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By Clint Bolick

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By Clint Bolick

A little revolution took place in the spring of 1990. A lady named Polly Williams, who is diminutive in physical stature but a towering giant in courage, led a few low-income youngsters to the promised land of a good educational opportunity. But the old adage that no good deed goes unpunished proved true once again.

The Milwaukee parental choice program is very modest in scope: it gives only a few hundred low-income youngsters the opportunity to use half of their education money—$2,500—at nonsectarian, private schools. But even though it is modest in scope, you would think an atomic bomb had been set off in Milwaukee when you gauge the amazing reaction and opposition to this program by the public school establishment. Indeed, you would think that this little program threatened the very pathetic existence of the education establishment—maybe because it did.

The battle over choice is not really about appropriate policy or esoteric legal theories, it is about power. What the Milwaukee parental choice program did that poses such a dramatic threat to the status quo and the vested interest, is that for the first time in the history of public education it transferred power over education from the bureaucrats to the parents. And if we learned anything in this battle at all, it is that the education establishment will not sit idly by in the face of any challenge to its monopoly stranglehold over public education.

The battle over choice in Wisconsin exposed the education establishment for everything that it is—alarmist, dishonest, profoundly reactionary, and evil. And it unleashed massive resources, and we can expect that it will do so every single time that choice is posited as an alternative. The Milwaukee parental choice program was a miracle, the first true parental choice program in the nation. But as is the case in these modern times, every miracle will one day end up in court. I am enormously proud to have had the honor of defending in court this beautiful program on behalf of the low-income parents of Milwaukee.

Setting the Stage. To tell you how this drama unfolded since the spring of 1990 through the spring of 1992, I first would like to give you the cast of characters. The first character, and the most important one, is the Milwaukee public schools. The Milwaukee public schools, like most inner-city public schools, are drug-infested, crime-ridden, educational cesspools. That anyone escapes from them with the barest modicum of education is another miracle. The statistics are sobering: of children from families on welfare 85 percent never graduate; those 15 percent who do graduate do so with an average grade point average of less than "D." Now these statistics follow these youngsters for the rest of their lives. Some 75 percent of the prison population in Milwaukee is comprised of people who were high school dropouts. The unemployment rate among high school dropouts in Milwaukee is 45 percent. Only one in five high school dropouts is employed in a full-time job. The public school system as it exists in Milwaukee is a recipe for

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perpetual dependency and despair, and I regret to say that it is not at all unusual. This situation in Milwaukee is replicated in virtually every urban public school system in the United States.

Juxtapose this against the second character in our drama, the little community private schools that these children were allowed to attend for the first time. These private schools are different than the private schools that you and I might think of, but they are, in fact, more typical of private schools than the ones we might think of. They are little, community private schools that run bake sales, that have parents on their Board of Directors, that charge $2,500 or less for tuition, and that produce an incredibly good education. Some of them have pictures of Malcolm X or Martin Luther King on their walls, but the one thing that distinguishes them from the public schools only a block away is that education takes place there. These kids have values. These kids have reading and writing. These kids have discipline, and these kids have a graduation rate and a college attendance rate in excess of 90 percent. They are the very same low-income kids who are now consigned to the public schools in Milwaukee. I would be proud to have my little boys going to any of the private schools in the Milwaukee parental choice program.

Central Character. The third character in the drama is most certainly the most important. Polly Williams is an amazing lady. This program is known nationwide as the Polly Williams plan, but locally people know that it is really the Polly Williams and Larry Harwell Plan. I would be remiss if I did not mention Larry, her aide, the person who really pushed this program through in so many ways. I have learned much more about working with low-income clients in the public interest litigation practice from Larry than I could possibly recount. He is an amazing man.

