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LAW AND THE QUEST FOR EQUALITY

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The Tyrrell Williams Memorial Lectureship was established in the School of Law of Washington University by alumni of the school in 1949, to honor the memory of a well-loved alumnus and faculty member whose connection with and service to the school extended over the period 1898-1947. This nineteenth annual lecture was delivered March 8, 1967.

I have defined my subject as "Law and the Quest for Equality." Actually the subject involves several themes: the synergy of law and social patterns; the promotion of reform through, and by means of, existing legal means and doctrine; and the changing role of a lawyer in society. I hope these themes become apparent as I proceed.

I shall begin by giving a brief exegesis of the *School Segregation Cases*.[1] I do not propose to tell of every legal recognition of equality or of every lapse or legitimization of inequality from *Dred Scott*[2] to the school cases; the story has been told elsewhere and quite well.[3] But it is necessary for the development of my subject and themes to discuss some of these cases.

Dred Scott sued Sandford, the executor of the estate of his former master, for damages for an assault and battery that probably never occurred; the suit was filed in a Missouri federal court in 1853. Sandford was a citizen of New York; Scott alleged that he was a citizen of Missouri, having been taken to the free state of Illinois and to territory in which slavery had been prohibited by the Missouri Compromise. The jurisdiction of the court was thus asserted to exist under the diversity clause. When

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1. Brown v. Board of Educ., 347 U.S. 483 (1954).

2. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

3. *See* J. GREENBERG, RACE RELATIONS AND AMERICAN LAW (1959); R. HARRIS, THE QUEST FOR EQUALITY (1960) (from which, obviously enough, I in part borrowed my title); L. MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO (1966).

the case was finally decided by the Supreme Court, however, Scott—probably the person least affected by the decision—found that he could not be a "citizen" of a state within Article III of the Federal Constitution, and that, in any event, he was not free by his having lived in free territory because Congress had no power to deprive slave owners of "property" rights by prohibiting slavery in certain territory. It had been hoped—indeed expected—that the Supreme Court's ruling would settle much controversy, including that of the status of the vast territory, and the states to arise out of it, west of the Mississippi not covered by the Northwest Ordinance of 1787, which had prohibited slavery and had been passed prior to the adoption of the Constitution. As we now know, and as was realized shortly after the decision, *Dred Scott,* rather than settling controversy, added to it.

After much travail and a costly war, the thirteenth, fourteenth, and fifteenth amendments were adopted, each of which contained an innovative provision giving Congress the power to enforce them "by appropriate legislation." And the Reconstruction Congresses exercised that power in various civil rights legislation. The Supreme Court, however, struck down some of those provisions in the *Civil Rights Cases*[4] in 1883, which tolled the deathknell for such legislation; and, as it turned out, Congress did not use the power specifically granted to it for the next eighty-odd years. Of course, one can hardly place all the responsibility for the *Civil Rights Cases* on the Court. By the time the Court had declared the Civil Rights Act of 1876 unconstitutional, the Act had already fallen into desuetude. Thereafter, and perhaps partially as a result of the reasoning of Chief Justice Taney in *Dred Scott,*[5] the fourteenth amendment became not an effective shield for human rights, as it had been intended, but rather a mechanism by which corporations took on human traits and enjoyed the protections of what became known as substantive due process.

The last of this unfortunate trilogy is *Plessy v. Ferguson,*[6] which, like *Dred Scott,* was largely a trumped-up case. The Supreme Court upheld a state statute prescribing the racial separation of railroad passengers within the state; it reasoned that establishing "separate but equal" facilities did not violate the fourteenth amendment. In so upholding the enforced separation of those who were declared by that amendment, as "citizens of the United States and the State wherein they reside," to be entitled to the "equal protection of the laws," the Court legitimized and gave impetus to the myriad laws and customs described as—

4. 109 U.S. 3 (1883).

5. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 399 (1857); *see* 2 L. POLLAK, THE CONSTITUTION AND THE SUPREME COURT: A DOCUMENTARY HISTORY 212 (1966).

6. 163 U.S. 537 (1896).

> . . . a pervasive, official system of segregation which carries from cradle to grave . . . requir[ing] the Negro to begin life in a segregated neighborhood, attending separate schools, using segregated parks, playgrounds, swimming pools, which later kept him apart at work, at play, at worship, even at court and while going from one place to another, which confined him in segregated hospitals, and prisons, and finally relegated him to a separate burial place.[7]

Thus, as Dean Pollak has said, the Court in *Plessy* "gave constitutional momentum to the growth of an entire way of life: the racially divided pattern known as Jim Crow."[8]

Justice Harlan correctly prophesied in his dissent in *Plessy* that the decision would, "in time, prove to be quite as pernicious as the decision . . . in the *Dred Scott Case*."[9] But *Plessy* marks the nadir of constitutional protection for minorities.

