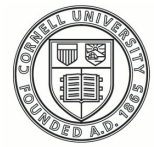

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From Opportunity to Status

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From Opportunity to Status

Abstract

[Excerpt] When Ronald Knox, at the age of four, was asked what he did for his insomnia, he replied, "I lie awake and think about the past." I suspect that even the future celebrated biblical scholar did not, at the age of four, have much of a past to think about-- unless, with Plato and Wordsworth, we believe that a child is not born in entire forgetfulness, but comes trailing clouds of glory. In my own case when I lie awake and think about the past, I do have a relatively long past to think about--it is thirty-eight years since I began my teaching career, and almost thirty years since I came to Cornell.

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Comments

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FROM OPPORTUNITY TO STATUS

Milton R. Konvitz

When Ronald Knox, at the age of four, was asked what he did for his insomnia, he replied, "I lie awake and think about the past." I suspect that even the future celebrated biblical scholar did not, at the age of four, have much of a past to think about--unless, with Plato and Wordsworth, we believe that a child is not born in entire forgetfulness, but comes trailing clouds of glory. In my own case when I lie awake and think about the past, I do have a relatively long past to think about--it is thirty-eight years since I began my teaching career, and almost thirty years since I came to Cornell.

And when I think of the American past I have seen and experienced, what strikes me as the most important development, in a span of years that saw countless significant events, is the great expansion of democratization: the incommensurably greater acceptance of religious and racial differences, and the recognition won by numerous classes of disadvantaged persons to their right of human dignity and of legal and social equality.

In 1945, the year in which the School of Industrial and Labor Relations first opened its doors, the president of Dartmouth, E. M. Hopkins, justified a quota for Jewish students by emphasizing that "Dartmouth is a Christian college founded for the christianization of its students." In defending a <u>numerous clausus</u> for Jewish students, Hopkins was only echoing the statements made by A. Lawrence Lowell, president of Harvard, when in 1922 he proposed a quota system for Jewish students. The quota fortunately was

rejected by a Harvard faculty committee in 1923, though by all accounts the quota system survived at Harvard and at other leading institutions of higher learning through secretely operated techniques. I cite these instances for their symbolic value, for they provide us with an easy measure of the distance the American people have traveled in the last fifty, or even the last thirty, years. In all their long history, extending over thousands of years, in no other country and at no other time have Jews enjoyed so much of the precious commodities of liberty and equality as they have in the United States in the last three decades.

Similar judgments can be expressed with respect to Roman Catholics in the United States. Perhaps no single event in American history so dramatically articulated the change in status and dignity of the Roman Catholics as the election of John F. Kennedy as president in 1960. His election for the first time made a reality of the provision in Article VI of the Constitution that no religious test shall ever be required as a qualification for public office, and of the Religion Clauses of the First Amendment.

In the 1930s and 1940s the Jehovah's Witnesses were harassed and persecuted in many parts of the country, where an open season on them seemed to have been declared. But by 1946 the United States Supreme Court had decided fifteen cases, brought by the sect, in its favor--more than the total of all cases on religious liberty decided by the Court in its first 150 years. These decisions, which rested on broad free speech and religious liberty grounds, effectively put an end to religious persecution of any unpopular denomination or sect, and established precedents that have been helpful to all exposed, unpopular causes.

In recent years these momentous achievements have been overshadowed by the great gains made against racial discrimination and segregation, especially with the decision in Brown v. Board of Education in 1954 and its progeny; and the enactment of the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, and the Equal Employment Opportunity Act of 1972; and the decision of the Supreme Court in Griggs v. Duke Power Co. in 1971.

While we all recognize that much remains to be done about the income, unemployment, and occupational distribution of blacks, it is important to note that of the 140 other member states of the United Nations, not one can compare with the United States in the legal rights to equality enjoyed by our racial minorities, or the great progress that has been made toward political, social, and economic equality in the last several decades. Three measures of our achievement can be cited: One is that while there were hundreds of cases attacking racial segregation in places of public accommodation before enactment of the Civil Rights Act of 1964, today there is hardly one such case--the ultimate denial of human dignity no longer defaces our country. Another measure is to be found in the greatly enhanced political status of blacks as voters in the South and as public officials throughout the United States. But perhaps the most telling measure is to be seen in the fact that today concentration is not on the elimination of present discrimination in employment, but on remedying the effects of past discrimination.