The thing that makes Larry effective is having Polly Williams as the incredible proponent of the programs that she pushes. One of the first things I asked Polly when I met her was, "Have you ever worked in this kind of coalition before?" The parental choice program was enacted with a coalition of black legislators, black Democrats and conservative Republicans, with white liberals as the opposition. And she said, "I have never gotten anything passed with any other coalition. It is the white liberals who have been holding us back on the plantation." And Polly put together this amazing coalition, and it is one that I think that we can and must replicate elsewhere around the country.

Another thing about Polly is that she is always on the offensive. It is an astounding thing to see. When the teachers unions unleashed their lawsuit against this program and did everything they could to destroy it, what did Polly Williams do? She said, "There is an interesting fact that a lot of people don't know. The teachers are in court trying to keep these low-income kids out of school. But it so happens that 60 percent of the public school employees in Milwaukee send their kids to private schools—60 percent." And Polly said, "If the public schools are good enough for these low-income kids, they are good enough for their kids." So after this lawsuit was filed, Polly Williams announced that she was going to introduce legislation in the Wisconsin Legislature that would require public school teachers as a condition of their employment to send their kids to public schools. What happened? She got death threats on her telephone answering machine. I mean, if anybody knows how bad the public schools are, the people who work there do. Polly shakes things up better than anybody I have ever seen. And her guerrilla tactics on behalf of low-income people are just awesome. They are fun to watch and they are even more fun to be a part of.

Another person in the drama was Governor Tommy Thompson. Thompson is a role model for conservative Republicans, as is Jack Kemp and so many others who have learned how to work with low-income people and put constituencies together. Thompson had the courage to push this voucher plan, to sign it into law, and then when he ran for re-election against a labor union-backed Democrat, Tommy Thompson was the first Republican to carry Milwaukee County since World War II. He did so because he campaigned on empowerment, not on appeasing black estab-

lishment leaders—such as the fashion is here in Washington, and has never worked. Rather he promised and delivered on empowerment. Tommy Thompson is going places in this country.

Determined Opponent. The next character, and now I turn to the other side of the aisle, is Herbert Grover, the head of the Department of Public Instruction in Wisconsin. I have called him the Darth Vader of education. The *Wall Street Journal* has called him the Orval Faubus of the 1990s. A man standing in the schoolhouse door and saying "never." Bert Grover personified everything that is absolutely most corrupt and disgusting about the public education establishment. He was determined not to give choice a chance, not ever to let this experiment see the light of day. He did everything in his power to make sure that this would never happen. He personified massive resources in the form of the state teachers union that hired big lawyers and did everything it could to destroy the program.

Allied with Bert Grover—and this is shameful—was the Milwaukee chapter of the NAACP, which prostituted itself and allowed itself to be used as the lead plaintiff in this lawsuit challenging the choice system. The *Milwaukee Community Journal*, the largest black newspaper in Milwaukee, asked Felmers Cheney, the head of the NAACP, "Why is your name the first name on this lawsuit challenging the choice program?" Felmers Cheney said, "Well you know, choice is just a subterfuge for segregation, like it was in the South." And the *Community Journal* said, "Don't you realize that 85 percent of the kids in this choice program are black?" And Cheney said, "Well, I haven't actually read the plan." This is the beginning of a wedge that is developing —maybe not the beginning, but dramatic evidence of a tremendous division—between the leaders and the led in the black community in the United States. We saw it in the Clarence Thomas battle and we saw it here. This action by the NAACP may be the beginning of the death knell for that organization if it does not get behind the people it purports to represent. I hope that the bell tolls.

A poll was taken in Milwaukee among blacks by the *Community Journal* a few months ago measuring support or opposition to the choice program, and it found 90 percent of black Milwaukee residents in favor of the choice plan and 86 percent of blacks in the state in favor of extending the Milwaukee choice program state-wide. So with the NAACP standing in the schoolhouse door itself, I think this may be the beginning of a major shift.

