

Michigan Law Review

Volume 58 | Issue 7

1960

Greenberg: *Race Relations and American Law*

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Recommended Citation

Spencer L. Kimball, *Greenberg: Race Relations and American Law*, 58 MICH. L. REV. 1081 (1960).

Available at: <https://repository.law.umich.edu/mlr/vol58/iss7/13>

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RECENT BOOKS

RACE RELATIONS AND AMERICAN LAW. By *Jack Greenberg*. New York: Columbia University Press. 1959. Pp. viii, 481. \$10.

When the daily newspapers are filled with stories of filibusters in Congress, of sit-in strikes, mass arrests, and narrowly-averted violence in the South, of police killings of Negroes and violence on a large scale in the Union of South Africa, one can hardly doubt the contemporary importance of problems of race relations. The recent dramatic shifts of political power on the world stage in favor of the colored races point to the compelling need for us to find solutions, both in foreign relations and internally, before time runs out on us. This is more than a matter of elementary justice—our very survival may depend upon it. In this state of affairs, one must welcome Mr. Greenberg's excellent primer of race relations, as viewed from the vantage point of the lawyer, the person professionally most concerned with the formulation of answers to these fateful questions.

The problems that can be subsumed under the title "Race Relations and American Law" are so intricate and far-reaching that at first it seems pretentious for an author to use that title without qualifying it by the use of "Introduction," "Preface," or "Primer," but Mr. Greenberg goes far to justify the appropriation of the title. He has done a prodigious amount of wide-ranging research, not only into traditional source materials but also into administrative rules and practices, into the studies of social scientists, and into the periodical literature devoted to race problems. He has digested and organized his material well and made it accessible through copious documentation, and through well-constructed indices and appendices. This volume is an indispensable and readable source-book for the legal aspects of race relations in the United States, and will remain so until the material in it becomes too badly dated by the pace of events.

The material is not organized on the lawyer's traditional conceptual framework. Mr. Greenberg has used what he calls a "vertical" approach, dividing the subject "according to the main categories of social activity in which civil rights problems arise—housing, earning a living, public accommodations, the armed forces, voting, and so on." (p. 31) Since this organization provides no systematic discussion of the technical legal concepts used as tools, such as "equal protection," "state action," and the like, a long introductory chapter entitled "A Legal Overview" seeks to provide it. This is a thoughtful summary which will refresh the recollection of those whose constitutional law is rusty. It also provides some intriguing information about the planning of the program of litigation which culminated in the School Segregation cases. He declines to elaborate on this last theme, "for it would take perhaps a volume the size of this one to tell the whole story of the litigation program." (p. 39) If Mr. Greenberg has the inclination to tell the whole story sometime, many of us will be fascinated readers.

In another introductory chapter, entitled "The Capacity of Law To Affect Race Relations," the author attempts to provide a passing acquaint-

ance with current psychological and sociological thinking on the subject. Social scientists have acquired much more sophistication on the nature of social interaction since the days when William Graham Sumner uttered his sententious but erroneous dictum that "stateways cannot change folkways." Unfortunately Sumner's idea is still widely held. People who oppose anti-discrimination legislation are apt to argue that "you cannot legislate attitudes," and point to the failure of the prohibition experiment as the sufficient proof. Though it is naive to suppose that there are *no* limits upon the effectiveness of legal action, it is equally naive to think that the law cannot affect attitudes in significant ways. It is even more naive to think that law cannot control effectively many kinds of discriminatory conduct resulting from prejudiced attitudes, even without changing the attitudes themselves. The law and the social matrix are mutually interacting—each has effect upon the other, and often the effect is profound. This introductory chapter does as good a job as one can do in thirty pages, but it is much too brief. Anyone seriously interested in the legal solution of problems of race relations must begin by mastering an introductory work like Gordon Allport's *The Nature of Prejudice*, conveniently available in a paperback edition, and then go on to read extensively in the psychological and sociological literature. No real comprehension of the limits on the capacity of law to influence human conduct in a field like this, where attitudes are often intense and patterns of conduct are deeply rooted, can be acquired from even a competent thirty-page summary.

