From the Editor . . .

Law, Violence, and Civil Rights

Anyone inclined to see law as a solution for all social disturbances ought to have done some rethinking of his premises during the past summer. The violence that erupted in inner cities around the country wrote in blood and fire the message that law had been weighed in the balance and been found wanting.

Those of us who spent the summer working on this special issue of the *Review* were increasingly depressed by evidence of legal ineffectiveness in coping with the civil rights problem. Analysis of the case studies on the following pages demonstrates clearly that the courts deferred almost completely to the political process in the effort to integrate the schools. Where the courts entered the picture, it was often as not to obstruct the integrative objectives of the legislature. In Illinois, for instance, the State Supreme Court nullified the Armstrong Act which authorized, if it did not command, school boards to promote public school integration. Where plans for integration succeeded, typically in smaller cities, the objective was reached largely through pressures brought directly on school boards and public officials. The one major attempt to alter de facto segregation through court action—Judge Skelly Wright's decision in *Hobson v. Hansen*—was useless where it could be enforced, in virtually all-black Washington, and unenforceable where it might have been useful, in the greater metropolitan area.

The conclusion that courts must sometimes yield to the political process is neither new nor disturbing in itself. These two subsystems have long shared responsibility for adapting to change while retaining order and continuity. As long as the task is adequately handled between them, societal equilibrium can be maintained. The interplay of courts and legislatures becomes an interesting topic for the scholar and an issue for debate among judges (activism v. self-restraint) and other political actors.

It is when disturbance spills beyond the two subsystems into violent action in the streets that nice middle class people, scholars and officials alike, lose their cool. Explanations increase in diversity, intensity, and futility: We have been moving too fast, too slowly, in the wrong direction. Such responses rarely extend beyond the foolishness of conventional wisdom, because unfortunately we don't have much more than that to rely on.

It is plausible to assume a direct relationship between the frustrations of legal-political action and the increasing violence of the civil rights movement. These frustrations are multiple. The legal-political system tends to focus attention on a limited number of issues which can be framed as justiciable or statutory questions. Legal and political decisions take a long time, execution takes even longer. In securing such decisions, a small and privileged group of leaders preempt the action. Defeats arise unpredictably in the legislatures and courts, rationalized by doctrines which use the language of equality and justice but seem to many to produce opposite results.

Even when victories are won, they are not necessarily satisfying. In the struggle for legal or political success, the civil rights forces tend to line up on the side that will best express their resentment at the whole pattern of discrimination which is their major grievance. In practice, however, this may lead them to fight for outcomes which if achieved might well detract from the main objective.

This is well illustrated in the struggle for school integration, an issue so defined that victory may be self-defeating. If integration were achieved through political or legal action, would it help to eliminate racial inequality? If we rely on the Coleman report, the evidence seems to say that it would. That conclusion depends, however, on extrapolation from the few integrated systems that have emerged spontaneously, to the many that would be achieved through conflict. It does not consider the possibility that forced integration in the large cities would expedite the departure of white families to the suburbs. If the central cities become overwhelmingly black, would integration become a meaningless policy?

Alternatively, the achievement of integration may be far less satisfactory a method of promoting educational achievement for Negroes than compensatory education. Recently, black power proponents have increasingly advocated the creation of segregated schools of very high quality. In the absence of empirical instances of this kind, it is currently

impossible to compare such schools with those that are integrated. It seems plausible, nevertheless, to suppose that such schools might provide the most effective means of developing the educational techniques and the morale necessary to provide optimal learning conditions for Negroes.

Whether or not these speculations are correct, the legal-political apparatus has in some ways inhibited their exploration. In the adversary context, symbolic victory for Negroes tends to be phrased in terms of winning the right of Negroes to be treated as others are, rather—perhaps —than in the way that would benefit them most. Thus the channels open in the political-legal system seem to have focused on too narrow a range of issues and led to the expenditure of vast energies on potentially self-defeating objectives.

Does this mean that law is inevitably incapable of coping with this kind of problem? Perhaps not, if we think through the nature of the problem and reexamine legal institutions creatively.

What is the nature of the problem? It is that the entire social position of a group in the population is unsatisfactory. Inchoately, it demands a redefinition of the rules of the game. At present, it faces the alternatives of issue-focused action through law, politics, or perhaps economic pressure, on the one hand, and violence on the other. The violence of the summer suggests that the former techniques are unsatisfactory. Is there a third way?

I do not know the answer. I am struck by the fact that alienated groups in society have sometimes achieved a change in the rules of the game so that their grievous demands were more readily met. In the nineteenth century, industrial strikers were criminally liable for conspiracy. Eventually the legitimacy of their interests was recognized and a procedure set up for an orderly test of strength between them and their adversaries. Their organizations, formed according to a regular procedure, were then called unions instead of conspiracies. Other examples of the legitimization of protesting groups come to mind: the official position of professional associations in this country, the religious communities (*Gemeinde*) in Germany, the resistance movement in South Arabia. What form might be appropriate for institutionalizing and legitimizing the range of interests of the Negroes or the poor? I do not know. Nor am I certain that such an approach would be wise. Given the unsatisfactory nature of our present handling of the problem, however, we seem to need some alternatives. Perhaps the law can help if its functions

and possible techniques are more broadly considered than usual. At any rate, we need to think of something.

In the meantime, it should be noted that the legal process has played a not unimportant part in furthering the civil rights movement. It provided an initial legitimatization of the grievances of the Negroes. Specifically, it contributed a normative slogan, recognized by the dominant white community under the phrase "equal protection." It has provided a forum in which the realities of life in the slums could be brought dramatically to the attention of men of conscience in the intelligentsia and middle classes, white and black. It has spotlighted the role of law itself in maintaining inequality under our system of "justice," both in the criminal and civil spheres.

Not that all of these functions were capable of being performed unaided by the courts, legislatures, or administrators. Without assistance from scholars and critics at the margin, these insights might not have been achieved. To illustrate from previous issues of this *Review*, it is significant that the detailed analysis of legal barriers to genuine equality on the civil side came from the sociologists (Carlin, Howard, and Messinger) and that the criminal process has received its sharpest critique in these pages from a lawyer-turned-sociologist, Abraham Blumberg. Nevertheless, such critiques are being taken seriously by government (in its neighborhood legal assistance offices), professional associations (e.g., ABA resolutions supporting the legal operations of OEO, ABF studies of representation of the indigent), and the law schools (e.g., courses and law review articles on race relations and the law of poverty).

It may be true, as Styron suggests in *The Confessions of Nat Turner*, that "justice" can perpetuate slavery for a thousand years. But it may also be true that the legal system, properly analyzed, can reveal the hidden assumption and devious control devices of the society. Properly used by an aroused minority and an appalled segment of the majority it may contribute to the conversion of "equal justice under law" from a cruel shibboleth to a vibrant reality. The probable alternative is not very appealing: Violence may be, in Rap Brown's phrase, as American as cherry pie, but who would choose either as a steady diet?

—RICHARD D. SCHWARTZ