

It is a sorry state of affairs when an American plaintiff is thrown out of an American court because he does not establish a foreign law that is so nearly unknowable, and that, if it is known, may provide a mere pittance calculated according to barbarous concepts. One gathers that the reason why the authors did not dwell on the injustices of *Wallon* and *Crosby* is that they were concerned in this book to deal with a "practical" subject in a "practical" way (p. 1). Is it impractical, however, to suggest to American lawyers that our courts may return to the sensible and just course of applying the law of the forum when the foreign law is not made to appear? If so, it can only be because the practical sense of the American lawyer has been corrupted by the influence of an academic, imported, and highly conceptualistic theory of conflict of laws which is quite inconsistent with the common law tradition.

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Race Relations and American Law. By Jack Greenberg. New York: Columbia University Press, 1959. Pp. 481. \$10.00.

Mr. Greenberg begins with the question: "Can the law alter race relations?" and declares that his thesis is that "law often can change race relations, that sometimes it has been indispensable to changing them, and that it has in fact changed them, even spectacularly" (p. 2). He then provides rich documentation and illustration for the oft made observations that laws do change, that these changes are responsive to and creative of other changes in the "political, social, economic, and moral" orders (p. 370), and that since 1938 there have been vast changes in the legal institutions affecting race relations in the United States.

Mr. Greenberg has followed the general pattern established by Myrdal, Rose, and Sterner in *An American Dilemma* (1944). It is essentially a description of how, since 1938, state law (in the broadest sense) in the United States has moved away from substantial conformity to one of the major competing value-judgments about race relations in our society and into progressively closer conformity to the other, and a consideration of what additional legal arguments and legislative and administrative actions might further reduce the gap between this latter ideal and the norms applied by the agents of the state. In its narrowest form, the progressively dominant value-judgment is that it is wrong to *discriminate* against any individual solely upon the basis of race. In its broadest form, this value-premise states that it is wrong to *differentiate* between individuals solely upon the basis of race.

Again following *An American Dilemma*, Mr. Greenberg presents this narrowing gap in chapters three through ten as it affects each of several of the "main categories of social activity" (p. 31): public accommodations and services (36 pages), interstate travel (18 pages), elections (19 pages), earning a living (54

pages), education (67 pages), housing and real property (38 pages), criminal law (30 pages), and domestic relations (12 pages). A final chapter in the body treats the armed forces (16 pages) upon the ground that "integration of the armed forces shows the potential of law for achieving changes in race relations."¹ The book closes with several valuable appendices, including one which cites and describes briefly most of the existing legislation pertinent to the subject of race relations.

The author presents his general "legal overview" in chapter two. It is Mr. Greenberg's position that the narrow form of the previously described value-premise is clearly embodied in the Constitution in the fifth and fourteenth amendments as an express prohibition upon any such conduct by the "state," and with an implied obligation that the state take such action as necessary to remedy any such discrimination as may exist. Furthermore, Mr. Greenberg appears to take the position throughout that, given what all Americans (including the members of the Supreme Court²) *know* about those state actions which have for over one hundred years differentiated between individuals of various racial ancestries, the broadest form of the premise is also included in the Constitution: *any* state action which *differentiates* between individuals solely upon the basis of race is *unconstitutional*. He so holds it as a denial of equal protection and/or a failure to meet the substantive reasonableness of classification necessary under our due process requirements. Otherwise stated, his position is that any state action which takes race into consideration or which seeks to give legal effect to decisions based upon race (e.g., court enforcement of restrictive covenants) must stand against an initial presumption of unconstitutionality.³

It is not necessary for a reader to agree with Mr. Greenberg on these matters in order to make profitable use of this book. However, it is necessary for the reader to keep this position constantly in mind if he desires to understand the author's evaluations of the constitutionality of statutes and practices currently having legal effects. For instance, it is with this specific meaning of "unconstitutional" in mind that Mr. Greenberg states: "Antimiscegenation laws are undoubtedly unconstitutional" (p. 353).

But this does not mean that the author expects all such laws to be so declared by all courts tomorrow, or even the day after tomorrow. It means that he rejects

¹ "In a democracy no one is subject to greater legal control than those in the armed services, and no other aspect of American life is so subject to government management, no other control can be so swift and unequivocal" (p. 369).

² As Professor Kurland has written in comment upon the *School Segregation Cases*: "The second of the non-technical factors was the recognition by the Court that the separate but equal doctrine has always resulted in separation but never in equality." Kurland, Book Review, 27 U. CHI. L. REV. 170, 178 (1959).

