

THE NEW LAW OF RACE RELATIONS†

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Professor Larson suggests that the time has come to formally recognize a new field of law: the law of race relations. Piecemeal treatment is no longer appropriate for a field so large, so dynamic, and of such great consequence to the American people. Professor Larson then proceeds to explore some of the new frontiers of the law of race relations, paying special attention to recent federal legislation and the Jones and Green decisions.

I. INTRODUCTION

The law of race relations is standing on the threshold of a new era. In the last few years, there have been such profound changes in legislation, in judicial decisions, in constitutional concepts, in federal-state relations to the issue, in the character, methods, and objectives of the civil rights movement, and in the scope of the problem as a nationwide and heavily urban matter rather than primarily a Southern matter, that we have on our hands, in the colloquial phrase, a new ball game.

As to legislation: we have seen in quick succession three major federal enactments. The Civil Rights Act of 1964¹ forbids discrimination in most areas of public accommodations and employment, and greatly strengthens federal power to enforce school integration. The Voting Rights Act of 1965² strikes down devices used to deny suffrage on the ground of race and backs this up with effective federal remedies. The Fair Housing Act of 1968³ abolishes discriminatory practices in a large segment of residential housing.

On the judicial front: near the close of the last session of the United States Supreme Court there came down within three weeks of each other the *Green*⁴ case and the *Jones*⁵ case. *Green*, in

† This article is based upon a series of lectures financed by the Oliver Rundell Fund delivered at the University of Wisconsin in the fall of 1968, as part of the observance of the centennial of the law school.

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¹ 42 U.S.C. §§ 2000a-h (1964).

² 42 U.S.C. § 1973 (Supp. II. 1965-66).

³ PUB. L. No. 90-284, 82 Stat. 73 (1968).

⁴ *Green v. School Bd.*, 391 U.S. 430 (1968).

⁵ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

effect, knocked out freedom of choice plans in the South as attempts to comply with the 1954 *Brown*⁶ decision requiring school integration. *Jones*, at one stroke, supplied a broad fair housing law, and quite possibly an equally broad law banning discrimination in employment, professional services, private education, retail establishments, and service businesses of all sorts, by revitalizing the Reconstruction statutes on equal property and contract rights, as well as the thirteenth amendment abolishing slavery.

As to constitutional concepts: *Jones* sets the stage for a new and less limited constitutional basis for antidiscrimination legislation and judicial decision by treating most forms of discrimination as badges or vestiges of slavery which may be eliminated without the cumbersome and tricky limitations imposed by the need to find constitutional footing in some kind of state action or impact on interstate commerce.

As to federal-state relations: the Voting Rights Act of 1965, to take only the most striking example, institutes perhaps the most unsubtle pushing aside of state power by federal in modern history, with federal examiners simply taking the process of registration of voters out of the hands of the states in some areas.

As to the civil rights movement: within the same three or four years we have seen the shift of emphasis away from gradual integration through the processes of law to militancy and even separatism.

And as to the scope of the problem: what was once thought of as essentially a Southern problem stemming from regional customs and prejudices is now decidedly a nationwide problem going far beyond personal prejudice and involving complex components of economics, urban life, employment, and poverty.

In one sense, the modern law of race relations may be thought of as dating from the Supreme Court's school integration decision in 1954, *Brown v. Board of Education*. But it took a decade of trial and error, of attempting to meet stubborn problems with partial solutions, of trying to catch up with evasive devices invented as fast as the last ones were stamped out, and generally of advancing public attitudes to the point where they would accept reasonably effective race relations measures, to bring us to our present posture. The crucial decade is just now beginning, as we approach the panorama of racial problems armed with a fairly comprehensive arsenal of constitutional, statutory, judicial, and administrative weapons.

The time is ripe to recognize the emergence of an identifiable new field of law: the law of race relations. Once in a while there appears on the scene a category of law so distinctive, so important, and so interrelated in its principles that it deserves to be given its

⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

own name and its own place in the books. Something like this happened many years ago, in the case of the law of workmen's compensation, which, after having for a time been uneasily squeezed in or cut up among such fields as torts, agency, administrative law, master and servant, and labor law, eventually had to be assigned a status of its own. It now occupies more inches of shelf space in the *Decennial Digest System* than any other substantive field of law.

What may be identified as the law of race relations is now similarly distributed among a number of other topics. For example, if one wants to run down a major school integration decision in the West key number system, he will find it distributed between "Schools and School Districts," "Constitutional Law," and "Civil Rights." If one looks under the word "race" in *Corpus Juris Secundum*, he will be given first a number of cases involving race-tracks, and then a cross reference to "Aliens," "Citizens," "Civil Rights," "Constitutional Law," "Marriage," "Miscegenation," and "Witnesses." If one looks at the entry under "Civil Rights," he will find it amounts to only 22 pages, compared with 4,118 for "Workmen's Compensation."

The nearest thing to what is here called race relations law has in the past been the law of civil rights. However, in any typical treatment of civil rights, one will find that much more than half is concerned with topics unrelated to race, such as freedom of expression, academic freedom, freedom of religion, rights of accused persons, and so on. Conversely, a considerable amount of race relations law is not necessarily found under the heading of civil rights.

One reason for this new classification is that there is now a large and swiftly growing body of law in which the central issue is specifically concerned with race. Sometimes the statutes involved may not actually use the word, but both their legislative history and their application in practice show that race is what they are almost entirely about. Most of the time "race" is written into the statute or decision.

Another reason for establishing this category of law is that the problem of race relations is now the most important domestic issue on the American scene. This being so, it is fitting that it should have a field of law to itself.

One of the advantages of adopting this kind of arrangement is that it draws attention to the interrelation between the components in the field. Indeed, one of the prerequisites that should exist before a field of law is given separate status is that there should be found threads of principle running through its parts binding it together.

II. THE COMPONENTS OF THE LAW OF RACE RELATIONS

There may be said to be five main segments of the law of race relations: public accommodations and facilities; political and legal rights, of which voting is the most notable; education; employment; and housing.

Any approach to an intelligent solution of the complex problem of race relations must begin with an understanding of the way in which progress in each one of these segments is dependent on progress in the others. This is particularly true of education, employment, and housing. No matter where one cuts into the story, he finds himself going in a vicious triangle among these three. Why is the quality of education of Negroes generally inferior to that of whites, even apart from illegally enforced segregation? It is because school districts generally follow residential patterns and Negroes generally live in poorer residential areas. Why do most Negroes live in poorer residential areas, even apart from illegally enforced housing restrictions? Because they cannot afford to live in the better districts. Why can they not afford to live in the better districts? Because, even apart from illegally enforced employment discrimination, they often cannot compete for the higher paying jobs. Why can they not compete for the higher paying jobs? Because the quality of their education is poorer. And why is the quality of their education poorer? Because they live in a poorer housing area, because in turn they have poorer jobs, because in turn they have poorer education. And so round and round it goes.

For this reason one must be wary of singleminded panaceas for the race problem, and of such statements as "the real essence of the race problem is education," or "the real solution lies in better jobs." If there is to be any progress, a coordinated attack has to be made on all fronts at once.

The voting rights segment occupies a special relation to this process. Each one of the other segments is directly affected by the degree of progress in achieving genuine suffrage. As is now becoming evident, the more the Negro voter is enabled to exercise his franchise, the more he can put into office legislators and officials who will, in turn, pass fairer laws on public accommodations, housing, employment, and education, and administer them more effectively and sympathetically.

The new law of race relations may be introduced by an analysis of each of the five main segments of race relations with two questions principally in mind: first, what is the stage of development as of today, in view of the rapid changes of the last few years, and second, what is the distance still to be covered before it may be said that the law has done its job in each of these segments? As part of this latter question it is appropriate to examine what new

legal measures might be available to courts, legislatures, and administrators to remedy the remaining deficiencies in race relations law. One of the reasons this kind of analysis is imperative is that each of the five segments displays a different "mix" of constitutional, decisional, statutory, and administrative law, and the development of the law is at a different stage in each.

A. *Public Accommodations*

The important thing to note about the law relating to public accommodations—that is, the law applying to discrimination in hotels, restaurants, places of entertainment and the like—is that within the past four years it has changed from a matter of constitutional law to a matter now of predominantly statutory law. The coverage of public accommodations in the Civil Rights Act of 1964, while by no means complete, is so broad that the resolution of most questions of discrimination in public accommodations from now on will be typically a matter of interpretation of the language of the statute. This is not entirely true, since the other limits of coverage at several important points still depend upon concepts like interstate commerce or "state action," which are heavily encrusted with hundreds of constitutional law interpretations.

This change is significant, not only because it supports the thesis that this branch of race relations law can no longer be considered a subhead of constitutional law, but also because the character of legal activity in this segment of the problem is markedly influenced by the change. Instead of having to construe broad concepts like "under color of law," one is now apt to be confronted with more mundane questions such as "what is a restaurant"? or "what is a place of entertainment"? This is not to say that there will not be litigation. Indeed, the example of workmen's compensation shows how prolific a field of law can become at the decisional level even when the intention of the framers of the statute was to put all legal questions to rest through statutory language.⁷ Even so, the process of settling coverage questions under statutory rather than constitutional language is on the whole simpler, as one may see by examining the kind of accumulation of purchasing and sales information and other data that still seems to be necessary to establish the fact that a particular establishment affects commerce.

Indeed, the amount of skirmishing under the Public Accommodations title about borderline establishments and evasive devices

⁷ It is only recently, some four and one-half years after passage of the act, that a federal court has finally held that drive-in restaurants are "restaurants," *Newman v. Piggie Park Enterprises, Inc.*, 377 F.2d 433 (4th Cir. 1967); and amusement parks are "places of entertainment," *Miller v. Amusement Enterprises, Inc.*, 394 F.2d 342 (5th Cir. 1968), within the meaning of the 1964 statute.

is not as great as one might have expected. As to borderline establishments: bars which serve only liquid refreshments are not places "principally engaged in selling food for consumption on the premises"⁸ nor are grocery stores that do not sell food ready for consumption on the premises,⁹ under recent decisions. As to evasive devices: the most common one is the attempt to disguise a restaurant or other public accommodation as a private club. In practice this has turned out to be an easy kind of fraud to pierce. Recent cases have developed an almost foolproof list of obvious tests, including control over selection and expulsion of members, size of membership, qualifications for membership, membership fees, and recipient of income from the establishment,¹⁰ which, coupled with the usual rule shifting the burden to the defendant to prove that the establishment is in fact a private club,¹¹ have enabled courts to deal quite easily with this widespread form of attempted evasion. After all, when a white person can walk into a restaurant and become a club member for life at a cost of 10 cents, a court does not have to be particularly shrewd or suspicious to cut through the sham.

So far as the unfinished business of law in this area is concerned, there remains a certain amount of territory that has not been occupied by either the federal government or state governments having comparable statutes. It should be said that, although this article will deal mostly with federal statutes and decisions, most of the states outside of the South have statutes covering in varying degrees discrimination in public accommodations, housing, employment, and education. Accordingly in any calculation of the residuum of unfinished coverage, one has to overlay the federal coverage upon coverage of the particular state, and see what is left. Even then there remains the possibility that further coverage may be added by judicial decisions interpreting constitutional provisions.

Of the exemptions from the federal statute, the best publicized is "Mrs. Murphy's boardinghouse"—that is, the small four-unit lodging occupied by the owner. This boardinghouse would be covered in a number of Northern states, but, in the absence of federal coverage, would be exempt in most states. In addition, the following areas have not been occupied by the 1964 Act: grocery stores; small bars not selling food;¹² retail shops; depart-

⁸ See *Cuevas v. Sdrales*, 344 F.2d 1019 (10th Cir.), *cert. denied*, 382 U.S. 1014 (1965).

⁹ See generally *Newman v. Piggie Park Enterprises, Inc.*, 377 F.2d 433 (4th Cir. 1967).

¹⁰ See generally *Kyles v. Culberson*, 263 F. Supp. 412 (E.D. Ark. 1967), *aff'd*, 395 F.2d 118 (8th Cir. 1968); *United States v. Jack Sabin's Private Club*, 265 F. Supp. 90 (E.D. La. 1967).

¹¹ See *Kyles v. Culberson*, 263 F. Supp. 412 (E.D. Ark. 1967).

¹² See *Cuevas v. Sdrales*, 344 F.2d 1019 (10th Cir. 1965).

ment stores which do not sell food to be eaten on the premises;¹³ and services such as those of doctors, dentists, skilled tradesmen, plumbers, and electricians.¹⁴

All estimates about coverage, however, are subject to the as yet unmeasured impact of *Jones* in these areas. It seems quite clear that since *Jones* contains no exceptions, Mrs. Murphy's boarding-house would be caught by its coverage. Moreover, the case contains a strong implication that comparably sweeping results may be possible whenever the question is one of freedom to contract in general, as distinguished from freedom to buy and lease real property. This topic is examined in greater detail later in this article.

As to the strictly legal situation, then, the Public Accommodations title seems to be producing relatively little difficulty. There appear to be no more than about 50 federal district court cases arising under the substantive section of the 1964 Act, which is strikingly less than the litigation in other areas, such as the hundreds of cases that have been brought in the area of education since 1964. Moreover, so far as the matter of actual compliance is concerned, the position is certainly more advanced in the realm of public accommodations than in education, employment, or housing. Although there are exceptions, the segregated railway waiting room, restroom, drinking fountain, cinema, restaurant, hotel, park, or swimming pool has become a rarity in most parts of the country including the South. As a result, the question of legal enforcement does not seem to be attracting much attention or causing much concern. The normal vehicle of enforcement appears to be the private initiative of the person discriminated against, although in cases of a pattern or practice, or of general public importance, it is possible for the Attorney General to become involved.

B. Voting Rights

The law of voting rights, like that of public accommodations, has become largely statutory, as a result of the Voting Rights Act of 1965. Under this act, the law of voting rights has also embarked upon a new phase. It is normally no longer necessary to reach back to the Constitution or to decisional law based on the Con-

¹³ See generally *Newman v. Piggie Park*, 377 F.2d 433 (1967); 110 CONG. REC. 6533 (1964) (remarks of Senator Humphrey).

¹⁴ No mention of retail stores or professional services is found in the act, and unless they can be brought within the sections covering lodging, restaurants, or places of entertainment they are not covered. Subsection 3(a) of Senate bill S. 1732 covering establishments if the goods, services, facilities, privileges, advantages, or accommodations are provided to a substantial degree to interstate travelers was not included in the final Civil Rights Act of 1964. S. REP. No. 872, 88th Cong., 2d Sess. (1964), reprinted in 2 U.S. CODE CONG. & AD. NEWS 2358 (1964).

stitution, since the statutory provisions are as comprehensive as the job requires.

