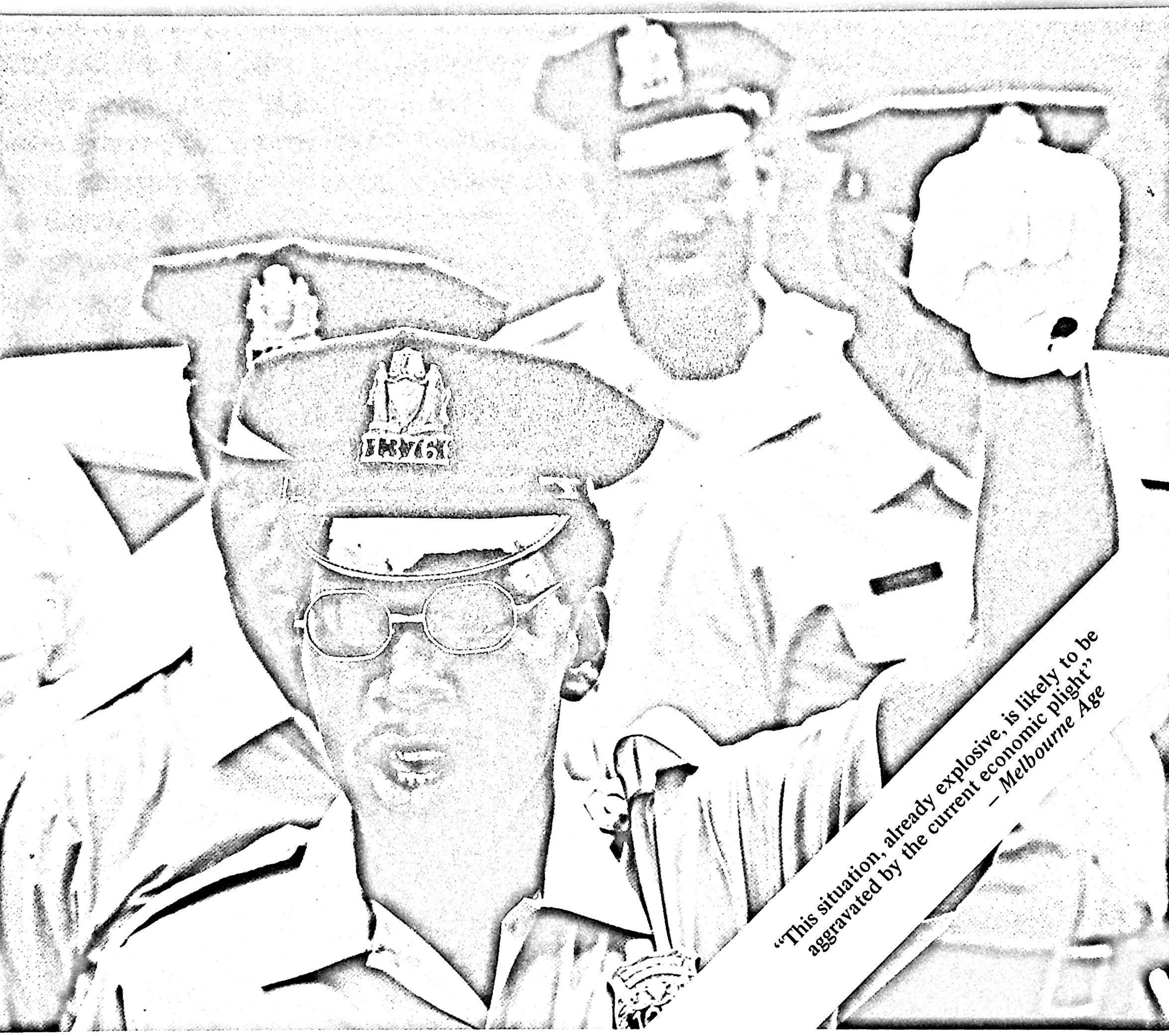
RACE AND LAW IN BRITAIN AND THE UNITED STATES



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RACE AND LAW IN BRITAIN AND THE UNITED STATES

by Louis Claiborne, with additional material
by Prof Julian R. Friedman, Bradford Cooke,
and Kuttan Menon

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From the Universal Declaration
of Human Rights,
adopted by the General Assembly
of the United Nations
on 10th December 1948:

Article 1
All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2
Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty.

Article 10
Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 19
Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20
(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

RACE AND LAW IN BRITAIN AND THE UNITED STATES

by Louis Claiborne

INTRODUCTION

As the title implies, the subject matter of this report is limited. First, only Britain and the United States are considered. While there are major differences, the two countries have a substantial common heritage which is not shared by the rest of the world, or even the Western white world. Accordingly, their experience may have little or nothing to teach others – whether it be what to copy or what to avoid.

Second, and notwithstanding the literal breadth of the title, the only race relations examined here are those between white and black – subsuming under this last label, in the case of Britain, the Asians from the Indian subcontinent (whether coming directly from India, Pakistan, Bangladesh or Sri Lanka, or indirectly from East Africa or the West Indies). We are thus dealing with the special problems of racial groups immediately identifiable by skin colour – a very different matter from, say, the situation of the Irish in England or the Poles in America. But, beyond that, our focus is on a particular colour contrast that has unique associations in the mythology and history of the Western world. Accordingly, we leave out of consideration the relations of the white majority with the peoples of the Far East, of the Pacific Islands, and (in the case of the United States) with the Eskimo and the American Indian.

Finally, this report is not concerned with all aspects of black-white relations in Britain and America, but solely with the impact of *law* on those relations. While we look at law in all its forms – statutes, administrative regulations, judicial decisions, and the various modes of their enforcement – our attention is primarily directed to what is overtly *race* law. Obviously, race relations are effected by the general legal structure of the place – just as it is by the economic facts and the cultural climate. But, here, we seek to isolate the effect of legal intervention which (although it may change general law) is motivated by a desire to eliminate race prejudice and discrimination.

The utility of anti-discrimination law is often questioned. On one side, many see this approach as a useless effort to treat the surface symptoms rather than the root causes, and urge radical surgery on a "sick" society. Others, of a different temperament, diagnose no illness, or no curable malady, and argue that the clumsy intervention of law in this "delicate" area has probably done more harm than good. And both camps can point to the actual state of race relations in the United States and the United Kingdom as casting doubt on the efficacy of law as an instrument to combat colour prejudice and discrimination. The matter is not quite so simple, however.

Indeed, even if it were true that the race situation is worse today than before law intruded, that would prove little. It may be that, but for the restraining hand of law, things would now be worse still. Also, the failure may be attributable to waiting too long before invoking law, or using an inappropriate legal approach, or vacillating too much, or prescribing the wrong dose of law. What is more, the experiment has not been without successes, on both sides of the Atlantic.

What follows is a brief survey of American and British experience in applying law to problems of race, with an assessment of the achievements and setbacks. While it is not the aim of this short report to draw definitive conclusions about the utility of a legal approach, some lessons will emerge from our consideration of what went right and what went wrong. Hopefully, the fruits of the inquiry will suggest measures to improve the racial climate in the English-speaking world.

1. THE BACKGROUND OF LEGAL INTERVENTION

This is not the place to trace the whole of the history of race relations in Britain and America. But it is quite impossible to judge the successes or failures of recent legal intervention without noticing briefly what it was the law had to deal with. And it is not enough to know the statistical situation on the day the law came into force. For – unfortunately – race attitudes today are affected by memories, old legends, even myths. And history also influences the way law is brought to bear on race relations.

The Common Heritage

Too much is sometimes made of the differences between the racial history of Britain and America. Of course, there *are* important distinctions. But a common heritage also survives and it weighs heavily today on both sides of the colour line, on both sides of the ocean.

Needless to say, white prejudice against black and brown did not begin in America. Americans – when they ceased to be Englishmen, a century and a half after black slavery was introduced in Virginia – were, in this as in most other things, mere pupils of their island ancestors (albeit, in the end, they did outdo their teachers). Colour prejudice within the British Isles was well established before North America was colonized. We need only invoke the Venerable Bede, the first "civilized Englishman" as he has been called: he deemed it necessary to explain that the Ethiopian eunuch mentioned in the Acts of the Apostles became white-skinned upon being baptized. Some eight centuries later it was the popular Elizabeth I who expelled the "black-amoors" from her realm, and, shortly after, we have dramatic evidence of contemporary colour prejudice in Shakespeare's plays from *Titus Andronicus* and *The Merchant of Venice* to *Othello*.

There followed more than two centuries of black slavery and slave trading. Even before Britain had colonies of her own in the New World, British adventurers engaged in the trade, and soon the British outstripped the Spanish, the Portuguese and the Dutch. A few years later, it was British capitalists financing British merchants selling blacks as slaves to British colonists in North and Central America and the Caribbean. During the same period, there was the domination and exploitation, albeit without slavery, of India and parts of the East Indies. The importance of that history for current race attitudes, on both sides of the colour line, is difficult to exaggerate.

To be sure, the impact was, and is, greater on the American side of the ocean. Indeed, in Britain, black slavery was held legally unenforceable in 1772. But too much has been made of that famous judgement of Lord Mansfield. First, it did

not appreciably change the condition of the African in this country – perhaps as many as 20,000 in London alone – much less the way he was regarded. One need only notice how the Chief Justice himself worded his decree of emancipation in favour of Somersett: "The black must be discharged". Nor was the British slave trade ended, nor slavery itself in the British colonies, where the law of England was deemed inoperative in this respect.

Although the history of Britain was measurably affected by the slave trade and slave labour in her American possessions, especially the Caribbean, and many a then prominent English family (including the Royal Family) was enriched and many a now prominent family owes its position to that profitable exploitation, it may be that, for some time, these realities did not seem to touch the ordinary Britisher at home, and therefore contributed little to his colour prejudice. Needless to say, it was different on the other side of the colour line: no "ordinary" black man in the British colonies could stand aloof, unaware how he was treated and regarded by his British masters. And *his* descendants remember, whether the Englishman does or not. But at all events, the fact of colour and the notions of white superiority over coloured "natives" were brought home to the British consciousness during the long Victorian era.

The requirements of the widening and deepening Empire – over black and brown peoples throughout the world – eventually involved the whole British nation. First, more people actually served in India and Africa or the West Indies or the East Indies. Then there were dramatic events – "atrocities" as seen from home – which every Britisher heard about, drawing the "proper" conclusions: the Indian Mutiny of 1857, the Jamaican Revolt of 1865, the "Massacre" of Khartoum in 1885, the Boxer Rebellion of 1899. And, finally, every schoolchild was taught his own "superiority" over black and brown peoples who lived in all the pink-shaded areas of the globe under the Union Jack: inevitably, that creed was part of his history, his geography, his literature.

During a part of this period, Americans were similarly instructed by their own imperial expansion into places with darker "natives": the Mexican territories, Alaska, Hawaii, Puerto Rico, the Philippines, Samoa, the Canal Zone, the Virgin Islands. But the American attitude to race was largely moulded at home, vis-a-vis a substantial domestic black population. And, here, it is essential to make the difference between the two sides of the Atlantic.

The Differing Heritage

The preceding pages sufficiently indicate the too common fallacy of treating Americans as specially "guilty" and the British as wholly "innocent" with respect to the historic treatment of blacks by the dominant white society. The heritage is largely held in common. But it will not do, either, to ignore important distinctions.

A. The United States

The first of these is merely one of time, proximity and numbers. British involvement in the slave trade, in slavery overseas, and white dominance over "natives" in the coloured Empire, although they importantly affect race attitudes in Britain today, nevertheless do not aggregate anything comparable to the American experience. It does make a difference that, for three centuries, substantially more than 10% of the population of the United States has been black, and that today's Negroes are very old Americans, almost all of them being descended from slaves imported during the Eighteenth Century (during part of which the black population was more than a third of the total). Kept apart though they were, in the slave compound, in segregated living or in the contemporary urban ghetto, American Negroes have never been totally isolated. They were not "overseas"; they were neighbours, with immediate daily contacts with the white community.

Of course, this long period of close co-existence of black and white might well have given America an advantage in race relations. Even the cruelties of involuntary importation and the curse of slavery might have been overcome in the intervening century – as, to some extent, they have been in Brazil and in much of the Caribbean. Indeed, the Civil War seemed to make a break which offered such a new opportunity and in the ensuing decade a promising start was in fact made. But it is the tragedy of the United States that the experiment was so quickly abandoned and that a cruel reaction took its place. The consequence is that the duration of the American experience and the apparent permanence of the "colour problem" makes the solution not easier, but more difficult.

This brings us to the second very marked difference between the British and American background which has special relevance to our inquiry. It is that in Norther America race relations have always been regulated by law, whereas in the British Isles, until a decade ago, there was in effect no law whatever on the subject. (*Somersett's Case*, in a real sense, merely wiped the slate clean: it ended slavery as a legally recognized institution without substituting any new race law). Here, too, the long experience of law might have worked advantageously for the Americans – and, in some respects, it has. But, on the whole, it has added to the task.

