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Commentary

An Ode to Rejection

*Aaron D. Twerski**

In January, 1968, the United States Supreme Court denied certiorari in the case of *Avins v. Rutgers, State of New Jersey*.¹ The case raised a most novel and engaging issue. Plaintiff, a distinguished professor of law at Memphis State University, had written an article which reviewed the legislative history of the Civil Rights Act of 1875 as it pertained to school desegregation. He concluded that in light of the Congressional debates surrounding that Act the Supreme Court had erred in *Brown v. Board of Education*² in its holding that the Fourteenth Amendment required desegregation of the schools and that separate but equal facilities were inherently unequal. Professor Avins submitted the article to the Rutgers Law Review but was rejected by the articles editor on the ground "that approaching the problem from the point of view of legislative history alone is insufficient."³

After receiving this letter of rejection plaintiff brought suit in the United States District Court for the District of New Jersey asserting that the editors of the Law Review had adopted a discriminatory policy of accepting only articles reflecting a "liberal" jurisprudential outlook in constitutional law. The plaintiff claimed that his article represented the "conservative" approach and that its rejection solely because of its conservative tenor violated his right to freedom of speech. He also argued that the student editors of the Rutgers Law Review had been so indoctrinated in a liberal ideology by the faculty of the law school that they were unable to evaluate his article objectively.

* A.B. Beth Medrash Elyon, 1960; J.D. Marquette University, 1965; Teaching Fellow, Harvard Law School, 1966-67; Assistant Professor of Law, Duquesne University.

1. 390 U.S. 920 (1968).

2. 349 U.S. 294 (1954).

3. The article was subsequently published in 38 Miss. L.J. 179 (1967) and is entitled *De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment From the Civil Rights Act of 1875*. The author concluded that "*Brown v. Board of Education* is not now, nor has it been, the supreme law of the land. Rather, it is an unwarranted exercise of non-existent authority which being illegitimate in its origin, cannot be made legitimate by the lapse of time. . ." *Id.* at 246. Other articles by Professor Avins reflecting a similar point of view *Towards Freedom of Choice in Education*, 45 J. Urb. L. 23 (1967); *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment, and Housing*, 14 U.C.L.A. L. REV. 5 (1966).

After losing in the District Court he appealed to the Third Circuit. In affirming the lower court's decision Judge Maris held that Professor Avins did not have a right:

to commandeer the press and columns of the Rutgers Law Review for the publication of his article, at the expense of the subscribers to the Review and the New Jersey taxpayers, to the exclusion of other articles deemed by the editors to be more suitable to publication.⁴

The fundamental argument raised by the plaintiff is not frivolous. Serious consideration has been given to the question of when a private party has a constitutional right to a public forum.⁵ In this day of mass involvement in publication and communication the question ceases to be purely academic. Nevertheless, this writer must admit to seeing some degree of humor in a law review staff being forced to defend its publication policies. The following lines of doggerel reflect a light-hearted resume of the litigation. It was written in good cheer and should be read in the same frame of mind.

Rejection

Professor Avins of Memphis State
had a 'plaint of no mean weight
He toiled and worked with sweat and tears
to scan the history of yesteryears

He read and thought and then concluded
the Highest Court must be deluded
when they can decide nary a frown
that segregation be outlawed in *Brown*

To him it was clear after much concentration
no such result was compelled by legislation
So using great skill and scholar's insight
he wrote to set the record right

4. Avins v. Rutgers, State University of New Jersey, 385 F.2d 151, 153 (1967).

5. For a fascinating discussion of this general problem see, Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). Also see Gorlick, *Right To A Forum*, 71 DICK. L. REV. 273 (1967) for a discussion of this problem in a somewhat different setting.

And from his labors a paper shew forth
By Pony Express it came to the north
It arrived one morn at Rutgers U
for approval by the law review

The Pinko Board with concern alive
Read of the Civil Rights Act—1875.
It had never been meant to place Negroes together
With their white brethren—oh no, no, no never

To publish a statement of such intent
was wrong, sinful, of evil bent,
A letter rejecting they authored well
telling Avins—sorry, no sell

We like your syntax, we like your style
If fiction you wrote you'd make a pile.
This article though really won't last
it speaks, alas, of days in our past

With gnashing of teeth, a wail, and a snort
straight off rushed Avins to the district court
He argued with vigor and all of his vim
imploring the court to side with him

"Your Honor", he said, "I've no altercation
with patriotic students in our nation
These innocent students were badly misled
By a faculty that is clearly Red"

The judges considered and then they decided
twas not the students who were misguided.
"Listen, Professor, don't you know
tis the duty of editors to say yes or no."

However, Avins, be not despondent
that victory went to the respondent.

Commentary

Tomorrow some editor will your paper read
and decide to give your ideas the lead

Your pain will ease and your nerves will calm;
your ire will recede by this good balm
Sweet dreams will come in your sleep again
as they must to all satisfied men

But do us a favor both now and forever
the very next time you attempt an endeavor
Ask not the courts what they'll do for your views
we have enough trouble with the law reviews