³ For closely related arguments, see Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); and Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421 (1960). Each of these articles goes some distance in explicitly pointing out the "sociological nature" of *Plessy v. Ferguson*, but neither goes far enough in this respect.

the proposition that any state action is constitutional until and unless it is expressly rejected by the Supreme Court. Intervening between what is unconstitutional, in his usage, and what the courts so declare is the variable of judicial restraint. As implied here, this idea of "judicial restraint" involves more than such matters as standing to sue, the practice of accepting administrative determinations, hesitancy to enlarge jurisdiction, and deciding wherever possible on some non-constitutional ground. Mr. Greenberg gives equally great weight to such considerations as the scope of the immediate consequences of the statute in question (whether the issue represents a "pressing interest"), the appropriateness of various kinds of legal change as an instrument of a particular social change, and the ability of the courts to give reasonable effect to their decrees.⁴ Thus, he anticipates that many courts in the foreseeable future will continue to be "reluctant" to "strike down" antimiscegenation laws.⁵

Our courts are assuredly "political bodies" in this sense, and it is almost a truism that we all would reject the proposition that a matter is "political" and beyond the hand of the judiciary *merely* because it is controversial.⁶ Many of us would be more likely to concur with Miss Mentschikoff that, of the two basic types of disputes, the controversy which involves "a demand by some person or sub-group for change in the standards regulating the future behavior in some particular area of some or all the members of the group" is normally thought of as one better suited to the "legislative process."⁷ Yet one might suspect that Mr. Greenberg would reply that the *standard* involved here, the fourteenth amendment, was established not only by legislative process but also by that tragic ultimate of political processes—a bloody Civil War. One can easily concur with the remarks of Justice Holmes on the fourteenth amendment and social experimentation⁸ and yet conclude that after a century of experimentation the

⁴ The author offers the opinion explicitly that "violence did not influence the results" of any of the cases of school desegregation (p. 229).

⁵ If we examine the final conclusion of the most recent law review article which argues that the existing miscegenation statutes perhaps do represent one area of social relations in which the classification by race is justified, we are hard put to differentiate it from a plea that the Supreme Court exercise considerable delay on this matter. "Thus, in the absence of any clear basis to hold an anti-miscegenation law unconstitutional . . . it would be most improvident for the Supreme Court to grant certiorari *at this time*. If certiorari be denied, there is no pronouncement to inflame passions on either side, and time may accomplish what no edict can." (Italics supplied.) Williams, *Racial Inter-marriage—A Constitutional Problem*, 11 W. RES. L. REV. 93, 101 (1959).

⁶ "If the Judiciary has the power to strike down what is plainly forbidden, what is there about the matter of the judicial process, traditional separation of powers, or the doctrine of judicial abstention from 'political' matters, that robs the Judiciary of its accustomed role of inquiry and ascertainment of legislative purpose?" Judge Brown, dissenting, in Gomillion et al. v. Lightfoot, 4 RACE REL. L. REP. 993, 998 (1959).

⁷ Mentschikoff, *Some Observations on the Adjudicatory Process*, 18-19 (1960) (unpublished article).

⁸ "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an

results are in: the various efforts among our states to give vitality to the fourteenth amendment within a framework of legally enforced racial segregation seem to have failed. As predicted by Mr. Justice Harlan in his dissent in *Plessy v. Ferguson*,⁹ these efforts appear only to have contributed to that very state of affairs which *on their face* they were to remedy.¹⁰

So far as legal doctrines and further court-initiated changes are concerned, the author sees this matter largely in terms of the question, "How inclusive can the concept of 'state action' be made *in considerations involving race relations?*" (one-third of chapter two). He presents this as the dominant line of legal reasoning which must be followed with respect to "public" and "quasi-public" facilities, accommodations, and memberships. Writing early in 1959, he anticipated that the next attempted sustained court actions along this line would be directed toward hospitals, "private" housing, labor unions, and private colleges. He states that the most forcible arguments of need and substantial state interest could be presented on these matters. Against these criteria, he placed privately owned ice cream parlors quite low on the list of priorities, although not so in the case of restaurants which enjoy exclusive franchises along interstate highways. The kinds of facilities now involved in the "sit-downs" (and so involved in various parts of the United States for two decades) would presumably be somewhere in between these limits.

