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# Civil Rights--The Test of Democratic Fiber

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## Civil Rights—The Test of Democratic Fiber

The life of the Negro race has been a life of tragedy, of injustice, of oppression. The law has made him an equal, but man has not. And, after all, the last analysis is, what has man done? — and not what has the law done?<sup>1</sup>

This, from Clarence Darrow's final argument to the jury in the famous *Sweet* case<sup>2</sup> in 1926 in Chicago, is a statement for the time; a truth which covers a century of American history.

During our nation's growth, problems have arisen from time to time which have challenged a most basic concept of our constitutional system — equal justice for all people under the law. In some parts of our country we are again faced with such problems. Unfortunately, the chronology of yearbooks in too many a high school library will display a gap indicating the "lost class of '59" — permanent mute testimony to this abrasion to the fabric of democracy. Decisions of the federal courts determining the legal rights of Negro school children are being met with resistance in a few areas. Continued resistance cannot fail to damage our governmental fabric and the standing of our nation in every corner of the world. Thus are our public educational problems of urgent concern to all of us. The issue resolves itself to the question of determining the role of a Supreme Court decision itself in our society — whether this pronouncement of the highest judicial body is supreme or whether it may be evaded and defied? It is the purpose of this note to study the issues presented by the school segregation cases and study the skills of compromise employed by the federal judges to secure the democratic principle of equality as an actual practice rather than a theoretical concept — a prerequisite for democracy's survival in today's world arena.

### HISTORY OF "SEPARATE BUT EQUAL"

Racial segregation in public schools dates back to the beginnings of public education in the United States. Segregation was voluntarily abolished in most states of the union, but it remained the uniform and established practice in the schools of the South. In fact, any law designed to segregate persons of different races in the location of their homes, in the public schools and on public conveyances has been a prolific source

1. WEINBERG, *ATTORNEY FOR THE DAMNED* 233 (1957).

2. *Id.* at 229. Dr. Sweet, a Negro, had purchased a house in a "white district" of Chicago. A large mob surrounded the house the first night the Sweets occupied their new residence. The second night even a larger mob gathered, and, for some unexplained reason, a shot was fired from the house. One of the mob was killed. Dr. Sweet, his family, and those of his friends who were in the house (eleven in all) were arrested and charged with first degree murder. None was convicted.

of litigation. The staunch position for segregation was first argued to be violative of the equal protection clause of the United States Constitution.<sup>3</sup> This argument was met by the "Separate but Equal" doctrine which, though invented prior to the adoption of the fourteenth amendment<sup>4</sup> and in a state court,<sup>5</sup> seemed most appropriate. The United States Supreme Court adopted the doctrine in 1896<sup>6</sup> when it held a state statute providing for separate but equal accommodations on railroads for white and colored persons not to be a denial to the colored man of the equal protection of the law required by the fourteenth amendment.

To the colored man fifty years ago even the protective aspect of the "Separate but Equal" doctrine appeared dismal when the action of a local board of education in temporarily suspending a high school for colored children because of economic reasons was held not to be sufficient reason for restraining the board from maintaining an existing high school for white children<sup>7</sup> — so long as the board had not proceeded in bad faith and had not acted in hostility to the colored race.

Yet "Separate but Equal" was to be with us a long time. As late as 1927 a child of Chinese ancestry, who was a citizen of the United States, was deemed not to have been denied equal protection of the law by being assigned to a public school for colored children, when equal facilities for education was offered to both races.<sup>8</sup> But from 1938 on, through a variety of oblique references in other cases, the Justices intimated that the days of segregated public schools were numbered. It became increasingly apparent that the Court was prepared to prohibit segregation as a violation of "equal protection of the laws"<sup>9</sup> to all persons.

The beginning of the new attitude was evidenced in the Court's inclination to review more critically both the tangible and intangible factors of the cases brought before it to ascertain whether equality was being offered. Possibly because it was felt that less resistance would be encountered, the new approach was applied first to cases involving institutions of higher learning. In *Missouri ex rel. Gaines v. Canada*<sup>10</sup> the

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3. U.S. CONST. amend. XIV: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

4. Secretary Seward certified without reservation that the amendment was part of the Constitution on July 21, 1868.

5. *Roberts v. Boston*, 59 Mass. 198, 206 (1849): "Conceding . . . that colored persons . . . are entitled by law . . . to equal rights, constitutional and political, civil and social, the question then arises whether . . . separate schools for colored children is a violation of any of these rights." The court held there to be no violation.

6. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

7. *Cumming v. Board of Education*, 175 U.S. 528 (1899).

8. *Gong Lum v. Rice*, 275 U.S. 78 (1927).

9. U.S. CONST. amend. XIV.

10. 305 U.S. 337 (1938).

Supreme Court held that the state was denying the equal protection of its laws to Negroes in failing to provide a legal education for them comparable to that afforded white students. In a later case the state of Oklahoma was obliged to provide a legal education for a qualified Negro applicant as soon as it did for applicants of any other group.<sup>11</sup> This mandate became more than mere verbiage when the state court entered an order requiring, in the alternative, the admission of a Negro to the state maintained law school or nonenrollment of any other applicant until a separate school with equal educational facilities should be provided for Negroes. The culmination of this new trend was manifested in the *Sweatt v. Painter*<sup>12</sup> decision. In that case, after a close examination of the facts, the Court concluded that the legal education offered in a separate law school for Negroes was inferior to that being offered by the University of Texas Law School and hence the equal protection clause required that a qualified applicant be admitted to the latter.

#### THE DEMISE OF THE SEPARATE BUT EQUAL DOCTRINE

When, therefore, the contention that "equal protection of the laws" prohibited any form of segregation was brought before the Court in 1952<sup>13</sup> by certain southern Negroes on behalf of their children and of others similarly situated, the big problem was not *whether* to declare segregation unconstitutional, but *how* to proceed to do so. There was no secret about the impassioned opposition of the state and local authorities and of substantial segments of the populace in the southern states. The educational structure and deep seated habits of a whole region were involved.

Both "law" and "logic" seemed to dictate that enforcement of segregation must either be constitutional or unconstitutional. There seemed to be no possibility for a middle ground. In the two years that passed until the decision was finally announced on May 17, 1954, the public mind had had adequate opportunity to prepare for the discarding of the old rule of "Separate but Equal." Some people may have been shocked at the unanimity of the Court's decision, but all should have been aware that this showed implicitly that the Court had discovered that elusive "middle ground."

#### THE ADAPTABLE MANDATE

As one would expect, the bulk of the opinion was devoted to demonstrating that segregation was unconstitutional and that various earlier statements to the contrary were, for one reason or another, either irrele-

11. *Sipuel v. Oklahoma*, 332 U.S. 78 (1927).

12. 339 U.S. 629 (1950).

13. *Brown v. Board of Education*, 347 U.S. 483 (1953).

vant or no longer binding on the Court. Thus, on principle, segregation in public schools was condemned to death. The greatest hurdle remained: How to effectuate the difficult and complex transition from segregated to unsegregated schools? The Court had arrived at a threefold solution: (1) interested parties (not only "parties" to the suit, but also the Attorney General of the United States and the Attorneys General of all states requiring or permitting racial discrimination in public education) were invited to participate in recommending and framing a suitable procedure and were allowed several more months for a cooling period; (2) the procedure to be adopted must be flexible enough to permit consideration of varying local needs and conditions; and, (3) perhaps by far the most important, the plan must allow for "an effective *gradual* adjustment."<sup>14</sup> A wedge of duration had been inserted between the immediate "either-or." Without the use of such a temporal dimension the alternative results seemed inexorable. A method for gradual transition had been devised which could accommodate both the required change in regional mores and the Negroes' generic rights. Obviously, racial adjustment will require time, but the use of time is equally as important as its availability. Time can prove to be either an ally or an enemy. Bacon recognized its importance as an ally when he stated:

In all negotiations of difficulty, a man may not look to sow and reap at once; but must prepare business, and so ripen it by degrees.<sup>15</sup>

Time used as a cloak to achieve complete defiance can, however, be an elusive enemy.

