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THE JURISPRUDENCE OF AFFIRMATIVE ACTION: A POST-REALIST ANALYSIS

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In this essay, Professor Deutsch explains why the Realists' description of our legal system is invalid and then proposes a post-Realist explanation of it. Using the example of affirmative action, he attempts to demonstrate both why society accepts desegregation decrees and why judges often reject racial quotas although such quotas may be the most efficient means of remedying past discrimination.

I

In a civil law jurisdiction, one is presumed to be able adequately to define the law by pointing to the volume containing the relevant statutory provisions. The emphasis on process that represents the permanent contribution of the work of Henry Hart brings into prominence the fact that the common law concept of precedent incorporates this act of pointing. What is perhaps most remarkable about this incorporation is the self-definitional aspect that makes it possible to assert that the law is completely defined by what the courts say it is. In practical terms, what makes this incorporation feasible is that the value of any system consists of its application to particular instances; what precedents mean are the propositions for which they are cited by future courts.¹

To understand our post-Realist era in legal history, it seems appropriate to engage in the act of oversimplification required by any attempt to account for a shift in intellectual perspective. For the Realists, precedent does not actually define the law, but rather serves

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1. R. POUND, THE FORMATIVE ERA OF AMERICAN LAW 112 (1938) ("Until the world stands still and life ceases to involve activity and change, every code and every corpus juris will be subject to alteration and interpretation and revision.")

as a justification for a decision rooted in the values of the particular judge;² it merely gives the appearance of harmony and continuity as the judge applies his biases and sympathies to a given situation.³ Although recognizing that it is through an oversimplification, I nonetheless will try to demonstrate that the Realists failed to create a satisfactory legal theory because of a naive overestimation of the clarity with which truth about what law is can be communicated. What I am attempting, in short, is to demonstrate the explanatory power of the metaphor.

The general jurisprudential question I will attempt to answer is why the common law is effective: why this nation—and even a separate and equal branch⁴—continues to obey judges possessing power “over Neither the sword Nor the purse.”⁵ Because the common law is a system that works through application of precedent to facts and facts to precedent, the focus will be upon a particular concrete situation, and the example of affirmative action is particularly enlightening.

The Realist postulates a judge subjectively perceiving a goal, who then acts to achieve that goal in the most efficient manner available. Yet even courts who have accepted the need for affirmative action in implementing desegregation decrees often have resisted the most efficient means to that end,⁶ the imposition of racial quotas.⁷ Thus—and this is what the post-Realist has come to recognize—the judge’s perception of the goal and of the available means is tempered by the role imposed on him both personally and institutionally, that of serving as a filter for the values of society. What causes the judge to implement something other than his own individual biases and sympathies is not

2. G. WHITE, *THE AMERICAN JUDICIAL TRADITION* 274 (1976).

3. *Id.*

4. See *United States v. Nixon*, 418 U.S. 683, 707 (1974) (legitimate needs of judicial process may outweigh generalized assertion of executive privilege as to confidential communications).

5. *THE FEDERALIST* No. 78, at 504 (A. Hamilton) (Bicentennial ed., R. Luce, Inc. publisher 1976).

6. The argument assumes that racial quotas would be the most efficient means of attaining desegregation. If one defines desegregation as access to resources by the disadvantaged group equivalent to that previously afforded the advantaged group, the assumption seems justified.

7. *E.g.*, *Kirkland v. New York State Dep’t of Correctional Servs.*, 520 F.2d 420, 428-30 (2d Cir.) (district court improperly imposed racial quota on state civil service eligibility list, but other relief affirmed; clear-cut, long-term, egregious discrimination absent and effect of discrimination on small, identifiable group otherwise remediable), *rehearing en banc denied*, 531 F.2d 5 (2d Cir. 1975); *Weber v. Kaiser Aluminum & Chem. Corp.*, 415 F. Supp. 761, 768 (E.D. La. 1976) (courts are reluctant to impose racial quotas because inequitable); *Bridgeport Educ. Ass’n v. Zinner*, 415 F. Supp. 715, 723-24 (D. Conn. 1976) (unsettled whether court may order racial preference after finding prior discrimination); *cf. United Jewish Orgs., Inc. v. Carey*, 45 U.S.L.W. 4221, 4231-33 (U.S. Mar. 1, 1977) (Burger, C.J., dissenting) (“strict quota” approach by state to redistricting under Voting Rights Act not consonant with earlier Supreme Court decisions; “racial gerrymandering” improper even if purpose is to aid blacks); *De Funis v. Odegaard*, 416 U.S. 312, 336 (1974) (Douglas, J., dissenting) (“no constitutional right for any race to be preferred”); *Bakke v.*