The inadequacy of the introductory chapter on the capacity of the law is also the weakness of the whole book. It may be unfair to Mr. Greenberg to describe this as an "inadequacy," or a "weakness," for after all this is but a single volume, not a library. Indeed, in his preface Mr. Greenberg says merely that he believes he has "described and discussed race relations and American law essentially as they exist today and in a manner that will remain useful in the future." (p. vii) The statement is accurate and modest. However, there are some indications that the author intended rather more. Thus, when he is describing and justifying the vertical organization of the material, he says: "If we are trying not only to describe the rules but also their impact within the social matrix, a division by social institutions is more helpful in organizing the pertinent experience." (p. 31) In the discussion of the interaction of legal rules and the social matrix the book falls far short of definitive treatment. In particular, the interrelationship between individual social institutions, such as housing and education, seems more often suggested than adequately explored. This is only a criticism to the extent that the author intended to provide such treatment. The book makes a significant contribution to the literature of the field. It is probably not realistic for one even to conceive, as yet, of a treatise that describes fully the impact of the legal rules "within the social matrix." Such an enterprise must be undertaken piecemeal, at this stage, through the writing of monographs on narrowly-defined problems. After much monographic writing, it may become possible to make a definitive state-

ment on the larger problem, but the rush of events almost ensures that when such a study does come, it will be legal history rather than legal sociology.

Mr. Greenberg's treatment of the housing problem illustrates both the strength and the weakness of the book. In addition to the discussion of the traditional subjects of racial zoning ordinances and restrictive covenants, he provides extensive information about the impact of the federal housing programs on the patterns of housing segregation in America. In its earlier days, FHA was responsible for extending the use of restrictive covenants, with the purpose of preserving neighborhood stability. The urban renewal program and other federal housing activity have been responsible for the further extension of the pattern of segregation, through a policy of federal acquiescence in the local mores. This is one of the less lovely aspects of federal government activity in race relations in recent times. The power of the federal treasury could easily have been thrown into the scales on the side of housing integration, but instead it has been effectively used to further and encourage segregation. All this discussion is to the great credit of the author, but when he speaks of solutions, he tends to show the traditional limitations of the lawyer, who is accustomed to think of law in terms of courts and legislatures, and in recent times, of administrative tribunals. As he clearly recognizes, the really powerful legal agency here is the federal treasury, which has the most powerful lever for breaking up the segregated housing patterns across the land. No solution is realistic that does not fully take account of the way in which the power of the federal purse is to be used to weight the scales. Similarly Mr. Greenberg does not discuss extensively the implications of the studies showing that as non-Whites move into a housing area, stability continues until a certain percentage of non-Whites is reached. Then, at this "tipping point," which varies considerably in different situations, the remaining Whites tend to abandon the area quickly. Any effort to reduce the extent of segregation in housing must take account of this social-psychological pattern.

The idea of the "tipping point" has special significance for privately-financed integrated housing, a development Mr. Greenberg does not discuss. Privately-financed integrated housing has come dramatically into the news quite recently with the Deerfield incident in Illinois, which came too late for discussion in the book. [For a story on Deerfield, see Dykeman and Stokely, "The South' in the North," *NEW YORK TIMES MAGAZINE*, p. 8 (April 17, 1960).] The plaintiff in the Deerfield litigation was a corporation engaged in the construction of integrated housing. Plaintiff alleged that it was harassed by the misuse of the machinery of local government to prevent the completion and sale of the housing. One of the issues, treated rather extensively by the trial judge in his memorandum opinion, provides an ironic commentary on the ambivalence of legal concepts. In order to keep the development integrated for a period long enough to establish a stable interracial community, the plaintiff was contemplating various devices to prevent resale by White buyers to non-White buyers. A quota

