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RACIAL DISCRIMINATION AND PRIVATE SCHOOLS*

ARTHUR S. MILLER**

I. THE PRIVATE SCHOOL SYSTEM

Largely neglected in the swirl of controversy which has developed since the May 17, 1954, decision of the Supreme Court in the Segregation Cases† is the private school and its position in the pattern of educational racial discrimination. Attention has been focused almost exclusively upon the public school systems and their administration, and, to a lesser extent, upon the announced plans of some states to establish a subsidized system of private schools as a means of avoiding the impact of the segregation decision. But the privately operated school in the Southeastern United States, whether denominational or otherwise, has not escaped difficulty; it has not been able to avoid dealing with the same type of problems besetting the public school administrator. The specific manner in which the problems have arisen may differ but the broad pattern is basically similar. These difficulties, revolving around the admission practices of the nonpublic school, are both complex and important; they merit comprehensive development and exposition. It is my purpose here to attempt such a development and exposition; particular emphasis will be placed upon the legal problems which are involved.

Required first of all is a preliminary inquiry into the social and legal context in which the private school administrator operates. What place does the private school occupy in American education today? What is the legal status of the private school? It is

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*This is the first half of a study on Racial Discrimination and Private Schools. The second half will also appear in this volume. Much of the research for this study was made possible through a grant from the Fund for the Republic. All statements made and all conclusions drawn are, however, solely those of the author and should not be attributed to the officers and directors of the Fund.

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†Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954). Of the many discussions of these cases, both in and out of legal periodicals, the following is recommended for an up-to-date study of what has transpired since the decisions were rendered: McKay, "With All Deliberate Speed": A Study of School Desegregation, 31 N.Y.U.L. Rev. 991 (1956).
to these questions that our attention will first be directed. The
discussion will be concerned with the bona fide private school
as it has been known and not with the so-called private school
plans announced by some Southern government officials during the
past two years. The term “private school” will be used generically
to indicate both the denominational (parochial) school and the non-
sectarian school.

A. The Place of Nonpublic Education

Private, i.e., nonpublic, education has long held an important
place in the over-all scheme of American education. This is par-
ticularly true of higher education. The private colleges and univer-
sities have always enrolled a high percentage, usually a majority,
of the nation’s youth who have gone on beyond high school. And
it is also true of elementary and secondary education, although here
the public schools have for many years educated a much greater
number. With education itself being considered to be a matter of
vital societal importance, perhaps crucial to the survival of the
democratic system, the private schools have ably performed signifi-
cant functions. The belief structure of the American people includes
the notion that education has importance beyond the individual
being educated. The public weal itself is considered to be dependent
upon education conducted upon the broadest possible base. Dis-
agreement with education is only over the details: how it is to be
accomplished, not if it is. As the late Senator Robert Taft once re-
marked, we have “socialized education” in this country.

This is, it should be remembered, a belief relatively new in
history. Universal education, like universal suffrage, is apparently a
creature of the new world, one which came rather late even there. It
exists, so the theory goes, to promote the general intelligence of
the people and thus to increase their usefulness and efficiency. The
aim is to provide a reasonably adequate grasp of the relevant facts
important in the making of societal decisions together with a
reasonably adequate training in thinking about and evaluating

2. Some preliminary discussions of these plans have appeared. See,
Paul, The School Segregation Decision (1954); J. Murphy, Can Public
Schools Be “Private”? 7 Ala. L. Rev. 48 (1954); Murphy, Desegregation
221 (1955); Nicholson, The Legal Standing of the South’s School Resistance

3. General discussions of education, its history and development may be
found in the encyclopedia. See, for example, 3 Encyc. Soc. Sci. 403 (1931).
See also Carr, The Federal Government and National Interest in Education,
in National Policies for Education, Health and Social Services 3 (Russell
ed. 1955).
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those facts. With a minor exception no longer of consequence, the American people have consistently believed that the ends to be achieved by mass education could be accomplished through the medium of school systems both publicly and privately controlled. However, as will be shown below, the people generally have reserved the right to insure that private schools maintain standards similar to those established for the public schools. This right has not always been exercised; nevertheless, it is available for use should the need arise.

Statistically, of course, the public school today greatly overwhelms the nonpublic. Of the 163,673 schools in existence in the academic year 1951-52 only 15,216 were private. Of this total, there were 10,666 elementary schools, 3,322 secondary schools, 137 residential schools for exceptional children, and 1,191 higher educational schools controlled privately. Compare those figures to the public schools for the same year: 123,763 elementary schools, 23,746 secondary, 307 residential for exceptional children, and 641 colleges and universities. Only in the higher educational bracket does the private school outnumber the public.

The same ratio holds true for enrollment. Out of a total school enrollment of 32,934,748 in 1951-52, about 15 percent (4,994,116) of the students attended private schools. This figure breaks down in this manner: about 13 percent (1,593,852 out of a total of 23,958,113) at the elementary level, 10 percent (678,967 out of a total of 6,596,351) at the secondary level, and 50 percent (1,146,327 out of a total of 2,380,284) in higher education. It is of particular interest to note a significant increase in private school enrollment, both absolutely and in comparison to the public schools, since the academic year of 1939-40. At that time, 25,433,542 pupils were enrolled in public elementary and secondary schools and 2,611,047 in private schools—roughly one student in a private school to nine in the public schools. The figures for 1951-52 are 26,706,675 and

4. Whether the theoretical justifications of some of the beliefs in mass education, particularly with regard to those dealing with asserted abilities of all people to make wise political decisions, can withstand rigorous analysis is questionable; but beyond the scope of the present study. Compare Lippmann, The Public Philosophy (1955), with Dahl, A Preface to Democratic Theory (1959).


3,847,789—about one to seven. In 1955-56 it is estimated that the figures are 32,026,000 and 4,469,900—again, about one to seven. In absolute figures, private school enrollments since 1939-40 have increased 1,857,853 or about 72 percent, while public school enrollments have increased from 25,433,542 to 32,026,000 or about 22 percent. Thus, although the public school still greatly overshadows the private school quantitatively, the clear trend at the elementary and secondary school level is toward greater use by parents of the nonpublic school. As noted above, the private school already is used by almost as many students as the public at the level of higher education. While the trend is clear, the reasons for this change are not so readily apparent, and are probably multiple rather than single. Increased prosperity among people generally would allow more parents to send their children to the private school; also, the disquietude with the educational standards of many public schools which is evident among many people would tend to explain some of the increase in enrollment of the private schools. It is yet too early to determine whether racial integration since the Supreme Court's decision will cause any significant exodus from the newly-desegregated public schools to the private schools.\footnote{It has been reported, however, that desegregation has caused a number of parents in the District of Columbia either to move their residences outside the District or to send their children to an available private school.}

In the sixteen states and District of Columbia which can be considered as making up the South, there were in 1951-52 53,568 public schools (43,259 elementary, 9,971 secondary, 115 for exceptional children, and 223 colleges and universities) and 2,950 private schools (1,786 elementary, 766 secondary, 22 for exceptional children, and 376 colleges and universities). Comparative enrollment statistics for Southern schools were unobtainable.

One other statistic is of interest: income in the academic year 1951-52 was as follows. For all schools, public and private, and at all levels, there was an income of $11.7 billion. Of this figure, $9.3 billion (79 percent) went to the public school systems, $2.4 billion (21 percent) to the private. Thus, 21 percent of school income went to educate 15 percent of the nation's students. To the extent that monetary expenditures reflect a higher quality of education, the student at the private school is getting a better education than the public school pupil.

B. The Legal Status of Nonpublic Education

Relatively rare, but nevertheless important, have been the cases decided by the United States Supreme Court in the field of educa-
tion. A handful have dealt with the admission practices of public schools, in another few the Court has made pronouncements on the relationship of religion to the public school systems, and there have been other educational matters which have raised questions relating to the federal Constitution. Similarly, Congress has made but few interventions into education, and these have been in aid of local education rather than attempts to control the details of educational administration. It can be said that the educational system has, by and large, satisfied national, as distinguished from purely local, requirements. If not, substantial federal intervention would doubtless have taken place long ago. One of the reasons for the current increased congressional concern in education, manifested in the proposed massive school building program, is the belief that national ends are not being achieved under the present system. The shortage of engineers and other technicians is one item of this federal concern, the belief being that our national security is imperilled by such a shortage.

Because of the lack of substantial federal intervention into education, a comprehensive inquiry into the legal status of private education must, perforce, be directed for the most part to state statutes and state court decisions. The United States Supreme Court has made only two decisions of any real importance to private schools, Pierce v. Society of Sisters and Meyer v. Nebraska. Of the two the Pierce case is probably the more significant. Since that decision was rendered in 1925 it has been clear that parents may fulfill a state's educational requirements without use of the public school system. In other words, the right to send children to private schools was given constitutional protection.