To better understand the tempering effects of temporal dimension decisions, it is important to understand the respective roles of State and Nation.

#### THE STATE'S RIGHTS ARGUMENT AGAINST INTEGRATION

Admittedly, equality under the law is a national concept rooted in the nation's Constitution. Its fulfillment can not be a violation of the rights of any state. Nevertheless, one of the most deceptive arguments which has been advanced by the segregationists is that the federal government is improperly interfering with the operation of the local school systems. The argument begins with the appeal that the issue transcends race. That it strikes at the heart of every right reserved to the people under a government based on a constitution that delegates to the central government certain well-defined powers and reserves to the states and the people all

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14. *Brown v. Board of Education*, 349 U.S. 294, 298 (1954).

15. BACON, *Of Negotiation* in *ESSAYS AND NEW ATLANTIS* 200 (1942).

powers not specifically so delegated. Virginia's Governor Almond cogently summarized the argument:

[T]he Supreme Court of the United States has ignored the Ninth, the Tenth and the Fourteenth amendments . . . to rule that the States have no authority to operate their schools as they see fit and, on the contrary, can operate them only if they adopt the sociological and psychological views of the nine men who happen today to constitute the Court.

I do not concede an opinion of the Supreme Court to be the law of the land. If I did, I would be . . . guilty of displaying lack of respect for the Constitution. . . . The Constitution itself provides and specifies what shall constitute the law of the land. It does not embrace judicial opinions which change with the winds.<sup>16</sup>

Of course, public education, as the Supreme Court explicitly recognized,<sup>17</sup> is a primary concern of the states. But, all state action must be exercised consistently with the federal constitutional requirements as they apply to state action.<sup>18</sup> The applicable constitutional requirement is the provision of the fourteenth amendment, as Governor Almond points out, with a somewhat different emphasis;<sup>19</sup> specifically, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>20</sup>

In a long line of decisions prior to the school cases, the Supreme Court, in a variety of situations, gave concrete meaning to this command of the Constitution. For example, it set aside convictions of Negroes by state juries from which Negroes had been systematically excluded.<sup>21</sup> The states involved did not seriously contend that the Supreme Court was thereby trying to run their jury system. The Court also struck down licensing laws which were administered so as to exclude persons of Oriental

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16. Address by Governor J. Lindsay Almond, Jr. of Virginia at The Virginia Farm Bureau Federation Convention in Richmond, November 24, 1958. Reported in U.S. News & World Report, Dec. 5, 1958, p. 75.

17. *Brown v. Board of Education*, 347 U.S. 483, 493 (1953).

18. In determining what constitutes "state action" the courts have consistently held that a state and its instrumentalities cannot avoid their constitutional obligations by turning public facilities over to private corporations for operation on a segregated basis. *Simkins v. City of Greensboro*, 149 F. Supp. 562 (M.D. N.C. 1957), *aff'd*, 246 F.2d 425 (4th Cir. 1957) (golf course); *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 352 U.S. 838 (1957) (county cafeteria); *Virginia Dept. of Conservation & Development v. Tate*, 231 F.2d 615 (4th Cir. 1956) (state park); *Lawrence v. Hancock*, 76 F. Supp. 1004 (S.D. W. Va. 1948) (swimming pool).

19. Governor Almond urged: "The Fourteenth Amendment, with its 'equal protection of the laws' clause, specifies that the Congress shall have power to enforce the article 'by appropriate legislation.' This power resides in the Congress and not in the courts."

20. U.S. CONST. amend. XIV.

21. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

ancestry from certain occupations.<sup>22</sup> The states involved did not argue that the federal government was attempting to take over their legitimate licensing functions. On the contrary, they recognized the unconstitutionality of the discriminatory practices.

There is no more reason to argue that the federal government is interfering with the rights of the states in the field of public education. A state is completely free to work out, as it chooses, a public school system — teacher selection, curriculum, all of the elements which go into a school system and its management are, as they have always been, the affair of the state and local authorities.<sup>23</sup> The Supreme Court has never suggested otherwise. It merely held that a state violates the Constitution of the United States when it denies to a Negro child who is otherwise qualified for admission to a particular school, and who seeks admission, the right to enter that school.

