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Segregation - A Challenge to the Legal Profession

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SEGREGATION—A CHALLENGE TO THE LEGAL PROFESSION

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THE PHILOSOPHY of American Democracy is expressed in two immortal documents: the Declaration of Independence and the Constitution of the United States. The two are inseparable. For, although the Declaration of Independence is not part of the organic law of the land, it is in truth the vital *spirit* and *thought* of which the Constitution is the operative *body* and *letter*. The vital spirit and thought of our living philosophy of government and law is epitomized in the familiar words of the Declaration:

> We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

According to this philosophy, government is not an end in itself, but a means to an end. And the end of government is not merely the establishment of order; for order itself is a means, and its end is justice. But justice also is a means, and its end is liberty. Finally, liberty is simply the condition of social life necessary to enable all members of society to cooperate in peace and prosperity, to attain their happiness, to achieve their perfection, and thereby to fulfill their human destiny. Thus, the real end of government is adequately defined as a just and ordered liberty. But the essence of liberty is the free exercise by every human being of the rights proper to human personality and destiny. Wherefore, the prime purpose of government is the protection of the individual in the exercise of his personal rights. Therefore, the crucial test of the value of a government is the measure of its success in protecting the personal rights of its citizens and subjects.

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The characteristic feature of democratic government, as distinguished from other forms of government, is that it is rule by the majority. But contrary to a popular modern fallacy, true democracy is not a mere matter of form. It is much more than majority rule. Majority rule could be mob rule. Remember a distressed Italian people, flooding the piazzas of Rome, crying "Duce! Duce! Duce!" They cried for a leader and got a demagogue. Remember a bewildered German people, crowding the squares of Berlin, shouting "Heil Hitler!" and *voting* for Adolph Schicklegruber. They shouted for a fuehrer and elected a tyrant. Who ever received greater majorities than Joseph Stalin? No, there is no magic in mere forms. And mere majority rule is capable of establishing a tyranny as atrocious as that of any Oriental despot. Hence, democracy, as mere majority rule, would be a faceless and spineless philosophy of government and of law.

On the contrary, because the essence of liberty is the freedom to exercise individual and equal personal rights, and because voting majorities are able and quick to vindicate their own rights, *true* and *effective* democracy must consist in minority rights under majority rule. But never in history has there been, and never in the future can there be, minority rights under majority rule unless the majority repudiates the blasphemy that numbers make truth, and that might makes right; unless the majority has the intelligence and good will to subordinate will to reason, and to subjugate prejudice to judgment; unless the majority faces and accepts the fact that there is an *objective moral order,* within the range of human intelligence and within the capacity of human virtue, to which civil societies and voting majorities are bound in conscience to conform — and upon which the liberty, the peace and happiness of personal, national and international life depend.

The mandatory aspect of the objective moral order is called by philosophers *the natural law.* In virtue of the natural law, essentially equal human beings are endowed by their Creator with natural rights and obligations, which are inalienable precisely because they are God-given. They are antecedent, therefore, both in logic and in nature, to the formation of civil societies and the casting of majority ballots. They are not bestowed by the beneficence of any state, democratic or otherwise; wherefore the tyranny of any state, democratic or otherwise, cannot destroy them. Rather it is the high moral obligation of all civil societies and all voting majorities to acknowledge their existence, to protect their exercise, and to facilitate their enjoyment by the construction and maintenance of a civil code of laws which embraces, complements and applies the principles of the natural law to civic life.

In its essence, granted the existence of Almighty God, the natural law is a simple thing. It is man's participation in the eternal law of God. It implies that we know, independently of Lafayette Square, or Baton Rouge, or Washington, or London, or Moscow — or of the Vatican, for that matter — that all human beings, without exception, are the children of God, endowed with immortal souls, destined for eternal life, bound in conscience to pursue that destiny, and possessed of equal and inalienable rights to enable them to do so. It implies that we know, from our God-created nature, that some things help in attaining our destiny and some make it more difficult; that some actions and some institutions are right, and some wrong, regardless of material consequences. It implies that human governments and laws are instituted and administered by us to safeguard the personal rights of every

single member of the brotherhood of men, so that each and all of us may attain, in human dignity, the divine destiny decreed by the One Good God Who is the loving Father of us all.