The most awkward fact, of course, is that America has had so much law, for so long, entirely devoted to the control and degradation of the black population. From the mid-Seventeenth Century, slavery was codified as a legal institution and miscegenation was made a crime. Nor was anything changed when the American colonies became a unified and independent nation. The Constitution of the United States itself confirmed that blacks were non-persons: they were to be counted only as fractional entities in the apportionment of legislative seats (and then, not for their own benefit, for it was understood that they were not to be "represented"); their forcible return after escape was authorized (on the same footing as fugitive criminals); and any brake on their "importation" was solemnly forbidden for two decades. Chief Justice Taney was entirely correct (if impolitic) when he recounted that at the time Negroes were regarded "as so far inferior that they had no rights which the white man was bound to respect".

To be sure, slavery was soon confined to the Southern half of the Nation. But, despite the fervour of the "abolitionists", the black man rarely enjoyed civil and political equality even in the North before 1870. As for the South, the law was entirely one-sided. Not only were there detailed "slave codes" regulating the relationship between master and slave, but increasingly, law turned its attention to the supposed "black menace" – fear of too many blacks, especially too many free blacks, and fear of "amalgamation" of the races. Legal restrictions were imposed on the further importation

of slaves within many States, on emancipation, on the movement of free blacks, and the ban on intermarriage and miscegenation was reaffirmed. Later – after the brief decade of Reconstruction was washed away – came the massive invocation of law to disfranchise the Negro politically and to segregate him, literally from the cradle to the grave, notwithstanding the Constitution which now seemed to forbid it.

The worst of all this for the future, perhaps, was that it lent the imprimatur of law to prejudice and discrimination. The official sanction of the state, alas, can make a difference, on both sides of the colour line. Within the dominant white community, it offers encouragement to bigots and to the worst instincts in others, and overbears all but the most courageous reformers. For the Negro, the struggle was made to appear entirely hopeless when arrayed against him were not only white people, but governments and law itself, solemnized even by the Supreme Court of the United States. Because the legal order is uniquely resistant to change, the codification of Jim Crow prevented any gradual "withering away" of the institution.

What is more, against this background, while it was logical, it was also awkward to invoke law as a proper instrument for achieving equality when the climate ultimately changed. To put it mildly, law had a bad name in race relations. Not only because most of it had been overtly discriminatory, but because those laws which ordained otherwise, even the post-Civil War Amendments to the federal Constitution, had been so easily emptied of their promise. To the black man, at least, law seemed a most unlikely weapon to further his cause. Nor was law, in any case, a very familiar concept to most American blacks. Traditionally, law was the white man's invention, regulating white society, not black. To be sure, law kept the line between the two worlds and the black man knew its bite when he crossed the forbidden boundary. But, in the black quarter – from the slave compound to the modern ghetto – law had little impact on daily life. White officials, white judges, white policemen, did not concern themselves with the relations of black people with one another. They were, after all, "savages" or "children" whom one could not expect to observe the moral code of "civilized" society. And so, the black man grew up with no sense that law could serve him.

Finally, the existence of so much discriminatory law – and the pervasive tradition of law enforcement officials to use their position to control race relations, well beyond the letter of the law – presented a formidable obstacle. One could not begin to use law constructively without first dismantling the existing legal structure. That was an enormous task. Partly a massive engineering job. But also, because the old law is never supine, a full-scale war had to be engaged with the existing order which waged "massive resistance". In that struggle, law suffered once again: the nation, black and white, witnessed all manner of officials, sworn to uphold the "law of the land", openly defying it; and, worse, they were too often seen to prevail.

There were, on the other hand, advantages in the unique American experience of law and race relations. The British debate whether law ought to "intrude" into such a "delicate" matter was never real in the United States. Obviously, a legally established regime of separation and discrimination must be dismantled by law. More than that, since law could be pointed to as the cause of the problem, it was natural to look to law for the cure. And, quite easily, it could be argued that redressing the balance required much more than merely repealing oppressing laws: law must create the new climate, just as it had the old. Nor did it sit well for those who had invoked the law to oppress the black community, now to object if law was used creatively for the opposite purpose. "Race law" was not a new idea; it was a familiar tradition, several centuries old.

Another factor worked to advantage in America. That was the peculiar American habit of treating most questions legally – race relations being only one example. Although not a wholly law-abiding society, the United States is a very legalistic one. As De Tocqueville remarked a century and a half ago, "in America all questions eventually become legal questions". So, it really shocked no-one that law should be invoked here too.

One manifestation of this brand of American legalism, and one that proved significant in race relations, is the existence of a written constitution and the power conceded to the courts to nullify "unconstitutional" actions, even legislative enactments. Of greatest importance was the Supreme Court, with its well-established authority. "Political" as that institution may be in the sense that it deals with "political" issues and decides them on "policy" rather than strictly "legal" grounds, what really mattered was that the Court was independent and could do what no popular assembly would and no politically responsible official dared.

Finally, America had what was here an asset: a revolutionary tradition. In its short history, the United States had known several full-fledged upheavals, each ending with a comparatively fresh start: the American Revolution itself, the sudden shift to Jacksonian Democracy, the Civil War, the Decade of Radical Reconstruction, followed by a strong Reaction and Reunion, the Great Depression, followed by Roosevelt's New Deal. The American public is more prepared for radical change and often welcomes with enthusiasm what elsewhere would be rejected as "excessive" and "extreme". So, in America, it was not entirely unrealistic to try a sudden change of direction in race relations.

B. Britain

For the most part, what has been said about the distinctive American background sufficiently implies how Britain differs. But one or two points require explicit emphasis and there are, moreover, some peculiarities of the British situation which are not merely the opposite of the American.

First, a word about the coloured population itself. At the time Britain initially turned to law as an instrument for better race relations in 1965, there were in the country perhaps three quarters of a million "coloured", less than 2% of the total population. Today, there are about twice that many. Then, as now, roughly half were of African stock (mostly from the former British colonies of the Caribbean), the other half Asian (from India, Pakistan, Bangladesh, Sri Lanka, and former British East Africa). Almost all of them are recent immigrants who have, of course, come voluntarily, albeit many with active encouragement from British industry, public and private. While viewed by the host population for some purposes as a single objectionable "alien wedge", the coloureds are in fact many widely differing groups of people, often having nothing in common with each other before their migration to Britain. Besides the total gulf between "Blacks" and "Asians", there are, within the two largest groups, a dozen obvious distinctions,

whether ethnic, cultural, religious, linguistic or of national allegiance. Strangers to each other, some are more strangers here than others, and there are wide differences in their image of Britain, their expectations on arrival, and their intentions.

This disparity of the groups that make up the "coloured" population is one dimension of the British race problem that is wholly unlike the American. And it accounts, at least in part, for the absence of any very effective immigrant voice. But equally important is the subjective view of their "hosts". Surprisingly few British – at least at first – distinguished, or could distinguish, between the immigrants from three continents: the Asian, the African, and the West Indian were all lumped together as "coloureds". The differences between them were less obvious than their common "darkness" and origin as "natives" of former colonies who, only yesterday, were not thought fit to govern themselves. This was no doubt, in large measure, because the dark strangers made a jarring sight – and noise and smell – in a relatively tranquil island whose population, basically homogeneous for centuries, had quite accustomed itself to its own familiar patterns. One does not look too closely at an intruder who can be labelled such at a glance.

In an important sense, then, the coloured in Britain today are "outsiders", so viewed by their "hosts" and, to some extent, so viewing themselves. And, because of their colour, they are not only immediately identifiable as outsiders, but as immigrants from recently emancipated colonies. This very much complicates the British race relations picture. Among other things, it raises issues which cannot seriously arise in America – where blacks are bona fide natives. What have they come for: only to take and give nothing in return? For how long? If they want to be treated like Englishmen, why shouldn't they be expected to shed their foreign ways? Why must we welcome this disagreeable (or simply unfamiliar) horde? Why not close the gates to further entry? Why not encourage them to return whence they came? The existence of these questions affects attitudes and it suggests a dilemma for the law: In Britain, legal intervention does not necessarily mean law for the protection of the coloured minority; it can also mean restrictive immigration law or "repatriation" law, or even "dispersal" law.

Another ingredient of the British approach to race relations is the unique political and legal tradition of the United Kingdom. There are several strands. One of them is as old as the nation. It is the inclination to postpone decisive action in the hope that the problem will somehow solve itself, and, if action be taken, to equivocate, to compromise, to muddle. This distaste for hasty decisions, for radical solutions, for logical conclusions, is apparent in the way the British government eventually acted in race relations. But that it took any action at all when it did was a break with the most fundamental principle of the British political tradition: to do nothing whatever until long after the case for action has been repeatedly made and conceded on all sides. Consider, for instance, the incredibly slow pace of electoral reform, which long resisted the eloquence and ability of such giants as Fox, Grey, Russell, and Brougham.

To this general British reluctance to take novel action in any field, which counsels a great deal of "waiting and seeing", must be added a special hesitancy to use law as an instrument of social reform. The recent experience of the Industrial Relations Act and the debates about statutory price and income control sufficiently illustrate the prevalent unease with the notion that law can, or ought to attempt, to enforce socially desirable conduct, even in matters of paramount public concern. To the British mind, this is an "unnatural" role of the law, whose "real" job is simply to *maintain*, to *protect*, the status quo: to resist, not to initiate, change. This is, with only eccentric exceptions (such as Lord Denning), the philosophy which pervades the British courts. And, in attenuated form, this conservative image of law also dominates Whitehall and Westminster (where lawyers are, of course, prominent).

Whatever breaches have been made in this tradition, it yet finds a strong consensus in abhorrence to intrude law into matters of "private" choice (sexual morality excluded). The Britisher, at all levels, has a strong sense of privacy, which he defines very broadly. He resents inquiries from his government. This applies with perhaps greater force to less neutral questions about his prejudices and his "personal" conduct. All the more, he resists efforts by law or government to *control* his "private" behaviour, which for him includes all the discriminations or "preferences", made in daily life. And so, race relations law, insofar as it goes beyond requiring official neutrality, seems an invasion of privacy.

But the well developed British sense of privacy does not betray weakness or lack of self confidence. On the contrary, the Britisher is uniquely self-assured about his private domain. Delightful as this is, it is not a blessing for race relations, for it allows people to voice their prejudices, including race prejudices, relatively unembarassed, and to act on them, without the restraint of self-doubt or fear of community disapproval. Precisely because these are deemed matters of private right, of individual preference, one is entitled to state one's opinion without apology, to stick to it, and censure is out of place. As it happens, moreover, the British have a strong sense of national identity, born of that unique combination of geography and history which permitted an island, untouched by foreign invasion for a thousand years, to dominate much of the world outside. There is pride and – very unlike America – a feeling of cultural and ethnic continuum. Not surprisingly, what emerges is a sort of pride of race (the Britisher speaks easily of "this island race"). So, when the Britisher gives expression to his personal sense of superiority over strangers, especially dark strangers, he is likely to find a responsive audience. The consequence is that race relations are aggravated by too much "candid" talk which the potentially restraining influence of public disapprobation barely curbs.

It is not all one-sided, however. There are British qualities which tend to insure against the excesses of discrimination once common on the other side of the Atlantic. The Englishman may say what he thinks and act accordingly, but, by and large, he simply cannot bring himself to carry his thought or his actions to the logical extreme of his prejudices. There is a stopping point, summed up in the British expression "fair play". To be sure, the Notting Hill riots of 1958 and the revelations of the extent of discrimination in Britain during the 1960's dispelled some exaggerated claims for British "tolerance" and "fairmindedness". Yet, prevailing opinion – which holds that the coloured immigrant is "inferior", or at least "undesirable" – has never advocated legal inequalities or official segregation, much less resort to violence against him.

Britain enjoys another advantage, as well. It is a political tradition – no doubt much depreciated since the days of Edmund Burke, but still operative – which permits, indeed

expects, members of Parliament and Government Ministers to do "the right thing", notwithstanding, in the event, the voters would not. There are strict limits to this principle, but it has played a significant role in race relations. Thus, while the Immigration legislation of 1962, 1968 and 1971 was the expectable response of Whitehall and Westminster to popular pressure, this certainly does not explain the Race Relations Acts of 1965 and 1968 or the decision to admit the expelled Ugandan Asians in 1972. Those were acts of "statesmanship" as they would be called in America. The point is not only that such measures wholly lacking popular stimulus could be initiated, but that they could be undertaken by a responsible government and a democratic assembly in the name of the people. Of course, such actions cannot be too radical, but – unlike the declarations of the American Supreme Court – they win an easy acquiescence, and they stick.

II. THE FORM AND EXTENT OF LEGAL INTERVENTION

When it comes to legal intervention in race relations, Britain is the child and we must accordingly first look to the American experience – without, for the moment, suggesting any view whether that experiment holds useful lessons for the British. Our sequence is dictated by the fact that, in this, it happened first in the United States.

