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Expanding Liberties: Freedom's Gains in Postwar America, by Milton R. Konvitz

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EXPANDING LIBERTIES: FREEDOM'S GAINS IN POSTWAR AMERICA. By Milton R. Konvitz. New York: The Viking Press, Inc. 1966. Pp. vii, 429. $8.95.

Expanding Liberties is a history of the development, since World War II, of some of the major rights the first amendment expresses. As its title indicates, this book has as its theme the recent expansion and progress in the establishment of liberties. Two entwined rights, call them the right of opinion (which would include belief, expression, and association) and the right of action (which would include association and the consequences of association and expression) frame the substance of the book.

While the major portion of the book is devoted to the post-war work of the Supreme Court with the first amendment, that is, in the areas of religious liberty, freedom of association, academic freedom, censorship, civil rights, and free speech, the devotion is not exclusive. A modicum of attention, by comparison, is given to judicial, executive, and legislative expansion of equality and liberty to deprived minorities in the United States: Negroes, Orientals, American Indians, and aliens. A final section of the book treats the internationalization of human rights.

The logic of the book thus is the triple expansion of the general rights of opinion and action: the substantive expansion in content; the jurisdictional expansion to groups not formerly accorded the rights; and the geographical expansion, at least formally by agreement and rhetoric in the forums of the United Nations and its specialized agencies, to countries in which the rights were not formerly established.

The great burden of the book is the first amendment activity of the Supreme Court, presented historically in lines of decision in a specific area, and analyzed with the aid of supporting material. Thus, for the most part, only the substantive expansion of liberties is fleshed out, while the two other dimensions of expansion are presented only in chiaroscuro.

The post-war history of the first amendment is well and clearly presented. Sufficient background is given to make the cases and lines of cases sharply intelligible and meaningful in terms of the developing legal issues, as well as to indicate the Court's difficulty in framing lasting and appropriate standards. The issues as they were presented, decided, or avoided in the cases are extricated and analyzd. The opinions are thoroughly examined for their significance, relevance, and consequences. It is in this last respect that Professor Konvitz is particularly illuminat-

ing, for so presented, it is easy to see the Supreme Court setting the premises of its future debates. In short, a good view is given of the recent intellectual history of first amendment rights.

There is a division among lawyers, and suspicion and confusion in the public, regarding the post-war work of the Court. A book such as this, therefore, is essential for lawyers who read about, but do not read first amendment and civil rights cases; for those who find the Court itself defiling the temple of constitutionalism; and for those generally interested, because it condenses, connects, and makes coherent what must seem to be the desultory appearance of new law. When the significant cases are decided, they must often appear to the uninitiated, whose expectations have not been framed by study of relevant past decisions, but rather by belief, habit, or prejudice, as ungrounded new departures and dispensations. For the most part, this is exactly the opposite of the truth. The Court is a social as well as a legal institution, and nothing so clearly shows the law in the decisions of the Supreme Court to be interim conclusions in a continuous debate in which relevant premises and information are continually changing than an historical approach to the decisions.

A number of themes appear *passim* throughout the book. The most interesting of these are: the nature of constitutional decision-making; the interrelated observations of the didactic role of the Supreme Court and the purposive use of law as an instrument of social change; and the proper point of legal regulation—acts and conduct, not existence, status, or expression.

The cat may as well escape the bag for all to see. Taking a sociological and institutional view of the Supreme Court and the Constitution, as Professor Konvitz does, the proper legal concern in the work of the Court is not with some abstract of "constitutionalism," some fleshless, literal adherence to the words and original meaning of the Constitution, but with legitimacy and the Supreme Court's maintenance of its institutional authority. Adherence to the original meaning of the Constitution is important only insofar as it affects the Court's authority and the perceived legitimacy of its decisions. A most difficult question to be sure.

With justified hyperbole, however, it is possible to say that the Court has changed from being simply the ultimate decision-maker to being, as well, a significant locus of national debate on intensely important matters. The Court, in addition to being the ultimate *magister* of lawyers and the occasional tutor of Congress, has assumed a didactic role for the nation as a whole. The Court, in short, because of the impact of its decisions and because of the fact that it has shown itself willing to review its own past thought, has revealed itself to be an intellectual enter-

prise, to be a student, to be a teacher of a responsible and responsive segment of the population and at least a gadfly to the interested remainder or an ideological enemy to be fought with ideological weapons. The decisions of the Court set the topics, assumptions, tone, and arguments of much national debate. The Court has thus come to operate, as no other national institution in our society does, as if it were a national university of sorts, a role formerly assigned solely to Congress, but now largely abdicated.