The voting rights story supplies a good illustration of the point made near the outset: that the race relations law record since 1954 has consisted of about a decade of frustration with half-measures, which finally led to an assault on the problem with all-out legal weapons. Nothing could have been clearer than the illegality of denying a man on the ground of race one of the most precious rights of citizenship in a democracy—the right to vote. Yet there seemed to be no end to the ingenuity and determination of some Southern officials in destroying this right in practice, through manipulation of literacy tests, and through an endless stream of other maneuvers invented as fast as old maneuvers were run to earth by tedious case-by-case litigation.

If it were not for the monstrous nature of the evil to be eliminated, the measures adopted by the 1965 Act might seem downright draconian. The literacy test, which had been the principal vehicle for discrimination, was in effect abolished in the offending states.¹⁵ In principle, and under proper circumstances, a case could be made for the relevance of literacy tests to the right to vote; but their abolition survived the constitutional test largely because 10 years of experience with lesser measures had convinced most people that nothing short of this would eliminate the greater evil of voting discrimination.¹⁶ The same treatment was dealt out to the poll tax, which was simply abolished for all elections, state or federal.¹⁷ This action survived for the same reason. As to enforcement, the course adopted was equally forthright: if necessary, federal officials moved in, muscled aside the state officials, registered the state voters, and caused their names to be placed upon the voting lists. And if anyone attempted to interfere with the process, he found himself facing five years in prison and a 5,000 dollar fine.

As to the character of future problems in this area, there seems to be no more room for significant litigation. From now on the job is an administrative one, that of methodically enrolling Negro voters, by federal registrars if necessary; the legal armory seems to be adequate for the job.

¹⁵ The 1965 Act requires the court to suspend the use of any test, in an action by the Attorney General, if it has been used in these states to abridge the right to vote on the ground of race. Earlier, the 1964 Civil Rights Act, although not prohibiting the use of literacy tests, did establish a rebuttable presumption of literacy for purposes of voting in federal elections if the person had achieved a sixth grade education at a public school where instruction was carried on predominantly in the English language. 42 U.S.C. § 1971(c) (Supp. II. 1965-66).

¹⁶ See statement by Attorney General Katzenbach in *Hearings Before Senate Comm. on Judiciary on Voting Rights*, 89th Cong., 1st Sess., pt. 1, at 13 (1965).

¹⁷ U.S. CONST. amend. XXIV.

C. Education

Of the five main headings of race relations law, that of education is the most complex from the legal point of view. The other four have as a starting point a firm base of substantive antidiscrimination law in federal statutes: public accommodations and employment in the Act of 1964; voting rights in the Act of 1965; and fair housing in the Act of 1968. The substantive law of nondiscrimination in education, however, is still constitutional in origin, beginning with the fourteenth amendment equal protection clause as interpreted in *Brown v. Board of Education*.¹⁸ From the first *Brown* decision have flowed hundreds of subsequent cases attempting to achieve integration of previously segregated school systems on a case-by-case basis. Statutes have for the most part only been involved at the point of providing procedures for vindication of these rights, the most frequently used being section 1983 of title 42, providing civil actions to persons deprived of rights secured by the Constitution. The Civil Rights Act of 1964 apparently did not feel it necessary to enunciate fundamental substantive rights in education, presumably since the law as laid down by the Supreme Court in *Brown* and other decisions was thought adequate. However, it did spell out the details of civil actions that could be initiated by the Attorney General and, more importantly, as we shall see, in title VI of the Civil Rights Act of 1964 made available the device of withholding of federal funds from school districts that were out of compliance with the law of the land on integration.

Here again, as in the case of voting, the story of the first decade after 1954 was one of case-by-case litigation designed to work out and enforce acceptable integration plans while fighting an endless succession of devices to frustrate the law, ranging from every kind of evasion to the grossest forms of direct defiance calling for actual use of federal troops. On the purely legal side, there was a staggering amount of litigation and interpretation on the two principal issues: the substantive adequacy of particular school integration plans in actually achieving integration, and the pace and timing of the process by which the goal was to be reached.

The failure of this laborious, time-consuming, and exasperating process to achieve any significant amount of integration is notorious. By the end of the 1962-1963 school year, almost 10 years after the first *Brown* decision, less than one percent of the Negro students in states of the Old Confederacy attended schools with white students.¹⁹ The "all deliberate speed," decreed as the pace of integration by the second *Brown*²⁰ decision, turned out to be all deliberateness and no speed.

¹⁸ 347 U.S. 483 (1954).

¹⁹ U.S. COMM. ON CIVIL RIGHTS, REPORT ON SOUTHERN SCHOOL DESEGREGATION 6-8 (1967).

²⁰ 349 U.S. 294 (1955).

The situation was therefore ripe for a sharp new departure, and this did indeed come in two developments, one legislative, the other judicial. The legislative development was the passage of title VI of the Civil Rights Act of 1964, declaring flatly that no persons shall be excluded from the benefits of, or be subjected to discrimination under, any program or activity receiving federal financial assistance, and authorizing federal departments to adopt regulations to put this rule into effect, including the termination of grants in cases of noncompliance. This potent antisegregation weapon appears to have originally survived the rigors of the legislative process for two reasons. One was that the Southern anti-integration Congressmen and Senators expended most of their ammunition on the emotion-charged area of public accommodations (although, as we have seen, in retrospect it has proved to be perhaps the least controversial segment of the problem once the law was on the books). The second reason was that the amount of federal financial assistance to state and local school agencies in the 17 Southern and border states was only 176 million dollars during fiscal year 1964. But in 1966, well over one billion dollars was paid to the Southern and border states by the Office of Education.²¹ As a result of this increased financial involvement of the federal government, many Southern school districts became heavily dependent upon the federal grant, in some instances receiving over half of their annual budget from the federal government. The threat of having funds of this magnitude cut off thus became a source of tremendous leverage, beyond anything the Southern Congressmen had expected.

There have thus developed two parallel main lines of enforcement of integration: enforcement, usually by injunction, by federal courts administering plans worked out on a case-by-case basis; and the title VI withholding power, administered under regulations issued by the Department of Health, Education and Welfare and approved by the President, according to "guidelines" worked out by the department. Coordination between the two systems has been facilitated somewhat by the HEW rule that agreement to comply with a final court integration order will be accepted as compliance for title VI purposes.

The second major recent development has opened the possibility of an equally far-reaching new departure on the substantive law side. On May 27, 1968, the Supreme Court of the United States held, without dissent, in *Green v. School Board*,²² that a "freedom-of-choice" plan could not be accepted as a sufficient step in the effectuation of transition to a unitary system when the operation of the plan in actual fact had not achieved a significant amount of integration. Since it is probably true that the same factual

²¹ REPORT, *supra* note 19, at 2.

²² 391 U.S. 430 (1968).

failure of integration can be shown for practically every other freedom-of-choice plan in the South, the net result of the decision is to sweep away the freedom-of-choice device as a means of compliance with *Brown*. And since freedom-of-choice plans have been by far the most common type of plan in the South, it is evident that in the field of education, once more, we are standing on the verge of a new story, and one which promises to be perhaps more stormy than anything we have seen up until now.

What makes the current moment so portentous is the concatenation of the power to withhold upwards of a billion dollars in federal moneys with a substantive integration requirement that can be satisfied only by the actual fact of integration. For 13 years the school districts of the South have been "getting by" with plans that, on paper, might have seemed to be in compliance with the letter of the law but that in fact did not achieve integration at all. Now comes the moment of truth. Already we are beginning to read in the paper about the kind of thing that may be expected to happen: school boycotts and other strong arm methods cropping up when genuine integration plans, such as rezoning of school districts on a nonsegregated basis, are substituted for freedom of choice.

It is not surprising, then, that the Southern Congressmen, belatedly discovering the potency of title VI, counterattacked with legislation aimed at both title VI and the *Green* decision. On September 27, 1968, a Senate-House Conference Committee dealing with an appropriation bill agreed upon a rider, that, in effect, would have prohibited the use of the title VI withholding procedure in any case in which there was a plan that would satisfy the old freedom-of-choice test. In other words, the rider purported to undo *Green*, so far as title VI enforcement is concerned. Then an almost unprecedented thing happened. When the conference report got back to the House floor, the House rejected its own rider that it had battled for all night in the conference committee. The Senate version was adopted, which in effect merely prevents title VI withholding in cases of promoting racial balance where de facto segregation exists.

Although title VI has by no means had time to show what it can do in the brief period since it has been sufficiently tooled up to operate, the initial statistics on the pace of integration in the title VI era indicate a marked upsurge in actual integration. As noted, it took the first 10 years to get 1 percent of Negro students in 11 Southern states into schools with whites. In 1964 to 1965, this figure doubled to 2.25 percent, and in 1965 to 1966, the percentage more than doubled again and reached 6 percent. The achievement in absolute terms is still anything but impressive. After all, at the end of the 1967 school year, in the Southern and border states, two and one-half million Negro pupils still attended

all-Negro schools. This is 300,000 more Negroes than attended all-Negro schools in these states at the time of the first *Brown* decision.²³ The only reassuring conclusion from the percentage figures is that the advent of title VI seems to have caused the breaking of the almost complete deadlock that had persisted up to that time.

Although the spotlight until recently has been upon the elimination of dual segregated school systems deliberately imposed by law in the South, the most important, the most complex, and the most politically sensitive public education issue of the future promises to be that of so-called de facto segregation. De facto segregation is a somewhat unsatisfactory term used to describe the condition in which segregation has grown up, not by legal compulsion, but by the combination of geographical concentration of Negro residences and the typical practice of drawing school district lines on a geographical basis. (For present purposes, and for the sake of simplicity, one may leave to one side the question of gerrymandering of school districts and of other similar practices that in any proper sense should be classed as de jure segregation.) Because of the intense and increasing concentration of Negro population in the older sections of cities, de facto segregation is more extensive than most people realize. To take only a sampling of some representative Northern cities: the proportion for the school year 1965-1966 of Negro students attending school with 90 to 100 percent Negro attendance is as follows: Gary, Indiana, 90 percent; Chicago, 89 percent; Cleveland, 82 percent; Chester, Pennsylvania, 78 percent; Buffalo, New York, 77 percent; Detroit, 72 percent; Milwaukee, 72 percent. What is even more alarming is that de facto segregation is on the increase. For example, in 1950, the figure for Milwaukee was 67 percent instead of 72 percent.²⁴

It is clear by now that if anything is going to be done about de facto segregation it will not be done by the federal Congress. On the only occasions Congress has addressed itself to this topic it has emphatically declared that its legislative provisions on desegregation shall *not* be understood to include the use of measures to achieve racial balance—the term usually employed for combatting de facto segregation. Any movement on this front will have to be in the form either of state and local action or of action by federal courts applying the federal Constitution. As to the former, there have been well-publicized efforts by local school boards to achieve racial balance, often through the device of bussing students to more remote schools. Although the political and emotional reactions in some areas (but not all) have been violent, the constitutional issue is not particularly troublesome. Various constitu-

²³ REPORT, *supra* note 19, at 6-10.

²⁴ U.S. COMM. ON CIVIL RIGHTS, REPORT ON RACIAL ISOLATION IN PUBLIC SCHOOLS 4, 9 (1967).

tional attacks have been made on such plans, but the courts have quite uniformly upheld their constitutionality.²⁵

The exciting constitutional issue for the future is not whether school districts *may* compel desegregation in de facto segregation areas, but whether they *must*. Although the idea of holding de facto segregation unconstitutional might come as something of a surprise to many people, it is not difficult to state a forthright case for unconstitutionality. One way to do it is merely to say that equal protection of the laws under the fourteenth amendment means freedom from unequal educational opportunity based on race. All of the evils that *Brown* identified as flowing from de jure segregation equally flow from de facto segregation. This being so, it makes no difference that the segregation was the incidental result of housing patterns rather than the deliberate result of segregation policy. The element of state action is readily supplied, not by state action compelling segregation as such, but by state action compelling school attendance in the teeth of the known fact that the schools are racially segregated.

Another way to go at the matter would be to go behind *Brown* to *Plessy v. Ferguson*,²⁶ and insist on an honest, factual application of the "equal" part of "separate but equal." A vast body of precedent is available identifying objective factors by which the quality of predominantly Negro schools can be measured against the quality of predominantly white schools. At least 60 such factors have been pressed into service in reported cases, touching such matters as physical facilities and equipment, number and qualifications of teachers, richness of curriculum, and teachers' salaries.²⁷ It is a laborious and treacherous task to apply these standards in particular cases, but no matter how they are applied, the result is almost always the same: the predominantly Negro schools are consistently of lower quality.

In short, whether one applies *Brown* or *Plessy*, there is inequality in the constitutional sense. It only remains to get over the hurdle that in the South the segregation was deliberately imposed while in the North it was "fortuitous." Even this fortuitous designation can be challenged, if one wants to go behind it and point out, for example, that much of the segregation in housing patterns that in turn leads to segregation in school districts is itself the result of

²⁵ See *Addabbo v. Donovan*, 16 N.Y.2d 619, 209 N.E.2d 112, 261 N.Y.S.2d 68, cert. denied, 382 U.S. 905 (1965); *Olson v. Bd. of Educ.*, 250 F. Supp. 100 (E.D.N.Y. 1966); *Offermann v. Nitowski*, 248 F. Supp. 129 (W.D.N.Y. 1965); *Guida v. Bd. of Educ.*, 26 Conn. Supp. 121, 213 A.2d 843 (1965); *Katalinic v. City of Syracuse*, 44 Misc. 2d 734, 254 N.Y.S.2d 960 (Sup. Ct. 1964).

²⁶ 163 U.S. 537 (1896).

²⁷ Physical equipment in general: *Carter v. School Bd.*, 182 F.2d 531 (4th Cir. 1950); playground facilities: *Blue v. Durham Pub. School Dist.*, 95 F. Supp. 441 (M.D.N.C. 1951); gymnasium: *Davis v. County School Bd.*, 103 F. Supp. 337 (E.D. Va. 1952); football stadium: *Brown v. Ramsey*, 185 F.2d 225 (8th Cir. 1950); auditorium: *Moses v. Corning*, 104 F. Supp. 651 (D.D.C.