A. The United States

For a very long time, the function of law with respect to American race relations was simply to assure white dominance over the black population. That was the single direction until 1865. For a brief decade thereafter, there was the radical effort of Reconstruction, an almost unparallelled experiment in which law, supported by the sword, and often without popular support, attempted a total revolution in race relations. The United States Constitution was three times amended (with doubtful coerced votes in some States) on behalf of the former black slave, massive federal legislation was enacted, the courts made sweeping edicts, and, where necessary, military force was applied.

Whether the bold venture might have fully succeeded in time is difficult to say, for it was deliberately abandoned. All the agencies of the federal government, including the Executive, the courts and the Congress itself, very quickly withdrew from the task. This is not the place to probe the causes of the reaction. But among the apparent lessons of the experiment are two which have relevance today: that an extraordinary revolution in race relations can be made and enforced by government when it expends its full powers and resources on the effort; and that, with appalling haste, a return to the *status quo ante* can result when those powers and resources are removed.

At all events, what followed was a return to total white dominance with an increasing exclusion of the black man from any participation in the control of his destiny. There is no need to recall the quick disfranchisement of the Negro, his intimidation through every means, including lynchings, and the seemingly unstoppable pace of deepening segregation, which eventually reached hospitals, courtrooms, even asylums for the blind and cemeteries. The popular momentum which carried State governments to these lengths and encouraged the national President and Legislature to turn a blind eye is perhaps not too difficult to understand. What is more surprising – and more worrying – is that the Supreme Court of the United States, at a time when it enjoyed enormous force and might have stood effectively independent of these pressures, joined the chorus. It was the Court which took on the task of dismantling the legal structure which had been erected during the Reconstruction decade to protect the Negro.

The new constitutional guarantees were construed so as to deny any revolutionary intent; the bolder federal laws, too plain for misinterpretation, were struck down as unconstitutional. And it was done, not neutrally, but with eloquent enthusiasm:

> It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach, or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business. . . . Where a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favourite of the laws . . .

So said the Supreme Court of the United States in 1883, annulling a federal statute of 1875 which forbade exclusion or segregation of blacks, on the ground of race alone, in public transport, hotels and public places of amusement or entertainment. Note the trick which converts the relation between the operators and paying customers of a large and often corporate business enterprise like the Grand Opera House of New York or the Memphis & Charleston R.R. Company into "social intercourse" between a discriminating "person" and his "guests". This became a favourite "line". A dozen years later, in *Plessy* v. *Ferguson*, the Court was condoning compulsory segregation on railways – and quite casually, in State schools – with the statement that the federal Constitution "could not have been intended . . . . to enforce social, as distinguished from political equality . . . .", indeed "cannot put upon the same plane" two races "if one . . . . be inferior to the other socially", since, after all, "legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation". And the echoes of that argument could be heard less than a decade ago in the United States and in Britain.

What is remarkable is not that the claim for exemption from constitutional compulsion in the name of "liberty" or "privacy" should have been made, or for so long succeeded. The truly extraordinary thing is that, almost from the beginning – at least from *Plessy* v. *Ferguson* in 1896 – this apparent deference to the individual's right to indulge in private "social" discrimination was put forward not only to annul federal interference with segregation practices, but also to sustain State legislation which compelled even unwilling white people to follow that pattern. Whereas one would have supposed the Court was holding discrimination in what it labelled "social relations" a matter of private discretion outside the proper reach of governmental regulation, most of the cases in fact upheld State statutes forbidding consenting adults to enter into an interracial marriage or dicta-

ting segregation in public transport, education (public and private), and impliedly, all other activities, regardless of what any of the participants might prefer.

In other areas, where there was no possible argument for condoning racism as an expression of private preference, the Court simply resorted to shabby jurisprudential devices to avoid intervention. Lynching was held beyond federal power to deal with, as was most violence aimed at teaching the black man "his place". Perhaps typical of the sort of decision that the Court was making at the turn of the century is *Giles* v. *Harris*, vintage 1903. In that case, that otherwise great judge, Mr. Justice Holmes, ruled that the Court could not help a black man to enjoy the right to vote in Alabama because, if he succeeded in annulling the State voting statute which discriminated against him, there would remain no law under which he might qualify to vote!

Thus, the Supreme Court actively promoted racial discrimination in all non-governmental activities, lending it the highest legal authority and unimpeachable respectability. And, for the rest, the plain injustices of State governments were granted total insulation from federal legal intervention. In the process, the Court not only tied its own hands for the future but also disabled (and therefore excused) the federal Congress from attempting any new remedial measures. So that, for some decades, it seemed that the entire paraphernalia of federal law was neutered, the Constitution, as now construed, commanding abstention and forbidding intervention.

In this predicament, it is almost surprising that any turnabout occurred at all. For a change in the law of race relations – if change there was to be – had to come from the most guilty of the three branches of government and the one which had locked the door and held the key, the Supreme Court, traditionally an institution composed of relatively old and conservative minds whose professional outlook was to look backward to precedent. It remains one of the most remarkable facts of recent American history that the second revolution in race relations was led and, for some time, sustained by the Court alone.

It would be wrong to suppose, however, that an abrupt break with the past suddenly occurred one day in 1954 when the American Supreme Court handed down its decision in the *School Desegregation Cases*. That was a practical turning point – for reasons not entirely easy to assess – but the ground had been prepared, almost imperceptibly, for some decades. In rather unpredictable fits and starts, the Court began to recant some of its worst work as early as 1915. In that year, the Court, lead by a Chief Justice from Louisiana (of all places) outlawed the so-called "voting grandfather clause", a transparent device for excluding blacks from the vote which confined the franchise to those whose ascendants had been eligible to vote in 1866 when only whites could. For the next four decades, the Court continued to annull the crudest legal barriers erected in the Southern States against Negro suffrage, especially the white primary. To be sure, the pace was very leisurely and the immediate impact of the decisions was negligible. But, at least in the fundamental area of voting rights, a new direction had been found and a momentum gradually gained force.

Nor was the Supreme Court's contribution entirely confined to the right to vote. There was a beginning toward dismantling the enormous legal structure of segregation. Indeed, the Court issued a startling decision in 1917 striking down in the name of the Constitution local zoning ordinances which prohibited racially mixed residential areas. Significantly, the case was brought by a white man who challenged the law that prevented him from selling his house in a "white" street to a black man and the Court's ruling vindicated his "freedom of contract", not Negro rights. Again, the practical effect of the decision was negligible, but at least the validity of *legally* enforced segregation was now open to question. And, very gradually, the Court condemned the most extravagant forms of race discrimination: the shocking double standard for criminal justice in the South, refusal of trade unions to represent black workers, exclusion of blacks from rail dining cars, State Court enforcement of private racially restrictive covenants, exclusion of blacks from graduate education.

No doubt because the Court's rulings came so occasionnally, were so easily circumvented, and affected the pervasive pattern of discrimination so little, they passed almost unnoticed in the general community, white as well as black. But they are not without importance and were probably an indispensable prelude to what followed. For these decisions did encourage a few, on both sides of the colour line, to take on and sustain the struggle for equal rights and they committed the Court itself, marking out a path which inexorably lead to the dramatic innovations of the late '50's and the '60's. It may be doubted whether even the American Supreme Court would have had the courage of its new convictions if, to some extent, the way had not been slowly charted in the preceding decades.

Nevertheless, the desegregation decisions of 1954 and 1955 created an electric shock in the country. The reaction in the white South was doubtless more violent than the Court and the federal government (which had encouraged the decision) had imagined in their worst nightmares, and the effect on the black community, suddenly awakened out of its despair and apathy, was more dramatic than black leaders had dared hope in their wildest dreams. Eldridge Cleaver (writing ten years later) has described the event from the black point of view:

> Prior to 1954 we lived in an atmosphere of novocain. . . . The 1954 U.S. Supreme Court decision in the case of *Brown* v. *Board of Education*, demolishing the principle of segregation of the races in public education and striking at the very root of the practice of segregation generally, was a major surgical operation performed by nine men in black robes, . . . without benefit of any anaesthetic except God and the Constitution, in a land where God is dead and the Constitution has been in a coma for 180 years . . .

The reaction of the white Southerner was equally strong. For a brief moment, responsible people, especially the school officials immediately concerned, seemed ready to acquiesce in the inevitable, anxious to make the best of a bad bargain. But, very soon, anger was the prevalent mood. And it was encouraged by the most prominent officials from the area, including one hundred Members of Congress, a former Justice of the federal Supreme Court, Governors and lesser State officers, legislative, executive and judicial. The Supreme Court was castigated for "usurpation", "tyranny" and, most effective while the "Red scare" was still alive, the Court was said to be pushed by the Communist-infiltrated National Association for the Advancement of Coloured People and misled by communist sociologists. A programme of evasion and defiance was openly advocated. Because the Court had expressly allowed a "period of transition" before its decree must be obeyed, the South had time to prepare its defence. It did so, with an incredible maze of laws to circumvent the new rule, with

a massive effort of propaganda, oral and written, in which public figures, academics, scientists, even religious leaders, were enlisted in the battle to maintain "the Southern way of life", and finally, with public force and private violence, against any attempt by blacks to enjoy their rights.

For a long time it was not clear how the conflict would end. Many whites in the South believed they would win. There was reason to doubt how long the N.A.A.C.P. could survive the assaults against it, how long the black community could suffer its members, especially its children, to be used as a battering ram against the gates that would not yield. The moderates were now silenced and "defeatism" was drowned in the patriotic enthusiasm of Massive Resistance. And Southerners were emboldened by the hesitations of the federal courts and federal officials. The confrontation in Little Rock, Arkansas, in which a reluctant President ultimately sent armed troops to escort nine black children into a formerly white school, and the Supreme Court unanimously refused a plea for delay, seemed to settle the matter. But it did not. Much of the white South, far from capitulating, prepared for war. Two years later, the colour line remained wholly unbroken in the Deep South. Even the truly remarkable perseverance and disciplined restraint of the black movement, symbolized by Martin Luther King's programme of "direct", but non-violent, action, did not immediately carry the tide. Public opinion was briefly swayed by the extraordinary spectacle of the sit-ins, swim-ins, pray-ins, "freedom rides" and voter registration drives of 1960 and 1961. But, too often, the only immediate consequence was massive arrest and the white Nation became weary of the show and lost its sympathy for the "trouble makers". As late as 1962 and 1963, it took federal force summoned by Presidential proclamation against the State Governor to admit a single Negro to the University of Mississippi and two to the University of Alabama. Only in mid-1963 – almost a decade after the Supreme Court's decision, with practical implementation barely begun – did it become clear that the South would lose its battle.

The events of 1963 made the difference. Partly, it was the cruel and stupid reaction of Southern diehards – the police dogs and bullwhips and fire hoses brought out against blacks, including women and children, in Birmingham, Alabama; the killing of four girls in a church bombing in that city; the murder of Medgar Evers in Mississippi – that made it impossible to longer stand by. The American image reflected abroad by these events was embarrassing and the conscience of the Nation at home at last required action. And so, for the first time, the President of the United States took a strong hand; at long last, he was going beyond enforcing the Court's decrees, right or wrong, in the name of law and order. He was declaring racial discrimination immoral and contrary to national policy. And he announced legislation to carry out that programme. What was critical was the public involvement of the two popular branches of government, the Executive and the Legislative, in the cause of Negro civil rights. For the Court could not carry the burden alone much longer.

The President and the national Congress, to be sure, had made gestures earlier. Roosevelt, during the war, had directed that contracts between the government and defence suppliers include a promise that the latter would not practise racial discrimination, and he established a committee to police compliance (the F.E.P.C.). But the committee had no powers and, for the most part, the promise remained unenforced. Even this limited effort ended with the war. In 1948, President Truman, at the recommendation of a special committee he had established a year earlier, proposed legislation to deal with the most blatant areas of race discrimination. That came to nothing, however, since the Congress failed to enact the measure. The next year, at the President's directive, a beginning was made toward integrating the armed forces. And, in the following decade, race discrimination in the federal government service generally was gradually eliminated.

The Executive branch contributed very little else until 1963. The involvement of the federal government in "private" civil rights litigation, especially in the Supreme Court, was of some importance. For, almost certainly, the advocacy of the Executive on the side of the black man, and its implied undertaking to enforce an unpopular decision, influenced the Court. One may doubt, for instance, whether the Supreme Court would have rendered its dramatic judgment on school desegregation in 1954 if the government had not committed itself to backing the result. But that involvement, barely known outside legal circles, was somewhat remote. To the general public, it would not have appeared that the President was acting at all.

There was, to be sure, more visible involvement when President Eisenhower was persuaded to use troops in 1957 to enforce a school desegregation order at Little Rock, and again when President Kennedy acted similarly to secure the admission of James Meredith to the University of Mississippi in 1962. Yet, on both occasions, the President went out of his way to make clear that he was merely upholding "the rule of law" by enforcing a court decree, and not pledging the Presidency to the cause of racial equality. That commitment did not come until 1963.

