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Ehrlich's Living Law Revisited— Further Vindication for a Prophet Without Honor*

James F. O'Day

In Fundamental Principles of the Sociology of Law, a major work of the late German legal sociologist, Eugen Ehrlich, the doctrine of the "living law" was introduced. Ehrlich predicted that this doctrine would be applied by modern jurists and administrators alike. Mr. O'Day begins by succinctly reviewing the life and theories of Ehrlich and answers many of the sociologist's critics. The author then demonstrates how the "living law" has been illuminated by modern jurisprudence, discussing a typical example — The School Segregation Cases. He concludes by commending the Supreme Court's implementation of Ehrlich's theories.

I. INTRODUCTION

THIRTY TURBULENT YEARS have passed since the publication in 1936 of the English translation of *Grundlegung der Sociologie des Rechts* (*Foundation of the Sociology of Law*), the main work of the Austro-Hungarian sociologist of law, Eugen

Ehrlich,¹ under the Anglicized title, *Fundamental Principles of the Sociology of Law*.² The original German version of the book had been published in 1913.

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The life and times of Eugen Ehrlich, as well as the past and potential impact of his philosophy of law, constitute an interesting and somewhat contradictory mosaic. Praised as a "fertile and original genius"³ and a "great sociologist of law,"⁴ Ehrlich was acclaimed for his brilliance and his incisive writings by many leading legal scholars in the common law countries; yet it is recorded that he died

* This article is based upon a paper written for the course in Jurisprudence at the Western Reserve University Law School, Graduate Program.

¹ At the time of his death in 1922, Eugen Ehrlich was Professor of Roman Law at the University of Czernowitz.

² EHRlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Moll transl. 1936) [hereinafter cited as *FUNDAMENTAL PRINCIPLES*].

³ Kidd, Book Review, 38 COLUM. L. REV. 383, 386 (1938).

⁴ NORTHRUP, *THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE* 15 (1959).

a broken man in 1922, a prophet without honor, in his native Germany.⁵

Many epoch-making events in the field of jurisprudence have occurred since Ehrlich's main work reached the American scene in 1936. A great global movement for world peace through law has been nurtured by men of vision; in the United States, an upheaval in civil rights has been experienced as the colored man finally begins to demand that he be given equal protection under the law; civil disobedience has run rampant and has at times approached anarchy; civil liberties and the rights of free men have become an ideological battleground as legislative and investigatory agencies, as well as law enforcement officers, have oftentimes been at loggerheads with the citizen's right to be secure in his home, property, employment, and reputation; the death penalty in criminal cases has been re-examined and the rights of defendants in criminal cases redefined; long-established contract, tort, property, procedural, and other legal concepts have been drastically revised and often overturned; New Deal, Fair Deal, New Frontier, and Great Society social and civil rights legislation has had a profound impact on virtually every area of the law; the apportionment of rural-dominated state legislatures has been re-examined as the "one man-one vote" rule is enunciated; the magic of electronics may change the whole concept of legal research; and efforts towards uniformity among the statutes in corporate, commercial, probate, criminal, property, domestic relations law, and in other areas of the law, have proven to be eminently successful.

The above-described trends, but a few in the kaleidoscope of changing concepts which have shaped our lives and will alter our futures, are in varying degrees interwoven historically, sociologically, and jurisprudentially into a single theme which pervades the writings of Eugen Ehrlich. The touchstone of Ehrlich's legal philosophy is set forth in his foreword to *Fundamental Principles* where he states: "At the present as well as at any other time, *the center of gravity of legal development lies* not in legislation, nor in juristic science, nor in judicial decision, but *in society itself*."⁶

In Ehrlich's view, no statutory enactment or judicial decision of any people or culture is truly effective unless the underlying law, which he termed the "living law," is also known and considered.⁷ To determine what is the living law, Ehrlich suggested that one

⁵ Simpson, Book Review, 51 HARV. L. REV. 190, 193 (1937).

⁶ Foreword to FUNDAMENTAL PRINCIPLES. (Emphasis added.)

⁷ See NORTHROP, *op. cit. supra* note 4, at 15.

must look outside the statute books, the reported decisions, the texts, and the legal tomes, so that a true legal order, consistent with the social habits of the citizens, can be achieved.⁸

Ehrlich's thesis is that the whole economic and social order is based upon relatively few concepts: usage, domination, possession, and disposition.⁹ The living law reveals how men relate their activities, in light of such concepts, in association with their fellow men. Ehrlich contended that the living law is to be found to some extent in the legal documents governing legal relationships but more fully in the way people conduct themselves in their associations and activities.¹⁰

Ehrlich was of the belief that the jurist, in order to discern the living law and thereby more effectively adjudicate the cases which come before him, must learn from his own observations and not from sections of a code or from "bundles of legal papers."¹¹ Ehrlich acknowledged that this process would make exacting demands upon jurists; however, he maintained that such a task was unavoidable and that the results which could be achieved by this approach might well be "marvelous."¹² Whether recent times have borne out Ehrlich's high hopes or whether he should be looked upon as merely another overly optimistic legal-social philosopher, will be the subject of this discussion.

In revisiting Ehrlich's living law, this article will first analyze the impact of the man on his times and on the contemporary science of law. Then, one of the significant jurisprudential events occurring in modern times, and especially since Ehrlich's *Fundamental Principles* was translated into English in 1936, will be examined in depth, as to whether it serves to substantiate Ehrlich's hopeful prediction made some fifty years ago. This milestone of jurisprudence is the decision of the United States Supreme Court in the so-called *School Segregation Cases*.¹³ The Court's decision, it is felt, serves to emphasize the lasting impact of the various ideas offered by Eugen

⁸ See Simpson, *supra* note 5, at 192.

⁹ FUNDAMENTAL PRINCIPLES 118.

¹⁰ See Kidd, *supra* note 3, at 383.

¹¹ FUNDAMENTAL PRINCIPLES 498.

