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EQUAL PROTECTION AND MINIMUM SOCIAL BENEFITS: AN ADDENDUM TO PROFESSOR WEST'S ABOLITIONIST THEORY

CARL M. SELINGER*

Back in 1953, when I was an undergraduate at Berkeley, I received one day a compliment that I hope I still deserve. Professor Jacobus tenBroek had just “proven” Socratically to our (pre-*Brown v. Board of Education*) class on the equal protection clause that one should willingly acquiesce in being made a slave as long as the system is colorblind (Robin West’s test case for a merely formalist theory of equal protection¹) and was adopted by a democratic majority. When I alone timorously registered an objection, he turned his sightless but insightful eyes in my direction and roared approvingly, “Selinger, you would have been an abolitionist!” — and that from the author of *The Antislavery Origins of the Fourteenth Amendment*.²

As a student, and then briefly a faculty colleague of that seminal scholar,³ peerless teacher of a generation of future lawyers, and passionate champion of the rights of the poor,⁴ minorities,⁵ and the disabled,⁶ I am sure that Jacobus tenBroek would have been pleased

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1. Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 134-35 (1991).

2. JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951).

3. See, e.g., Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

4. See, e.g., *THE LAW OF THE POOR* (Jacobus tenBroek ed., 1966); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pts. 1-3), 16 STAN. L. REV. 257, 900 (1964), 17 STAN. L. REV. 614 (1965); Jacobus tenBroek, *California's Welfare Law—Origins and Development*, 45 CAL. L. REV. 241 (1957).

5. See, e.g., JACOBUS TENBROEK, ET AL., *PREJUDICE, WAR AND THE CONSTITUTION* (1954) (tracing the origins of, and challenging, the evacuation of Japanese-Americans during World War II).

6. See, e.g., Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809 (1966); Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966). Jacobus tenBroek founded, and for 21 years served as President of the National Federation of the Blind, which he described as “an aggressive, militant, activist organization of the blind themselves.” *Id.* at 841 Author’s Note.

indeed with the way that Robin West has drawn upon his historical research and analysis to construct a striking new constitutional theory.⁷

The purpose of this brief addendum to Professor West's article⁸ is, first, to emphasize how peculiarly difficult it is today to derive a constitutional claim to welfare rights for those at the bottom of the American economic ladder from her abolitionist, denial-of-protection interpretation of the equal protection clause; second, to sketch out an argument that under the clause the government must nevertheless take reasonable steps to insure that all persons receive as much protection from our laws as people in general receive; and third, to suggest that the satisfaction of such an obligation to afford protection could well require the provision to the poorest of minimum social benefits.

I.

On February 13, 1990, public television's Frontline series broadcast an excellent documentary, narrated by Roger Wilkins, on the African-American underclass in Washington, D.C. The title of the program, "Throwaway People," succinctly sums up the poignant situation of today's poorest Americans — as contrasted with their counterparts a hundred, or fifty, or even twenty years ago.

In the past, the services of the poorest were a sought-after commodity. If they could no longer be enslaved, they could still be exploited in the workplace, mobilized to win elections, used sexually, etc. It was realistic to talk about a governmental obligation under the Fourteenth Amendment to protect them from the "dual sovereignty" of the more affluent. Because their services were wanted, this protection could be accomplished by direct governmental regulation of the terms of the relationships in question (through, for example, the enactment of wage and hour, and occupational safety laws), and also by empowering the poorest to obtain more favorable

7. Jacobus tenBroek died at the age of 56, in 1968 — a year in which too many extraordinary people died too soon.

8. West, *supra* note 1.

terms on their own (through, for example, the sanctioning of collective bargaining).

Today, however, due to an array of factors ranging from technological developments to enhanced international economic competition to the presence of much larger numbers of women in the workforce to greater sexual freedom and other value changes, it seems that hardly anyone wants to employ the poorest (or even, for that matter, to enslave, exploit, or use them if possible). Professor West acknowledges that others might not want the labor of the poorest, but suggests that “a general pattern of obedience, acquiescence, and subservience” on their part might still be in demand, as it were.⁹ While one could hardly fail to recognize a *Lord of the Flies*¹⁰ kind of desire on the part of many persons to dominate others, I frankly doubt that the affluent and powerful of today need the poorest even for that purpose.

In fact, most people seem to want nothing more from the poorest than for them to just disappear, and take with them the rest of what the majority doesn't want: taxes for social benefits, the squalor of homelessness, aggressive panhandling, drugs, crime, indiscipline in the schools, and teen pregnancies. They are indeed throwaway people; and — to return to Professor West's theory — it just doesn't seem realistic to talk about *protecting* them from the more affluent, except from their lack of compassion, which would rise to the level of a constitutional violation, if at all, only under an antisubordinationist interpretation of the Fourteenth Amendment which she argues against.

