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Constitutional Law -- Racial Imbalance in Public Schools: The Affirmative Duty to Integrate Administrators

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legislatures, perhaps with a shove from the courts, might not abolish prehearing attachment and garnishment procedures altogether or at least limit their use to the "extraordinary situations" referred to in *Sniadach*.[30]

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Constitutional Law—Racial Imbalance in Public Schools: The Affirmative Duty to Integrate Administrators

On May 28, 1968, the Board of Education of Newark, New Jersey voted to invalidate a promotional list which was formerly the sole criterion in the appointment of grade-school administrators.[1] The action by the Board of Education admittedly was motivated by a desire to promote racial balance in the school system.[2] The Negro student population in Newark was 72.5%, yet there were only two Negroes on the promotional list.[3] Moreover, of 249 administrators in the city school system, only twenty-seven were Negro.[4] In lieu of appointments from the list, the Board of Education appointed seven new grade-school administrators—six Negro and one white.[5] As a result, ten white teachers[6] brought a suit seeking money damages and injunctive relief under the fourteenth amendment and the Civil Rights Act of 1964.[7] The principal issue raised

[30] See note 3 *supra*.

[1] The contract entered into between the plaintiffs and the defendant on February 1, 1967 reads in part:

> The positions of principal, vice principal, head teacher, department chairman and counsellor shall be filled in order of numerical ranking from the appropriate list, which ranking shall be determined by written and oral examination. Appointments to the position of teacher to assist the principal (formerly called Administrative Assistant) shall be made annually on a temporary basis if the Superintendent determines that such a position is necessary or desirable, and all appointments to such positions shall be made in order of numerical ranking from the appropriate vice principal's list if such list exists.

Porcelli v. Titus, 431 F.2d 1254, 1256 n.2 (3d Cir. 1970), *cert. denied*, 39 U.S.L.W. 3486 (U.S. May 4, 1971) (No. 850).

[2] Record at 89, 95, 98, Porcelli v. Titus, 302 F. Supp. 726 (D.N.J. 1969).

[3] Porcelli v. Titus, 431 F.2d 1254, 1255-56 (3d Cir. 1970).

[4] *Id.*

[5] *Id.* at 1256 n.3. Since the purpose in deviating from the list was to promote racial balance, it is curious that the Board of Education chose to make a white appointment. No particular reason can be discovered.

[6] Four of the plaintiffs—Hickey, Dunne, LaRusso, and Chagnon—had taken only the first of two stages of the examination to qualify for the list when the list was suspended. 302 F. Supp. at 728 n.1.

[7] 42 U.S.C. § 1983 (1964). The provision reads:

by the complaint was the constitutional limitation on the power of a state agency to consider color in the selection and promotion of its employees. The district court in New Jersey dismissed the complaint,[8] and the Court of Appeals for the Third Circuit, in *Porcelli v. Titus*, affirmed per curiam.[9]

Several federal court decisions have held that the mandate of *Brown v. Board of Education*[10] applies not only to the integration of students in the public schools, but also to the integration of faculties[11] within both a single school and a school system, and of administrators[12] within a system. In those cases, however, the courts have reasoned that the duty to integrate arises upon a showing of past, intentional discrimination. In *Porcelli* the dispute arose in the absence of proof of past, intentional discrimination, and that absence was noted by the district court.[13] Nevertheless, in *Porcelli* the court found a duty to integrate even if the existing imbalance was not the result of prior discrimination.

> It would therefore seem that the Boards of Education have a very definite *duty to integrate* school faculties[,] and to permit a great imbalance in faculties—as obtained on August 22, 1968, when a new plan was proposed to the school board in Newark for the increasing of qualified Negro administrators—would be in negation of the Fourteenth Amendment to the Constitution and the line of cases which have followed Brown v. Board of Education . . . .[14]

The question of whether there is a duty in this particular situation is one of first impression and should be examined.

The public schools, at least since *Brown*, have been recognized as a peculiar area of governmental interest, and it follows that decisions involving public schools will focus primarily on the effect of a particular situation on the schools themselves. This approach finds support in the following language:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[8] Porcelli v. Titus, 302 F. Supp. 726 (D.N.J. 1969).

[9] Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970). On May 4, 1971, the Supreme Court denied certiorari. 39 U.S.L.W. 3486 (U.S. May 4, 1971) (No. 850).