1952); study hall: *Butler v. Wilemon*, 86 F. Supp. 397 (N.D. Tex. 1949); cafeteria: *Carter v. School Bd.*, 182 F.2d 531 (4th Cir. 1950); infirmary, health services: *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952); science laboratory: *Freeman v. County School Bd.*, 82 F. Supp. 167 (E.D. Va. 1948); science laboratory equipment: *State ex rel. Toliver v. Bd. of Educ.*, 360 Mo. 671, 230 S.W.2d 724 (1950); shop equipment: *Carter v. School Bd.*, 182 F.2d 531 (4th Cir. 1950); library: *Sweatt v. Painter*, 339 U.S. 629 (1950); swimming pool: *Brown v. Ramsey*, 185 F.2d 225 (8th Cir. 1950); toilets, sewage: *Pitts v. Bd. of Trustees*, 84 F. Supp. 975 (E.D. Ark. 1949); drinking fountains: *Id.*; heating plant: *Freeman v. County School Bd.*, 82 F. Supp. 167 (E.D. Va. 1948); fire hazards: *Webb v. School Dist. No. 90*, 167 Kan. 395, 206 P.2d 1066 (1949); worn out or outmoded desks: *Pitts v. Bd. of Trustees*, 84 F. Supp. 975 (E.D. Ark. 1949); overcrowding: *Carr v. Corning*, 182 F.2d 14 (D.C. Cir. 1950); dangerous conditions on road to school: *Moses v. Corning*, 104 F. Supp. 651 (D.D.C. 1952); distance from residence to school: *Winborne v. Taylor*, 195 F.2d 649 (4th Cir. 1952); school outside district or state: *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); bus transportation: *Corbin v. County School Bd.*, 177 F.2d 924 (4th Cir. 1949); number of courses, course content, curriculum: *Carter v. School Bd.*, 182 F.2d 531 (4th Cir. 1950); length of school term: *Pitts v. Bd. of Trustees*, 84 F. Supp. 975 (E.D. Ark. 1949); scholarship and writing by teachers: *McKissick v. Carmichael*, 187 F.2d 949 (4th Cir.), *cert. denied*, 341 U.S. 951 (1951); number of teachers: *Claybrooke v. City of Owensboro*, 16 F. 297 (D. Ky. 1883); teachers' "load": *Carr v. Corning*, 182 F.2d 14 (D.C. Cir. 1950); teachers' tenure: *Parker v. University of Del.*, 31 Del. Ch. 381, 75 A.2d 225 (Ch. 1950); training of teachers: *Gebhart v. Belton*, 33 Del. Ch. 144, 91 A.2d 137, *cert. granted*, 344 U.S. 891 (1952); pupil grading or promotion system: *Graham v. Bd. of Educ.*, 153 Kan. 840, 114 P.2d 313 (1941); summer school: *McKissick v. Carmichael*, 187 F.2d 949 (4th Cir.), *cert. denied*, 341 U.S. 951 (1951); student association and discussion out of class: *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); compulsory nature of attendance: *Corbin v. County School Bd.*, 177 F.2d 924 (4th Cir. 1949); hours of instruction: *Richardson v. Bd. of Educ.*, 72 Kan. 629, 84 P. 538 (1906); special guidance and counseling: *Carr v. Corning*, 182 F.2d 14 (D.C. Cir. 1950); availability of public high school instruction: *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899); extra-curricular activities: *Carter v. School Bd.*, 182 F.2d 531 (4th Cir. 1950); law review: *Sweatt v. Painter*, 339 U.S. 629 (1950); athletic program: *Carter v. School Bd.*, 182 F.2d 431 (4th Cir. 1950); school social functions: *Jones v. Newlon*, 81 Colo. 25, 253 P. 386 (1927); professional fraternity: *Sweatt v. Painter*, 339 U.S. 629 (1950); national reputation of school: *Id.*; accreditation: *Carter v. School Bd.*, 182 F.2d 531 (4th Cir. 1950); opportunity for post graduate employment: *Parker v. University of Del.*, 31 Del. Ch. 381, 75 A.2d 225 (Ch. 1950); position and influence of alumni: *Sweatt v. Painter*, 339 U.S. 629 (1950); school tradition and prestige: *Id.*; associations with fellow students which will have practical post graduate value: *Id.*; teachers' salaries: *Morris v. Williams*, 149 F.2d 703 (8th Cir. 1945); value of capital assets: *Pitts v. Bd. of Trustees*, 84 F. Supp. 875 (E.D. Ark. 1949); apportionment of school funds: *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899); voting in school tax or bond election: *County Bd. of Educ. v. Bunger*, 240 Ky. 155, 41 S.W.2d 931 (1931); discriminatory school taxation: *Davenport v. Cloverport*, 72 F. 689 (D. Ky. 1896); expense of school attendance: *Witchita Falls Junior College Dist. v. Battle*, 204 F.2d 632 (5th Cir. 1953), *cert. denied*, 347 U.S. 974 (1954); availability of scholarship funds: *Sweatt v. Painter*, 339 U.S. 629 (1950); voting in school board election: *Wright v. Lyddan*, 191 Ky. 58, 229 S.W. 74 (1921); membership on school board: *Moore v. Poterfield*, 113 Okla. 234, 241 P. 346 (1925); members of supervisory staff: *Daviess County Bd. of Educ. v. Johnson*, 179 Ky. 34, 200 S.W. 313 (1918); experience of school administrators: *Sweatt v. Painter*, 339 U.S. 629 (1950).

state-supported illegal practices in the past, such as restrictive covenants on the sale of real property. However, one need not reach this far, since, as already mentioned, the element of compulsory school attendance supplies the element of state action. Alternatively, one could apply the maxim that a person is presumed to intend the natural and probable consequences of his acts, and thus reach the conclusion that what really counts is the end product of segregation, not the purity or wickedness of the intentions that might have led to it—even if one could ascertain those intentions. To this could be added the theme of *Bolling v. Sharpe*,²⁸ the case that outlawed school segregation in the District of Columbia under the fifth amendment, that it is unthinkable to have one rule in one part of the country and a different rule in the rest of the country—whether the rest of the country is the District of Columbia or the North.

If there is constitutional inequality, it is clear under existing authority that the state has an affirmative constitutional duty to eliminate that inequality. It cannot take a merely neutral posture, since every day it is compelling students to submit to this unequal treatment by force of law. At this point one should dispel the confusion caused by the widespread notion that there is only one way to do this, and that is by bussing. There are plenty of other devices at hand, including, at the minimum, the open transfer plan in which a Negro child has a definite right to transfer from an imbalanced school to a balanced school without regard to geographic zones; rezoning of school districts so as to cut across racial residential lines while retaining geographical compactness; selecting sites for new schools with a deliberate view to drawing geographically upon both white and Negro residential areas; enlarging attendance zones so as to draw upon students of both races, perhaps accompanying this with allocating different grades among different schools; and finally various combinations of these measures, perhaps combined with bussing as well.²⁹

As to the state of the law on this issue, the authorities are split on the unconstitutionality of de facto segregation. At the district court level, *Hobson v. Hansen*³⁰ in the District of Columbia found an affirmative constitutional duty to achieve racial balance, while *Moses v. Washington Parish School Board*³¹ in Louisiana held the opposite. At the court of appeals level, the fifth circuit in *United States v. Jefferson County Board of Education*³² found a violation of the constitution in de facto segregation, while in *Bell v. School*

²⁸ 347 U.S. 497 (1954).

²⁹ FISS, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965).

³⁰ 269 F. Supp. 401 (D.D.C. 1967).

³¹ 276 F. Supp. 834 (E.D. La. 1967).

³² 372 F.2d 836 (5th Cir. 1966).

City,³³ the seventh circuit held that the school board had no affirmative constitutional duty to alter de facto racially segregated attendance districts. The Supreme Court of the United States denied certiorari in both the *Jefferson County* and *School City* cases.

If the question reaches the Supreme Court of the United States while the court has anything like its present composition, it would be probable that the court would hold de facto segregation unconstitutional in any situation where there is a practical alternative that would adequately preserve educational values while reducing de facto segregation. This prediction is based not only on the trend of general doctrine enunciated by the Supreme Court, but also upon a certain amount of reading between the lines in *Green*. *Green*, ruling out freedom-of-choice plans that do not in fact eliminate segregation, is significant for the fact that it makes a pragmatic test of results the controlling factor, not some theoretical compliance. It would be consistent with this pragmatic approach to deal with de facto segregation on the basis of what has in fact happened, rather than on speculative theories about why it happened.

The distance remaining to be covered in the field of educational desegregation, in summary, is this: the complete elimination of de jure segregation in the South; the elimination of de facto segregation throughout the country, through local and state action, and through an attack on de facto segregation as violative of the Constitution; and the elimination of segregation in private schools, either through state action, or through an extension of the principle of *Jones*, a point to be discussed later. The task ahead is one of great difficulty. Not the least of the difficulties will be the administrative task of determining permissible limits of racial concentration in the infinitely varied patterns of our cities, and the devising of plans that will eliminate the evils of racial separation without simultaneously destroying too many of the traditional values of the neighborhood school and the conveniences of geographical proximity.

D. Housing

The most recent transformation among the five segments of race relations law has occurred in housing. The spring of 1968 brought us in quick succession the Fair Housing Act of 1968, and the *Jones*³⁴ case, in which the Supreme Court of the United States by a vote of seven to two held that the Civil Rights Act of 1866 bars all racial discrimination, private as well as public, in the sale or rental of property, and that this statute as so construed constitutes a valid exercise of power of Congress to enforce the thirteenth amendment.

³³ 324 F.2d 209 (7th Cir. 1963).

³⁴ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

It may well be that this decision, by infusing new vitality both into the early Reconstruction statutes and into the thirteenth amendment, will prove to be the most far-reaching race relations case since the Civil War. The specific holding of the case was that the petitioner, a Negro, was entitled to injunctive relief³⁵ against the refusal of the defendants to sell him a home in a private subdivision solely because of his race. It had been assumed by many people in the legal community that the case would be decided under the equal protection clause of the fourteenth amendment, and that the Supreme Court might possibly go so far as to find the requirement of state action under the fourteenth amendment satisfied by the kind of quasi-public activities and involvements associated with large housing developments. The Court chose rather to base its decision entirely on 42 U.S.C. section 1982, incorporating part of the 1866 Civil Rights Act, which provides that:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

The central point of the decision is that this paragraph bars *all* racial discrimination, private as well as public, in the sale or rental of property. The Supreme Court reversed the holding of the Eighth Circuit Court of Appeals, which had gone along with the view—more or less taken for granted by lawyers for a century—that section 1982 applied only to state action and did not reach private refusals to sell.

Before surveying the wide-ranging potential impact of this decision on almost all areas of racial discrimination, it would be useful to comment briefly on the merits of the decision itself. Of course, so far as the specific housing issue is concerned, the clear holding of the Supreme Court has settled the matter, and since the vote was seven to two, no amount of retroactive argument is apt to undo the result. After all, when you are a Supreme Court of the United States, you can always follow the motto of old Umpire Guthrie: "Call 'em quick and walk away." At the same time, when the inevitable question arises of expanding the principle of *Jones* into other areas where the statutory language becomes less explicit, the probability and the range of expansion may depend on the sturdiness of the main rationale supporting *Jones*.

What makes the story of *Jones* unusually poignant is that there should have been slumbering almost unnoticed for 100 years a statute and a constitutional amendment, the thirteenth, that in three or four sentences have contained most of the constitutional and

³⁵ The Court stated: "The fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy." 392 U.S. at 414 n.13.

statutory law needed to wipe out racial discrimination in the United States. But since the period of sweeping reconstruction legislation was soon followed by a reactionary period of restrictive interpretation of these constitutional and statutory innovations, imperceptibly the lawyers and legislators of the country fell into the habit of accepting these restrictive interpretations and forgetting what the statutes and constitutional amendments said in the first place.³⁶ Indeed, even among many liberal constitutional lawyers, *Jones* has caused some consternation. As progressive-minded citizens, they of course welcome the result, but as constitutional lawyers, they are disturbed to witness such a large part of what they had assumed to be accepted constitutional law abruptly turned inside out. What particularly bothers them, and what bothered the dissenting justices, Harlan and White, is the question whether the result in *Jones* corresponds to the intention of Congress in passing the Act of 1866.

This issue presents a classic problem in statutory interpretation. We begin with the first maxim of construction of documents, if the words themselves are clear, there is no occasion to dig into evidence of what might or might not have been the intention of the framers of the document. If one reads the plain words of section 1982, with one's mind swept clear of the encrustations of interpretation of the past century, it is hard to see how the English language could be more explicit. "All citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to . . . purchase . . . real and personal property." Picture a situation in which a seller has placed property on the market for sale at a particular price, with the reservation that purchase is open to whites only. Freeze the situation at that instant in time, and then ask whether black citizens in that situation have the same right to purchase real property as white citizens. Plainly they do not, if the words have any meaning at all.

Indeed, Justice Stewart, writing for the Court, pointed out that the respondents themselves seemed to concede that, if section 1982 "means what it says" it must encompass every racially motivated refusal to sell. Apparently the respondents felt that the effect of giving the words their plain meaning would be downright revolutionary—that is to say, that respondents would lose their case in defense of deliberate racially-motivated discrimination in hous-

³⁶ In the *Slaughterhouse Cases*, 83 U.S. 36 (1873), the Court significantly restricted the privileges and immunities that came within the ambit of the fourteenth amendment. In the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court, construing a 1875 statute prohibiting discrimination in places of public accommodation, ruled that Congress only had power to legislate against discriminatory state action under the implementation provision of the fourteenth amendment. And in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court found that separation by race in public transportation did not violate the equal protection clause of the fourteenth amendment.

ing. In short, respondents seem to have argued that Congress could not possibly have really meant what it actually said.

With matters in this posture, the Court could have rested its decision on the wording of the statute and let it go at that. However, considering that the misconceptions of a century were being dispelled, the court thought it advisable to go on and examine the legislative history of section 1982 to bolster the idea that the statute was really not intended to be limited to discrimination imposed by state action. Justice Stewart accordingly went on to supply seven pages of excerpts from debates preceding the passage of the 1866 Act, and other morsels of legislative history, all supporting the view that private as well as public interference with the right to deal in property without discrimination was the concern of the act. Justice Harlan countered this by amassing 13 pages of excerpts from congressional debates selected to prove the opposite. The result is, at best, inconclusive; but what Justice Harlan did not seem to realize is that when legislative history is being adduced to prove that words do not "mean what they say" it is not enough to show that the inference urged by the dissent, in Justice Harlan's words, "may equally well be drawn."

One may go a step beyond what either the majority or the dissent argued, however, and suggest that in a matter of this kind any attempt to fix the content of a 100-year-old statute by samplings of what individual congressmen said is both improper and impossible. If the concern is with the intention of a single individual as a party to a contract, it may sometimes be possible to discover from various collateral sources what that individual intended when he used certain words in the contract. But who can say what the intention of several hundred congressmen and senators was? If the language itself affords any leeway, it can probably be assumed that the conservative congressmen intended a conservative construction and the liberal congressmen intended a liberal construction. And in assembling one's evidence of congressional intent, one can make whatever selection is most effective in proving one's case. This point was made by Chief Justice Warren in the first *Brown* decision³⁷ in dealing with arguments based on the history of the fourteenth amendment. The Chief Justice said:

The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislature had in mind cannot be determined with any degree of certainty.³⁸

³⁷ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

³⁸ *Id.* at 489.

That is precisely the situation here. Even here the evidence may vary according to what the particular legislator was trying to achieve at the time. Before the thirteenth amendment was passed, its proponents gave it a narrow interpretation, and its opponents were eloquent in showing how far-reaching and inclusive its terms were. After it had been safely passed, and the question was one of interpreting it in practice, the parties reversed themselves and headed for their own goal lines, with the proponents arguing for the broadest possible construction, and the opponents now announcing a severely restrictive interpretation.

