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Civil Rights and the Limits of Law

Paul A. Freund
Harvard Law School

CIVIL RIGHTS AND THE LIMITS OF LAW†

PAUL A. FREUND*

AN ancient Chinese curse carried a terrible doom. "May you live," it ran, "in a time of transition." Painful as the experience may be, it is apt to be fruitful for the development of principles of social action. There is nothing like an economic depression to advance the science of economic thought as well as to enlarge the awareness of moral claims and sharpen the sensitivity to social injustices. Thus, Mr. Justice Brandeis could say in the dark days of 1933 when a lady asked him tremblingly if he thought the worst was over, "Oh certainly," he replied cheerfully, "the worst took place before 1929." A similar response is appropriate in a time of legal crisis, when widespread challenges to law and its enforcement compel us to examine the foundations of the duty of law observance and to question the limits of law as a means of social ordering.

The civil rights movement presents such a crisis and offers such a stimulus. The effort to deal with discrimination through law raises questions of the appropriateness of law to cope with prejudice. Moreover, the pressures for preferential treatment of Negroes in respect to education and employment, for example, stir questions of equal protection of the law as a neutral principle. And finally the use of tactics of disobedience to law as a form of protest raises questions of the rule of law as a necessary framework of social expression. In more homely terms, all of these issues can be put as three queries which I shall try to consider in turn, briefly and I hope suggestively. First, can you change human nature by law? Second, must not the law be color blind? Third, is not disobedience of law equally reprehensible from whichever side it comes?

First, Can you change human nature by law? No, to be sure, the answer must be, but hopefully, one adds, human nature can change us with the help of law. The hope is that the sanctions of law will not be forever required to curb discrimination; that in due course after civil rights will come civility. This hope rests on a view of human nature as a congeries of discordant elements—a disorderly assembly, if you will—of impulses and controls, a congress, whether of Vienna or otherwise, with reason presiding uneasily in the speaker's seat, where behavior can affect attitudes no less than attitudes can affect behavior. Surely, to come closer to our present concern, surely segregation laws themselves have influenced attitudes of Negroes and whites to each other as has been demonstrated when, in the armed forces, men of both races were transported from an environment of enforced segregation to one of integration and changed their attitudes as a result. A vivid example of a change taking place, as it were, before the public occurred on a radio program in Little Rock at the

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* Carl M. Loeb Professor of Law, Harvard Law School.

time of the school crisis there, when two white and two colored school children participated in an extemporaneous radio discussion of segregation. Let me quote in extenso from the colloquy as it was reported in the New York Times of the day.

> Mrs. Ricketts (Moderator): Have you really made an effort to find out what they're like?
> Kay (White Child): Not until today.
> Sammy (White Child): Not until today.
> Mrs. Ricketts: And what do you think about it after today?
> Kay: Well, you know that my parents and a lot of the other students and their parents think that the Negroes are unequal to us, but I don't know. It seems like they are to me.
> Sammy: These people are, we'll have to admit that.
> Ernest: I think like we're doing today, discussing our different views, if the people of Little Rock would get together, I believe they would find out a different story, and try to discuss the thing instead of getting out into the streets and kicking people and calling names.
> Kay: I think that if our friends had been getting in this discussion today, I think that maybe some of them, not all of them, in time they would change their minds. But probably some of them would change their mind today.
> Sammy: I know now that it isn't as bad as I thought it was after we got together and discussed it. . . .
> Mrs. Ricketts: Is there anything finally we want to say that we have to say now?
> Kay: Sammy and I both came down here today with our minds set on it that we weren't going to change our minds, that we were fully against integration. But I know now that we're going to change our minds.
> Mrs. Ricketts: What do your parents say to that?
> Kay: I think I'm going to have a long talk with my parents.

In more scientific terms than I have been using, if you insist on that elaborate demonstration of the obvious by methods that are obscure which is the hallmark of so much current social science, the phenomenon we are discussing is known as cognitive dissonance, a strain between behavior and attitude, a tendency to ameliorate this tension by bringing the two into conformity, which may be done by rationalizing an enforced behavior of nondiscrimination. In this resolution law is an important element, for there is a strong tendency to obey and to emulate authoritative models and to accept a fait accompli.

