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Constitutional Law - De-Facto Segregation

CONSTITUTIONAL LAW

De-Facto Segregation

In *Bell* v. *School Board of Gary, Indiana*,[1] Negro plaintiffs, in a class action, sought a declaratory judgment, alleging that defendant school board had deliberately gerrymandered its school attendance areas to achieve a segregated school system and thus compel plaintiffs to attend inferior segregated schools, in violation of their constitutional rights.[2] Plaintiffs further alleged that they had a "constitutional right" to attend integrated schools.[3] The District Court, finding that the predominance of one race in certain school districts was caused by the housing patterns in those districts[4] and not by the affirmative acts of the defendant[5] denied plaintiff's motion.[6] On appeal, the United States Court of Appeals for the Seventh Circuit, *held*, affirmed.[7]

Although the problem of de-facto segregation—segregation caused by the racial composition of the area in which a school is located—is prevalent in many cities today,[8] *Gary*

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1 213 F. Supp. 819 (N.D. Ind. 1963). [The suit was primarily concerned with the redistricting of two schools in the city of Gary.]

2 213 F. Supp. 819, 820 (N.D. Ind. 1963). [". . .[N]or shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"].

3 213 F. Supp. 819, 820 (N.D. Ind. 1963).

4 213 F. Supp. 819, 827 (N.D. Ind. 1963).

5 213 F. Supp. 819, 826 (N.D. Ind. 1963). [On this point the court noted, "From time to time protests have been made to the School Board by negro groups concerning the construction of contemplated buildings on the grounds that the planned location would create a racial imbalance in the school. The evidence indicates that [attention] was given to all of these protests and that on one or more occasions the construction of schools already planned for a certain location was held up or cancelled because of the protests."]

6 213 F. Supp. 819, 831 (N.D. Ind. 1963).

7 324 F.2d 209 (7th Cir. 1963).

8 Areas that appear to be facing the problem most severely are: New York City and areas outside the city [Iee Balaban v. Rubin, 242 N.Y.S. 2d 973, *aff'd* 243 N.Y.S. 2d 472 (1963), the court in affirming stated that it did so, "on the sole ground that it would now be unfair and a hardship to the children to again dislocate

is the first Court of Appeals case dealing directly with the problem.[9] *Gary's* importance is further realized when one notes that it was decided under conditions that typify de-facto segregation, *i.e.*, concentration of Negro population in one area,[10] and many schools being attended predominantly by one race,[11] without any administrative action being taken to achieve this result.

In support of their allegations, plaintiffs had argued that defendants were under an affirmative duty to correct the "racial imbalance" in the Gary school system, under the law established in *Brown* v. *Board of Education of*

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and disrupt them." The case is now being decided on its merits; See also Branche v. Board of Education of Town of Hempstead, 204 F. Supp. 150 (E.D.N.Y. 1962) at 153, where the court declares, "So here it is not enough to show that residence accounts for the facts of segregation and to contend that therefore the segregation is ineluctible." Plaintiff's relied on this case to support their allegations in the instant case. but the court rejected it as not being in point]; California, [Jackson v. Pasadena School Board, 31 Cal. Rptr. 606, 382 P. 2d 878 (1963), which reached a different result from the principal case. Although deliberate acts of segregation were found by the court, the court holds by way of dicta, that even without these deliberate acts, school boards, under certain circumstances will be under a duty to correct racial imbalance in their districts at p. 610.] Chicago, Illinois [It appears that Illinois is the first state to pass a statute requiring that de-facto segregation be corrected. House Bill 113 Ill. 73rd General Assembly 1963, signed by Governor June 13, 1963. As reported in *State Policies against Racial Imbalance, Civil Rights* 1963 (Government Printing Office)].

9 N. Y. Times, Nov. 2, 1963 p. 12., col. 3. [Although not directly confronted with this issue courts have ruled in accord with the principal case, by way of dicta. See for example, Evans v. Buchanan, 207 F. Supp. 820, 823-4 (D. Del. 1963); Jeffers v. Whitely, 309 F. 2d 621, 629 (4th Cir. 1962); Thompson v. County School Board of Arlington, Virginia, 204 F. Supp. 620, 625 (E.D. Va. 1962); Borders v. Rippy, 247 F.2d 268, 271 (5th Cir. 1957); Brown v. Board of Education of Topeka, Kansas, 139 F. Supp. 468, 470 (D. Kans. 1955); Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D. So. Car. 1955).