¹² *Ibid.*

¹³ The *School Segregation Cases* are reported in *Brown v. Board of Educ.*, 347 U.S. 483 (1954). The four cases came to the Supreme Court from the states of Kansas, South Carolina, Virginia, and Delaware. Although they were premised on different fact situations and upon differing local conditions, a common legal question caused the Court to consider them together in a consolidated opinion. The individual cases are: *Brown v. Board of Educ.* (No. 1); *Briggs v. Elliott* (No. 2); *Davis v. County School Bd.* (No. 4); and *Gebhart v. Belton* (No. 10).

Ehrlich, one of the pacesetters of juristic thinking in the twentieth century.

II. EHRlich IN RETROSPECT

Although Eugen Ehrlich has made a noteworthy contribution to the study of jurisprudence, as admitted even by those who have severely criticized him for the ideas he propounded,¹⁴ very little information about him or his works is to be gleaned from the traditional sources. He receives virtually no mention in modern encyclopedias and is likewise generally ignored in most other contemporary reference material.

In one leading sociological reference work, Ehrlich is given but scant mention, and there it is stated that his European influence was lessened by his contentious personality.¹⁵ However, when it is considered that Ehrlich has been credited with rescuing jurisprudence from the ossification which might have been its fate had he not shown the way in admitting new light and insight from the related social sciences into a study of the law,¹⁶ perhaps he can be forgiven if he was in fact somewhat quarrelsome in propounding his beliefs, especially in his native land where he was rejected — a prophet without honor.¹⁷

Ehrlich was born in Czernowitz in the Duchy of Bukowina in 1862. In his early years, Bukowina was part of the Austro-Hungarian Empire, but later became part of Rumania. He studied law in Vienna and there obtained his doctor's degree, being named a "Privatdozent," or "teacher of law." He received the acclaim of legal scholars in 1893 with the publication of his book, *Die Stillschweigende Willenserklärung*, wherein he treated various civil law problems.¹⁸ In 1897 he was named a Professor of Roman Law at the University of Czernowitz. His writings reveal his profound and almost encyclopedic grasp of this law. At the University he undertook his life's work of setting forth his views on the living law. He was a prolific writer; his papers have appeared in legal periodicals throughout the world.¹⁹

¹⁴ See generally Vinogradoff, *The Crisis of Modern Jurisprudence*, 29 YALE L.J. 312 (1919).

¹⁵ 5 ENCYC. SOC. SCI. Ehrlich 445 (1931).

¹⁶ Fernando, *Ehrlich's Philosophy of Law*, 24 PHIL. L.J. 1, 12 (1949).

¹⁷ See Simpson, *supra* note 5, at 194.

¹⁸ Pound, *An Appreciation of Eugen Ehrlich*, 36 HARV. L. REV. 129 (1922).

¹⁹ A partial listing of Ehrlich's works includes: BEITRÄGE ZUR THEORIE DER RECHTSQUELLEN (1902); FREIERECHTSFINDUNG UND FREIE RECHTSWISSENSCHAFT

Ehrlich's writings reflect his command of German, French, and English. The event which brought him world-wide attention was the publication in 1913 of his chief work, *Grundlegung der Soziologie des Rechts*. Invitations poured in from all parts of the world to have him expound his views. In 1914 he had arranged to deliver a course of lectures at the Lowell Institute in America and to address the Association of American Law Schools. However, World War I erupted. Czernewitz was a battleground which changed hands repeatedly, and Ehrlich's health was adversely affected. At the end of the war, although efforts were undertaken to re-establish the University, his health continued to fail.²⁰ He died on April 1, 1922 at the age of sixty, "broken in health, as much a casualty of the war as Moseley at Gallipoli and as great a loss to the domain of learning."²¹

To Ehrlich, the living law was the thing. It described how men in society conducted themselves under ordinary circumstances. The living law must be distinguished from the law in the statutes and in the casebooks. The living law is just that, how law is *lived* in society and in the everyday interrelations of men. This concept is thus broader than the law in the books, for the living law may have never been on the books or even the contrary may have been on the books.²²

Ehrlich's emphasis on the variance between the law on the books and the living law is in part attributable to the fact that his native Bukowina, where he wrote, studied, and investigated the living law, had a largely heterogeneous population. Bukowina was formerly a Roman province which was overrun by the Huns in the fourth century and conquered by the Turks in 1512 and by the Russians in the mid-eighteenth century. The Turks later reconquered the land and then ceded the province to Austria in 1775.

In Ehrlich's time, Bukowina was inhabited by a number of nationality groups, including Rumanians, Germans, Jews, Russians, Slovaks, Hungarians, and gypsies.²³ Ehrlich's main theme, how-

(1903); *DIE ERFORSCHUNG DES LEBENDEN RECHTS* (1911); *DAS LEBENDEN RECHT DER VÖLKER DEN BUKOWINA* (1913); *FUNDAMENTAL PRINCIPLES* (1913); *DIE JURISTISCHE LOGIK* (1918); *Montesquieu and Sociological Jurisprudence*, 29 HARV. L. REV. 582 (1916); *The Sociology of Law*, 36 HARV. L. REV. 130 (1922). For a complete listing of Ehrlich's published writings, see *Preface* to *FUNDAMENTAL PRINCIPLES* at vii-ix n.2.

²⁰ Pound, *supra* note 18, at 130.

²¹ See Simpson, *supra* note 5, at 190.

²² *FUNDAMENTAL PRINCIPLES* 369-71.

²³ See Simpson, *supra* note 5, at 192.

ever, is clearly universal in application. It was his belief that the living law must be determined in all segments of society by a direct observation of life, commerce, customs and usages, and all associations, not merely those which had been dealt with by the law in the books.²⁴

Ehrlich's views have gained more widespread attention and respect, although not necessarily acceptance, in the English common law countries than upon the Continent. However, for varying reasons, he did not really "catch on" with American legal scientists as rapidly as might have been expected. This may perhaps be explained by a number of factors, not all of which necessarily have to do with Ehrlich's legal theorems.

