

## BOOK REVIEWS

A CENTURY OF CIVIL RIGHTS. By Milton R. Konvitz and Theodore Leskes. Columbia University Press, New York, 1961. Pp. viii, 293. \$6.00.

It is unfortunate that Professor Konvitz and Mr. Leskes, men eminently qualified to make a full study of the progress of Negroes in the United States during the past century, entitled their book so as to suggest that that is what they have done. The book is not a study of a century of civil rights; rather, it is a much more limited work, embracing a thumbnail history of the Reconstruction, a more detailed history of Reconstruction legislation (particularly the Civil Rights Act of 1875<sup>1</sup> and the *Civil Rights Cases*<sup>2</sup> of 1883), and a statement and survey of laws in those states that have affirmatively created protections against private discrimination. No attempt is made to chart a path for the future, to analyze critically what mistakes have been made in the past, or to describe in other than legal terms the progress which Negroes in this country have made during the past century. If the book is read in light of its more limited purposes, rather than for the broad implications of its title, there can be no doubt that *A Century of Civil Rights* is a useful, scholarly and interesting addition to civil rights literature.

The book begins with an historical chapter entitled "Freedmen or Free Men?"<sup>3</sup> which proposes that, unlike the institution of slavery in other civilizations, slavery practices in North America in the first half of the nineteenth century were based solely on race. As a result of this equation of slavery with the Negro, it is the thesis of this chapter that a distinction between free men and newly freed Negroes followed, the latter being considered free only in the sense that they were no longer legally pieces of property without human rights, and that this distinction vitally affected the course of our nation's history. In positing this thesis, which has much validity, the worst side of the South's development is necessarily emphasized. One of the many general condemnations of the South reads:

Not only did the South avoid the idea of human equality; in order to effect total suppression of this idea, it became necessary, as a means to this accomplishment, to suppress freedom of speech, press, assembly, and petition, freedom of preaching, and academic freedom. The white man himself lost the most essential

<sup>1</sup> Act of March 1, 1875, ch. 114, 18 Stat. 335.

<sup>2</sup> 109 U.S. 3 (1883).

<sup>3</sup> Konvitz & Leskes, *A Century of Civil Rights* 3-37 (1961) [hereinafter cited as Konvitz & Leskes].

liberties in the process of denying all liberties to the Negro. There were no operative bills of rights in the South for the masters or, of course, for the slaves, and even the idea of justice was greatly weakened by reversion to self-help and lynch law.

In the South, then, beginning with the 1830s, slavery was not challenged by the great idea of human dignity or "the idea of the essential rights of human beings, arising from their sheer humanity." In this respect the South excluded itself from the mainstream of Western intellectual and spiritual history.<sup>4</sup>

Elsewhere the assertion is made that southerners in general held a firm conviction that the Negro belonged to another and inferior species; that the Negro was "subhuman not because he was a slave; he was a slave because he was subhuman,"<sup>5</sup> citing Lloyd's study of American slavery between 1831 and 1860.<sup>6</sup> Professor Konvitz, in a sweeping generalization, refers to this as not only "the central theme of Southern history,"<sup>7</sup> but as an unqualified explanation of the Civil War, the Black Codes, Jim Crow laws, the South's opposition to Reconstruction and its political solidarity since then, and "Southern resentment at 'interference' in their affairs from the 'outside.'"<sup>7</sup>

It is unnecessary to dispute the thrust of this historical sketch to note its oversimplification of many currents of history and its failure to take into account racial problems and causes of discrimination which exist outside the South and are reflected in the minds of many white people who have not been exposed to the theories or prejudices of the slave system. Yet Professor Konvitz treats this slave system as the sole cause of the vast injustices which the Negro has endured and continues to endure throughout the United States. The authors are not professional historians but legal specialists, and this part of their book is a synopsis and synthesis of the work of others, rather than the product of original research or historical and psychological analysis. It would have been more effective if carefully qualified and set forth with more restraint.<sup>8</sup>

The next portion of the book deals with federal civil rights legislation. One chapter treats the Civil War amendments and Reconstruction legislation, two are devoted to the Civil Rights Act of 1875 and the *Civil*

<sup>4</sup> *Id.* at 7.