In our system of government the Constitution is, of course, the organic law, and it has become the function of the judiciary to interpret it. This is the very cornerstone of our federal system. As Hamilton stressed in *The Federalist*<sup>24</sup> "the want of a judiciary power was the circumstance which crown[ed] the defects of the [Articles of] Confederation." These difficulties were obviated in the words of Chief Justice Stone, "by making the Constitution the supreme law of the land and leaving its interpretation to the courts."<sup>25</sup> The unanimous decision of the Court in the *Brown* case thus represents the "law of the land" today, tomorrow, and for the future. However, the opposition and resentment caused by this decision is much more serious, widespread, and deep-seated than that caused by any court decision in recent times. This undoubtedly prompted the recognition that a period of transition would be required and fathered the test requiring that the method of change and the length of time be accomplished at "all deliberate speed"<sup>26</sup> with due regard to varying local conditions. The exact methods were left to the local school boards under the supervision of the federal courts. The crux of the matter is one of intention. The problems are difficult at best but they become hazardous if the underlying intent of those who are opposed to the decision of the Court is one of defiance. Particularly if those in official position are opposed to the decision. Although the executive branch does not assist

22. *Yick Wo v. Hopkins*, 118 U.S. 356 (1885).

23. *Accord, Lane v. Wilson*, 307 U.S. 268 (1938), where a similar question arose as to state control over election machinery. The court held that though the state has full control over elections it does not follow that it may adopt a scheme of registration which is subtly calculated to disfranchise voters of a particular race.

24. No. 22, at 138 (Mod. Lib. ed. 1937).

25. LAW AND ITS ADMINISTRATION 138 (1924).

26. *Brown v. Board of Education*, 349 U.S. 294, 301 (1954).

in formulating any details of the plan, there have been a few instances in which that branch has participated in court actions, not in connection with the proposed de-segregation plan, but in order to assure respect for law and order and for the decrees of the United States district courts.

#### EXECUTIVE INTERVENTION

One instance of executive participation in the enforcement of orders of a federal court involved a situation which arose in Clinton, Tennessee.<sup>27</sup> In compliance with a court order, a number of Negroes had been admitted, without incident, to the Clinton High School. Several days later, John Kasper, an agitator for the Seaboard White Citizens Council, arrived to organize concerted obstruction. His purpose was to frustrate the district court's order and to exert pressure upon the school board to dismiss the Negro students. At the petition of the members of the school board, the court enjoined Kasper from further hindering or obstructing the approved plan. Kasper refused to comply and continued to incite mob action aimed at subverting the court's decree. He was thereupon charged with criminal contempt, again at the instance of the school board members. At this point the United States Attorney, who had not been in the case since it involved predominantly a local question of formulating an appropriate plan of integration, was requested by the court to participate in the investigation and prosecution of the criminal contempt charges. This was done and Kasper was convicted and the conviction was sustained on appeal.

Another example of executive participation to help overcome violent interference with a plan of integration is the *Hoxie* case.<sup>28</sup> Promptly after the Supreme Court's decision, the Hoxie school board, finding no administrative obstacle to immediate de-segregation, announced that the schools in that district would be open to white and colored alike. This was met by threats and acts of violence designed to coerce the school board to rescind its action. The board and its members responded by an action in the federal district court to enjoin the agitators from threatening or intimidating the school board members in the performance of their duties. The injunction was granted, but the defendants appealed on the grounds that no federal rights were involved and that the federal courts therefore had no jurisdiction. The appeal thus raised the broad question whether the state officials can be protected in the federal courts from interference with their performance of a duty imposed upon them by the federal Constitution. Because of the effect the decision would

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27. *Kasper v. Brittain*, 245 F.2d 92 (6th Cir. 1957), *cert. denied*, 355 U.S. 834 (1957).

