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Race Relations and American Law, by Jack Greenberg

Arthur S. Miller
Emory University Law School

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RACE RELATIONS AND AMERICAN LAW. By Jack Greenberg. New York: Columbia University Press. 1959. Pp. viii, 481. \$10.00.

When the exigencies of American politics forced the negro to fight his battles in the judicial chamber rather than the legislative hall, an unlooked for by-product was the production of a fascinating case study of law in action. In a situation without parallel in our constitutional history, the Supreme Court has undertaken a re-examination and redirection of the position of the ten percent of the population whose lot it is to be colored in a nation which gives its greatest rewards to those with an absence of pigmentation. While the roots of this development can be traced at least as far back as 1938, and probably even farther, the major impact has of course come since the fateful Monday in mid-May 1954, when the Court announced its decision in the *Segregation Cases*. These half-dozen years mark one of the classic legal struggles which have erupted from time to time in the United States, struggles of a political and social nature,

† Department of Sociology, Indiana University.

which as Tocqueville remarked, tend often to be fought out in the judicial arena. The book under review is at once an account of how law operates as an instrument of social change and of the Supreme Court as promulgator of the law in question. It is, in short, a delineation of the details of a major example of judicial activism, one in which the author has set out what appears to be the brief for the affirmative. Mr. Greenberg, who is Assistant Counsel to the NAACP Legal Defense Fund, believes that "Law has demonstrated its capacity to change race relations, and in the future this ability will grow." (P. 371) Since this is the main thesis of the book, it perhaps is desirable to state his position in a little more detail:

As for race relations in particular, the thesis of this book 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. Indeed, it might be said that in many places law has been the greatest single factor inducing racial change. But law alone, like other social forces, and like laws affecting other institutions, may not be able to alter these relations beyond a certain point, and in some situations it cannot make much difference. (Pp. 2-3)

In developing his central thesis, Mr. Greenberg sets out in ten well-documented chapters the state of the law as of July 1959 on such matters as education and elections, interstate travel and public accommodations, the armed forces and housing, plus several other similar areas of contention. For one whose preferences are obvious, he does this in a calm and dispassionate manner. The development is comprehensive, the citation exhaustive. In net result *Race Relations and American Law* is an invaluable addition to the bookshelf of anyone who must deal with the troublous details of negro-white relationships. It is, moreover, a book that will retain its value, because as the author notes, the "basic law dealing with race relations in the United States is fairly well settled. . . ." (P. vii) Appendices collecting statutes and other materials, a select bibliography, a table of cases, and a good index serve to enhance the value of the book for reference purposes. All of this is served up in a flowing style of writing that makes for ease of reading.

But saying that does not mean that one need subscribe to the author's central thesis. Nor does it mean that the case for judicial activism in what have been called "polycentric" questions (of which more below) has been proved. The time is yet too early, even though the constitutional precept is clear and unmistakable, for definitive conclusions to be

drawn. The evidence now available at best is spotty. It would not be very difficult to mount a formidable attack against Mr. Greenberg's thesis. Taken on a nation-wide basis, it could even be said that there are indications that patterns of racial segregation are becoming more rigid, rather than breaking down.

There are a number of other points which can be made in connection with any discussion of this book and its subject matter:

1. It seems likely that most white Americans believe in a caste system based on color. Someone has remarked that the difference between the white Southerner and his northern counterpart is that the Southerner doesn't care how close the negro gets so long as he doesn't get too high, while the Northerner doesn't care how high he gets so long as he doesn't get too close. True or not, it does seem to be true that distinctions based on color are a common characteristic of the great majority of the white citizenry. These distinctions carry over into action and are evident in all types of social activity. In no area of American life is the negro accorded acceptance as a human being; rather, in all areas of American life he is the object of some sort of discrimination because of his color, even the reverse discrimination of over-acceptance. This point suggests the second:

2. The belief structure of the American people to the contrary notwithstanding, some social problems may not be solvable on a reasonable basis. Race relations seem to be one of those not likely to be resolved in any rational manner. The essential problem over race relations, as I see it, is not over the fact of discrimination. No one disagrees that there is discrimination. The disagreement comes over what should be done about it—a vast difference. In other words, the dispute is over the basic ends of social life—the goal values themselves—rather than over the means to achieve commonly held values. As such, it represents a situation fraught with peril for a democratic system, for that system has no available way to resolve disputes over goal values.¹ The democratic process assumes common agreement on the ends of society, and is made