system and restrictive covenants were thus perceived as devices to fight discrimination, rather than to perpetuate it. The landmark case, *Shelley v. Kraemer*, seems to stand in the way, and a doctrine enunciated to forbid enforcement of prejudice-motivated covenants also seems applicable to frustrate a private attempt to encourage integration. Similar problems exist for public housing projects, where the judicious use of quotas would probably encourage integration. (See p. 291.) The fact that the doctrine of *Shelley v. Kraemer* can be used to frustrate as well as to achieve the egalitarian objectives of the Fourteenth Amendment suggests the need for a close look at ultimate objectives and at the relationship of means to ends. Are quotas and restrictive covenants evil in themselves? Or are they morally and legally neutral, justified or condemned by the purposes for which they are used? Moral problems of this sort must exercise us, not only as we formulate ultimate and intermediate goals, but also as we explore devices and techniques to achieve the goals.

It is in the treatment of solutions that Mr. Greenberg's discussion is focused most narrowly. He has the trained lawyer's orientation toward litigation, with a secondary focus on the legislature and the administrative tribunal formed to control conduct much as a court does. The customary criminal sanctions for disobedience of a statutory proscription, and administrative machinery for quasi-judicial control of prohibited conduct, are quite suitable and reasonably effective whenever the community overwhelmingly supports the law. If the community does not give its support, however, the law is quite apt to fail to achieve its objective, and may even have untoward consequences unless more imaginative devices are invented. Prohibition is the classic example. This suggests the prime importance of making geographical distinctions, which Mr. Greenberg first suggests as a possible basis for organization of his material, and then cavalierly dismisses. (p. 31) Even in communities that are generally sympathetic to the enforcement of the law, the traditional legal sanctions are not necessarily the most effective devices to achieve a given result. In communities where there is almost unreconcilable opposition to implementation of the law of the land, the preconditions for successful use of the traditional sanctions are lacking, for community support is a necessary prerequisite. Either an intolerable amount of outside pressure, and even military force, must be brought to bear on the reluctant community, or else ways must be found to make the community *want* to comply. The most likely way to change the balance of motivation is through an appeal to the pocketbook. There is much evidence, such as the quick acceptance of an integrated Veterans Administration hospital in Mississippi (p. 88), to show that most prejudiced people will pay only a limited price for their prejudice. If solutions can be devised which make the cost of prejudice higher than that price, voluntary acquiescence is likely. Much of the solution is already within the power of the federal executive, if it would speak with a single voice on the issue. Thus the federal government spends two billion dollars a year for education. The Chairman and two members of the United States Commission

on Civil Rights, all Northerners, proposed in the commission's 1959 report (at p. 328) that federal agencies withhold funds from those institutions of higher learning that refuse to admit qualified students on racial grounds. One of the members would include *all* educational institutions, at whatever level (p. 329). The three Southern members of the commission disagreed (p. 329), expressing the view that the improvement of education was a matter of great national interest, and they refused to "endorse a program of economic coercion as either a substitute for or a supplement to the direct enforcement of the law through the orderly processes of justice as administered by the courts." It is no part of the purpose of this review to suggest a definitive ranking of the national goals. One's geographical background is influential in deciding on such a ranking, as the division on the Commission on Civil Rights shows. But on the assumption that desegregation in schools, and the other egalitarian objectives that stem from the equal protection clause, ranks close to the top of the list of national aims, then a powerful weapon lies ready for the achievement of the favored objective. A substantial portion of the federal budget could be brought to bear on the achievement of the national purpose, if there is strong and univocal leadership in the executive branch of the federal government. Perhaps this is the direction in which thinking about solutions should proceed, if it is to be most fruitful.

It is no criticism of Mr. Greenberg's book to suggest that a great deal yet remains to be done in the field he has mapped out, especially in the working out of solutions to the problems of race relations in American society. He has done an admirable job in providing us with a workmanlike collection of well-organized source materials that will be of great utility to those who are interested in the field. In the process, he has managed to extend substantially the range of our insights into the complexity of these crucial problems, which urgently demand solution.

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