Louisiana Law Review

Volume 13 | Number 4
May 1953

EQUALITY BY STATUTE, by Monroe Berger. Columbia University Press, New York City, New York, 1952. Pp. ix, 238. $3.25.

Charles A. Reynard

Repository Citation
Charles A. Reynard, *EQUALITY BY STATUTE, by Monroe Berger. Columbia University Press, New York City, New York, 1952. Pp. ix, 238. $3.25.*, 13 La. L. Rev. (1953)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol13/iss4/17

This Book Review is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.

be done to put an end to the many indefensible "interstate trade barriers" will find a persuasive brief ready at hand.[13]

For at least nine men in Washington the book is required reading. The absolute unconstitutionality of the 1938 *volte-face* in *Erie v. Tompkins* is now demonstrated beyond question. If the Supreme Court were then willing to rely on a piece of misleading research published in the *Harvard Law Review*,[14] by so much more they ought now to rely on Mr. Crosskey's really thorough analysis, overrule *Erie*, and get to their intended work as the supreme head of a general and nation-wide system for establishing Justice, as is provided by the document they have all solemnly sworn to uphold.

Scholars in many fields will be interested in these and subsequent volumes.[15] The "dictionary of terms" which the author has constructed will be of the first importance to the philologers. American historians will now be obliged to re-examine (and, perhaps, revise) a great many of their notions, as will the political scientists. The idolators of the late Thomas Jefferson and the late James Madison will, in these volumes, find good reasons to pause in their devotions.[16] I even venture to think that some law professors will be led to look at their familiar cases with new vision.

While this general reassessment of ideas proceeds apace, this reviewer would join in the sentiment manifested in the dedication of these volumes: "To the Congress of the United States, in the hope that it may be led to claim and exercise for the common good of the country, the powers justly belonging to it under the Constitution."

*William B. Jeffrey, Jr.**

EQUALITY BY STATUTE, by Monroe Berger. Columbia University Press, New York City, New York, 1952. Pp. ix, 238. $3.25.

This is a book that should be read by every person who possesses views on the subject of legislation in the field of race

13. Pp. 295-323.

14. Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923).

15. From the many hints scattered through these initial volumes, it would seem that at least two more volumes will be necessary to the completion of the work. Cf. especially pp. 6, 12, 82, 187, 510, 535.

16. For example, consider the perfectly fantastic frenzied maneuvers in the subversive campaign issuing in *U.S. v. Hudson & Goodwin* and *U.S. v. Coolidge*, recounted at pp. 754-784.

* Assistant Law Librarian, Yale Law Library.

relations. The opinions of some may be changed, those of others will doubtless remain unaltered or perhaps be reaffirmed, but all will be challenged.

In the Foreword to Mr. Berger's book Mr. Robert M. MacIver says:

> "No law should require men to change their attitudes, but most laws require something that is contrary to the attitudes of some group of men, whether large or small. No law should punish men for their beliefs or attempt to suppress these beliefs, but many laws are necessary or desirable that require behavior contrary to what some men approve or believe to be the right course. The whole sphere of opinion must be held inviolate by law, if the primary condition of democracy is to be fulfilled. But it does not follow that the behavior prompted by opinion or belief should not be regulated for the public good. The distinction is elementary. In a democracy we do not punish a man because he is opposed to income taxes, or to free school education, or to vaccination, or to minimum wages, but the laws of a democracy insist that he obey the laws that make provisions for these things.
>
> "On the same principle there should be no laws against ethnic or racial prejudice. A man should never be subject to legal penalties because he is anti any thing, anti any group, anti any faith, anti any form of government. If he is foolish enough to detest any people as such or to think he belongs to the master race, and if we cannot teach him the foolishness of his folly, then let him stew in it, so long as he does not seek to injure in overt ways those against whom his prejudice is directed. We may not let our 'righteousness' interfere with the liberty of any opinion, for that is the beginning of the road to totalitarianism itself. Righteous indignation can be the most insidious enemy of democracy."