Thus, the philosophy of the natural law provides a rational and spiritual basis for our civil rights and liberties. It gives an adequate *reason* for the essential equality of all men. It supplies a sufficient *measure* for the essential dignity of human personality. It tells us *why* the Chinese coolie is the equal of the Roman cardinal; the Australian bushman, the equal of the European diplomat; the African tribesman, the equal of the American financier: because they and all of us, white and black and red and brown and yellow, have been created by the One God for intimate association with Him in perfect happiness for all eternity. Such is the glorious destiny which measures the essential dignity of every man. Such is the common destiny which explains the essential equality of every man; an essential equality which makes rather ridiculous the pride and prejudice based on our accidental and temporary differences, be they physical, intellectual, economic, social or racial. Such is the awesome destiny which gives intelligibility to our constitutional principle of freedom and equality; and which demands, not merely decent human freedom and equality, but reverential respect and genuine brotherly love, for every single person on the face of God's earth, regardless of race or creed or color or national origin.

This is the philosophy of the natural law. It is not pietistic pap. It is not sanctimonious sentimentality. It is not the insubstantial mist of wishful theory. It is the only solid soil of human freedom and equality. It is the philosophy upon which this nation was founded and to which this nation, by its most solemn covenants and usages, is dedicated. It is the philosophy upon which we, the people of the United States, did ordain and establish our Federal Constitution. Despite the cynics and secularists in some academic halls, the glory of the American Constitution is that, for the first time in history, a great people formally and expressly made human rights the cornerstone of its political structure – and did so in a solemn profession of politico-religious faith. There should be peace in our minds and joy in our hearts; because what a man is before God, that he is before the Constitution of the country we love.

But ideals must be put to work. General principles alone do not decide particular cases. Neither a philosophy nor a constitution is self-executing. A constitution needs legislative implementation, executive enforcement, and judicial interpretation; moreover, from time to time, it may need substantial change. To provide for substantial change, we did ordain and establish Article V of the Constitution, defining the *only lawful process* of constitutional amendment. To provide for judicial interpretation, we did ordain and establish Article III of the Constitution, creating *one Supreme Court,* conferring upon it alone final judicial power to decide all cases, in law and equity, arising under the Constitution and the Amendments thereto. Wherefore, subject only to the lawful process of constitutional amendment, the prevailing decisions of the Supreme Court are the authoritative interpretations of the supreme law of the land. As such, they command our loyal obedience. As such, they are binding upon all private citizens and public agencies in these United States. For American liberty is not lawless license; it is the responsible liberty of free men living under God and the law.

I have said the "prevailing" decisions of the Supreme Court because, with all proper deference to the principle of *stare decisis,* the very nature of the judicial process postulates the reversal of a prior judicial precedent whenever, in the best judgment of the Court, such a reversal is necessary to correct previous error, or to interpret more accurately the meaning, and to apply more effectively the purpose, of constitutional provisions. Reversal of a judicial precedent may be necessitated extrinsically, by the impact of changing political, economic, technological or social conditions in a complex and dynamic society; or intrinsically, by the evolution of a clearer understanding and deeper appreciation of the moral and social values already implicit in the constitutional provisions themselves. This will always be true, I submit, at least until such time as society ceases to grow, knowledge ceases to advance, and the Supreme Court becomes infallible — *quod Deus avertat!*

The reversal of the 1896 *"separate but equal"* doctrine of *Plessy* v. *Ferguson,*[1] by the 1954 decisions in *Brown* v. *Board of Education*[2] and *Bolling* v. *Sharpe,*[3] was principally owing, it seems to me, to the evolution of a clearer understanding and a deeper appreciation of the moral and social values which were always implicit in the *equal protection* clause of the Fourteenth, and the *due process* clause of the Fifth, Amendments. But whatever be the explanation, this much is certain: that in the *Brown*[4] and *Bolling*[5] decisions the Supreme Court, which we established, exercising the powers we conferred, interpreting the Constitution we ordained, enunciated its authoritative interpretation of constitutional freedom and equality and applied the same to the difficult problem of racial segregation. The segregation decisions are binding, therefore, on all private persons and public agencies; but, *a fortiori,* they command the loyal obedience of those of us who are honored and privileged, as members of the bench and bar, to be the officers and the agents of the courts in administering justice and preserving liberty under the supreme law of the land. Ours is not merely the obligation of citizenship; ours is also a sacred responsibility of leadership. To defend the majesty of the law is our professional honor. To this exalted task we are solemnly sworn and dedicated.