<sup>5</sup> *Id.* at 11.

<sup>6</sup> Lloyd, *The Slavery Controversy, 1831-1860* (1939).

<sup>7</sup> Konvitz & Leskes 11.

<sup>8</sup> The same can be said of parts of the concluding chapter. The South and southerners are making much progress in the fair treatment of Negroes, and despite the greater political power of the Negro in the North, great injustices and inequality of opportunity exist throughout northern cities and states. While the conclusion gives a nod to this, *id.* at 270, the thrust is to blame all Negro problems on the South.

*Rights Cases* of 1883, and the last of the four chapters in the section sketches the birth and death of the separate-but-equal doctrine and, very briefly, the beginnings of the sit-in movement in the South.

The chapters dealing with the 1875 statute contain much detailed legal analysis, particularly in the discussion of the majority and dissenting opinions in the *Civil Rights Cases*. The legislative history of the Civil Rights Act of 1875 is interesting and detailed, and in the chapter<sup>9</sup> setting it forth, Professor Konvitz makes particularly useful reference to some of the statements made on the floor of Congress during the debates on the act. They might be made in a similar debate today without any appearance of anachronism. Then, as now, the argument was that the passage of time, without moral or economic pressures from the outside, would do away with the roots and causes of discrimination and lead to equality of opportunity for all citizens regardless of race.

The emphasis on the 1875 statute and the *Civil Rights Cases* derives from the central concern of the book with equality in the enjoyment of accommodations in places of public resort, which Professor Konvitz refers to as "basic human rights."<sup>10</sup> Accordingly, the book's major contribution in the federal field is the analysis of the legal aspects of the sit-in demonstrations.<sup>11</sup> Quoted is a statement made in the spring of 1960 by Governor Leroy Collins of Florida that while it is unfair and morally wrong for a department store which invites trade from all persons to refuse service to Negroes in one part of its store, the department store had a legal right to do this.<sup>12</sup> The thesis of the book is that, on this legal question, Governor Collins was wrong.

The first of the sit-in cases has recently been decided by the Supreme Court.<sup>13</sup> These cases, which came up from Baton Rouge, Louisiana, all involved the kind of accommodation to which Governor Collins referred—public places where the patronage of Negroes as well as whites was solicited in the first instance. They also involved, according to positions taken by counsel for the petitioners and by the United States as amicus curiae, voluntary enforcement by the police of the City of Baton Rouge of a policy of segregation which existed as a public and official matter, wholly apart from the personal wishes of the owners of the places involved. On this view of the cases, the Department of Justice supported

<sup>9</sup> Id. at 90-101.

<sup>10</sup> Id. at 93.

<sup>11</sup> Id. at 135-52.

<sup>12</sup> Id. at 138.

<sup>13</sup> *Garner v. Louisiana*, 368 U.S. 157 (1961).

the position advanced by the petitioners that the convictions on breach of peace charges were unconstitutional.<sup>14</sup>

The Court in fact decided the cases on an even narrower ground, also advanced by the Government, that there was no evidence in the records to support convictions of the defendants for disturbing the peace.<sup>15</sup> The Court, Justices Douglas and Harlan concurring on broader, separate grounds, deliberately and obviously refrained from expressing any view on the basic issue of the right of a restaurant owner to invoke the processes of the law to remove Negroes from his premises because of their race.