A number of experiments have tended to bear out this judgment. There were some interesting experiments, for example, in connection with department store employment policies. In certain departments of a store, Negro clerks were hired for the first time and customers who had been waited on by the Negro clerks were interviewed thereafter outside the store by interrogators who were part of the project but who did not indicate that they had seen the episode inside. The questions related generally to how the individual on the street

would regard service by Negroes in a department store. The interesting thing was that there was a tendency for those who had been served by a Negro in, for example, the clothing department, to say, "Well, I would accept it in a clothing department but I'm not so sure about the food department," and for people who had been served by a Negro in the food department to answer, "Well, I would accept it in a food department but I'm not so sure about the clothing department"; and each would think of the other unexperienced incident as being too intimate a relation to be accepted. But that which had been experienced came to be acquiesced in. The practice of the department store is, in effect, the law of the community of the store.

Two of the great civilizing human traits, it seems to me, are hypocrisy and greed. Hypocrisy is a bridge thrown up between attitude and behavior. Greed is a response to the equalizing power of money. I recall attending a convention in Atlanta three or four years ago at which the welcome was given by the then mayor who had served for more than twenty years and who had a wide basis of community support. Nowhere in the speech were the terms civil rights or Negro rights or equal rights even hinted at. But the theme of the speech was "Atlanta is too busy to hate." Atlanta was depicted as a great rising metropolis athwart an intercontinental airway with one of the ten largest airports in the world, and Atlanta was too busy to hate.

One may ask at this juncture, is the role of law then one simply of an amoral manipulation of behavior? I would say no, because the moral quality of law is itself a force toward compliance and the change of attitudes. A feeling of guilt upon violation of law becomes a feeling of shame if the law is felt to be morally right, and shame reflects one's innermost nature. But what, you will ask, of the precedent of prohibition. Just as in anthropology the skeptic always says but what of the Fiji Islanders or what of Samoa, so in these matters of legal instrumentality toward moral change the question is always what of prohibition. It is often cited to prove the thesis that you cannot change human nature by law. Actually it seems to me the lesson from prohibition is rather different, namely, that a law which is not an acceptable moral guide will not inspire a change in attitude. The experiment of prohibition was best summed up in the cynical jocularity of Ring Lardner's phrase: "After all," he said, "prohibition is better than no liquor at all." And I think most people came to feel, along with the lack of observance in the highest and most respected circles of the community, that prohibition was very much like the old Puritans' attitude toward bear baiting: they opposed it not because it gave pain to the bear but because it gave pleasure to the spectator. When Gunnar Myrdal spoke of the American dilemma, he was voicing an optimistic note, for the very existence of a moral contradiction between authoritative ideals and personal conduct is a hopeful basis for altering conduct, and in turn attitudes, to resolve the tension.

Consider now other fields of law to see whether there is any reason to

believe that law can alter and has altered attitudes. Is morality a product of law as well as its source and ground? That morality is indeed a source of law is hardly debatable though we may not go to the length of the early chancellor in the Yearbook whom Dean Pound was fond of quoting. When counsel argued to the chancellor in a celebrated passage that some things are for the law, for some there is a subpoena in chancery, and some things are between a man and his confessor, the archbishop who presided over the tribunal answered that the law of his court was in no wise different from the law of God. The pronouncement of the chancellor went like this:

> Sir, I know that every law is or ought to be according to the law of God and the law of God is that an executor who is evilly disposed shall not waste all the goods etc. And I know well that if he do so and make not amends if he have the power, il sera damne in hell.

And Dean Pound added: "As the most feasible substitute for the condemnation prescribed by the law of God, the chancellor sent the defaulting executor to an English jail."

But morality and law are in reciprocal relation. Moral attitudes and standards may be a product of law. Consider, for example, conflict of interests laws, laws dealing with fiduciary duties in business. Consider the commonplace now of paying half of one's income as taxes through voluntary returns. Consider the exclusion of hearsay evidence; think of the morally tonic effect on members of a jury of sitting through an austerely conducted jury trial, and I think you will agree that standards of right and wrong, of moral judgment are, and have been, affected by requirements of the law that are nicer than those that would occur to what the English call the man in the Clapham omnibus, to us simply the man on the street. There are to be sure limits to the effectiveness or the appropriateness of legal action. This is the ironic moral of the celebrated remark of Thomas Arnold, the master of Rugby: "Boys, if you're not pure in heart, I'll flog you."