As for the Congress, there had been no legislation whatever until 1957. In that year, the first "civil rights act" since 1875 was passed. That break in the long silence of the legislative branch was itself significant. But there was little substance to the measure actually enacted, the strongest provision of which merely authorized the government to initiate judicial proceedings to enjoin interference with voting in federal elections. Nor was the Civil Rights Act of 1960 very far reaching. Again, the law dealt only with the basic right to vote – and in elections for federal officers only. Voting records were henceforth required to be kept, the courts were now authorised to appoint officers to help them, and suits would be maintainable against any offending State (instead of against individual officials only). The first comprehensive equal rights legislation did not come until 1964.

As already noted, the turning point came during 1963 and 1964 when a series of dramatic events – violence against blacks and their supporters in Mississippi and Alabama, the peaceful march on Washington during which Martin Luther King shared his "dream" with the Nation, and the assassination of President Kennedy – combined with the huge persistence of the black population to goad the white community beyond mere tokenism. The culmination was President Johnson intoning "We shall overcome" to a joint session of the Congress and pleading, in the name of his fallen predecessor, for enactment of a strong anti-discrimination bill. When the Congress acquiesced and the Civil Rights Act of 1964 became law, it was the first time in a century that the three branches of government had come together to commit the nation's legal resources to defeating *apartheid*.

The Civil Rights Act of 1964

The Civil Rights Act of 1964 was a comprehensive statute, reaching most areas of public life other than housing. The first objective of the law was to end race discrimination in almost all privately owned places of public resort – restaurants, hotels, lunch counters, cinemas, theatres and sports stadiums. Some facilities, like clubs and service establishments unconnected with a hotel and which did not serve food or provide entertainment (*e.g.*, bars, barbershops, retail shops) were exempted. Others were not obviously covered, such as amusement parks and bowling alleys. But the law was nevertheless broadly based and a very expansive judicial construction narrowed the exceptions severely. Nor was enforcement slow. While the task was assigned to the civil courts, authorized only to issue injunctions, both legally-aided private actions and government suits were provided for and quickly invoked. And the Supreme Court soon found a way to authorize criminal prosecutions in the case of outside trouble-makers seeking to defeat compliance with the law. The combined pressures of litigation – much of it initiated by the federal Attorney-General – and impatient court rulings made short work of those few operators who did not find it in their self-interest to obey.

After dealing with privately owned placed of public resort, the Act turned to publicly operated facilities, such as parks, libraries, hospitals and schools. Private lawsuits were of course already available. So, what the law did was to contribute governmental intervention. The first approach was simply to authorize the Attorney General to initiate litigation. That invitation was quickly taken up and, before long, hundreds of actions – some of them against all schools within an entire State at once – were started or supported by the federal government. Despite too many hesitations and occasional retreats, the effort achieved measurable success, even in the most difficult area of school desegregation. For what was achieved, credit belongs equally to the tireless perseverance of the Legal Defence Fund of the N.A.A.C.P. and the Civil Rights Division of the Department of Justice and to the courageous and inventive decisions of the best federal judges, who did not hesitate, when necessary, effectively to direct and supervise the details of school administration, from the assignment and transportation of students to the allocation of teachers among various schools.

The second – and potentially most effective – assault on segregated facilities operated by local authorities was a provision which required all those receiving federal monies to comply. Since most local schools, universities and hospitals, as well as many other facilities, depend importantly on federal funds, this approach through the power of the purse seemed promising. And, indeed, for some time, the programme was very effective. Here, however, there were always difficulties: political pressures could delay, even prevent, actual implementation of a decision to cut off further funds, and, at all events, such a radical remedy immediately prejudicing children or patients, could not be lightly taken. Thus, it became increasingly important that courts remain free, at the end of the day, to issue mandatory orders.

Finally, the 1964 Act addressed itself to job discrimination. All implementation was delayed for a year and full coverage (never reaching enterprises with less than 25 employees) was not to take effect until mid-1968. Moreover, in this one area, an administrative commission was established and it was denied power to issue its own binding orders. This unusually hesitant approach has been regarded as a serious error, and increased authority has since been given to the Commission.

Even at the start of its work, however, the Equal Employment Opportunities Commission was far better situated than the British Race Relations Board. It could compel the attendance of witnesses and the production of documents; it could require records to be kept and reports to be made, irrespective of any charge of discrimination; and it could conduct unprompted investigations on its own. What is more, the Commission never held a monopoly of the field. A complainant could pursue his case in the courts if the Commission failed to do so, or he could by-pass the Commission altogether and ask the Attorney General to initiate litigation directly. Also important has been the attitude of the courts, whether applied to by the Attorney General or the Commission. Far from being niggardly in their interpretation of the statute, they have often required elimination of hiring or promotion rules, which, however neutrally applied today, have the practical consequence of carrying forward the effects of past discriminatory practices. And the ultimate decrees have not been limited to prohibiting future discrimination: orders requiring hiring or reinstatement or promotion of employees, or awarding back pay, are common.

The Voting Rights Act of 1965

For some years before 1965, the federal government had concentrated extraordinary efforts to restore the right to vote to the black man in the South. Countless lawsuits had been brought to strike down all the devices invoked to prevent equality of the franchise and draconian decrees had been granted. Nevertheless, little progress was recorded until the Congress was persuaded to enact a most radical piece of legislation in 1965.

The scheme of the law was original. It simply declared inoperative all local requirements for voting – however inocuous on their face – which had been and could be used to prevent the Negro from casting his ballot, in all those areas where blacks were seriously underrepresented on the voting lists. And, for good measure, it forbade the enactment of any new voting requirement until the Attorney General or a federal court in Washington had declared it harmless. Finally, to enforce the new regime, the statute authorized the federal government to appoint its own officials to register black voters and to police the polling stations. This very strong medicine, vigorously implemented by the government, and creatively applied by the courts (which independently struck down the poll tax, discriminatory apportionment schemes, excessive residency prerequisites for voting, and onerous qualifications for candidates), has unreservedly succeeded.

The Civil Rights Act of 1968

Discrimination in private housing – both rentals and sales – remained almost untouched by law until, after the assassination of Martin Luther King, Congress was finally moved to enact the Civil Rights Act of 1968. The new law had its flaws: a delayed scheme for implementation; a number of exemptions (for small boarding houses, for private sales without a broker); a limitation to dwellings, ignoring business premises. What is worse, primary enforcement responsibility was assigned to an executive department sub-

ject to political control and without coercive powers. Fortunately, however, both the victim and the Attorney General are free to apply directly to the courts. So far, that has been the most successful procedure, especially in the light of a Supreme Court decision resurrecting a musty statute of 1866 which has been construed as authorizing both damage and injunctive actions in any case of property discrimination.

Affirmative Action
by Julian R. Friedman and Bradford Cooke

Currently "affirmative action" is the prevailing programmatic strategy in the struggle for racial equality. It is very much alive, having survived in principle and practice despite influential opposition and particularly the *Bakke* decision – a decision of the United States Supreme Court to be summarized subsequently, that allows "affirmative action" but checks vigorous implementation along certain lines. An exposed but resistant target, it is under fire from several quarters.

Three and one-half decades of "equal opportunity", a decade of black militancy, and a thrust of "benign neglect" paved the way for the positive approach of "affirmative action". The "equal opportunity" era saw discriminatory laws lose validity and education, employment, housing, sports, politics, professions, and service in the armed forces previously denied to minorities (especially blacks) open gradually and selectively. Equality of opportunity was one thing, with new frontiers for qualified individuals; substantive equality for entire minorities quite another. In any case economic, social, and political inequality throughout the nation as a whole left equal opportunity a dead letter for many. *De jure* segregation crumbled, but *de facto* segregation, as well as discrimination and bias, remained evident in daily life. Against a background of two hundred years of slavery, impoverishment, Indian and Mexican wars, and low status of minorities, gains were made – but there remained clear indications of tokenism that left blacks and others very dissatisfied.

The reaction was black militancy and radicalism. The 1960s witnessed energetic attempts to mobilize black power. Violence flared up frequently, a direct consequence of sheer disappointment and deep frustration. Newark, Harlem, Detroit, and Watts are indelible stains on American history. The non-violent protestors pursued another course only to find tense confrontations steeped in the emotions and a rash of violence. Eventually community action and other programmes supported by the Federal Government drew several minority leaders back from the precipice, taking the edge off widespread hopelessness and powerlessness.

By the late sixties and early seventies improvement in the conditions and quality of life of the black elite and middle class elicited from White House aide (and now Senator) Daniel P. Moynihan his controversial and provocative "benign neglect" reply to the question "what next for minorities?". He perceived blacks moving into the mainstreams of American life. For them the time had come to jettison public crutches for competition in the marketplace and for the rest to look to the filter-down process for their livelihood and welfare. Beleaguered over Indo-china and caught in a tornado over school bussing, the Federal Government in the seventies took up a "big stick" in executing Title VII of the Civil Rights Act of 1964, "a clear statement of national will to end unfair treatment of minorities and women in the job market." (United States Civil Rights Commission, *Statement on Affirmative Action*, Clearinghouse Publication No. 54, Washington, D.C. Government Printing Office, 1977.) Among its civil rights measures, it leaned heavily on "affirmative action" guidelines mandating relevant programs in educational institutions and public and private employment, "beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future." It sought to break through walls of resistance and apathy, increasing the number of minorities in career tracks in proportion to their numbers in the population, beyond tokenism.

In pursuit of the "affirmative action" strategy, universities and corporations, for example, have created administrative staffs assigned specifically to such tasks and to act with commitment, deliberateness, and without procrastination. Guidelines stress the importance of disseminating precise information about appointments and jobs among minorities with step by step monitoring of the recruitment and selection process in a manner that virtually provides minority candidates with an advocate or ombudsman to protect their interests, if not rights. Aggressively but inconsistently the Federal Government puts its muscle behind them, threatening to withhold grants from academic communities and contracts from corporations that fail to mount and carry through "affirmative action" programmes.

While the strategy to eliminate discrimination on the labour market has undoubtedly had constructive results, it has also, as in the case of most remedial endeavours, produced unintended victims. In tight economic and institutional situations, the effect corresponds to the consequences of a zero-sum game, and a division between winners and losers. A minority person, chosen as a beneficiary of such a program, appears to enjoy preferential treatment. When that occurs at the expense of a white, sparks are bound to fly. At one level feelings run high in work units and unions, reducing support for these ameliorative measures. At another, victims have sought to vindicate their own fundamental rights through litigation. Thus, in the past eight years, the constitutionality, as well as the morality of "affirmative action" has come under close scrutiny.

At the School of Law of the University of Washington minority persons gained admission under a complex evaluation and points scheme. Mr. DeFunis, a white applicant who was rejected one year, ascertained that persons less qualified then himself had been admitted. Unsuccessfully he challenged the University, seeking to reverse the decision on his application *(DeFunis v. Odegaard*, 82 Wash. 2nd 11, 507 P. 2nd 1169 (1973).) His suit reached the United States Supreme Court amidst growing uneasiness about the implications only to be vacated as moot on the ground that he had already found practical remedies, namely, admission to the law school at a later date *(DeFunis v Odegaard*, 416 U. S. 312 (1974)). On this occasion no judgment was delivered on the validity, merits or other dimensions of "affirmative action", which nonetheless commenced to acquire a notorious name of "reverse discrimination".

From *DeFunis* to *Bakke* covered a considerable psychological and judicial distance. The University of California

got into the legal quagmire more deeply than its peer institution to the north. Under the "affirmative action" programme at the Davis campus, a special admissions policy sanctioned the allocation of sixteen of one hundred places to socially and economically disadvantaged or deprived persons. This commitment resulted in a quota, based on "race," in practice for minority persons only. None of these places had ever gone to a white applicant in the brief tenure of the policy. It was clearly understood that under this policy the University was to train physicians who would be expected to work among their own people and, by virtue of their background would have the appropriate empathy for effective understanding and communications. No doubt Watts was in everyone's mind.

Mr. Bakke, a white applicant for admission to the medical school at Davis, experienced rejection on two occasions. His situation he concluded came about from the reservation of the sixteen places for racial minorities – hence denying him access to this public, state supported institution mainly because he was white. Legal action followed in the California court, Bakke charging the University with discrimination in violation of his rights under the Equal Protection clause of the Fourteenth Amendment ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."), California Constitution, and Title VI, United States Code. Litigation in California turned out in his favor, and the State Supreme Court ordered the University to admit Mr. Bakke to the medical school in Davis.

On 28 June 1978, after the presentation of oral arguments and briefs during the previous ten months, the United States Supreme Court, to which august body the University of California had carried the case on appeal, upheld the decision of the California Supreme Court in a 5-4 "split decision". There were sharply differing viewpoints of the law among the Supreme Court justices, none fully receiving the endorsement of a clear majority. The Court did very little to clarify the law governing "affirmative action" programmes, leaving this critical area of public policy in a state of legal cloudiness. Both sides (public opinion divided in support of opposing adversaries) claimed victory, but in fact the decision may have slight utility when it comes to additional "affirmative action" cases. What seems very clear is that equal protection is no simple matter in application.