Allies in the Battle. Next in the cast of characters were our allies in fighting for the battle for choice. The conservative movement came behind this program and united so passionately and so effectively that it was breathtaking. On the list were my colleagues at the Landmark Legal Foundation and Mike Joyce at the Bradley Foundation in Milwaukee, without whose help this program would never have gotten off the ground. The list goes on and on: Bob Woodson at the National Center for Neighborhood Enterprise, who got us together with Polly Williams; I see Bob Dustrow from Catholic University in the audience, who came in and did an amicus brief at every single level, actually representing Polly Williams and other state legislators; John Fund of the *Wall Street Journal* with his relentless editorials attacking the public school bureaucracy and supporting us; the U.S. Department of Education which came through in a big way over and over again; Patty Farnan is here; Jack Klenk; Ted Sanders (the former Under Secretary) who came through constantly; and not the least, our friends right here at The Heritage Foundation.

This was one of those battles, like the Clarence Thomas battle, where if any single piece of the puzzle did not fit in, I honestly do not think we could have won. This was truly the ultimate in team spirit and teamwork that produced the victory that the Supreme Court came out with a few months ago.

But finally in the cast of characters, finally and truly most important, were the school children themselves. In public interest practice we always make it our business to know who it is that we are representing, where they come from, and what their needs are. So, early on I walked the hallways of these schools and I met these children. They were an omnipresent part of the lawsuit.

Many of you probably saw the amazing "60 Minutes" episode by Mike Wallace profiling the Wisconsin program, and you met little Larry, the beautiful little boy who at the end of the program has tears running down his face because he is not going to be able to graduate from eighth grade with his classmates because he hasn't done well there. I can't watch that without getting tears in my own eyes, not because Larry isn't going to graduate, but because somebody cares about him enough to encourage him to do better and to improve himself. If he were in the public schools, nobody would care about him. He is where he is because of this program.

I met many of these little kids and I confessed to my girl friend a few months ago when we were waiting for the decision in Wisconsin (we have a number of pending decisions that we are awaiting), "The one I can't bear to lose, I absolutely could not live with myself if we lose, is the Wisconsin case." And it was because there were too many faces of too many little kids and their lives were going to be fundamentally different depending on how this decision came out. It is an experience I would wish many of my colleagues in this room to have.

With this cast of characters we went to the Wisconsin courts. The ink was barely dry on the legislation before I was in Wisconsin telling Polly Williams two things. First of all, this program will be challenged in court. It is guaranteed lock, stock, and barrel that if anyone passes a choice program, it will be challenged in court. And second, the parents must be present in the courtroom. If they are not in the courtroom, this program will die. This program born in the legislature will die in the courts, because the state simply does not have the interest successfully, passionately to defend this program.

Two Fronts. Well, sure enough, within a few weeks the education establishment did file a lawsuit challenging the law's constitutionality. But it actually opened up, surprisingly to us, two fronts. The first was the lawsuit challenging the program on state constitutional grounds. They attacked its mode of implementation or mode of enactment as part of a budget bill as allegedly violating the state Constitution. They also claimed that it did not have adequate regulations under the Wisconsin Constitution, and finally that it violated the guarantee of a uniform public education in Wisconsin. I have always wondered, "Does that mean that everyone has to have a uniformly bad education in order to satisfy that constitutional provision?"

But they opened up a second front that was even more alarming, and that was that the state superintendent imposed a massive blizzard of regulations on the private schools that would participate in the program, including, but not limited to, the entire array of federal handicap regulations—any one of which would have bankrupted any of these schools that would have taken it on. Bert Grover extended the regulations, but did not extend any of the funding that goes with the regulations. And this was every choice proponent's worst nightmare, because everyone says if you have choice programs, the private schools are going to be regulated like crazy. None of the schools signed up for the program, because they could not survive these regulations.

So, in addition to defending the constitutional challenge, we had to go to court ourselves and file a separate lawsuit challenging the superintendent's regulatory authority. And what this meant —and this was in the beginning of the summer, with the schools set to open in September—was that we had to win in court every step of the way, and we had to win on every single issue in order for the program to open in September.

