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## COMMENT ON PROFESSOR LEWIS' PAPER

ROBERT F. DRINAN, S.J.\*

IT IS interesting to locate and analyze the few statements made in the opinions of the United States Supreme Court on the role which law should play with regard to racial prejudice. In *Plessy v. Ferguson* in 1896 the Supreme Court in a seven to one majority stated that:

legislation is powerless to eradicate racial instincts or to abolish distinctions based on physical differences. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.<sup>1</sup>

Some twenty years before this decision a seven to two majority of the same Court was much more positive in endorsing the view that a law based on prejudice can deepen feelings of bias. In ruling against a state law excluding Negroes from juries the Supreme Court in 1879 stated that such a law

is practically a brand upon them (Negroes), affixed by law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.<sup>2</sup>

Legal mandates from the executive, legislative and judicial branches of government today seek at least to remove any state-aided "stimulant to . . . race prejudice." Whether the removal of such stimulants will help "to eradicate racial instincts" is not the province of the jurist but rather of the social psychologist.

The task of eliminating any state-assisted "stimulant to race prejudice" is translatable in 1963 in the words "regulating discrimination in places of public accommodation." In discussing the latter topic it seems important to this observer to keep always in mind the fact that the law in forbidding discrimination has a double purpose; the law insists on equality of treatment while at the same time it seeks to eliminate a "stimulant to race prejudice."

In Professor Lewis' most ably argued presentation there is a thorough analysis of these purposes of the law. In an attempt to add at least a new dimension to the excellent and exhaustive paper of Professor Lewis this commentator raises the following questions:

- (1) Is the concept of "expectations" of service advanced by Professor Lewis a valuable thesis to support legal regulation of discrimination in places of public accommodations?
- (2) How concerned should we be with the universality and the immediate enforceability of laws to ban bias in public accommodations?
- (3) Can laws regulating discrimination in places of public accommo-

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1. 163 U.S. 537, 551-52 (1896). (Emphasis added.)

2. *Strander v. West Virginia*, 100 U.S. 303, 308 (1879). (Emphasis added.)

dation be completely understood or appreciated without an acknowledgment of the inescapable moral basis for such laws?

### I. COMMON EXPECTATIONS AND PUBLIC ACCOMMODATIONS

Professor Lewis asserts quite correctly that an "attempt to capture in words a standard of equality . . . leads naturally to the language of expectations."<sup>3</sup> While the notion of expectations of service in places of public accommodations has a probative and cogent force its use as a means to measure the extent to which legally enforced equality will be granted may be somewhat treacherous. In the first place the concept of the expectation to be served in a privately owned place of public accommodation is to some extent the product of an aggressive system of capitalistic enterprise. The expectation which the public in general may have of receiving service in what are termed "public accommodations" is always subject to the built-in protective caveat—"we reserve the right to refuse service to anyone."

While this restriction which every owner of a privately operated facility openly or implicitly expresses to his customers has little relevance to the vast majority of white customers it indicates nonetheless that the average private owner of a store or motel would probably *not* agree that his business in a literal sense is a place of "public accommodation."

Even more fundamental, however, is the fact that the expectation of receiving service which the average person has would most probably not be identified by the ordinary citizen as a moral or legal or constitutional right but merely as the result of the general invitation of merchants and hotel keepers to patronize their facilities. In other words the expectations which the average purchaser has of receiving service is based more on his status as a good customer than as a citizen entitled to enjoy equality in those accommodations which, because of some state involvement in their regulation, are deemed to be "public."

Finally the explication of the principle of equality in terms of common expectations could lead to a contraction of the universality implicit in the concept of "equal protection" as those words are understood in the Fourteenth Amendment.

### II. THE ENFORCEABILITY OF LAWS BANNING DISCRIMINATION IN PUBLIC ACCOMMODATIONS

It is clear that the enactment of a law totally at odds with the sentiments of the citizens to whom the law will be applicable is not always sound public policy. A consensus of considerable proportion is a prerequisite for the successful enforcement of any law.

In the matter of regulating the operation of private prejudices in public accommodations, however, the law confronts a task which it has never had

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3. Lewis, at 437-38.

occasion to meet before. Consequently no one can be certain as to how much consensus, if any, is required before a statute to desegregate places of public accommodations will be successful.

Professor Lewis' paper makes reference to the desirability of securing "the sympathetic support of the largest number of people, including especially enforcement officials."<sup>4</sup> But it may be that in discussing the role of law in regulating discrimination in places of public accommodation more emphasis should be placed on the educative function of law.

The relation of law to public opinion involves complex imponderables. There is, however, ever more impressive evidence that the law is the most effective teacher in America in forming Negro-white relationships. We should recall the words of Professor Dicey who, in the last century in his well-known lectures on law and public opinion stated: "No facts play a more important part in the creation of opinion than laws themselves."

It may be that a law with conciliatory machinery to work out compliance or even a simple declaration of public policy would be sometimes advisable as a first step toward integration. In any event the enormous educational impact which every law and every judicial opinion has on the thinking of the community should be thoroughly understood by those who are seeking a more profound understanding of the function and potential of law as a means of obtaining an integrated society.

A further point most worthy of consideration involves the question of whether any court decision should ever again incorporate the condition "with all deliberate speed" into its decree. If the United States Supreme Court follows the decision made in November 1963 by the Delaware Supreme Court and rules that law enforcement officials may not be utilized to remove non-white citizens from places of public accommodations there will automatically arise the question of the immediacy of the applicability of this decree. Presumably the ruling would be applicable on a universal basis "forthwith" and not on a "deliberate speed" timetable. It may be that jurists contemplating the role of law in changing the mores of a prejudiced society should give detailed consideration to the advantages and disadvantages of a legislative or judicial decree which would order desegregation of all public accommodations forthwith.

### III. THE MORAL BASIS OF ANTI-DISCRIMINATION LEGISLATION

Professor Lewis' thorough treatment of every legal and constitutional aspect of the role of law in combating discrimination does not even by implication omit the inescapable moral foundations on which law and particularly civil rights legislation is based. But after reading Professor Lewis' carefully reasoned article on all the arguments which can be employed to buttress the case for anti-discrimination legislation one is left with the overwhelming impression that in the ultimate analysis the law which seeks to correct the bias of

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4. *Id.* at 438.

a prejudiced society is in effect the establishment of "one set of values against another"—to use Dean Roscoe Pound's phrase.

Those who oppose legislation designed to inhibit prejudice show by the vehemence of their opposition that they understand that their own deeply held moral values are being rejected as inferior to the values that are sought to be established in the legislation which they oppose.

Professor Lewis notes perceptively<sup>5</sup> that those who argue that almost *any* state action will turn a privately owned and operated business into a public accommodation seem to rely on a "mechanistic jurisprudence." The advocates of coverage by anti-discrimination legislation of virtually every state licensee tend to assume the existence of a certain pre-existing moral right on the part of every citizen to be treated with total equality. If the case law does not show this, these proponents appear to urge, then basic justice or fundamental morality vindicates such a right.

Both the proponents and opponents of civil rights legislation very often "smuggle" in some of their own moral principles. As is done so often in controversies over the role of law the debate employs the terms of constitutional history but the argument actually centers on the most fundamental presuppositions concerning the purposes of man and of human society. One does not have to debate anti-discrimination legislation very long before one realizes that the struggle really does not center on the Fourteenth Amendment but rather on the complex relationship between law and morality in a pluralistic democratic society. It is to be hoped that Professor Lewis' discerning paper will lead its readers to the even more difficult but more important area of the role of the moral order in fashioning the legal institutions of American society.

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5. *Id.* at 413-14.