[10] 347 U.S. 483 (1954).

[11] Smith v. Board of Educ., 365 F.2d 770 (8th Cir. 1966).

[12] *See, e.g.*, Hobson v. Hanson, 269 F. Supp. 401, 429-30 (D.D.C. 1967).

[13] 302 F. Supp. at 736.

[14] 431 F.2d at 1257-58 (emphasis added).

> The public schools were not created, nor are they supported, for the benefit of the teachers therein, as implied by the contention of the appellant, but for the benefit of the pupils, and the resulting benefit to the parents and the community at large.[15]

Therefore, it is appropriate to direct any examination towards the cases in the *Brown* line rather than to the general run of equal employment cases.[16] Since there have previously been no cases finding a duty to remedy imbalance among school administrators in the absence of past discrimination, the most pertinent cases are those dealing with the integration of pupils.

There are numerous opinions indicating that schools need not be found guilty of intentional racial discrimination before being subject to a constitutional duty to take affirmative action to relieve the racial imbalance.[17] Typical of such decisions are those cases in which the courts have been asked to resolve disputes arising from systems of neighborhood schools.[18] Perhaps the leading case in which the court found a duty to take affirmative action is *Barksdale v. Springfield School Committee*.[19] In *Barksdale*, the neighborhoods designated to attend particular schools were, by chance, divided into black and white. The Court of Appeals for the First Circuit agreed with the defendant's contention that the resulting segregation was unintentional, yet rejected the argument that there was therefore no duty on the part of the School Committee to correct this segregated school situation. As in *Porcelli*, it was clear that racial imbalance *did* exist, and that it was the existence of the imbalance, not the manner in which it came about, which was constitutionally impermissible. Speaking directly to the point of intentional discrimination, the court noted that "[e]ducation is tax supported and compulsory, and public school educators, therefore, must deal with inadequacies within the educational

[15] Bates v. Board of Educ., 139 Cal. 145, 148, 72 P. 907, 908 (1903).

[16] The major distinction between employment cases which involve schools and those which do not is that in the school cases the court must consider not only the parties but also the effect of its decision on the children in the school. In addition, the history of equal employment legislation shows no anticipation of a situation such as the one in *Porcelli*. *See* Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

[17] *See, e.g.*, Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964); Branche v. Board of Educ., 204 F. Supp. 150 (E.D.N.Y. 1962).

[18] A neighborhood school system is one in which the Board of Education divides the city into school districts, and the students living within a district must attend the school within that district.

[19] 237 F. Supp. 543 (D. Mass), *vacated and remanded on other grounds*, 348 F.2d 261 (1st Cir. 1965).

system as they arise, and it matters not that the inadequacies are not of their making."[20] Other courts considering the same question have placed particular emphasis on the public nature of state-supported schools, stressing that they are supported with tax dollars,[21] and have couched their arguments in terms of the impermissibility of tolerating what is clearly racial imbalance.[22]

There is, of course, an opposing point of view on the necessity of proving past discrimination before arriving at a duty to remedy it.[23] This position, concisely stated, is that if racial imbalance exists by mere chance, the state is under no duty to remedy it. One of the most articulate explanations of this position is found in *Deal v. Cincinnati Board of Education.*[24] The court in *Deal* initially found, as a matter of law, that in the absence of intentional action on the part of the state the fourteenth amendment does not afford relief.[25] The court went on to hold that

> a showing of harm alone is not enough to invoke the remedial powers of the law. If the state or any of its agencies has not adopted impermissible racial criteria in its treatment of individuals, then there is no violation of the Constitution. If factors outside the schools operate to deprive some children of some of the existing choices, the school board is certainly not responsible thereafter.[26]

Although the court in *Porcelli* failed to discuss any of these competing considerations, it is evident that the *Barksdale* position is now accepted by the third circuit.