Little else is settled regarding the extent of state authority over the nonpublic school. That the state may exercise some control is clear. However, the line between permissible control and that which is constitutionally proscribed is not yet drawn. This lack of settlement may be traced, in part at least, to a fundamental disagreement over the theory of child control. The difference of opinion has its roots in antiquity. It can be traced at least as far back as Platonic times. The relevant question is this: Who, parent or state, has primary power over the education of the child? The question receives differing answers. While there are isolated judicial statements to the contrary in addition to a great deal of opinion from

8. The cases are collected and discussed in Spurlock, Education and the Supreme Court (1955) (extensively treating thirty-nine cases).
10. 262 U.S. 390 (1923).
church groups (chiefly Roman Catholic), it has generally been held by American courts that it is the state, not the parents, which is pre-eminent. From this basic view courts have adhered to the position that the wishes of society, operating through the state governments, can control in basic educational matters even in those situations where the parents are in direct opposition. This, and the reasons for it, was succinctly put by the Supreme Court of New Hampshire:

The primary purpose of the maintenance of the common-school system is the promotion of the general intelligence of the people constituting the body politic and thereby to increase the usefulness and efficiency of the citizens, upon which the government of society depends. Free schooling furnished by the state is not so much a right granted to pupils as a duty imposed upon them for the public good. If they do not voluntarily attend the schools provided for them, they may be compelled to do so. While most people regard the public schools as the means of great personal advantage to the pupils, the fact is too often overlooked that they are governmental means of protecting the state from the consequences of an ignorant and incompetent citizenship.\(^1\)

But even so, as the Pierce case demonstrates, the state may not require attendance at public schools if parents wish to send their children to private schools. The state may not, in other words, legislate the private school out of existence. The language used by Mr. Justice McReynolds in Pierce bears striking resemblance to that of religious organizations, and illustrates, when compared to the New Hampshire case, the conflict in basic theory. In an opinion which invalidated, because it was considered to be violative of due process of law, an Oregon statute which required children of the ages of eight to sixteen to attend public schools, Justice McReynolds said:

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\ldots \ [W\]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. \ldots \] The fundamental theory of liberty upon which all governments of this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Similar statements may be quoted to indicate the position of the Roman Catholic Church. For example, in 1946 it was said that the state's "role in education is in reality secondary and supplementary\(^1\)

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to that of the home,” and further that “the concept of the primary
rights of parents in education is not only legally basic to the Améri-
can system of schools, but fundamentally vital to the existence of
our democracy.” According to this view, “the function of the state
in education is, not to monopolize and control the schools, but to
protect and assist the parents in the fulfillment of their obligation
to provide adequate educational opportunities for their children.”

However, it seems to be generally accepted, in statute and de-
cision, by legislature and court alike, that the language of Justice
McReynolds is not to be considered as stating the predominant
theory of child control and education. It is society generally, operat-
ing through the state governments, which has primary control, that
is to say, which has the right to prescribe the minimum standards
of education which the child should have. Education of all the
youthful is a matter of vital public concern. The very foundations
of the democratic system of government are believed to depend, in
substantial measure at least, upon the existence of a literate,
knowledgeable citizenry. More than that, the very survival of the
United States as a nation is thought to be keyed to the availability
of a continuing flow of trained technical specialists from the nation’s
school systems to places in industry and related areas. Known
shortages of trained engineers, for example, is a matter of great
concern today. Other areas exist in which the demand for com-
petent manpower exceeds the supply.

Thus it is for two reasons that education is of major public
concern and cannot be left to the individual choice of the parents
of the child. Whereas, when viewed historically, mass education
has been the ideal and the goal, today it has become a necessity. The
time is past when the nation can afford a large group of partial or
complete illiterates. We have entered a period in which the machine
has either replaced or is replacing the untrained human being, both
in the manual tasks and in the menial mental tasks. An incredibly
rapid technological change has, in the space of a few years, done
away with the need for the untrained and unskilled and has left
scarcely any place for the slightly trained. At the same time, an
enormous demand has been created for the technician, for the
person of technical ability, for the “sliderule operator” who can

12. The statements quoted are taken from McLaughlin, op. cit. supra
note 5 at 188. See Gardner, Liberty, The State, and The School, 20 Law &

13. Recently, a number of pronouncements have been made on the
urgent need for more technicians and scientists. See, for example, N.Y. Times.
handle and perhaps even understand the machines he manipulates. All of this means that education has become more than a luxury for the betterment of the individual by providing a means to improve his status; it has become a necessity without which the economy would falter, the national security would be imperilled and the democratic system repudiated.

So, education there must be . . . and there will be. The point is important in any scrutiny of the private school system of the United States. It can thus be said with some degree of certainty that, even with the doctrine of the Pierce case, the private school will be allowed to remain in operation only so long as it continues to fulfill what society, i.e., the people generally, has set forth as minimum educational requirements and as the type and degree of training considered desirable or necessary. How does this notion fit in with the legal doctrine?

1. State Control Over Private Education

There seems to be considerable uncertainty in the legal doctrine regarding the extent to which a state may go in controlling the administration of private schools. It may be, however, that this uncertainty is more apparent than real; its basis could well be the relative paucity of court decisions as compared to legislative enactments and the tendency of lawyers trained in the common-law tradition to emphasize the case over the statute in finding authoritative doctrine. As mentioned above, there are few United States Supreme Court decisions directly in point. In addition to the Pierce and Meyer cases only the Dartmouth College case14 and Berea College v. Kentucky15 are relevant. And both of the latter are, in essence, of minor importance to the present inquiry. In the Dartmouth College case the Supreme Court ruled that a charter granted to a private institution is in the nature of a contract and cannot be revoked or altered without the consent of those to whom it was granted. The basis for the decision, which was rendered in 1816, was that part of the Constitution prohibiting state legislation which impairs the obligation of contracts. The force of this decision has been greatly reduced, however, through widespread use of reservations in the charters granted to corporations, including those of private schools. The Berea College case involved a Kentucky statute making it unlawful to intermingle white and Negro students in a private

15. 211 U.S. 45 (1908).
school; it will be more fully discussed below. Suffice it for present purposes to say that the Supreme Court reached its decision without finding it necessary to rule on the constitutionality of such statute.

The litigation which has taken place in state courts does serve to establish, in conjunction with the state legislation, certain fairly clear, albeit still uncertain, lines of doctrine concerning the private school and state authority. Speaking generally, there is no doubt that substantial intervention by state authority into the administration of private schools is permissible. This intervention, widely practiced throughout the nation, may be classified into three groups, curriculum, instruction, and administration, with some overlap existing.

a. Curriculum

In *Meyer v. Nebraska*, the Supreme Court held that a state may not prohibit the teaching of the German language and other subjects which "cannot reasonably be regarded as harmful." Nevertheless, it is true that English is the required medium of instruction in many states. In addition, certain subjects are frequently required to be taught in all the schools of a state. Examples of such subjects are the Constitution, history, and American government. In other states, such subjects as physical training, traffic regulation, and the effects upon the human system of alcoholic stimulants, narcotics, and poisonous substances must be given. Some states have extremely detailed curriculum requirements. An example is Pennsylvania, which by statute requires that "in every elementary public and private school, established and maintained in this Commonwealth, the following subjects shall be taught, in the English language and from English texts: English, including spelling, reading, and writing, arithmetic, geography, the history of the United States and of Pennsylvania, civics, including loyalty to the State and National Government, safety education, and the humane treatment of birds and animals, health, including physical education and physiology, music, and art."[6]

As a general proposition, it may thus be said that a state may prescribe certain minimum curriculum requirements to which private schools must adhere. However, it probably cannot prevent the teaching of other subjects, provided that these other subjects are not subversive in nature or inimical to the public order. So far

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as the latter is concerned, no doubt exists that a state may prohibit any type of educational activity which threatens its own safety or which is otherwise not in consonance with the generalized requirements of the state's police powers. The outward limits of the power of state authority to control private school curricula have never been drawn by the United States Supreme Court. There have, however, been some attempts by state courts to do so. People v. Stanley\textsuperscript{17} is an example. There, the Colorado Supreme Court stated that the right to conduct a private school and the right of parents to have their children taught in such schools are liberties guaranteed by the Fourteenth Amendment, subject, however, to the following qualifications: (a) the state may enact compulsory education laws, (b) certain subjects clearly essential to good citizenship may be required, and (c) teachers and the physical location of the schools must be reputable, and the subjects taught must neither be immoral nor inimical to the public welfare.

\textit{b. Instruction}

In addition to the actual subjects taught, a state also exercises a measure of control over those who teach private school pupils. The private school teacher must meet standards of competency established by the state. Statutes in many states require that teachers in private schools must obtain and possess the same certification as public school teachers. In other states, teachers in both private and public schools are required to take an oath to support the state and federal constitutions.\textsuperscript{16}

\textit{c. Administration}

The third general type of state control over private schools relates to the administration of the schools. As in the other types, such control follows as a natural concomitant of the fact that a state may compel attendance in a school and that private schools may be substituted by parents for the public schools as the medium through which this societal duty is fulfilled. Control over administration runs from the trivial to the important. For instance, some states have prescribed that fire drills must be carried out periodically while others have established certain sanitary standards to be met. More important, other states provide for supervision and inspection of the private schools, the keeping of certain records and the

\textsuperscript{17} 81 Colo. 276, 255 Pac. 610 (1927).

rendering of reports to state officials. Length of the school terms have, in like manner, been the subject of regulation.\textsuperscript{19}

2. Evaluation

Although the principle of private education being an acceptable substitute for public school education is firmly established—so much so that it has been given constitutional protection—this has not been followed to its logical conclusion. It has been met with a countervailing principle that there is an important societal interest in the education of the nation's youth. Accordingly, state control over private education is an established fact, meeting such little disagreement that the state statutes spelling out that control have met few challenges in the courts. Significant areas of the administration of the private school, including curriculum and instruction, are subject to governmental supervision.

Private schools exist because they pre-dated the public schools historically and, more important, because they allow for the fulfillment of certain goals not obtainable in the public school. Chief of these is that of religious training. Constitutionally banned from the public school, religion and religious training seems to be the principal difference between the two school systems as far as what is offered the pupil is concerned. Other differences exist, but they relate to matters other than offerings of the curriculum. And the differences do not concern matters considered to be fundamental by the people as a whole. Private education does fulfill, at least adequately and often in a superior fashion, the minimum standards of education established by society. An appraisal of the statutes and judicial decisions leads to the conclusion that, even with the Pierce and Meyer cases, there is a sufficient societal interest in education to make the continuation of that record necessary for the survival of the private school. In other words, as long as the private school continues to fulfill the minimum educational objectives of society, it will be allowed to continue and to flourish. That it does so now is evident in the minimal character of the control over private education exercised in fact by state governments.

