North Carolina Central Law Review

Volume 5
Number 2 *Volume 5, Number 2*

Article 18

4-1-1974

The Affirmative Duty to Desegregate State Systems of Higher Education without Eliminating Racially Identifiable Schools

Charles H. Holmes

or arise from the same transaction, or from connected transactions or form part of a common scheme or plan. Rule 8(b) provides for joinder of defendants. Rule 13 provides for joinder of separate indictments or informations in a single trial where the offenses alleged could have been included in one indictment or information.

In concluding, a quotation from the last paragraph of Justice Brennan's concurring opinion in *Ashe* would be relevant

> Abuse of the criminal process is foremost among the feared evils that led to the inclusion of the Double Jeopardy Clause in the Bill of Rights. That evil will be most effectively avoided, and the Clause can thus best serve its worthy ends, if "same offence" is construed to embody the "same transaction" standard. Then both federal and state prosecutors will be prohibited from mounting successive prosecutions for offenses growing out of the same criminal episode, at least in the absence of a showing of unavoidable necessity for successive prosecutions in the particular case.[13]

Thus, until the same transaction standard, as espoused by Mr. Justice Brennan, is adopted by all of the courts in our country, the Fifth Amendment protection against double jeopardy will remain devoid of meaning.

DONNIE HOOVER

The Affirmative Duty to Desegregate State Systems of Higher Education Without Eliminating Racially Identifiable Schools—

I. INTRODUCTION

In *Adams v. Richardson*, the appellees, citizens and taxpayers brought an action for declaratory and injunctive relief against appellants, Secretary of Health, Education and Welfare and the Director of HEW's Office of Civil Rights. They alleged that appellants had been derelict in their duty to enforce Title VI of the Civil Rights Act of 1964 because appellants had not taken suitable and timely action to end segregation in public educational institutions receiving federal funds. Title VI provides that discrimination in federally assisted programs must cease or those programs will no longer be federally assisted.[2] The United States Court of Appeals for the District

[13] 397 U.S. at 459-460.

[1] 480 F.2d 1159 (D.C. Cir. 1973).

[2] 42 U.S.C. § 200d (1964) provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

of Columbia affirmed and modified a District Court order to desegregate those state systems of higher education not in compliance with Title VI of the Civil Rights Act of 1964.[3] It held that enforcement must follow in absence of voluntary compliance within a reasonable time; that more time is required with respect to systems of higher education than was provided by the District Court; and that limited monitoring by HEW could be required with respect to school districts under court orders to desegregate.

The purpose of this comment is to examine and analyze the court's determination that: (1) because of its inexperience, HEW must use caution and care in desegregating colleges and universities;[4] and (2) Black schools do and should play a significant role in higher education. Particular attention will be given to the part these determinations play in the final acceptance by the Court of HEW's justifications for delay and inaction.

II. BACKGROUND OF *ADAMS*

In attempting to desegregate the public schools, resistance emanated from many sources. There may have been more resistance in this field than in any other type of civil rights litigation.[5] Before and after *Brown v. Board of Education*,[6] various forms of resistance to school desegregation were attempted: economic reprisals, legislation, closing of schools and on more than one occasion, outright violence.[7] Even today many school children attend segregated schools although *Brown* was decided two decades ago. The courts were faced with a Herculean task. Their case-by-case approach could not have feasibly brought about meaningful desegregation.

To alleviate this snail-like pace of desegregation, Congress passed Title VI of the Civil Rights Act.[8] Obviously, Congress thought the act would provide a fresh approach—a national policy of public school desegregation. All federal departments, including the Office of Education, were authorized to issue rules and regulations to insure that the provisions of Title VI would be carried out.[9] Although there was a possibility that some would reject assistance rather than eliminate segregation, the likelihood was that the school districts would opt for the much needed federal funds even though it meant the removal of segregated bastions. Because most

[3] 42 U.S.C. §§ 200d, 200d-4 (1964).

[4] 480 F.2d 1159 at 1165.

[5] Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 Va. L. Rev. 42 (1967); Bell, *Foreword*, 1 BLACK LAW JOURNAL 192 (1971).

[6] Massive resistance was characterized and in some instances presently by laws and resolutions adopted for the purpose of thwarting, using dilatory tactics, in refusal to implement school desegregation. Mississippi during the 1950's adopted interposition statutes; Virginia in one county disestablished its public school system.

[7] W. VOLKOMER, AMERICAN GOVERNMENT 655 ( ).

[8] 55 GEORGETOWN L.J. 325-51 (1966-67).

[9] 78 Stat. 252, 42 U.S.C. § 2000-1.

school districts in the country were receiving federal funds, the expectation was that Title VI would assist the courts in gaining compliance.[10]

As might have been expected of any plan in its initial stages, Title VI caused confusion. For one thing, the beneficiaries of the federal educational assistance—Blacks—were simultaneously the victims, however indirect, of the sanctions of Title VI. If the schools went without federal assistance, then so did the Blacks.

