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Book Review

A CENTURY OF CIVIL RIGHTS. By Milton R. Konvitz. With a Study of State Law Against Discrimination by Theodore Leskes. New York: Columbia University Press, 1961. Pp. v, 293. \$6.00.

This book is an historical survey of the principal constitutional and statutory provisions, federal and state, through which the effort has been made to achieve for the American Negro an equality before the law and an equality of opportunity to match the freedom which was won for him by war. Mr. Konvitz is a professor of law at Cornell who has written widely in the fields of civil rights and civil liberties. Mr. Leskes is director of the Legal Division of the American Jewish Committee. Instead of collaborating on the entire work, each of the authors individually has written certain chapters.

As background to the rest of the book, Mr. Konvitz in the first chapter discusses American slavery and contrasts it with other systems of slavery known to history. Elsewhere, slavery was an economic institution, a liberal manumission policy prevailed, and former slaves were accepted into the society without discrimination. In America, per contra, slavery was a racial institution, manumission was discouraged or made impossible, and freedmen were legally inferior to whites. These differences were due to a belief, peculiar to the American South according to Konvitz, that the Negro is an inferior species. This belief survived the Civil War and continues to be widely held; thus, although the slavery question was decided, the racial question was perpetuated.

After this introductory chapter, there follows a section of four chapters under the heading, "Federal Civil Rights Legislation." One chapter gives a chronological summary of the principal developments—the Freedmen's Bureau Acts of 1865, the thirteenth amendment, the Civil Rights Act of 1866, the fourteenth and fifteenth amendments and the Civil Rights Acts of 1870, 1871, and 1875. The greater part of these statutes were repealed in 1894; the remainder, comprising eight sections of the current United States Code, are set forth. Then, jumping to our own time and the resumption of the fight for Negro equality, Mr. Konvitz summarizes the 1947 report of President Truman's Committee on Civil Rights, the Civil Rights Act of 1957, the 1959 report of the Commission on Civil Rights which was created by the 1957 law and the Civil Rights Act of 1960. Although the book was published in 1961, it evidently went to print prior to the September 1961 report of the Civil Rights Commission.

An entire chapter is devoted to an analysis of the Civil Rights Act of 1875, in which Congress sought to provide a legal right to equality in the enjoyment of accommodations in places of public resort. This chapter is of particular interest

because of the inclusion of excerpts from the congressional debates. The distinctly modern ring is illuminating; the issues and attitudes and arguments of 1875 are still very much alive today, essentially unchanged. Even the question of school segregation is not new. Sumner's original bill in 1873 prohibited it, but the provision was dropped before final passage. A fascinating historical footnote is that the Senate in 1875 contained two Negroes; both were from Mississippi and one filled the seat vacated by Jefferson Davis.

Another entire chapter is devoted to an analysis of the *Civil Rights Cases* of 1883. Both Mr. Justice Bradley's opinion for the Court, limiting the scope of the fourteenth amendment as a source of protection of Negro equality, and Mr. Justice Harlan's dissent are clearly explicated. Although it is clear that Mr. Konvitz supports Mr. Justice Harlan's position rather than the majority, the analysis of both views is fair and accurate. One wonders, in passing, how Mr. Konvitz could be guilty of such an egregious error as to assert that the *Civil Rights Cases* were only the third instance, following *Marbury v. Madison* and *Dred Scott*, in which the Supreme Court declared an act of Congress unconstitutional.

In the final chapter of this section, Mr. Konvitz discusses the rise and fall of the "separate but equal" doctrine—its origination as State law in 1849 in *Roberts v. Massachusetts*, its incorporation into the fourteenth amendment in 1896 in *Plessy v. Ferguson*, and its eventual demise in 1954 in *Brown v. Board of Educ.* There follows a discussion of the student sit-in demonstrations, and the constitutionality of convictions for such activity. Mr. Konvitz concludes, not surprisingly, that the fourteenth amendment prohibits "state action" protecting private discrimination at such "public" places as lunch counters and restaurants. Since the book was published, the Supreme Court has reversed sit-in convictions on breach of peace grounds, but only Justice Douglas rested the result on the reasoning offered by Mr. Konvitz. Trespass convictions are something else again, but Mr. Konvitz's analysis is broad enough to invalidate them also.

The book then moves into a section of four chapters contributed by Mr. Leskes, entitled, "State Law Against Discrimination." This is a straight-forward, matter-of-fact review of the effort which is being made in twenty-seven states (as of March 1961) to eradicate racial discrimination by state legislative and administrative action. Separate chapters are devoted to the subjects of "Public Accommodations," "Fair Employments Practices," "Fair Educational Practices" and "Fair Housing Practices." In each instance Mr. Leskes gives a concise summary of the content of the state laws, and also a clear discussion of the leading state court decisions interpreting and applying the statutes.

