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WHAT LAW CANNOT DO FOR INTER-RACIAL PEACE.*

KARL N. LLEWELLYN †

IN THE CONTEXT of the topic assigned to me "Law" is a tricky term, and "Peace" not much less so. I have long been of the opinion that for the last century or so discussion and controversy about "Law" could have been much reduced if a few unhappy mis-translations had not crept into common and misleading usage. Thus what has been written in Latin on Natural Law, or on what kind of thing is rightly and truly to be honored in the legal field—such writing has been almost entirely about *ius*, and practically everything written in this connection removes itself largely from the field of reasonable controversy if you translate *ius* as you ought to, and read the word as meaning not "law," but "right-law." Again, those portions of Savigny and especially of Puchta which have been most subject to misunderstanding and attack are those in which *Recht* is used not to describe the lawyer's rules in a modern state but to refer to that right-way-of-life-and-heart which gives goal, support and body to the lawyer's technical rules.

I need to make these points because they come close home indeed to the question of "law's" relation to inter-racial peace. For surely the question of what "law" can or cannot do to build, as distinct from destroying, inter-racial peace, that question is addressed by necessary implication in first instance to *ius*, to right-law. It is, however, also sure that something more is envisaged than doctrine, however ideal, *in hominum vacuo*. Plainly the picture is one of right-doctrine which is also a going part of a going governmental system, equipped with machinery and personnel to do something about it.

But I should like to submit that one derives interesting and illuminating further suggestion from the Savigny-Puchta concept. I do not mean merely that there is no limit to what *Recht* can do for inter-racial peace if *Recht* is present on an adequate scale in the sense of the right-way-of-life-and-heart. That is true, and no goal could be truer; but it offers little by way of effective measures. No, what I mean is that in any matter of crisis or of change there is a strong case to be made to the effect that no piece or body of doctrine, however glorious in ideal or phrasing—that no piece or body of doctrine can be fully

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right-law unless it is so built as to have heavy impact upon its own people, and so upon the people of some one particular time, place and cultural tradition. Indeed, in regard to matters of change or crisis I am prepared to argue firmly that right timing therefore also becomes a vital aspect of the rightness, of the true *ius* character, of the relevant portions of *right-law*.

In any event, three things seem very clear. The first is that the machinery of law-government has no need to lag behind or to lag with or to uncreatively just fit into the existing ways of people in their race relations, whether inside a nation or between nations. On the contrary the machinery of law-government can be built (as has been done in part by our Constitution and by our Supreme Court and by our system of armed services and of elections) to set up ideals still far from full attainment, to set up tension, steady or sudden, in the direction of those ideals, and in some degree to block off or to beat down obstruction. But the second thing is no less clear: put tension on too suddenly, too sharply, too hard, and your wire can snap, can even snap back into that devastation called destruction and reaction. It is a fine trite truth that the art of statesmanship lies in finding workable measures, in introducing them with patient skill, in following them through with firmness, and with courage, *and also with tact*. Trite truths are commonly enough deep truths. Our problem is that this one gives little practical guidance to most of us. For the third thing which is also and sadly clear is that when we are muddled in the actual workings of inter-racial conflict, readjustment, and laborings toward peace, then only the event itself gives clear indication of which measures have been workable, which not, what has been vision, what error, what has been wise, what brash.

Meantime it may be that some further light on the limits of what can be done by way of the machinery of good or right law-government, manned by plain people who are not demi-gods, it may be that some further light can derive from looking a moment at this idea of "peace." I take it that the discussions at these meetings, certainly those of today, reach far beyond any idea of a simple absence of active danger to or attack upon limb and life. Peace in that sense of "The Peace" can be had, and had inter-racially, by way of the machinery of law-government; and there is not even any need that that machinery have about it any element of rightness. Consider the brutal law and policing of Englishry under the First William, or of occupied Europe under Hitler and Himmler; or if that does not seem to you sufficiently inter-racial, try thirteenth century Mongol occupation of any Western country, or today's Kenya or South Africa. Indeed, in this bare-bones aspect

of "peace," racial differences rather simplify than complicate the ruler's fiat "peace" problem.

But I take it that what is under contemplation here is a richer, more active, more fruitful kind of peace, one which reaches quietly on out into "goodwill toward men." And there one slogan has often been that you *cannot* "legislate" a change of heart or "legislate" friendship or even tolerance or any other thing of mind or spirit or of attitude.