28. *Hoxie School District v. Brewer*, 137 F. Supp. 364 (E.D. Ark. 1956).



have upon the procedures available for dealing with the obstructions to duly adopted plans of de-segregation, the United States, at the request of the school board and with the consent of all parties, appeared and filed a brief in the court of appeals in support of the power of the federal courts. The injunction was affirmed.<sup>29</sup>

The general policy of the federal government is to regard the matter of formulating an appropriate remedial plan as the responsibility of the local litigants and the local court. On the other hand, if there is concerted and substantial interference, as in the *Kasper* case, with the decree of the court, the government stands prepared to take such steps as may be necessary to vindicate the court's authority. As, for example, aiding the court in prosecuting a contempt charge. Other assistance also seems available — as in the *Hoxie* case, where, at the request of the local school board, the government submitted its views on an important question involving the formulation of an effective federal procedure for dealing with threatened obstruction of law and order.

The most serious situation arises when a state impedes the execution of a court's final decree in one of two ways: (1) under the guise of preventing disorder, it uses state military forces in a manner calculated to obstruct a final order of the court,<sup>30</sup> or (2) it fails to provide adequate police protection to those whose rights have been determined by final decree of the court and as a result "domestic violence, unlawful combination or conspiracy"<sup>31</sup> hinders the exercise of those rights.<sup>32</sup>

When a group of private persons engages in a concerted effort to

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

30. *Aaron v. Cooper*, 156 F. Supp. 220, 225 (E.D. Ark. 1957). The Governor of Arkansas dispatched National Guard troops to Central High School and placed the school "off limits" to colored students. "[N]o crowds . . . and no acts . . . or threats of violence . . . had occurred. The Mayor, the Chief of Police, and the school authorities had made no request to the Governor nor any representative of his for State assistance. . . ." Such action seems to have been entirely unwarranted. The guardsmen, "acting pursuant to the Governor's order, stood shoulder to shoulder and thereby forcibly prevented the nine Negro students . . . from entering."

31. 10 U.S.C. § 333 (1956): "The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress in a state, any insurrection, domestic violence, unlawful combination, or conspiracy. . . ."

32. *Faubus v. United States*, 254 F.2d 797 (8th Cir. 1958). The court determined that the Little Rock School Board's plan had been obstructed by the Governor through the use of National Guard troops, and granted a preliminary injunction on September 20, 1957. The troops were accordingly withdrawn and the Negro children entered the school Monday, September 23, 1957, under the protection of the Little Rock Police Department and the Arkansas State Police. The officers had difficulty controlling the demonstrative crowd which gathered during the morning and consequently removed the children from the school. See *Aaron v. Cooper*, 163 F. Supp. 13 (E.D. Ark. 1958), for a more complete factual presentation.

obstruct the execution of a court decree, application for an injunction and, if necessary, the institution of contempt proceedings, will ordinarily prove effective. This is illustrated by the *Kasper* case. In Clinton, Tennessee, however, there had been no breakdown of local law enforcement machinery. Local authorities stood ready, able, and willing to prevent violence and to protect the individual citizen. If local law enforcement breaks down and mob rule supplants state authority, the situation is immeasurably more serious. In that situation, it may be enough to go back to the courts for further relief in the form of an injunction, a process which is necessarily time consuming — a mob doesn't always wait.

The maintenance of order in the local community is the primary responsibility of the state.<sup>33</sup> When a court, either state or federal, has entered a decree, the state has a duty not to impede its execution. More than that it has the affirmative responsibility of maintaining law and order so that the rights of individuals, as determined by the courts, are protected against violence and lawlessness. What if the state fails to meet this responsibility? It means that persons who oppose the decisions of the court, if they can muster enough force, can set the court's decree at naught. If this occurs can there be equivocation?<sup>34</sup> President Eisenhower has clearly stated:

The very basis of our individual rights and freedoms rests upon the certainty that the President and the Executive Branch of government will support and insure the carrying out of the decisions of the federal courts.<sup>35</sup>

Each state, granting the will, is generally capable of maintaining law and order within the state, and at the same time permitting a final decree of the court to be effected. Therefore, no further occasion need arise which would require the federal government, by the executive branch, to act to support and insure the carrying out of a final decision of a federal court.

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33. *Thornhill v. State of Alabama*, 310 U.S. 88, 105 (1940): "The power and the duty of the state to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted."