Mr. Berger epitomizes his own thesis at the very end of his book where he says, "In summary, law can affect our *acts* and, through them, our *beliefs*." Hence, his argument proceeds, legislation designed to put an end to discriminatory action will lead ultimately to the disappearance of the prejudice which prompts it. To those who argue that behavior based upon private attitudes and tastes cannot be changed by law, Mr. Berger convincingly replies that "they themselves usually support laws

which require discrimination," and proceeds to elaborate upon this premise as follows:

> "To accept their position (and that of many well-meaning persons who misunderstand law) would be to say that where a law is backed by the community it is unnecessary, and where a law is opposed by the community it is futile. This view, implied more often than stated, simply ignores the real problem of the effective limits of legal controls in specific situations. Those who deny the efficacy of law in group relations must, to be consistent, favor the repeal of the vast network of legislation which now imposes and supports discriminatory patterns through the requirements of segregation. If all such laws in the South were to be immediately removed, no one, of course, would expect that there would be free relations between Negroes and whites. There are, after all, no laws requiring the exclusion of Jews from many places which effectively exclude them, and Negroes encounter discrimination even where the law forbids it. But the elimination of discriminatory legislation would at least pull out another of the props that support a system of relations which violates the Federal Constitution and even the stated values of the violators themselves."

In the publication of this book, Mr. Berger has demonstrated a rare combination of superb scholarship and most readable writing to bring forth a persuasive thesis for the elimination of discrimination based upon considerations of race or creed. As a sociologist writing in the field of law, and treating a vast number of decisions of the Supreme Court of the United States, he has shown a rare ability to cut through the legal underbrush, sever the doctrines of the cases, and present them in thoroughly understandable fashion.

Following a short Introduction, the essential plan of the book is to present a two-phase series of flash-backs. The first phase is developed in Chapter One where the author presents the picture of "Civil Rights Today and During the Reconstruction Era," while the second phase consists of Chapters Two and Three denominated "The Supreme Court 1868-1937: Buttressing the Caste Order," and "The Supreme Court 1937-1950: Undermining the Caste Order," respectively. A fourth chapter is devoted to a study (in considerable detail) of "The New York State Law Against Discrimination: Operation and Administra-

tion," and the final Chapter Five reflects upon "Law and the Control of Prejudice and Discrimination."

In his opening chapter Mr. Berger recounts the familiar story of the ambitious program of the Reconstruction with its Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution, Civil Rights Acts and Peonage legislation, and their failure to bring about freedom for the Negro. Five reasons are assigned for the collapse of the program: (1) disaster at the hands of the Supreme Court; (2) lack of sustained interest (a persistent and adamant white minority in the South was disregarded by a less adamant majority throughout the country bent upon new conquests in the field of manufacture, commerce and a host of other problems); (3) the Reconstruction program itself was too ambitious, demanding far more painstaking effort in its administration than it was accorded; (4) state civil rights programs in the North were not vigorously enforced, or even susceptible of such enforcement, leaving the injured individual to institute proceedings on his own behalf; and (5) governments, both state and federal, placed too much faith in the laws and failed to take steps in the course of government administration (employment and armed services, etc.) which might have led the way for racial integration.

With the advent of the New Deal in 1933 this trend was reversed and government demonstrated how it is truly capable of conditioning public opinion by its own action as well as securing real freedom of opportunity for minorities through the adoption of laws which attack the problem of racial minorities by indirect methods. In some twenty pages the author packs an amazing array of statistical material, recording the accomplishments of New Deal programs which were of significance for the Negro (Relief, Farm, Housing, Employment, Voting, Armed Services, etc.).

In concluding his contrasting treatment of the civil rights programs of these two widely separated eras, Mr. Berger says:

> "The emphasis during the nineteenth century was upon broad legislation, but this was not accompanied by institutional changes of an economic, political, and social nature. These laws protecting minorities had to be set in motion by individuals. Today civil rights are advanced by the government in a different way. Between the two periods there have come (one series of events on top of another) Amer-

ica's severest economic depression, the New Deal, a second world war, and the threat of a third. Under the constant, forceful impact of these developments, the American conception of the role of government changed, and attitudes toward racial and religious minorities have become more favorable. As a result, the civil rights of these minorities are, in our day, protected more directly by the state. All levels of the government do things that affect us more intimately than before, and in these activities government is increasingly providing its services without discrimination. On the federal level, governmental protection and advancement of civil rights has used administrative and executive powers; . . . State governments have relied upon new legislation as well as upon administrative and executive power. This legislation is of a new type—it asserts that discrimination harms not merely the victim but the community as well, and consequently makes a state agency responsible for reducing the incidence of discriminatory practices. The state acts for the individual—as it did under the older federal laws—in a situation deemed a peril to the entire community."