It can be inferred from the *Bakke* decision (and the several opinions of the Justices) that the "affirmative action" strategy is by no means in fundamental conflict with the Constitution and Federal statutes. On balance the law is supportive rather than destructive. Public and private agencies may continue to combat racial equality, but the ends cannot simply justify and engender the use of any means. The factor of "race" has its uses if necessity and prudence are shown but, in recruitment or selection processes, cannot by itself be the final authority, even for remedies leading to constitutionally valid goals. To do so may be discriminatory and hence prohibited under the Equal Protection clause. At the same time it can also be inferred from the *Bakke* decision, as well as other decisions, that the factor of race may be joined with other lawful criteria when it comes to the admission of students into a university, for example, to achieve a highly diversified student body. Hence, minority persons may be chosen in preference to whites in such instances, attaining indirectly the goals of "affirmative action". There is room for circumspect experimentation in this sensitive area, but presumably no public agency may or should cater exclusively to any one race.

In the litigation the University of California defended its "affirmative action" programme as a "compelling state interest". That is to say, California contended that the state has overriding and critical concern in professional education for the purpose of providing minority physicians to render services to the population of the state. Apparently the judges in the California court and justices on the Supreme Court weighed this contention but refused to accept it outright in the existing circumstances as an excuse for any departure from the Fourteenth Amendment or for clothing the actual practices at Davis with legality. The courts appeared to be of the opinion California had not exhausted its options. Alternatives with the limits of the law could be employed and still meet the "affirmative action" guidelines.

Meanwhile, the Supreme Court has agreed to review a decision in which an employer, with no proven history of racial discrimination, was ordered not to give special job preference to minority workers.

Brian Weber, a Kaiser aluminium plant worker in Gramercy, La., complained of "reverse discrimination" four years ago when he was bypassed for an in-plant craft training programme which called for 50 percent black and female participation.

The U.S. District Court in New Orleans and the 5th U.S. Circuit Court of Appeals said the programme was not legal because there was no proof of past discrimination at the plant. (*Civil Rights Update*, United States Civil Rights Commission on Civil Rights, January 1979). Some people consider this case could be the "Bakke" case for industry. Obviously there is considerable uncertainty just which strategy and methods are constitutional and legal in the endeavour to ensure equality for all, assuming that there can be a general understanding or consistent operational definition of the phrase "equality". Where equality begins for one person and ends for another is no easy puzzle to solve. Affirmative action practices that entail "reverse discrimination" in employment training programs are due for further scrutiny and adjudication in state and Federal courts shortly.

To date litigation has had little impact in delaying or weakening "affirmative action". It may in the near furture. These legal issues may never be resolved as the Fourteenth Amendment has a fascinating history of protection for both majority and minority persons. Where much of the problem lies is in the need for imaginative programmes and in the even greater need for determination of the public to rid the society of racial discrimination in all its forms and manifestations.

B. Britain

We have already noted that law explicitly concerned itself with race relations in Britain less than a decade ago. The fundamental reason is that, until the mid-1950's, the col-

oured population of the British Isles was so small, and for the most part so securely placed or so well-behaved, that one could not see any serious present or future "race problem". Then relatively large numbers of coloureds began arriving – mainly from the former British West Indies and from the Indian subcontinent. In 1958, there were race riots in Notting Hill, which shocked those who believed English tolerance would overcome any underlying prejudice. This was a signpost. But more important was the general alarm over the sharply increasing coloured immigration during 1961. The public mood seemed to require that something be done to quiet apprehension.

And so the government responded in 1962, not with anti-discrimination legislation, but with an immigration barrier to halt the "flood". No doubt, the dimensions of this influx of dark faces was grossly exaggerated in some quarters, and it is probable that the agitation for erecting a barrier increased the inward flow, many believing that they must get in before the gates were shut. But the fact remains that Britain was faced with a unique situation: a relatively small island, with a fairly high density of population, 99% pure white British, offering unrestricted entry to potential millions of black and brown and yellow who, whether citizens of independent nations or not, were entitled to come to the motherland because they were also Commonwealth citizens. However unreal, the prospect was too frightening to be endured indefinitely.

The new immigration law was not openly racist. Indeed, except for the Irish, it subjected to control every potential immigrant from the Commonwealth, white or coloured, who was not born in Britain or who did not hold a United Kingdom passport. But it was plain that the purpose of the legislation was to curtail coloured immigration. The law was not draconian, however. Admission was subjected to governmental control through a "work voucher" system, and the faucet could be turned on or off as circumstances suggested. Of course, those who had already entered could stay on, and, significantly, their dependants could join them.

Race Relations Act, 1965

Optimists had hoped that once the fear of an unchecked flood of coloured immigrants had been set at rest by the 1962 legislation, race relations would improve. But it was not to be. By 1964 the coloured population of Britain was about three-quarters of a million, and the existence of substantial discrimination was impossible to deny. Now the government acted – very promptly by American standards, precipitously according to British tradition, but very timidly as well. The first government-sponsored anti-discrimination law was proposed, and it was enacted as the Race Relations Act, 1965.

All things considered, it was surprising that any such legislation was proposed, much less enacted. Certainly government had not been prodded by the judiciary, as in the United States. Nor was it consistent with the orthodox British political tradition to resort so quickly to legislation to deal with a problem which, to many, did not appear very aggravated. Indeed, the pressure for the law was slight: there had been no organized demonstrations, marches, nor sit-ins, much less any obvious threat of violence. And, finally, it was very much against the grain to interfere by law in this delicate area of private preferences. But, if the conservative tradition was overridden, it was in a very limited way. The first race law was not a bold measure.

The 1965 Act covered three areas: "places of public resort", the transfer of tenancies, and incitement to racial hatred. The last provision enacted a sort of group defamation law, with criminal sanctions – which has no counterpart in the United States. There have been a few prosecutions under the law, two of them against Black Power leaders. While the provision is credited with curbing the most virulent racist outpourings, it has probably done more harm than good to race relations, if only because, on the coloured side, it is seen – whatever the truth – as an effort to muzzle outspoken critics of the status quo and because it has never been invoked against the public statements of Mr. Enoch Powell.

The main thrust of the Race Relations Act of 1965, however, is to be found in the first section, dealing with places of public resort. Although this provision was entirely repealed and supplanted by the far broader 1968 Act, it remains of interest because of the unusual enforcement procedures selected and because, as a starting point, it reveals the very different situation in Britain.

Because Britain, unlike America, had no discriminatory legal structure to dismantle, it was not necessary to begin by passing legislation enforcing the right to vote, the right to equal justice, the right to the same public education. So one could focus immediately on private discrimination. Looking only to that problem, it was natural to first tackle public places and public transport: discrimination in this area was the most obvious offense and the easiest to remedy – albeit, in the end, it may have mattered less than unequal opportunities in obtaining housing and jobs.

While the 1965 law – besides the transfer of tenancies – reached only "places of public resort", that coverage was comprehensive – more so than the American law of 1964 on which it was modelled. Unembarrassed by considerations of federalism, the British law reached all establishments generally open to the public without exception, whether they provided lodging, food, entertainment, or recreation. And, significantly, bars and pubs were not omitted as they are in American law unless food is served. Finally, for good measure, all governmentally operated public accommodations were brought under the law.

Less straightforward, however, was the enforcement scheme. Initially, the government bill provided criminal penalties only – a modest fine not to exceed one hundred pounds. But an unlikely coalition of progressive reformers and reluctant Conservatives succeeded in changing the remedy. For different reasons, both advocated conciliation rather than punishment or even coercion. One Conservative front bencher probably spoke for most of his countrymen when he deplored the attempt "to import the taint of criminality into this aspect of our affairs". The result was probably the most reluctant enforcement mechanism that could be devised by the mind of man.

A Race Relations Board with local "conciliation" committees was created as the exclusive agency to deal with claims of discrimination. No investigation could proceed unless an aggrieved individual complained in writing. And, then, neither the Board nor its committees had any compulsive powers, whether to summon witnesses, subpoena documents, require answers to interrogatories, or issue orders. They were simply to "use their best endeavours . . . to secure a settlement of any differences" between "the parties concerned". If these efforts failed and the Board was persuaded that the charged violation had not only occurred, but that it amounted to a "course of conduct" – presum-

ably what American law calls a "pattern or practice" – and that it was likely to continue, it would report the matter to the Attorney General. He, in turn, was authorized, if he thought fit, to institute judicial proceedings. In the end, if the court was satisfied that the defendant was engaging in a discriminatory practice and would persist unless enjoined, it might issue a "don't do it again" injunction – nothing more.

Thus, the philosophy of the law was to resolve claims of discrimination – in the area of public transport and public accommodations – by amicable persuasion, not coercion. The issue would not surface at all unless the victim made formal complaint. If he deemed that worthwhile – albeit he would never receive damages – he must address himself to the appropriate "conciliation committee". The victim could not go to court, or to the Attorney General, or even to the Race Relations Board. Indeed, the courts were so well screened against such troublesome cases that in three years under the 1965 Act no case ever reached them.

No one is sure how well the Race Relations Act of 1965 worked in its very limited sphere. After all, there had never been segregation in public transport or a firm colour bar in places of public accommodation. While instances of discrimination in pubs continued – and still continue – it seems the law was generally effective – just as Title II of the American Civil Rights Act of 1964 met relatively little resistance. But, more and more, it became clear that massive discrimination was unabated – perhaps it increased – in the critical areas of employment and housing, and also with respect to the provision of services. The law had not altered the prevailing climate of prejudice; it had not educated the public; there were no perceptible secondary effects. A Political and Economic Planning report, published in 1967, revealed the ugly facts with evidence that could not be denied.

Race Relations Act, 1968

The case for a wider ban on discrimination was plain and was made still plainer by two events of 1968. The first was the panic enactment of a new immigration law in response to the sudden exodus of the so-called "Asians" from Kenya – that is, people of Indian descent, originally brought into East Africa by the British, as they had been earlier to the West Indies. For the first time, full-fledged British citizens lost their right to enter Britain unless they, their parents, or grandparents had been born or naturalized within the British Isles. The intended – and transparent – effect was obvious: most white "colonials" would be exempted; most coloured "natives" would be barred. That a Labour government put forward such legislation indicates how strong the colour prejudice at home was.

The other barometer of racism in the country was the emergence of Enoch Powell on the issue in the spring of 1968. Although he was dismissed from the Shadow Cabinet for a notorious speech in April, Mr. Powell was clearly speaking a popular view. He no doubt influenced the public mood. But "Powellism" was a very strong movement only because it revealed the existing feelings of a very substantial part of the British population.

In this climate, while a broader anti-discrimination law was all the more necessary, it remains extraordinary that any law came so quickly. This is not the place to recall the story behind the Race Relations Act of 1968. But it must be said that it emerged in consequence of an extremely well organized campaign by dedicated people, who prepared their case with unparalleled thoroughness and pursued the cause with unflagging zeal. Even so, the successful enactment of the law was a kind of miracle, overriding all the usual obstacles that radical reform encounters in Britain: optimists who believe the problem is being exaggerated and that it will go away in time; pessimists of the Right – numerous and prominent – who believe legislation cannot change human nature; pessimists of the Left – a relatively uninfluential breed – who believe "bourgeois law" cannot affect economic realities; laissez-faire libertarians who believe that law ought not intrude; and conservatives who believe that all sudden change is dangerous, especially when it is ahead of public opinion. The occasions when these attitudes do not neutralise action are very rare in British politics; it is a shame that full advantage of this unusual opportunity was not taken to frame a stronger law.

On the side of coverage, it is true, there was little to fault. Unlike recent American law, the 1968 Act reached all commercial transactions – sales of all goods, whether at retail or wholesale, and the provision of all services, from those of the barber to those of the barrister. Employment was well covered in all aspects, specifically including hiring, firing, promotion, and conditions of work. There was a delayed timetable which, for two years, exempted employers with no more than twenty-five employees – a very large category in Britain – and, for a further two years, exempted employers with no more than ten employees. Two somewhat jarring provisions remained, however: the first exempted the merchant navy, it being deemed impossible to compel white seamen to share sleeping, eating, or sanitary facilities with darker shipmates; the second reversed the American "benign quota" idea by allowing an employer to discriminate against coloured applicants when his object was to establish or preserve a "reasonable" racial "balance".

A separate section of the Act appropriately focused on trade unions and professional associations, barring both discrimination in admission to membership and unequal treatment afterwards. There was also a housing section, which in all essential respects copies the American legislation of the same year – including what is known in the United States as the "Mrs. Murphy's exemption" (somewhat narrower in the British law) and the exemption for private sales or leases transacted without recourse to either advertisement or the services of an estate agent. But the British Act, unlike the American, was not limited to residential accommodations; it also covers the sale and rental of business premises.