Clearly, this position in *Deal* is irreconcilable with the *Barksdale* position. Until the United States Supreme Court chooses to rule on the subject, the conflict among the circuits is unlikely to be resolved, with the result that the same suit would succeed in one jurisdiction and fail in another. Yet it appears that the *Barksdale* approach finds more support in recent interpretations of *Brown.* In *Kemp v. Beasley,*[27] the eight circuit viewed the courts' role in school integration cases as being unique. The court in *Kemp* reasoned that in the normal case the court must balance

[20] 237 F. Supp. at 544.
[21] Branche v. Board of Educ., 204 F. Supp. 150, 153 (E.D.N.Y. 1962).
[22] Blocker v. Board of Educ., 226 F. Supp. 208, 222 (E.D.N.Y. 1964).
[23] *See, e.g.,* Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963).
[24] 369 F.2d 55 (6th Cir. 1966).
[25] Action by a school board, which is a state agency, is state action. Blocker v. Board of Educ., 226 F.2d 208, 226 (E.D.N.Y. 1964).
[26] 369 F.2d at 59.
[27] 389 F.2d 178 (8th Cir. 1968).

the conflicting goals of competing parties, but in school integration cases there is only one goal—a wholly desegregated school system. Those decisions recognizing the absolute impermissibility of racial imbalance in schools regardless of how it was achieved more closely reflect the *Kemp* position. Indeed, this attitude of looking beyond the parties to the schools themselves seems to be the thread holding such decisions together.

In *Brown*, the Supreme Court based its decision largely on the psychological effects of segregation on the school children involved, particularly the black children.[28] The Court concluded that the adverse psychological effects on the black children represented a violation of the fourteenth amendment: the knowledge that they were forced to go to a school that was only for their race was a serious handicap which the white children did not have, and the blacks, therefore, were denied the equal protection of the law. It was this kind of thought that led to the conclusion that segregated schools are inherently unequal. A similar argument can be made regarding the situation in *Porcelli*. There is ample psychological data to indicate that black students dealing with only white people in positions of authority tend to identify all whites with authority.[29] At the same time the black children lose respect for the black male, who is not seen in such a position of authority.[30] The result of this identification process is a serious psychological impairment for the black child. He loses confidence in his race in general and also in himself.[31] This psychological burden, it might be argued, is as serious as the psychological burden found in *Brown*, and the same equal protection argument should apply. Viewing the problem in this way, it becomes evident that the focus must be on the equal protection of the *students*, not the administrators. It is this emphasis, if not this argument, that was recognized in both *Kemp* and *Barksdale*.

If the court in *Porcelli* found that the school board was under a duty to promote racial balance in administrative positions, then clearly the

[28] 347 U.S. 483, 494 n.11 (1954).

[29] *See generally* H. BOND, THE EDUCATION OF THE NEGRO IN THE AMERICAN SOCIAL ORDER (1966); R. COLES, CHILDREN OF CRISIS; A STUDY OF COURAGE AND FEAR (1967). *But see* I. NEWBY, CHALLENGE TO THE COURT; SOCIAL SCIENTISTS AND THE DEFENSE OF SEGREGATION, 1954-1966 (1969).

[30] M. CRAMER, SOCIAL FACTORS IN EDUCATION ACHIEVEMENT AND ASPIRATIONS AMONG NEGRO ADOLESCENTS (1966); J. Knight, The Interpersonal Values and Aspirational Levels of Negro Seniors in Totally Integrated and Segregated Southern High Schools 36-40, 65, 1970 (unpublished thesis in Wilson Library, University of North Carolina).

[31] D. DINKMEYER, READINGS IN CHILD DEVELOPMENT 394-407 (1965); I. SARNOFF, PERSONALITY DYNAMICS AND DEVELOPMENT 85-116 (1962).

Board of Education was justified in taking appropriate action.[32] There are numerous holdings that the fourteenth amendment forbids the appointment of teachers, and by inference, administrators, solely on the basis of race.[33] Yet the court in *Porcelli* noted that "state action based partly on considerations of color when color is not used per se, and in furtherance of a proper governmental objective, is not necessarily a violation of the Fourteenth Amendment."[34] In *Porcelli*, the court concluded that the Newark School Board was acting to promote a proper—indeed, a compelling—governmental interest, and therefore properly considered color.