We went to court in Madison on a steamy, hot Saturday morning. The judge opened up the courtroom for a four-hour argument. It was incredibly grueling. It was the first time that I found that the Washington humidity actually served me well, because I was the only lawyer in the courtroom who was not sweating. But what we did in addition to marshalling as many legal arguments as we possibly could was to get a letter from the U.S. Department of Education opining that the federal handicap regulations do not apply to private schools. The obligation remains with the state, and that is an opinion letter that is dramatically important as we frame choice legislation around the country.

Rooting Parents. In addition to doing the legal arguments, we were stapling these opinion letters on the bus on the way up there. We rented a bus and we filled it with low-income parents wearing red, white, and blue school choice buttons. They packed this courtroom. And I will tell you, I do not know whether any other conservative lawyer had ever had the opportunity to be standing up in a courtroom like that, with a house packed full of low-income parents rooting for you, not against you. It was a phenomenal experience.

We began with a very liberal, but very conscientious trial judge, Susan Steingass, and you could tell that she began with an instinctive bias against this program. She was conscious of those people in that courtroom. She was conscious of them and I think that their presence and the incredible amount of interest that they had in the outcome of this lawsuit helped to sway her decision. And sure enough, a few weeks after the argument, the judge upheld the program on all grounds and struck down the state superintendent's regulatory imposition, clearing the way for the program to begin in September.

The regulatory issues were not appealed by the other side, which was great, because that meant that we had a victory then against an effort to overregulate a choice program. But the other side did appeal, and sought an injunction against the program in the court of appeals. So we had to go back to Madison once again that summer, and we were successful in getting the injunction refused.

Critical Moment. So the program opened in September. That, not the Wisconsin Supreme Court decision, was the critical moment in this choice program, because the schools opened their doors and the kids went in. That is the most important event in the history of the battle for choice in this country—the day those kids walked in that door. We knew that if all the horror stories were true that the other side was telling about these schools, if the worst set of circumstances occurred, it would still be better than what these kids had in the public school system. Once those kids walked in the door, we could not really lose, we could only win.

Now, as the program has been studied, it has been shown to be a success, and this is now a situation where the other side has its finger in the dike trying to hold back the flood, but it is spouting all over the place. Of course, the legal battle did not end, and in fact, at the next level of the battle in the courts we lost. The court of appeals ruled that the program did violate the Wisconsin constitutional provision that requires separate bills, rather than multi-purpose bills, as part of a budget bill. But the program was not stopped. The program was allowed to continue. So we took our sweet time taking it up to the State Supreme Court.

When we finally got to the Wisconsin Supreme Court we found a court that was extremely ideologically divided. We knew that among the seven justices in that court, we were going to begin with three votes against us, so we had to go for 100 percent in the other votes. I will tell you that we had to combine passion and the very best legal arguments that we could possibly muster. A lot of people think of lawsuits and the lofty arguments that can be made. But we were pulling all-nighters on those musty old books looking at esoteric arguments about the public purpose doctrine and things that go back hundreds of years. I will tell you, I learned more about the

minutiae of Wisconsin law than I ever wanted to in my whole life. But those are the sorts of things that you have to do in order to get to the really big issues.

Once again, we argued not only the law, but the equities of the case—how much these parents had at stake. When we got to the oral argument, we made these arguments again. When I left that courtroom I thought that the odds were about fifty-fifty. So, you can imagine how excited I was when a few weeks ago the Wisconsin Supreme Court, by a four-to-three decision, upheld this decision in its entirety. And not only that, not only did it uphold the program, but it gave us language in its decision that we will be able to use in choice litigation all around the country. I commend the decision to you; it is phenomenal. The dissents are absolutely amazing and horrible, but a number of the points in the decision are especially worth noting.