Finally, the 1968 law contained a very useful provision which has no counterpart in the United States: a blanket prohibition on racially discriminatory advertisements, regardless of whether the substantive discrimination would be permitted by law. Thus, for instance, a Mrs. Murphy, while free to apply the colour bar, was forbidden to publish her policy, whether by a newspaper notice or a sign in her window.

On the face of it, then, Britain – in two short steps – had apparently overtaken the United States in dealing with race discrimination by legislation. But, alas, all is not what it seems. For when we look at what are labelled the "enforcement" provisions, the new British law was seen to be a very

modest effort. Indeed, while coverage had been very generously expanded, the mechanisms for implementing the 1968 Act were much the same as in the 1965 legislation.

A new body emerged: the Community Relations Commission. But this was not meant to be an agency for enforcing the law: it was, rather, an official liaison committee for co-ordinating voluntary efforts at reducing racial tensions. The job of implementing the law was entirely delegated – some say relegated – to a reconstituted Race Relations Board. This time the Attorney General was omitted – except presumably to defend a government department accused of violating the law – and government, as such, had no role to play. The Board was enlarged, but not its powers. It remained legally impotent; it could require nothing: not that questions be answered, that people appear, that documents be furnished, that reports be submitted, that records be kept.

And, of course, it still could issue no orders. Nor could the victim go anywhere else for redress: he was not to go troubling the courts on his own, or the government either.

The Board itself could invoke the courts. But it was then no more than an ordinary plaintiff: the courts did not enforce the Board's decision, nor even accord special weight to the agency finding of violation. Indeed, the Board was at a disadvantage compared to the private petitioner. It could not apply to the judicial arm until it had first exhausted efforts at amicable conciliation, by which time the victim may well have preferred a compromise or simply withdrawn. And the Board was conscious that its role was to avoid, not encourage, the open confrontation which adversary litigation represents.

Lastly, when finally appealed to, the courts are unusually restricted in this area. The 1968 Act – unlike the earlier legislation – did permit an award of damages, but only actual loss incurred, normally a nominal sum. An injunction against the discriminator was possible only if it was shown that the violation in suit was neither the first nor likely to be the last. Even then, the court could only order the defendant not to do it again; he could not be directed to hire or reinstate the victim of employment discrimination, or to offer the dwelling to the victim of housing discrimination.

This scheme was no accident. It was the deliberate policy of those who framed the Race Relations Act to eschew compulsory enforcement in favour of private cooperation. The hope, of course, was that by using quiet persuasion, one would not risk hardening attitudes, exacerbating prejudice, drawing battle lines. Consciously, the American precedents of enforcement by more drastic weapons – including the bayonet – were avoided. And that remains the view today.

The Immigration Act 1971 came into force in 1973. The pretext for the law was to "rationalize" the existing controls. In fact, the legislation was responding to Powellite pressure to further diminish coloured immigration and encourage "repatriation" of the coloured already in Britain. It was so framed and has been so administered as to do neither. No doubt, the law served its purpose in allaying some fears on the side of the host community. But, unavoidably, it also aggravated race relations by suggesting to coloured residents that their presence was "undesirable" and, at the same time, officially endorsing the view of those in the white community who so believed.

Nothing significant in race relations law was added during the currency of the 1968 Act. A dozen cases – mostly involving peripheral questions – have reached the courts, but the result has been most disappointing. The judiciary cannot be said to have given the 1968 Act a generous interpretation. One promising judgment by Lord Denning in the Court of Appeal – holding many "private" clubs subject to the law – was promptly reversed by the House of Lords. Another ruling – that discrimination on the ground of alienage was barred – suffered the same fate before the House of Lords. Whatever the correctness of these decisions, they teach us to expect no creative expansion of race relations law from the judiciary.

Race Relations Act 1976
by Kuttan Menon

The 1976 Act came into force in June 1977, and superseded the 1965 and 1968 Acts. The 1976 Act was a response to the widespread criticism regarding the deficiencies in the previous enactments. The Race Relations Board and the Community Relations Commission were abolished and merged into the new Commission for Racial Equality (CRE), which has the following duties:- (a) to work towards the elimination of discrimination; (b) to promote equality of opportunity, and good relations between persons of different racial groups generally; and (c) to keep under review the working of the 1976 Act and if necessary, submit proposals to the Home Secretary for amending it.

The CRE no longer has the duty to conciliate and seek a settlement between the parties nor has it the duty to obtain satisfactory written assurances from alleged discriminators against any repetition of their alleged unlawful acts *before* considering whether to commence legal proceedings. Nor does the CRE stand between the complainant and the courts (or tribunals) as the old Board did. Complainants have direct access to courts (or tribunals). However, individual complainants can, if they wish, apply to the Complaints Committee of the CRE for assistance and the Complaints Committee has a very wide discretion in deciding whether to grant such assistance which could include: advice and assistance; representation at tribunal or court proceedings either by the CRE's officers or by outside solicitors and Counsel; and any other form of assistance which the Complaints Committee may consider appropriate.

The 1976 Act introduces a new concept, "indirect discrimination" and deals with victimisation (or as the Americans and Canadians would call it: "retaliation").

For the purposes of the Act, a person discriminates against another if: (a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or (b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but – (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and (iii) which is to the detriment of that other because he cannot comply with it.

Direct discrimination as set out in (a) above follows the terminology in the 1968 Act. "Indirect discrimination" or "discrimination in effect" as set out in (b) above means that it may, in certain circumstances, be discriminatory, e.g., for an employer to insist that employees should speak perfect English, or that they must be at least 6' tall, unless he can prove that such a requirement or condition is job-related and therefore justifiable *irrespective* of the racial origins of applicants. Whether the employer *intended* to discriminate is irrelevant, save that damages in the form of financial compensation are not awarded in cases of indirect discrimination where there is no intent to discriminate on racial grounds.

Under the Act, segregating a person from other persons on racial grounds is less favourable treatment on racial grounds. Therefore, the so-called "separate but equal" provision of services – i.e. separate toilets, separate areas for non-whites in public bars etc. – would be unlawful.

The definition of discrimination also includes victimisation of a person because he has brought proceedings under the Act against an alleged discriminator; or has given evidence or information in connection with any such proceedings commenced either by himself or some other person; or has made allegations that the alleged discriminator has contravened the Act etc. However, the victimisation provisions do not apply if the allegations are false or if they are not made in good faith. In view of the subtler forms of victimisation it would be very difficult to prove "discrimination by victimisation".

The 1976 Act widens the definition of "racial group" to include "nationality". "Racial group" means a group of persons defined by reference to colour, race, nationality or ethnic or national origins and "racial grounds" have a similar meaning.

The provisions of the Act insofar as they affect individual complainants are divided into two broad categories – employment and non-employment. It is unlawful for employers to discriminate both against persons seeking employment and against existing employees. Thus it would be unlawful for an employer to discriminate in recruitment arrangements in the terms on which he offers employment, or to refuse or deliberately omit to offer employment on racial grounds. Similarly, it would be unlawful for employers to discriminate against their employees in the way they are afforded access to opportunities for promotion, transfer or training or to any other benefits; or by dismissing them or subjecting them to any other detriment. The employment provisions also cover contract workers, partnerships (where there are at least six partners), Trade Unions, organisations of employers, qualifying bodies (e.g. Law Society), vocational training bodies, Manpower Services Commission, employment agencies and police recruitment. Exceptions are made for "general occupational qualifications" in dramatic performances or other entertainment where, for purposes of authenticity a particular part requires a member of a particular racial group; similarly, in relation to artists or photographic models or jobs involving work in a place where food or drink is provided to members of the public in a particular setting (e.g. an Indian or Chinese restaurant) for which persons of particular racial groups are required for purposes of authenticity; where the job involves providing persons of a particular racial group with personal services promoting their welfare and those services can most effectively be provided by a person of that racial group.

Complaints in the employment field have to be presented to an Industrial Tribunal within three months of the alleged act (or omission to act) of discrimination. Unlike unfair dismissal cases, the burden is on the complainant to prove discrimination. Where a tribunal finds that a complaint is proved, it may make: (a) an order declaring the rights of the parties in relation to the alleged act of discrimination; (b) award compensation to the complainant – usually, in respect of "injury to feelings" and/or in respect of loss of earnings (the present maximum that tribunals can award is £5,200); (c) a recommendation that the respondent (i.e. the discriminator) take, within a specified period, action aimed at obviating or reducing the adverse affect on the complainant of any act of discrimination – this may be a recommendation to re-engage, or engage. The Tribunal has no power however to order respondents to comply with their recommendations.

In the non-employment field, it is unlawful for bodies in charge of educational establishments to discriminate on racial grounds and for education authorities in the course of carrying out their statutory functions, to discriminate on racial grounds. (Complaints of racial discrimination in public sector education should in the first instance be addressed to the Secretary of State for Education and Science). The non-employment provisions of the Act apply also to the provision of goods, facilities or services to the public – access to and use of any place which members of the public are permitted to enter; accommodation in hotels, boarding houses etc; insurance, banking, grants, loans, credit or finance; education; entertainment, recreation or refreshment; transport or travel; services of any profession or trade; or any local or other public authority; disposal or management of premises; and clubs (having at least 25 members). There are exceptions in relation to small dwellings. Claims of discrimination in non-employment cases are initiated by way of county court proceedings (there are specially designated county courts in England, Wales and in the Sheriff's court in Scotland), which must be commenced within six months of the act (or omission to act) of discrimination (unless the complainant has applied for CRE assistance, when he is given an extra two months). In addition to the usual County Court remedies – injunctions, damages etc. – successful applicants are entitled to ask for damages in respect of "injury to feelings".

Employers are liable for the discriminatory acts of their employees (in the course of their employment) and principals are likewise liable for the discriminatory acts of their agents. In such circumstances, a complainant can proceed against *both* the alleged discriminator and/or his employer or principals. It is also unlawful for a person to knowingly aid another person to do acts of unlawful racial discrimination. The 1976 Act does not apply to discriminatory acts outside Great Britain.

The Act also renders unlawful:- (i) discriminatory practices (i.e. the application of a condition or requirement which in effect results in unlawful discrimination); (ii) discriminatory advertisements (iii) instructions to discriminate and (iv) pressure to discriminate. It would therefore be unlawful for an employer to instruct or pressurize his employees to discriminate on racial grounds. Similarly, it would be unlawful for employers to instruct or pressurize employment

agencies not to send persons who belong to certain racial groups in respect of job vacancies. In relation to these four matters, an *individual* complainant has no right of redress except that he can complain to the CRE which can initiate proceedings against the alleged discriminators, either in the industrial tribunal or county court. In relation to advertisements, there are exceptions mentioned above, but it is *not* permissible to advertise, for instance, "blacks need not apply" in relation to letting accommodation even though the actual letting may be outside the scope of the Act because the premises are a "small dwelling". Similarly, although the 1976 Act does not extend outside Great Britain, it is not permissible to include an advertisement for a job outside Great Britain any indication that it is limited only to persons of certain colour, race, ethnic or national origins (although to meet the very real difficulty that certain categories of jobs in all countries are reserved for their nationals only, some advertisements may indicate that applicants must be of a certain nationality).

The 1976 Act applies to charitable instruments to the extent that such instruments may not limit their benefits to persons of a class defined by reference of their colour, but it appears that it would not be unlawful to limit such benefits to members of a particular nationality or national or ethnic origins.

There are exceptions to the Act; for instance, it is permissible to limit membership of clubs or associations to persons of a particular nationality or national or ethnic origins in order to promote the cultural and social activities of that particular national or ethnic group. It is therefore permissible for a club to restrict its membership to French nationals, but it is not permissible for such a club to exclude black French nationals. Acts affording persons of a particular racial group access to facilities or services to meet the special needs of persons of that group in regard to their education, training or welfare are also excepted as is the provision of training designed to enable persons of a particular disadvantaged racial group to compete on equal terms with others in relation to employment. National representative sports teams may restrict membership to persons by reference to their place of birth or nationality, but not by colour. Acts done under statutory authority and acts safeguarding national security, are excepted, effectively putting the U.K. Immigration Acts outside the ambit of the 1976 Act. Similarly, the discriminatory fees charged of overseas students is outside the scope of the Act. "National security" reasons are of course advanced to deny civil service jobs in sensitive areas such as Foreign Office or the Ministry of Defence to aliens.

The 1976 Act gives the CRE general investigatory and enforcement powers, including the powers to conduct formal investigations, issue sub-poenas for witnesses and documents, and issue non-discrimination notices. All these powers are subject to strict judicial scrutiny, and persons against whom such orders are issued have the right of appeal to the courts, and/or tribunals, within specified time limits.

Either in the course of, or at the end of, the formal investigations, the CRE can make to the persons or organisations investigated such recommendations as are likely to promote equality of opportunity between persons of different racial groups or recommend changes in the organisation's policies or procedures, e.g., in recruitment.