In his two chapters (Three and Four) on the role played by the Supreme Court of the United States, Mr. Berger retells the story already familiar to lawyers, of the fate of the Reconstruction program. Here are paraded the shriveling of the Privileges and Immunities Clause, the tortuous path of the Due Process of Law Clause, and the disappointing (for the Negro and his sympathizers) development of the Equal Protection Clause to embrace the separate but equal doctrine of the *Plessy* case. The author also takes account of the substantial protection which the Fourteenth Amendment's Due Process Clause was construed by the Court to confer upon business interests during the same period, leading to the rhetorical question, "Whose Fourteenth Amendment?"

Mr. Berger then proceeds to round out the story with the development, beginning in 1937 when the Court reversed both trends and began to allow legislatures greater freedom in the regulation of the economic interests of business and looked more and more askance upon alleged violations of civil rights. Here he recounts the cases which have provided real bulwarks of freedom for the Negro on such basic matters as jury exclusions in criminal cases, voting, restrictive covenants, common carriers,

education and labor. Separate sections are also devoted to discussions of the Japanese Evacuation during World War II, and the Jehovah's Witnesses cases.

Throughout his treatment of the Supreme Court cases the author adheres to his thesis that law tends both (a) to conform to the general consensus of public thought, and (b) to crystallize public opinion along the lines that it decrees. Thus, in defense of the pre-1937 Court, Berger says:

> "This review of the Supreme Court's handling of issues involved in group discrimination between 1868 and 1937 shows that the Court was most consistent in the protection of Negroes' rights to a fair trial, to exemption from forced labor, to equal but separate public facilities, to enter any business or occupation, and to make contracts. These are rights the exercise of which is least likely to bring Negroes into close personal association with whites on a level of equality. Where the exercise of Negro rights might result in equal intergroup association, e.g., in use of the same public facilities, the Court was reluctant to uphold Negro claims. Thus the Court's role was to support laws which enforced the separation of the Negro and white castes and to strike down laws which allowed or encouraged inter-caste contact that implied their social equality.
>
> "There is a variety of evidence that in carrying out the function just described, the Court was responding to the pattern of conduct and belief in that section of the American community which was not willing to admit the Negro to full citizenship and its implications. There is considerable resemblance between the rank order of decreasing discrimination against Negroes as given by Myrdal and the rank order of successful litigation by Negroes in the Supreme Court.
>
> "According to Myrdal discrimination is shown against the Negro in various activities, listed in order of decreasing intensity as follows:
>
> "1. Intermarriage and sexual relations involving white women.
>
> "2. Other personal relations, e.g., eating, dancing, bathing, and general social intercourse.
>
> "3. Use of public facilities, e.g., schools, churches, means of transportation.

> "4. Political rights, i.e., suffrage.
>
> "5. Discrimination in courts of law and by police and other public officials.
>
> "6. Economic activities such as landownership, employment, obtaining credit, public relief."

and in appraising the work and tendencies of the present Court, Mr. Berger says:

> "The present Court has continued to protect the rights of accused persons; advanced the protection of federal civil rights by strengthening Sections 51 and 52 of the United States Code; ended federal toleration of the South's white primaries; made it unlawful for courts to enforce racial restrictive covenants; outlawed segregation in interstate travel; and advanced a step closer to educational equality by a progressively stricter interpretation of what constitutes 'equal facilities.' "

Berger's analysis in Chapter Four of the New York State Law Against Discrimination is detailed and objective. He pulls no punches. A number of surprising developments have ensued following the adoption of the act. Many of its original opponents are now actively supporting the measure. Its most severe critics are the very minority groups which supported the act in the legislature. Many of the criticisms which have been directed against the work of the New York Commission appear superficially to have merit, but upon closer examination the reader pauses when he reflects upon the nature of the problems encountered. It is true that the Commission has handled a surprisingly small number of cases, has dismissed a majority of the complaints which have been filed, has made practically no use of publicity channels, the delight of so many governmental agencies, and had held only one administrative hearing, as of 1950. The Commission answers each of these complaints persuasively, indicating that education, in the broadest sense, is the primary objective of the law, and that its small case-load, method of settlement by conciliation rather than hearings, and abstinence from sensational publicity are all a part of its policy to achieve that objective. Mr. Berger concludes that with all its difficulties, the New York law is accomplishing results (although conceding that criteria for determination in this area are admittedly unreliable).