From this point, the story changes. To be sure, there had been some earlier indication of hope for the quest for equality through the courts, most notably the decisions in the *Strauder*[10] case in 1880, which in effect held unconstitutional a state statute prescribing that only white males could serve on a jury, and in *Yick Wo v. Hopkins*[11] in 1886, which condemned administrative discrimination against Chinese as a class. Nevertheless, the story, despite the numerous legal victories from this point onward, does not follow an undeviating plot. Like any interesting story, it has its ups and downs.

One of the first cases in which a then fledgling organization, the National Association for the Advancement of Colored People, participated was *Guinn v. United States*[12] in 1915, in which the "grandfather" restrictions on voting were struck down. Thereafter, the NAACP helped to have declared unconstitutional racially restrictive zoning ordinances,[13] state laws barring Negroes from primary elections,[14] and the mob-dominated trial of a Negro.[15] In these and other cases in which the NAACP participated no over-all litigation strategy was developed or followed.

In the early 1930's, however, there was a change. Gratified by the ad hoc

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7. Brief for the United States as Amicus Curiae at 62-63, Griffin v. Maryland, 378 U.S. 130 (1963) (footnotes, citing statutes, omitted).

8. *See* 2 L. POLLAK, *supra* note 5, at 256. *See generally* C. WOODWARD, THE STRANGE CAREER OF JIM CROW (1955).

9. 163 U.S. 537, 559 (1896).

10. Strauder v. West Virginia, 100 U.S. 303 (1880).

11. 118 U.S. 356 (1886).

12. 238 U.S. 347 (1915).

13. Buchanan v. Warley, 245 U.S. 60 (1917).

14. Nixon v. Herndon, 273 U.S. 536 (1927).

15. Moore v. Dempsey, 261 U.S. 86 (1923).

victories but dissatisfied in its quest for equality, the organization decided that it would press on every possible front for the elimination of inequality and discrimination. The means selected was through use of the courts,[16] partially because other avenues of redress appeared to be closed, and partially because of the deep and abiding faith the planners had in the rule of law, and the efficacy and feasibility of instigating social reform through reliance upon the Constitution—which after all was designed to insure the protection of the basic values of our society. I should not, however, stress too greatly any over-all plan other than the decision to proceed through the courts, for that would be misleading.

In any event, realization of the quest proceeded, not without occasional setbacks to be sure, but it proceeded. The Supreme Court continued to rule against discrimination in the selection of grand and petit jurors and, in various ways, to insure the fairness of criminal proceedings against Negroes. It struck down abhorrent police practices, such as the beating of Negroes suspected of crime in order to obtain confessions. As Chief Justice Hughes said in the first of the coerced confession cases, *Brown v. Mississippi*[17]: "The rack and torture chamber may not be substituted for the witness stand." That case, incidentally, was argued for the petitioners on behalf of the NAACP by a former governor of the state of Mississippi.

In the famous *Scottsboro*[18] cases—in which a group of Negro boys were charged with raping a white woman—the Court first ruled that the trials were unfair because the defendants did not have the effective assistance of counsel, and later, after several of the boys had been retried, that the trials were unfair because of discrimination against Negroes in the selection of juries: no witness could recall when a Negro sat on a jury; in the old common law phrase, man's mind runneth not to the contrary.

Thereafter, rulings against discriminatory practices were reached in wide aspects of life. In a series of decisions the Court helped to eliminate discriminatory disenfranchisement of Negroes by looking through the ingenious white primary,[19] gerrymandering,[20] and other such schemes. As Justice Frankfurter said: the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination."[21] Similarly, the Court struck down

16. *See* J. GREENBERG, *supra* note 3, at 34-39; L. MILLER, *supra* note 3, at 259-62.

17. Brown v. Mississippi, 297 U.S. 278, 285-86 (1936). *See also, e.g.,* Chambers v. Florida, 309 U.S. 227 (1940).

18. Norris v. Alabama, 294 U.S. 587 (1935); Powell v. Alabama, 287 U.S. 45 (1932).

19. Smith v. Allright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); *cf.* Terry v. Adams, 345 U.S. 461 (1953); United States v. Classic, 313 U.S. 299 (1941).

20. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

peonage laws,[22] and, under the aegis of the federal labor laws, discriminatory union practices,[23] while at the same time protecting the right to protest and demonstrate against discrimination in employment.[24]

In the area of discrimination in public accommodations, the Court ruled against the maintenance of separate dining cars under the Interstate Commerce Act,[25] in a case in which the United States through the Solicitor General, though nominally a defendant, supported the petitioner against the ICC. And the Court upheld state laws proscribing discrimination in transportation.[26]

The enforcement of racially restrictive covenants was declared to be violative of the fourteenth amendment.[27] And in a series of rulings[28] involving discrimination in higher education, the Court seriously undermined the rationale of the *Plessy* case, at least with respect to public education. In one of the cases the Court said *not* that the Negro student having been admitted to the state school might receive separate but equal treatment, but rather that he "must receive the *same* treatment at the hands of the state as students of other races."[29]

I should note also that by this time, the early 1950's, many states had undertaken to eliminate racial discrimination, and that the executive branch of the federal government had not only supported the petitioners in several of the cases, but had affirmatively sought to eliminate discrimination in the services, in governmental employment, and in the insurability of homes in mixed neighborhoods through the FHA. I mention this because it is important to realize the impetus for change stimulated by, among other things, the Court decisions I have mentioned.

Finally in 1954, *Brown v. Board of Education,* the school segregation cases, was decided. I had the privilege of arguing the cases in the Supreme

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21. Lane v. Wilson, 307 U.S. 268, 275 (1939).

22. Taylor v. Georgia, 315 U.S. 25 (1942); Bailey v. Alabama, 219 U.S. 219 (1911).

23. *See, e.g.,* Conley v. Gibson, 355 U.S. 41 (1957); Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

24. *See, e.g.,* New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

25. Henderson v. United States, 339 U.S. 816 (1950).

26. Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948).

27. Shelley v. Kraemer, 334 U.S. 1 (1948); *cf.* Barrows v. Jackson, 346 U.S. 249 (1953).

28. *See* Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

29. McLaurin v. Oklahoma State Regents, 339 U.S. 637, 642 (1950) (emphasis added).

Court—actually of arguing them twice, since they had been set for reargument from the previous term. Because of my participation, I might perhaps overestimate *Brown's* importance, though I doubt it.

My friend Loren Miller prefaces the chapter on the *Brown* case in his recent book with an excerpt from a spiritual:

> There's a better day a' comin'
> Fare thee well, fare thee well,
> In that great gettin' up morning
> Fare thee well, fare thee well.[30]

and refers to May 17, 1954—opinion day in *Brown*—as "That Great Gettin' Up Morning." Similarly, Dean Pollak of the Yale Law School has said that the decision in the *School Segregation Cases* was, with the exception of the wars, "the single most important governmental act of any kind since the Emancipation Proclamation."[31] It doesn't matter for my purposes here if you do not fully share that view; surely, though, all will acknowledge the importance of the decision. In holding segregated public education unconstitutional, the Court eliminated one of the two primary pillars of the caste system (the other being disenfranchisement). The decision was not an easy one to reach, nor did it prove easy to enforce. Several states and many communities were quite recalcitrant and are only now coming to accept the decision.

Of course, the story of the quest for equality does not end with the *School Segregation Cases.* Indeed, it branches out in several directions, most notably to legislation: the Civil Rights Acts of 1957, 1960, and 1964, and the Voting Rights Act of 1965. Since it is a quest, the quest for equality is always an ongoing search, as our ideas and hopes are transmuted into reality. As President Johnson said recently at Howard University's centennial celebration:

> For the work that lies ahead is demanding, and involves far too many lives in urgent need of help, to be parceled out by race. Tomorrow's problems . . . will not be divided into "Negro problems" and "white problems." There will be only human problems, and more than enough to go around.[32]

I should also mention at this point that for many the civil liberties problems today are not so much of active discrimination, but rather of lack of certain opportunities. Hence, the emphasis has shifted toward the seeking of affirmative action, the exhortation to legislatures to act. I am sure that

30. L. MILLER, *supra* note 3, at 347.
31. 2 L. POLLAK, *supra* note 5, at 266.
32. 3 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 357 (1967).

all recognize that if a statute is patently unconstitutional, it can be challenged in the courts. But what if the claim relates to some lack of opportunity, a denial not of access to facilities, but rather of the refusal to take needed affirmative action? As we have seen, much of this kind of protest cannot effectively be channeled. Indeed, some of the protest cannot even be said to be directed at particular goals. Of course, civil disobedience, which is the theoretical underpinning of protest movements, is also a force for social change and progress. It is often necessary, in order to establish the need for action, to obtain and use what Professor Harry Kalven has called, in his interesting analysis of the sit-in cases, the "public forum."[33] But he who advocates civil disobedience must be aware of its import:

> [I]t goes counter to the general obligation to obey the law and almost always there are serious dangers of undesirable consequences for others. There is, therefore, a particular obligation to act conscientiously. . . ."[34]

The NAACP participated in most of the decisions I have discussed. Indeed, it was so successful that several states began to attack it through legislation, discriminatory application of old laws, or legislative investigation—seeking directly and indirectly to prevent or curtail its operation. The attacks on each occasion were rebuffed only by action of the Supreme Court.[35]

As I have mentioned, the quest for equality by litigation in the courts, up to the Supreme Court, and by the favorable decisions obtained is, I think, testimony to support my themes: that law cannot only respond to social change but can initiate it, and that lawyers, through their everyday work in the courts, may become social reformers.