One can accept the slogan so far as concerns any direct commands by way of the law-government of a many-wayed, many-grouped, society in rapid movement. "Kiss and make-up," even inside the family, is a command which presupposes a pre-existing, a going, a lasting regime that offers a basis for resumed relations, for revived and remembered affections and patterns of team-work. In such a situation even the compelled gesture of get-together can have its impact on the habit and the heart. Not so, if the gesture rests on no such basis, or when it even stirs disgust. But is such a limit "the limit of effective legal action," or is it but the limit of certain ways and measures—measures none too well conceived, measures ill-designed? There is, says boyhood's proverb, more than one way to skin a cat. The tool chest of law-government has long been rich in tools, and the crafts of law-government have for millenia been as rich in wisdom as in wisdom's misuse. Let us then not too lightly leap to "what *cannot* be done."

Take a piece or two of material once widely supposed to have been pretty silly, material with which we have, however, a decade or so of experience. Fair Employment Practices laws and commissions. for example. You will recall that everywhere the commissions have moved on velvet feet with velvet paws with velvet patience for evasion. But slowly outfit after outfit which had been lily-white has begun to turn up one or another theretofore unfamiliar type of personnel. This has results. The hard-bitten lawyer who finds a woman associate in his office (not that women are protected under Fair Employment) awakes against his will to the fact that a woman can be not only a lawyer but a good lawyer—he has watched one work, he has worked with one. Everywhere, the "No Social Relations" tabu tends to yield, in modern man, to an opening up of some contact and some understanding for any member of your team; and that does queer, slow things to the traditionally received mere "anti" labels of ignorance. It does queer, slow things also to that deliberate ignoring which is worse than ignorance.

All observations, however, with due caution, please! I have said

that the process does queer things in eating away "anti"-feelings and in building some understanding, some liking. This our machinery of right law-government can go far toward getting started, toward spreading, toward freeing from any flavor of the strange. But I have said also, please, that the process of having "Other" kind of folk, "Different" folk, "Outsiders," in the team of your working outfit is a *slow* process. It is very slow. And about that there is not much which even the best law-government machinery can do. Team is not magic, team can breed rivalry and irritation, too. I have actually heard, *e.g.*, of Democrats, Catholics, raised in the same parish, school and block, each Irish (or Polish or Italian) in background, who were yet in bitter war over control of a single political club. Neither will it do to overlook that the slowly spreading understanding and often friendship which has developed so often during the war and under the Fair Employment regime, first, is as yet far from typical of our population; and, second, has yet to be subjected to the corrosive effects of severe hard times and ensuing survival-competition within the team itself. On this last, law-government can of course help some, insofar as it can cushion any economic bother. But it is not my office today to go into questions of either means or price, on that.

Here, if you will allow me, is a place where I feel a need to lodge a personal caveat. My faith in jurisprudence as in legislation has always rested on the need for seeing the facts straight, as the beginning for the man of law-government. The facts of life and of man-in-society confront the craftsman with his problems, they utterly condition his powers, they offer him also, under God's guidance and help, the only tools he has. A hard-eyed view of what the law-governmental craftsman is up against is thus of the essence of his coping with the problems of his necessary, nay, his noble craft. This approach I have been preaching for more than a quarter of a century. I called it realistic. It is realistic. It is a matter not of goal, but of method. "Neo-realism," a—shall I say *another?*—"mistranslation" sounds like the name of a philosophy. It has never been a word or a philosophy of mine. And I do not want either any echo of an outdated controversy (not, by the way, inter-racial) or any possible present misconception to permit any one of you to get any idea that I like or approve or urge any of a number of things which I observe as being—to me—very troubling facts-of-life that have to be wrestled with.

May I feel free, then, to grapple with worries which in these days are no light burden?

For I come now to places where, so far as I can spot the facts, the values of our civilization move into a civil war which (among other

things) interferes with inter-racial peace; where also, so far as I can spot the facts, the price of a gain can rise high; and where the problems of timing become very restless. Let me try out a sequence of oversimplified but suggestive situations, when it is the machinery of official law-government which seeks to remove racial discrimination.

Hospitals: (which I think could be made today into regulated public utilities, at least for purposes of anti-discrimination.) As to patients, admissions to private rooms raise problems no more serious than the "outrage" felt years back by people with "real cars" and "real" status when Ford began to pay "mere" workmen five dollars a day and to let us ordinary folk climb into Model-T's; while emergency work and wards entail an element of common suffering that goes some distance toward an even deeper common feeling than that of "team."

Much more troubling is the matter of professional staff, where the limited facilities and opportunities produce a bottle-neck not unlike that envisaged above in regard to industry in a depression.

But at least so far as concerns supervisory personnel, how far is this different from the other professions, or from industry at large. The number of colored foremen or chief engineers, of Nisei bank vice-presidents, of American Indian senior law partners, is not noticeably large; nor does the Fair Employment aspect of law-government seem to me to have done much to increase that number. Indeed I do not see how it can. In contrast, it has been suggested that what law-government might well have been unable to do in the professions to open up opportunity and welcome in high place in this country for Catholics and for Jews has over the generations been partly accomplished by the arrival of Chinese, Nisei, Negroes, and Women, all to be happily discriminated against.