C. Conclusion

It is, thus, evident that private education occupies an important position in the American system of education. No doubt it will continue to do so. Parents will continue to have the choice of sending their children to a public school or to a school which meets minimum

\textsuperscript{19} McLaughlin, \textit{supra} note 5, collects the relevant statutes.
standards but which is administered privately. The basic pattern of education, as established and maintained for decades, will not be altered. But whether a private school can escape feeling the impact of the Supreme Court's segregation decision is another question, as yet unanswered.

What importance does the decision in the *Segregation Cases* have for the private and denominational school administrator? This broad question has several facets: (a) Suppose that it was decided to admit Negroes to a hitherto all-white private school. What governmental sanctions, if any, exist which are intended to prevent such action? Are such sanctions valid under the federal Constitution? What sanctions of a nongovernmental character could an administrator of an integrating private school anticipate? Similarly, are privately-imposed sanctions legally valid? (b) Is there any likelihood that the doctrine enunciated in the *Segregation Cases* can be extended to apply to the admission policies of the nonpublic school? This question raises the further question, is the conduct of nonpublic education "state action" within the reach of the proscriptions of the Fourteenth Amendment? A subsidiary question is, if a private educational institution is considered to be performing a public function so as to be within the "state action" requirement of the Fourteenth Amendment, does that mean that a parochial school would then violate the establishment of religion clause of the First Amendment? (c) Suppose there is a trust fund set up for the education of whites. May a nonwhite person invoke the judicial process so as to benefit from the trust? Conversely, may the trustee alter the terms of the trust so as to include nonwhite persons among the beneficiaries? This problem involves the broader question of whether recent pronouncements on racial matters by the Supreme Court and the President have established a national policy against racial discrimination. (d) Assuming a grant of property to a private school with the grantor reserving a right to recover the property should it be used other than for education for whites, would the operation of that clause require judicial action and thus fall within the doctrine of the restrictive covenant cases? In other words, would court enforcement of such a clause be state action within the Fourteenth Amendment and thus prohibited under existing law?

The ensuing discussion will take up these questions in detail, setting out the legal doctrine with as much precision as the various matters allow and forecasting the probable course of future judicial decision. Some of what will be discussed travels judicial seas
II. Governmental Sanctions

The place of the private school as an integral part of the American school system has been secure since the decision in 1923 of the United States Supreme Court in the Pierce case. However, the limits of the power of state governments to regulate those schools has never been definitely clarified. That the state can regulate is clear. That some restraints do exist is a necessary conclusion from the Pierce decision and from the nature of the American system of constitutional government.

By and large, state control has taken the form of measures designed to insure that the private school at least meets the standards to which the public schools ostensibly adhere. The main idea has been for the state to prescribe minimum standards in certain areas deemed of particular importance—e.g., curriculum and faculty—and to allow the private school free rein in other areas. One of the latter areas has been the admission practices of private schools. Whereas all states have detailed legislation and regulations regarding admission to the public schools, most have not seen fit to concern themselves with the private schools. As far as race or religion is concerned, several states have legislated so-called Fair Educational Practices Acts designed to require certain private schools to ignore race or religion as a criterion for matriculation. On the other hand, a number of Southern states have statutes which appear to require racial segregation in nonpublic schools. These statutes range from out-and-out prohibition of racial intermixture to imposition of criminal sanctions against those who attempt integration of white and colored students. This section will outline and discuss these statutes.

Of course, racial separation, even in those states where it has not been required, has been a fact of life in private education. Few schools, and then mostly in the universities, failed to use race as a condition of admission. Even in those schools where some Negroes have been allowed to enter—Yale, Stanford and Harvard come to mind—they have been but a handful. Even today, the "white" private school which has accepted large numbers of Negro students does not exist.
Our discussion of the attempts of state legislatures to prescribe admission standards for private schools can begin with a case decided in 1908 by the United States Supreme Court. The case is Berea College v. Kentucky. A Kentucky statute made it “unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution where persons of the white and Negro races are both received as pupils for instruction. . . .” Berea College, a coeducational, nondenominational institution, was established in 1855. Beginning in 1866 it began to admit Negroes, treating them exactly as it did its white students. The Kentucky legislation came in 1904, was violated by Berea’s administration, upheld by the state’s highest court, and ultimately challenged in the United States Supreme Court as a deprivation of liberty and property protected by the due process clause of the Fourteenth Amendment.

The Court thus had a direct opportunity to rule on the constitutional validity of state prescription of admission standards of private schools. It, however, chose to reject that opportunity. Nevertheless, it upheld the legislation, pinning its decision not on constitutional grounds but on the power a state has over a corporation to amend its charter. The statute was considered to be an amendment to the corporate charter of Berea College. In so ruling the Court gave strong support to the notion that a state can prohibit corporations from giving instruction to a racially mixed student body. Justice Harlan vigorously dissented, stating that he thought that the Court “should directly meet and decide the broad [constitutional] question presented by the statute.” He then went on to say that the Court should adjudge whether it could be made a crime “to maintain and operate a private institution of learning where white and black pupils are received, at the same time, for instruction.” The Justice left no doubt as to what his view would be on that question: “I am of the opinion,” he said, “that . . . the statute is an arbitrary invasion of the rights of liberty and property guar-

But it should be pointed out that the problems involved in desegregation are virtually nonexistent when only a handful of Negroes are admitted as compared to the problems which would arise if, say, fifty percent of the student body were colored. For example, Yale’s problems several years ago when Levi Jackson, a Negro, matriculated and later became captain of the football team are hardly to be equated with the problems now facing Archbishop Rummel in the Roman Catholic parochial schools in Louisiana.

anted by the Fourteenth Amendment against hostile state action and is, therefore, void." He did not prevail, however, and since that time the United States Supreme Court has not had to face the question.

The rather unique circumstances involved in the Berea College case make it one which is of interest but which does not have controlling authority over possible present-day cases. It did, of course, uphold indirectly the power of a state to require separation of the races in private schools. But the constitutional question was not met by the majority of the Supreme Court. Because there have been no other cases on the point since the decision in the Berea College case, that question is still an unsettled one. It will be discussed in some detail in the latter part of this section.

A. State Statutes Appearing to Require Racial Segregation in Private Schools

Since May, 1954, and the Supreme Court decision in the Segregation Cases, governmental officials in most of the Southern states have made strenuous attempts to avoid the impact of those decisions in the various state public schools systems. Doctrines of "interposition," long dormant, have been resurrected and dusted off in six states. Through these efforts, it is hoped that the racial separations of the public schools will be continued indefinitely. Other actions of the Southern state officials have been to establish a statutory basis for a system of "private schools," to be established at such time as a court orders the entry of a Negro student into some public school formerly limited to whites only. Both of these actions do not concern our present inquiry. However, in at least two states—Mississippi and Louisiana—the legislatures in 1956 considered bills which would seek to prevent (or punish) a desegregation of non-public schools.

After Archbishop Rummel of the Roman Catholic Church announced that the parochial schools of Louisiana would be racially integrated an immediate furore broke out. In addition to strong protests from many Catholic laymen in Louisiana, bills were

23. The changes in racial relations which have taken place in the last half-century could well make the Berea College case a historical curiosity. It is of interest to note, also, that Berea is again an integrated institution.


25. These actions are discussed in McKay, "With All Deliberate Speed": A Study of School Desegregation, 31 N.Y.U.L. Rev. 991 (1956).
introduced into the legislature to take away the tax benefits and deny any state benefits to any denominational or private school which integrated. The bills, however, failed of enactment. Similarly, in Mississippi the legislature failed to enact comparable proposals for invoking sanctions against a desegregating private school.

These actions, although abortive, indicate the type of adversity which can befall the private school in some Southern states. Other than direct prohibition of interracial private education such as took place in Kentucky and which led to the Berea College decision, actions by state authorities seeking to prevent integrated private schools fall into two broad categories. On the one hand, some state statutes purport to deny benefits otherwise obtainable, while on the other, some statutes seek to impose personal punishment upon those involved, the students, the teachers who instruct them, the administrators who admit them. While relatively rare at the present time, provisions for these stiff sanctions do exist. Accordingly, they merit detailed attention.

1. Denial of Benefits

Control over education and educational matters is one of the powers reserved to the states in accordance with the Tenth Amendment to the Constitution. In the absence of a provision to the contrary in the state constitution, accordingly, there is nothing to prevent a state government from conferring any benefit upon privately controlled educational institutions. While it may be, as we will note below, that the equal protection clause of the Fourteenth Amendment to the federal Constitution requires that a benefit accorded one private school must be tendered similarly to all, there has been no litigation on the point. The only provision of the federal Constitution which has been brought into play with regard to benefits for private schools is the “establishment of religion” clause of the First Amendment. Some litigation has arisen in recent years with regard to sectarian education—schools controlled or operated by religious groups—resulting in the enunciation of the so-called “wall of separation” doctrine. Under this doctrine, it is held that a state is forbidden by the First Amendment either to allow the use of public school buildings for the furtherance of religion or to support religion or religious institutions, including those devoted to education.27


27. Among the many discussions of the relationship of church and state in the United States, see O’Neill, Religion and Education Under the Constitution (1949); Pfeffer, Church, State and Freedom (1953).
However, the no-establishment-of-religion doctrine has not pre-
vented the Supreme Court from upholding the constitutionality of
state legislation which confers certain benefits upon denominational
as well as other private schools. One of the most important of these
benefits is that of exemption from taxation of the property of private
schools. All states have such a practice, and it has never been seri-
ously challenged. In like fashion, some states have made provision
for the distribution of textbooks free of charge to pupils of private
schools as well as those attending public schools. This the Supreme
Court found to be a valid practice. And some states have estab-
lished a system of free bus transportation for such students. Again,
this has been found to be within the Constitution.