Law may be too crude and its cost too great, as in all but the grossest family relations or in all but the most insistent calls on the good samaritan. But these are not really relevant to the civil rights issue, where, after all, we are dealing with conduct in business relations. Let me then say a few words about the public accommodations approach in the civil rights bill, now the civil rights law. It seems to me entirely fitting that it should rest on the commerce clause. I am quite unmoved by the notion that the commerce clause does not deal with moral issues. Surely this is the way that Congress has open to it for dealing with any exigent problem, whether it be one of morality or safety or one of economic advancement, when it is aggravated by the uses of the channels of interstate commerce—or, to use a more up-to-date term, when it is aggravated by the use of our great national common market. I am a little sorry that the statutory approach under the commerce clause seems to have been entirely modeled on what might be called the antitrust or labor relations technique,

namely through the avenue of effect on commerce. This tends to be rather attenuated in certain eating establishments, and it seems to me it does not bring out as sharply as possible the moral thrust of the commerce power in this context. An alternative approach which could have been added is what might be called the security act or pure food and drug technique, where the law is not conditioned by effects on commerce but by the movement of goods themselves in commerce to facilitate or produce an evil. The regulation of the sale of improperly labeled goods at retail for the sake of protecting the consumer, when those have come directly or indirectly through interstate commerce, and by like token the control of interstate sales of securities in the interest of consumers, are the paradigm cases. This seems to me to be technically easier and also more persuasive to the ordinary man. Surely it is right for Congress to interest itself in a local barbecue stand if the owner of that stand insists on selling meat from Montana and fish from Louisiana and coffee from Colombia and does not limit himself to selling chicken and beans grown on his Alabama farm. If he insists on utilizing all of the great advantages of our national and international common market, which the federal government through Congress and the judiciary has so laboriously worked to maintain and strengthen, if he insists on that, he may be made to utilize the products which he so chooses to receive in a way not to spread and perpetuate what Congress deems to be a moral evil, namely, service limited on the basis purely of color.

And so I come back to my central point, that in the field of public accommodations, the most thorny current issue, we are dealing not with intimate family relations or the good samaritan stranger, but with everyday business relationships that depend on the existence and the enjoyment of a great national market which is of federal and not merely local concern. There is in this connection, I believe, a real issue as to the choice of legal instrumentalities in addition to the point already made about the choice of drafting techniques; that is to say, there is a choice between a direct constitutional limit on private action and a limit imposed by statutory law. Those who argue that the fourteenth amendment, in and of itself, applies or should apply to places of public accommodation do so partly because they see in the fourteenth amendment the most appropriate source of moral strength. But I believe they overlook some institutional considerations of importance. If we were to use the fourteenth amendment directly without the intervention of an act of Congress, as some members of the Court wished to do last June, there would have been all kinds of unresolved questions of the range of application of the fourteenth amendment: not merely in racial discrimination, for the fourteenth amendment is far broader than that, but in other forms of equal protection, nepotism in business, for example, in the concept of due process of law applied, for instance, to the conduct of stockholder meetings or labor union meetings. All of these would potentially be federal constitutional questions to be resolved by authoritative decisions overrulable by constitutional amendment, but surely lacking in that

sense of tentativeness, of experimentation, of progressivism, of flexibility, that are the hallmarks of statutory or common law development as distinguished from constitutional adjudication. And so I for one welcome the fact that the Court did not see fit last June to decide the cases on sit-ins in places of public accommodation on grounds of the fourteenth amendment per se. The choice of institutional means pointed in the direction of the more flexible and *ad hoc* approach.

I come now to the second of my basic questions, Is not the Constitution color blind? Can a preferential treatment of Negroes be squared with the requirement of equal protection of the laws? Is it not an unconstitutional discrimination in reverse?

A head-on clash of principle can be averted, in most cases wisely in my judgment, by framing programs of aid in terms of reaching the most disadvantaged segment of the community, whether economically, educationally, or politically. And if these happen to be in fact predominantly Negroes, no principle of race-creed classification has been violated. It is worth noting that in the administration of justice something of this sort has already taken place. Decisions excluding coerced confessions, requiring counsel to be provided for indigent defendants, and liberalizing the practice on bail, all redound to the benefit of the most submerged group—in many communities, the Negro. Likewise in the sphere of economic aid. A general program for reducing unemployment will help to absorb the most vulnerable members of the labor force. A burgeoning economy is the best remedy for Negro unemployment as it has been the most effective basis for a more liberal policy of immigration.