34. On September 25, 1957, the President dispatched federal troops to effect admission of the Negro students. Regular Army troops remained until November 27, 1957, and were replaced by federalized National Guardsmen who were stationed there for the balance of the school year. *Cooper v. Aaron*, 358 U.S. 1 (1958).

Because there appears to be some doubt as to the federal courts' ability under 18 U.S.C. § 1503 to cite members of a "mob," who are not specifically named in the court order, with contempt, Title I of H. R. 4457, in committee for the first session of the 86th Congress, would make it a federal offense willfully to use force or threats of force to obstruct court orders in school de-segregation cases. Upon conviction the offender could be punished by fine of not more than \$10,000 or imprisonment for not more than two years, or both.

35. *N.Y. Times*, Sept. 25, 1957, p. 14, col. 3.

In any civilization based upon ordered liberty, it is fundamental, in the words of John Locke, a favored philosopher of the founding fathers, that "no man in a civil society can be exempted from the laws of it."<sup>36</sup> It follows that no man can be excepted from the requirement of respecting the lawfully determined rights of others. The answer lies with responsible state officials.<sup>37</sup>

#### COMPLIANCE WITH THE MANDATE

What course or courses then are being followed allegedly to comply with the integration mandate?

Obviously, imposed solutions are much less satisfactory than voluntary ones. That which is imposed tends to accentuate tensions; it may leave a residue of resentment — both on the part of those who feel that too much is being required too soon, and on the part of those that feel that too little is being done too slowly.

On the other hand, where the individual citizens and the responsible officials have frankly faced the facts and have proceeded in good faith to formulate their own plans and go forward with them, confusion and disorder have largely been avoided and substantial progress has been made.

On Monday, February 2, 1959, for the first time in the history of the Commonwealth of Virginia, Negro children walked through the open doors of public schools to sit down in class room with white children. This was a milestone. The State of Virginia had adopted legislation<sup>38</sup>

36. LOCKE, *Of Political or Civil Society* in TWO TREATISES OF GOVERNMENT 168 (1947).

37. No state legislator or executive can war against the Constitution without violating his oath "to support this Constitution" taken pursuant to U.S. CONST. art VI, § 3.

In *Sterling v. Constantin*, 287 U.S. 378, 397-98 (1932), the court decided if a governor had the power to nullify a federal court order "it is manifest that the fiat of a state governor, not the Constitution of the United States, would be the supreme law of the land. . . ." Similarly, in *United States v. Peters*, 9 U. S. (5 Cranch) 115, 136 (1809), the court said: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery. . . ."

38. VA. CODE ANN. §§ 22-188.3-49 (Cum. Supp. 1958). The gist of that legislation being that "all elementary and secondary public schools in which both white and colored children are enrolled are, upon the happening of that event automatically closed, removed from the public school system, and placed under the control of the Governor. All State appropriations for the support and maintenance of such schools are cut off and withheld from them. Such State funds so withheld . . . are to be used for the payment of tuition grants in nonsectarian private schools of children who have been attending such public schools, who cannot be assigned to other public schools, and whose parents or custodians desire that they do not attend schools in which both white and colored children are enrolled and taught. Schools which may be policed under federal authority, or disturbed by such policing are, upon the happening of that event, likewise automatically closed, and, . . . tuition grants are made available for pupils attending such schools." *Harrison v. Day*, 106 S.E.2d 636, 640 (Va. 1959).

which had the avowed purpose of avoiding and preventing the very occurrence which was taking place. That legislation proceeded from the untenable premise that somehow it was possible, consistent with the law as declared by the Supreme Court of the United States, to continue a policy of racial segregation in the public schools. Further anti-integration legislation may be in the offing, but the judicial order was effected without incident. This can only be attributed to the "responsibility" of Virginia's Governor Almond. He is admittedly in disagreement with the rulings by state and federal courts and abhors the idea of integration in the public schools, but his "responsibility" is evidenced by his comment that

whatever may ensue . . . law and order must prevail to the end that the good name and honor of Virginia be not defamed. With fairness and impartiality to all, I am determined to keep the peace and good order.<sup>39</sup>