In his concluding chapter the author reviews the materials

presented in earlier chapters and places them in their sociological and psychological framework, drawing a few conclusions concerning the place of law in this context. His central thesis has been set forth piecemeal throughout this review, but in justice to him we should quote what appears to be his fuller, and to this reviewer, his most persuasive, statement:

> "Law is an effective means for reducing the discrimination or overt antiminority conduct of the extremely prejudiced. We have seen that the personality studies have found such persons to be conformists of a certain kind, respecters of power, scorning the weak but toadying to the strong. One of the few constants in their behavior is submission to the symbols of power. Law, when it is backed by the full panoply of the state and has strong support in at least some sections of the community, is just such a symbol. Even if law did nothing but reduce discrimination by such persons it would be accomplishing something of value in a multigroup democracy. But there is evidence that antibias laws can also influence the conditions under which our attitudes are developed and maintained."

Assuming, for the moment, the truth of the assertion that "antibias laws can also influence the conditions under which our attitudes are developed and maintained," is there any reasonable likelihood that such laws will be adopted within the foreseeable future by southern states? If we are to judge the future by looking to the past, the answer is an emphatic "no." Nevertheless, this reviewer ventures the prediction that such legislation will be forthcoming within the next two decades, and that the nation will witness the phenomenon of pro-F.E.P.C. congressmen from the Solid South. This prediction is based upon the assumption that Negro voting will continue at its presently accelerating rate. If opposition to equality of civil rights continues these voters will tend to cast their votes as a bloc, just as they did in the presidential election of 1952 (there is substantial evidence to support the conclusion that it was the Negro vote which carried the State of Louisiana for the Democratic Party by an uncomfortably slim margin in that election). With such a substantial number of votes on the block, it is inevitable that political parties and factions will seek to attract them with a favorable program. Hence the prediction just ventured may not be as unrealistic as it appears at first blush.

If and when such a day comes, and equality is achieved by statute, Berger predicts that the Christian principle of "Love thy neighbor" will in fact be fulfilled.

*Charles A. Reynard**

LAW AND TACTICS IN JURY TRIALS, by Francis X. Busch. Bobbs-Merrill, Inc., Indianapolis, 1949. Pp. xxii, 1147.

"Twelve Good Men and True"—the bulwark of democracy and the preserver of our freedom. Does Louisiana hold the jury trial in the same degree of respect and reverence as do all the other states of the Union? This is an interesting question, but in view of the fact that the civil jury trial has been used very sparingly in Louisiana up until recently, it has been said that Louisianians do not have the same understanding and confidence in the jury system as do those who see it in more constant usage. Perhaps the reluctance of Louisiana atorneys to use the civil jury trial is attributable to the provision in our law which grants the appellate court the right to review the facts of any given case. It has been generally felt by plaintiffs' attorneys that our law is not geared for effective civil jury trials; this explains the negligible part that jury trials have played in the legal history of our state.

During the last several years, however, there has been a trend toward the more frequent use of the civil jury trial. Many prominent Louisiana attorneys have apparently been enlightened relative to the advantages that the jury trial affords, and have been putting it to very effective use in the federal courts and have even used it to some extent in the state courts. This trend in Louisiana developed on the heels of a nationwide rejuvenation or modernization of jury practice. Certain leading legal luminaries have achieved phenomenal success by injecting new methods and devices into jury practice, such as the more extensive and refined use of demonstrative evidence—charts, pictures, diagrams, blackboards, et cetera. Their ideas and methods have been spread throughout the country, and they have given the jury system a boost which might well return that system to the stature which it once held.

Regardless of how one feels about the jury trial, he cannot

* Professor of Law, Louisiana State University.