One reason for his belated recognition in this country is that although his *Fundamental Principles* was first published in Germany in 1913, it was not translated into English until 1936. Almost continually during that period, which encompassed World War I, anti-German sentiment ran high in the United States. Although this feeling was not as strong in the early thirties, by the time his work was translated into English and published by the Harvard University Press in 1936, the world was noting with apprehension the rise to power of Adolph Hitler. War clouds were again gathering when Ehrlich's work made its appearance on the American scene, and a built-in animosity toward anything German was a common feeling in this country.²⁵

Ehrlich's theories have not gained significant acceptance in his native Germany. His refined, cogent postulations were not embraced in that country prior to World War I, when drums were beating and war loomed and the minds of men were on other things. Following the war, as his health failed, he was not able to prosecute his legal-sociological "contentions" with customary vigor. Germany, during the period following Ehrlich's death in the early 1920's and on through to the waging of World War II and the final defeat of Hitler's legions, was not exactly sympathetic to a school of jurisprudence which espoused a critical and searching glance at the existing social order. Thus, Ehrlich lived, died, was buried, and has truly remained, a prophet without honor in his own country.²⁶

In the United States, the sociological movement was given a tremendous impetus by Ehrlich's writings. His followers and cham-

²⁴ FUNDAMENTAL PRINCIPLES 493.

²⁵ See Simpson, *supra* note 5, at 193.

²⁶ *Ibid.*

pions in this country argued in the years following the publication of his major work that law should not be an isolated, insulated system of rules and propositions operating independently of society; rather law should be intertwined with life itself and with the social and cultural phenomena of life and of the people who were affected by it.

Holmes,²⁷ Cardozo,²⁸ and Pound²⁹ were among the leaders in the sociological-realist movement. As at least the foster-father of the movement, Ehrlich, in guiding it into existence, agreed with Savigny's and Puchta's historical school of jurisprudence that we can learn the laws governing the development of society only by studying the historic facts.³⁰ However, he felt that Savigny and Puchta should have gone farther in that they failed to distinguish between legal propositions and the living law.³¹ To Ehrlich, the legal proposition was an instruction framed in words addressed to the courts as to how to decide legal cases or a similar instruction addressed to administrative officials as to how to deal with particular cases.³² The living law, however, dominated life itself even though the law had not been posited in legal propositions. The living law, that is, man in society, long antedated legal propositions and the courts which adjudicate legal conflicts.³³

Roscoe Pound in his introduction to Ehrlich's *Fundamental Principles* stated that Ehrlich was the first to attack the proposition that law is no more than an aggregate of legal concepts.³⁴ Ehrlich emphasized the necessity of considering the relations of men in groups and associations rather than as abstract individuals, so that the inner order of their relations could be maintained. Pound agreed with Ehrlich that the law was more than legal propositions; it was the law in books *in action*.³⁵

²⁷ HOLMES, COLLECTED LEGAL PAPERS 210, 225 (1920); Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 452 (1899); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

²⁸ CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); CARDOZO, THE GROWTH OF THE LAW (1924).

²⁹ Pound, *Fifty Years of Jurisprudence* (pts. 3-4) 51 HARV. L. REV. 444, 777 (1938); Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912).

³⁰ FUNDAMENTAL PRINCIPLES 175.

³¹ *Id.* at 466.

³² *Id.* at 38. See also Ehrlich, *The Sociology of Law*, 36 HARV. L. REV. 130, 132 (1922).

³³ FUNDAMENTAL PRINCIPLES 38.

³⁴ *Id.* at xxxi.

³⁵ *Id.* at 370-71.

Ehrlich, ever the realist, disdained legal mathematicians whose method was to arrive at a decision by pigeonholing a set of facts into an established legal concept.³⁶ Rather he advanced the view that

The juristic science of the future . . . will discard for good and always all the mummary of creation of abstract concepts and of construction. But it must be admitted that these things always only served the sole purpose of concealing a necessary social process from the eyes of busybodies. Free finding of law is not, as some have thought, a finding of law that disregards the statute, but a finding of law that is untrammelled by useless and superfluous confinement in abstraction and construction.³⁷

Ehrlich favored the free decision approach in judicial decision-making only when the applicable law did not conform with the existing mores of society or where a specific conflict of interest had arisen for the first time.³⁸ He pointed out that the free decision approach was dependent upon the talents and creativity of the individual jurist.³⁹ However, the jurist, rather than rendering a decision overbalanced with his own personal beliefs, would, under Ehrlich's free decision approach, attempt to adjudicate in conformity with the prevailing spirit of justice as indicated by the living law.⁴⁰

Ehrlich argued, in his free decision approach, that it was impossible to formulate in a code or in the decision books legal provisions that would encompass every fact situation. To him the law, as applied by the courts or as contained in the cases, was insufficient to explain the inner relations of men in society. The law of the code and of the courts was to him a complex of rules meant to guide judges in their decisions. Moreover, a legal controversy which is resolved in court is an exceptional occurrence as compared to the multitudinous relations and agreements of a juridical nature which constitute the daily life of a community.⁴¹

Ehrlich pointed out that, as centuries passed, the mass of legal provisions had grown to such an extent that "there certainly is no jurist in the world who can master all of them even for his own state without losing his mind."⁴² However, he contended that if this was impossible, it was even more impossible and foolhardy to

³⁶ *Id.* at 324-26.

³⁷ *Id.* at 340.

³⁸ See Ehrlich, *supra* note 32, at 140.

³⁹ FUNDAMENTAL PRINCIPLES 73-74.

⁴⁰ *Id.* at 181.

⁴¹ See Ehrlich, *supra* note 32, at 141; Vinogradoff, *supra* note 14, at 313.