Labor unions are now so much a part of the conventional American scene that we tend to forget that little more than forty years ago, before Congress enacted the National Labor Relations Act in 1935, students of labor law or labor history had to spend much of their time

studying the law of criminal conspiracy. Today labor law is a major independent branch of American jurisprudence and is a subject taught and studied in every law school. In 1935 trade unions had a membership of less than four million; at present the membership is twenty million. Not so long ago, one would hardly have discussed unionization of public employees, or of agricultural workers, or of professional groups. Today unionization of such persons is no longer one of the world's seven wonders. At the time of the passage of the Wagner Act, we read the shocking revelations of the LaFollette Civil Liberties Committee, which exposed the wholesale violations of the workingman's legal and constitutional rights; in the 1970s we read about the success, wealth, and power of organized labor. Then the concern was that organized labor would be a force for socialism or radicalism; now the concern is that organized labor is a conservative force that retards economic and social development.

These have been our greatest gains: the elevation of all religious denominations and sects, of all racial minorities, and of all blue-collar and white-collar workers into a status that entitles them to equal dignity and equal rights. But there have been many other notable gains, which we can mention only briefly.

Whether the Equal Rights Amendment will become part of the Constitution, women in the last ten years have in fact won a larger measure of equal rights by legislation and court decisions than Elizabeth Cady Stanton and Lucretia Mott had ever thought possible when they planned the Seneca Falls Convention in 1848.

For some seventy years, beginning with our Chinese exclusion laws and extending through the notorious immigration quota laws of the 1920s, the United States openly declared that millions of Americans who had their roots in Asia or in Eastern or Central

Europe were men of lower breed and lower caste. But in 1952 our new Immigration and Nationality Act ended all racial and color bars on naturalization, and all color and racial discrimination in our immigration policy.

In this context we might note the great change that has come about in the legal status of our aliens. States excluded aliens from the professions and from many types of work. New York, for instance, had more such restrictive laws than any other state. In twenty-six states aliens were excluded from old-age benefits, seven states denied aid to blind aliens, and Congress in its 1938 legislation, providing public employment as a form of relief, excluded aliens from its benefits. In the last several years all this has been changed radically. The break came in 1971 in a decision of the Supreme Court, in which the laws excluding aliens from the right to welfare were declared unconstitutional as a denial of equal protection. The Court, for the first time, held that a classification based on alienage is inherently suspect and is, therefore, subject to close judicial scrutiny. An example of how far the new judicial solicitude for aliens has been carried is the Supreme Court's decision of 1973 denying Connecticut the right to exclude an alien from taking the state's bar examination. The state, said the Court, may require an oath to support the United States and the state's constitution, but aliens as a class cannot be held ineligible to take such an oath in good faith.

In this connection, too, we would mention the new right won for bilingualism. The monopolistic position traditionally and legally enjoyed by English came to an end with the enactment of the Voting Rights Act of 1965, which provided that anyone who had attended any public or private school in which the predominant language was one other than English, may not be denied the right

to vote because of an inability to read, write, or understand the English language. The spirit of this provision is now being felt in many public schools and public offices, and is a significant aspect of the renewal of the spirit of cultural pluralism and ethnic diversity that we had tended to suppress. No longer is it possible for a president of the United States to speak scornfully, as did Theodore Roosevelt, of "hyphenated Americanism," or to say, as did Woodrow Wilson, that "the most unAmerican thing in the world is a hyphen."

The poor who are on welfare are another large category of persons whom we had tended not to see; they were nonpersons, without legal status and without rights. Today, let it be noted to our credit, the picture is quite different. The first important breakthrough came in 1969, in the decision of the Supreme Court in Shapiro v. Thompson. The two states involved in that case and the District of Columbia required a year's residence to qualify for welfare. The Court held that the waiting period requirement violated the Equal Protection Clause and also infringed the constitutional right to travel. The language of the Court's opinion went, however, beyond the strict necessities of the decision. A state, said the Court, may not fence out indigents who are seeking to better their life. Persons may move because of the promise of better schools, of a better environment, of better business or professional opportunities. Why may not a mother consider better welfare benefits? Does she not have a right to seek a better life for herself and her dependent children?