the dead hand of precedent, but the living force of others' values. The strength of our common law is thus that it can reconcile contradictions by embracing the social goals in whose service the Realists wished to enlist the law, while simultaneously guarding against implementation of individual biases and sympathies by, if necessary, rejecting the most efficient means of implementing those goals.

The Realist school of thought was a product of an era in which Social Darwinism largely accomplished in its sphere what Newton was regarded as having accomplished in the physical realm—the replacement of the judgmental morality of religious injunctions with apparently scientific descriptions of mechanisms. As a result, the Realists could ignore the distinction between the scientific law, which defines what must be if certain conditions are satisfied, and the moral law, which defines what ought to be.⁸ Law made by judges is in fact a description of how members of society want each other to behave; each person wants to impose his own values, but he also wants every other person not to impose his own on him. Thus, by ignoring the distinction between law as a must and law as an ought, the Realists failed to recognize that law's essentially contradictory nature accurately mirrors the tragic condition of human existence.

II

The essence of the human tragedy—in fact, what defines the human condition—is the consciousness of mortality. In social terms, it was the repression of this consciousness that Freud traced cultural

Regents of the Univ., 18 Cal. 3d 34, 55, 553 P.2d 1152, 1166, 132 Cal. Rptr. 680, 694 (1976) (no ameliorative measures may be related to race), *cert. granted*, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977) (No. 76-811). "The permissible scope of the use of quotas as a remedy in discrimination cases remains a delicate question." *United States v. New Hampshire*, 539 F.2d 277, 280 n.4 (1st Cir. 1976). Some Supreme Court decisions do imply that quotas may be an appropriate remedy, but the Court has not yet faced the issue squarely. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971); *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 236 (1969). In *United Jewish Organizations, Inc. v. Carey* the Court found that compliance with section 5 of the Voting Rights Act often requires the use of racial considerations in redistricting. 45 U.S.L.W. 4221, 4225 (U.S. Mar. 1, 1977). The plurality opinion concluded that, although the state "used race in a purposeful manner," neither the fourteenth nor fifteenth amendment was infringed because whites were not "under-represented relative to their share of the population." *Id.* at 4227.

8. This is one example of the oversimplification to which I previously referred. Of course, not all Realists ignored the "ought," but all did focus on the "is." Compare Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 697 (1931) (work of Realists is not concerned with questions of what ought to be) with Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1262 (1931) (survey of Realist literature shows Pound wrong). Dealing with the "is" was the Realists' great contribution.

expression in *Civilization and Its Discontents*.⁹ On a personal level, the individual defines himself as a human being by maintaining awareness of the similarity between himself and others while sustaining those differences that define his own individuality. In personal terms, therefore, what is repressed is the fact of individual mortality that is the ultimate human similarity. The most common manifestation of this repression is the individual's need to reproduce himself. Children, however, are not the only symbolic form of immortality. Group membership—identification as a member of a group that survives individual deaths—also fulfills this need.

The pursuit of legitimacy by political authority—the justification for coercion of the individual in furtherance of supraindividual goals—is unending because of the permanent tension between the two aspects of the individual's definition of himself as human. Whatever status an individual accepts by identifying himself as a member of the group may, over time, conflict with a desire to discard that identification, to express individual values free of the obligations of group membership, or to assume membership in a different group. In a large and diverse society, the resolution of such conflicts may well require choices by the individual as to which memberships are preferred; it may also require the individual to subjugate some individual values to the values of the group, to express those conflicting individual values in a manner acceptable to the group, or to obscure his belief in those conflicting values.¹⁰ These resolutions may occur consciously, as expressions of a strong belief in how the system should operate or in what is most expedient in the particular situation, or unconsciously, because group dynamics influence individual values.

