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ling state interest to preserve life. Nor is it clear whether such a compelling state interest will prevail in every case.

IV. CONCLUSION

In *Kennedy Hospital* the court seemed to place a great deal of emphasis upon the fact that the hospital was an "involuntary custodian" of the patient and that, as such, the hospital and its staff should be allowed to act to save lives.[42] But it reserved judgment in the situation in which a patient who is completely competent and capable of making decisions on his own behalf is *voluntarily* admitted to a hospital, but refuses to submit to a blood transfusion because of religious beliefs. If the court were to follow the precedent established by *In re Brooks' Estate*[43] and *Erickson v. Dilgard*,[44] it would seem that the court would allow the patient to make his own decision with regard to the blood transfusion. However, the court pointed out that no one has a constitutional right to die, religiously based or not,[45] and such a view casts doubt as to whether the court would follow these decisions. It will be interesting to see if other courts in similar cases will consider whether the state has a sufficient interest in the sustenance of life such that the presence of this interest alone will justify interference with the free exercise of religious liberty.

Donald H. Snell

Equal Protection and the Closing of Public Facilities: *Palmer v. Thompson*

One year after a federal district court declared that the segregated operation of public swimming pools in Jackson, Mississippi, denied its citizens equal protection of the laws,[1] the city closed its pools. At least one of the pools was subsequently disposed of such that it continued to be operated on a segregated basis.[2] A number of Negro citizens of Jackson filed suit to compel the city to reopen the pools and operate them on a desegregated basis.[3] The federal district court found that the closing of the pools did not deny the plaintiffs equal protection of the laws.[4] The Fifth Circuit affirmed.[5] *Held affirmed*: The closing of previously segregated public recreational facilities by a city does not deny its

[42] 279 A.2d at 673.
[43] 205 N.E.2d 435 (1965).
[44] 252 N.Y.S.2d 705 (1962).
[45] 279 A.2d at 672.

[1] Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962). The plaintiffs obtained a declaratory judgment, but the court did not grant injunctive relief.
[2] The city cancelled its lease on one pool, which the Y.M.C.A. subsequently reopened to white persons only. Palmer v. Thompson, 403 U.S. 217 (1971).
[3] The suit was predicated upon 42 U.S.C. §§ 1981, 1983 (1970).
[4] The opinion of the district court was not reported.
[5] 419 F.2d 1222 (5th Cir. 1969). The court sat en banc, and six out of the thirteen circuit judges dissented.

citizens equal protection of the laws. *Palmer v. Thompson*, 403 U.S. 217 (1971).

I. THE EQUAL PROTECTION CLAUSE AS A BARRIER AGAINST RACIALLY DISCRIMINATORY STATE ACTION IN THE USE AND ENJOYMENT OF PUBLIC FACILITIES

Since its earliest interpretations of the post-Civil War amendments,[6] the United States Supreme Court has sought to prevent arbitrarily discriminatory official conduct. The equal protection clause of the fourteenth amendment[7] was interpreted to prohibit such action as early as 1914.[8] The standard traditionally used by the Court in applying the equal protection clause is one of reasonableness. Thus, when a state furthers or maintains a policy of discrimination, that standard is met if such discrimination bears a reasonable relationship to a legitimate legislative end.[9]

In recent years the Court has employed a stricter standard when a state's discriminatory policies are based on suspect criteria, such as race,[10] or when the classification hampers the exercise of some fundamental right, such as the right to vote.[11] When one or both of these factors are present, the classification must not merely meet the standard of reasonableness, but there must be a compelling state interest in maintaining the policy.[12]

For many years the Court countenanced racial discrimination in the use and enjoyment of any given public facility so long as "separate but equal" facilities were provided for both races.[13] However, in *Brown v. Board of Education*[14] the Court overruled all of its earlier decisions under the "separate but equal facilities" standard and held that since race was not a rational basis for classification, racial segregation of public facilities was presumptively violative of the equal protection clause. The rationale for this decision was that separate facilities are inherently unequal.[15]

Though *Brown* was applicable to segregated public schools, this same principle of inherent inequality was soon applied to public facilities of all types.[16]

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[6] U.S. CONST. amends. XIII, XIV, XV.