No serious disagreement exists on the question of tax exemp-
tions to the private schools. On the other subsidies, however, major
controversy has arisen. Despite the fact that the Supreme Court has
indicated that there is no objection under the federal Constitution to
giving books and other aid, a number of state constitutions expressly
forbid any subvention to sectarian schools other than tax exemp-
tions. Speaking parenthetically, this is an interesting differentiation.
Tax exemptions, dollar-wise at least, are much more important
than, say, bus transportation or even textbooks, yet it is on the
monetarily unimportant benefit that controversy arises. The most
important subsidy meets no opposition.

Benefits of these types are readily available for use by a state
administration wishing to prevent or make it difficult for a private
school to remove racial restrictions on admission. The idea is
simple: What the state gives, the state can take away. Subsidies
should not be given to those who do not support the basic policies
of the state; benefits should be denied those who are considered to
be undermining "the way of life" of the particular state. Diversity,
in other words, is a sin; conformity to imposed norms is a virtue,
at least as far as racial segregation is concerned. And coercion
should be visited upon those who do not conform, upon those who
refuse to accept governmental standards of virtue, upon those who

28. See the discussions in Elliott and Chambers, The Colleges and the
Courts 285-350 (1936); McLaughlin, A History of State Legislation Affect-
ing Private Elementary and Secondary Schools in the United States 1870-
1945 (1946); Note, 3 N.Y.U. Intra L. Rev. 147 (1948).
case and the Cochran case, supra note 29, are bottomed on the theory that
the state is aiding and benefiting the pupil, not the religious school, in giving
free textbooks and bus transportation. The Supreme Court is careful to point
out that "a wall of separation" exists and must be maintained between church
and state. But of course aid to a pupil of a denominational school cannot
avoid being aid to the school and thus an aid to religion.
believe that a person who lives in the United States has a right to choose those with whom he would associate.

One state which already has made provision for the denial of tax exemptions to an integrating school is Georgia. Long before the current crisis in racial relations developed, Georgia's constitution contained the following provision:

The General Assembly may, by law, exempt from taxation all public property; places of religious worship or burial; all institutions of purely public charity; all intangible personal property owned by or irrevocably held in trust for the exclusive benefit of, religious, educational and charitable institutions, no part of the net profit from the operation of which can inure to the benefit of any private person; all buildings erected for and used as a college, incorporated academy or other seminary of learning, and also all funds or property held or used as endowment by such colleges, incorporated academies or seminaries of learning, provided the same is not invested in real estate; and provided, further, that said exemptions shall only apply to such colleges incorporated academies or other seminaries of learning as are open to the general public; provided further, that all endowments to institutions established for white people, shall be limited to white people, and all endowments to institutions established for colored people, shall be limited to colored people . . . .\[31[Emphasis added.\]

The Georgia legislature has implemented this with a statute which is now part of the Georgia Code. Identical language to that quoted above has been used, including the provision that "all endowments to institutions established for white people shall be limited to white people, and all endowments to institutions established for colored people shall be limited to colored people . . . .\[32[\]
The two provisions, constitutional and statutory, operate together in such a fashion that any private school accepting both white and colored students would lose its tax exemption. Of course, it may well be that law enforcement officials may choose not to invoke the statutory penalty, particularly if the school which integrates the races does so without fanfare and without publicity. As we will mention subsequently, this has happened in at least one instance.

Georgia's statute has not been tested in court on constitutional grounds. However, it can readily be seen that such legislation immediately raises serious questions as to its validity under the Constitution. There are at least two fundamental objections. Would denial of tax benefits solely on the basis of racial admission policies be a denial of equal protection of the laws as required by the Four-

teenth Amendment? If the action is taken against a denominational school, would it be an interference with the practice of religion and thus violative of the "free exercise of religion" clause of the First Amendment? These questions will be discussed in detail below. Suffice it for the moment to say even if such a statute were eventually to be declared unconstitutional, the interim difficulties would be considerable. It would take a brave administrator to undertake an attack on the statute or to go ahead without regard to consequences. Severe deprivations could be the result, for the tax exemption amounts to a considerable subsidy—so much so that it could be of crucial importance to the financial viability of the organization.

As far as statutes presently on the books are concerned, the removal of tax exemptions is apparently the only type of direct sanction available which would involve the denial of a state-granted benefit. However, other subventions in favor of nonpublic education exist, and it would be possible for a state administration to get enabling legislation through what normally is an acquiescent legislature. Benefits so affected include free school books and writing material, hot lunches, and similar grants which, when challenged, have been interpreted as grants to the individual students rather than to the schools. In like fashion, free bus transportation could be taken away.

Again, whether these actions would hold up under attack on constitutional grounds would depend upon the manner in which the statutes are drawn and the manner in which they are administered. An argument, developed below, could be made on equal protection grounds that singling out integrating schools for such action would be an unreasonable classification and thus proscribed by the Fourteenth Amendment. And if the statute purported to treat all private schools, whether integrating or not, alike, it could still be open to attack constitutionally if in fact it was being administered in an uneven way.

Another possible sanction under this category does not, as yet at least, exist on the statute books, but it would seem to be at least theoretically possible. That is the accreditation of graduates of private schools in the public school system (e.g., the accreditation of graduates of private preparatory schools to the state university) could be keyed to the admission practices of the private school. In
other words, it appears possible that a state could, if it chose, deny graduates of integrated private schools the opportunity to attend a public school. This could be done by statute or, with an appropriate delegation of authority, by administrative regulation. Whether valid or not, the argument could be made that graduates of integrated schools are ill-equipped to utilize the benefits of a higher education. Such a sanction would, of course, operate against the students themselves and only indirectly against the school. To the extent placed in practice, however, it would tend to exercise an influence over the actions of the administration of a private school. Constitutional objections similar to those concerning denial of benefits would, however, be available.

2. Criminal Punishment

The broad group of powers usually called the police power provides the basis for the other general type of sanction which could be invoked against a private school. The police power can only be loosely defined. It means that a state has power to protect the health, safety and morals of its population and may legislate for the general welfare. Other than those appearing in state constitutions, its only limitations are those of the federal Constitution, chiefly the Fourteenth Amendment's due process and equal protection clauses plus those parts of the first eight amendments which have been judicially read into the Fourteenth Amendment.

The police power may be used in two ways by a state administration bent on punishing a private school. Statutes could be passed which would impose criminal punishment, by fine or imprisonment or both, upon those concerned, and the general statutes aimed at protecting the public order could be used in a stringent fashion by law enforcement officials who wished to harass the school and those in charge of it. Some existing laws on the statute books of Kentucky, Tennessee and Oklahoma illustrate the first type. The

34. See McLaughlin, supra note 28, at 80:
A possibility of considerable indirect control [of private schools by the state] was implicit in a regulation which required pupils coming from non-public schools to take an examination in order to determine their proper assignment to grades in the public school system. A school board in Parsons, Kansas, passed a rule that pupils from a private or parochial school would be required to pass an entrance examination in order to enter the high school. The regulation was opposed as an arbitrary and unreasonable discrimination between private-school and public-school pupils, and as a violation of the constitutional right of all children to attend the public schools. The court ruled, however, that the requirement of an examination of students from private schools was reasonable as a means of determining the proper placement of pupils and a matter wholly within the discrimination of the board.
action taken by law enforcement officials of Alabama and Louisiana against the National Association for the Advancement of Colored People indicate what can be done under the second.

Tennessee’s statutes may be quoted to indicate the precise nature of the criminal sanctions which could be invoked; three sections of the Tennessee Code are relevant:

§ 49-3701. Interracial schools prohibited.—It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning.

§ 49-3702. Teaching of mixed classes prohibited.—It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent, or procurement.

§ 49-3703. Penalty for violations.—Any person violating any of the provisions of this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars ($50.00), and imprisonment not less than thirty (30) days nor more than six (6) months.

Oklahoma has similar statutes, but goes a step further. Provision is there made for fines and punishment “for any white person [attending] any school, college, or institution where colored persons are received as pupils for instruction.” Florida and Kentucky seek to prohibit interracial private education but do not provide for any punishment for violations. Florida’s statute contains the flat prohibition: “No individual, body of individuals, corporation or association shall conduct within this state any school of any grade (public, private or parochial) wherein white persons and negroes are instructed or boarded in the same building or taught in the same classes or at the same time by the same teachers.” Kentucky prohibits operation of integrated schools as well as an instructor teaching in or a student attending any “college, school or institution” where persons of both white and colored races are received as pupils or receive instruction.

The basic theory of American government and American jurisprudence—that the government is one of “laws, not of men” operating under the general supervision of “The Rule of Law”—pre-
supposes that law will be administered evenly, objectively and without preference or prejudice. Justice is blindfolded and operates, so the theory goes, without the need for determinative intervention by fallible human beings. It has, of course, long been recognized that this is only an ideal, not a reality, but more than that, it is an ideal which is impossible of attainment. Law is not self-executing. It requires the thought processes of human beings before it can operate. This fact, which should be obvious but which nevertheless is all too seldom recognized, sets the stage for the second type of police power action which could be taken against a private school integrating the races.

The vast discretion exercised by law enforcement officials, even though subject to being checked by the courts should excesses occur, gives those officials an enormous power of harassment. Given sufficient incentive, they can bring tremendous pressure to bear upon individuals unfortunate enough to incur their displeasure. None of this type of action will be illegal. All of it will, ostensibly at least, be aimed at enforcement of the law. But nevertheless, the real intention will be that of causing annoyance, embarrassment, or harassment to the object of the official action.