⁴² See Ehrlich, *supra* note 32, at 133.

attempt to set down in legal provisions (be they code enactments or court decisions), with any purported finality, all of *life's* content. He pointed up by means of a graphic example the folly of such an attempt:

To embrace the whole variegated body of human activities in Legal Provisions is about as sensible as trying to catch a stream and hold it in a pond; the part that may be caught is no longer a living stream but a stagnant pool — and a great deal cannot be caught at all.⁴³

Ehrlich, as is to be expected of one who is a pacesetter in new ideas and who is critical of and perhaps even "contentious" toward prevailing views, came in for his share of brickbats.⁴⁴ His emphasis on the living, as opposed to "lawyers' law" was termed by Edwin W. Patterson "a naive half-truth"⁴⁵ and an "exaggeration."⁴⁶ Patterson asserted that Ehrlich's "semi-scientific" theory of law, which held that the living law depended upon social mores as well as upon established custom and usage, was quite unscientific.⁴⁷ Patterson argued that the law required great technical and professional discipline and that it was incorrect to represent it as arising spontaneously out of its environment. He stated:

On the contrary, the enactment of new laws often engenders new mores and habits, *e.g.*, the payment of income taxes in the United States since 1913, and the persuasive effect of the law of warranties upon the processing and packaging of food. Indeed, the maintenance of law contributes as much to the community's moral ideas as those ideas contribute to the content of law.⁴⁸

Patterson thus accused Ehrlich of putting the cart before the horse in representing that the law arises from the mores of people in society. He contended that, instead, the law profoundly affects social mores; Ehrlich's reverse philosophy and his "naive" method of attempting to discover the living law are therefore termed "unscientific."

Similar criticisms, especially of Ehrlich's failure to set forth a clearly delineated method of determining the living law, have been leveled at Ehrlich since he rose to the forefront in legal thinking.⁴⁹

⁴³ *Ibid.*

⁴⁴ See, *e.g.*, Husserl, Book Review, 5 U. CHI. L. REV. 330, 339 (1938); Nussbaum, *Fact Research in Law*, 40 COLUM. L. REV. 189, 194 n.25 (1940); Vinogradoff, *supra* note 14, at 318.

⁴⁵ PATTERSON, *LAW IN A SCIENTIFIC AGE* 48 (1963).

⁴⁶ *Id.* at 57.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ See, *e.g.*, Ginsberg, Book Review, 1 MOD. L. REV. 169, 171 (1937).

One writer has stated that Ehrlich, one of the ardent champions of legal realism, did no significant fact research himself.⁵⁰ Another reviewer observed of Ehrlich that the "heat of the battle in which he was engaged carried him away; many exaggerated statements found in his writings are due to this fact."⁵¹

One author more recently stated that Ehrlich's living law is by Ehrlich's definition limited to the here and now; yet, the very term connotes a dynamic rather than a static condition. This author felt that the true living law should point the way to the future, whereas Ehrlich's reliance on pure observation did not seem calculated to produce information that would provide a reliable guidepost to the future course of the living law.⁵²

Criticizing Ehrlich for his alleged failure to formulate a clearly defined scientific method, Professor Northrop of the Yale Law School wrote:

What is the method of sociological jurisprudence for determining the living law? A reading of the works of Dean Emeritus Roscoe Pound, who was the first to introduce this sociological philosophy of law into the United States, and of Ehrlich, who, following upon Savigny, pioneered in this philosophy of legal science in Europe will show that they threw very little light upon the scientific method which the sociologically trained lawyer is to use to determine the living law.⁵³

It is believed that Ehrlich's critics have perhaps expected too much of him. It must be remembered that he wrote his major work in 1913, when the science of fact observation and collection was in its very early stages of development. Ehrlich was a pioneer, and his methods, of necessity, were perhaps crude, untried, and ill-defined. To accuse his method of being crude is akin to saying that the Wright brothers were not great pioneers in aviation because they had a faulty take-off apparatus on their first flying machine. Although the device had not been technically perfected, the Wright invention took off. So too with Ehrlich's living law — it "took off"; it changed the course of jurisprudential history, even though his take-off apparatus, that is, the method of gathering facts to determine the living law, was not then letter perfect.

⁵⁰ See Nussbaum, *supra* note 44, at 197.

⁵¹ Husserl, *supra* note 44, at 340.

⁵² See Fernando, *supra* note 16, at 11.

⁵³ NORTHROP, *op. cit. supra* note 4, at 29. Northrop has high words of praise for Underhill Moore, who first saw this weakness in sociological jurisprudence and made the first constructive attempt to remove it, as reflected in Moore & Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1 (1943).

History, it is submitted, has vindicated Ehrlich's basic beliefs. Methods are always subject to change and improvement. Ehrlich stressed in-depth observation of the social mores of society and of men's inner relationships with one another in that society in order to determine the living law.⁵⁴ He advocated empirical studies of the ingrained philosophies, social mores, and habits of the community. He pointed out that the source of the living law is, first, the modern legal document and, secondly, direct observation of life, of commerce, of customs and usages, and of all associations.⁵⁵

The best single reply to those who have fretted over Ehrlich's alleged failure to furnish students of the science of the law with the exact method to be followed in observing and recording the living law was made by Ehrlich himself when he wrote in his *Fundamental Principles*, perhaps somewhat "contentiously" and none too patiently, at the closing line of his great work: "Method is as infinite as science itself."⁵⁶

It is thus important to discuss in the following section of this article the implementation of the living law as exemplified in *The School Segregation Cases*.⁵⁷

III. THE LIVING LAW IN A NUTSHELL: THE SCHOOL SEGREGATION CASES

On May 17, 1954, Mr. Chief Justice Earl Warren, speaking for a unanimous United States Supreme Court in the case of *Brown v. Board of Educ.*,⁵⁸ held that the segregation of children in public schools solely on the basis of race, even though the physical facilities may have been equal, deprived Negro children of equal educational opportunities in violation of the equal protection clause of the fourteenth amendment. The Court held that the "separate but equal" doctrine announced by the Supreme Court in 1896 in *Plessy v. Ferguson*,⁵⁹ had no place in the field of public education. Under that doctrine, which was applied to segregation in public transportation, "equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate."⁶⁰

⁵⁴ FUNDAMENTAL PRINCIPLES 493.