[7] *Id.* amend. XIV, § 1.

[8] McCabe v. Atchison T. & S.F. Ry., 235 U.S. 151 (1914).

[9] McGowan v. Maryland, 366 U.S. 420, 425 (1961).

[10] *See, e.g.*, Hunter v. Erickson, 393 U.S. 385 (1969).

[11] *See, e.g.*, Williams v. Rhodes, 393 U.S. 23 (1968).

[12] When suspect criteria or fundamental rights are not at issue, there exists a presumption of constitutionality. Such a presumption operates heavily in favor of the state. *See, e.g.*, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). But the imposition of the compelling state interest standard has the effect of placing a very onerous burden upon the state to demonstrate the necessity of maintaining a policy of discrimination. Thus, as a practical matter a state may seldom justify a policy that discriminates on the basis of race. Shapiro v. Thompson, 394 U.S. 618 (1969).

[13] The "separate but equal" standard was first announced in Plessy v. Ferguson, 163 U.S. 537 (1896).

[14] 347 U.S. 483 (1954).

[15] *Id.* at 495.

[16] Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877, *aff'g per curiam* 220 F.2d 386 (4th Cir. 1955) (public beaches and bathhouses); Holmes v. Atlanta, 350 U.S. 879, *vacating per curiam* 223 F.2d 93 (5th Cir. 1955) (municipal golf courses); Browder v. Gale, 352 U.S. 903, *aff'g per curiam* 142 F. Supp. 707 (M.D. Ala. 1956) (public transportation); Dorsey v. State Athletic Comm'n, 359 U.S. 533 (1959), *aff'g per curiam* 168

Initially the Court permitted a program of gradual desegregation. More recently, however, the Court held that delays in integration were no longer tolerable.[17] Since race is a suspect criterion, and since the "separate but equal" standard is no longer defensible in view of *Brown* and its progeny, it follows that a state may not maintain a segregated public facility in the absence of a compelling state interest.

II. The Closing of Public Facilities: The Motivation and Practical Effect

The courts have indicated that under certain circumstances the closing of public facilities may amount to state-sanctioned segregation. Hence, a closing by a state of certain public facilities may violate the equal protection clause. The decisions that have enjoined such closings have been predicated upon the *motivation* behind the closing and upon the *effect* of the closing.

Motivation. Motivation was a key issue in *Griffin v. County School Board.*[18] There all the public schools in a single county were closed. Consequently, students in that county attended private schools which were partially supported by public funds.[19] The Supreme Court found that the sole purpose of the closing was to insure that white and Negro children would not attend the same schools. Thus, the county's policy was nothing more than a ruse designed to sidestep impending desegregation orders. Hence, the scheme violated the right of the county's Negro citizens to equal protection of the laws. The Court ordered the reopening of the public schools on an integrated basis. Motivation was also at issue in *Bush v. Orleans Parish School Board.*[20] There the Louisiana Legislature authorized the Governor to close any public school ordered to be integrated. The district court found that the enactment of the statute granting such power was motivated solely by an attempt to avoid desegregation of the public schools. The Supreme Court affirmed without opinion.[21] The Court evidently concurred with the district court's conclusion that the motivation for the state's action was grounds for declaring the law unconstitutional.[22]

In *Wright v. City of Brighton*[23] a suit was initiated to enjoin the city from leasing a building to a private segregated school. After the court indicated at a preliminary hearing that a lease by the city to a private segregated school would probably be invalid, the city *sold* the building to the school. The district court held that the sale did not violate any rights of the Negro plaintiffs and denied relief. The Fifth Circuit reversed and held that the sale of the building to a

F. Supp. 149 (E.D. La. 1958) (stadiums and theaters); Johnson v. Virginia, 373 U.S. 61 (1963) (per curiam) (public office buildings).

[17] Watson v. Memphis, 373 U.S. 526 (1963).

[18] 377 U.S. 218 (1964).

[19] All the public schools in Virginia except those in that single county remained open. *Id.* at 223.

[20] 187 F. Supp. 42 (E.D. La. 1960).

[21] 365 U.S. 569 (1960).

