach the wall isolating the Catholic community and give it a greater stake in the public school system; and is consistent with church-state separation because the program provides assistance to the child and not to the parochial school. The other side argues that shared time will not solve the federal aid problem, nor will it in practice break down the isolation of Catholic children because they will be a special and identifiable group within the public school. Moreover, there will be administrative havoc and added expense. Finally, it would be inconsistent with separation of church and state, first because it would involve aid to church schools, which would be saved consider-

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57. Cronin, *supra* note 45 at 14-15.

58. *Id.* at 15.

able sums that would go into strictly religious aspects of education, and second, because it would involve church officials in the management of public schools, where their voices could have considerable influence.<sup>59</sup>

How the dispute will be resolved in the courts is yet unclear, although a leading authority has suggested that no doctrinaire answer will be forthcoming and that the result will depend on the precise form of a given shared time program.<sup>60</sup>

How does this controversy bear on our problem of civil rights? Presumably not at all if a particular shared time program is upheld under the First Amendment; in that case it would be one further useful method of achieving racial balance in public and parochial schools.

But what if a particular shared time program ordinarily would violate the Establishment Clause? Might such a plan survive if its purpose is to achieve racial balance in the schools? In other words, would the command of the First Amendment be tempered in the interest of carrying out a mandate of the Fourteenth Amendment? Much would depend, of course, on the precise nature of the program. But in general my guess is that the constitutional balance is sufficiently close so that the use of shared time as a way of helping to eliminate racial isolation would be sympathetically received in the courts, especially if the Fourteenth Amendment is ever held to mean that schools have an affirmative duty to integrate.

Because I know of no precedent that would control the decision, I merely present the question as a final perplexing problem that our courts one day may have to answer.

#### CONCLUSION

I have attempted in this article to analyze some diverse and difficult problems relating to racial discrimination in private schools, but the fundamental thought that I would like to emphasize in concluding this article is that a great opportunity awaits the independent schools of this country. I only hope that they seize the occasion to make their institutions the proving grounds of the future in education rather than the battlegrounds.

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59. See the thoughtful discussion in PFEFFER, *CHURCH, STATE AND FREEDOM* 571-579 (Rev. ed. 1967).

60. *Id.* at 578-79. See also the statement of the American Civil Liberties Union on shared time, issued April 4, 1965.