The author does not himself suggest how far or how fast the "state action" concept will be extended by the courts. In fact, he seems to argue that this may well depend in large part upon how far its extension is forced by sustained pro-segregationists' demands for special privileges for whites only (as were denounced by Governor Collins in the case of the downtown lunch counters in Florida) and by any continued lack of effective positive action by the coordinate branches of government, federal, state, and local. "[T]here may be a race between the spread of civil rights legislation and equalitarian treatment on the one hand, and the expansion of the fourteenth amendment state action concept on the other. Perhaps it is tautologous to say that the courts will stop protecting minority rights when those rights no longer need protection. But the time of arrival of that condition may help to decide for how long the state action idea will continue to grow" (pp. 60-61). In short, Mr. Greenberg seems to believe that most

important part of the community desires, in the insulated chambers afforded by the states, even though the experiments may seem futile or noxious to me and to those whose judgment I most respect." Dissent in *Truax v. Corrigan*, 257 U.S. 312, 344 (1932).

⁹ 163 U.S. 537, 560 (1896).

¹⁰ It seems to me that there is no other answer that can be given to Professor Wechsler's apparently serious query: "Who will be bold enough to say whether the judgment in the segregation cases will be judged fifty years from now to have advanced the cause of brotherhood or to have illustrated Bagehot's dictum that the 'courage which strengthens an enemy, and which so loses, not only the present battle, but many after battles, is a heavy curse to men and nations.'" *Reflections on the Conference*, 3 COLUM. LAW ALUMNI BULL., No. 2, p. 2 (1958), quoted in Greenberg, p. 28.

American courts will not soon forget the dicta of Justice McClellan of the Supreme Court of Alabama, in justification of that state's segregation laws, that those statutes were "enacted promotive of the social purpose of the dominant race."¹¹

Although much of the book is occupied by discussions of the courts and court cases, it is, in fact, to the legislative and executive branches that the author looks for the most effective uses of law and other state action to reduce further the gap between his ideal and reality. He anticipates a continuing spread of statutes and ordinances, with special administrative agencies to implement them, toward the end of assuring further that Americans of minority races will have equal opportunities to compete as individuals in the "main categories of social activities."

It is, thus, the problem of state action positively aimed at integration, insofar as it involves the uses of quotas and other related decisions based upon race, which causes Mr. Greenberg the most unrest in view of his general position on the fourteenth amendment. State action aimed at integration must comply strictly with constitutional limitations. If the *School Segregation Decisions*¹² sought to secure any general right it was the right to attend school in any community which desires or is required to have public schools in a school system free of decisions based upon race. In the face of this, the use of state-applied quotas in educational systems in the North would appear as a most improper device for resolving the problems of residential segregation, as well as a poor substitute for a more equitable resolution of this issue. The author is quite correct when he notes that the absence of quotas in public housing tends to turn these projects into "Negro projects" because, at least in part, Negroes are over-represented among those eligible. Here he notes that the issue is most clearly seen when presented as a question of what happens when an *individual* is deprived of needed adequate housing because of the quota (and Mr. Greenberg is correct on page 292 when he assumes that this individual will probably be a Negro). The very heart of the author's moral and legal arguments lies in his contention that the fourteenth amendment refers to "equality between individuals in spite of race" and not the fatuous "equality between the races" which the Supreme Court was still willing to accept in *Pace v. Alabama*¹³ and *Plessy v. Ferguson*.¹⁴ Yet Mr. Greenberg's restless impatience merits at least as much sympathy as Senator Eastland's need for time.

This total picture relates directly to another recurrent theme which runs throughout the volume. On the one hand, the author repeatedly stresses that under the American system of law-government, the extent to which *anyone* can secure his lawful rights and convert his demands for equal opportunity into

¹¹ *Story v. Alabama*, 178 Ala. 98, 103, 59 So. 480, 483 (1912).

¹² *Brown v. Bd. of Education*, 347 U.S. 483 (1954).

¹³ 106 U.S. 583 (1883).