Similarly, the conscious role of law has changed. As Professor Konvitz notes, the effect of recent Supreme Court decisions, executive orders, and civil rights legislation makes it quite clear what many refuse to see, or view with alarm. That is, that law is necessarily an instrument of social change and that it ought to be used as such. The resurrected hypocrisy that you cannot legislate morals is simply untrue. We do, and we have done it all along. It is salutary to recognize that law is a specialty in morality.

The recent opinions and process of law in the Supreme Court, together with the authority, power, and prestige of the Court, support this innovative function of law. The institutional requirements of reassessment, and the necessity to draw on the past, to distinguish, utilize, and revitalize past formulations of value, present at least the appearance of careful, attuned, and considered decisions. Thus, while a particular result is displeasing, some continuity with the past is retained, and any change required by the Court's decision does not appear arbitrary.

Political theory is highly important here, for the ultimate goals of the polity and the means of achieving those goals frame and form the content of first amendment protections. With this in mind, it is quite clear that the Supreme Court in handling the first amendment is imposing a normative vision on the country. Professor Konvitz accepts this as a part of the human condition, but those to whom the book could have been a service are not likely to understand it. Thus, a little more polemic and argument, more philosophy and sociology, and some demonstration of the merits on first amendment issues would have been to the good.

By far the most interesting and comprehensive chapter in *Expanding Liberties* is that dealing with censorship of literature. Here the history is particularly enlightening, for perhaps no series of cases is so revealing of the changes in our society and of the creative, didactic role of the Supreme Court than the line of obscenity cases. Professor Konvitz achieves breadth here, where others have not, by including in his discussion the significant and formative decisions of the lower federal courts and by noting the cross-pollination of English and American decisions in the

forming of obscenity standards. And it is instructive to see the Court shifting from the concept that obscenity is not constitutionally protected speech, through the various obscenity standards, until the Court is on the verge of articulating, not a final simple obscenity standard, but a rather different pornography standard. This the Court has finally begun to do. In *Ginzburg v. United States*[1] and *Mishkin v. New York*,[2] the Court, in despair of creating a satisfactory obscenity standard, is apparently turning to a standard based on the purposeful creation, for profit, of a market for titillating sexual literature. A free speech standard based on a finding of exploitation and intent, however, creates its own difficulties. Suffice it to say, without entering them, Professor Konvitz' book aids one to see the Court pushing itself to this point.

Professor Konvitz' other discussions on freedom of religion, academic freedom, and freedom of association are also quite interesting. His discussion of subversive activities legislation and the cases arising under it is instructive, revealing the whole business really to be the bugbear it was and showing the enormous mountain of governmental work, talent, time, resources, and money giving birth to a pebble of legal result—and for all the failure of the great effort to control the Communist Party, the country has survived.

In view of the author's expressed goals and interests, there can be few criticisms of the book which will reveal anything other than the reviewer's predilictions. But generally speaking, and in view of the probabilities of its readership, the book appears to have been written for a rather limited audience: roughly, those who share or aspire to civil libertarian philosophy and who wish to have a handy, coherent, and topical history of its recent progress and success. However, the cautious joy and optimism of shared expectations and success aside, the first amendment is so pregnant with possibilities and so potent with exciting development and ideas that it is disappointing to see that the dangers and issues in expanding liberties, and expanding unfreedoms, are not examined: and that some important cases are not touched upon.

One fundamental question occurs readily: why has there occurred so great an expansion in first amendment liberties in the post-war period? Myriad reasons are assignable, but one obvious one, appearing at least *sotto voce* in the Court's decisions, is the political experience and knowledge gained from the times and events preceding World War II to the present. I refer specifically to the rise of Fascism and Nazism; the Spanish Civil War; the totalitarian state and its acts and laws suppressing

1. 383 U.S. 463 (1966).
2. 383 U.S. 502 (1966).

freedoms, human status, and organizations mediating the power of the state; the Nuremberg laws; Endlösung, the concentration camps and inconceivable treatment of life; propaganda, thought control, manipulation, and vast governmental deception; and finally, the events in the Cold War contest, the rise of totalitarian China, the end of colonialism, and the development of the poor nations. The shock, horror, and knowledge of these events, combined with our position in the world, has driven us to define and distinguish ourselves from totalitarian, communist, and authoritarian states, as well as from our own partially authoritarian and paternalistic past. Free expression, and all that it entails, was found to be the essential mark of distinction, the source of our difference, at least insofar as political practice is concerned. Thus free expression has become our face to the world and to ourselves—our very pride, merit, and essence. But, as our politicians continually reveal in their carnivals of buncombe, nothing is easier regarding basic freedoms than to be pompous in the word and waffling in the deed. With so desperate a need, so enthusiastic an embrace, and so crucial a contest, however, we could not abide the hypocrisy of preaching our virtue but not practicing it, particularly in the face of vast and sometimes competent criticisms of our system of life and government. To make the claim was to be required to enforce it. This reveals a source of the popular distrust and confusion. It was never really conceived, except by a few, that free expression involved such radical things as are now legally protected.