At the end of the formal investigations, CRE must prepare a formal report to be made available for inspection by members of the public or by publication. If, in the course of a formal investigation, the CRE are satisfied that a person is committing or has committed an unlawful discriminatory act, the CRE may serve on that person a "non-discrimination notice" requiring him not to commit such acts and, where necessary, to change his practices or arrangements so that he does not commit such acts, and inform the CRE that he has affected such changes and taken such other steps as are required by the notice. There is a right to appeal, either to an industrial tribunal or county court, but if an appeal is dismissed, or there is no appeal, the notice becomes final. The CRE has powers to monitor the compliance of the terms of non-discrimination notices and take appropriate action in relation to non-compliance. The CRE has a duty to establish a public register of non-discrimination notices which have become final.

Apart from the above functions, the CRE's functions include giving financial or other assistance to organisations concerned with the promotion of good relations between persons of different racial groups, undertaking research or educational activities or helping others (financially or otherwise) in such research and educational activities. The preparation of Annual Reports and issuing a Code of Practice containing guidance for the elimination of discrimination in the employment field and for promoting equality of opportunity in employment are also among the duties.

The Act also has what is known as the "RR65 Questionnaire procedure". This questionnaire is in statutory form, and aggrieved persons can include the substance of their complaint in the questionnaire and serve it on the alleged discriminator, adding other questions designed to elicit information which might help him to decide whether there has in fact been discrimination. The alleged discriminator is not under a legal duty to reply, but his failure to do so can be drawn to the attention of the tribunal or county court, which may draw adverse inferences.

The 1976 Act also introduces a new section into the Public Order Act 1936 to deal with "incitement to racial hatred". It is an offence for a person to publish or distribute written matter which is threatening, abusive or insulting; or to use in any public place or at any public meeting words which are threatening, abusive or insulting – in a case where, having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question. There are the usual exceptions concerning accurate reports or Parliamentary or court proceedings. The absence of any "intent" is noteworthy. It is a defence for the defendant to prove that he was not aware of the content of the written matter in question and neither suspected nor had reason to suspect if of being threatening, abusive or insulting. Prosecutions can only be commenced with the consent of the Attorney-General.

Local authorities are under a duty to make appropriate arrangements in such a way that in carrying out their various functions they pay due regard to the need to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups.

III. THE EFFECT OF LEGAL INTERVENTION

As we noted at the outset, it is very difficult to assess the impact of law on race relations, even if one knows exactly the situation prevailing before and after – which, of course, no-one really does. One reason is simply that the change, whether for better or worse, may or may not be attributable to the intervention of law. Nor is that all: although race prejudice and discriminatory conduct are intimately related, they do not always follow the same barometer. Thus, race tensions may increase while disparate treatment abates. Nevertheless, some tentative conclusions about the effect of legal intervention must be attempted.

A. The United States

For some years, it has been fashionable in the United States – and elsewhere – to dismiss the legal approach to race relations in America as a kind of fraud which has not achieved racial equality. The accusation, in part, is that "civil rights"legislation was a cheap "sop", conceded only reluctantly under threat of violence, to diffuse a potentially explosive situation and distract from the need for a real change in race relations. What is stressed is that anti-discrimination statutes and judicial decrees do not build houses or create jobs or redistribute wealth. There is some merit in the charge – especially as one notices the continuing enormous gap between the races measured in economic terms.

A quite different comment is that the exorbitant promises of the legal declarations of the 1960's created unreal expectations which, inevitably unfulfilled, have reaped frustration, anger, and – ultimately – violence. The harvest, it is said, is increased racial friction. Again, this view is not without supporting evidence – in riots, angry incidents and the frightened mood of the city streets.

Nevertheless, it is quite impossible to blink the fact that, in less than two decades, the United States had made truly remarkable strides toward racial equality, mainly through the intervention of law. To be sure, law –whether enacted in statutes, decreed by courts or imposed by regulatory agencies – has had only limited impact. But, both in specific areas, and in its more generalized influence on attitudes and conduct, the effect of legal intervention cannot be gainsaid.

1. One field in which progress has been dramatic is that of *political participation*. In order to appreciate the changed situation of today, one must remember that in 1950, no black man in the old Confederacy had any part whatever in government – albeit his race then represented 30% of the population of the area. The most exalted job on the public payroll a Negro could aspire to was janitor or elevator operator: he could not even be a policeman or a fireman. To ensure this, he was, one way or another, prevented from voting. And, outside the South, while permitted to vote and occasionally to participate, the black man had no real voice in the government of his State or nation. Everywhere, all the important posts, legislative, executive, judicial, were a white monopoly.

The contrast today is sharp. To be sure, there is yet no black Governor of a Southern State and only two black members of Congress from any of them. But black men do hold office in the South, hundreds now, including legislators and town and city mayors – as they do throughout the country. In the federal government, the highest posts are no longer foreclosed. And, everywhere – including Mississippi, Louisiana and Alabama – black people now vote freely. This is a true revolution, forced by law, which carries implications far beyond the immediate privilege of casting a ballot or running for office. It attests a new dignity, commands a new respect, and has required a change of attitude.

2. Equally dramatic is the end of the *system of dual justice* – as administered in the criminal law from the point of arrest to the day of sentence. The extreme of lynching aside, official brutality and intimidation against black suspects was common practice a decade ago in much of the country. Nor did the disparity end there. Under a regime administered entirely by whites – police, prosecutor, defence counsel, jury and judge – who regarded the black man as a potentially dangerous semi-barbarian, it was natural to dispense a very different brand of "justice" to the Southern Negro. Prosecutions were instituted on flimsier evidence, legal representation for the defendant was often lacking, the trial (in a segregated courtroom) was swifter, and, upon conviction, the penalty harsher. One statistic is enough: in the decade 1940-1949, almost two-thirds of those executed by law were black convicts, although, at the time, that very subdued race represented less than 10% of the population and crimes by black against black were usually ignored as of no concern to the white establishment.

No doubt, some instances of unequal treatment still occur. But, these are now rare. The change is in part the consequence of judicial rulings requiring free counsel, enforcing the right of blacks to sit on juries, banning extorted confessions, scrutinizing more closely the fairness of the trial, outlawing capital punishment. Another ingredient is the increasing participation of the black community in the legal process, as policemen, prosecutors, lawyers, court officials, juries, judges. As important, however, is the general change of attitude on both sides of the colour line which now entitles, and requires, a black defendant to be addressed as "Mr.", not "boy".

Whatever remains of racism in the police station and penitentiary – no longer accepted as "natural" – the judical system has largely rid itself of the old double standard. Eloquent testimony was the acquittal of Angela Davis and so many Black Panthers – most unlikely a decade ago. And the unthinkable: that black men and women sitting as a grand jury should name the President of the United States as a conspirator in crime.

3. Another major accomplishment of law is the practical elimination of the once pervasive system of *racial segregation*. It is less than two decades ago that, in the American South, and well beyond it, the black man was totally kept apart, literally from the cradle to the grave. Born at home in a restricted black area or in the segregated ward of a hospital, he went to separate schools, remained segregated at play in parks, pools, beaches, cinemas, sporting events, travelled in partitioned buses or street cars, was kept apart as much as possible at work and entirely in all public places (from the soda fountain to the courtroom), in all social – and sexual – relations, as well as in adversity (hospital, jail, asylum), and finally ended in a separate cemetery. What is more, where duplication of facilities was uneconomic and separation impractical, the Negro simply was excluded –

from the restaurants, the hotels, the golf course, the amusement park, the public library.

Vestiges of this extraordinary regime remain. But, with very few exceptions, the law has successfully destroyed these walls of separation. To be sure, the black ghetto remains, and voluntary self-segregation prevails in some areas. But, whatever the dangers of the new situation, it is not of a kind with the legally established system which has gone. The end of official segregation removes some inconveniences and affords some practical opportunities. But far more important is the symbolism: one cannot exaggerate the hurt inflicted day to day by the "White Only" signs; their removal was an essential beginning to any "race relations" worthy of the name.

4. A lesser claim of success must be recorded for the critical areas of *education*, *housing* and *jobs*. But, even here, there has been marked improvement – if not an end to discrimination.

The agonizingly slow battle for desegregation of the schools has finally overcome most obstacles in the South, if not in the larger urban centres of the North and Middle-West. Public authorities have now fully accepted the principle and, equally important, so have most parents and pupils. The arguments today are no longer about "defiling" a white school by admitting any black children. The debate now is over preserving a white majority and avoiding "busing" to achieve a greater mix. That is still racism, but of a very mild variety when one remembers the school violence and boycotts of a decade ago.

What is more, the now unchallenged proposition that every child is equally entitled to the same education has removed the most glaring disparities in public concern (and expenditure) and private incentive with respect to the education of the two races. The upshot is that blacks have, in twenty years, doubled their average education period, with enormous increase in the number who go on to university – where they now enjoy a legal preference.

On the housing front, the change is more ambiguous. The number of multi-racial residential areas has no doubt increased. But, on the debit side, the white exodus from most central cities has left even larger black ghettos. Anti-discrimination law alone has not – indeed, cannot – resolve that problem. Yet it has, substantially, removed the legal fences that once shielded all-white residential communities, and it has also lessened the hostility of the white home owners to a moderate inflow of black residents. To be sure, the legal freedom of the black man to remove from his ghetto does little for the vast majority who cannot afford the prices of the suburbs. But there is still a difference between confinement imposed by law or community hostility and isolation based on poverty, from which there is *some* hope of escape.

Which brings us to jobs, the most difficult challenge for anti-discrimination law, which it has not properly met. The disparity between the races on the score of jobs remains. Yet, important barriers have been removed – in private and public employment, as well as in the trade unions. Although the numbers are small, it is significant that blacks are now to be seen, however occasionally, in every job, in every profession. Nor is the appearance of black faces in leading roles in films and on the television screen a wholly empty symbolism. And, finally, while modest, the emergence of so-called "black capitalism" is encouraging.

5. Perhaps most significant of all is the revolution of *attitudes* that has occurred in less than two decades, as a direct or indirect consequence of massive legal intervention in race relations. Most obvious is the change in the negro's image of himself. Today's "black pride" – sometimes black arrogance – would have been unthinkable, and intolerable, in 1950, or even 1960. And the conversion on the white side of the colour line is also startling, if somewhat more gradual. Whether born of fear or new respect, the manner of the white man toward his darker neighbour has altered very noticeably. Nor is it only a changed public etiquette. Impatience, even anger, may be voiced privately. But, almost nowhere in white society is it any longer permissible to speak of the black man as an inherently "inferior" being or to deny the justice of according him full political and civil equality. Such new forms of speech and conduct are critical because, once become habit, they undermine prejudice – which cannot survive without exercise.

6. So much for the achievements. They are not small: indeed, when tempers cool, the black liberation won during the short decade of the 1960's will be seen as one of the truly remarkable events of history and a unique tribute to the efficacy of law, used inventively and enforced courageously. Needless to say, it could not have been done without the extraordinary patience, determination, and almost naive faith of a relative handful on both sides of the colour line. But, neither could it have been done without law as the instrument – most especially bold and creative intervention by an independent judiciary invoking a written constitution.

What is more – unlike the brave experiment of Reconstruction a century ago – the recent civil rights revolution is irreversible. Never again will the American black man suffer enslavement or second-class citizenship. Nor will the white American have the stomach to make the attempt. Which is not to say that race relations in the United States today are good, or that the situation will not get worse. There is, alas, much amiss.

The crux of the matter is that almost all that has been achieved is no more than elementary justice, which ought to be taken for granted in any democratic country. Seen through British eyes, conceding political and civil equality to native citizens is so obvious as to provoke no applause. And such is, indeed, the attitude of at least the younger black community in America today. Thurgood Marshall, whose father was an underpaid Pullman porter and who himself now sits on the Supreme Court, after years in the forefront of the legal battle against segregation, remembers the old days and knows how much has changed. But the ghetto youngster does not. It would be surprising, amid his surroundings, if he were content merely because his parents won a legal emancipation. He wants a great deal more – and he will not wait another century.

The basic complaint is, of course, that all the anti-discrimination law of the recent past – even when fully and fairly enforced – has not equalized. Entrenched power and entrenched wealth remains mostly where it was, in white hands. In sum, "equal opportunity" means little when the starting point is so unequal. Some effort has been made to redress the balance – by outlawing employment promotion systems which tend to freeze the *status quo ante*, by banning literacy tests for voting which disadvantage the victims of unequal education, by striking down residence requirements for welfare benefits which discriminate against the Southern black migrants to the North, by imposing mandatory racial quotas upon government contractors and universities. And, in some fields, governmental and

private, blacks enjoy a special preference. But, needless to say, the priviledged white community has not deemed it necessary, or just, to engage in a wholly fresh deal, or massive "reparations", for the sake of a more equal starting point.

So, the disparities of wealth – and all that it buys – continue. And that rude fact suggests to much of the black community and increasingly to the Hispanic communities, that the white man's law is a fraud and that self-help or organized militancy is the only viable course. This attitude, in turn, engenders fear and anger and some violence on the other side of the colour line. The upshot is that race relations are not easy, nor even wholly peaceful.