⁵⁵ *Ibid.*

⁵⁶ FUNDAMENTAL PRINCIPLES 506.

⁵⁷ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁵⁸ 347 U.S. 483 (1954).

⁵⁹ 163 U.S. 537 (1896).

⁶⁰ *Brown v. Board of Educ.*, 347 U.S. 483, 488 (1954).

Mr. Chief Justice Warren noted that subsequent to the *Plessy* decision the Supreme Court had ruled on six cases involving the "separate but equal" doctrine in the field of public education.⁶¹ He stated that in the more recent of the six cases, each of which concerned public education at the graduate school level, inequality had been found in that specific benefits enjoyed by white students had been denied to Negro students possessing the same educational qualifications.⁶² However, the Chief Justice observed that in none of the previous decisions had it been necessary to re-examine the "separate but equal" doctrine to grant relief to a Negro plaintiff. In the *Brown* case, the issue was squarely before the Court because unlike *Sweatt v. Painter*,⁶³ there were findings in the lower courts that the segregated Negro and white schools in question had been or were being equalized with respect to buildings, curricula, qualifications of teachers, and other tangible factors.⁶⁴

The Court noted that its decision, therefore, could not turn on a comparison of the tangible factors in the various Negro and white schools under consideration; rather, it was necessary to look to the effect of segregation itself on public education.⁶⁵ The Court unanimously concluded that the segregation of school children on the basis of race deprived the Negro children of equal educational opportunities. The Court asserted:

In approaching this problem, we cannot turn the clock back to 1868 when the [fourteenth amendment] . . . was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.⁶⁶

The Court concluded that in the field of public education the doctrine of "separate but equal" had no place since separate educational facilities are inherently unequal.⁶⁷ It stated that to separate

⁶¹ *Cumming v. County Bd. of Educ.*, 175 U.S. 528 (1899); *Gong Lum v. Rice*, 275 U.S. 78 (1927); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

⁶² *Brown v. Board of Educ.*, 347 U.S. 483, 492 (1954).

⁶³ 339 U.S. 629 (1950).

⁶⁴ 347 U.S. at 492.

⁶⁵ *Ibid.*

⁶⁶ *Id.* at 492-93.

⁶⁷ *Id.* at 493.

Negro children from other children of similar age and qualifications solely because of their race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁶⁸

In finding that the *Plessy* "separate but equal" doctrine had no place in public education and that school segregation generated a feeling of inferiority among Negro children, the Court stated: "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."⁶⁹

The School Segregation Cases will surely rank among the most epoch-making decisions handed down by the Supreme Court. It has been written that probably no Supreme Court ruling since *Scott v. Sandford*⁷⁰ (popularly known as the *Dred Scott* decision) has provided as much public discussion, excitement, and even disorder, as *Brown v. Board of Educ.*⁷¹ The reaction in the South was predictably bitter. The president of the National Association of Attorneys General, a Southerner, referred to the members of the Supreme Court as "Constitutional 5th Columnists [who] march with hobnailed boots across the face of sacred traditions and with legal sabres slash whole concepts of free government out of the Constitution."⁷²

Former United States Supreme Court Justice James F. Byrnes of South Carolina was of the opinion that the Court must be curbed.⁷³ On the floor of the United States Senate, Senator James Eastland of Mississippi stated: "What the bar and the people of the United States are slow to realize is that in the rendition of the opinion on the school segregation cases the entire basis of American jurisprudence was swept away."⁷⁴

Those favoring the decision came to the defense of the Court, accusing leading Southern spokesmen of making unwarranted "smears" upon Mr. Chief Justice Warren and the other members of

⁶⁸ *Id.* at 494.

⁶⁹ *Id.* at 494-95. (Footnote omitted.)

⁷⁰ 60 U.S. (19 How.) 393 (1857).

⁷¹ See Cook & Potter, *The School Segregation Cases: Opposing the Opinion of the Supreme Court*, 42 A.B.A.J. 313 (1956).

⁷² Address by Texas Attorney General John Ben Sheppard, Texas Independence Day Celebration, March 2, 1956, quoted from Dickson, *The Segregation Cases: Equal Justice Under Law for All Citizens*, 42 A.B.A.J. 730 (1956).

⁷³ U.S. News & World Report, May 18, 1956, p. 50.

⁷⁴ 101 CONG. REC. 7120 (1955) (remarks of Senator Eastland).

the Court.⁷⁵ Throughout the length and breadth of the land, *The School Segregation Cases* were discussed and debated. Responding to charges that the Supreme Court was attempting to legislate,⁷⁶ those favoring the decision stated:

[T]his was a judicial question and did not at all evidence any intent upon the part of the Supreme Court to legislate. The legal question was whether there was a violation of the Fourteenth Amendment . . . This question could not be assigned to the state for final determination. The Supreme Court of the United States had the duty to determine whether or not there was a violation of the Fourteenth Amendment to the Federal Constitution. That is all it did.⁷⁷

One critic stated that the Court ignored every rule of law in its decision. He argued that *The School Segregation Cases* were not only not the law of the land but also were legally erroneous.⁷⁸ Another stated that our country, four years after the decision had been handed down, was "reaping the whirlwind of evils" sown by Mr. Chief Justice Warren and his associates.⁷⁹ Still another made the dire prediction that the country would meet its Armageddon as a result of the Court's decision, rhetorically asking: "Does chaos in the Congo indicate what might happen in the Deep South if large numbers of semi-illiterate blacks are given the suffrage franchise and are encouraged in their pretensions to social equality?"⁸⁰

By way of well-reasoned contrast, another writer placed the sociological impact of the *Brown* case in perspective:

It is the law's ancient truth that no man may be judge in his own case, and no race may justly maintain its sole competence to measure the equal protection to be accorded to fellow citizens. These simple verities are bound to prevail. It is futile to make war "to keep the past upon its throne." Once the Court's judgment is everywhere in the course of execution, difficult though that objective now appears, this country will gain the much-needed calm *that comes from doing right*, and the hurtful attack upon the Court will cease.⁸¹

⁷⁵ See generally DeLacy, *The Segregation Cases: A Judicial Problem Judicially Solved*, 43 A.B.A.J. 519 (1957).

