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ADDRESS

BY

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During our nation's growth, problems have arisen, from time to time, challenging to a most basic concept of our constitutional system - equal justice for all people under law. In some parts of our country we are again faced with such problems.

Unfortunately there is resistance in a few areas to decisions of the federal courts determining the legal rights of Negro school children. Continued resistance cannot fail to damage the fabric of our government and the standing of our nation in every corner of the world. The problems are thus of urgent concern to all of us.

It is vitally important that all persons, whatever their personal views, understand the law and comply with its requirements. I am not unmindful that many persons who resist the decisions in the School Cases do so out of deep personal conviction. Many of them do not intend to defy the courts or to deny to others their lawfully determined rights. In large measure, I think they have relied on representations, by state officials and others, that there was some constitutional means, other than closing down the public schools, by which they might maintain their traditional practices.
Tragic though it is, the closing of some public schools has demonstrated the fallacy of this notion. But even though the alternatives should now be perfectly clear, much misunderstanding and confusion, charged with high emotion, persist.

The late Arthur T. Vanderbilt, Chief Justice of New Jersey, once said that, "No class in our society is better able to render real service in molding public opinion than the lawyer." Today our profession has a heavy responsibility to provide leadership and guidance to the end that there shall be orderly compliance.

Last week, the Supreme Court, speaking as one, announced its opinion in the case of Cooper v. Aaron.* The opinion is a memorable one. In its opening words, the Court solemnly declared, "As this case reaches us, it raises questions of the highest importance to the maintenance of our federal system of government." The Court has answered the questions posed by the case and it has done so in clear and unmistakable terms. For lawyers, there can certainly be no substantial doubt as to the existing legal situation.

There is, first, the basic proposition that the Constitution is, in the words of Article VI, the "supreme Law of the Land," of binding effect upon the states "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." State legislators, executives and judicial officers, as well as federal officials, are solemnly

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*August Special Term, 1958, No. 1
committed by oath of office to support the Constitution. For, as the Court points out, "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."

No less fundamental is the proposition that it is the province and the duty of the federal judiciary to interpret and expound the law of the Constitution. From the earliest days of the Republic, it has been recognized that this is a permanent and indispensable feature of our constitutional system of government. Under the system thus conceived, we became a united nation. Under it, we have weathered every constitutional crisis.

The opinion recites and the Court, as it is now constituted, unanimously reaffirms the constitutional principle declared in Brown v. Board of Education*: That denial of admission to public schools upon the grounds of race is inherently discriminatory and constitutes a denial of "the equal protection of the laws" guaranteed by the Fourteenth Amendment.

The Court further emphasizes that "the constitutional rights of children not to be discriminated against in school admission on grounds of race or color *** can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously'."

*347 U.S. 483.
The Court points out, at the same time, that the federal district courts, in the exercise of their equity powers, may take account of local factors in order to permit the necessary adjustments to be made in an orderly and systematic manner. Time, it is recognized, will be required in some communities, though not in others. The timing and the manner of transition are left to local school boards under the supervision of local district courts. However, delay in any guise because of hostility to the principle announced will not be countenanced.

The applicable legal principles have thus been clearly established. And, as President Eisenhower said last week: "It is incumbent upon all Americans, public officials and private citizens alike, to recognize their duty of complying with the rulings of the highest court in the land." "Any other course," he cautioned "would be fraught with grave consequences to our nation."

It is not enough, in the administration of justice, to declare the legal principle. The law is not a mere intellectual pastime. It provides the framework for the establishment of orderly human relationships. Legal principles must be implemented by persons who have both a respect for the law and an understanding of the particular requirements which it imposes.
In the Department of Justice, we have received hundreds of letters from all over the country concerning the School Cases and the problems of desegregation. As you might surmise, they reflect every shade of opinion. Certainly the points of view of all persons on this important national issue need to be carefully weighed and given thoughtful consideration.

One point of view often advanced is that the problem is purely one of local concern. Why, they ask, are federal courts interfering with the operation of local public school systems?

Of course, public education—and I quote from the Supreme Court's opinion of last week—"is primarily the concern of the states." But that is not the end of the matter. As the Court goes on to point out, all state responsibilities "must be exercised consistently with federal constitutional requirements as they apply to state action."