1. In my opinion, this is a point which has received far too little attention. "Democracy implies, among other things, a belief in the equality of men . . . ; consequently, one who is a practicing democrat cannot consistently indulge in or sustain others who indulge in the discriminatory practices that contravene the equalitarian creed. Democracy implies, too, that the *way* in which men adjust or resolve their differences is of crucial importance, that conflicts of opinion as to what constitutes the right moral and political ends are not to be resolved arbitrarily—i.e., by fiat of a stronger or allegedly superior group—but are to be mediated and temporarily adjusted through a political process that builds on the free exchange of opposing ideas. . . ." SPITZ, *DEMOCRACY AND THE CHALLENGE OF POWER* 106 (1958). As Yves Simon has put it, in the democratic state "deliberation is about means and presupposes that the problem of ends has been settled." SIMON, *PHILOSOPHY OF DEMOCRATIC GOVERNMENT* 123 (1951).

up of institutions designed to permit the working out of feasible means to attain those ends. The central spirit is one of compromise—exactly what is lacking in American race relations.

3. The accommodations which are being worked out in new patterns of negro-white relations reflect more the operation of power than they do of law. Where concentrations of negroes are high, as in some northern industrial cities, and where the negroes also have the vote, they are able to swing great leverage in politics, and to force change in some areas of action. Thus it is in New York City, where bloc voting by race apparently makes the negro vote the balance of political power. Thus it is also in Atlanta, where bloc voting has kept a friendly city administration in power. Thus it will be throughout the South should the time come when the Fifteenth Amendment receives full enforcement. A polity ruled by power, abetted by law, is far different from "a government of laws and not of men."

4. There is a need for a sociology of judicial precedent—for learning just what impact a judicially created norm has on the practices and the attitudes of those affected by a decision. We should, in other words, take up Cardozo's suggestion for the substitution of "exact knowledge of factual conditions for conjecture and impression."² Should this be done, it may be found that the Court's prescriptions are followed more in the breach than in the observance. As was said in connection with corporate reorganization:

The decisions of the Supreme Court may fall like thunderbolts from Almighty Jove. There is a blinding flash, perhaps some spectacular damage to a restricted area. Temporarily there is terror and repentance. But soon calm is restored and with it confidence that, granted a proper observance of prescribed rituals and occasional adaptation of their form to the whims of an angry god, there is likely to be very little interference with the actual plans of those who walk the earth below.³

As a generalization, possibly this is faulty. But it does point up the gap in our knowledge about law and the judicial process,⁴ a gap not filled by the book under review.

5. A corollary of the fourth statement is that judicial determination of "polycentric" questions apparently requires assistance from one

2. CARDOZO, *THE GROWTH OF THE LAW* 117 (1924).

3. FOSTER, *Conflicting Ideals for Reorganization*, 44 *YALE L.J.* 923, 927-28 (1935).

4. One of the few studies in the sociology of judicial decision may be found in PATRIC, *The Impact of a Court Decision: Aftermath of the McCollum Case*, 6 *J. PUB. L.* 455 (1957).

or more of the other branches of government for their operational fulfillment. The term "polycentric" refers to problems of a complex type: "we may consider every problem of balancing a large number of elements as a polycentric task."⁵ The resolution of racial relations in the United States is such a problem. Michael Polanyi, whose idea it is, goes on to assert that "A polycentric task can be socially managed only by a system of mutual adjustments"⁶—by which he means that "the social management of polycentric tasks requires a set of free institutions."⁷ And further: "if no system of mutual adjustments can be devised which will lead to the social performance of a polycentric task, then it is socially unmanageable."⁸ What Polanyi seems to be saying here is that "social management" of some tasks (those called "polycentric") cannot be obtained solely through the articulation of norms. Again, negro-white relations seems to fit this category.

This is neither the time nor the place to undertake a full-scale discussion of Polanyi's idea of polycentricity.⁹ But I should like to suggest that executive or legislative assistance would help immeasurably in the "social management" of American race relations.¹⁰ In this connection, the creation of the Civil Rights Commission by Congress in 1957 has been of help. What would have been of greater assistance, and could even have smoothed the road to accommodation of conflicting interests, is affirmative leadership from the executive branch of the government.

The decisions in the race cases of the past half-dozen years have about eradicated *legal* distinctions based on ethnic differences. That was important, and in itself justifies the results. But that alone is only a first step in eliminating the running sore of race relations in the United States. If such is to happen, then it will take more than Supreme Court decisions. It will take even more than the combined weight of all three branches of

5. POLANYI, *THE LOGIC OF LIBERTY* 176 (1951).

6. *Id.* at 184.

7. *Id.* at 186.

8. *Id.* at 184.

9. Professor Lon L. Fuller of the Harvard Law School has spelled out his views on polycentric questions in an as yet unpublished paper entitled "The Forms and Limits of Adjudication," which he presented at the annual meeting of the Association of American Law Schools in St. Louis, December 29, 1959.