The pivotal decision leading to Virginia's integration was the *James* case.<sup>40</sup> This was a suit instituted on behalf of white Norfolk children who had been shut out of the public schools in consequence of Virginia's school-closing laws. The court ruled that it was unconstitutional for a state to close schools on a selective basis; *i.e.*, to close down only those schools in which it has been ordered that Negro children be admitted while continuing to operate other schools not subject to a similar order. On the very same day that the *James* case was decided in a federal court, the state supreme court reached a decision of far-reaching importance in the *Harrison* case.<sup>41</sup> That court decided that Virginia's school-closing and related laws could not be squared with the requirements of the Virginia Constitution that the "general assembly shall establish and maintain an efficient system of public free schools throughout the State."<sup>42</sup> This decision underscores the importance which the people of Virginia have attached, and which a democratic people can scarcely fail to attach, to the general availability of public schooling. If the *James* case makes it clear that if a state is to operate a public schooling system at all it must do so in compliance with the requirements of the United States Constitution, the *Harrison* case highlights what an indispensable place the institution of the public school has come to occupy. It must be noted that

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39. Akron Beacon Journal, Feb. 3, 1959, p. 6, col. 1.

40. *James v. Almond*, 170 F. Supp. 331 (E.D. Va. 1959). One last attempt to resist the inevitable is disclosed by *James v. Duckworth*, 170 F. Supp. 342 (E.D. Va. 1959), wherein the court enjoined enforcement of an ordinance and two resolutions which were adopted with the avowed purpose of canceling appropriations to integrated schools.

41. *Harrison v. Day*, 106 S.E.2d 636 (Va. 1959).

42. VA. CONST. § 129.

this start made in Virginia took place without the necessity of intervention by the Executive branch of the federal government.

But this does not mean that mass integration will now blanket the South. Still a new evasive tack has been initiated which, to date, has received the sanction of the federal courts. This mode of resistance has been termed the School Placement Law.<sup>43</sup> Alabama enacted this law in 1955 with the design of establishing some standards other than race as a measure for placing children in school. By the specific provisions of this law some seventeen standards<sup>44</sup> can be applied by school boards in determining placement of pupils in schools. Race is not one of the mentioned criteria. The validity of this law was attacked when four Negro children in Birmingham sought to have the courts rule on its constitutionality in the light of the *Brown* decision. The federal district court<sup>45</sup> concluded that the law was constitutional *on its face*. In the words of the court:

The School Placement Law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color. We must presume that it will be so administered.<sup>46</sup>

The United States Supreme Court, in a one paragraph decision, af-

43. Act No. 201 of the Legislature of Alabama, Regular Session 1955, which became an Act on August 3, 1955, as amended by Act No. 367, Regular Session 1957, which became an Act on August 26, 1957; GENERAL ACTS OF ALABAMA 1955, p. 492, as amended by GENERAL ACTS 1957, p. 482.

44. Act No. 367, Regular Session 1957, § 4: "In the assignment, transfer or continuance of pupils among and within the schools, or within the classroom and other facilities thereof, the following factors and the effect or results thereof shall be considered, with respect to the individual pupil, as well as other relevant matters: [1] Available room and teaching capacity of the various schools, [2] Availability of transportation facilities, [3] The effect of the admission of new pupils upon established or proposed academic programs, [4] Suitability of established curricula for particular pupils, [5] Adequacy of the pupil's academic preparation for admission to a particular school and curriculum, [6] The scholastic aptitude and relative intelligence or mental energy or ability of the pupil, [7] The psychological qualification of the pupil for the type of teaching and associations involved, [8] Effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof, [9] Effect of admission upon the prevailing academic standards in a particular school, [10] The psychological effect upon the pupil of attendance at a particular school, [11] The possibility or threat of friction or disorder among the pupils or others, [12] The possibility of breaches of the peace or ill-will or economic retaliation within the community, [13] The home environment of the pupil, [14] The maintenance or severance of established social and psychological relationships with other pupils and with teachers, [15] Choice and interest of the pupil, [16] Moral conduct, health and personal standards of the pupil, [17] The request or consent of parents or guardian and the reason assigned therefor."