I do not wish to imply, of course, that our obligation of loyal obedience to the Supreme Court precludes adverse criticism of its decisions. Certainly, I do not wish to insinuate that all those who disagree with the Court are necessarily members, hooded or otherwise, of the Ku Klux Klan; any more than all those who agree with the Court are necessarily members, underground or otherwise, of the Communist Party. For freedom of speech is a constitutional liberty. The Supreme Court itself is its vigorous champion. Justices of the Court frequently have been the Court's severest critics. Many men of good will, however, are greatly perplexed by the merits of the segregation problem, and profoundly disturbed by the violence of the controversy it has aroused. Without question, there is an alarming danger in the current controversy. That danger, however, does not arise from freedom of speech, but rather from a grave threat to its exercise. That threat, as it becomes daily more evident, consists in the ominous climate of *fear,* produced by intemperate partisanship and

[1] 163 U.S. 537 (1896).
[2] 347 U.S. 483 (1954), *rehearing for final decree,* 349 U.S. 294 (1955).
[3] 347 U.S. 497 (1954), *rehearing for final decree,* 349 U.S. 294 (1955).
[4] See note 2 *supra.*
[5] See note 3 *supra.*

unrestrained passion, and penetrating into the home, the office, the shop, the school, the store, the club, the playground, and even the church. The fear which I mean is in the hearts of many citizens, and not a few of the legal profession, who have honest and reasoned opinions about segregation, but who are afraid or hesitant to express them, lest they or their families suffer unjust political, economic, professional or social reprisals. I sympathize sincerely with their fear; but I admire all the more those who have had the fortitude to speak and the courage to stand up and be counted. The success of the democratic process is predicated upon intelligent conviction courageously expressed.

The obligation of loyal obedience to the Supreme Court does not preclude, of course, honest and reasonable efforts to reverse its decisions by the *lawful process* of constitutional amendment defined in Article V of the Constitution. But it does preclude the employment of tactics of evasion and defiance, based on obsolete and unconstitutional theories of interposition and nullification. Where, for instance, is the loyal obedience of the lawyer who would counsel, encourage, persuade or incite his fellow citizens to violate the supreme law of the land? Where is the loyal obedience of the lawyer who would lend the skill of his craftsmanship and advocacy to the enactment of a statute, which he *knows* to be unconstitutional, and which provides criminal penalties against citizens who desire to respect the supreme law of the land? Where is the loyal obedience, or even the elemental sense of self-respect, in the lawyer-legislator who would *knowingly* lobby and vote for such a statute, and then cynically explain to one of his minority constituents, "Oh well, it's unconstitutional anyway!"? When such things happen, and they *do* happen, why should we be surprised at the evidently growing disrespect and distrust, not merely for the legal profession, but for the law itself? The law is a majestic structure of principles. The legal profession is their sworn guardian. Neither the law nor the profession nor the public, for whom both exist, is well served by the lawyer who stands by, alerted to pressure, ready, able and willing to jettison principle for selfish and cowardly expediency.

Subject always to the obligations of loyal obedience to the Supreme Court, to the requirements of constitutional procedure, and to the fairness and courtesy of civilized debate, by all means let us exercise, without fear or favor, the constitutional right of free and open speech on this controversial issue of compulsory segregation. It would be a substantial public service if the legal profession, in appreciable numbers, would assume its traditional role of leadership in public affairs, by demonstrating the way of calm and dispassionate, and therefore fruitful, controversy. It would clear the air of public fear and create a healthy climate of discussion, if members of the bar could dissuade the misguided and discourage the malicious from the reckless use of insulting epithets and the irresponsible imputation of improper motives – which run the gamut, apparently, from trivia to treason. A really free, truly fair, and calmly intellectual discussion on the merits of the issue is demanded by the grave importance of the fundamental principles involved, and by the enormous impact of compulsory segregation on the daily lives of millions of our fellow American citizens. It is my confident *belief* that such a discussion would lead to agreement on the basis and the meaning of the fundamental principles involved; and it would be my *hope* that such agreement on principles would eventually lead the major-

ity of the legal profession, at least, to concur with the United States Supreme Court that compulsory segregation is completely incompatible with the fundamental constitutional principles which support our proud American way of life. Surely, the realization and perfection of that way of life is our common purpose.

The fundamental principles of the natural law, which I have attempted to outline in the beginning of these remarks, are obviously incompatible with compulsory segregation unless: the Negro is not a man; or, if he is a man, then an essentially inferior man; or, if he is not an essentially inferior man, then an accidentally inferior man, whose accidental inferiorities unfit him, *as a Negro,* for free association with the allegedly superior white man. At this point I feel constrained to beg the considerate indulgence of Negroes for the mention of these hypotheses, every one of which is absolutely and demonstrably false.