At least one court, however, in another case involving action by a board of education to promote racial balance, has noted: "Only if specific provisions of the Plan do, in fact, discriminate against plaintiffs because of their race, could it be said to result in an infringement of their constitutional rights."[35] In that case, no discrimination was found; however, it is difficult to escape the conclusion that in Newark qualified whites were passed over in favor of qualified blacks. It is in its almost perfunctory resolution of this tricky problem of "reverse discrimination"[36] that the *Porcelli* court may well have been the most incisive. For the Court of Appeals for the Third Circuit seems to recognize that the constitutional demands, coupled with the social context in which the situation arose, outweighed the competing considerations of the plaintiffs' harm. The court has sensed that the most stringent demands of *Brown v. Board of Education* may well fall not on the states and not on the school boards, but on the white population as a whole. And that demand, as it appears to be mirrored in *Porcelli*, is for a constitutional "leap of faith."[37] The "leap" is a belief that the constitutional and social significance of racial balance at this time is worth even the harm that may be inflicted incidentally on other members of society.

It is in this regard that *Porcelli v. Titus* acts to tie together in both legal and societal terms what should be a major movement in Constitutional thought—the actual implementation of principles of equality under law. Yet because so little of this reasoning is explicit, it may well be that

[32] There is some question as to whether the action by the Board of Education would have been permissible even if the court in *Porcelli* had not adopted the *Barksdale* position.

[33] *See, e.g.*, Rolfe v. County Bd. of Educ., 391 F.2d 77 (6th Cir. 1968).

[34] 431 F.2d at 1257.

[35] Fuller v. Volk, 230 F. Supp. 25, 34 (D.N.J. 1964).

[36] This is the popular term for those situations in which whites are passed over in favor of blacks.

[37] This term was first used by Kierkegaard in, of course, a religious sense.

Porcelli will have little actual impact beyond the third circuit and the situation as it existed in Newark.

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Consumer Protection—Credit Card Protection Under the Truth in Lending Act

On October 26, 1970, in response to widespread complaints, Congress amended[1] the Truth in Lending Act to expand consumer protection into the area of credit cards.[2] The legislation outlaws further issuance of unsolicited credit cards[3] and imposes stiff criminal penalties for the fraudulent use of cards to charge more than five thousand dollars.[4] The most important provision limits the liability of the consumer for a lost or

[1] Pub. L. No. 91-508, §§ 501-03 (Oct. 26, 1970), *amending* 15 U.S.C. §§ 1601-64 (Supp. IV, 1965-69).

[2] The tremendous upsurge in credit cards has brought an increased awareness of the abuses associated with their use. From Dec. 31, 1967, to June 30, 1969, the Federal Research Board found that credit outstanding on bank credit cards increased from 800 million dollars to 1.7 billion dollars. The year-to-year increase on oil company cards is 200 million dollars. *Hearings on S. 721 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 1st Sess. 30 (1969) [hereinafter cited as *1969 Hearings*]. The abuses are more often related to unsolicited cards which (1) have encouraged some consumers to spend beyond their means possibly to the point of becoming bankrupt, (2) have been burdensome to some consumers because they were hard to destroy, (3) have been an unwarranted intrusion into consumers' personal lives, (4) have encouraged crime because they were easily stolen and quite negotiable, and (5) have had a potentially inflationary impact upon the economy. Another factor common to all cards has been the possibility of unlimited liability in the event that the card was lost or stolen. S. REP. No. 91-739, 91st Cong., 2d Sess. 3-5 (1970) [hereinafter cited as 1970 S. REP.]. The statistical impact of this last point was measured in Murray, *A Legal-Empirical Study of the Unauthorized Use of Credit Cards*, 21 U. MIAMI L. REV. 811 (1967).

[3] Pub. L. No. 91-508, § 502(a) (Oct. 26, 1970). This provision is far-reaching because it also concerns renewals of existing credit cards. Renewals can be automatic, *i.e.*, without request by the holder, only if the card had been specifically requested initially. Unsolicited cards that were issued prior to the act may not be renewed unless the holder so requests. *Id.*; 1970 S. REP. 6. What impact will this have upon the firms who have used both solicited and unsolicited cards in the past and are unable to distinguish the accounts of holders using solicited cards from those using unsolicited cards? 1970 S. REP. 13. Another argument of those opposed to outlawing the unsolicited card is that this prohibition makes it impossible for new enterprises in the credit card field to get off the ground and compete since the sending of unsolicited cards is the only practical way to build up a large backlog of customers. *1969 Hearings* 24-26.

[4] Maximum of ten-thousand-dollar fine and five years in prison. Pub. L. No. 91-508, § 502(a) (Oct. 26, 1970).