But suppose this more general approach is not taken. Then we face something of a liberal dilemma. Drawing on the early Mr. Justice Harlan's dissent in *Plessy v. Ferguson*, the phrase, the Constitution is color blind (which in fact was a phrase found in the brief filed in that case by the eminent lawyer-novelist Tourgée) many liberals viewed *Brown v. Board of Education* as establishing the color-blind principle for public education. Now, facing de facto segregation and pressures to combat it by treating Negroes more favorably or at any rate by taking color into account, the liberal is puzzled. He too suffers some cognitive dissonance of his own. The first thing to note about Justice Harlan's phrase is that it is not a constitutional text, it is a constitutional metaphor. And then we may take a look at some of Justice Harlan's own efforts to deal with social problems through constitutional abstractions; and we soon find that these are a two-edged sword. In *Adair v. United States* he wrote the opinion for the Court holding that the right of an employer to hire and fire at will could not be interfered with constitutionally by a statute which attempted to protect the employee's right to join the labor union. This statute was a violation, said Justice Harlan, of the liberty of contract of the employer and the employee. In *Connolly v. Union Pipeline Company* he wrote for the Court holding that an antitrust law which contained an exemption for agricultural products violated the guarantee of equal protection of the law. And so

before canonizing Mr. Justice Harlan it might be well to listen to an advocatus diaboli.

If we look at the Constitution rather than a constitutional metaphor, and at the history of the fourteenth amendment, we find that the most obvious fact about it is that it grew out of the Civil War in an effort to raise Negroes from a level of legal inferiority. Certainly in two situations there can be little doubt of the validity of preferential treatment of Negroes: first, where public facilities are in fact unequal and there is de facto segregation placing the Negro in the unequal facilities; and second, where de facto segregation is a product in part, a remnant, of governmental discrimination in the past. There is here I suggest, an analogy from the law of labor relations. You may recall that the labor board was upheld very early in its history in deciding that a company-dominated union could be required to disestablish itself, not merely to free itself from employer domination but to disestablish itself at least temporarily in order that the effect of employer domination could be clearly dissipated. The disestablishment might, for the time being, deprive the members of the union of the free exercise of the right to choose their own bargaining representatives. But out of abundance of caution and to dispel the lingering effect of past malpractice, complete disestablishment could be required. By analogy it seems to me de facto segregation which is in part a remnant of past governmental discrimination may be corrected as a means of overcoming the effect of what was a violation of the fourteenth amendment.

But suppose these conditions are not present in de facto segregation. Still a legislature or a school board ought to be able to take account of the facts of segregation in the interest of promoting long-run de facto desegregation, which is surely a legitimate aim. This is the position taken by both the New York Court of Appeals and the New Jersey Supreme Court, there being no issue in the cases of requiring integration constitutionally but only of permitting the race factor to be taken into account by a school board disposed to do so, without violating the abstract principle of color blindness. This is a question of educational and social policy, a choice of means to a legitimate end, the encouragement of desegregation, as segregation itself would be an illegitimate end. There the matter rests and, in my judgment, is likely to rest so far as constitutional law is concerned.

Let me turn to my third and final question, Is the civil rights movement running a collision course with the law through civil disobedience? When I speak of civil disobedience I use it in a rather limited and strict sense to mean practices which are nonviolent, which are highly selective because of their moral quality, and whose practitioners are prepared to pay the penalty of the law by acting openly in an effort to sear the conscience of the community. Now the easy answer to this question is that there may be a moral justification but that this is not a legal defense. This is the answer which is readily given, I would say, by most lawyers and certainly by most bar association groups: a

curse on both your houses—on the Faubuses and the Barnettes as well as the Martin Luther Kings—so far at least as the legality of their conduct is concerned.