Some discussion of the idea of polycentricity in adjudication is contained in Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication* (to be published).

10. The fact that legislative activity of a meaningful nature has not been forthcoming reflects the pluralistic nature of the American society, as well as the lack of commitment by whites to the democratic principle of equality. See Hill, *Labor Unions and the Negro*, 28 *COMMENTARY* 479 (1959), for an account of racial discrimination in labor unions. "Labor's democratic values are in serious conflict with a tradition of racial discrimination in the unions that is currently very much alive."

government. It can take nothing less than a realignment of a basic human response.

6. Distinctions based on color are made throughout the planet. Those in the United States who are wont to look upon the problem as one peculiar to the South are slowly awakening to the fact that the problem exists wherever negroes and whites are thrown together, save for a few isolated examples of mutual tolerance. Furthermore, color distinctions are made in other nations, the clearest illustration of course being that of Africa.¹¹ The point here is not that such distinctions should continue, but rather that racial discrimination is a *human* problem, not one limited to what some consider to be the benighted white population of the American South. To give true perspective to the problem, this simple and obvious fact must be grasped.

7. The attempt now being made within the United States to make a viable adjustment of negro-white relationships, so as to assimilate the negro into the dominant white social structure, is without parallel, either contemporaneously or historically. In no other part of the world today is a similar effort being made, as witness the situation in the Union of South Africa. So far as history goes, again no comparable example exists. The point here is that this presents the American people both with a unique problem—one without guiding principle or precedent—and, more importantly, with a unique opportunity. The opportunity is that of devising means whereby people of diverse racial and religious strains can live together in harmony and under conditions which do not violate the dignity of any human being. If this can be done—and the task is gargantuan, it seems to me—then it might be possible to forecast a similar development on a world-wide scale. The colored peoples of the world are on the march. The three-fourths of mankind which is colored is also non-Western, anti-colonial, and in the midst of the “revolution of rising expectations.” The Western white man—arrogant, self-assured, certain that his ideas and his values are universally valid—is fast being put on the defensive. It is now realized that the demands being made by the teeming multitudes of the poverty-rows of the world must somehow be met and somehow resolved. In this titanic meeting of Orient and Occident—which is, by all odds, the most difficult of all “polycentric” problems—what happens in American race relations will have at least some small influence in the final resolution.

On these complex and difficult matters opinions of course can and do differ. I would like to believe that Mr. Greenberg had proved his central thesis that law can change both practices and attitudes in race re-

11. See VAN DER POST, *THE DARK EYE IN AFRICA* (1955).

lations. But he has not done so. At best he has indicated that a number of legal discriminations have been removed from the statute books and that the courts now habitually hew to the anti-segregation line. That much, of course, is true. But social relationships, outside the area of coerced behavior, as in the armed forces, remain much the same as before May 17, 1954. It can even be said with validity that the personal relationships between individuals of the negro and white races have worsened since 1954. A tension and a mutual distrust now is evident, where before it was not present, a tension which shows no signs of lessening. Those who hope for an eventual viable resolution of the situation cannot, I fear, use Mr. Greenberg's book as evidence for those hopes. May 17, 1954 marks a major turning point in American race relations—comparable to the emancipation of the slaves—the ultimate resolution of which will take decades. At such time as the minds and hearts of people are changed—as well as the law—there will be the approximation of the democratic ideal that Mr. Greenberg and others so fervently work for.

ARTHUR S. MILLER†

ON LAW AND JUSTICE. By Alf Ross. Berkeley and Los Angeles: University of California Press. 1959. Pp. xi, 383. \$6.00.

In the last few decades the English language jurisprudential literature has been enriched by a number of books which are of either one of two types. There are the books which compile between two covers the writings of others arranged in a way that reflects the editor's interests. These are the kind of books most generally used in this country to teach courses in jurisprudence. On the other hand, there are the few original and creative writings which only seldom appear in book form and which, characteristically, unlike even Austin, do not purport to cover anywhere near the whole range of the problems indigenous to jurisprudence.

This latter type book is apparently only rarely adopted for instructions in jurisprudence courses and this for at least two reasons. First, jurisprudence is often regarded as the proper vehicle to satisfy the demands for some "culture" in the law school curriculum, and for some unexplained reason "culture" in such contexts seems to demand great breadth and wide vistas. As a result, jurisprudence ends up as a very superficial course which tries to survey too much, if not all legal philosophy since the pre-Socratics. This means a book of readings will be used

† Professor of Law, Emory University Law School, Atlanta, Georgia.