All of the cases I have discussed involved infringements upon the rights of Negroes. Of course they involved more than the race of the particular litigant, for as President Kennedy said, echoing the thoughts of others, in a nationwide address on June 11, 1963, occasioned by the opposition of a governor of a state to the court-ordered enrollment of two students in a graduate school:

> This nation . . . was founded on the principle that all men are cre-

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33. H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 123-72 (1965). *See also* M. KONVITZ, EXPANDING CIVIL LIBERTIES 267-339 (1960).

34. Weingartner, *Justifying Civil Disobedience*, COLUM. U.F., Spring 1966, at 44.

35. NAACP v. Alabama, 377 U.S. 288 (1964); Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 368 U.S. 16 (1961); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961); NAACP v. Alabama, 360 U.S. 240 (1959); NAACP v. Alabama, 357 U.S. 449 (1958); *see* H. KALVEN, *supra* note 33, at 65-121.

> ated equal, and that the rights of every man are diminished when the rights of one man are threatened.[36]

Moreover, these cases do not appear in *Shepard's Citations* with an asterisk to limit their precedential value to race relations. They concern us as lawyers, law professors, citizens, and government officials because the principles they announce quite transcend the immediate controversy which occasioned them. Thus, *Powell v. Alabama*,[37] the first Scottsboro case, gave rise to an important principle in the administration of justice announced finally in *Gideon v. Wainwright*:[38] the due process right to a fair trial includes representation by counsel and the appointment thereof for the defendant who cannot afford to retain counsel. The same is true, of course, of the early coerced confession cases; they too have spawned many offspring. In short, these decisions go far to prove the truth of Dean Pound's statement that what he called "justice according to law"—

> . . . insures that the more valuable ultimate interests, social and individual, will not be sacrificed to immediate interests which are more obvious and pressing but of less real weight.[39]

And the social reform inherent in the decisions was achieved by the efforts of men, largely lawyers, who believed that through the rule of law change could indeed be wrought. The Negro who was once enslaved by law became emancipated by it, and is achieving equality through it. To be sure law is often a response to social change; but as I think *Brown v. Board of Education*[40] demonstrates, it also can change social patterns. Provided it is adequately enforced, law can change things for the better; moreover, it can change the hearts of men, for law has an educational function also.

Of what relevance is all of this to my second theme: the role of lawyers in society? The lawyer has often been seen by minorities, including the poor, as part of the oppressors in society. Landlords, loan sharks, businessmen specializing in shady installment credit schemes—all are represented by counsel on a fairly permanent basis. But who represents and speaks for tenants, borrowers, and consumers? Many special interest goups have permanent associations with retained counsel who seek and sponsor advantageous legislation. But who represents and speaks for the substantial segment of the populace that such legislation might disadvantage? Outside of

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36. 1963 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES—JOHN F. KENNEDY 468 (1964).

37. 287 U.S. 45 (1932).

38. 372 U.S. 335 (1963).

39. Pound, *Justice According to Law*, in ESSAYS ON JURISPRUDENCE FROM THE COLUMBIA LAW REVIEW 261 (1963).

40. 347 U.S. 483 (1954).

the political processes, I think the answer is clear. Lawyers have a duty in addition to that of representing their clients; they have a duty to present the public, to be social reformers in however small a way.

The cases I have mentioned show what can be done by private lawyers through the courts. And the possibilities of social change and reform today are far greater. The lawyer's image as solely the protector of vested interests is changing.

For years the bar responded to the need for legal services for the poor through legal aid, but even the most ardent supporters of the legal aid movement never claimed that the needs of the poor were fully met. Now, we have at hand the tools with which to provide those services in an organized and more complete way. Of course I am referring to the Neighborhood Legal Services concept within the Office of Economic Opportunity, ninety per cent federally funded, organized legal services for the poor. Like any reform scheme, however, the success of that program is directly related to the quality of the people, especially the lawyers, who become active in it. And like one of my themes, it involves the quest for equality, no longer racial, but rather equality in access to justice.

Some may undoubtedly disagree with some of the recent changes in social patterns and in the law. Well-considered dissent is, of course, an intimate part of the process of society. But I am sure all agree that the force of law—its capacity to initiate change and its flexibility to accept and mold change—is a major force in society, a force which lawyers are most often called upon to shape. From the early days in this country's history, it has been the traditional task of lawyers to mediate between principle and practice, between man's heritage and his hopes—that is the message of Law and the Quest for Equality—and that task and message we must never forget.