Indeed, anyone familiar with the workings of the legislative process knows that congressmen will sometimes deliberately insert into the record statements of their understanding of the meaning of a particular enactment, hoping to achieve through this manipulation of the legislative history some impact on the future operation of the statute that they perhaps would not be able to achieve directly by getting that meaning plainly enacted into the statute itself.

An even more important reason for discounting the technique of appeal to legislative history is that, even if it were possible to know what the legislators intended as the impact of the enactment on the conditions of their times, there is no way of knowing what their answers would have been if one could have asked them: "What is your intention as to the impact of this 1866 enactment upon conditions in 1968"? It is an interesting intellectual exercise to try to imagine what the post-Civil War reformers would have answered to that question. Can anyone imagine that they would have answered as follows: "If 100 years from now, there is still almost complete segregation of the races in housing in many parts of the country as a result of restrictive practices of private individuals, we do not intend that this statute creating equal rights to purchase real property shall have any application."

One must go further and add that, as social conditions change, the content of a statute may necessarily change even beyond the intention of the framers, assuming that that intention could accurately be determined. For example, in the *Civil Rights Cases*,³⁹ which in 1883 held the Civil Rights Act of 1875 unconstitutional in barring private racial discrimination in public accommodations and the like, the Court argued that to conceive of barring Negroes from restaurants as a badge or vestige of slavery was to run the slavery-abolition idea into the ground. Let us assume for the sake of argument that, in the social environment of 1883, with the country scarcely a generation away from outright slavery, and with far more conspicuous vestiges of slavery than exclusion from public accommodations still prevalent on all sides, the Court might assign a low value to the right to be free from discrimination in public accommodations. But does this mean that the same set of

³⁹ 109 U.S. 3 (1883).

values must be applied in 1968? Tremendous changes have taken place in the meantime, with worldwide revulsion against all forms of racism as the result of the excesses of fascism, with scientific knowledge dispelling old myths about racial inequality, with a sharply changed relation between white and black races on an international scale as the result of the decolonization process, and with a substantial though still far from adequate movement toward integration of races in many aspects of society. Under these new conditions, the banning of a man from a restaurant because of his race may well loom much larger as a vestige of slavery than it did in 1883. Moreover, it is not unusual in the construction of statutes, constitutions, or even treaties, especially after the passage of a considerable period of time, to find an interpretation adopted in spite of the fact that it might honestly be said that the interpretation is *not* what the original draftsmen had in mind.⁴⁰

In short, resort to the "intention of the draftsmen," especially after the passage of a considerable period of time, is a notoriously fickle breeze to sail by. The only reliable course is to accept the plain meaning of the words in the statute and apply them faithfully to the problems of today.

As to the impact of *Jones* on housing discrimination itself, the most practical question is that of the relation between *Jones* and the Civil Rights Act of 1968, the Fair Housing Act. It will be useful to catalog briefly the respects in which each is more inclusive or versatile than the other.

The majority in *Jones* had a special reason for going out of its way to emphasize the differences between the effect of *Jones* and the effect of the 1968 Fair Housing Act. The opinion began by announcing: "Whatever else it may be, 42 U.S.C. § 1982 is not a comprehensive open housing law."⁴¹ The opinion then goes on to list six or seven aspects in which section 1982 falls short of the Fair Housing Act of 1968. The Court did this because it felt the necessity, *in limine*, of demonstrating that the case before it was not rendered moot by the passage of the 1968 Act. The two dissenting

⁴⁰ In the law of workmen's compensation, for example, if one were to study the legislative history, legislative committee reports, and debates that led up to the workmen's compensation acts, one would look in vain for any evidence that workmen's compensation was to be payable for some of the kinds of heart cases (see Larson, *The "Heart Cases" in Workmen's Compensation, An Analysis and Suggested Solution*, 65 MICH. L. REV. 441 [1967]); mental illness cases (1A A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 42.20-24 [1967]); and the like that are commonly compensated today, not to mention such awards as those for a broken leg incurred in a three-legged race at a company picnic (1 A. LARSON, *id.*, § 22.23); or an award to a silk stocking salesman injured in a traffic accident on Christmas Eve, while he was on his way to act as Santa Clause in a house of ill repute—because his false eyebrows fell down over his eyes at a stoplight (*id.* at 452.39 n.47).

⁴¹ 392 U.S. at 413.

Justices took the position that the entire case should have been disposed of by declaring the writ of certiorari to have been improvidently granted on the ground that the intervening Fair Housing Act had largely occupied the field, so that there was no real public interest remaining in the decision to justify the Supreme Court's taking jurisdiction. In counteracting this argument, the majority rather overshot the mark in emphasizing the extent to which section 1982 differed from and fell short of the new Fair Housing Act.

In fact, five pages after having said that section 1982 "is not a comprehensive open housing law," the majority said: "On its face, therefore, § 1982 appears to prohibit *all* discrimination against Negroes in the sale or rental of property—discrimination by private owners as well as discrimination by public authorities."⁴² If that is not a comprehensive open housing law, it is hard to imagine what would be.

As to inclusiveness of coverage, section 1982 is more inclusive than the 1968 Act in some respects and less so in others. The 1968 Act exempts most direct sales or rentals of single family houses by owners, and rentals of units in dwellings containing less than four units and resided in by the owner.⁴³ No such exemptions apply to section 1982. Section 1982 applies to *all* real property, which would include commercial property, while the 1968 Act applies only to dwellings. On the other hand, the Act of 1968 addresses itself to discrimination on grounds of religion or national origin⁴⁴ as well as race, while section 1982 deals only with racial discrimination. The 1968 Act expressly prohibits advertising or other representations that indicate discriminatory preferences,⁴⁵ a feature not present in section 1982.

The Court pointed out that the Act of 1968 expressly deals with several ancillary subjects that are not mentioned in section 1982, but the Court made clear that no view was intimated on whether comparable ancillary provisions applicable to section 1982 might be found elsewhere in the law. Thus, unlike the Act of 1968, section 1982 does not deal specifically with discrimination in services or facilities in connection with the sale or rental of a dwelling, nor does it refer in so many words to discrimination in financing arrangements or in the provision of brokerage services. However, the Court in a footnote called attention to 42 U.S.C. Section 1981, also part of the original 1866 Civil Rights legislation, which provides that all persons in the United States "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens"⁴⁶ There is no reason why this broad pre-

⁴² *Id.* at 421.

⁴³ PUB. L. No. 90-284, § 803 2(b) (1), 82 Stat. 73 (1968).

⁴⁴ *Id.* § 804.

⁴⁵ *Id.* § 804(c).

⁴⁶ 392 U.S. at 413 n.10.

vention of discrimination in anything that can be called a contract should not reach such ancillary matters as financing arrangements, brokerage contracts, and agreements for incidental services and facilities connected with dwellings.

As to remedies the statutes are roughly similar in that the 1968 Act prescribes a number of remedies, while section 1982, in its elegant one-sentence simplicity, leaves remedies to be found in other portions of the statutes. The fact that section 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, as the Court pointed out, prevent a federal court from fashioning an effective equitable remedy, as has been held in many cases. In *Jones*, the remedy was an injunction. Nominal damages had been asked for, but were not granted, because among other things the value of the property had greatly increased during the pendency of the litigation and no actual damages could be shown. However, although section 1982 contains no express reference to damages, the Court did refer to section 1988 of title 42 which grafts the state common law onto federal civil rights statutes in cases where the federal statutes are "deficient in furnishing suitable remedies."⁴⁷ As a result, there seems to be no doubt that in an appropriate case compensatory damages would be available, since they would be necessary for effective enforcement of the statutes.

Punitive damages are available under the 1968 Act, but only to the extent of 1,000 dollars. Here again, it seems obvious that the general authority given to courts under section 1988 to "furnish suitable remedies" for violation of federal civil rights statutes by drawing upon state law would be sufficient to support punitive damages in appropriate cases. The general common law rule in tort cases is that punitive damages may be awarded when the defendant acted maliciously, oppressively, or recklessly. However, there is good authority for the view that in civil actions under the civil rights statutes the standard of punitive damages should be less stringent. The argument runs as follows: The civil rights

⁴⁷ *Id.* at 415. Section 1988 states:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this title, and of title 18 for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil and criminal case is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the same courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

42 U.S.C. § 1988 (1964).

statutes were passed to enforce the fourteenth amendment prohibition against racial discrimination; therefore they are in part punitive, and operate independent of the state tort interest, which is concerned primarily with shifting the loss and making the injured party whole.

This view has been adopted by the third circuit in *Basista v. Weir*,⁴⁸ where an action was brought under section 1983 for unlawful arrest and confinement by police officers. Section 1983 is the third of the three early civil rights provisions and provides civil actions for deprivation of rights secured by the Constitution and laws by persons acting under color of law. The jury awarded punitive damages without finding compensatory damages. The district court set aside the punitive damage award, because under Pennsylvania law punitive damages would not be given unless there were compensatory damages. The Court of Appeals for the Third Circuit reversed the district court holding, and decided that section 1983 does not require adoption of the state damage rule if that rule would frustrate federal policy.

Basista is important because it gives the federal courts flexibility in the application of state enforcement machinery under the civil rights statutes. In addition, the decision stands for the general proposition that in cases of conflicting federal and state interests in civil rights litigation, the federal interest should prevail. Finally, *Basista* illustrates a general judicial frustration with the continued existence of practices by a public authority which are inconsistent with constitutional norms.

It would be sound to argue that the federal interest against unconstitutional fourteenth amendment action by a public authority requires granting punitive damages in cases where the defendant's act was clearly in violation of the civil rights statutes regardless of his motivation or intent. A recent Supreme Court case supports this position. In *Newman v. Piggie Park Enterprises*,⁴⁹ the Supreme Court interpreted section 204(b) of the 1964 Public Accommodation Act ("the court in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee") so as not to require a showing that defendant was motivated by "bad faith." The Court reasoned that the counsel fee section of the 1964 Act was enacted not simply to penalize defenses tendered in bad faith but to encourage the victims of racial discrimination to seek judicial relief. Although *Newman* involved interpretation of a statute making specific reference to attorneys' fees, the Court's recognition of a dual policy in attorneys' fees cases—*punishment* to violators and *encouragements* to litigants—serves as a general guide to statutes like section 1981 where there is no mention of attorneys' fees. The rule emerging from *Newman* is that in the absence of special

⁴⁸ 340 F.2d 74 (3rd Cir. 1965).

⁴⁹ 390 U.S. 400 (1968).

circumstances rendering such an award unjust, litigants obtaining an injunction should be awarded full attorneys' fees.

Although punitive damages would obviously have been inappropriate in *Jones* itself, since the defendant had no particular reason to realize that the law would turn out to be what the Supreme Court finally held it to be, from now on defendants will have no such excuse, and every case of clear discrimination in the sale of property should also be a clear case for punitive damages. The amount of punitive damages should depend on what the court feels is necessary to discourage continuation of the practices by the class represented by the defendants.

Further as to remedies: the 1968 Act, unlike section 1982, expressly provides in sections 808 to 811 for federal administrative agencies to assist private parties, and in section 813 authorizes the Attorney General to initiate civil actions when he has cause to believe that there is a pattern or practice of resistance to the full enjoyment of any of the rights secured by the act. As of 1968, there was some evidence that the Attorney General was disposed to take an aggressive view of this power. For example, 304 complaints came into the Department of Housing and Urban Development from the Baton Rouge area. The complaints were completely unrelated. However, the Attorney General petitioned for an injunction on the ground of a "pattern or practice" of discrimination in the area, although there was no ground for alleging a conspiracy between the people engaged in the practice. In other words, the Attorney General interpreted the statute to mean that the mere existence of a large number of examples of discrimination, quite apart from any conspiracy or relation between them, was sufficient to satisfy the wording of the statute that refers to "any person or group of persons . . . engaged in a pattern or practice." If this principle becomes established, the remedies under the 1968 Act may prove to be more effective than had been anticipated, since the actions by the Attorney General will go a long way toward getting around the inherent difficulty of attacking the total problem of discrimination through the expensive case-by-case efforts of aggrieved individuals.

The 1968 Act also specifically authorizes the district judge to refer cases to the Community Relations Service set up under the statute for assisting in amicable settlement of such cases. But there is no reason why, under section 1982, a federal district judge could not do the same thing as a part of overall administrative policy in the federal system to reduce litigation by conference before trial, as reflected in Rule 16 of the Federal Rules of Civil Procedure.⁵⁰

⁵⁰ See also FED. R. CIV. P. 54(c):

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to *which the*

In one important respect, the elaborateness of the remedy provision of the 1968 Act in comparison with the stark simplicity of section 1982 constitutes a distinct advantage in favor of section 1982.

Under the 1968 Act, the injured party is required to exhaust state remedies before going to the federal district court, a provision that might cause considerable delay and disadvantage to the plaintiff in states whose fair housing laws are on their face substantially equivalent to the federal law. However, although there is no direct decisional authority arising under section 1982, existing authorities under the parallel provisions of section 1983 would rule out the necessity for exhaustion of state remedies under section 1982. Under section 1983, it has not been necessary to exhaust state remedies before bringing action in the federal district court since *Monroe v. Pape*.⁵¹

It might be argued that the federal policy expressed in section 810 of the 1968 Fair Housing Act requiring exhaustion of state remedies under that Act would be evidence of an intention to encourage state antidiscrimination legislation and therefore would require that an exhaustion rule be grafted onto section 1982. Basically the same argument was made and rejected in *Monroe*. There the argument was that the tenth amendment contained a strong constitutional policy against use of the federal judicial system where a state remedy was available. The court acknowledged this, but found Congress had passed the 1871 Civil Rights Act partly because the existing state remedies had not been adequate in fact, although they were in theory. Of particular significance was the 600 page report⁵² on the extent of terrorist activities that had been prepared for Congress and that concluded that failure to enforce state remedies had left Negroes and white sympathizers unprotected. *Monroe v. Pape* involved interpretation of a post-Civil War civil rights statute 90 years after the statute was passed, and the court held that Congress did not intend to incorporate an exhaustion rule in the statute.

Sections 1981 and 1982 were originally passed in 1866, but were re-enacted in 1870, one year before section 1983 was passed, the statute in issue in *Monroe v. Pape*. Congress could have intended to have separate rules for sections 1981, 1982, and 1983, but it is unlikely that such a purpose could be shown in view of the fact that all of the statutes were treated by the Abolitionist-controlled Congress as necessary to protect the newly freed slave, and all the statutes have been viewed as a family in the cases since then. Therefore to treat sections 1981, 1982, and 1983 separately for purposes of the exhaustion rule would be inconsistent with both

party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. (Emphasis added.)

⁵¹ 365 U.S. 167 (1961). See also *Damico v. California*, 389 U.S. 416 (1967).

⁵² 365 U.S. at 174.

history and logic. If there are good reasons for not requiring the injured party to exhaust state remedies for discrimination in public education, covered by section 1983, then these reasons also apply to discrimination in the right to purchase land.