⁷⁶ Verba, *The Supreme Court, Segregation and Social Research*, 31 TEMP. L.Q. 1 (1957).

⁷⁷ DeLacy, *supra* note 75, at 521.

⁷⁸ Bloch, *The School Segregation Cases: A Legal Error That Should Be Corrected*, 45 A.B.A.J. 27 (1959).

⁷⁹ Gaillard, *Origins of the Races and Their Development for Peace (Separate but Equal)*, 20 ALA. LAW. 115, 122 (1958).

⁸⁰ Tansill, *How Long Will Southern Legislatures Continue To Acquiesce in the Aligned Decision of the Supreme Court on May 17, 1954?*, 23 ALA. LAW. 364 (1962).

⁸¹ Fairman, *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 94 (1956). (Emphasis added.)

The Supreme Court's reliance upon the testimony of sociologists and psychologists as well as its now-famous footnote eleven,⁸² wherein were cited social science authorities indicating that segregation in the schools generated a feeling of inferiority among Negro children, came under especially heavy attack.⁸³ Allegations were made that several authors cited by the Supreme Court in footnote eleven had pro-Communist leanings and that they, or members of their staffs, were active in other leftist organizations.⁸⁴ One critic indignantly made note of the fact that one of the contributors of sociological information was a Negro educator who allegedly sent a message of condolence upon the death of Joseph Stalin.⁸⁵ Such transparent attempts to undermine the *Brown* decision, smear the Supreme Court, and discredit those who supported the holding, caused Judge Irving B. Kaufman to state: "Americans must guard against striking 'blindly at all who espouse an honest and decent cause merely because the Communists are also paying it lip service.'"⁸⁶

In criticizing the Court's giving consideration to sociological and psychological treatises, critics of the *Brown* decision remarked:

The findings of social science are sometimes regarded as elaborate statements of what everybody knows in language that nobody can understand. . . .

Should our fundamental rights rise, fall or change along with the latest fashions of psychological literature? How are we to know that in the future social scientists may not present us with a

⁸² Footnote eleven reads as follows:

11. K. B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, *Personality in the Making* (1952), c. VI; Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. Psychol. 259 (1948); Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, *Educational Costs, in Discrimination and National Welfare* (MacIver, ed., 1949), 44-48; Frazier, *The Negro in the United States* (1949), 674-681. And see generally Myrdal, *An American Dilemma* (1944). *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954).

⁸³ See, e.g., ROSS & VAN DEN HAAG, *THE FABRIC OF SOCIETY* 163-66 (1957); Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150 (1955); Cook & Potter, *supra* note 71, at 314, 316; Gregor, *The Law, Social Science, and School Segregation: An Assessment*, 14 W. RES. L. REV. 621 (1963); Tansill, *supra* note 80, at 380; Van den Haag, *Social Science Testimony in the Desegregation Cases — A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69 (1960).

⁸⁴ See Cook & Potter, *supra* note 71, at 316; DeLacy, *supra* note 75, at 521; Gailard, *supra* note 79, at 122-23.

⁸⁵ Cook & Potter, *supra* note 71, at 316.

⁸⁶ DeLacy, *supra* note 75, at 521.

collection of notions similar to those of Adolph Hitler and label them as modern science?⁸⁷

Kenneth B. Clark, Associate Professor of Psychology at City College of New York, was a social science consultant to the legal staff of the NAACP in *The School Segregation Cases*. His work, *Effect of Prejudice and Discrimination on Personality Development*, was one of the treatises cited by the Supreme Court in its footnote eleven.⁸⁸ Some time ago he stated his conviction that the social scientist should play a definite role in the legal process; however, he emphasized that role should be that of a scientist and not that of a propagandist social reformer.⁸⁹

Is there not a strong Ehrlichian tone to Professor Clark's professed credo that the expertise of social scientists does have a place in certain lawsuits:

It is to be hoped that a decreasing number of lawyers believe that laws and courts are sacred and should be kept antiseptically isolated from the main stream of human progress. . . .

The law is concerned with society and the regulation of human affairs. . . . Man's relations with his fellow man involve matters far too grave and crucial to be left to lawyers and judges alone. Respect for the law, intelligently and ethically conceived and executed, is essential for stable government. Intelligence and ethics cannot stem from the law alone but must be fed to it through the ceaseless struggles of scholars, scientists, and others toward truth and understanding.⁹⁰

Professor Clark has endorsed Ehrlich's contention that a jurist, in order to effectively decide cases coming before him, must be aware of the social mores of the community out of which the litigable question arose; he must discern the rules of society which men actually live by, and then decide what those rules ought to be for a better-ordered society.⁹¹ It was Ehrlich's basic theme, as set forth forty years before *The School Segregation Cases*, that a judge must take into account the relations of men in groups and associations, so that the inner order of their relations can be better maintained.⁹²

Advocates of Professor Ehrlich's views on the sociology of law would hold that *The School Segregation Cases* were nothing more than an updating of legal provisions; that is, the "separate but

⁸⁷ Cook & Potter, *supra* note 71, at 316.

⁸⁸ See material quoted note 82 *supra*.

⁸⁹ Clark, *The Desegregation Cases: Criticism of the Social Scientist's Role*, 5 VILL. L. REV. 224 (1960).

⁹⁰ *Id.* at 234.

⁹¹ FUNDAMENTAL PRINCIPLES 498.