[22] The district court relied on Cooper v. Aaron, 358 U.S. 1, 17 (1958). Motivation and purpose must be determined irrespective of the terms of a statute or any other official act. Acts generally lawful may become unlawful when done to accomplish an unlawful end, particularly when that end is racial discrimination.

[23] 441 F.2d 447 (5th Cir. 1971), *petition for cert. filed sub nom.* Hoover Academy v. Wright, 40 U.S.L.W. 3080 (U.S. Aug. 2, 1971) (No. 71-212).

private school so that the school would remain segregated was not done in good faith and, thus, was violative of the plaintiffs' right to equal protection. The decision in *Wright* considered motivation important in determining whether a constitutional right had been violated as a result of the city's sale to private parties.[24]

Therefore, the holdings in *Griffin*, *Bush*, and *Wright* exemplify the significance attached by the courts to the motivation behind the closing of a public facility. These opinions imply that the closing of a public facility to avoid desegregation *may*, in itself, constitute a denial of the right to equal protection with regard to those citizens who are deprived of the use of such a facility on a desegregated basis.

Effect. Aside from the motivation behind the closing of public facilities, the courts also consider the ultimate effect of the closing in determining whether such action violates a citizen's right to equal protection. In *Griffin* the Supreme Court found that the school closings placed Negro children at a disadvantage because white children had private schools to attend, while Negro children had no such facilities available to them.[25] Hence, the language of *Griffin* indicates the Court's concern with the effect of the closing.

The opinion in *Bush* also addressed itself to the ultimate effect of the Louisiana statute that authorized the closing of public schools. The court found that the effect of the closings in *Bush* was a patent violation of the equal protection clause and that this effect rendered the statute unconstitutional.[26] *Wright* also suggested that the effect of closing a public facility was not to be overlooked. In that case the court's opinion exemplified the necessity of assessing the potential impact of the state action in determining whether the state involved itself in invidious discrimination.[27] The court concluded that since the effect of the city's action was to encourage maintenance of a segregated facility the action was unconstitutional.[28]

Although the courts have considered both the motivation and effect of a closing, these cases do not reveal whether a finding of invidiously discriminatory motivation alone will warrant relief. Neither do they show whether discriminatory effect, absent some showing of bad faith, will suffice as a ground for not allowing a state to close a public facility.

[24] The opinion in *Wright* cites Hunter v. Erickson, 393 U.S. 385 (1969), for the proposition that legislation that is apparently neutral may be unconstitutional if its motivation was to avoid racial desegregation. The holding implies that even the minimal requirement of reasonableness—some rational relationship to a *legitimate* legislative end—cannot be satisfied when the motivation behind a state's policy is the perpetuation of segregation of the races, an obviously illegitimate end.

[25] 377 U.S. at 230.

[26] 187 F. Supp. at 43.

[27] 441 F.2d 447 (1971). The court relied upon Reitman v. Mulkey, 387 U.S. 369, 380 (1967), and applied the Court's holding in that case to the lease and sale arrangement in *Wright*. The selling by the city of a public school building to an institution which they knew would operate an all-white segregated school had the ultimate *effect* of placing a special burden on black citizens.

[28] 441 F.2d at 451. The court also discussed an earlier related case, Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956). *Derrington* indicated that racial discrimination on the part of the state's private lessee constituted state action. However, *Derrington* also indicated that a county might, *in good faith, sell* and dispose of its surplus property such that any subsequent racial discrimination in the use of the property would not be state action. The opinion in *Wright* casts serious doubt upon the validity of the sale-lease distinction.

III. PALMER V. THOMPSON

Palmer v. Thompson[29] raises the issue of whether a city can close its municipal recreational facilities in order to avoid a desegregation order. *Palmer* also raises the issue of whether a city can close a public recreational facility if such action has the practical effect of placing a particular racial group at a disadvantage. Hence, questions of motivation and of effect were both before the Court.

The plaintiffs in *Palmer* contended that the closing violated their fourteenth amendment rights because the motivation for the closing was the avoidance of desegregation orders. The Court dismissed the motivation behind the city's action as a valid criterion for determining the constitutionality of the closings. In fact, motivation was characterized as judicially indeterminable and difficult to apply even if determined. Thus, whether the closing was an attempt to avoid desegregation orders became irrelevant. The Court then passed on to the effect of the closings on the Negro citizens of Jackson.