Mr. Konvitz then returns to contribute a final chapter with the evocative title, "Stand Out of My Sunshine." The basic position asserted here is that the struggle for Negro equality is just and reasonable, and that the demands are not precipitate. He therefore denies that the concepts of voluntarism and moderation have any valid application. On the former point, it is doubtless true that the progress of the Negro in the South in the past twenty-five years would not have occurred, or at least not to the same extent, without the pressures applied by the federal government and an organized Negro leadership, chiefly the NAACP. The disagree-

ments between the civil rights leadership and Southern whites are, Konvitz says, ". . . only superficially over the means. The real disagreements are over the ends—the inclusion of the Negro race in the community of citizens and in the communion of human beings." As a native Southerner, I would say that this statement is not nearly as true today as in the past, and is increasingly less so. But again, the introspection which has led many Southerners to change their attitude toward the Negro was not self-willed; it resulted from pressures applied externally, and more recently, from within the South. The moral reformation is still far from complete, however; in many places the Citizens Council mentality is dominant and in control of the political, economic and educational structures. Leadership of this ilk has demonstrated its willingness and ability to repress and stifle the civil liberties of all citizens, white and black alike, in an effort to maintain segregation and inequality. The position of the progressive whites is therefore a hazardous one, and since the Negro as yet lacks the local organization, leadership, power and influence to achieve his rights by his own efforts alone, the external pressures must be continued. Basically, therefore, Mr. Konvitz's position on voluntarism is substantially well taken.

On the question of moderation, Mr. Konvitz first takes aim at those who "question the efficacy of law as an instrument of social control and advancement in the field of race relations." These persons (Mr. Konvitz thinks former President Eisenhower is one) apparently believe that progress in race relations and civil rights should be left to the processes of time, education, and changes in moral attitudes. On this point I think Mr. Konvitz is unquestionably correct; it seems enough to say that because law alone is not sufficient, it does not follow that law should not do what it can.

As I read Mr. Konvitz, however, his attack on moderation is broader. He takes issue also with those who believe that the law should be used with moderation and that the realization of Negro equality should proceed on a gradual basis. Verbally, his position is appealing. "But one might ask whether fundamental constitutional liberties and guarantees ought to be the subjects of 'moderate' bills. The right to vote or to other civil rights is not the same thing as an income tax rate, over which reasonable minds might differ Why should basic human rights become subject to compromises?" The answer is that, however right a principle may be, its implementation in a world of people may create enormous practical problems which counsel the wise to make haste slowly.

Nowhere does Mr. Konvitz take notice of the fact that the percentage of Negroes is substantially higher in the South than elsewhere. Or that in many places the majority of the Negroes are educationally, economically and culturally unprepared for a status in society greatly different from their present one. This fact is not an extenuation of segregation or a justification for its continuance; on the contrary, it is a damning and irrefutable indictment. A social system which condemns a substantial proportion of its members to relative ignorance and poverty does not have much to commend it. The fact that the majority of Southern Negroes are what they are therefore calls for change and progress; at the same time, the existent fact prevents any immediate and total transformation. This being true,

the path to progress in civil rights must be one of gradualism, with the uses of the law, the improving status of the Negro, and the changing attitude of the whites all proceeding apace, steadily forward, to the goal of equal citizenship. The Citizens Council diehards recognize this, even if Mr. Konvitz does not; their deepest hatred and choicest epithets are reserved for the Southern "moderate."

I have another bone to pick with Mr. Konvitz. An intriguing question in the area of civil rights is why the Negro, almost a century after the Civil War, has not yet achieved a status of equal citizenship. Although he does not discuss the question specifically at length, Mr. Konvitz clearly reveals his view throughout his portion of the book. As I understand him, it is his judgment that the consummation of Negro equality has been blocked and thwarted solely by white Southern racist bigots. As he writes the history of race relations law in America, it has been a struggle between the Good Guys (Negroes and Northerners) and the Bad Guys (white Southerners). However rewarding such an approach may be to class B Westerns, as an explanation of history it is inadequate.

It is certainly true that Southern politicians, backed by dominant or at least dominated opinion, have opposed all civil rights legislation in recent years and are today, in the Deep South, counseling intransigent defiance of the law. But this is only a partial and a contemporary explanation. History suggests other answers which should be taken into account. If the white Southerner was able to resume his dominion over the Negro a short ten years after the Civil War, it was because the North had lost interest in Negro equality. It was, after all, a Supreme Court dominated by non-Southerners which decided the *Civil Rights Cases* and *Plessy v. Ferguson*. Not until recent times, after the Negro had become numerous in Northern urban areas, did the Northern politicians rediscover the noble cause. Even today Northern Republicans do not hesitate to trade anti-civil rights votes for economic votes from Southern Democrats; the coalition is a commonplace. Although he decries the sectionalism of Southerners, Mr. Konvitz views the problem of racial discrimination as almost exclusively a Southern one; he minimizes the extent of the evil in the North. "While in the North one needs to look for discrimination . . . in the South one needs to look for instances of nondiscrimination." Mr. Konvitz to the contrary, civil rights leaders in recent months have repeatedly admonished that the de facto discrimination in the North is equally as serious a problem as segregation in the South. Self-help factors might also be noted. Only since the war have the Negro organizations received any degree of the financial support which might have been forthcoming from the Negro community. There has been footdragging by many Southern Negro educators who have a vested interest in segregated schools because teaching and administrative positions are not open to them outside the South. Surely there is enough blame for America's delayed redemption of the promise of equality that the South need not be cast in the role of the sole villain. And finally, to throw a blanket of condemnation on the entire South is grossly unfair when no mention is made of the thousands of white Southerners whose daily exercise of good citizenship and constructive leadership is surely and steadily accomplishing tangible

improvements. And where they are, the going is considerably rougher than it is in Ithaca.

To close, I think that in important aspects of the problem, Mr. Konvitz has permitted his moral indignation to cloud his judgment. On the other hand, it is entirely possible that inherited sectional attitudes may have clouded mine. In any event, even if my criticisms are sound, they do not outweigh the overall value of the work as an informative and interesting study of a challenging area of the law. Mr. Konvitz and Mr. Leskes have produced a very good book.

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