⁹² *Id.* at xxxii.

equal" doctrine enunciated in *Plessy v. Ferguson*⁹³ was out of kilter with the living law, so the Supreme Court applied moral, sociological, and ethical standards in order to arrive at the needed reform.

The Court in *The School Segregation Cases*, it is submitted, did no more than what it had done almost one hundred years earlier when it assessed the sociological, psychological, and political implications of the issues before it in the *Dred Scott*⁹⁴ decision. In *Dred Scott*, the members of the Court were split as they reached diverse conclusions regarding the social and political overtones of the case. However, a century later in *The School Segregation Cases*, they were of one mind in assessing the "living law" aspects of the "separate but equal" doctrine as it applied to public education.

As the late Dean Pound suggested, when such concepts have acquired a certain fixity in the judicial and professional tradition,

they are part of "the law" quite as much as legal precepts. Indeed, they give the latter their living content and in all difficult cases are the ultimate basis of choosing, shaping, and applying legal materials in the decision of controversies. When we seek to exclude them from our formal conception of law we not only attempt to exclude phenomena of the highest significance for the understanding of actual functioning of judicial justice, but, as things are, we do the courts much wrong by laying them open to the charge of deciding lawlessly when they do what they must do, and what courts have always been compelled to do, in administering justice according to law.⁹⁵

Pound, as did Ehrlich, thus insisted that it is futile to attempt to ignore the sociological and political aspects of controversies coming before the courts. To do so is to invite, according to Pound, ignorant attacks upon the courts and must, in the end, impair lay confidence in our judicial institutions much more than would a frank recognition of the facts and an attempt to give a scientific account of them.⁹⁶

It is felt that the attacks which have been directed toward the Supreme Court since it handed down its decision in *The School Segregation Cases* would not surprise Dean Pound. Abuse and unreasoned attacks have been the lot of the Supreme Court since its inception. In a strong argument for a deeper awareness of the "living law" in judicial decision-making, Pound stated:

⁹³ 163 U.S. 537 (1893).

⁹⁴ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

⁹⁵ Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 654 (1923). (Emphasis added.)

⁹⁶ *Id.* at 655.

[C]ourts and jurists have always proceeded on the basis of something more than the formal body of legal precepts for the time being. Even the analytical jurist, whose boast is that he goes wholly and exclusively upon the actual rules that in fact obtain in the courts in modern states, in practice imports into his science an ideal pattern of what those rules should be which determines all his results. The "law-that-is" in the sense of the analytical jurist is an illusion. Representing to himself the whole body of legal precepts, as made at one stroke on a logical plan to which it conforms in every detail, he sets out to discover this plan by analysis. What he does is to set up a plan which will explain as much as possible of the actual phenomena of the administration of justice, and to criticize the unexplained remainder for logical inconsistency therewith.⁹⁷

On another front, a much-debated question has been whether the sociological and psychological studies presented to the Supreme Court played a major role in shaping its decision in *The School Segregation Cases*. In retrospect, it is doubted that this was the case.⁹⁸ The Court, it is true, did speak of the adverse effects of segregation on the hearts and minds of Negro children, and it did aver that "modern authority," as evidenced by the writings cited in its footnote eleven, corroborated its finding that segregation was fostering a feeling of inferiority in Negroes.

However, the main thrust of the Court's decision, it is felt, was not attributable to the sociological testimony presented to the Court. Rather than relying in the main upon sociological data which perhaps might be erroneous, inconclusive, or subject to subsequent countervailing studies, it appears that the Court's decision was posited on the conclusion that the defendants had been deprived of their substantive due process as a result of the violation of the equal protection clause of the fourteenth amendment.

The Court's finding that the sequestration of school children into separate facilities, solely on the basis of race, violated the equal protection clause was consistent with a series of earlier decisions.⁹⁹ The Court reasoned that if the purpose of that amendment was to establish equal justice under the law for all citizens, then there was no valid reason to carve out an exception in the case of Negro children. It concluded that to do so deprived those children of substantive due process;¹⁰⁰ the doctrine of "separate but equal" was, in

⁹⁷ *Ibid.*

⁹⁸ See Lewis, *Parry and Riposte to Gregor's "The Law, Social Science, and School Segregation: An Assessment,"* 14 W. RES. L. REV. 637 (1963).

⁹⁹ See cases cited note 61 *supra*.

¹⁰⁰ *Brown v. Board of Educ.*, 347 U.S. 483, 489, 494-95 (1954).

effect, held to be a contradiction in terms as applied to public education.

The roots of the decision in *The School Segregation Cases* are not traceable to the sociological studies presented to the Court. Had such studies not been offered, it is believed that the Court would nonetheless have reached the same conclusion.¹⁰¹

However, the Court was confronted with a most difficult problem as it struggled with the ramifications of its decision. What was asserted by an Alabama critic in castigating Mr. Chief Justice Warren and his associates may actually have been a true assessment of the Court's approach. The critic complained that the Court "scrapped the criterion of history" and instead applied the "American ideal of fairness."¹⁰² In the Ehrlich-Pound realist tradition, one might well ask: Is that really so bad?

The Warren Court had to decide whether it wished to abide by the existing legal provision, namely the doctrine of "separate but equal" as set forth in *Plessy v. Ferguson*,¹⁰³ and thus follow the principle of stare decisis,¹⁰⁴ or whether it should apply the test of the "American ideal of fairness," revealed by its understanding of the living law and thereby reform the legal provisions if it concluded that the prevailing doctrine predictably would tend to infuse a feeling of inferiority in a minority group.¹⁰⁵

In *The School Segregation Cases*, the Supreme Court, of necessity, recalled its earlier-enunciated attitude toward the principle of stare decisis — the realization that adherence to an old decision in order to avoid the unpopular practical results of a change sometimes perpetuates an unsatisfactory rule.¹⁰⁶ The Court decided that the "unfortunate practical results" of no longer adhering to *Plessy* were outweighed by the desirability of overturning the "separate but equal" doctrine. The Court felt that if the purpose of the fourteenth amendment was truly to establish equal protection under

¹⁰¹ See Lewis, *supra* note 98, at 649-50.