First of all, the court truly embraced the concept of choice itself. We had argued a lot using the Chubb and Moe book from Brookings. They cited it very favorably. Listen to this passage from the majority opinion: "This program empowers selective, low-income parents...." When have you read a court decision that uses the word "empowers"? The exciting thing is that we are affecting the vocabulary here—

> empowers selective, low-income parents to choose the educational opportunities that they deem best for their children. Concerned parents have the greatest incentive to see that their children receive the best education possible. Parental choice allows parents to send their children to non-sectarian, private schools, which, except for the statutory responsibilities of the state superintendent, are autonomously operated, free from the bureaucracy of the public school system. And so providing, the program will engender educational success competition between the public and private educational sectors for students of low-income parents.

That is an understanding of what is going on here that I would never have hoped in my wildest dreams that the court would have.

But the concurring opinion of Justice Lewis Cece went even further, and this is a blast. This is the kind of decision that a lawyer lives for. Justice Cece begins his opinion by saying:

> Let's give choice a chance. Literally thousands of school children in the Milwaukee school system have been doomed because of those in government who insist upon maintaining the status quo. The sacred cow of status quo has led to the terrible problems that manifest themselves as described in the majority opinion. The Wisconsin legislature, atuned and attentive to the appalling and seemingly insurmountable problems confronting socio-economically deprived children, has attempted to throw a life preserver to those Milwaukee children caught in the cruel riptide of a school system floundering upon the shoals of poverty, status quo thinking and despair. The dissent attempts to paint a different picture and that the schools that these deprived children will now attend will be the recipients of 'the state's largesse'. If the schools receiving a mere $2,500 per child, as these private schools will, are the recipients of largesse, what foolishness are we engaged in when the taxpayers are spending approximately $5,000 for each of these same children in a failing public school system?

He finishes by saying that this is constitutionally appropriate. He says that he is in full accord with the majority and finishes with the words, "Let's give choice a chance." This is a fun decision to sit down and read, let me tell you.

What lessons can we learn from this experience? First and foremost, the lesson is that we can slay the dragon, that David can defeat Goliath. That is a lesson that we ought to incorporate into our thinking—that the education establishment, with all of its resources, could be beaten in this battle. We also need to learn that we can alter the terms of the debate, that empowerment is a powerful concept and that school choice is something so tangible, something that we can offer to the people in the inner city, that nothing that the opposition can offer is as powerful as what we know and offer. We need to go to the inner city and we need to offer that. I think that we can change the political dynamic in this country. And finally, we learn that we really do need to take the offensive.

What does the future hold? As choice plans get enacted around the country, there now is a cadre of lawyers capable of defending those plans. I think our motto at the Institute for Justice now will be, "If you've got a choice plan, you've got a lawyer." Getting those choice plans is the tough part. But we really do need to go on the offensive, and I am looking forward very much to future court battles, not only those that we are defending, but those that we are launching to secure choice around this country. But as a movement we need to take the ideas off the drawing board and bring them into the real world—stop talking and start acting. I say this to the Bush Administration and I say this to all of us: We have unbelievable opportunities here.

On the Inside Now. One last point, and I really think that this is a historical moment. When we had the argument in the Wisconsin Supreme Court, once again we arranged to get a busload of kids and parents to go to the argument in Madison. It turned out this time the bus was late, and by the time the kids got there the courtroom was packed to capacity and there was no place for them to sit. Most of the seats were occupied with bureaucrats who had taken the day off to come and see the argument. Most of the people in the audience were white and most of them had a vested interest in the status quo. Around two minutes to ten, when the argument started, I looked to the back to see whether the kids had arrived. The doors have glass panes, and I looked at the doors and, sure enough, I saw this row of faces with their noses pushed against these windows—these beautiful, innocent, little faces. I thought to myself, what a metaphor for what is going on in our society. All of these little faces on the outside, always looking in.

Well, I am proud and pleased to say that they are in the inside now, and together we will make sure that they will always be on the inside. Thanks for your help.

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