II.

Who in this society lacks protection from other people? Professor West points to three groups: the wives of sexually abusive husbands,¹¹ the children of abusive parents,¹² and economically dependent homemakers.¹³ Another group that comes readily to mind

9. *Id.* at 130.

10. WILLIAM GOLDING, *LORD OF THE FLIES* (1962).

11. West, *supra* note 1, at 140-41.

12. *Id.* at 141-42.

13. *Id.* at 146.

are non-violent prisoners in many of our nation's penal institutions. But I want to focus here on a variety of groups who have in common the fact that they are trying, first, to just stay alive, and then to live relatively conventional lives, by American middle-class standards, in neighborhoods that are not only very poor but also dangerous, physically, emotionally, and socially.

One such group consists of infants who were born prematurely following exposure to drugs or who are liable to contract infections from unsanitary surroundings. Toddlers who may be killed or wounded in drive-by shootings make up another. There are children who are at risk of being assaulted on the way to school for their lunch money, tennis shoes, or for just being different in one way or another, children who may not learn at school because of the disruptiveness of other children or because they may be persuaded that trying to learn will make them appear to be different, and children who could be pressured into using or even selling drugs. There are adults who are in constant jeopardy of being mugged, burglarized, or vandalized (including homeless people who are afraid to go into public shelters); and adults who are discouraged from using community services and amenities (subways, libraries, parks) because of their squalid, if not dangerous condition. And there are older people who are so frightened that they rarely go out into the streets at all. All of these groups are desperately in need of protection — *from* some of their poorest fellow citizens.

As Professor West points out, the provision of a lower level of police services, or other protective services, to poor and dangerous neighborhoods than is provided to more affluent neighborhoods would clearly confound an abolitionist interpretation of the equal protection clause.¹⁴ But what if such a disparity cannot be shown? What if the same level of protective services is already being provided to dangerous neighborhoods, albeit to little avail? Clearly, the residents of such neighborhoods are nevertheless less protected — are *receiving* less protection — than the residents of other neighborhoods. The constitutional guaranty, however, is not one of “equal

14. *Id.* at 141.

protection” *simpliciter*, but of “equal protection of the laws” which could be understood narrowly as calling only for an *equalization of governmental protective services* in relation to whatever services are already being provided to people in general.

Even this narrow interpretation may require that some limited additional protective services be provided to dangerous neighborhoods, even at some additional expense; and that is often the practice. To return to Professor West’s metaphor of parents raising children on a sometimes dangerous island,¹⁵ it is difficult to imagine a parent saying at one and the same time that she is going to protect all of her children equally, and that she will do *nothing* more for the smallest and weakest than for the others.

More broadly, however, since the presence of official protection is expressly postulated in the Constitution — as the presence of such other social benefits as housing, food and clothing, health care, and education is not — constitutional claims can be advanced with respect to the *receipt* of protection without the necessity of reading the Fourteenth Amendment as embodying a general guaranty of substantive equality.

At a minimum, the equal protection clause would appear to guarantee that the poor will not be stripped of even a minimum level of governmental protective services in the current trend toward *de facto* partial privatization of public services:

Those who can’t afford to pay [for abortion counseling] will have to continue to live with a level of public service that many middle-class Americans would regard as inadequate but don’t have to worry about — not as long as they can afford private health care, to say nothing of the private schooling, private mail service, private security, privately reconstructed playgrounds, and private trash collection that are becoming the requisites of a decent life in this country.

. . . [A]s middle-class taxpayers use public facilities and services less and less, they are less and less inclined to subsidize them. Every effort to solve a social problem these days seems to inspire some policymaker to come up with a means for people to buy their way out of it.¹⁶

15. *Id.* at 126-27.

16. *Talk of the Town*, THE NEW YORKER, June 24, 1991, at 22. Already some owners of low-income apartment buildings in Brooklyn are employing a private security force “to oust drug dealers when the police cannot.” Chris Hedges, *In Brooklyn, Private Police as Violent as Their Enemy*, N.Y. TIMES, June 16, 1991, at 1.

However, I think that we can and should go farther. The command that the government not deny to any person “the equal protection of the laws” can and should be given a plain-meaning interpretation that the government must take reasonable steps (that are otherwise constitutional) to insure that all persons receive *as much* protection from our laws as people in general receive — and this would usually require taking steps to insure that our laws do achieve the protective goals that they are supposed to achieve.