Illustrations of this principle are abundant. The enforcement of a state's criminal laws is certainly the primary responsibility of the state. Thus, in providing for trial by jury, a state may choose any reasonable method it wishes for organizing juries and selecting jurors. But a state may not exclude persons from jury service on the basis of race, creed or
color. Thus, in *Strauder v. West Virginia*, decided in 1880, the Supreme Court set aside a Negro's conviction on the ground that state law had effectively excluded all members of his race from service on the grand and petit juries. In doing so, the Court emphasized that the Fourteenth Amendment was drafted because "it required little knowledge of human nature to anticipate *** that state laws might be enacted or enforced to perpetuate the distinctions that had before existed." The amendment "was designed," the opinion continues, "to assure to the colored race the enjoyment of all the civil rights that under law are enjoyed by white persons ***."

Consider another example. In the exercise of its police powers, a state may regulate, by licensing or other measures, the manner in which a local business is conducted. It may also restrict entry into that business to qualified persons. But, as was held at an early date in the leading case of **Yick Wo. v. Hopkins**, this certainly does not mean that a state may administer a licensing statute so as systematically to exclude from an occupation persons of a particular race -- in that case, persons of Oriental ancestry.

* 100 U.S. 303

** 119 U.S. 356
A state has full control over its election machinery. But it does not follow that it may adopt a scheme of registration which is subtly calculated to disfranchise voters of a particular race. The Constitution, as was said in one such case, "nullifies sophisticated as well as simple-minded modes of discrimination."*  

So, also, in the field of public education, a state is free to work out, as it chooses, the details of its public school system. Buildings, school buses, teacher selection, curricula, all the elements which go into a school system and its management, are, as they have always been, the affair of the state and local authorities. What the Supreme Court has held is that a state violates the Constitution of the United States when it denies to a Negro child who is otherwise qualified for admission to a particular public school and who seeks admission, the right to enter that school. For the state to do this is to deprive Negro children of rights guaranteed to them by the federal Constitution.

Others say to me, "A majority of the people in our community are opposed to desegregation of the public schools. What has happened to the democratic principle that the views of the majority should prevail?"

*Lane v. Wilson, 307 U. S. 268
This question shows a basic misunderstanding of our constitutional system of government. The Constitution does not mean one thing in Maine, another in Florida, and something else in California. People living in different sections of our country may have different viewpoints on particular issues, but constitutional rights are fundamental guarantees which may not be denied in any area.

To be sure, there is always the right to seek change in the law through orderly constitutional processes. But disagreement with a constitutional principle declared by the Supreme Court of the United States does not give those who disagree the right to override the Court's mandate. The constitutional rights of individuals and of minority groups would be worth little if a majority could push them aside at will. As the President has said: "We must never forget that the rights of all of us depend upon respect for the lawfully determined rights of each of us. As one nation, we must assure to all our people, whatever their color or creed, the enjoyment of their constitutional rights and the full measure of the law's protection."

A closely related question takes this form -- Is it the business of government to tell people with whom they shall associate?
Of course, it is not. Private preferences or prejudices, noble or ignoble, present no constitutional question. But state action stands on a different footing. The injunction of the Fourteenth Amendment applies to state action and provides that no "State shall deny to any person within its jurisdiction the equal protection of the laws." Individuals may not look to the state to aid or support their particular private prejudices.

This point is well illustrated by the Restrictive Covenant Cases. In those cases, various individuals had entered into agreements restricting the use and occupancy of certain property to members of the Caucasian race. A piece of property covered by such an agreement was conveyed to a Negro family, whereupon other property owners in the area brought suit in a state court to restrain them from taking possession. On review, the Supreme Court concluded that, standing alone, these private arrangements did not violate the Constitution. Nonetheless, the Court held, the state may not make available to individuals the "coercive power of government" to deny to persons, on grounds of race or color, the enjoyment of private property rights.

As I stated earlier, many who write are confused because they have been led by state laws and by some of their state officials

to believe that there are means and devices by which the principle of segregation might be maintained in their public school systems. But, as the Court stated last week, "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the (Fourteenth) Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." If it ever were doubtful, it is plain now that subterfuge and evasion will not work. They are self-defeating. They lead but tortuously to a dead end.