III

According to the analysis adumbrated above, the decision in *Dred Scott*¹¹ represents an attempt by the Justices of the Supreme Court to avoid resolving such a conflict between the individual and the groups of which he is a potential member by defining the individual plaintiff as belonging to a group existing outside the political community defined by the Constitution. The Court described its duty as deciding “whether the facts stated in the plea are sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States”:¹²

9. S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* 69-75 (J. Riviere trans. 1958).

10. See generally L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

11. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

12. *Id.* at 402.

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States¹³

. . . .

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.¹⁴

. . . .

Yet the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.¹⁵

. . . .

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. . . . And if Congress itself cannot do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a territorial Government to exercise them. It could confer no power on

13. *Id.* at 403.

14. *Id.* at 407.

15. *Id.* at 410.

any local Government, established by its authority, to violate the provisions of the Constitution.

It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it, have been dwelt upon in the argument.

But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government, and interfering with their relation to each other. . . . And if the Constitution recognises the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government."¹⁶

As the last argument indicates, the strategy employed by the Supreme Court to avoid holding that blacks existed within the American social and constitutional communities required acceptance of the proposition either that the community governed by the Constitution of the United States is not subject to the law of nations or that persons treated as property are not participants in the human condition. If the latter proposition is accepted, then, insofar as economics can be regarded as a science, the only law is that which defines what is thought inevitable under certain social conditions rather than what ought to be undertaken in accordance with given social aspirations.

IV

Law in the latter sense, what ought to be, governed the implementation of the equal protection clause undertaken by the Supreme Court in *Brown v. Board of Education*.¹⁷ Herbert Wechsler's jurisprudential

16. *Id.* at 450-51.

17. 347 U.S. 483 (1954).

objection to *Brown*, although phrased in terms of lack of neutrality, intimated that the Supreme Court was engaged in the process of politics rather than lawmaking.¹⁸ Wechsler analyzes *Brown*:

The Court did not declare . . . that the fourteenth amendment forbids all racial lines in legislation¹⁹

. . . .

. . . Rather, it seems to me, [the decision] must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved.²⁰

. . . .

For me, [however], assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved.²¹

Brown is more appropriately perceived as a legal response to *Dred Scott*. Given my reading of *Dred Scott*, it was, of course, simply not the case that "denial by the state of freedom to associate" impinged on the plaintiffs in *Brown* "in the same way [as] on any groups or races"; Wechsler's analysis is valid only if *Brown* is read as a recognition, on the part of the Supreme Court, that the descendants of slaves are members of the political community governed by the Constitution of the United States. The individual Justices considered blacks to be members of the political community, and thus faced a dilemma: the yearnings of blacks to be treated no differently than other members of the community conflicted with the values of many whites. The Justices phrased the decision as if they had no choice. In fact, the real controversy arose after the Court decided on the remedy,²² and even the remedy was tempered to placate, unsuccessfully, the views of others.²³ The question remains, however, why the defendants in *Brown* were bound by the

18. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) [hereinafter cited as *Neutral Principles*].

19. *Id.* at 32.

20. *Id.* at 33.

21. *Id.* at 34.

22. See R. KLUGER, *SIMPLE JUSTICE* 711 (1976) (until the implementing decree was handed down, extremists had nothing firm to attack).

23. *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 299-301 (1955). See also Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 YALE L.J. 1520, 1522-28 (1968) (desegregation hampered until late 1960's by political and social factors).

decree issued by the Supreme Court and why the law enunciated in that decision should have been obeyed.