A possible example of this type of subtle punitive action is that which has recently been taken against the NAACP in Louisiana and Alabama. In March, 1956, Louisiana officials brought an action to enjoin the NAACP from continuing operations in that state until that organization had filed with the Louisiana Secretary of State the names and addresses of all its members and officers. The injunction has been granted, and the NAACP has ceased operations in Louisiana pending appeal. The injunction was granted

39. This is one of the fundamental concepts of traditional democratic theory. It is perhaps not facetious to point out that Judge Jerome Frank once remarked that a government of laws and not of men inevitably resulted in “a government of lawyers, not of men.” A recent restatement of the concept may be found in Freund, The Rule of Law, 1956 Wash. U.L.Q. 314.

40. See McKay, supra note 25, at 1059-60 for a brief discussion, in addition to the Southern School News for April, May, June, and July 1956. An example of this type of activity taken from a Northern city and having nothing to do with racial relations appeared in Newsweek, July 23, 1956, pp. 46-47: “The Federal agents who moved in on Reading, Pa., on July 5, to the complete surprise, perhaps even the astonishment, of the city’s mayor and police force, were acting on tips from The Times and The Eagle, the jointly owned local dailies. The raiders seized 44 pinball and slot machines in 23 taverns and hotels, including a bar once owned by the mayor . . . and now operated by his brother.

“For their enterprise on behalf of the law, the two Reading newspapers were rewarded last week with systematic bullying by both mayor and police.

“The next Monday, July 9, reporters were locked out of the press room at City Hall on the mayor’s claim that the space was needed for other purposes. . . . [The political reporter for The Times] was arrested [on the
pursuant to a statute originally enacted in 1924 as an anti-Ku Klux Klan measure.

The highly publicized bus boycott in Montgomery, Alabama, by Negroes in an effort to end bus segregation led finally to the leaders of the boycott being indicted under an old city ordinance originally enacted for use in labor disputes. Then in June, 1956, the NAACP was enjoined from further activity in Alabama after the state attorney general had brought an action alleging that the NAACP's actions "have resulted in violation of our laws and tend in many instances to create a breach of the peace." The chief allegations were that the Negro organization had fostered and led the bus boycott in Montgomery, had "employed or otherwise" paid Miss Autherine Lucy to break down segregation barriers at the University of Alabama, and had "never qualified to do business in Alabama as a foreign corporation."41

The same techniques are available for use by state officials against the administrators of a private school mixing the races. Given the desire on the part of an attorney general or district attorney, a complaisant judge would probably not be too difficult to find. While ultimately such actions would probably be invalidated on constitutional grounds, that would take a long time. In the interim, a great deal of annoyance or worse would be suffered. The ideal of blindfolded justice can be—often is—shattered by the operational reality of a prejudicial thumb on the scales.

41. See Southern School News, July, 1956, p. 10. Compare the following action taken in Americus, Georgia: "Superior Court Judge Cleveland Rees Monday at Americus postponed until July 19 a hearing on an injunction to ban permanently the operation of a summer camp which operated last summer on a nonsegregated basis. The Sumter County commissioners obtained on June 8 a temporary injunction which prevented opening of the camp on June 18 and now seek to make the ban permanent on health grounds. Monday's postponement was granted at the request of [the] county attorney. . . . The County's petition does not mention race but bases its argument on an alleged lack of proper sanitary and health facilities at the campsite. . . . Four Sumter County farmers . . . have sought to associate themselves with the county in the injunction action, claiming in their petition the sponsors have no license and would operate the camp 'in a manner detrimental to morals.' They claimed specifically young children at the camp would be allowed to see pigs being born. The camp is a religious communal enterprise in which about 60 white and Negroes are associated." The Atlanta Constitution, July 3, 1956.
B. The Constitutional Basis of Governmental Sanctions

It may well be that state law enforcement officials will choose to ignore violations of law and thus the sanctions discussed above may never be invoked. Should an individual private school quietly decide to admit Negro students and do so without publicity, quite possibly nothing would be done about it. This has in fact happened in some isolated instances in the South. Some private schools have admitted Negroes for a number of years, and this, although certainly known to state officials, receives no adverse reaction. The reason for this appears to be simple. Since the admissions are not publicized and are not widely known, the officials are not called upon to take a public position, to make a decision on the matter. Their hand has not been forced. If it were otherwise, the result could only be that the official would enforce the punitive statutes.

The governmental sanctions, whether a denial of state benefit or punitive in nature, would if enforced doubtless be attacked on federal constitutional grounds. The relevant provisions which could be invoked are those which have the effect of precluding arbitrary action on the part of state governments, the due process and equal protection clauses of the Fourteenth Amendment, and, for denominational schools, the religious freedom clause in the First Amendment which has been made a limitation also on state governments through judicial interpretation.

Absent a precise, fully developed factual situation out of which a constitutional problem arises, it is difficult to foresee all of the possible variations a problem may take. Additionally, it is difficult to forecast the manner in which the Supreme Court will approach any given case. It has a variety of techniques available, of which one or a combination of several will be chosen depending upon the peculiar factual situation involved. Even so, arguments on Fourteenth Amendment grounds would probably proceed substantially as follows. Suppose that a private school integrated the races. Suppose further that a state administration enforced a statute which required the denial of tax exemptions to such schools, but did not remove tax exemptions generally or of other schools in a similar situation. Whether that would amount to a denial of the standards of equality of treatment required by the equal protection clause would depend upon the answer given to the further question of whether the state had made an "unreasonable classification." For

42. A list of integrating private schools has been compiled by the Southern Regional Council, Inc., 63 Auburn Ave., N.E., Atlanta, Georgia, and is available in mimeographed form.
the Supreme Court has stated many times that the Constitution does not forbid a state making some classifications, but only those which are unreasonable or arbitrary—without a rational basis. The answer to that question is not self-evident. There is no direct authority in point.

Nevertheless, it would appear reasonably likely that action taken only against a school which integrates the races and with no concomitant action taken to remove all tax exemptions from all schools would fall under an attack on equal protection grounds. While the Fourteenth Amendment is not a doctrinaire requirement of the impractical (reasonable distinctions and classifications are permitted) it does forbid invidious discrimination. It requires laws of like application to all who are similarly situated. Thus the result in the Segregation Cases: a classification based solely on race is "unreasonable" and arbitrary and, accordingly, improper under the equal protection clause. Would the same type of reasoning carry over and be applied in the event of denial of tax exemptions because of racial integration? It is likely that it would.

The cases are relatively rare, but it seems clear that the same concepts apply whether the state action in question seeks to impose deprivations (e.g., in taxation or school segregation) or to extend benefits (e.g., tax exemptions or free textbooks). A tax exemption to one school or church would have to be extended to other schools and churches falling into the same category. And the converse would appear to be valid; denial of a benefit accorded to all in a category, the benefit being denied because of admission practices contrary to public fiat, would be an "unreasonable" classification. The reason for this is that the state, under constitutional proscription against distinctions based on race, could scarcely be allowed to use race as a means of classification in extending or denying benefits. Racial discriminations, in other words, when made by an organ of the state government are unreasonable and arbitrary, and cannot be used in an effort to control individual behavior. This would seem to be true even though, as Edward S. Corwin has pointed out, a state's "latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemption on the grounds of policy. . ." 43

The result would be the same should the state, by statute, eliminate all exemptions from taxation for all private schools, but through administration of assessments for taxation in fact impose

an unequal burden upon those schools integrating the races. In such an event, the school aggrieved by such discrimination in fact would be entitled to have its assessment reduced to the level of others similarly situated. For the equal protection clause not only prohibits “discriminating and partial legislation . . . in favor of particular persons as against others in like condition,” it also applies to the manner in which law is administered. “Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.” More than a mere error would have to be shown, however, to be able to invoke the constitutional guarantee; it would take a purposive, deliberate discrimination.

Governmental sanctions against interracial private education, through denial of state-granted benefits would, then, probably be found unconstitutional. If the action were to be taken only against the transgressing school, it would seem to be a clear case, and the same applies if all benefits are removed but the administration of, say, taxation is in fact unequal.

Turning now to the other type of official sanction which might be visited upon a private school administrator, teacher or student—action under the police power—another constitutional question is posed. The problem is one of whether the state’s action accords with the constitutional concept of due process of law. And it is “substantive” due process, as distinguished from the “procedural” variety that is the focus of our interest. The problem is one of the substance of the state action or state legislation, not of the manner in which it is administered; that is to say, we assume a regularity of procedure and look instead to what is being done. And again, the two-pronged manner in which the police power of a state may be used will result in a separate discussion for each aspect.