But there are questions for the law in the process of becoming. There are some lessons to be drawn from the history of organized labor and the law. At first concerted strikes were regarded as a criminal conspiracy. Then they were viewed by some common law judges and some legislatures as a means to achieve more nearly equal status with ownership in the community of the plant or the industry and therefore were privileged. Then there came with the Wagner Act a legal guarantee of the right, which was in turn followed by limitations on labor organizations when they acted outside the scope of the means spelled out in the law. I refer of course to Taft-Hartley and similar legislation. Now the Negro movement, insofar as it includes demonstrations, boycotts, rent and school strikes, is similarly seeking equal status and recognition in the political and economic communities. The community of the factory, it seems to me, provides certain lessons regarding the capacity of the law to adjust to such claims. Also there is some lesson to be drawn from the community of nations. Our long delay in recognizing the Soviet Union and our dispatch of troops there in 1918 is deemed by many students to have poisoned our relations with that nation for a generation.

At the same time, excessive resistance by the victims of the exclusion tends to be self-defeating. It was the Montgomery bus boycott and the Washington march which were the high-water marks of moral self-discipline and effectiveness. But the shutting off of deliveries to hospitals because they engaged in discriminatory practices would be morally revolting and self-defeating. The legal order means the domestication of power, that power is to be brought within the community's control. But in turn, this means a reciprocity of rights and duties within the community. It means, to use an old fashioned but still I think philosophically useful term, a social compact, the principle of the covenant, which goes back at least to the Old Testament and runs through our social and political thought from the Mayflower compact, to say nothing of our later charters and constitutions. The idea of the covenant is that of reciprocity of rights and duties. In terms of the civil rights movement, this means, I suggest, full participation politically in the right to vote, the right to serve in public office, the right to serve on the police force, to be appointed to the probation service and to those various public agencies and missions which are in their nature policing activities.

Short of cases of exclusion from the political community, legal history furnishes some further light. The recent rent strikes are a reflection of the fact that our law in this field is a survival from an ancient legal order when land holding rather than contract was the basis of obligations. Instead of enjoying interdependent covenants to pay rent on the one hand and to have repairs made on the other, the tenants were obliged to pay so long as they

occupied the premises; the remedy through constructive eviction by leaving the premises is all too often unrealistic today in the setting of an overcrowded urban community. Now more modern law is coming to provide for a mutually interdependent covenant, for mutually interdependent conditions, perhaps with provision for payment of rent in escrow.

Even before the law makes adjustments of this kind, before there are changes in the substantive law as there were in the law of strikes, as there are doubtless coming to be in the law of rent, the moral frame in the civil rights movement need not go unrecognized. I refer to the elements of discretion in our legal system which were devised for such contingencies, for a clash between the moral sense of the case and the strict legal obligations: the discretion of the prosecutor in deciding whether or not to bring a case following a one-day school strike, the discretion of a jury whether to convict or acquit, the discretion of a judge in sentencing, the discretion of a governor in pardoning.

To sum up, the civil rights movement is a challenge to law in many ways, to the moral influence of the law, to its impartiality, and to its acceptance and observance. But it is a challenge also to the creativity of law. Creativity has been defined, sensitively I think, by the psychologist Jerome Bruner as a tension between passion and decorum, between the frenzy of a mathematical insight and the formula of an equation. In law creativity is a product of the tension between heresy and heritage. I often like to say that law is like art in that it imposes a measure of order on disorder without suppressing or disrespecting the underlying diversity, spontaneity and disarray.

The civil rights movement has already brought reform in the general fabric of the law. Take, for example, the recent New York Times libel case which, of course, was an outgrowth of the reporting of civil rights protests in Alabama. We now have new law on the subject of the privilege of the press to report on the conduct of public officials. This is not limited, obviously, to the civil rights movement, but it was occasioned by the pressures of that movement. Similarly, we have new law from the Supreme Court regarding the provision of counsel through lay intermediaries, a very sore issue with the organized bar, a decision first produced by the efforts of the NAACP to channel cases to particular counsel or lists of counsel. That decision has already been extended to apply to the railroad brotherhoods. The general body of the law is being altered under the pressures engendered by the civil rights movement in ways that may seem rather collateral but are nonetheless quite significant for general legal reform. The creative impulse has surely not been exhausted. Out of the sometimes terrible struggles that threaten to rend the fabric of society, some constructive efforts may still come as they have come in the past with the scourge of wars, depressions and labor troubles. Out of danger we may pluck security, out of injustice we may hope to discover a wider justice.