Professor West argues, with Judge Posner, that “the wave of Klan lynchings and private violence undeterred and unpunished by the state that characterized the post-Civil War era is the paradigmatic equal protection violation”¹⁷ If the government could not have avoided a finding of unconstitutionality by showing merely that it would have been difficult and quite costly to afford a victim of lynching the protection both contemplated by its laws against homicide and received by people in general, a similar explanation for not actually protecting the residents of dangerous neighborhoods today should also be rejected.

Criminal laws clearly have protective goals. But so, implicitly, do laws establishing school systems and providing for other community services and amenities. These laws assume that students will be protected from acts or conditions (at least man-made conditions) that interfere with their ability to learn or pressure them into not trying to learn, and that people generally will be protected from acts or conditions that will significantly impede their access to transportation, books, and other information sources, and recreational facilities. When people in general receive such protection — the affluent may not need to use the subways, public libraries, or parks, or even the public schools, but they do have unimpeded access to their equivalents — and residents of dangerous neighborhoods do not, the latter are effectively denied the equal protection of the laws.

While not relying on the Fourteenth Amendment, the U.S. Court of Appeals for the Second Circuit seemed to be concerned about equal protection for New York City subway riders in its recent de-

17. West, *supra* note 1, at 139.

cision upholding a regulation prohibiting panhandling in the subway system:

The subway is a not a domain of the privileged and powerful. Rather, it is the primary means of transportation for literally millions of people of modest means, including hard-working men and women, students and elderly pensioners who live in and around New York City and who are dependent on the subway for the conduct of their daily affairs. They are the bulk of the subway's patronage, and the City has an obvious interest in providing them with a reasonably safe, propitious and benign means of public transportation.¹⁸

III.

Plainly, it would be pointless to say that governments are obligated to take reasonable steps to insure that all persons are as well protected by its laws as people in general are if such an obligation were in practical terms impossible to discharge. And that might often be the case if the only way to afford increased protection in dangerous neighborhoods would be to increase the police and other protective services provided to them. In some instances, even massive increases in protective services would not achieve the desired protective results. In other instances such increases would have to be viewed as unreasonable because they would impose on the neighborhoods concerned a deadeningly oppressive atmosphere.

In still other instances, increases in protective services for some persons could conflict with the constitutional rights of other persons. To cite one example, although the unimpeded use of public libraries, as sources of books and other information or simply as calm and quiet places to study or write, has historically been of tremendous value to new immigrants and other poor people in this country, a federal district judge in New Jersey, H. Lee Sarokin, ruled recently that the homeless could not constitutionally be prevented from loitering in public libraries, and annoying other patrons by their noise, staring, and poor bodily hygiene.¹⁹

18. *Young v. New York City Transit Auth.*, 903 F.2d 146, 158 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 516 (1990).

19. *Kreimer v. Bureau of Police*, 765 F. Supp. 181 (D.N.J. 1991). However, New York City officials have recently roused the homeless from permanent encampments in Tompkins Square Park and Columbus Circle on the ground that the community was being prevented from using these public spaces. Sam Roberts, *Evicting the Homeless*, N.Y. TIMES, June 22, 1991, at 1, 26.

Fortunately, increased protection can often be afforded to a dangerous neighborhood not only through increased protective services, but also by providing all of its residents with minimum social benefits such as adequate housing, food and clothing, health care, and possibly even guaranteed employment. As Judge Sarokin observed with respect to protecting would-be library users from the squalor of homelessness, "If we wish to shield our eyes and noses from the homeless, we should revoke their condition, not their library cards."²⁰ Under a broad denial-of-protection interpretation of the Equal Protection Clause, if that's what it takes, that's what's required.

* * *

In her article, Professor West emphasizes correctly that the main responsibility for implementing a denial-of-protection interpretation of the equal protection clause must rest with the political branches of government, the legislature and the executive, rather than with the judiciary, and that therefore our attitudes as citizens are critically important.²¹

For his part, Jacobus tenBroek professed that "the basic principles of our political and constitutional system" call on us to:

Protect the essential dignity of the individual: by recognizing the worth of the human personality and treating it as a community asset rather than a community liability . . . [and] by making possible [for recipients of public assistance] a standard and circumstance of living not conspicuously different from that enjoyed by the rest of the community . . .²²

20. *Kreimer*, 765 F. Supp. at 183.

21. West, *supra* note 1, at 152-55.

22. Jacobus tenBroek & Richard B. Wilson, *Public Assistance and Social Insurance — A Normative Evaluation*, 1 U.C.L.A. L. REV. 237, 263 (1954).