Since other cases involving these questions are before the Court, and since I appeared on the brief filed by the United States in the first cases, it would be inappropriate to discuss in any detail the legal analysis made by Professor Konvitz on the sit-in question. In brief, however, he contends that state action is involved whenever there is an arrest, that the arrest constitutes governmental aid to private racial discrimination, and that such governmental aid is a violation of the fourteenth amendment under the decision of the Supreme Court in *Shelley v. Kraemer*.<sup>16</sup> In addition, occasional emphasis is put on an assumed state or municipal policy of racial discrimination which is being implemented by individual proprietors.<sup>17</sup> It is not clear to me what view would be taken if, for example, a private restaurant owner in the State of Oregon were to refuse service to Negroes as a matter of private prejudice and to invoke the aid of the police to have removed from the restaurant any Negro who refused to leave voluntarily. The case would differ from those where the proprietor seeks the trade of all persons in at least two ways: first, the restaurant would not be a public place inviting the patronage of Negroes generally, as is true of a department store, a drug store or a bus station; and second, no assumption could be made concerning a state or municipal custom of racial discrimination. It seems that Professor Konvitz would not distinguish at all between a lunchroom in a department store and a hot dog stand open to the public generally, except Negroes,<sup>18</sup> but I cannot tell how he feels, as a legal matter, about the question posed above.

<sup>14</sup> *Id.* at 162-63.

<sup>15</sup> *Id.* at 163-64.

<sup>16</sup> Konvitz & Leskes 142, 144-45, 147-52.

<sup>17</sup> "The proprietor does not practice segregation as an isolated private person. He acts in response to and in accordance with the policy of the state or municipality, just as if he were enforcing a state or local law." *Id.* at 142.

<sup>18</sup> *Id.* at 139.

Apart from the legal analysis, I think that it is appropriate and proper for me to mention two aspects of this problem not fully explored in the book. One is the significant progress which has been made in many cities, not through court action, but through private and public acceptance of the opening of public accommodations to Negroes. The book makes passing reference to these events<sup>19</sup> but that is all. To me they are one of the most heartening of many recent advances in the area of civil rights, and on the whole I think it well that they were taken as a matter of economic pressure and of acceptance of racial advancement and morality, as has been true, for example, in Atlanta<sup>20</sup> and Dallas<sup>21</sup> last year, rather than under the pressure of law.

The other point to which I think more consideration should have been given is the problem of self-help. The legal analysis in the book suggests three courses for the owner of a restaurant: to close the lunch counter, to remove the seats and serve customers standing, or to call the police and have the demonstrators removed.<sup>22</sup> It is only in the last case that the question of state action arises and the constitutional doctrines on which Professor Konvitz relies come into play. He does not say what the legal consequences would be if the proprietor tried to force sit-in demonstrators to leave the establishment without calling in the police, although this is a problem inherent in the situation. I do not suggest that it is an insurmountable one, but I should have liked to see full discussion of it.

It is again a mark of the difference between the scope of the book itself and the scope of its title that the discussion of federal law and federal legislation makes only a cursory analysis of the federal Civil Rights Acts of 1957<sup>23</sup> and 1960.<sup>24</sup> The text of the statutes is summarized and some of their political history given,<sup>25</sup> but their significance is minimized, and no thorough consideration is given to their potential. It is my own belief that the remedies of these statutes can be made much more effective through imaginative litigation and plain sweat than was believed possible by most people at the time of their passage. While our experience under the statutes is still limited,<sup>26</sup> effective relief has been

<sup>19</sup> *Id.* at 136.

<sup>20</sup> *N.Y. Times*, Sept. 29, 1961, p. 1, col. 5.

<sup>21</sup> *Id.*, July 28, 1961, p. 1, col. 4.

<sup>22</sup> Konvitz & Leskes 145.

<sup>23</sup> Act of Sept. 9, 1957, 71 Stat. 634 (codified in scattered sections of 5, 28, 42 U.S.C.).

<sup>24</sup> Act of May 6, 1960, 74 Stat. 86 (codified in scattered sections of 18, 20, 42 U.S.C.).

