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## Review of “Equality by Statute—Legal Controls Over Group Discrimination,” By Morroe Berger

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## BOOK REVIEWS

**EQUALITY BY STATUTE—LEGAL CONTROLS OVER GROUP DISCRIMINATION.**  
By Morroe Berger. New York: Columbia University Press, 1952. Pp. xii,  
238. \$3.25.

The efficacy of law in group relations, particularly as a means to minimize group discrimination, is currently a subject of renewed interest. The 1952 term of the United States Supreme Court will produce a highly controversial decision in the school segregation cases. Opponents of laws against discrimination argue that attitudes and prejudices cannot be altered by law, that a law without community sanction is valueless. Yet the author of this study effectively points out that much of our discrimination against the Negro in the United States rests on law. He concludes that "those who deny the efficacy of law in group relations must, to be consistent, favor the repeal of the vast network of legislation which now imposes and supports discriminatory patterns through the requirement of segregation."<sup>1</sup> He points out that the law has been used through the years to perpetuate a social caste system, and the courts, ultimately the United States Supreme Court, have effectively nullified by a process of judicial erosion, the application of the Fourteenth Amendment as a means of eliminating legalized castes. He defines "caste" as a system under which, because of a condition fixed by birth, it is impossible for a person to change his position in the structure of society.

For those interested in the development of constitutional interpretation, this book in very brief compass outlines the inconsistencies in the decisions of the United States Supreme Court dealing with minority rights. The first chapter discusses civil rights during the Reconstruction Period after the Civil War as background for the Court's decisions following that period. The current trend of judicial determinations is foreshadowed by such factors as the treatment of minorities under the federal relief program of the New Deal, the industrialization and urbanization of the South, the treatment of the Negro in the armed forces and his increased voting power. The author then follows with two chapters outlining in rapid sequence the court decisions dealing with this subject. Appropriately entitled, "Buttressing the Caste Order," the first of these chapters deals with the period from 1868 to 1937. The author attempts to give an objective analysis, but the sequence of cases itself leads the reader to the inexorable conclusion that many of the objectives of the Fourteenth Amendment were nullified by judicial decision. "The Court generally upheld laws which enforced the separation of the two 'castes' and struck down laws which permitted or facilitated contact between them on a level of equality."<sup>2</sup>

The next chapter similarly outlines the decisions from 1937 to 1950. It is impossible to escape the conclusion that the Court in large degree was

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1. p. 4.
  2. p. 69.

reflecting changed public opinion. "It now gave to civil rights the same preferred position which earlier courts had given to property rights."<sup>3</sup> For those who feel that the Court works in a judicial vacuum apart from the social and political scene, these two chapters are highly disillusioning. To the lawyer interested in the field, as well as the student of constitutional law, these two chapters outlining the pertinent decisions serve as a valuable compendium of cases for reference. The juxtaposition adopted in organizing the material is particularly effective.

The analysis of the logic or lack of logic in the Court's opinions throughout the years is similar in the field of group discrimination to Professor Corwin's famous study of 1934 entitled "The Twilight of the Supreme Court." Perhaps the best summary of the conclusion forced on the reader is Mr. Hughes' famous remark, quoted by Mr. Corwin and again in this book by Mr. Berger, "We are under a Constitution, but the Constitution is what the judges say it is."<sup>4</sup> The emasculation of the "privileges and immunities" clause of the Fourteenth Amendment, the sometimes tortured construction placed on the "due process" clause, and the vacillation in the application of the "equal protection of the laws" clause stimulate further consideration of the role of the Court. The author remarks with pungency, "The large number of discriminatory statutes indicates that the law is itself a strong (perhaps the strongest) means by which discrimination is imposed and supported."<sup>5</sup>

Recognizing that law is the result of legislative action as well as judicial decision, Mr. Berger devotes a chapter to the operation and administration of the New York State law against discrimination as a typical example of positive action taken by an ever increasing number of states in this field. The study presented is thorough but perhaps too detailed to be of great interest to the general reader. Some of its conclusions however are striking, particularly that people generally do not wish to be in violation of law. Just as legalized segregation is effective, so it seems that legal sanctions help in eliminating group discrimination.

The final chapter discusses the problem of law and the control of prejudice. Numerous studies are summarized, varying from philosophical observations to reports of psychological investigations in individual and group prejudice. The general view that law can reduce discrimination is strikingly borne out by various empirical methods. For example, New York department stores began hiring Negro salespersons as a result of the anti-discrimination law. The author quotes a study by Saenger and Gilbert made in 1947 in which 256 respondents were sampled. Of these nine said they would never buy from a Negro clerk, but three of these nine had been observed buying from a Negro clerk less than an hour before they were interviewed. Twelve said they would not buy in a store with Negro clerks, but five of these twelve had been actually observed at a counter in a store where there was a Negro clerk.<sup>6</sup>

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3. p. 72.

4. p. 73.

5. p. 67.

6. p. 191.

The text of this book is thoroughly documented, and all footnotes are placed at the end to avoid interruption of continuity. There is an excellent bibliography and table of cases in addition to the usual index. While the approach is that of the sociologist (the author is assistant professor of sociology at Princeton University), the concept of law as a promoter or eradicator of social discrimination is most effectively handled. Any one interested in a concise analysis of the effect of law in dealing with social problems will find this study exceptionally rewarding.

MALCOLM W. MARTIN†

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THE LAW OF HOMICIDE. By Roy Moreland. Indianapolis: The Bobbs-Merrill Company, Inc., 1952. Pp. viii, 338. \$7.50.

It is the style in law books to make studies of this and that, studies which purport to be and usually are scholarly expositions of a chosen field. Some of these books laboriously trace the development of the common law rule through a labyrinth of legal minutiae until everything from Bracton's casual footnote to Holmes' felicitous epigram has been expounded in lush detail. Some of the books touch history lightly and rush on to a statement of the "existing law" in which everything is distinguished from everything else. Now and then a book appears which goes beyond mere exposition to what the law should be. Unfortunately many of these rare books are phrased in a terminology so esoteric that none but the chosen can comprehend. Rarely there is a book, however, which traces the delicate thread from history to the present, explains the contemporary law and indicates the way without slipping into a special argot proposed by the author. Such a remarkable book is Moreland's *Law of Homicide*.

Professor Moreland has taken the entire field of homicide and subjected it to a remarkably clear and penetrating analysis. His objective is the drafting of a suggested homicide statute which he hopes may "serve as a working guide to legislators and lawmakers generally." The author's method is historical and comparative. He traces the law of homicide from its obscure common law beginnings to the present time. As a part of the modern treatment the statutes of all forty-eight states are examined and classified. The book contains a very interesting chapter on statutes relating to homicides arising out of the operation of motor vehicles. The treatment of the current law is so meticulous that even the most pragmatic practicing lawyer should be pleased. Ponderous as this may sound in review, Professor Moreland has managed it with a lightness of touch which makes his book as delightful reading as one finds in the law.

Fundamentally (as the preface points out) the presentation follows traditional lines. Although the subject headings are orthodox, the traditional terms of art like *mala in se* are given tough-minded analysis. Professor Moreland does not shy off from obscure phrases and retreat into a new vocabulary as esoteric as the old; rather he comes to grips with the stock phrases and explains what sins each subtends. One departure from

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