By January, 1969, HEW had concluded that Louisiana was operating a racially segregated system of higher education in violation of Title VI of the Civil Rights Act of 1964. Between the months of January, 1969 and February, 1970, HEW made the same determination regarding the systems of higher education in the states of Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland, and Virginia. Letters from HEW were sent out to the states, requesting them to submit a desegregation plan within 120 days or less. Five states totally ignored[11] the letter and although five others submitted plans, these were found unacceptable. HEW failed formally to comment on any of the submissions afterwards, i.e. before the Adams case. As recently as June, 1973, HEW required these states to submit follow-up desegregation plans.

III. EVOLUTION OF *ADAMS*

In *Green v. County School Board*,[12] the Supreme Court held that a state had an affirmative duty to dismantle its racially segregated educational systems. Even freedom of choice plans would not absolve the boards' duty to eradicate racially identifiable schools.[13] Green applied to lower education. Later a lower court, in *Alabama State Teachers Association v. Alabama Public School and College Authority*, refused to apply Green to higher education.[14] Here the court had to rule on legislation which permitted Auburn, a predominantly white university to establish a branch campus in Montgomery through the sale of bonds, although Alabama State College, a predominantly Black college, already existed in the city.[15] The court acknowledged that in *Lee v. Macon County Board of Education*[16] it had required the junior and senior colleges within the state to refrain from discrimination and begin faculty desegregation. However, the court

[10] 55 GEORGETOWN L.J. 347 (1966-67).

[11] Adams v. Richardson, 480 F.2d 1159 at 1164.

[12] 391 U.S. 430 (1968).

[13] Freedom of choice exists when students have the right to select the school they wish to attend.

[14] 289 F. Supp. 784 (M.D. Ala. 1968).

[15] *Id.*

[16] 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd* Wallace v. United States, 389 U.S. 215, 88 S.Ct. 415. 19 L.Ed. 2d 422 (1967); United States v. Jefferson County Board of Education 372 F.2d 836 (5th Cir., 1966); *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967) *cert. denied*, Board of Education of City of Bessemer v. United States, 389 U.S. 840, (1967).

in reference to the extent of this policy said:

> . . ."We do not agree, however, with the characterization of the college authorities conduct, nor do we agree that the scope of the duty should be extended as far in higher education as it has been in the elementary and secondary public schools area."[17]

The Alabama Court based its position on three arguments.[18] It thought consideration should be given to the significant differences between elementary and secondary public schools, and institutions of higher education. Secondly, the court voted that students should be free to choose what college they wanted to attend since attendance was neither compulsory nor free. This was also a distinction with the elementary and secondary school levels. Thirdly, the court felt that the student's freedom to select a school of his or her choice served an important educational prerogative: matching the right school with the right student. The Supreme Court affirmed the court's approach.[19]

About a month later, a Tennessee Court in *Sanders v. Ellington* took a different approach to *Green* and held that it was the duty of a state to desegregate its colleges and universities beyond a non-discriminatory admission policy.[20] The court found the existence of a dual system of higher education and cited *Green* as a mandate to disestablish the duality. Acknowledging *Green* and *Brown*, the court said:

> . . . the court is convinced that there is an affirmative duty imposed upon the state by the Fourteenth Amendment to the Constitution of the United States to dismantle the dual system of higher education which presently exists in Tennessee.[21]

The court required plans from both parties designed to effect desegregation. In dictum, the court stated that:

> . . ."Although it was not specifically commented on by witness, that the failure to make A & I (Tennessee State University, 99% Black) a viable, desegregated institution in the near future is going to lead to its continual deterioration as an institution of higher learning. I think everybody recognizes that. It is clearly apparent on that record that something must be done for that school and that the one thing that is absolutely essential is a substantial desegregation of that institution by whatever means can be devised by the best minds that the State of Tennessee can bring to it."[22]

This view, that a racially identifiable school was unconstitutional,

---

[17] 289 F. Supp. 784, 787 (M.D. Ala. 1968); for a discussion of both *Sanders* and *Alabama Teachers*, see 82 Harvard L. Rev. 1757 (1969) and 69 Columbia L. Rev. 112 (1969).

[18] *Id.* at 787, 789.

[19] 37 U.S.L.W. 3259 (U.S. Jan. 21, 1969), aff'd per curiam, 289 F. Supp. 784 (M.D. Ala. 1968).

[20] 288 F. Supp. 937 (M.D. Tenn. 1968).

[21] *Id.* at 942.