The plaintiffs alleged that the closing of the city's public swimming pools had the practical effect of denying the use of such facilities to Negroes only, because the closing left whites with several private pools open to them, while Negro citizens were altogether without such facilities.[30] The Court candidly conceded that the Negro citizens of Jackson were placed at a disadvantage by the closing. Whether this disadvantage was constitutionally proscribed then became the primary question before the Court.

Shifting the emphasis from motivation to effect, the Court clarified *Griffin v. County School Board*[31] as a case turning on the unequal effect engendered by the closing of schools. The effect of the closing in *Griffin* was that white children had accredited private schools that they could attend, while Negro children had no available private schools. The majority found *Palmer* to be analogous in that the closing of the public pools had the practical effect of closing all swimming facilities to Negroes, while leaving private facilities available to whites. Another similarity noted by the Court was that in both cases the public facilities were closed after orders to integrate had been issued.[32] Nevertheless, the majority in *Palmer* found *Griffin* to be distinguishable. In *Griffin* the facts revealed an elaborate scheme on the part of the county to run the schools "privately" following the closing. In *Palmer* the City had completely ceased to operate the swimming pools. Thus, the Negro citizens of Jackson, unlike the

[29] 403 U.S. 217 (1971).

[30] One of the pools formerly run by the city was leased, not owned. After the closings this pool was returned to its owner, the Y.M.C.A., which operated it on a segregated basis. This raises the question of whether the closing of the leased pool and its return to the lessor, which then operated it on a segregated basis, was unconstitutional state action. A lease by a city *from* private persons is patently distinguishable from a lease *to* private persons. The latter situation has been held to constitute unlawful state involvement in invidious discrimination. *See* Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956). *Cf.* Evans v. Newton, 382 U.S. 296 (1966), in which a city was held responsible for racial discrimination by private citizens who excluded Negroes from a private park after the city had turned the park's administration over to private control. *See also* Pennsylvania v. Brown, 392 F.2d 120 (3d Cir. 1968); City of Greensboro v. Simkins, 246 F.2d 425 (4th Cir. 1957).

[31] 377 U.S. 218 (1964).

[32] The similarity suggests that the same motivation, the avoidance of desegregation orders, was present in both cases. However, the purpose for which a public facility is closed is, under the Court's own standards, not determinative. *Id.* at 226.

citizens of Prince Edward County, could not demonstrate that the city was involved in the funding of those public facilities, which had been relinquished to the control of private concerns.[33]

The essence of the Court's opinion in *Palmer* is that the effect of the closing of a public facility, rather than the motivation for the closing, is controlling. However, in order to distinguish *Griffin*, a case in which the decision of the Court was said to turn on the *effect* of the closing of certain public schools, the majority in *Palmer* relied upon another factor. This point of distinction was that in *Griffin* the schools were still funded by the county, while in *Palmer* the city had removed itself from the business of running of the pools altogether. After distinguishing *Griffin*, the Court went on to hold that since the public pools were closed to both blacks and whites alike, the closing did not violate the plaintiffs' right to equal protection. It followed that the district and appellate court decisions denying relief should be affirmed.

IV. UNCONSTITUTIONAL STATE ACTION IN THE DISPOSAL OF PUBLIC FACILITIES

Because of the difficulty involved in assessing the true motivation behind any official conduct, the motivation factor seems to be an inadequate criterion for determining the constitutionality of state action. Thus, the majority in *Palmer* reasoned forcefully that courts should look primarily at the practical effect of the disposal of a public facility in order to assess whether a state's action constitutes unlawful discriminatory conduct. The intent of a city or state to discriminate is paled by the actual fact of invidious discrimination. For this reason the Court in *Palmer* looked to the effect of closing the public pools rather than the motivation for the closing. The opinion of the Court was that the closing affected both blacks and whites equally.[34] Hence, the Court found no violation of equal protection as a result of the city's action. However, if the closing placed the city's Negro citizens at a disadvantage, how could the closing be said to *affect* blacks and whites equally?