In view of their topicality, Professor Konvitz' failure to discuss conscientious objection cases is striking. While the line of these cases is perhaps not as substantial and dramatic as those he chose to discuss, the conscientious objection cases deal significantly with freedom of belief in action. In *United States v. Seeger*,[3] the statutory requirement of a belief in a relation to a Supreme Being was found by the Court to be satisfied by "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption. . . ."[4] Thus, at least for purposes of the free exercise clause, there appears to be no test for religious belief except sincerity. This appears to require a reassessment of some prior decisions and promises future difficulties, as for example when the claim is made by some users of LSD that they are involved in religious practices, even as the California Indians who use peyote. However, such a formulation was probably necessary in view of the radical rethinking of theology and the meaning of religion which is now current. But with growing persis-

3. 380 U.S. 163 (1965).
4. *Id.* at 176.

tency and in new contexts, Nuremberg considerations continue to be raised, *i.e.*, the question whether and when individual judgment, even if not grounded on religion, may challenge and refuse to obey the coercive powers of government.

Professor Konvitz also does not discuss the possibilities for effective democracy opened up in *New York Times Co. v. Sullivan*.[5] The future referent of the discussion would not have marred the post-war history, but rather would have given it fullness, as showing the potentiality of the history.[6]

If I may be permitted to divine in the entrails of events, there are portents of an immense development in the first amendment. For while liberties may be expanding, there are also expanding unfreedoms and coercions, and increasing pressures to conform. At the same time, dissent and self-help have achieved a legitimacy they formerly did not have. The mass media; mass marketing and merchandising techniques; our government's veritable monopoly on information, its ability to create events and manipulate results; the existence of large quasi-governmental private organizations; the development of an autonomous youth culture—in general, the overwhelming organized, standardized, and bureaucratic character of our life—promises great dissent; and that dissent will demand new legally protected means and channels of expression. Particular points of sensitivity appear to be within the philosophy of the first amendment: rights of association, rights to be heard, rights of access to information, individual and minority rights in private organizations, rights of privacy, psychological as well as physical. In this connection, the civil rights demonstration cases offer an example of the possibilities, for in gross, they seem to say that if political channels to influence power are closed, a legal channel will be opened for certain kinds of activities. It is difficult to see how one could miss the revolutionary nature of this legal protection. Perhaps that is why so many people are uneasy about it.

My own notion is that the first amendment can be profitably viewed as institutionalized revolution. It is the legal protection and insurance of change. It insures not only beliefs, the expression of opinions, the taking of certain actions without sanction, and access to certain kinds of information or communication, *but also* that we shall be subjected to differing opinions, to expressions and actions we seriously dislike, whether or not there exists the remotest possibility of being convinced of them.

5. 376 U.S. 254 (1964).

6. For some indications of the possibilities of the *New York Times* case, see Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

The first amendment fosters diversity, not necessarily as an instrumental value in some process of progress or as a means of attaining truth, but as a value in itself. Outside of a few selected disciplines and the universities, there is little evidence that in the marketplace of ideas truth will out. It is equally dubious that open discussion and decision after public debate will initiate a course of action appropriate to the reality calling it forth. The purpose of first amendment freedoms is not simply the attainment of truth or progress or orderly change, but also democratic participation in decision-making, for its own sake, and diversity, which both reconcile and create conflict. The anti-civil libertarian instinct is correct in this: the first amendment does lead to social dissent, disruption, deviance, and discord.

While it has often been stated that orderly change is a vital social interest, it may also be true that disorderly social change is positively beneficial to society and desirable. The problem with this statement, however, is, as Whitehead said, "We think in generalities, but we live in detail." "Disorder" is upsetting to a legal mind, as well as to others, but it should not be condemned until viewed in the particular. Spontaneity, novelty, chance, contingency, surprise, freshness, irreverence, challenge, risk, adventure, imagination, diversity, and expression—these carry disorder and change like a magnetic field.

Thus, while the passion for order seeks means to control the consequences of expression and yet permit an opening for change, and finds it in the control of action, the task of analysis is not quit. One must not always assume an overriding social interest in order or in the smooth, efficient, economic, and stately flow of public business. The asserted social claims must be examined in the particular for their merit.

Or we may say, so many goods, real and intangible, are seen and felt to flow from first amendment freedoms that, as a matter of policy, we will treat it as a good in itself and will demand that, if it is to be abridged in any way, the grave burden of showing its bad and severe effects upon society in a particular case is upon the one attacking it. Thus, we change an ideological or political presumption, and the first amendment needs no justification.

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