Human knowledge, it seems to me, has advanced to the point where the burden of proving the alleged inferiorities of the Negro is upon those who assert them. That the Negro is a man, essentially equal to the white man, is a clear and certain truth, objectively demonstrated by philosophical argumentation, experimentally verified by scientific investigation, and universally accepted by the common consent of mature and civilized society. That the Negro is not an accidentally inferior man whose accidental inferiorities unfit him, *as a Negro,* for free association with the allegedly superior white man, is also an objective certainty, established by philosophical considerations of his nature and destiny; corroborated by the overwhelming evidence of the anthropological, biological, psychological and sociological sciences; and conceded by the vast majority of thoughtful men the world over. It has been argued to the contrary, however, that the Negro is inferior to the white man in his standards of health, intelligence, culture and morality; and, therefore, the compulsory segregation of the Negro is a reasonable exercise of the police power of the State.

The first answer to this argument, of course, is that compulsory segregation is not based on any standards of health, intelligence, culture or morality, but simply and solely on race. The Negro of robust health, refined intelligence, gentle culture and heroic virtue must still sit in the back of the bus; while the most diseased, stupid, uncouth and immoral white man must ride in front. The second answer to this argument is that the statistics, offered in its support, do not prove what they purport to prove. The statistics do show that many Negroes are in fact less healthy, less intelligent, and less law-abiding than many white men. But the statistics do not prove that the Negro, *as a Negro,* has a lesser potential for health, a lower aptitude for education, or a smaller capacity for virtue than the white man who lives in a similar environment. The statistics do show that many Negroes are in fact handicapped severely in reducing their potential to actuality, their aptitude to achievement, their capacity to fulfillment by the substandard physical, economic, educational and social environment in which they are compelled to live. Compulsory segregation is the most extreme method employed by racial discrimination to force the Negro to live in the sub-standard environment which it has created. Ironically, the statistics offered in support of segregation constitute powerful evidence against it. Surely, it is a cruel and cynical logic which argues for segregation from the very evils it has produced.

By their fruits you shall know them. Com-

pulsory segregation is the bitterest fruit of so-called "racial supremacy," an obsolete and exploded doctrine which is false in theory and vicious in practice. It is not without significance that two of the most prominent antagonists of the Supreme Court, both governors of sovereign states, in arguing recently for segregation, one in a national magazine and the other on a national television program, made use of the expression "mongrelization of the race." How could such an expression, with its degrading canine implication, escape the lips of anyone who sincerely believes that human beings, as human beings, are possessed of personal dignity, entitled to reverential respect, and deserving of brotherly love? How far can emotion displace reason? What price the pride of "racial supremacy?"

There are some who disavow the racial supremacy nonsense, but argue, nevertheless, that compulsory segregation is not *per se* unjust or uncharitable; and, therefore, the old "separate but equal" doctrine is still a reasonable exercise of the police powers of the state. The first answer to this argument, of course, is that the "separate but equal" facilities of *Plessy* v. *Ferguson*[6] never were, are not now, and – in view of the tragic experience of the years – never in the future will be, even remotely, "equal." The *per se* argument is an abstraction contemplating itself in a vacuum. It prescinds from the facts of life. It ignores the real problem in its real moral and social context. The facts of life are that compulsory segregation is the product of the mentality of "racial supremacy," a mentality which is still deep and widespread and which, in a vicious psychological circle, draws strength and "respectability" from the legal blessing it received in the "separate but equal" doctrine of *Plessy* v. *Ferguson.*[7] Separate facilities are "inherently unequal," because the matrix and context of separation is belief in the inequality of the separated. The second answer to the *per se* argument is that, even supposing the contrary-to-fact hypothesis of equal facilities, compulsory segregation would still be objectively wrong; because it would still be contrary to the natural unity which impels human beings to associate in organized society for their common good; because it would still violate the political and social unity of organized society which is demanded, in both justice and charity, by the essential equality and natural dignity of human personality.

Peripheral to the main issue, but of serious civic importance, is the question of the *spiritual* damage segregation has done and is still doing to those who force it upon their fellow citizens, both Negro and white. For injustice has a subtle way of reversing its impact, spiritually, from the oppressed to the oppressor. Peripheral also, but of momentous international importance, is the question of the *diplomatic* damage segregation has done and is still doing to our American aspirations to the moral leadership of the free world. We must practice what we preach. A busy and effective section of Soviet Russia's propaganda machine will collapse if, and when, we decide sincerely and efficaciously, to obey the supreme law of the land as enunciated by the United States Supreme Court.

The segregation issue constitutes, in my opinion, a formidable challenge to the intellectual vigor, the moral courage, and the genuine patriotism of the legal profession. I have spoken as a member of that profession. Nothing I have said rests upon the

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

[7] *Ibid.*

(*Continued on page* 89)