45. *Shuttlesworth v. Birmingham Board of Education*, 162 F. Supp. 372 (N.D. Ala. 1958).

46. *Id.* at 384.

firmed the decision "upon grounds on which the District Court rested its decision."<sup>47</sup> The failure of the Birmingham Board of Education to honor the requests of four Negro pupils for assignment to white schools was thereby not questioned by the Supreme Court. The law is valid. Only the question of its application remains. Each child wishing to appeal to a federal court to test a school board decision will be required to bring a separate suit as to the merits of that specific application. Without a reconsideration by the United States Supreme Court, the best that can be hoped for will be a case by case series of trials through a chain of courts resulting in, at most, token integration with little or no erosion to the effective substance of the Alabama statute.

It is true that the fourteenth amendment does not affirmatively command integration, but the Supreme Court has made it clear that the amendment does forbid any state action requiring segregation. Has then the wedge of temporal accommodation been inserted too deeply to compel compliance with the order for de-segregation without further judicial declaration? Probably yes, but this should not detract from the useful role it has played in creating a period of adjustment; a period marked by progress in the communities where compliance is the intent; but a period marked by treading where evasion is the intent.

If the Alabama School Placement Law is designed as a camouflage to continue segregation the result of its use will display the empirical knowledge necessary to ascertain such a purpose. There can be no doubt that the United States Supreme Court would, and should, then declare the law unconstitutional in its application.

#### CONCLUSION

Of all the weapons in the arsenal of the free world, the most potent is the dedication of free nations to the basic concept of justice, morality, and the rule of law. Above all others, the one thing that distinguishes free nations from totalitarian regimes is the importance attached to the rights of every individual. By contrast we need only look behind the Iron Curtain to see how little value and protection there is for the individual in the mere cold words written on parchment. The people under the Soviet rule have many substantial rights expressly granted to them by written constitution, many of them strikingly similar to ours. For example, freedom of speech<sup>48</sup> and of the press<sup>49</sup> are listed as rights guaranteed in the Constitution of the U.S.S.R. The same is true of the right

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47. *Shuttlesworth v. Birmingham Board of Education*, 358 U.S. 101 (1958).

48. U.S.S.R. CONST. ch. X, art. 125 (a).

49. U.S.S.R. CONST. ch. X, art. 125 (b).

of assembly for peaceful purposes.<sup>50</sup> The Soviet Constitution proclaims the independence of the judiciary,<sup>51</sup> and recognizes the right to freedom of religious worship.<sup>52</sup> Yet it is clear that these written principles are merely deceptive devices. Whenever the interests of the state are involved, justice behind the Iron Curtain becomes synonymous with what the leaders decide. Under such a system the rights of the individuals of necessity are of subordinate importance. Isn't then one of the greatest weaknesses of the Soviet system that it places so very little value on the individual's rights and liberties?

This fact must be remembered in the days ahead. In an effort to detract attention from their own shortcomings, the Soviet leaders will continually seek to exploit out of all proportion the slightest shortcoming they can find in our system of justice. The challenge of our time is how to demonstrate to the whole world that our system of government, not just in theory but in fact, actually provides meaningful justice to all individuals under all circumstances. We cannot hope to persuade the people of the world that our system holds forth the greatest hope for individual freedom and opportunity if by our actions at home we fall short of the mark in matters relating to race relations. Equality before the law is the hallmark of democracy. This principle finds deep roots in our constitutional system. It is the very essence of the rule of law. We can ill afford not to give substance to this basic concept of justice to all our people.

The peoples of the world are not going to be satisfied with the glowing promises painted on dry parchment by empty words. Only the discernible threads of merle woven into the fabric of democracy shall make it the material demanded for the world's governmental raiment.

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50. U.S.S.R. CONST. ch. X, art. 125(c).

51. U.S.S.R. CONST. ch. IX, art. 112: "The judges are independent and shall be subordinate only to the law."

52. U.S.S.R. CONST. ch. X, art. 124: "In order to ensure to citizens freedom of conscience, the church in the USSR shall be separated from the state, and the school from the church. Freedom of religious worship and freedom of anti-religious propaganda shall be recognized for the citizens."