¹⁰² Tansill, *supra* note 80, at 381.

¹⁰³ 163 U.S. 537 (1893).

¹⁰⁴ Ehrlich himself argued that the same decision generally should be rendered in like or similar cases. See FUNDAMENTAL PRINCIPLES 132. However, he also felt that the living law must be applied to update legal provisions which did not reflect the mores of men in society. He advocated that the judge render a decision under his "free decision" approach in conformity with the spirit of justice existing at the time. *Id.* at 181.

¹⁰⁵ See NORTHROP, THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE 74 (1942).

¹⁰⁶ *Helvering v. Griffiths*, 318 U.S. 371, 403 (1942).

state laws for all citizens, it could not engraft an exception in the case of a state law prohibiting Negro children from sharing a public school with white children.¹⁰⁷

The Court's holding, it is submitted, exemplifies Ehrlich's "free decision" approach. The Justices rendered their opinion after attempting to apprise themselves of the living law. They conscientiously examined the inner relationships of white school children and Negro school children attending segregated schools and assessed what they learned in relation to what they considered to be the spirit of justice existing in the country.¹⁰⁸ As Ehrlich has recommended, they undoubtedly gauged the resistance inherent in society against their judicial pronouncement. That there was considerable resistance is obvious. That they correctly caught the "spirit of justice" existing in our land is felt to be even more obvious as *The School Segregation Cases* are reviewed more than a decade later. It is felt that Mr. Chief Justice Warren and the other Justices measured up to Ehrlich's exacting standards for enlightened judgment. His "free decision" principles in judicial decision-making were really not concerned with the substance of the law so much as the quality of the judges.¹⁰⁹

Critics of *The School Segregation Cases* may have unwittingly paid the Warren Court the highest of compliments when they wrote that the Court did not hold that *Plessy* was bad law. "It held that it was bad sociology."¹¹⁰

This intended brickbat most certainly would have been received as a real bouquet by the late Austro-Hungarian jurist, who once had written: "At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, *but in society itself*."¹¹¹

Ehrlich, stern taskmaster though he was, recognized the difficult decisions confronting judges as they attempted to resolve conflicting interests. He knew that to do this required a measure of greatness in the judge and stated his own reflections on the genius required of judges:

In these paths the genius is the born leader of mankind. Even in the most primitive days, . . . the judge [stood] in the thoughts of men by the side of the founder of a religion, the prophet, the poet.

¹⁰⁷ See Dickson, *supra* note 72.

¹⁰⁸ FUNDAMENTAL PRINCIPLES 131.

¹⁰⁹ *Id.* at 181.

¹¹⁰ Cook & Potter, *supra* note 71, at 314.

¹¹¹ Foreword to FUNDAMENTAL PRINCIPLES. (Emphasis added.)

The genius is the more highly developed man in the midst of a human race that has remained far behind him; the man of the future, born, by a mysterious coincidence, into the present, who today thinks and feels as some day the whole race will think and feel. Therein lies his tragic fate, for he is lonely; and his sole compensation lies in this, that he shows the way to others.¹¹²

Could not the above words written by Ehrlich over fifty years ago serve as an epitaph to the man himself, whose "tragic fate" was to live and die as a "prophet without honor"; one who most certainly did "show the way to others"?

IV. CONCLUSION

Ehrlich is a man for the ages. The foundations upon which he built his philosophy of law have withstood the tremors of a changing world and a vastly more complicated society. Upon those foundations which he laid, other men of genius like Pound, Cardozo, and Brandeis, have constructed a "rock of ages" of legal thinking.

Perhaps Ehrlich lived in the wrong time and place — but then perhaps he did not. He served as a link between two of the most momentous periods in the history of mankind. His major work, published in 1913 caught with intuitive brilliance the spirit and the historical and sociological significance of that fantastic era of European history beginning with the French Revolution in 1789 and lasting until the outbreak of World War I. Great technological changes had taken place, an industrial revolution was under way, monarchies were falling, and the common man began to demand social justice. A new system of juristic science was needed.

Ehrlich expounded upon this felt need for a new juristic approach. His answer was the living law. He effectively challenged the "establishment" of legal thinking as he opposed the prevailing notion that there was an inherent infallibility in state legislation.

The era following Ehrlich's death, the cataclysmic period from 1922 to the present, has certainly not witnessed any surcease of unrest, upheavals, and momentous change. Being acutely aware of these problems, Ehrlich believed that order could be brought out of potential jurisprudential chaos and "marvelous results" obtained if those who grappled with these conditions were diligent in their absorption of the living law.

It is submitted that trends in justice have borne out Ehrlich's contentions. Lawyers and judges certainly may not insulate them-

¹¹² FUNDAMENTAL PRINCIPLES 207.

selves from the world or from society. The storm over *The School Segregation Cases* and the climate existing in this land in the decade since the *Brown* decision indicates that the Court correctly gauged the living law and properly interpreted the sense of justice existing in America.

Ehrlich recognized that methods are subject to refinement and that research in the physical sciences would far outstrip the progress made in the social sciences. Man is infinitely more complex than atoms, protons, and alpha particles. No rigid formulas can be devised. The scientist only observes facts, whereas the legal-sociologist is concerned with facts as they are in relation to what ought to be. It is indeed difficult to draw the line between fact and ideal. No electronic device can foretell what should be the end of the law.

Every student of the law, anyone "living" with the law, owes a debt to this man of foresight who took the first giant step; yet many more steps are yet to be taken. As we quicken the pace toward the fulfillment of the ideals he held out for us, Ehrlich, a giant of the ages, and his living law, will, it is predicted, grow in stature as history finally comes to recognize the truths which he so brilliantly propounded.