V

Wechsler himself noted that in our society the resolution of conflicts among competing groups crucially involves the institutional structure of federalism:

In a far flung, free society, the federalist values are enduring. They call upon a people to achieve a unity sufficient to resist their common perils and advance their common welfare, without undue sacrifice of their diversities and the creative energies to which diversity gives rise. They call for government responsive to the will of the full national constituency, without loss of responsiveness to lesser voices, reflecting smaller bodies of opinion, in areas that constitute their own legitimate concern.²⁴

One legal implementation of these values of federalism occurs by means of choice of law, by requiring that certain conditions be met before disputes are governed by federal rather than state law or by the law of a state other than that in which the court sits. Judicial decisions concerning those conditions, opinions in the field of conflict of laws, are those most apt to be characterized by the layman as purely technical, and that characterization is proper because the impact of such decisions on the resolution of the controversy before the court is apparent only to the lawyer.

However, such technical knowledge—expertise in assessing the significance of the subtle changes in the way a system of rules is applied—represents the source of professional power not only for lawyers, but also for politicians. Empirical findings indicate that “although Americans almost unanimously agree on a number of general propositions about democracy, they disagree about specific applications to crucial cases” and that “a majority of voters frequently hold views contrary to the rules of the game actually followed in the political system.”²⁵ Those rules, however, will remain in force in the absence of agreement by the majority as to the desirability of a single set of alternatives, because those who devote substantial amounts of time to political activity tend, because they have mastered the existing

24. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954). Thus, federalism itself provides a metaphor for the individual in the dual roles of individual and group member.

25. R. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* 312 (1961) (footnotes omitted).

rules, to resist changes in them. Moreover, agreement on the desirability of a single set of alternatives is unlikely so long as voters who do not devote substantial amounts of time to politics continue to focus only on changes in substantive rather than technical rules.

VI

Wechsler began his Holmes lecture, "Toward Neutral Principles of Constitutional Law," by responding to Learned Hand's argument denying legitimacy to the power of judicial review exercised by the Supreme Court of the United States.²⁶ Wechsler's argument centered on the supremacy clause,²⁷ which he interpreted "as a mandate to all of officialdom including courts, with a special and emphatic admonition that it binds the judges of the previous independent states."²⁸ In terms of the meaning of *Brown*, it seems important that the very decision cited as establishing the power of judicial review—*Marbury v. Madison*²⁹—involved a similar focus on technical as opposed to substantive rules. The Court established the judicial power to define and resolve conflicts among laws and the Constitution in a decision that denied to the Congress the power to grant to the Supreme Court of the United States the right to issue the writ of mandamus.³⁰ The real decision in *Brown* could not be hidden in technicalities, however, as the reaction to the decision showed.

In an opinion signed by all nine Justices, the Supreme Court in *Cooper v. Aaron*³¹ invalidated "actions by the Governor and Legislature of Arkansas [taken] upon the premise that they are not bound by our holding in *Brown v. Board of Education*."³² Although the Court found that "[t]he controlling legal principles are plain"³³ and "enough to dispose of the case,"³⁴ it also felt it important to "answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case,"³⁵ which it did by "recall[ing] some basic constitutional propositions which are settled doctrine".³⁶

26. *Neutral Principles*, *supra* note 18, at 2-10.

27. U.S. CONST. art. VI, §2.

28. *Neutral Principles*, *supra* note 18, at 3.

29. 5 U.S. (1 Cranch) 137 (1803).

30. *Id.* at 171-79.

31. 358 U.S. 1 (1958).

32. *Id.* at 4.

33. *Id.* at 16.

34. *Id.* at 17.

35. *Id.*

36. *Id.*

Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."³⁷

The Supreme Court wished to make it clear that the system operates only if everyone adheres, perhaps grudgingly, to its decisions. What was left unstated is the corollary: the system works only if judges, in reaching decisions, attempt in good faith to reconcile the conflicting values in the community.

Judicial implementation of affirmative action programs seeks to fulfill the promise of *Brown* by accomplishing two goals simultaneously: compensating for past injustices and providing equality of access to the resources required to realize future opportunities.³⁸ Yet racial quotas are unpopular with many whites: "Governmentally-imposed preferential treatment may, in the eyes of whites, be so improper that it will have negative effects on an entire range of shared values which reinforce the economic, political, and social infrastructure."³⁹ More generally, furthermore, the courts are faced both by a diversity of rapidly changing environments in which past discrimination has produced deprivations and the fact that reparations for such past discrimination would not necessarily provide equal opportunity for future advancement in any such environment. As a result, any given

37. *Id.* at 18.