10 213 F. Supp. 819, 822 (N.D. Ind. 1963). [The negro population in Gary is concentrated in what is generally called the "Central District". . ."]

11 213 F. Supp. 819, 820 ["In the school year 1961-62 10,710 of the students enrolled in the Gary School system attended fourteen schools which were 100% white, 16,242 students attended twelve schools, which were populated from 99-100% by negroes; 6,981 students attended four schools which had a range from 13-37% negro; 5465 attended five schools which had a negro population from 1-5%." A detailed chart of the racial composition of each school in the Gary system is presented at p. 821].

Topeka.[12] The court rejected this argument, by showing that students were assigned and boundary lines drawn, based upon criteria other than race[13] and therefore *Brown* was not applicable to the case before it because students were not separated, ". . .solely because of their race,[14]" the practice that existed when the court decided *Brown.*

Plaintiffs further attempted to support their allegations by citing *Taylor* v. *Board of Education of New Rochelle,*[15] which allowed Negro students to be transferred across a city to attend integrated schools.[16] Here again the court distinguished between the factual situation in the case before it and that presented in the case cited by plaintiffs, when it pointed out that in *Taylor,* ". . .the board had deliberately drawn the district lines,[17]" to achieve a segregated school system, whereas in the instant case no "intent and purpose" to achieve a segregated school system was shown on the part of the defendant board.[18]

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[12] 347 U.S. 483, 494 (1954). ["To separate them (negroes) from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may effect their hearts and minds in a way very unlikely ever to be undone."]

[13] 213 F. Supp. 819, 823-24 (N.D. Ind. 1963).

[14] 347 U.S. 483, 494 (1954).

[15] 191 F. Supp. 181 (S.D.N.Y. 1961); 195 F. Supp. 231 (S.D.N.Y. 1961); *aff'd* 294 F.2d 36 (2nd Cir. 1961), modified in part 221 F. Supp. 275 (S.D.N.Y. 1963), *cert. denied,* 368 U.S. 940 (1961).

[16] The court, in the instant case, ruled this possibility out when it stated at p. 831, "Furthermore, requiring certain students to leave their neighborhood and friends and be transferred to another school miles away while other students, similarly situated, remained in the neighborhood school, simply for the purpose of balancing the races in the various schools would in my opinion be a violation of the equal protection clause of the 14th amendment." [Gary and Balabin are the first case to consider the rights of the pupils who are being transferred, without request, to achieve a racial balance]. See however, California Administrative Code Title 5 Section 2010, 2011 and New York City Board of Education Policy statement as reported in N. Y. Times Aug. 26, 1963 p. 1 col. 1, allowing this procedure as a corrective measure in dealing with de-facto segregation.

[17] 213 F. Supp. 819, 828 (N.D. Ind. 1963) [Taylor v. Board of Education of New Rochelle, 191 F. Supp. 181; 192,93 (S.D.N.Y. 1961); 195 F. Supp. 231 (S.D.N.Y. 1961); *aff'd* 294 F.2d 36 (2nd Cir. 1961), modified in part 221 F. Supp. 275 (S.D.N.Y. 1963) *cert. denied* 368 U.S. 940 (1961)].

[18] 213 F. Supp. 819, 826 (N.D. Ind. 1963).