There are no cases directly on the point of whether a state may constitutionally impose criminal penalties for biracial private education, unless the Berea College case is considered to be one. Since

45. Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 446 (1923).
49. Justice Harlan, dissenting in the Berea College case, did not believe that the Court had ruled on the constitutional issue.
the question is essentially one of whether a state may impose admission standards on private schools, the result would probably hinge upon the extent to which the Supreme Court would be willing to extend the doctrine of the *Pierce* and *Meyer* cases discussed above. In those cases, the Court held that a state may not, consistent with due process, prohibit private education in toto or prevent the teaching of the German language in a private school. Or, to put it another way, the result could depend upon the extent to which the Court would extend the principle of the *Segregation Cases* to private education. In either event, the problem for the Court would be one of determining whether the legislation imposing criminal penalties, and thus effectively preventing biracial private education, had a rational basis or whether it was purely arbitrary. For the test of validity of state exercises of the police power is whether the means employed by the state (i.e., the statute) bears a real and substantial relation to an end which is public, that is, the public health, safety or morals, or some other phase of the general welfare.\(^5\)

The end sought by the state, thus, must be legitimate and the means utilized to reach that end must be neither arbitrary nor oppressive. Despite the recent swing to broad concepts of substantive due process under which states may freely experiment in economic and social affairs, there has been a concurrent tendency for the Supreme Court to construe state limitations on personal liberties strictly. The normal presumption of constitutionality of state legislative action is, so some believe, reversed in personal liberties cases with the result that there is a presumption of invalidity of anything that restricts the liberty of the individual.\(^5\) A private school and its administration, faculty, and student body would seem to be protected against arbitrary interference by the due process clause. Some language by the Supreme Court in the *Meyer* and *Pierce* cases is apposite. In *Meyer*, it was said that:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely

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50. If a police power regulation goes too far, it becomes a taking of liberty or property which the Constitution proscribes. What is "too far," i.e., what is "arbitrary," is of course not susceptible of precise definition but depends upon the rendering of a judgment on the facts and circumstances of each case. See Corwin, *op. cit. supra* note 43, at 982 for a collection of cases.  
51. There is considerable debate on this, among members of the Supreme Court and among the commentators, so much so that it is doubtful that more than a few of the individual justices have ever adhered to the notion of the "preferred position" of the First Amendment freedoms. Cf. Jackson, *The Supreme Court in the American System of Government* (1955)
stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.52

The Meyer case is, in substance, an affirmation of the constitutional liberty of a teacher to pursue a lawful calling free and clear of arbitrary restraints imposed by the state.

In the Pierce case, the Court said that the "state legislature is not the final judge of limitations of the police power, but its enactment will be set aside when found to be an unwarranted, arbitrary interference with the constitutional right to carry on a lawful business or occupation, and to use and enjoy property," and that the statute requiring compulsory public education "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."53 The Court then went on to hold that the corporations involved (i.e., the private schools) were being deprived of their "property" without due process of law.

As we have seen above, the state does have constitutional power to regulate in a reasonable manner the activities of private schools. It is doubtful, however, that it can, consistent with due process, impose admission standards of racial separation, even though the converse is not true. The state apparently can impose standards of no racial discrimination upon private schools.54 Requiring racial separation anywhere—as distinguished from condoning voluntary segregation by private action—is scarcely permissible and hardly a legitimate use of the state's police powers.55 It would be an arbitrary action on the part of the state, one proscribed by the due process clause of the Fourteenth Amendment. As was said by federal Judge J. Skelly Wright in a recent case in New Orleans involving use of the police power of Louisiana to compel racial segregation in public schools, "The problem of changing a people's mores, particularly those with an emotional overlay, is not to be taken lightly. It is a problem which will require the utmost patience, understanding, generosity and forebearance from all of us, of whatever race. But the magnitude of the problem may not nullify the

52. 262 U.S. at 399.
53. 268 U.S. at 534.
54. See Note, 64 Harv. L. Rev. 307 (1950).
principle. And that principle is that we are, all of us, freeborn Americans, with a right to make our way unfettered by sanctions imposed by man because of the work of God."

Not so clear in probable result is the validity under the Constitution of actions taken against an integrating private school based upon general statutes for protection of the public order. On the one hand, action taken by law enforcement officials which would insure the most meticulous adherence to the exact letter of all statutes by private school personnel would doubtless be entirely valid, or at least impossible of proof of an improper motive. An example of this could be such general statutes and regulations as those relating to sanitation and fire protection. While ostensibly only carrying out the law or regulation, state officials conceivably could so harass a private school as to cause a great deal of annoyance and expense. Suppose, on the other hand, an action is brought by a state's attorney in which an injunction is sought against a private school for conspiring to violate the state law against racial intermixture. This would probably, as explained above, be invalidated.

The point is, however, that law enforcement officials do have the power, if not the right, to pursue policies and to take action which would result in disturbance and which would otherwise molest private school personnel. The abstract constitutional principle may be clear enough, but difficulties of proof and the probability of protracted litigation, may go far to nullify that protection.

Should the private school concerned be owned or controlled by a religious group, another constitutional argument could be advanced in an attack of official sanctions against an integrating school; that is, the freedom of religion provision of the First Amendment. Since 1940, the limitation against laws prohibiting the free exercise of religion has operated on the states as well as the national government.

Here, again, no direct authority is available. The states have been singularly loath to attempt any systematic regulation of religion, religious groups, or denominational schools. Some of the language used by Justice Black in his opinion for the Court in

56. Id. at 342.
57. A discussion of how police actions at times fail to coincide with constitutional guarantees may be found in Ernst, The Policeman and Due Process, 2 J. Pub. L. 250 (1953). See also the example of police action discussed in notes 40 and 41 supra.
58. The case so holding was Cantwell v. Connecticut, 310 U.S. 296 (1940).
Everson v. Board of Education, though made in passing, tends to indicate that he, at least, believes that possibly a state may have no power to interfere in the conduct of affairs in parochial schools. The Everson decision sustained the right of New Jersey to provide free bus transportation to parochial school children. Justice Black's statement, relevant here, was: "[The First Amendment] requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." On the other hand, it is clear that while laws "cannot interfere with mere religious belief and opinions, they may with practices." Thus, if the First Amendment is construed so as to permit a man to excuse his conduct on the ground that it involves a religious belief, it would be tantamount to making "the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." In other words, as the Court stated in Cantwell v. Connecticut, "the [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." The Court has pursued what is at best a rather erratic course in its interpretation of what acts or practices of religion are within the protection of the First Amendment. It is difficult and perhaps even impossible to forecast what the Court would do with a freedom-of-religion argument aimed at invalidating the official sanctions discussed above.

However, add the strong constitutional preference for an absence of restraint on religion to the fact that the sanctions which could be imposed have little or nothing to do with education—in itself, a legitimate object of governmental concern—and the result would seem to be that the use of the sanction would be proscribed. At the very least, the First Amendment point would serve to buttress a decision based on a due process argument.

59. 330 U.S. 1 (1947). In Wood, Due Process of Law 1932-1949 85 (1951), the following statement is made: "In the Everson case Justice Black appeared to add the idea that to deny the parochial-school children the benefits of free transportation would have infringed upon their right to free exercise of their religion."
60. 330 U.S. at 18.
62. Id. at 167.
63. 310 U.S. at 303.
C. An Evaluation

Statutes of some Southeastern states under which sanctions could be imposed upon those connected with a private school at which both white and colored pupils attended, have been discussed. These sanctions either deny a state-granted benefit to such a school or provide for criminal penalties. It is fair to say that serious doubts exist as to the constitutionality of such sanctions. Should they receive a judicial test, it can be forecast with some confidence that the Supreme Court would adhere to the spirit of the recent racial cases and would strike down attempts to compel private groups to maintain policies of racial separation.

Even so, a private school administration may be reluctant to run the risk of a possible decision upholding the statutes, or, in any event, to suffer the undoubted difficulties which would ensue in the interim period between first admitting Negro students and final Court decision. It is possible that the litigation would not reach final resolution for several years. And it is always possible, as noted above, for law enforcement officials to use existing, apparently general, statutes in a manner which would seriously molest the school. There would, in addition, be a number of nongovernmental sanctions which could well be imposed privately against the school. These private sanctions will be discussed in detail in the next section.

Despite all of this, there have been a number of schools in the South whose administrations, whether bravely or temerariously or with indifference to possible consequences, have already admitted students of both the white and colored races. Spring Hill College in Mobile, Alabama, is an example.\(^4\) The parochial schools of Louisiana will be integrated at an, as yet, unannounced time in the future.\(^5\) Other formerly all-white institutions which have already admitted Negroes include Vanderbilt University, Southern Methodist University, Barry College of Miami, Florida, Columbia Theological Seminary of Decatur, Georgia, as well as colleges in all Southern states except Mississippi and South Carolina.\(^6\)

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\(^4\) Spring Hill College is controlled and operated by the Roman Catholic Church.

\(^5\) See various 1956 issues of the monthly Southern School News for data on the situation in Louisiana. On August 5, 1956, Archbishop Rummel announced that integration would be postponed until at least September 1956. He also indicated that integration, when it comes, will be gradual, affecting the elementary parochial schools one grade at a time. The Atlanta Constitution, Aug. 6, 1956, p. 1.

\(^6\) The listing of former all-white schools, both public and private, which have announced that race will no longer be a condition of admission contains only colleges and universities; it includes seventy-three private and eighty-five public institutions in the District of Columbia and seventeen states considered to constitute the South. All states except Mississippi and South Carolina are represented by at least one integrated school.
It is particularly noteworthy that private colleges or universities have been desegregated in all of the states which have specific statutory enactments designed to prevent racial integration. The initial reaction, thus, of state law enforcement officials is to ignore the statutes and to allow the institutions to continue free from official sanction. The reasons for this failure to act would indeed be interesting, but probably beyond ascertainment. Possibly the difficulties experienced with the public schools have been enough to occupy fully the time of the officials; possibly there is no desire on their part to harass the private schools. Whether this attitude and failure to act will continue is, of course, unknown and unknowable. The statutes do exist in those states mentioned above; the opportunity for causing major trouble to the private school administration is present. What can be said at this time is little more than that the problems involved in official sanctions have not, as yet, been fully resolved.

III. Nongovernmental Sanctions

Law, whether created by legislature or by court, is but one of the means by which the affairs of society are ordered, even though it may be, as Roscoe Pound maintains, the most important of the numerous methods of social control. The behavior patterns of people are created or altered as a result of a congeries of factors and influences. Law at best has but a limited role to play in this process. Accordingly, there are factors other than the governmental sanctions discussed above which will be influential in the decision whether to mix the white and colored races in a private school. It is the purpose of this section to indicate the nature of these other factors and to illustrate with concrete examples the form which they can take. In order to do that, we must perforce take off our legal spectacles and replace them with those labelled "sociology." And it will be one of the basic concepts of sociology—that of "social control"—that will occupy our attention.