<sup>25</sup> Konvitz & Leskes 72-89.

<sup>26</sup> Sixteen cases charging discrimination in the registration processes of particular coun-

obtained where litigation has been pressed and the court has made full exercise of its equitable powers.

This is illustrated in the litigation in Macon County, Alabama, the seat of Tuskegee Institute. While there had been previous private litigation in the county, among other things to defeat an attempt at gerrymandering,<sup>27</sup> injunctive relief was granted on March 17, 1961, in a suit by the Government to protect voting rights.<sup>28</sup> Only nine Negroes had been registered in the county between October 1958 and the date of the injunction; since then almost 1500 have been registered. In early fall the Justice Department filed an application for further relief, which was granted. As an alternative to court appointed federal voting referees under the 1960 act, two new registration officials were appointed by the Governor to serve as registrars in the county starting last October, and the new Board of Registrars speeded up its work. In contrast to an almost complete cessation in the processing of Negro applicants to vote during the preceding years, seventy-seven applications were processed on October 16, sixty-one on November 5, and one hundred and three on November 20. For the first time in the history of the county, Negroes will have substantial representation at the polls during the elections in 1962. For several months there were a substantial number of additional potential voters on a list waiting to be processed. The supplementary court order required that no applicant be deprived of his right to be registered without discrimination for more than five registration days; as a result, the entire waiting list was processed by the end of February.

In other ways the book's discussion of federal law does not appear to consider, or at least fully to consider, the potentials of the exercise of federal executive power. In one portion of the field of public accommodations where the law previously may have been satisfactory but its enforcement certainly was not, I think it quite startling that, except in a few spots which are now being eliminated, the entire rail and bus transportation system in the South has been desegregated since last May.<sup>29</sup> In the less dramatic but certainly crucial area of employment, the President's Committee on Equal Employment Opportunity has

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ties or parishes had been filed as of November 27, 1961, twelve of them since April of the same year. In addition, two cases involving more specific charges of discrimination and five cases charging voter intimidation had also been placed in court, making a total of twenty-three cases under the 1957 and 1960 acts, not counting record demands.

<sup>27</sup> *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

<sup>28</sup> *United States v. Alabama*, 192 F. Supp. 677 (1961).

<sup>29</sup> See Ops. Att'y Gen., May 29, 1961.

changed in a short time the patterns of employment in many companies handling government contracts. While these are changes only in pattern and direction at the moment, enforcement procedures are now being devised which will have far greater impact than that which could be achieved by legislation setting up administrative machinery limited to the processing and litigating of complaints, as in the case of the state machinery discussed in the excellent chapters on state regulation. No part of this area of federal law is discussed. The authors cannot, of course, be in any way criticized for not discussing what has taken place since the writing of their book; nevertheless, the potential for executive action which has now been taken was widely recognized in 1960 and before, and I think that it is at least fair to say that subsequent events have been such as to suggest that the authors, if they had had prescience, would have included further analysis of the potential for nonlegislative federal action.

On the whole, I think that the most useful portion of the book is the four chapters dealing with state laws against discrimination.<sup>30</sup> These chapters contain detailed facts as to the content of the statutes and decisions taken under them. The national and international importance of the inability of either the federal or the state government to deal with private discrimination in public accommodations has recently been dramatized by the controversy over the restaurants located along route 40,<sup>31</sup> the principal highway between Washington and New York, along which many African diplomats travel between the United Nations and the seat of our Government. I hope, among other things, that Maryland and other states which have under consideration legislation to deal with such problems will note particularly the discussion of the use of administrative remedies initiated by New Jersey<sup>32</sup> in the elimination of racial discrimination in public accommodations.

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<sup>30</sup> Konvitz & Leskes 155-251.

<sup>31</sup> N.Y. Times, Oct. 8, 1961, p. 56, col. 4.

<sup>32</sup> Konvitz & Leskes 180-84, 230-32, 246-48.

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