To summarize the relative advantages and disadvantages of the statutes: the 1866 Act would have to be used if the case involved either a direct sale by an owner without use of a broker, or the rental of a Mrs. Murphy's boardinghouse type of accommodations, and it might also in certain circumstances be preferable when the plaintiff wanted to bypass state procedures and get directly into the federal courts. The 1968 statute would be the one to use for an attack on peripheral discrimination in the form of advertising, services, facilities, financing or brokerage contracts, although as to many of these, equivalent remedies might be available under the 1866 Act, provided the plaintiff wanted to face the prospect of carrying through appellate litigation in order to get the necessary interpretation established. The 1968 Act would also have to be resorted to if discrimination were based on religious, ethnic, or national origin grounds rather than racial grounds.

E. Employment

The new look in the employment picture is the result both of *Jones* and of the Civil Rights Act of 1964. The Civil Rights Act of 1964 prohibits racial and other discrimination in employment, and bolsters this substantive standard with specified remedies, including a special attack upon the problem at the level of the employment agency and the labor union. The main gap left by the statute results from its being limited to firms affecting commerce and having 25 or more employees. This gap is filled in many states by state fair employment legislation. It is also filled by *Jones*.

If the central operating principle of *Jones* is followed out consistently, the conclusion is inescapable that, just as section 1982 has been construed to be in effect a fair housing law, so section 1981 must be construed to be a comprehensive fair employment practices act.

Section 1981 provides that all persons in the United States "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ." Plainly an employer who refuses to make contracts of employment with Negroes on the same basis as with whites is depriving the Negro of the "same right . . . to make and enforce contracts" guaranteed by this clause.

This conclusion is reinforced by a specific reference in *Jones* to an employment case, *Hodges v. United States*,⁵³ which involved interpretation of 18 U.S.C. section 241. (This statute covers acts vio-

⁵³ 203 U.S. 1 (1906).

lating sections 1981 and 1982, and makes persons who conspire to injure, threaten, oppress or intimidate a citizen in the free exercise of rights secured by the laws of the United States subject to criminal prosecution.) In *Hodges*, a group of white persons were prosecuted under section 241 for terrorist activities against Negroes who worked in a saw mill. The Negroes argued that such activities deprived them of the right to be free from discrimination in contracting for employment, as guaranteed by section 1981. As mentioned earlier, section 1981 was originally part of the same section of the 1866 statute that included section 1982. In 1870 the statute was re-enacted and divided into two parts, one relating to property rights and the other to contract rights. The white persons in *Hodges* were found guilty of violating section 241, but the conviction was reversed by the Supreme Court on the theory that section 1981 did not prohibit private acts. The court in *Jones* made the following statement as to *Hodges*:

The conclusion of the majority in *Hodges* rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with the position taken by every member of this Court in the *Civil Rights Cases* and incompatible with the history and purpose of the Amendment itself. Insofar as *Hodges* is inconsistent with our holding today, it is hereby overruled.⁵⁴

The only possible conclusion to draw from this statement is that the Court has now injected the same vitality into section 1981 in respect to contracts generally that it did into section 1982 in respect to property transactions.

This is not to say that the extension of section 1981 to coverage of private racial discrimination in employment will be achieved without a struggle. In one respect the case may not be quite as strong as *Jones*, in that the 1866 Statutes do not specifically refer to contracts of *employment*, whereas they do contain an express provision about the right to purchase real property. It might be argued, for example, that contracts of employment result in a more personal relation than contracts for the sale of property. It is submitted that this distinction will not stand up. No such ground of distinction can be found in the statute. In any event, under *Jones* even the leasing of units in Mrs. Murphy's boardinghouse is caught by the 1866 Statute, and the situation of a landlady who takes in a single renter is surely just as personal as that of most employers hiring employees.

There has already been one federal district court decision treating section 1981 as a fair employment law. In *Dobbins v. Local 212, Electrical Workers*,⁵⁵ Judge Timothy S. Hogan invoked section 1981 as well as the Act of 1964 in ordering Cincinnati's all-white

⁵⁴ 392 U.S. at 442-43 n.78.

⁵⁵ 292 F. Supp. 413 (S.D. Ohio 1968).

local electrical workers union to admit a highly qualified Negro electrician. If this or a similar case were to go up to the Supreme Court, it seems certain that the Court would rule that section 1981 prohibits all racial discrimination related to employment.

This being so, it will be useful to make a brief comparison between the old and the new acts comparable to the one just made in the case of housing. The principal advantage of section 1981, like section 1982, would be its freedom from exceptions which, in the case of the fair employment provisions of the Act of 1964, are quite extensive. The 1964 Act, as already noted, exempts employers having less than 25 employees. It also exempts federal, state, and local governments, government corporations, and private membership clubs.⁵⁶ By contrast, section 1981 contains no exemptions whatever. The 1964 Act applies only to employers in an industry "affecting commerce,"⁵⁷ and consequently leaves open the necessity of amassing evidence to satisfy the elaborate tests that have grown up around the concept of "affecting commerce"—although in the end it is difficult to imagine how a business with 25 or more employees these days could fail to affect commerce under the highly inclusive standards that have grown up. Under section 1981 there is no comparable necessity to show that the industry affects commerce.

As in the case of housing, the new statute is more inclusive in some respects. It outlaws discrimination not only on the basis of race, but also on the basis of religion, national origin, or sex. It also deals with discriminatory practices of employment agencies, labor organizations, and training programs, and makes it an unlawful employment practice to indicate any discriminatory preference in advertising.⁵⁸ As in the case of housing also, eventually a considerable part of this same type of coverage might be found under the general meaning of "contract" under section 1981, but here again a person looking for a prompt remedy for one of these grievances would do better to proceed under the 1964 Act.

When we come to the matter of remedies and procedures, practically everything that was said earlier about remedies under section 1982 has its counterpart in section 1981, since there is no basis for distinction between these two paragraphs. The fair employment title of the 1964 Civil Rights Act, like the 1968 Fair Housing Act, requires an injured party to proceed under state laws respecting discrimination in employment before proceeding under the 1964 Act. For the reasons discussed earlier in connection with housing, it seems reasonably clear that if action were brought under section 1981 for discrimination in the right to contract for employment one could proceed directly to a federal district court

⁵⁶ 42 U.S.C. § 2000e (1964).

⁵⁷ *Id.*

⁵⁸ *Id.* § 2000e-2.

without going first to the state court. Here also, although there is no duty on a federal district court to refer cases brought under section 1981 to agencies for settlement, it would be within the discretionary equity power of the district court to do so. In this way the court would produce something resembling the procedure expressly created by the 1964 Act for preliminary efforts through the Equal Employment Opportunity Commission to eliminate unlawful employment practices by informal methods of conference, conciliation and persuasion.

One advantage of the old acts seems to be the much longer statute of limitations within which private actions may be brought. Under the 1964 Fair Employment Act, the basic statute of limitations is only 90 days,⁵⁹ and under the 1968 Fair Housing Act it is 180 days.⁶⁰ Under sections 1981 and 1982, the state statute of limitations would govern, and this might be a number of years, depending on the jurisdiction and depending on whether the action was characterized as contract or tort. The better view seems to be that the action sounds in tort. Although a contract is involved in such cases, the basis of the cause of action is the act of discrimination itself. Unlike a traditional contract action, where the alleged damage is the product of breaching a condition of the agreement between the parties themselves, action under section 1981 or 1982 does not depend on the conditions of the agreement between the parties, but arises out of a statute creating personal rights that the defendant has deliberately infringed.

For reasons discussed earlier in connection with housing, the remedies under section 1981 in the form of injunctions and damages should be at least as adequate as those spelled out in detail in the 1964 Act. Here also, as in housing, the 1964 Act has the advantage of specific authorization of civil actions initiated by the Attorney General in cases of a "pattern or practice" of employment discrimination. And it may be recalled that the Attorney General, in connection with a similar right of initiative in housing discrimination, has taken the view that this pattern or practice can be found quite apart from any conspiracy or relation between the persons engaged in the acts of discrimination.

III. FURTHER IMPLICATIONS OF JONES

A. *Public Accommodations, Retail Sales, Services, and so on*

Just as the gaps in the 1968 Fair Housing Act and the 1964 fair employment title are filled in by the unqualified coverage of sections 1981 and 1982, so the omissions and exceptions in the public accommodations title of the Civil Rights Act of 1964 may also be remedied. For example, the public accommodations title of the

⁵⁹ *Id.* § 2000e-5(d).

⁶⁰ PUB. L. No. 90-284, § 810(b), 82 Stat. 73 (1968).

1964 Act does not include Mrs. Murphy's boardinghouse; small bars not selling food; grocery stores, retail shops,⁶¹ and department stores that do not sell food to be eaten on the premises; and services such as those of doctors, dentists, skilled tradesmen, plumbers, and electricians.⁶² Moreover, there is here again the pervasive limitation to situations affecting interstate commerce or involving state action. In every one of these situations, the operative act is the making of a contract, and therefore discrimination on the ground of race in any of these transactions would violate section 1981⁶³—and this completely without regard to interstate commerce or state action.

The *Civil Rights Cases*⁶⁴ which held unconstitutional the portion of the Civil Rights Act of 1875 prohibiting racial discrimination in various public accommodations are an additional complication. In *Jones*, the Court noted this decision, and expressly refrained from passing on its present validity, observing that the question is rendered largely academic by the public accommodations title of the Civil Rights Act of 1964. As we have just seen, the part of the problem that is still not academic is perhaps more substantial than the Court's passing reference would indicate. The Court was at pains to emphasize that the entire bench in the *Civil Rights Cases* did agree upon the essential proposition of law at stake in *Jones*: that Congress did have power under the thirteenth amendment to outlaw *private* actions in order to eradicate the last vestiges and incidents of slavery. The precise ground of the decision in the *Civil Rights Cases* is that the majority of the Court thought that "it would be running the slavery argument into the ground"⁶⁵ to apply it to such private acts as deciding who shall be admitted into one's coach or car or concert or theater.

In view of the social standards and concepts of race relations in 1883, the relative seriousness of this kind of discrimination might have appeared markedly smaller in 1883 than it does today. To most people nowadays, it does not in the least sound strange to

⁶¹ See generally *Newman v. Piggie Park*, 377 F.2d 433 (1967); 110 CONG. REC. 6533 (1964) (remarks of Senator Humphrey).

⁶² See note 14 *supra*.

⁶³ Negro citizens North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to "go and come at pleasure" and to "buy and sell when they please"—would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep. *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 443 (1968) (Stewart, J.).

⁶⁴ 109 U.S. 3 (1883).

⁶⁵ *Id.* at 24.

say that the deliberate exclusion of Negroes from hotels, restaurants, theaters, parks, and public conveniences is a form of maintaining the badges and vestiges of slavery.

The relative advantages and disadvantages of section 1981 and the public accommodations title of the Act of 1964 run along roughly similar lines to those discussed in connection with employment. Coverage of kinds of establishments under section 1981 is more complete, but kinds of discrimination under the 1964 Act include acts based on religion and national origin as well as on race. As to exhaustion of state remedies, at one point the public accommodations title states that exhaustion of other remedies is not necessary,⁶⁶ but at another point there is a requirement that 30 days' notice of an action must be given to the appropriate state or local authorities, and a provision that during this period the federal court may stay proceedings.⁶⁷ No such provision would apply to actions brought under section 1981.

As a practical matter, because of the sharp diminution in the amount of serious discrimination in public accommodations, the availability of the alternative remedies of section 1981 will probably not have the importance that it has in connection with housing and employment. There are, however, two remaining areas of possible coverage by section 1981 that are of unusual interest in principle, since they are not specifically covered by recent federal legislation and decisions. These are the fields of private education and or private clubs and organizations.

B. Private Education

The question whether racial discrimination by private schools and colleges is barred by the equal protection clause of the fourteenth amendment is still unsettled. Dicta can be found expressing the view that there can be no such thing as private education, in view of the place occupied by education in national life;⁶⁸ other cases can be found insisting upon a substantial amount of governmental involvement in the form of financial aid or administrative participation.⁶⁹ In view of the widespread practice of acceptance

⁶⁶ 42 U.S.C. § 2000a-6 (1964).

⁶⁷ *Id.* § 2000a-3(c).

⁶⁸ See *Guillory v. Administrators of Tulane Univ.*, 203 F. Supp. 855, 858-59 (E.D. La. 1962). See also Comment, *The Constitutional Rights of College Students*, 42 TEX. L. REV. 344 (1964); Note, *Desegregation of Private Schools: Pursuit and Challenge*, 21 N.Y.U. INTRA. L. REV. 149 (1966).

⁶⁹ In *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964), the Court of Appeals for the Fourth Circuit held that participation in the Hill-Burton program made hospitals subject to the fourteenth amendment. Private schools receive much private aid, e.g., the National School Lunch Act, 60 Stat. 233 (1946), as amended, 42 U.S.C. § 1759 (1964); the National Defense Education Act, 72 Stat. §§ 1581-90 (1958), 20 U.S.C. §§ 401-45 (1964); and the recent Higher Education Facilities Act of 1963, 77 Stat. 366 (1963), 20 U.S.C. § 714 (1964).

of governmental financial aid by educational institutions, along with the possibility that even tax exemption might be considered such aid, it might be difficult to find many schools or colleges that are purely private, if the broadest concepts of state action are accepted. In any event, this entire controversy about state action in private education can be over-leapt in one bound by invoking section 1981 instead of the fourteenth amendment. A Negro who applies for admission to a private school or college is, in effect, asking to make a contract with that institution to purchase its educational services. If a private school refuses to make the contract on the ground of race, this is a clear case of infringing the Negro's right to make and enforce contracts on equal terms with white citizens. Here again, an argument might be raised on the personal nature of the relationship involved, but surely even if the argument is relevant, which it is not, the relation involved in an educational institution is no more intimate than that involved in Mrs. Murphy's boardinghouse or in private employment in a small firm.

C. *Private Clubs and Organizations*

Private clubs and similar establishments not in fact open to the public are specifically excluded from the public accommodations title of the Civil Rights Acts of 1964,⁷⁰ and various kinds of private associations not falling within the description of public accommodations would also be without coverage under any of the new federal legislation. However, if we carry the contracts concept of section 1981 to its outer limits, the 1866 Act reaches many areas of discrimination in private clubs and associations. Section 1981 could properly be applied to any such club or association when it can be said that the essence of the arrangement is that the club or association supplies certain services or facilities in exchange for the payment of dues. For example, postulate the case of a private association whose sole reason for existence is to put on a series of chamber music concerts. For a fee of 10 dollars a year, the members receive the right to attend four concerts. If that is all there is to the arrangement, the heart of the matter is merely the making of a contract to obtain something of value in exchange for a money payment. Racial discrimination in such a situation would accordingly be a violation of section 1981.

At the other extreme, suppose that a small group of private individuals band together in an informal bird-watching society. They have annual dues of one dollar, merely to defray a few incidental expenses such as mailing notices. In no sense, however, is something of value furnished for the dues payment. One senses that the process of expansion of the section's coverage will probably stop somewhere short of this point.