One of the cases cited with approval in the Supreme Court's opinion is the decision of the Court of Appeals for the Fifth Circuit in the case of **Derrington v. Plummer.** * The facts of that case are worth noting. A county in Texas had leased a cafeteria in a newly constructed courthouse to a private tenant. The tenant then undertook to exclude Negro patrons. The Court of Appeals, pointing out that the courthouse had been constructed with public funds for the use of citizens generally, held that the acts of discrimination were as much state action as if the county had operated the cafeteria directly.

In still another case which involved operation of public facilities through the agency of a private corporation, a federal

* 240 F. 2d 922
district court in West Virginia stated, "Justice would be blind
indeed if she failed to detect the real purpose of this effort **
to clothe a public function with the mantle of private responsibility."**

As Justice Holmes once declared, "States may do a good
deal of classifying that it is difficult to believe rational, but
there are limits, and it is too clear for extended argument that
color cannot be made the basis of a statutory classification **."**

The lesson is written in large letters, plain to everyone's
view. An Alabama lawyer recently summed it up in these words:
"To a lawyer who has followed the segregation cases it is apparent
that the state cannot exercise any part in the operation of a private
school system. In other words, if we are to have a segregated
school system then public education as we have known it is finished."

It is encouraging that responsible voices are beginning to
be heard with more frequency. Ministers, school boards, parent-
teacher associations, students, and some state officials are
speaking out courageously and realistically. For example, the
Attorney General of North Carolina said last week:

* Lawrence v. Hancock, 76 F. Supp. 1004

**Nixon v. Herndon, 273 U.S. 536
"Those states which seek to evade have been and will continue to be unsuccessful, and, to those states, there are but two avenues which remain open — an obedience to the law or avoidance of the law. To avoid the law, the state merely goes out of the business of public education. That day should never come to North Carolina."

In speaking of compliance, let me re-emphasize that the courts have not imposed drastic or inflexible requirements. An examination of the decrees now outstanding discloses that the district courts, in the exercise of their equity powers, have approved a variety of plans submitted by local school authorities. These plans embrace different approaches. Thus, in some, the transition is to be initiated in the first grade; in others, at a different level. In Little Rock, for example, the first step under the school board’s plan was to be taken in the senior high school in the year 1957 — a date more than two years removed from May, 1955, when the plan was initially approved by the local district court — and it was to be gradually extended to the remainder of the school system over a period of six years. The test applicable in each instance is whether the specific plan submitted, viewed in the light of prevailing local conditions, provides a prompt and reasonable
start towards desegregation. Time is allowed in appropriate cases, if it is utilized in good faith.

But there must be an end to delusion and an awareness of the path which, in view of our constitutional system and the unanimous decision of the highest court in our nation, must inevitably be followed. The crux of the matter is one of intention. In those states where there has been a willingness to seek methods of good-faith compliance reasonable solutions are being found. Where people have sought to comply, they have, in every instance, made progress. On the other hand, those who seek to thwart compliance are sowing a bitter harvest. There is not only the damage, already evident in some places, to public schooling. There is this, also, to weigh and consider. Disrespect for law in one area breeds disrespect in others. And in an atmosphere of disrespect, rebelliousness leads soon to violence.

A few moments ago, I quoted the Attorney General of North Carolina. He also said this: "However distasteful may be the job which is assigned to me by law, I intend to take my stand on the side of the law--and neither through public utterance nor in any other manner will I seek to advise people to take any other stand than that which I know under the law is the only stand we may take. If this is politically inexpedient, dangerous or fatal, I'll just have to be content with what the future holds for me."
All responsible citizens must face the realities. They, too must take their stand on the side of the law. I repeat - given the will to comply in good faith, all problems of accommodation and adjustment can be satisfactorily met. The federal government stands ready to cooperate and assist by every means within its power in the search for such solutions. But without a basic willingness to comply, any search, by whatever means, is apt to be merely time-consuming and frustrating.

We have known in the past problems which cut deep and caused division within the nation. The comforting conclusion which one can draw from our history is that, regardless of the travail or the conflict of the day, the nation has invariably emerged strong and united. If we are to be faithful to the principles upon which our nation was founded, we must go forward today with the task of translating into reality the constitutional guarantee of equality under the law.