¹⁴ 163 U.S. 537 (1896).

legal rights by means of judicial, legislative, and executive actions depends in large measure upon the persistence and effectiveness of his demands, both as an individual and as a member of organizations composed of others similarly situated or of like mind (p. 23).¹⁵ On the other hand, he stresses that the legal rights secured through court action greatly enhance the abilities of the parties, individually and collectively, to utilize their political and extra-legal instruments in an effective manner to secure further opportunities which, for technical or practical reasons, can scarcely be secured solely by any amount of judicial action. There is little doubt that Mr. Greenberg is seeking here in part to vindicate the largely adjudicative program of the NAACP at a time when more spectacular leadership has emerged upon the public scene by placing this program within a larger perspective. However, this recurrent theme is also indicative of the extent to which the various leadership levels in the quest for equal opportunities are increasingly informing the seekers that new opportunities are emerging and that they as individuals must assume greater personal responsibilities both in the efforts to expand the opportunities and in preparing themselves to take effective advantage of existing opportunities.

Unfortunately, the weakest chapter of the book is the first, wherein the author addresses himself generally to the topic, "The Capacity of the Law to Affect Race Relations." It is fine to reassert that prejudice has many different causes (p. 27); to reassert that while one cannot outlaw prejudice one can by means of law usually affect conduct and through this have some ameliorative effect upon the prejudice of many persons in most situations; and to reassert that some dimensions of a pattern of race relations are more readily altered than others, while pointing out that the order does not necessarily follow that indicated by Myrdal in all situations (p. 13). His discussion comes much closer to recent theoretical developments in sociology when it is couched in terms of the "elasticity" of the "institution to be changed," but this is hardly pursued (p. 25). However, it is hardly reasonable to discuss the "inefficiency of the law" when the term *inefficiency* as used refers only to slowness and the ability of one's opposition (even if it be a judge in some instances) to use procedural devices to increase delay (pp. 17-21). In short, Mr. Greenberg's general discussion of his subject is completely devoid of any kind of organized conceptualization, and a great deal of it seems to boil down to the proposition that it is more difficult to induce a change in race relations by means of a change in law when the proposed change in the social pattern is (a) opposed and (b) involves much physical re-

¹⁵ If one grants that this general pattern constitutes one of the more important "ordinary modes" by which our citizens in this world seek to protect their rights, then one must conclude that the descendants of American slaves have finally reached that point which Justice Bradley had in mind when he stated: "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the ranks of a mere citizen, and ceases to be the special favorite of the laws, and when his rights, as a citizen or a man, are to be protected in the ordinary modes by which other men's rights are protected." *Civil Rights Cases*, 109 U.S. 3, 25 (1883).

arrangement than when the proposed change is (a) unopposed and (b) involves little or no physical rearrangement. This is clearest in his discussion of the factors which "help to smooth a changeover in racial patterns" (p. 17), and his attempt to state "in precisely what circumstances a particular situation in a particular community is ready for legal efforts seeking racial change" (pp. 29-30). His discussion of this last query may be correct, but a close analysis of it leads me to conclude that his answer says something like "when the gap between the *status quo* and the goal you are seeking is quite slight, when you are sure to win, and when there is at least some and preferably substantial support among the dominant group for the proposed change." With the school cases, this seems to fit the situation in Topeka, Kansas, for instance, but it is far from the situation in Clarendon County, South Carolina. On the other hand, Clarendon County now has a new school for the Negro students, and one can hardly avoid asking whether anything less than the threat of desegregation would ever have achieved such rapid good-faith compliance with *Plessy v. Ferguson* at this time in that county. In view of the massive "school equalization" programs now afoot in the Deep South (even assuming they are slightly overly rated, if they are), one is hard put to understand how Mr. Greenberg can state, "In certain places, however, law as legislation often has failed to change even conduct. . . . A hard core of states has hardly altered at all" (p. 7). This may not be the precise result the author desired, but sometimes Mr. Greenberg seems to apply his criteria so severely that he tends to ignore evidence which adds strong support to his fundamental thesis.

With all this said, special sympathy should be extended the author for his having even attempted to write this first chapter. As he says, it was to fill a gap. But thus far no social scientist has produced more than pioneering theoretical work on this subject. Some idea of the extremes appears to be relatively well outlined, but the problem is one of multiple variables, and we simply do not know precisely what those variables are or how they fit together in intermediate situations. At any rate, he does succeed even here in providing considerable evidence that law is a more effective agent of change than was believed by social scientists in 1900.

Perhaps a final comment should be added about the fact that Mr. Greenberg is Assistant Council to the NAACP Legal Defense Fund. It is obvious that his form of presentation is most favorable to the long-range value commitment of himself and that organization, as well as other American individuals and organizations, in favor of racial integration. He himself makes no bones about his identity or his allegiance; he frequently discusses cases explicitly "from the standpoint of our interests." This, however, does not make his book merely a brief for the NAACP.

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