⁷⁰ 42 U.S.C. § 2000a(e) (1964).

The most sensitive and important type of proving ground between these extremes would be exemplified by the country club. Tested by the standards suggested, a country club falls within the category of organizations supplying valuable services, such as the availability of a golf course, dining rooms, and club rooms, for the payment of a sum of money.

This precipitates the inevitable question: In this process of expansion of the scope of section 1981, where is the "stopper"—what is the countervailing principle that will set boundaries on this coverage short of extension to every aspect of human relations?

As so often in constitutional law, here we have a head-on collision of competing fundamental human values. On the one hand is the value of freedom from discrimination on grounds of race. On the other is a complex of values, associated with the first amendment and perhaps the ninth, including freedom of association, right of privacy, and the right to choose one's companions and associates, especially if the relation is essentially social, private, and personal rather than economic, public, or corporate.

The crucial question is: How high a value is the Court apt to set up on the first when the showdown comes?

Startling as it might sound, it may be suggested that the decisions of the Supreme Court from *Brown* to *Green* to *Jones* show that a new hierarchy of values has been established; that at the peak of this pyramid today is concern over the elimination of all forms of racial discrimination, private as well as public, and that this concern takes precedence even over competing values embodied in the first 10 amendments. In view of the enormity of the accumulated injustice to be undone, and the primacy of restoring racial justice and harmony as a domestic issue, is it surprising that this should be?

The "stopper," therefore, should not be looked for so much in any countervailing constitutional right as in the inherent limitations of the thirteenth amendment itself. This brings us back to the original test used in this connection: Is the discrimination in question serious enough to be described as one of the badges or incidents or vestiges of slavery? The standard to be applied would be much more exacting than it was when the *Civil Rights Cases* were decided. In today's social climate, it would not be "running the argument into the ground" to say that methodical exclusion of Negroes from country clubs on the ground of race is a vestige of slavery.

D. General Constitutional Implications

So far, this analysis has been concerned with the impact of *Jones* on the application of the 1866 legislation to familiar categories of discrimination. The other half of the case's impact is on constitu-

tional law. This could take two main forms. The first would be the supplying of a much broader basis for additional federal legislation. The second would be the possible self-executing effects of the thirteenth amendment itself, quite apart from any present or future legislation.

The first impact is the least controversial. The key sentence of the *Jones* opinion on this matter is as follows:

Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.⁷¹

One certainly gets the impression from the opinion as a whole that, under the rubric of abolishing the badges and incidents of slavery, Congress would be within its constitutional rights in passing legislation striking down almost any conceivable kind of action, public or private, characterized by racial discrimination. Such legislation could go not only beyond the legislation of the 1960's, but also beyond the legislation of the 1860's, even given the broad interpretation that has been suggested. Congress could prohibit all kinds of racial discrimination apart from any element of making contracts, purchasing property, and the like. It could declare that barring Negroes from private clubs and associations is a badge and incident of slavery, even if this conduct were not caught under the contract argument.

Congress could also now greatly simplify the Civil Rights Act of 1964 by removing all reference to the necessity for the affecting of interstate commerce or the presence of state action. This could at one stroke eliminate a great deal of burdensome quibbling, and permit the lines of coverage to be drawn on much more forthright and objective grounds.

There remains the question of the extent to which the provisions of the thirteenth amendment, unaided by legislation, might have direct operative effect in the same way as those of the fourteenth amendment have. The *Jones* decision sets this question to one side:

"By its own unaided force and effect," the Thirteenth Amendment "abolished slavery and established universal freedom." *Civil Rights Cases* 109 U.S. 3, 20. Whether or not the Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more.⁷²

The question whether the abolition of slavery by the unaided

⁷¹ 392 U.S. at 440. This statement is more or less a paraphrase of a similar statement in the *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

⁷² 392 U.S. at 439.

amendment prohibits of itself certain kinds of discriminatory conduct is not the same question as whether, once that same conduct has been prohibited by congressional legislation, the amendment would form an adequate constitutional base for the legislation. There seems to have grown up a double standard on this point. The fact that Congress has addressed itself to the question and decided that certain conduct is to be prohibited under the authority of the particular amendment establishes a presumption with the Court that the legislation is authorized by the amendment, since Congress is given explicit authority to pass legislation implementing the amendment. It has recently been established that Congress can use its legislative power under the implementing provision of the fourteenth amendment to make conduct illegal even though it would not be unconstitutional under the amendment as a self-executing provision. This was not always thought to be the case. But two recent cases support this proposition.⁷³ Both cases involve criminal prosecution under statutes which are criminal counterparts to sections 1981, 1982, and 1983. Although there are different views expressed by the Justices in the opinions, a careful count of judicial heads shows that a majority of the Justices found that Congress had the power to reach private acts under the fourteenth amendment, although exclusively private acts are not unconstitutional under the fourteenth amendment considered as a self-executing provision.

Realistically, if the 1866 legislation had not been passed, it seems unlikely that the Supreme Court would have based *Jones* on the unaided provisions of the thirteenth amendment, even though this would have been theoretically possible, on the argument that the abolition of slavery in and of itself makes illegal the entire range of discriminatory badges and incidents that Congress had the constitutional power to abolish if it chose to.

Now that *Jones* has broken the ice, however, it is by no means inconceivable that at least some of the more unmistakable badges and incidents of slavery might be brought directly under the guns of the thirteenth amendment. Assume, for example, that membership in a particular Southern state bar association could not be brought under the concept of contract, nor under the state action doctrine. The fact remains that barring of Negroes from a state bar association meets all the characteristics of what the Court describes as vestiges of slavery. Barring a man from a professional association on the ground of race certainly partakes of the same quality of insult, humiliation, and degradation to second class status that the Court's concept of slavery carried with it. A strong argument could therefore be made that such discrimination was illegal purely by the force of the thirteenth amendment itself.

⁷³ United States v. Price, 383 U.S. 787 (1966); United States v. Guest, 383 U.S. 745 (1966).

E. Constitutional Implications for Discrimination in Education

Three weeks before the *Jones* decision, the Supreme Court handed down the *Green* decision,⁷⁴ that, as noted earlier, promises to render illegal almost all of the freedom of choice integration plans that have been attempted as compliance with *Brown v. Board of Education*.

The interplay between this decision and *Jones* could produce some interesting developments in the story of the desegregation of public educational institutions. It is interesting to conjecture whether if *Jones* had been handed down in its present form before 1954 the Supreme Court might have invoked the thirteenth amendment in *Brown*. If it had, some of the limitations and artificialities of *Brown* and of the ensuing history of attempts to translate it into specific plans might have been avoided. *Brown*, so to speak, accepted the challenge of *Plessy v. Ferguson*,⁷⁵ on its own terms, fought the battle on *Plessy's* ground rules, and brought *Plessy* down to defeat by introducing a new element into the concept of equality—the idea that separate schools are inherently unequal by the fact of separateness.

In this connection it is interesting that the standard of what constitutes satisfactory integration of public accommodations is intrinsically different from the standard of what constitutes satisfactory integration in schools. A restaurant keeper can bring himself into compliance with the Civil Rights Act of 1964 by simply throwing open his doors to people of all races in a bona fide way. In other words, a freedom of choice plan is satisfactory compliance with the public accommodations integration law. If, as a matter of freedom of choice, no Negro ever chooses to eat in his restaurant, the restaurant owner is not considered to have violated the statute—always assuming, of course, that his conduct is genuine and that there are no hidden or subtle practices designed to discourage patronage by Negroes. No court checks up on the statistics showing how many Negroes have actually eaten in the restaurant during the year. Even if they did, and found that the number was zero, it still would not put the restaurant keeper out of compliance so long as he could show that he gave Negroes full freedom of choice to use his restaurant.

The same is true of housing. If a housing developer throws open his houses and apartments to people of all races without discrimination, in not merely technical but genuine form, and if for various reasons only white people choose to live in his development, he is not guilty of segregation practices. Here again, no field studies or sociological statistics on actual degree of integration would change this result.

⁷⁴ *Green v. School Bd.*, 391 U.S. 430 (1968).

⁷⁵ 163 U.S. 537 (1896).

In the case of public education, however, the offering of freedom of choice is no longer enough. The standard to be applied is a factual one, and depends heavily on the degree to which integration in public schools has been achieved in practice under the plan. Of course, the question is complicated by the fact that it is almost impossible to judge whether freedom of choice in the communities under question is bona fide in the sense here assumed. There are all kinds of pressures that in many instances make this freedom of choice a fiction.

Most people would probably react to this distinction by saying that the standard *should* be different and that integration in education should be tested by results. Nevertheless, for present purposes, it is useful to probe a little more deeply into why this distinction should have emerged. In the process, we are inevitably carried back to what may have been the inherent flaw in the *Brown* approach, when it limited itself to undoing *Plessy*, instead of putting its decision on broader and more affirmative basis.

The reason that discrimination in public accommodations is harmful must be the humiliating and degrading psychological effect of being barred from certain places on the ground of race. For this kind of damage to occur, it is not necessary to have it happen repeatedly over a sustained period to any particular individual. The damage is done when the Negro knows from one experience that he will not be allowed to enter certain public accommodations. It is quite possible that, as a matter of choice, he does not want to eat in a previously all-white restaurant, but he definitely wants to know that he could if he wanted. Having been assured of this, he will probably make his decisions on where to eat on quite different considerations of convenience, quality, price, and all the other familiar grounds. If there is only one good hotel or restaurant in town, the result of freedom of choice may be a considerable increase of Negro utilization of the particular facility. But if there is a wide range of choices, many such accommodations may never be integrated on any substantial scale, and no one will object on the ground of illegality. In the case of education, however, tested by the standards now to be applied under *Green* for compliance with *Brown*, the underlying basis for the decision must be quite different. The basis must be that the continuance of segregation in education is in fact harmful. In other words, the damage to be guarded against is not the psychological insult of being barred from a particular place, here a school, but that the Negro child is being deprived of a good education, a right all children have in this country.

The point here is that there is a certain lack of continuity between the technical rationale of the *Brown* decision and the standards now being developed to test the adequacy of plans to carry out the decision. There is an interesting although not perfect

parallel between the concept of psychological damage that lies at the heart of the illegality of discrimination in public accommodations, and the idea of *Brown* that it is the element of separation that creates the harm in public education, since this damages the *psyche* of the Negro child. If it were only a matter of damage to the *psyche* of the child, would not that damage be adequately undone if, under a freedom of choice plan, the child knew that he could attend a white school if he wanted? Thus, if the *Brown* decision had been squarely placed on the ground that segregated education had demonstrably over a long period resulted in inferior education for Negroes, and that this in itself was an unconstitutional deprivation, the groundwork would be more secure for testing compliance by statistical and other evidence of the quantitative amount of integration.

It is at this point that one might raise the question whether the thirteenth amendment could not have supplied an additional basis for the school segregation decision. Certainly one of the most glaring vestiges of slavery over the years has been segregation in education. If there is any area of segregation in American life where the unaided thirteenth amendment might be operative to forbid racial discrimination, it would be education. If the thirteenth amendment were, even in part, the ground for the school segregation decisions, it would be clear beyond dispute that the mere offering of freedom of choice would not satisfy the requirements of the Constitution. The entire pattern and structure of inferior education of Negroes is intimately associated with the institution of slavery. One does not abolish slavery, with all its badges and incidents, and establish freedom for the Negro merely by taking a neutral attitude and saying to the former slaves that they can have freedom of choice to try to pull themselves out of the morass of inferior education that has been submerging them for more than a century. Plainly, under the thirteenth amendment concept, particularly under the concept that slavery includes the degrading vestiges of the period of slavery, there is a duty—an affirmative duty—to bring the standard of education of Negro children up to the standards of the community in general. Until this has been done, it cannot be said under the thirteenth amendment that slavery (including its vestiges) no longer exists.

If this line of reasoning were to achieve acceptance by the Supreme Court, the principal effect would be that, in future decisions passing upon the adequacy of particular integration plans, the Court might gradually begin to infuse the thirteenth amendment concept into the school integration bloodstream.

The Court at the time of *Brown* came closer to doing the equivalent of this than has been realized. In *Bolling v. Sharpe*,⁷⁶ the

⁷⁶ 347 U.S. 497 (1954).

Court had to find a different constitutional basis for outlawing school segregation in the District of Columbia, since the fourteenth amendment, relied on in *Brown*, applies only to the states. The Court therefore invoked the fifth amendment, and held that school segregation deprived the petitioners of liberty without due process of law. The Court said that liberty "is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue. . . ."⁷⁷

Liberty and slavery are the two opposite sides of the same coin. If school segregation deprives one of liberty, obviously by the same token it constitutes a badge or incident of slavery. Although this was not the original basis for *Brown*, there is no reason why it cannot gradually be worked into the picture in the process of everyday application of *Brown* to school integration plans. The Court could properly point out that *Jones* throws new light on the vitality and scope of the thirteenth amendment, and, that if *Jones* had preceded *Brown*, it might very well have been a factor in the decision.

To put the matter another way: There is no reason why, if there are two possible constitutional grounds for a decision, and if only one of them was originally announced, the other should not be superimposed later if in fact it is valid, and if it is of assistance in giving proper scope and application to the decision itself. The constitutional ground is no less valid merely because it was not announced or perhaps even thought of at the time. If it is valid it is valid. As to its not being announced in the first place, one can only say: "Better late than never." The practical importance of this suggestion is that the infusion of thirteenth amendment concepts into the school integration process would quickly and firmly correct some of the weaknesses, inherent in *Brown*, that have permitted the actual pace of integration to lag so far behind what the decisions seemed to promise.

The central deficiency of the *Brown* cases was that, being tied to the fourteenth amendment, they stressed the element of state action, and the especially detrimental effect on students when segregation is imposed under sanction of the law. From this it was easy to draw the corollary that if a state lifted this sanction of law, eliminated the offensive state action, and gave everyone freedom to choose schools, its task would be done.

One must reconstruct the mood and expectations of 1954 and recall that almost everyone, including counsel for the petitioners, assumed that if the state-compelled barriers were torn down there would immediately follow a flood of integration. No one foresaw that a number of factors including long-standing habits, community patterns, intangible pressures, fears of Negro teachers for their

⁷⁷ *Id.* at 499.

jobs, and perhaps just inertia would make the mere removal of barriers a totally inadequate solution.

Since the whole desegregation process, implemented by hundreds of individual court-supervised plans, got started on this remove-the-barrier theme, it has taken 13 years to replace this theme with the current test, fully realized in *Green*. The new requirement is not satisfied if a state merely lifts its discriminatory compulsions. Under the new standard, the state has an affirmative duty to abolish the dual system entirely, so that there are no longer black schools and white schools—just schools.

It is a matter of who has the burden. Having through force of law hammered the school system into a rigid segregated dual pattern, the state cannot now merely stop hammering and say to the Negro population, "All right, *you* go ahead and undo what we have done. *You* remodel this school system into an integrated unitary one. No one is stopping you." The full burden of achieving this change is now clearly placed on the school districts.