38. Comment, *Race Quotas*, 8 HARV. C.R.-C.L. L. REV. 128, 151-55 (1973).

39. *Id.* at 167; accord, *United Jewish Orgs., Inc. v. Carey*, 45 U.S.L.W. 4221, 4229 (U.S. Mar. 1, 1977) (Brennan, J., concurring) ("we cannot well ignore the social reality that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given classification"). *But see* Abernathy, Book Review, 65 GEO. L.J. 181, 186 (1976) (popular dissatisfaction with race-conscious relief is not rejection of all efforts to aid blacks as much as it is suspicion that many such efforts are arbitrary or unnecessary).

decree may be incapable of functioning as a precedent either for a different environment or even for future plaintiffs in the same environment. Given this situation, the jurisprudential question presented is what gives such decrees the force of law: why should any given environment be changed in accordance with what the individual judge has decided the law requires?

The most concise formulation of the answer is that our system makes judges capable of deciding in accordance with Kant's Categorical Imperative: "[A]ct on that maxim through which you can at the same time will that it should become a universal law,"⁴⁰ and "in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."⁴¹ Because the judge is not in fact personally bound by the decree being issued, my argument is purely formal in that it simply assumes what it is attempting to demonstrate—the good faith of the judge. I will attempt to demonstrate further, however, that for human society the assumption that the institution of law permits us to know when decrees are issued in good faith is a necessary one if we are to "know" anything in a social context.

Because each individual's consciousness represents a point of view, each individual perceives and makes choices from that point of view. To the extent that other points of view can be communicated and taken into account in making such choices, the necessary adjustments may successfully be made. We cannot be certain, however, that any given individual is capable of successfully making all necessary adjustments.

What the law provides is a process, by entry into which a member of society can compel an adjustment to a personal choice of what is experienced as conflicting choices by other individuals or groups. Entry into the process is possible, however, only in terms of the technical rules of the law. The law, in other words, categorically decides which ostensibly conflicting points of view have a right to demand mutual adjustment. Any judicial decree properly can be questioned, of course, in terms of its adherence to "propositions which are settled doctrine,"⁴² but only the reliance on technical rules of law⁴³ makes possible the

40. I. KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 84 (AK 421) (H. Paton trans. 1967).

41. *Id.* at 91 (AK 429).

42. *Cooper v. Aaron*, 358 U.S. 1, 17 (1958).

43. Perhaps this explains why courts sometimes dispose of cases on threshold, technical grounds of justiciability or the like, although logic indicates that the merits should have been reached. See Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 *HARV. L. REV.* 40, 45 (1961) (discussing *Muskrat v. United States*, 219 U.S. 346 (1911)).

hypothesis of successful adjustments of potentially conflicting individual consciousnesses.

VII

What I hope has been accomplished thus far is a satisfactory analysis of the jurisprudence of affirmative action: an explanation of why the plaintiffs in *Brown* are no longer entitled to treatment different from that accorded to "any [other] groups or races"⁴⁴ and why individual judges implementing the resolution of the cases before them in terms that may not be applicable to later plaintiffs or different social situations should be obeyed. It remains only to delineate the metaphor that accounts for the adherence to those decrees, the compulsion on the individual defendant to prefer the determination reached by the individual judge over that mix of preferences representing the group identifications that serve to define his own individual personality.

Physical science observes that free protons and neutrons weigh slightly more than they do when they are inside an atomic nucleus. Relativity theory postulates that the loss of weight is the result of matter having been turned into energy equivalent to the strength of the forces that bind the nucleus. Measurements of the binding energies of all known elements show that, from the lightest elements upward, binding energies generally grow stronger and stronger until they reach a peak, whereafter, as the elements increase in atomic number, the binding energies very gradually become weaker. The resultant graph has become known as the curve of binding energy.

44. *Neutral Principles*, *supra* note 18, at 34.