It appears that the Supreme Court may be in accord with the above interpretation of *Taylor* as applied to de-facto segregation. In denying the New Rochelle School Board's suit, to stay the Court of Appeals order requiring Negro students to attend integrated schools, the court said:

> The petitioners argue in their formal application that there is presented a question 'as to whether there is an obligation on a school district whenever the Negro attendance in a school reaches a high percentage to abandon a rule of law based on residence and to establish a racial quota system.' However, the District Court found that the petitioners had deliberately created and purposely maintained the Lincoln Elementary School as a racially segregated school. 191 F.Supp. 181. Upon its own examination of the evidence the Court of Appeals concluded that 'this crucial finding is. . .supported by the record.' 294 F.2d 38. Therefore, the question which the petitioner claims is presented by the case (as to which question and its importance, I intimate no view) could be before this Court only if the court overturned the factual findings concurred in by the two lower courts. The petitioners have not suggested reasons for believing that these findings would be held to be clearly erroneous.[19]

Although the court in the instant case rejected *Brown* and *Taylor,* it did so on a factual and not a legal basis. The legal criteria established by the three cases appears to be the same, *i.e.,* if an affirmative act to achieve segregation is shown, then the board is under a duty to desegregate its schools. Thus, *Gary,* appears to be the correct legal application of *Brown* to the problem of pure de-facto segregation.

The purpose of the *Gary* suit, and others of this class, appears to be the providing of better educational facilities and opportunities for the Negro student who resides in an area that has de-facto segregation. However, the method

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[19] 82 S.Ct. 10, 11 (1961).

that has been chosen to achieve this goal, forced integration, has been questioned.[20] Some authorities have expressed the opinion that it might prove detrimental rather than beneficial.[21] The New York City Higher Horizons Program[22] and the Demonstrative Guidance Project are preferable methods and ones that have produced commendable results, while students attended their neighborhood schools.[23] These latter programs required a greater cooperation and understanding and took a longer period of time to achieve their goals than a program that would merely transplant pupils across a city to achieve a meaningless quota.[24] However, their results have yet to be equalled.

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[20] JAMES B. CONANT, *Schools and Jobs in the Big Cities*, SLUMS AND SUBURBS, (New York: McGraw-Hill, 1961), p. 30. ["Clearly a complicated arrangement for moving large groups of young children around the city for the sake of mixing all the elementary *and the Schools: A Crisis North and South*, THE ATLANTIC (January, 1958), pp. 29-34. Evans v. Buchanan, 207 F. Supp. 820, 824 (D. Del. 1962).

[21] See for example, Claire Selly and Stuart W. Cooks, *The Effect of Personal Contact on Intergroup Relations*, RELATIONS OF THEORY INTO PRACTICE (College of Education, The Ohio State University, 1963) Vol. II Number 3 pp. 158-166. See also the remarks of Dr. Ernest van de Haag as reported in the N.Y. Times May 11, 1963, p. 10 col. 3.

[22] Higher Horizons Programs attempted to compensate a pupil for his inadequate educational background by providing for the student and his family, extra teachers, counselors, and specialists, coupled with field trips, "and attendance at plays, musical events and activities." N.Y. Times June 12, 1963, p. 29. col. 1. The program thus sought to remedy all aspects of the problem.

[23] Among the results of the Demonstrative Guidance Program were:
1. ". . .38% more pupils finished high school than before. 2 1/2 times as many completed the academic course of study and 3 1/2 times as many went to higher education.
2. I. Q., reading and math levels were raised.
3. At the completion of three years of high school, project students ranked first, fourth, and sixth in a graduating class of more than 900

These results are all the more remarkable when one considers that, "[t]he homes of many were troubled by family problems, and nearly one-half of them had lost one or both parents." N.Y. Times Feb. 9, 1961, p. 28 col 4. See also N.Y. Times June 12, 1963, p. 29 col. 1.

[24] "In the three years we found no substitute for sound educational procedures that would enable young people to prepare themselves for college and careers. Whatever was accomplished came as a result of hard, unceasing day-in and day-out work by teachers, counsellors, and supervisors as well as by the students themselves." Remark of Mr. Henry T. Hillson, Principal of the George Washington High School where the project took place. As reported in N.Y. Times Feb. 9, 1961, p. 28 col. 4.

In light of the opinions expressed by those familiar with the problem of de-facto segregation and the type of program that has proved itself successful in dealing with the problem, the words of former Justice Frankfurter should be considered by those who advocate immediate integration as the remedy for de-facto segregation: "Only the constructive use of time will achieve what an advanced civilization demands and the constitution confirms.[25]"

Gary is a sound judicial application of these programs and principles.

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[25] Cooper v. Aaron, 358 U.S. 1, 25 (1958).