An additional advantage of the thirteenth amendment is that it supplies a unified constitutional force with which to attack all segregation, de jure and de facto, North and South. In a sense, a Southern school district with a freedom of choice plan, and with persisting segregation, can be said to have de facto segregation. The only distinction now between this situation and a Northern de facto segregation situation is that the Southern condition was originally produced in part by deliberate compulsion of law. But once reliance is placed on the thirteenth amendment, this distinction loses its force, since state action has nothing to do with the matter, and since school segregation is as much a badge and vestige of slavery in the North as in the South.

Over all this new picture of the potentialities of *Jones* there hangs one small cloud. That is the question whether Congress might not decide to repeal the 1866 legislation on which *Jones* was based. Some rumblings of this kind of counterattack have already been heard, the usual rationale being that the old statutes are superfluous and inappropriate since we now have more specific and modern legislation covering the same ground. As this analysis has been at some pains to delineate, the early statutes are not superfluous at all, since they supplement the recent legislation in a number of important ways. Moreover, it seems unthinkable that Congress could bring itself to turn the clock back and admit that in 1969 we are not willing to go as far in the guaranteeing of elementary human rights as we were in 1866.⁷⁸

⁷⁸ My worries on this score were largely lifted when I listened to a discussion of this possibility at the recent American Bar Association convention by John C. Williamson, the Director of the National Association of Real Estate Boards. Mr. Williamson pointed out that the 1968 Fair Housing Act caused alarm among real estate brokers because of its provision

IV. WHAT CAN LAW DO ABOUT RACE RELATIONS?

When the question is approached with generalizations, one of two extremes may be the result. The one extreme is to proclaim, as some of the more militant exponents of black power do, that legal gains in the form of greatly liberalized statutes and decisions mean nothing. The hard-won gains produced as the result of years of patient litigation by the NAACP Legal Defense Fund, the three far-reaching Federal Civil Rights enactments of 1964, 1965, and 1968, and the ground-breaking Supreme Court decisions of *Jones* and *Green* in the spring of 1968 are all brushed aside as worthless.

As so often happens in respect to extremist views, the same low opinion of the role of law has often, and indeed much earlier, been voiced by traditionalists. In their case it takes the form of the cliché that changes in race relations cannot be brought about by laws but only by changes in the "hearts and minds of men." This is a more damaging concept than if it were mere rhetoric. At one point in the story of race relations law, it played an important part in steering race relations law into its most tragic period. In 1896, the Supreme Court decided *Plessy v. Ferguson*⁷⁹ and found that separation by race in public transportation did not violate the equal protection clause of the fourteenth amendment. This in turn established the separate but equal rule, which for almost 60 years formed the basis for compulsory school segregation in the South. So far as legal precedent was concerned, the Court had ample authority to support a ruling in favor of the Negro complainant. The legislative history was not particularly compelling on either side of the issue, and there was sufficient language in earlier cases, notably *Yick Wo v. Hopkins*,⁸⁰ the *Slaughterhouse Cases*,⁸¹ and *Strauder v. West Virginia*,⁸² to settle the case in favor

that the antidiscrimination standards of the act do not apply when the owner of a residence sells it directly without the aid of a broker. The brokers were afraid that a whole new pattern of real estate marketing, bypassing the brokers, would evolve. The real estate brokers were therefore relieved and cheered by *Jones v. Mayer*, because the blanket fair housing effect of *Jones* did not put a premium on voiding sales through brokers. The paradoxical emotional position of the real estate agents reacting to *Jones* was, said Mr. Williamson, something like Balzac's description of a "lady who was violently inflamed and inflexibly virtuous." Mr. Williamson strongly intimated that if Congress tried to undo *Jones* by repealing the 1866 Act, the real estate agents would be found lobbying against any such repeal.

Anyone who is anxious to prevent retrenchment in race relations law through the repeal of the 1866 legislation can, therefore, now sleep more peacefully, knowing that the National Association of Real Estate Boards is on his side.

⁷⁹ 163 U.S. 537 (1896).

⁸⁰ 118 U.S. 356 (1886).

⁸¹ 83 U.S. 36, 71-72 (1873).

⁸² 100 U.S. 303 (1880).

of the plaintiff. However, the majority in *Plessy* suggested that it was the problem of control of conduct by law that was decisive:

The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals Legislation is powerless to eradicate racial instincts or to abolish distinctions based on physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.⁸³

There is, of course, in this quotation a glaring contradiction. The Court says that the way to reconcile racial differences is to let natural social interaction operate. But the law whose vitality was in question made this impossible. "Natural affinities," "mutual appreciation," and "voluntary consent" to commingle could not be expressed even where they existed, since these contacts were forbidden by law.

At the other extreme from the view that law can do nothing about behavior would be the view that, once the appropriate statutes and decisions have been placed upon the books outlawing most forms of discrimination, the job is essentially done and the advocates of nondiscrimination can relax. It is doubtful that one could find anywhere a pure specimen of this view of taking the word for the deed, but it will serve at least as a theoretical concept marking the other end of the spectrum.

The main concern of this analysis will be to try to get to the bottom of this fundamental disagreement about the relation of law to behavior in the area of race relations. This is a matter of profound practical importance, since it bears heavily on the question: Where should those who want to see race relations improved concentrate their efforts?

It hardly needs to be said in advance that the answer is not going to turn out to be something that can be caught up in a single generalization, whether at one extreme or the other, or even at some point in between. The reason is that the effectiveness of the application of legal compulsions in a given situation will depend on several things, including how strong and ingrained and widespread the opposition is to the ordained line of conduct, and to what extent the opposition to the legal norm is the result of emotion, ingrained bias, economic considerations, fear of loss of political power, and other factors. It will also depend on the character of the sanctions or incentives adopted to secure compliance with the law.

⁸³ 163 U.S. at 551.

In order to expose the inadequacy of any across-the-board generalization, it will be helpful, at the outset, to sketch out a broad three-part pattern of the relation of law to behavior, reflecting three levels of intensity of popular opposition to the conduct required by the law because of the current state of the hearts and minds of the people affected. Beginning with the mildest degree of resistance, the first category may be identified as a situation in which one finds general public acceptance in principle of the required conduct, such as integration, although it may be somewhat grudging, and although there may be substantial minority opposition. Nevertheless, the situation is such that, apart from some nudge by law, the community would not adopt that line of conduct. This would include, for example, *de facto* educational segregation in the North, which exists in spite of the fact that the people involved would probably not think of themselves as having any particular race prejudice. In this combination, law can be definitely effective to push conduct over the line into the new required pattern. Specifically, it can bring about bussing, redistricting, and other efforts to achieve racial balance in schools, overcoming both the moderate resistance of the majority and the more vigorous resistance of the minority.

The intermediate category would be one in which the people affected are predominantly opposed to the line of conduct required, due to habit, history, or custom, but are in a state of latent readiness to accept a change, due to overall changes in mores and some sense of conscience, guilt, or anachronism, and perhaps also due to other motives that might be ethical, ideological, or religious. The most familiar illustration of this category is integration of public accommodations, including motels, restaurants, places of recreation, cinemas, and transportation systems. In this category, the operation of law to change actual conduct in the South has been relatively successful.

The fact that this category is relatively amenable to change of conduct by law may be obscured in advance, because the amount of anticipatory protest to this category of integration is of an intensity out of all proportion to the ease of eventual compliance. Once the law has been changed, except for a few rear guard actions by diehards, the degree of compliance becomes surprisingly great in a comparatively short time. One can conclude that the hearts and minds of the people involved, whether they knew it or not, had changed to the point where they could accept this final impetus applied by law. They were, so to speak, on the five yard line, not in midfield as they thought. The same people who felt that they could not bear the prospect of having Negroes at the same lunch counter, or in the same motel or cinema, quickly discovered that it was really not so bad after all.

It is this category that the perceptive observation of Eric Seva-

reid would fit most aptly. "New law, enforced, compels new behavior. Behavior repeated daily comes to seem normal, and attitudes change. Illusions tend to vanish."⁸⁴

At the extreme end of popular opposition to law, we may note a familiar example outside of the law of race relations, that of prohibition, which is always the prime exhibit of those who say law cannot change conduct. This category may be described as one in which opposition to the required conduct is widespread, strongly felt, and deeply rooted in personal habits and convictions. But the important thing to note is that these habits and convictions, unlike those of race prejudice, are not of an anachronistic character, that they are not out of line with the standards of modern civilized society as a whole, and therefore they are not apt to evolve or change substantially. In this type of situation the relation between law and behavior is, first, that there will be widespread disobedience, impossibility of enforcement, and a breakdown of the legal attempt on a wide scale. Second, there will be eventual repeal, and the law will have to acknowledge defeat. There is no branch of race relations law that falls into this category, and therefore, there is no justification for cynical or despairing conclusions invoking the analogy of the collapse of prohibition.

With the preliminary three-way breakdown before us, we are now ready to arrive at a more precise answer to the question of the relation of law to conduct. Let us go down this same checklist of three types of situations and ask: What would the behavior have been in the *absence* of law forbidding the old line of conduct? The answer is that, in all three categories people would have gone on behaving precisely in accordance with their own personal inclinations. This is plain as to the third category, where if people wanted to drink they would drink, and if they wanted to abstain they would abstain. It is equally true of the second category, and it is true even of the first category. That is, in the absence of some kind of legal stimulus, there would probably be no change in most communities in a situation like *de facto* educational segregation, even when there is no strong element of racial prejudice at work. When a city has fallen into a comfortable pattern of largely segregated residential neighborhoods, coinciding with largely segregated schools, as a result not of legally imposed segregation, but of the interplay of such factors as income, employment, housing, and racial gregariousness, that pattern will probably persist by sheer force of inertia until some kind of legal force is applied to make it change.

By this review, we can see that the generalization brushing aside law as having no impact on actual behavior is accurate only as to the one extreme: category three, where public attitudes are

⁸⁴ LOOK, July 9, 1968, at 28.

predominant, irrevocably and not unreasonably opposed to the required conduct. As to the other two categories, which more accurately represent the problem of race relations, there is no escaping the conclusion that the law as such plays a significant part. Indeed, in the first and second categories, for which the illustrations of de facto segregation and public accommodations have been used, it would not be overshooting the mark to say that the law is often the decisive factor that brings about the desired change. Other factors may have operated over the years on the hearts and minds of men to make the situation ripe for change—religious teachings, effects of travel and mass media, the general pervasive effect of changes in mores of the larger communities surrounding the community affected, the pressures of economic development and industrial modernization, and the large scale intermingling of people from different parts of the country with different views, such as university professors, technicians, businessmen, and students. Yet, even with all these forces operating and preparing the ground for change, the change itself might never have happened but for the final push provided by law. It is in this type of situation, then, that the law makes the most impressive showing.

A more detailed analysis may now be undertaken, introducing various factors in addition to the state of hearts and minds, addressed to the specific question: What are the reasons for the observed variations in degree of difficulty of changing behavior by law?

The President's so-called "Riot Commission" caused something of a sensation by stating boldly that the ultimate source of the trouble it was investigating was white racism. It is helpful for our purposes to go a step further and ask what racism really is in this context. We will soon discover that it is no single force or motive. It combines with various other interests and variables to produce at least five situations that in turn entail varying degrees of difficulty in the application of law to conduct.

The first would be the kind of situation in which personal racism is the almost exclusive force at work. As an example, one might cite various laws, such as miscegenation laws, in which the average person probably does not have in his own lifetime any direct stake. There is nothing here bearing on property value, on the quality of education of his children, or on the contacts of his daily life. What is involved is the emotional side of racism, exaggerated to its highest pitch, which usually happens when relations between the sexes are involved. It might well be, then, that to the man whose motivations are almost exclusively racist, the last statute on the books that he would want to part with would be the miscegenation statute, in spite of the fact that its real impact on his life would probably be the least of all.

The second variable that can readily be identified is the differ-

ence between long range and short range contacts between races. Here again we begin with racism as the primary operating factor, but we note that its effect may be different according to the purely *quantitative* difference in degree of exposure. It is this factor that helps to explain why the degree of compliance with desegregation rules has been low in education and housing as compared with public accommodations. To a person with race prejudices, there is still a difference between the prospect of having a Negro in some part of a moving picture theater with him for a couple of hours, and of having Negroes in the same school with his own children all day, year after year, just as there is a difference between having a Negro somewhere in the same hotel where he is staying as a transient, and having a Negro living permanently in the same block.

The third combination begins to introduce elements other than sheer racial feelings. The mildest additional element of self-interest would be that of mere inconvenience. There are many people in the North who are not only moderate in racial matters but consider themselves liberal. Yet when they are confronted with the necessity of having their children bussed to different schools in remote parts of town instead of being able to run across the street to the neighborhood school, they find their racial liberalism wearing a bit thin. They have not only favored but even perhaps actively worked for desegregation in practically every other area and form, but this of course caused them no direct personal inconvenience. Now the inconvenience is real. It may also be accompanied by the additional factor that the more distant school is also a poorer school. In any event, the added trouble of having to get children up earlier in the morning, sending them off at different times on different busses, perhaps not being able to have them run home for lunch, and personally having to travel greater distances to perform the parental chores of attending parent-teachers' meetings and the like, add up to a genuine price that has to be paid for one's convictions. This accounts for the fact that the base of at least unspoken opposition to bussing is by far the broadest of any of the segregation constituencies. Such people may be sufficiently sensitive to the inconsistency of their position to avoid making any public protest, but if there were some way to express their protest in the privacy of a voting booth, they might well prove to belong to a considerable company of secret ad hoc practitioners of segregation.

The fourth combination is found when economic interests are combined with racial feelings. There is no economic loss to a race-conscious person if the Negroes no longer go to the back of the bus, but even people who normally consider themselves immune to race prejudice will dig in their heels and act like racists when they think that the acquisition of a house by a Negro in their

block may reduce the value of their own property by several thousand dollars. The same combination is found in connection with employment discrimination in several forms. As to white workers themselves, it may take the form of fear of job competition. As to employers, it may be the belief that they may incur added training costs, on the idea that Negroes generally do not have the same degree of education and training as white workers. Or the operation of race prejudice may be vicarious. The proprietor of a restaurant or bowling alley or motel may swear that he has no race prejudice himself, but will tell you that he is afraid he will lose customers because his customers do have race prejudice. It is a familiar phenomenon that, when a person takes up prejudice vicariously, he may even exaggerate it beyond the prejudices of the persons for whom he presumes to speak.

The fifth mixture involves the combination of race prejudice and political power. This is operative in the realm of deprivation of voting rights on racial grounds. Any change in this pattern may mean to white people in a particular county that they will no longer control the political offices and power in that county. This would seem bad to them even if the shift had nothing to do with race, but it is especially unnerving to some white citizens in Southern communities to contemplate the possibility of actually being subject to the legal authority of elected black officers.