In the following year the Court held that welfare recipients have a constitutional right to due process when the state proceeds to terminate or suspend their benefits. They are then entitled to an opportunity to confront and cross-examine witnesses, to have

an attorney, to present their own evidence, and to have an impartial decision maker, whose conclusions must rest solely on legal rules and evidence. In an important footnote the Court said that welfare entitlements today are more like "property" than a "gratuity"; for much of existing wealth does not fall into common law concepts. Doctors, for example, have their licenses, car dealers their franchises, workers their union memberships and union contracts. The government is the source of many entitlements, such as routes for airlines, channels for television stations, and social security pensions. They are not forms of charity or gratuities. Why should only the entitlements of the poor be an exception? Could a church be deprived of tax exemption without the protection offered by the Due Process Clause? Could a public employee be dismissed without due process? The termination of welfare involves, said the Court, important benefits, which cannot constitutionally be disposed of by referring to them as privileges rather than rights.

These and other cases--by now there are hundreds of cases in state and federal courts--have introduced a new area of jurisprudence in American law: the law of poverty. Courses in this subject are offered in all major law schools. Just as there is Corporation Law, so today there is also Poverty Law. Much of the gap that existed for millenia between the Old Testament concept of vested rights in the poor and the Anglo-American idea that relief is a gratuity that is to be doled out resentfully and grudgingly has now, to a remarkable degree, been bridged by these new legal developments. The result is that individuals on welfare are no longer pariahs, but enjoy the constitutional status of persons with entitlements which the law must protect.

Then there are the millions of young Americans who have quite suddenly, within the last few years, won a place for themselves

within the confines of the United States Constitution. By the Twenty-Sixth Amendment, ratified in 1971, eighteen-year-old citizens may vote. The Supreme Court in 1969 for the first time held that students do not shed their constitutional rights to freedom of speech at the schoolhouse gate, and in January 1975 the Court held that students facing temporary suspension from public school were entitled to protection under the Due Process Clause. Hundreds of cases have challenged school authorities on their length-of-hair regulations and dress codes, and in at least twenty-six states such challenges have been successful.

Finally, recent decisions of the Supreme Court have vindicated the constitutional rights, either under the Equal Protection or the Due Process Clause of the Fourteenth Amendment, of illegitimate children, of inmates of mental institutions, and of prisoners; all are individuals whom society had, with shocking casualness, swept under the rug.

In the administration of prisons, wardens are limited by the commands of the Due Process Clause and by the Eighth Amendment's ban on cruel and unusual punishments, and prisoners have not forfeited their religious liberty, or their right to free communication and access to the courts.

In June 1975 the Supreme Court, in the Donaldson case, held that nondangerous mentally ill persons, confined in mental hospitals against their will, have a right to treatment or to their freedom. While the full implications of this decision are as yet undetermined, the Court's opinion goes a long way to bring under the light of the law tens if not hundreds of thousands of individuals whose families and whom society had been eager to forget.

In a series of cases that started in 1968, the Supreme Court has wiped out as unconstitutional differences in legal status between children born out of wedlock and those born legitimately. The state, the Court has said, has an interest in furthering legitimate family life, but, the Court asked, will persons shun illicit relationships because the offspring may not one day reap the same benefits which the law allows to children born within the confines of wedlock? No children, said the Court, are responsible for their own births; penalizing them for the conditions under which they were conceived is both ineffectual and unjust.

All these developments are gains for moral sensitivity, because, as was said by Archbishop William Temple in his Gifford Lectures, "morality is the discovery or recognition by persons of personality in others, to whom by the common attribute of personality they are bound in the ties of community membership." In the last several decades, despite McCarthyism, the cold war and the Vietnam War, increased crime rates, and Watergate, there has been constitutional and moral progress. We have learned to apply commonly accepted constitutional and moral principles to individuals and groups whom we had hitherto condemned as being beyond the pale, beyond the reach of the phrase in the Preamble of the Constitution, "We, the people...." Emma Lazarus' poem inscribed on the Statue of Liberty spoke to the people of other continents: "Give me," the woman holding the torch of liberty was made to say to the peoples of Europe and of other continents,

> ...your tired, your poor,
> Your huddled masses yearning to breathe free,
> The wretched refuse of your teeming shore,
> Send these, the homeless, tempest-tossed, to me.

Now we have begun to turn the Statue of Liberty around, so that its message is to be read as addressed to ourselves. For at long last we have begun to see that it is we who have huddled masses who yearn to be free and that it is our own teeming cities that have wretched refuse who wait for liberation.