[22] *Id.* at 943.

was not followed by *Alabama State Teachers*[23] nor by *Adams*.[24]

Adams supports *Sanders'* thesis that higher education systems should be desegregated. Furthermore Adams said that enforcement would follow in the absence of voluntary compliance within a reasonable time. Enforcement would come through the termination of federal assistance or by any other means provided by law. The court did not address itself to the problem posed by schools refusing federal funds.[25] However, it is unlikely that any college or university will be in a financial position to refuse federal funds. Moreover, *Adams* does not dismiss the possibility of racially identifiable schools, and acknowledges the worth of Black institutions. After accepting the District Court's conclusion that HEW should not neglect its responsibility to enforce Title VI, the court recited:

> The problem of integrating higher education must be dealt with on a state-wide rather than a school-by-school basis. Perhaps the most serious problem in this area is the lack of state-wide planning to provide more and better trained minority group doctors, lawyers, engineers and other professionals. A predicate for minority access to quality postgraduate programs is a viable, coordinated state-wide higher education policy that takes into account the special problems of minority students and of Black colleges. As amicus points out, these Black institutions currently fulfill a crucial need and will continue to play an important role in Black higher education.[26]

Thus *Adams* accepts the general plan of *Sanders*, yet adopting the wait-and-see, cautious policy of *Alabama State Teachers*. HEW has, subsequent to *Adams* required the non-complying states to submit plans under their guidelines to eliminate the vestiges of duality in the higher education systems.[27]

---

[23] 289 F. Supp. 784 at 789.

[24] 480 F.2d 1159 at 1165 (1973).

[25] See Guillory v. Administrator of Tulane University, 203 F. Supp. 855, 858-9 (E.D. La. 1962), aff'd 306 F.2d 489 (5th Cir. 1962); Sweet Briar Institute v. Button, 280 F. Supp. 312 (W.D. Va. 1967); Coffee v. William Marsh Rice University, 408 S.W. 2d 269 (Tex. Civ. App. 1966). The courts found that although these were private universities there was sufficient state action in all to require compliance with the Fourteenth Amendment. Another theory to support desegregation was that since such a premium is placed on education in this country, and the unlikelihood of success without it, a denial of an opportunity to attend a university if the state provides one is a denial of equal opportunity. Fraser v. Board of Trustees of the University of North Carolina, 134 F. Supp. 589, 592 (M.D.N.C. 1955), *aff'd* 350 U.S. 979 (1956).

[26] 480 F.2d 1154 at 1165 (1973); for a discussion of this issue, see Dubois, Does the Negro Need Separate Schools? Journal of Negro Education (July, 1935); the Summer, 1971 issue of Daedalus devotes the entire issue to the Future of Black Colleges; for a negative view of Black Colleges see RIESMAN AND JENCKS, THE ACADEMIC REVOLUTION(1968); a recent book supports the viability and worth of Black Colleges, MAYHEW, THE CARNEGIE COMMISSION OF HIGHER EDUCATION (1973).

[27] Two letters, those to the proper officials of North Carolina and Mississippi are in the files of the author.

IV. CONCLUSION

The *Adams* opinion, viewed in practical terms seeks to accommodate the positive values of free choice on the higher educational level, with the problems attendant on the affirmative duty to desegregate. While primary and secondary school districts have compulsory zoning laws and busing as a means of eliminating a dual system, the appellants are allowing the non-complying states to devise plans to allow free choice of schools. These plans should approach desegregation on a state-by-state basis, thus allowing great flexibility.[28] Predominantly Black institutions have demonstrated an important role in producing graduates who take meaningful positions in society. *Adams*, and *Hawkins v. Board of Control of Florida*[29] acknowledges this role of Black institutions. It is difficult to envision white institutions, in the near future, assuming similar roles. This pragmatic approach by *Adams* appreciates HEW's obvious difficulties in achieving an equitable solution. The goal of having racially unidentifiable schools in the immediate future is highly unlikely considering the fact that minority college enrollment has decreased since 1973.[30] It has been demonstrated that the only "good education" does not necessarily have to be an "integrated education."[31]

CHARLES H. HOLMES

U.S. v. Robinson : What is Reasonable?

The Fourth Amendment of the Constitution of the United States provides that the people shall be protected against unreasonable searches and seizures, and no warrants whall be issued except upon probable cause.[1] However, a search incident to a lawful arrest is a long-recognized exception to the requirement that searches must rest upon warrants issued upon probable cause.[2] While eliminating the requirement of a warrant in some instances the courts do require that the search be reasonable to meet the safeguards of the Fourth Amendment.[3]

The Supreme Court of the United States, with Mr. Justice Rehnquist writing for the majority, has further defined what it considers to be a reason-

[28] For a cogent discussion of the inverse effects of Brown v. Board of Education, see Howie, the Image of Black People in *Brown v. Board of Education*, 1 BLACK LAW JOURNAL 234 (1971) in which the writer maintains that Brown supports and reincarnates Dred Scott.

[29] Florida ex rel. Hawkins v. Board of Control of Florida et al. 350 U.S. 413 (1956).

[30] N.Y. Times, February 3, 1974, at 54.

[31] See EDMONDS, JUDICIAL ASSUMPTIONS ON THE VALUE OF INTEGRATED EDUCATION FOR BLACKS, PROCEEDINGS, NATIONAL POLICY CONFERENCE ON EDUCATION FOR BLACKS (1972); *The Value of Integrated Education*, in THE SOCIAL SCIENCE RESEARCH CONTROVERSY 562.

[1] U.S. CONST. Amend. IV.

[2] Jones v. U.S., 357 U.S. 493, 497 (1958).

[3] U.S. v. Rabinowitz, 339 U.S. 56 (1950).