The Court successfully distinguished *Griffin* from *Palmer*. Even assuming the ultimate effect of the closings in both cases to be comparable, the cases may be distinguished—and without reliance on the motivation criterion. In *Griffin* the schools that were closed continued to be financed and run by the state. This did not happen in *Palmer*. However, the majority in *Palmer* did not attempt to distinguish *Bush v. Orleans Parish School Board*.[35] *Bush* is more difficult to distinguish in that there the state did not continue to operate the closed facilities under the guise of private ownership, and the motivation for the closings in

[33] The Court also distinguished Reitman v. Mulkey, 387 U.S. 369, 373-77 (1967), a case condemning state sanctioning of private invidious discrimination. In *Palmer* the district court found no evidence of state endorsement of private efforts to perpetuate segregation.

The petitioners in *Palmer* also argued that the closings violated the thirteenth amendment. The Court discounted as "unpersuasive" the argument that the closings imposed a badge of slavery. The Court stated that to reach such a result would "severely stretch" the meaning of the thirteenth amendment. 403 U.S. at 226.

[34] The Court's observation that the effect of the closing fell equally upon both black and white citizens is difficult to rationalize with the fact that one of the pools was reopened and operated on a segregated basis. *See* note 2 *supra*.

[35] 187 F. Supp. 42 (E.D. La.), *aff'd per curiam*, 365 U.S. 569 (1961).

both *Bush* and *Palmer* was the same. However, even assuming that motivation is no longer crucial in demonstrating a violation of equal protection with regard to the closing of a public facility, the cases still seem analogous. The majority in *Palmer* relied heavily upon the notion that both black and white citizens could no longer use the pools. It followed, for the Court, that the closing was not in violation of the equal protection clause. However, the closings in *Bush* also meant that schools were closed to all citizens, both black and white. This fact was evidently not persuasive to the court in *Bush*, for there the district court found a violation of equal protection, and the Supreme Court affirmed. Because no such violation was found in *Palmer* the cases seem irreconcilable. Indeed, it may be argued that the facts in *Palmer* make out an even better case for demonstrating a violation of equal protection. In *Bush* certain schools were closed to persons of both races, and evidently those schools remained closed. In *Palmer* at least one of the pools was reopened by a private concern and operated on a segregated basis. Hence, the ultimate effect in *Palmer* was the perpetuation of segregation in the very same facility that was closed.

Of all the previously discussed cases dealing with the closing of public facilities, none seems more analogous to *Palmer* than *Wright v. City of Brighton.*[36] Although the opinion in *Wright* was not rendered by the United States Supreme Court, its facts are much like those in *Palmer.*[37] *Wright* involved a sale by the state of a particular school to persons who intended to operate the school on a segregated basis. In analyzing the effect of the sale, the court held that the state's action encourages racial segregation and was, therefore, unlawful. *Palmer* appears indistinguishable from *Wright* in the following respect. In *Palmer* the closing of one of the public pools and its return to its owners, private persons whom the city knew would operate the pools on a segregated basis, seems no less state encouragement of segregation than the court found in *Wright.*[38] However, two possible points of distinction deserve attention. In *Wright* the city wished to *sell* a public school. The disposal of one of the pools in *Palmer* was effectuated by the city's cancellation of its *lease* of the pool. Thus, perhaps some distinction can be drawn between the closing and selling of a city's facilities and a city's failure to renew its lease of public facilities. The second possible distinguishing factor is that *Palmer* involved the closing of swimming pools, whereas both *Bush* and *Wright* involved the closing of public schools. Yet, this is a somewhat questionable distinction in that the Supreme Court has not held public education to be a fundamental right.[39] Hence, any distinction between

[36] 441 F.2d 447 (5th Cir. 1971).

[37] Admittedly, the Court could not possibly have considered *Wright* in disposing of *Palmer* since *Wright* was not considered by the court of appeals until after the opinion in *Palmer* had been rendered.

[38] Interestingly, in *Wright* the court purported to distinguish *Palmer* by demonstrating that the pools in *Palmer* were closed to all, while in *Wright* the school would eventually be open only to white children. This is a somewhat questionable distinction since a dissenting opinion in *Palmer* points out that one of the pools closed by the city was then being operated by private persons on a segregated basis. 403 U.S. at 252 (White, J., dissenting).

[39] In Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), however, the Supreme Court of California held that the right to public education is a fundamental right.