Social control is a concept which is concerned with human conduct and the manner in which it is shaped or altered. It is "a collective term for those processes, planned or unplanned, by which individuals are taught, persuaded, or compelled to conform to the usages and life-values of groups. . . . Social control takes place when a person is induced or forced to act according to the wishes of others, whether or not in accordance with his own indi-

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vidual interests." Its purposes are "to bring about conformity, solidarity, and continuity of a particular group or society."*

Viewed thusly, the concept has importance to our present inquiry. The relevant questions requiring discussion are: What are the nonlegal sanctions which might be visited upon the personnel of a private school considering racial integration? What are the deprivations which might be imposed upon such personnel? What, to put it another way, are the rewards to be gained by not violating the custom of a community? Are there sanctions which may be used as a countervailing force by those against whom social pressure is brought? The context in which the discussion may best be made is the over-all pattern of practices in Negro-white relations throughout the South in the period of time since the decision in the Segregation Cases in May, 1954.

A. The General Picture

There are two factors particularly evident in the present-day South: (1) the overwhelming majority of the Southern whites are committed, in greater or lesser degree, to continue the patterns of racial separation which have long prevailed; (2) there is a split, deep and growing, between the two communities—white and colored—so that any attempt to bring about a rational solution to the segregation problems is foredoomed to failure. By a "rational" solution I mean one which is taken in the ideal democratic manner, by full and free discussion and argument of the issues, a full airing of all the pertinent facts, and then a decision made which all agree to observe even though some may have serious mental reservation. Rationality in decision-making presupposes basic agreement in end-values. But that is precisely what is lacking here. In other words, the conflict is one over ends, not means.

The views of the white Southerners have been widely publicized and need no restatement here. Similarly, the views of the colored

68. Social Control 3 (Roucek ed. 1947).
69. Young, Sociology 898 (1942).
70. It is doubtless true that the South generally and the white Southerner in particular has received a "bad press" from non-Southern newspapers and magazines. This has traditionally been true, and it remains one of the chief valid criticisms that Southerners make of "yankees." For restrained statements of the Southern viewpoint, all made from differing points of view, see the following articles by leading Southern newspapermen: Mc-Knight, Troubled South: Search for a Middle Ground, Collier's, June 22, 1956, p. 23; McGill, The Angry South, Atlantic Monthly, April 1956, p. 31; Waring, The Southern Case Against Desegregation, Harper's Magazine, Jan. 1956, p. 39; Carter, Racial Crisis in the Deep South, Saturday Evening Post, Dec. 17, 1955, p. 26.
minority, while not so broadly disseminated, are well-known.\footnote{For a recent statement made by a leader of the NAACP see Hill, *The South in Conflict*, The New Leader, April 2, 1956, p. 3. The monthly *Southern School News* is one of the best sources of statements of Negro and white alike.}

Opposition to the law created by the Supreme Court in the *Segregation Cases* and subsequent decisions has taken two main forms. Chief and best known of these are the governmental actions of a number of Southern legislatures and the public statements of Southern politicians and community leaders. So-called "private school" plans and resolutions of interposition and nullification\footnote{A thorough discussion of interposition and nullification may be found in a group of articles entitled *The Doctrine of Interposition: A Round Table*, 5 J. Pub. L. 1 (1956).} have been the principal expressions of the legislatures, led by the governors and other public figures. The other type of opposition has been the actions of individuals or groups of white Southerners acting as private citizens, aimed at imposing deprivations (or withholding rewards or benefits) upon anyone, white or colored, who favored racial integration and who worked for the implementation of the Court decision. This action, not so highly publicized as the other, is the focus of our present attention.

Much of the imposition of nonlegal sanctions upon those who incur the displeasure of the white supremacist is done *sub rosa*. Accordingly, there has been nothing more than sporadic reporting in newspapers and other media of isolated instances of this type of activity. It is, as a consequence, not known whether this action is taken in concert throughout the South or is an unconnected series of operations taken by individuals or groups of individuals acting without central direction or control. On the basis of what evidence there is, however, it would appear to be the case that nonlegal sanctions have, at times at least, a state-wide operation. And there is at least a loose liaison, if not a clear tie, between groups in different states.\footnote{A loose-knit organization including groups from eleven states, known as the Federation for Constitutional Government, was formed in December, 1955. Apparently, however, local groups have almost complete autonomy. See *Southern School News*, Feb. 1956, p. 8, for an account of the Federation.}

The ability of the white Southerner to impose nonlegal pressures stems predominantly from the over-all superior power position of the white man in the South. The social structure is completely oriented toward patterns of white domination. Most, if not all, of the important governmental posts, judicial as well as executive and legislative, are occupied not only by white men, but by those whose
preferences clearly lie with the maintenance of the status quo ante May, 1954. Both the Negro and the minority of the white Southerners who espouse his cause are in the same position of power-inferiority vis-à-vis the white supremacist.

This fact has great significance in the manner in which the social structure is maintained or altered. Those who would create difficulties for the Negro and his champions are in the most advantageous position to do so. Mentioned in section II above was one example of this, the ability of designated law enforcement officials to take action, while ostensibly only doing their duty according to the law, so as to harass anyone who incurred their displeasure. It can be forecast with some certainty that nonlegal “private” sanctions will be invoked against some or all of those who are temerarious enough to mix the races in a private school in the South.

B. The Over-All Pattern

Historically, sporadically-imposed physical sanctions have been one of the principal means used in the South to keep the Negro “in his place” in the Southern “caste system.” These have included the occasional (but greatly diminishing) use of extermination (lynching and the casual shooting of Negroes) and of physical punishment (such as floggings), as well as the entire set of taboos and social conventions in some or all of the South. In addition, such other forms of terrorism and physical action as wrecking buildings and burning homes took place from time to time. The pattern was one of a background of occasional intimidation and violence, put into operation just often enough to insure that the mass of colored people kept quiescent. Other sanctions traditionally used included the denial of educational opportunities and pressures to prevent use of the ballot.74 There were, in addition, a variety of means to keep the Negro in a position of economic subservience so that all but a few were poor and could obtain only menial jobs.

It should not be thought that the attitude of the Southern white to the Negro has been wholly one of antagonism. As long as he did not threaten the status of the white man, the Negro was often treated with kindness and even respect. The two communities could, and did, live very well together. In numerous individual instances, there was genuine liking and friendship between white and colored. Even “Jim Crowism,” as C. Vann Woodward has demon-

74. Recognition of the potency of the vote was made soon after the Civil War and steps were immediately taken to prevent Negroes from voting. Many of these have been carried down to the present.
came relatively late. Rigid separation in important activities and complete exclusion from much of the community life did not prevent a large amount of interchange between the races.

The Ku Klux Klan was the chief instrumentality of the organized form of Negro repression, although as John Cash has related in his classic *The Mind of the South*, there were numerous examples of unorganized, individual acts of violence. In recent years, however, the Klan has suffered a major decline in importance and influence, at least as a group. A number of states have enacted laws aimed at hampering its activities. Anti-mask laws are an example. It has been placed upon the list of subversive organizations maintained by the Attorney General of the United States. "Ineptly led, unmasked by state laws, and inhibited by the unfriendly attentions of the Federal Bureau of Investigation, it is a 'fringe' group in the full meaning of the term."

With the decline of the Klan as an important factor in racial relations, a number of other resistance groups have been formed since May, 1954. At least fifty (there are doubtless more) of these organizations now exist throughout the South. Although not necessarily affiliated, these groups have sufficiently identical aims and purposes to be given a common generic name, White Citizens' Councils (WCC), and may be treated as a common organization. Many of them have anti-Semitic features.

Thus far at least, the WCC do not operate in the manner which led to the virtual demise of the KKK. Their membership has been publicized, their activities carried out relatively openly, there has been no use of hoods or burning crosses which can be attributed to the WCC, and they have emphasized their intention to work "by peaceful and legal means." Their purposes and declarations of intentions may be learned from the constitution of the Association of Citizens' Councils of South Carolina:

> Its purposes are the gathering, discussion, and dissemination of information relative to the operation of constitutional government and the preservation of State sovereignty and bi-

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76. Cash's book, published in 1941, is basic to an understanding of the South.
77. A brief discussion of anti-Klan legislation may be found in Note, 1 J. Pub. L. 182 (1952).
80. A listing, doubtless incomplete, may be found in McKay, "*With All Deliberate Speed*": *A Study of School Desegregation*, 31 N.Y.U.L. Rev. 991 (1956).
racial society, the betterment of relations between the races, the maintenance of peace, good order, and domestic tranquility in the community, the education of the public generally thereabouts, the association with other groups having similar aims, and the doing and performance of all acts and things incident to the attainment of its purposes.\textsuperscript{81}

They have already gained a considerable membership and exercise a significant influence over governmental activity in a number of states. This may, of course, be attributable to the fact that quasi-official support is given the WCC in some states through the active membership of high government officials.\textsuperscript{82} In less than two years after formation, the WCC in Mississippi had 300 chapters and more than 80,000 members. Alabama's groups claim more than 65,000 adherents and South Carolina's more than 55 chapters.