B. Britain

To assess the impact of race relations law in Britain is more difficult. Clearly, the effect has been very much less dramatic than in America. That is, in large part, because the starting point was so different. Legal recognition of slavery at home ended a century earlier, and since that time, two hundred years ago, English law has been neutral. Indeed, the "race question" within the British Isles dates only from the 1960's, and, what is more, discrimination on the ground of race never had official sanction. No one in Britain has ever dreamed of denying the coloured resident full political rights and equality before the law.

Thus, one cannot point to those obvious victories which, in America, involved no more than re-establishing a legal equality that had been promised a century before. For Britain, the job of race relations law, from the first, was to combat private discrimination – a far more delicate task, and one whose success is less easy to judge. Besides, except for places of public resort (reached in 1965), British law did not tackle the problem until 1968. The recency of the experiment explains some disappointments. Yet, there is good reason to doubt whether anti-discrimination law has done all that it might.

1. We should first note some apparent successes. The most obvious is the virtual elimination of openly discriminatory signs and advertisements – once prevalent in many areas. That change is significant not only because it removes an obvious affront to the coloured resident, but also because, in some degree, it induces an attitude among the white majority that a crude racial bar is no longer acceptable in Britain.

For the rest, the effect of the 1968 legislation could not be accurately gauged – largely because those in a position to discriminate were not required to report and no agency had the power to make an unencumbered investigation. But, even if discrimination today is as prevalent as it was found to be before the 1968 Act, that is no ground for dismissing the work of the Race Relations Board and of other agencies less directly involved. Nor, indeed, is there any reason to suppose that the law, merely because it exists, has not had some of the educational and restraining influence which was predicted.

The only concrete evidence of the effect of the 1968 Act lay in those cases where the Race Relations Board, having found discrimination, obtained a satisfactory assurance, or decree, ending it for the future. In all areas covered by the law, these instances came to about 500 in five years. For a variety of reasons this figure is not a safe guide to the extent of actual discrimination. But it would be equally wrong to conclude that the Act had no impact beyond those 500 cases. Obviously, the Board's success in any given instance had repercussions. No doubt, the exemplary effect was less than if public and positive sanctions had attended the outcome of the Board's proceedings. Nevertheless, we must assume that the Board's action in upholding complaints and requiring an assurance and sometimes financial compensation from the discriminator taught a lesson to at least some of those similarly situated. And we must likewise assume that the efforts of the Community Relations Commission, the Home Office, the Department of Employment, the Metropolitan Police, and several voluntary agencies were not wholly wasted.

Thus, we may safely assume that the situation would be worse if the law, however modestly, had not been interposed. Unfortunately, no one can say with assurance that there has been a marked net decrease in discrimination in any field.

2. Perhaps the most surprising fact which seems to emerge from the experience of the Race Relations Board was the continuance of discrimination in places of public resort, or at least public houses. Indeed, the Board's reports indicated that the number of well-founded complaints in this area did not decrease. Although the figures condemned only a very small minority of operators, the persistence of reported incidents is disappointing, especially since in this case racial discrimination has been outlawed since 1965.

In other fields, discrimination persists, albeit it is probable that the problem is less acute in most regions. Identifiable instances of discrimination in the provision of financial and credit services remain. So, also, proven discrimination with respect to housing – by accommodation bureaus, by estate agents, by private landlords – is substantial. And, in both categories, one must assume that many instances go unrecorded for a variety of reasons: the potential victim is discouraged – by the experience of his brethren or by other causes – from even applying for the service or accommodation; the discrimination is disguised in such a way that the victim is unaware of it; or, often no doubt, the knowing victim simply does not complain, because no useful remedy is available or because he mistrusts the CRE.

3. Most disturbing of all, however, is continuing discrimination on the basis of colour with respect to employment. The practical importance of job equality requires no elaboration. But the psychology is as significant. With comparable earnings and job status, other discriminations tend to fall and, in any case, matter less. *Per contra*, when an identifiable group is relegated to the least desirable and lowest paid jobs, its members feel exploited and they can more easily be deemed undeserving of equal treatment in other respects. What is more, with respect to employment a single proven case of race discrimination is especially likely to be accepted as evidence that every refusal to hire or promote a coloured worker is discriminatory – at least so long as the great majority of them are holding the least desirable jobs. And that echo effect may well carry beyond the immediate firms to others in the same area or the same industry which in fact do not discriminate.

In these circumstances, it is particularly regrettable that actual colour discrimination should be seen to persist.

Inquiries by the Department of Employment and the findings of the Race Relations Board leave no doubt on this score. Indeed, the Board itself, while noting an increase in the number of well-founded complaints with respect to employment discrimination, suggests that it is only seeing the tip of the iceberg. One reason is that colour discrimination in jobs (unlike discrimination in places of public resort or even in housing) is very easily disguised as something else. Another is what the Board calls "passive acceptance of discrimination by everybody concerned" – employers, unions, fellow workers, customers and the potential victims themselves.

4. Finally, a word should be said about race relations and the criminal process. Police-immigrant relations have been strained for some time and predictably erupt in angry confrontations. While many of the accusations of brutality, harrassment and discrimination hurled at the police are plainly exaggerated or wholly unfounded, there can be no denying that racist attitudes are not uncommon among policemen and those attitudes are sometimes translated into discriminatory action. Serious efforts to ameliorate the situation have been initiated by the Metropolitan Commissioner and by several provincial Chief Constables and these have certainly helped. But a problem of credibility remains, partly because complaints in this area are beyond the jurisdiction of the Race Relations Board and are investigated by the police themselves.

It is also charged that race discrimination affects the courts in criminal cases. Doubtless, some lay magistrates do translate into their decisions the prejudice against coloured immigrants which they share with their neighbours. One supposes the professional judges of the higher courts do not. Indeed, there has been a strong judicial response in the case of coloured victims of white violence. But it may well be that occasionally a black accused who betrays a casual view of some transgressions of the criminal law will be sternly dealt with to teach him that such conduct is not acceptable in his new homeland. So also, the background of the English judiciary does not make for easy communication with a newly-arrived West Indian – especially one who is young and somewhat militant. There is no evidence, however, that racism significantly affects the traditional impartiality of British justice.

5. The upshot is that race discrimination remains a fact in Britain. Whether it is more or less than a decade ago, the persistence of that situation is a matter of growing concern for several reasons. First, the coloured population is now large enough – especially in those areas where they are concentrated – legitimately to claim a measurable share of the benefits which Britain has to offer. Second, the percentage of those who have been in the country 5 or 10 years or longer has very substantially increased, and they no longer view themselves as lucky immigrants, but, rather, as established residents entitled to full equality of opportunity. And, finally, the younger generation of coloureds, whether recently arrived or not, is impatient, often borrowing the rhetoric and at least tempted by the methods of their militant brethren in America, Africa, or Asia. This situation, already potentially explosive, is of course aggravated by the current economic plight of Britain in which disparities of wealth are all the more offensive to those who are near the bottom of the society.

The reality is that a marginal decline in actual discrimination will not improve race relations in Britain. For, while substantial discrimination persists, every disparity will tend to be seen as the consequence of deliberate discriminatory conduct.

CONCLUSION

It is appropriate to stress once again the limited role of anti-discrimination law. Civil rights statutes, much less court decisions, cannot build houses, create jobs, or remake society. But the American experience does indicate that anti-discrimination law, if written generously and administered forcefully and inventively, can do far more than is often supposed. Not only has law shown itself capable of effectively controlling overtly discriminatory conduct in most aspects of public life, but it can, over time, substantially affect attitudes.

On the other hand, we now know that successful legal intervention in race relations is very hard work when the claim for equality must overcome both the prejudice and the self-interest of an entrenched majority. And the cost may be large – in money, in effort, in disappointment, in frustration, even in violence. So one must be clear, at the outset, that the task is worth it and be prepared to carry it through. For, if one thing is plain, it is that half-measures and vacillations do not work. Racism dies hard: it does not give way to mere exhortations or polite admonitions.

It follows that merely declaring discrimination on the ground of race or colour illegal is not enough. Although it serves a limited educational role, an unenforceable declaration too often ends as an unfulfilled promise, raising expectations which, unrealized, produce frustration and anger. Moreover, when anti-discrimination legislation is seen to be defied without penalty, both the victims and those inclined to discriminate plausibly conclude that the law is a token gesture, not intended to be taken seriously. To be effective as a teacher and deterrent, the law must be known to work.

1. Governmental involvement

The appropriate mechanisms for enforcement of anti-discrimination law obviously depend in part on the local situation. But experience indicates that resort to a combination of means is usually more successful than a single approach. Sole reliance on the criminal law is doubtless a mistake. For many cases, the weapon is too big; the procedure is too slow and too rigid; and, of course, a guilty verdict does not of itself compensate the victim. Yet, it is useful to declare at least the worst offenses of discrimination crimes, even if actual resort to criminal prosecution remains rare. The deterrent effect is significant. But, perhaps more important, treating racial discrimination as criminal conduct implicates the state in its most solemn robes and stresses an official view that such practices are condemned as public wrongs, which the state has a duty to prosecute.

There is, of course, no inconsistency in using the courts for civil litigation as well. And it is entirely proper that government itself should invoke the judicial process to obtain an injunction or other order against discrimination, especially when the violation appears to be recurrent or widespread. The active intervention of the Department of Justice in the United States was critical, both because its resources and determination were necessary to the task and because its involvement manifested a governmental commitment that emboldened the victims and deterred the potential discriminators.

Nor is the governmental role exhausted by becoming a litigant, in criminal and civil cases. It is difficult to overemphasize the importance of vocal and visible governmental involvement in combatting discrimination. As an employer and operator of public facilities, government can do much by way of example. As a source of funds and a significant contractor, it can effectively use the power of the purse to combat discrimination. And finally, government can usefully establish and operate administrative machinery to implement, more swiftly and with greater flexibility than courts, the practical remedies of anti-discrimination law, and to uncover violations. The creation of a specialized agency to enforce the law is undoubtedly sound. But it presents special problems. The agency must be seen as enjoying the wholehearted support of government, with sufficient funds, staff and powers to carry out its mandate. Otherwise, it is likely to be looked upon as no more than a convenient dumping area to which is relegated the "awkward" problem of race. Moreover, to do its job properly, such an administrative body cannot become solely a processing centre for complaints. The agency must be empowered to investigate on its own, to ferret out patterns of discrimination. And, to that end, it ought to have authority to require periodic reports to be made (for instance, by all employers and trade union groups) regardless of any allegation of discrimination.

The lesson of American experience is that massive governmental involvement on several fronts is vital to the successful operation of an anti-discrimination programme. But it does not follow that the victim's direct access to a neutral tribunal can safely be foreclosed. On the contrary, however cumbersome, it is best if a claimant who is dissatisfied with the official handling of his case should be free to pursue it himself. As a practical matter, cost and lack of continuing interest will usually counsel a victim to entrust the prosecution of his complaint to public authority. But confidence in the integrity and dedication of a governmental agency will be enhanced if it enjoys no monopoly of access to the courts. Private lawsuits can do no harm and their availability answers any suspicion that the official agency is attempting to "control" the victimized minority by declining to process complaints.

2. Penalties and Remedies

No anti-discrimination law will operate successfully unless violations are costly and appeal to the law is worthwhile for the victim. On the first branch of the question, the potential of criminal sanctions is obviously a useful deterrent – especially if something more than token fines are provided. Equally important are onerous civil remedies. Punitive or exemplary damages ought to be allowed. And both the administrative agency and the courts ought to be empowered, in proper cases, to issue mandatory injunctions and supervision orders and to require posting of notices and continuing reports.

In some instances, of course, the same order which is effective as a deterrent will provide generous compensation. But, so far as it is possible to do so without injury to innocent third parties, remedies ought to be made available which truly enforce the law. Immediate injunctions to preserve the status quo pending the outcome of litigation or administrative proceedings are often necessary if the applicant for a job or a dwelling is not to win an empty victory. What is equally important, the tribunal which finds a pattern of discrimination within an enterprise must be empowered to go beyond satisfying the immediate complainant by requiring the guilty party to alter the offensive practices for the benefit of others similarly situated. In sum, "class action" relief must be permitted. And such relief must, in a proper case, include devices which "make up" for past discrimination.

3. Application to Britain

Britain has a justly vaunted tradition of working changes gradually and solving problems gradually, by education and persuasion, rather than coercion. To deal with race discrimination by law at all was thus an innovation. But, not surprisingly, a very "soft" technique of enforcement has been attempted. We have already seen that this approach cannot be counted a success. Which suggests changes. The question is how much of the complex legal paraphernalia developed in America is appropriate for Britain.

The short answer is that the whole of it may safely be imported. The variety of tribunals, techniques and remedies discussed earlier may be less obviously necessary in the British situation. No doubt, they would be invoked less frequently and the taut adversary confrontations familiar to Americans would normally be avoided on this side of the Atlantic. But that is insufficient reason not to be fully prepared with the full arsenal. On the contrary, the prospect that the most radical weapons will remain unused makes it less dangerous to have them available.

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