Hotels: Here I seem to see privacy enough to make the social price of "forcibly" opening them rather negligible.

Restaurants: The social price in terms of tension rises. But tables remain separate.

Bars: Typically, people are much closer together. And there is alcohol. Doubts rise, as to the *price* of "legal" compulsion. I wish I could see a smooth way in regard to bars. But in much of Chicago the matter is working out moderately well.

Beaches: There is little alcohol, but any crowded beach is a place of constant intrusion and of constant need for restraint. There is rarely such continuity of personnel as can lead to understanding. And crowds can mobilize too easily into trouble.

Yet this is not a thing which right law-government cannot handle.

One piece of inter-racial relations has to do with any group's pleasure in feeling at home in recreation. If you use the machinery of right law-government to provide (by way of condemnation and taxation, at need) adequate and appropriate facilities within easier reach, for example, of any colored neighborhood, you will find folks grouping up largely for their own pleasure. This is to be sharply distinguished from any unthought-through, unimplemented official law-government *mere* insistence that anybody is entitled to admission to any beach. Of course this latter is called for. My point is that, *alone*, such a measure not only is not enough, but may move against its own purpose.

Against such a background of troubled meditation one approaches the explosive question of *Schools*.

In graduate schools it seems to me that both horse-sense and experience show the job-team pattern to be available in a very satisfactory form.

In primary schools my observation and my readings combine to make me believe that (parents apart) inter-racial peace is an as-of-course aspect simply of being and working together, certainly if the start is made say in the two lowest grades, letting the integration move forward from there.

High school and college open up problems on which I am not reticent. You simply have limited me to twenty minutes in which to deal with a two-hour subject. Let me say simply that where resistance is strong, I should think it wisest to take high school last, and only after experience with the college had become available to demonstrate the unfoundedness of many fears, and, along with the primary school picture, to let the unparalleled turn into the familiar. So many things terrify because they have never been met with, looked at, lived with, *and found to be no worse than most of life*.

Two things remain to say. The first is that it is an honor to be able to acknowledge in public the impressive work of the Roman Catholic Church in this task of furthering a true peace among mankind. You know, but you will let me state, that this goes back to earliest origin. You know, but you will let me state, that it is a matter for deep, full pride to see such a great tradition currently live and flourish in a time of trouble.

The other thing which remains to say is this: the machinery of even the rightest of right *ius* is subject to the limitations of human inventiveness. Just as to build for speed is to sacrifice carrying-capacity, and vice-versa, so building in law-government has through the ages had to labor sometimes with handling conflicting functions. I was visited yesterday by two ancient gentlemen of an American

Indian tribe. They had come a long way to Chicago. They had complaint to make. Though why to me is not easy to make out, the ground of the complaint is clear indeed. Twice in the last few years an Indian and a White had gotten into conflict. Each time the conflict arose out of the White's bringing illegal liquor onto the Indian reservation. Each time there resulted a quarrel and a killing and a trial. Regardless of what you or I might think to be the so-called merits of any case or cases, with curiously few exceptions the results in cases like this, since long before Custer, have been that if the defendant White has killed an Indian he is "Not guilty," but if the defendant Indian has killed a White, "Guilty" he is. Note that this is not a question of White and Negro, nor a question of Deep South. In every other bar you can find a picture of the brave Custer, who became a general by killing children, and without provocation.

This matter is an inter-racial problem of no small import. It derives, moreover, directly from our general official law-governmental system. It derives from the fact that we have deliberately built that system to serve values which conflict among themselves. "A jury of the vicinage" has been ordained with special intention to make it possible not only for the law-government set up by any distant central establishment to be set at naught, but also for the so-called facts to be "found" in the teeth of the truth—all in the interest of the prevailing emotions of the vicinage. On the whole, I think this to have been wise, at least for criminal cases. I do not mean that I think juries should lightly disregard their oath of office, any more than I think that judges should in their search for justice disregard the letter of the rules of law. I do mean that it does not pay to overlook or forget any real and built-in reason of an institution. And the "of the vicinage" idea is as purposeful as is an appellate court's duty to justice. On the whole (with some changes in procedure) I think that if I had it to do over, I should redo this jury job, for criminal cases, close to the original design.

Thus, when you think about what "Law" *cannot* do in regard to inter-racial peace, take on yourselves the burden of facing up to what your own fundamental legal machinery for escaping from your own fundamental law makes it sometimes impossible for even your own fundamental law to get done.

Pressed by my own limitations of imagination and ingenuity, I should, I repeat, have to leave to a local jury the power to defeat rules even of Constitutional law in the interest of local emotion.

But I shall do some unpleasant dreaming about the faces of those ancient Winnebago gentlemen.