The WCC thus form a loose organization of Southerners willing to take strong, perhaps extreme, measures to preserve their traditional social structure. They have many important government figures and other community leaders and accordingly, are in a position to invoke many of the informal means of social control. “Even critics of the WCC will concede that many of the leaders of the movement have community status in terms of political influence, economic power, or both.”\textsuperscript{83} Hodding Carter, one of the more astute observers of Southern life, has said that “by and large, the men who thus far have led the Councils' movements have standing in their communities. They are, primarily, men with an obsession—namely, that integration of the public schools means blood integration as well—and this obsession is shared by many who abhor the Councils.”\textsuperscript{84}

\textbf{C. Types of Nonlegal Sanctions}

For purposes of description, the sanctions which might be invoked by individuals or groups in efforts to prevent change in racial patterns may be classified in three groups, physical, economic, and psychological. These control measures are privately invoked by individuals and groups. It should be noted that they are not disturbed by state authority, however, and thus may be said to be condoned, if not encouraged, by state officials.

\textsuperscript{81} Quoted \textit{id.} at 1065.

\textsuperscript{82} Such well-known political figures as Senators Eastland of Mississippi and Thurmond of South Carolina, Governor Griffin of Georgia, and Congressmen Davis of Georgia and Williams of Mississippi, among many others, indicate the pattern which is taking place.

\textsuperscript{83} Fleming, \textit{op. cit. supra} note 79, at 47.

\textsuperscript{84} Carter, \textit{A Wave of Terror Threatens the South}, \textit{Look}, March 22, 1955, p. 32.
1. Physical Sanctions

The concept of social control includes the utilization of techniques which both punish and reward. However, physical sanctions can only be applied to penalize or punish, never to reward. Thus, they are essentially negative in character. And while they are doubtless the most simple and direct of the methods of social control, no doubt they are also the least frequently used. Such sporadic resort to physical punishment as does exist, however, makes it necessary to indicate the forms it can take.

Mob violence is perhaps the most spectacular example, although it is seldom resorted to. The spectacular, highly publicized action of the mob in Tuscaloosa, Alabama, following the enrollment of Autherine Lucy in the University of Alabama highlights recent instances of racial disturbance. But while some of these actions can be expected from time to time, their importance should not be exaggerated. Rioting and other forms of mob violence will likely be local in nature and of relatively short duration. No government can tolerate such activities which represent a breakdown of law and order, not even if law enforcement officials are basically in agreement with the rioters.

Other physical sanctions are, similarly, likely to be imposed only locally and sporadically, if at all, and then only by members of the lunatic fringe. They include possible extermination of the offending person or of the person who is believed to be an offender (the Till episode in Mississippi is an example, but that is merely the most sensational; a few Negroes have been killed in other parts of the South85), bombings (of homes and meeting places; these seem to occur in connection with Negro attempts to move into white residential areas; similar episodes of this type have taken place in Chicago and Detroit, among other Northern cities), and casual physical punishment (an occasional flogging or beating).

All of these examples of physical sanctions are based on the individual’s fear of physical pain or injury. They are effective only as far as an individual allows his fear to control his actions. Since, however, they are local and sporadic, their importance should not be over-emphasized. This sanction, in short, is of relatively minor and diminishing importance. Those who have forecast “a reign of terror” in the South are building on very flimsy evidence.

85. For example, Rev. George W. Lee, a Negro minister, was slain in Belzoni, Mississippi, allegedly for “activities in the NAACP and seeking voting rights for Negroes.” Southern School News, April, 1956, p. 11.
2. Economic Sanctions

Of more importance are the economic sanctions which have been and are being imposed to influence the conduct of Negroes and their supporters. Two quotations from Southern newspapers indicate that the principal weapon of the WCC has been "economic pressure"—a euphemism for a practice of what one Southern newspaper called "economic thuggery." The Jackson, Mississippi, Clarion-Ledger carried the following statement of one Fred Jones: "We can accomplish our purposes largely with economic pressure in dealing with members of the Negro race who are not cooperating, and with members of the white race who fail to cooperate, we can apply social and political pressure." And at an organizing rally of the WCC in Alabama, an account of which was carried in the Montgomery, Alabama, Advertiser, a speaker gave blunt voice to the principle of economic coercion: "The white population in this country controls the money, and this is an advantage that the council will use to legally maintain complete segregation of the races. We intend to make it difficult, if not impossible, for any Negro who advocates desegregation to find and hold a job, get credit, or renew a mortgage."

The numerous instances of economic pressure which have been reported (many and perhaps even the majority of which are not publicized) do not measure the influence which such control actions have. They are intended as object lessons, and are designed not only to penalize the individual victim but also to intimidate and silence others. Thus, the action of the New Orleans Chamber of Commerce in discharging the editor of its news bulletin for belonging to an anti-segregation organization is of the type of economic pressure which has wider ramifications. To some extent, the use of economic reprisals has resulted in the creation of an atmosphere of fear.

The technique has been widely used. "Negro teachers have been discharged, Negro farmers have been denied credit, and Negro merchants have been boycotted by wholesale distributors. In a number of instances, signers of desegregation petitions directed to local school boards have recanted after their names and addresses were published by the newspapers. In a few cases, white persons believed to hold unorthodox racial views have been 'advised' by

86. Quoted in Fleming, supra note 79, at 48.
87. Ibid.
88. The organization to which the editor belonged is the Southern Conference Educational Fund. Southern School News, May, 1956, p. 12.
organized groups of their neighbors to move; and a small but growing number of white ministers have lost their pulpits because of their opinions on segregation."

Nevertheless, as will be discussed below, economic pressure is a technique which can be used by the Negro also. It is a knife which can, and has, cut two ways.

3. Psychological Sanctions

The final method of social control which has been used in the South is the psychological sanction. It is probably the most important of the three we have discussed, although the other two are far more spectacular and get far more publicity. Of major importance to an individual is his status in the group in which he lives and conducts his affairs. Loss of that status can be a severe, even traumatic personal experience. The psychological sanction is the one which is probably first imposed, and it is only after it has apparently failed that economic or physical sanctions are put into use. Its success is dependent upon the value an individual places upon his status in his community (or the sociologist's "status group").

Social ostracism, the failure to include a transgressing individual in the activities he normally considers his part, is a ready example. It is, of course, a sanction which in the South would be available for use against the nonconforming white, not the Negro. The action of the State Board of Education in stripping Dr. Guy H. Wells of his honorary title of President Emeritus of the Georgia State College for Women is an example. This was done because of his activities in the promotion of interracial cooperation. The concurrent attempt to prohibit pension payments to Wells, rejected as unconstitutional by the trustees of the state retirement system, is an instance of the failure of an attempted economic sanction.

89. Fleming, supra note 79, at 49.
90. An account of the various techniques of social control may be found in LaPiere, A Theory of Social Control c. 9 (1954).
91. Southern School News, April 1956, p. 7. Compare the following: "'Our Southland,' said John Howard O'Dowd to his fellow South Carolinian, 'is becoming a place where concurrence with the established orthodoxy is cause for rejection and social ostracism.' An editor of the Florence, S.C. Morning News . . . O'Dowd knew whereof he spoke. Because he had broken 'the established orthodoxy' by calling for moderation on the desegregation issue, O'Dowd was pressured into dropping the whole subject of racial integration from the New's editorial page. Nevertheless, threats against O'Dowd and his family and pressure on the newspaper . . . only increased. Last week Jack O'Dowd resigned 'for my own good and the good of the paper.' Next month he will join the staff of the Chicago Sun-Times as a reporter. Said O'Dowd regretfully: 'I'm certain that the News no longer will buck racial feeling.'" Time, July 30, 1956, p. 50.
Other psychological sanctions are threats of economic reprisal, of physical punishment, or of the loss of social "face." They thus combine with the other types of sanctions. An indication of the form threats may take can be seen in the use of the burning cross and other similar crude, but suggestive, devices.

4. The Double-edged Character of Economic Pressure

That the nonlegal sanction can be used as a weapon to fight segregation is evident from the well-known bus boycotts in Montgomery, Alabama, and Tallahassee, Florida, as well as a host of quiet, unpublicized similar movements by the Negro. The growing economic power of the Negro in the South and in other areas of the nation makes it possible for him to exert pressure of his own. Representing more than ten percent of the population, Negroes could hold the power of economic life or death over many small retail merchants as well as other business enterprises.

D. An Evaluation

Nonlegal sanctions invoked in racial matters make up a good part of the context in which a private school administrator operates. As Arshbishop Rummel of the Roman Catholic Church in Louisiana has experienced, an announced decision to integrate the races in a private school can have important results in the furore of opposition stirred up. Of course, the Catholic school in Louisiana occupies a much more important position in the educational picture than does the private school elsewhere. But the pattern could well be the same.

The private school administrator deciding whether to admit Negro students would have to ponder the possible effect that action would have on his school. Economic pressure could well be invoked against the administrator and against the school itself. Psychological sanctions might likewise result.

That this is not a fear lightly to be considered is indicated by recent actions of private school trustees in Oklahoma and North Carolina. In Oklahoma, the headmaster of the Casady Private Day School resigned after the board of trustees rejected an application for admission of an 11-year-old Negro boy. The trustees of the school announced that the headmaster had disagreed with them on segregation barriers, recommending that the barriers be removed at once. But the trustees felt that the school's finances

would suffer if it moved "too fast" on the integration issue. The
school is "financed entirely on tuition and private appropriations,"
the trustees said, "and we felt we would approach the integration
issue cautiously."\textsuperscript{93} The school is sponsored by the Episcopal
Church but supported by laymen.

Nevertheless, as noted in section II above, a rather large
number of private schools have integrated their student bodies or
have announced their intention of doing so in the near future.
Significant as this is, it should not be thought of as indicative of a
general pattern. Even in those schools which have admitted
Negroes, the numbers involved are very small.

\textsuperscript{93} Southern School News, July, 1956, p. 8. See Southern School News,
March, 1956, p. 10.