So far we have broken down the problem of relation of law to behavior from the side of analysis of the difficulty of the required behavior itself. The other half of the equation requires a breakdown of the degrees of vigor and effectiveness of the legal compulsions or incentives applied. Here again let us identify five categories of legal force in ascending order of strength.

At the bottom of the list is reliance on individual grievance procedures. By this is meant waiting for some individual Negro to come forward, braving the many risks that might be entailed, and seek an injunction in court against an act of discrimination in public accommodations, education, employment, or housing. Of all the legal sanctions at hand, this is probably the least effective and the most burdensome. It is in the very places that most need strong desegregation measures that individual plaintiffs are least likely to take the initiative, because of the well-documented danger of economic reprisals, social harassment, loss of credit, foreclosure of mortgages, and outright physical threat and assault. Moreover, the procedure is expensive, even when one takes into account the assistance of such organizations as the NAACP Legal Defense Fund, whose resources are not unlimited. This type of procedure has been very valuable in the past in the setting of legal precedents, as in *Jones*. But it is hopelessly inadequate as to the day-in-and-day-out job of methodically eradicating thousands of individual cases of discrimination. This is the more true because in some

key areas, notably housing, it is inherently impractical to bring class actions when the initiative is solely with an individual.

Even when the difficulty of providing the initiative and financing to start a law suit is surmounted, the troubles of the plaintiff may be only beginning. The opportunity to delay implementation of Supreme Court directives is inherent in our federal system for those who wish to take advantage of the opportunity. Resourceful lawyers may use the many procedures available in both state and federal law to prevent a speedy decision on the merits.⁸⁵

The next category is that of case-by-case action at the initiative of the Attorney General, usually in the form of seeking federal court injunctions. Sometimes, but not always, this has the advantage of avoiding the necessity for finding an individual complainant willing to take the risks involved, and it has the advantage of permitting broader attacks under the "pattern or practice" clause, which permits the Attorney General to initiate actions when he finds that there is a pattern or practice of discrimination in an area.

In these first two categories should also be included the typical procedures for enforcing school integration in the South under court plans backed by the injunction power.

The difficulties and shortcomings of this approach are by now well-known. In the area of school integration, the Attorney General cannot bring an action under the 1964 Act unless he has received a complaint from an individual. When this hurdle has been surmounted, there remains the fact that the Attorney General cannot possibly launch all actions that have to be launched simultaneously. Compounding the difficulty is the fact that the defendants in school cases are not common criminals but usually officials. Moreover, the variety of evasive devices is almost infinite, and, at least until recently, the problem of proving discrimination in such areas as education and employment has been extremely difficult.

The third category of compliance actions is attack on ancillary discriminatory processes. A good example is that of approaching housing discrimination by getting at real estate brokers. This sometimes has a marked advantage in that the particular person on whom the enforcement action operates does not have a primary emotional or financial involvement in the issue. Brokers have everything to lose and nothing to gain from violating fair housing laws, and it is significant that real estate agents now routinely include a passage in their contracts that all multiple listings must be free of any discrimination on grounds of race, religion, and the

⁸⁵ See generally Meador, *The Constitution and the Assignment of Pupils to Public Schools*, 45 VA. L. REV. 517 (1959).

like. This is to protect the brokers themselves and their commissions as much as ensuring equal rights for the Negroes.

Similarly, an effective point at which to attack the employment discrimination problem is at the level of the employment agency, for somewhat the same reasons. There is greater difficulty here, however, in case of private employment agencies, because of what appears to be a prevalent practice of conveying unwritten discriminatory instructions to agencies.

Another ancillary point of attack is that of advertising, although this is probably of limited importance. In this connection, it might be worthwhile to call attention to a little-noticed detail in the passage on advertising in the 1964 Civil Rights Act. After forbidding advertising that is discriminatory as to race, religion, sex or national origin, the act goes on to make an exception "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."⁸⁶

Note that in this clause there is a significant omission. Although this catalog of grounds of discrimination everywhere else in the Act includes the word "race," at this point the word "race" is omitted. The obvious implication is that, in the opinion of Congress, there can never be any circumstances whatever under which race is a bona fide occupational qualification. One can certainly imagine plenty of situations in which sex is such a qualification, and even religion, and national origin. For example, if the local Sons of Norway chapter were hiring an executive secretary, they might not want to hire Patrick Gilhooley. But no such question can legally arise as to race. One reason may be that it is difficult to think of even a hypothetical situation in which race would be a bona fide ground of qualification, and another is that this omission removes any ground for the kind of quibbling that would probably take place if the exception were left open.

The fourth level of sanction is the utilization of the leverage afforded by the power of withholding federal grants, federal contracts, and other federal financial aids where discrimination is practiced. The best known example in this category is title VI of the Civil Rights Act of 1964,⁸⁷ under which it is plainly stated that no person in the United States shall on the ground of race, color or national origin, be excluded from participation in or subject to discrimination under any program or activity receiving federal financial assistance. This is backed up by the power of federal departments and agencies to issue regulations under which

⁸⁶ 42 U.S.C. § 2000e-3(b) (1964).

⁸⁷ *Id.* § 2000d, formerly Pub. L. No. 88-352, title VI, § 601, 78 Stat. 252 (1964).

grants can be refused or terminated when there has been a finding of a failure to comply with regulations on discrimination.

It was pointed out earlier that after the advent of title VI the percentage of Negro students in white schools in 11 Southern States rose from one percent to six percent in two years, and that this figure was impressive only in relative terms, against the miserable showing of the pre-title VI era. Why, with this potent enforcement weapon, has the actual performance been no better than this? There are at least two principal reasons.

One is that resistance to school integration has been so stubborn in some deep South areas that they have preferred to allow their federal grants to be terminated rather than accept integration. Tragically, the black schools were the ones to suffer most from this cut-back in financial resources. In many instances, the federal funds have been used mostly to bring the expenditure per Negro pupil up to the level afforded to white schools by local financing.⁸⁸

The second and perhaps more important reason why title VI has not of itself solved the problem is that it had to act upon an unmanageable substantive test of integration. Until last spring, freedom of choice plans were being treated as adequate compliance with *Brown* by the courts, and since under the Department of Health, Education, and Welfare guidelines a school district that was operating under a court order was ipso facto deemed eligible for federal grants, and since in practice little integration took place under freedom of choice plans, the statistics on integration remained discouraging. However *Green* changes all this and holds that only the factual achievement of a unitary system, as shown by actual statistics on integrated enrollment, can satisfy *Brown*. In summary, what has happened is this: from 1954 to 1964 there was both a weak substantive rule, accepting freedom of choice plans, and a weak enforcement procedure, the case-by-case injunction method. In 1964, the enforcement device was greatly strengthened by the addition of title VI power to withhold federal grants, but the substantive rule remained weak. Finally, in 1968, under *Green*, there arrived a substantive test of integration

⁸⁸ Take the case, for example, of Unadilla, Georgia. The Hunter family had courageously taken the lead in attempting to integrate Unadilla High School. Roy Hunter, a Negro student, had put up with beatings by his schoolmates and threats to his life during his time at the high school. His mother had been fired from her job, and on one occasion had found a dead bear on her front porch. In 1968, the federal grant to Unadilla was cancelled. All but \$25,000 of this \$200,000 grant had gone to the Negro school, a considerable part of it for school lunches. The community raised its taxes to replace the \$25,000 for the white school, but did nothing to replace the amount lost to the black school. The school then announced that the white school would no longer accept black children, but it is heartening to be able to report that the Hunter children went right back and enrolled in the white school in the fall of 1968.

that is strong, realistic, and objectively administrable. In view of the time that elapsed between *Green* and the opening of the fall term of school, it is not fair to start passing judgment on how well this new combination is going to work. A rash of violent parent protests and boycotts, coupled with a sort of permissive attitude on the part of some federal courts in view of the shortness of time to make the adjustment, in effect postponed the real show-down until 1969.

Another possible version of the device of financial leverage, particularly relevant to private schools, would be the cancellation of tax exemption. Under section 501 of the Internal Revenue Code of 1954, providing tax exemption for institutions organized "exclusively for . . . charitable or educational purposes,"⁸⁹ it might be possible to hold that these provisions exclude tax exemption benefits to an organization, and to individuals contributing to such an organization, if the organization discriminates at any level of its activities. The argument would have a double base: first, as a matter of statutory construction, this section and the comparable provisions of section 170⁹⁰ as to charitable, educational and comparable corporations, are qualified by the requirement that tax benefits must be limited to institutions whose purposes are consistent with the public interest as reflected in clearly articulated federal constitutional policies; second, the federal government is forbidden, under the due process clause of the fifth amendment, from subsidizing institutions to carry on activities having an effect of perpetuating racial discrimination.

In the field of housing, there is, and has been for a long time, the leverage afforded by the power to withhold federal guarantees, FHA mortgages, loans, and the like. And in the field of employment discrimination, there is the vast power of the federal government to enforce nondiscrimination through insistence on nondiscrimination clauses in government contracts and subcontracts, backed by the power to withhold such contracts in the case of violation. One way or another, this power probably reaches over 17 million Americans through the connection of their wages with government contracts. Almost as much money is spent by the government each year for new plants and equipment as is spent by the entire private sector of the economy.

The next level of sanction in the rising order of severity is reached when the federal government, instead of applying injunctions, fund withholding, or other devices to induce states and others to carry on a function in a nondiscriminatory way, takes the function out of the hands of the state completely. This was the solution adopted in the case of voting rights. Under the Voting

⁸⁹ INT. REV. CODE OF 1954, § 501(c) (3).

⁹⁰ *Id.* § 170(c) (2) (b).

Rights Act of 1965, in the last analysis, the federal government pushes the state voting registrars aside, sends in its own registrars, registers the voters of the state directly, and compels the state to accept the result.

Obviously this is the sort of strongarm technique that would only be resorted to in aggravated discrimination situations, of which deprivation of the right to vote is a conspicuous example. It is interesting to speculate, however, whether the federal government might some day be driven to equally forthright measures in other areas. For example, suppose that it becomes apparent, after several years of operation of the Fair Housing Act, that local governments are consistently frustrating overall federal policy on provision of decent housing for Americans by manipulating zoning regulations. Could Congress pre-empt the zoning function on the theory that this action was indispensable to implement high federal policy in the matter of preventing racial discrimination in housing?

Now, having set side by side five categories of increasing difficulty of changing behavior by law, and five categories of increasing vigor of legal sanctions or incentives, one can see at a glance why in several important fields law has not been effective. The only successful approach is to identify the relative stubbornness of the resistance to be encountered, and then choose legal weapons that are of a correspondingly high degree of potency. If one is trying to knock out a submarine bunker with 10-foot concrete walls, one does not choose as his weapon a 22-calibre rifle or even a machine gun; he calls on his 16-inch guns and his biggest aerial bombs.

But what have we done in race relations law? Segregation in schools, discrimination in housing and discrimination in employment would all fall largely into category four—nearly the most stubborn category of all. Yet until recently the weapon mostly used to combat all three has been the weakest of all—category one: the case-by-case grievance procedure in the courts dependent on the initiative of individuals.

A refreshing exception, and a good example of the right way to do the job, is in the voting rights area. Here the highest category of resistance, associated with the fear of loss of political power, was matched by the highest category of legal force: a slashing takeover of the entire voting registration process from the offending states, coupled with abolition of poll taxes and literacy tests.

V. CONCLUSION

There may be summarized briefly what appears to be the character of the task ahead in race relations law. For the most part, the supply of basic antidiscrimination substantive and enforcement law is reasonably good, as has been indicated. In many instances it is so new that judgment should not yet be passed upon its prob-

able effectiveness, particularly in the case of the Fair Housing Act and the new realistic *Green* test as to achievement of unitary school systems.

One serious omission that still remains is the problem of the Southern school district in which, first, the district is willing to forgo federal educational grants and thus immunizes itself to the impact of the title VI withholding power, and second, the atmosphere is such that no Negro dares to come forward and take the initiative in launching an action in federal court to compel desegregation.

One of the curious blunders in the Civil Rights Act of 1964 is found in the passage that purports to give the Attorney General the power to wage civil actions to further the orderly achievement of desegregation in public education. For some reason, the act gave the Attorney General this power only when he received a complaint in writing signed by a parent or an individual stating that the minor child was being deprived by the school board of equal educational rights because of race. The reason this passage deserves to be called curious is that, a little later on in the same title, it is stated that the Attorney General may bring this kind of action

whenever he is satisfied that the institution of such litigation [by an individual on his own motion] would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.⁹¹

In other words, there is presupposed a situation in which the waging of this kind of litigation by an individual in person would jeopardize his safety and employment; but somehow the act seems to assume that no such damaging consequences would crash over the head of the complainant if, instead of waging the litigation directly, he made a formal signed complaint to the Attorney General which had precisely the same result. The Attorney General has to give notice of the complaint to the appropriate school board, and consequently there is presumably no way of concealing the identity of the complainant, particularly since the school board is supposed to be given a reasonable time to adjust the conditions alleged in the complaint.

This procedure is all the more perplexing because in other connections, such as housing, a quite different procedure is available. The Attorney General merely has of his own motion to conclude that there is a pattern or practice of resistance to the rights granted by the title, and he can go forward with enforcement action in the form of application for an injunction or other order. At the very minimum, the Civil Rights Act of 1964 should be promptly

⁹¹ 42 U.S.C. § 2000 b(b) (1964).

amended to eliminate the necessity for individual complaints prior to the initiation of action by the Attorney General.

With an occasional exception such as this, the problem ahead will not take the form of getting new legislation. As to further judicial decisions, one may hope for a sequel to *Jones and Green* holding definitely that de facto school segregation is unconstitutional by the unaided force of the thirteenth and fourteenth amendments themselves. From this point on, the struggle will be carried on largely at the level of administration and of ancillary measures, with legal weapons, such as use of federal financial and contract leverage, matched to the stubbornness of the problem, particularly in the areas of education, housing, and employment. In this connection there must be issued one strong caveat. This period must not be approached as if there were a wide discretion to decide whether the value of integration is outweighed by other competing values. We are sure to hear a great deal of this kind of talk in connection with the vigor with which title VI is used to enforce school integration. It will be argued that the value of federal support to education in the South must be balanced against the value of integration. The trouble with this argument is that it is not open. Congress has already made that judgment, and has decreed that the value of integration takes the higher priority.

The same argument cuts equally in the other direction. There is no lack of discussion these days among activists on whether separatism might not be preferable to integration. It is far too late in this analysis to launch that debate. As the law of the land now stands, that question too is closed. Since the present discussion is a legal analysis, it has accepted throughout the proposition that the goal of race relations law is integration. This certainly does not mean that the cultural values of any racial, ethnic, or national background should be sacrificed in the process. If the history of America proves anything, it proves that, rightly handled, integration of diverse cultures can preserve the best of both worlds—the old world of language and history, customs and costumes, folklore and mythology, dances, dishes, and drinks, and the new world of the rich, distinctive and endlessly promising culture of America.