REVIEWS

THE BILL OF RIGHTS. By Learned Hand. Cambridge: Harvard University Press, 1958. Pp. v, 82. $2.50.

FREEDOM, VIRTUE AND THE FIRST AMENDMENT. By Walter Berns. Baton Rouge: Louisiana State University Press, 1957. Pp. xiii, 264. $4.00.

FUNDAMENTAL LIBERTIES OF A FREE PEOPLE. By Milton R. Konvitz. Ithaca: Cornell University Press, 1957. Pp. xiii, 420. $5.00.

THE fascination of constitutional law is a compound of its importance, its uncertainty and the degree to which its great moments come in the contest of lively particular issues. While most citizens have been content to show the general respect which the Supreme Court has earned in our history, feeling only an occasional strong resentment of specific decisions, there is among many others a remarkably close and zestful attention to the actions of the Court, with recurrent attempts to distill from the decisions themselves conclusions of the widest sort about the nature of justice in our society. The delights of this kind of study have nourished very different spirits in the law schools; they are the sustaining strength of the subject in undergraduate teaching; they are at the root of this year's demonstration by Anthony Lewis in *The New York Times* that Supreme Court reporting can be at once as important as the best of traditional political correspondence and as lively as the Sunday sports page in November. The three books at hand are all relevant to this continuing fascination, and each, to one layman, has qualities that are instructive.

Professor Konvitz has written a good book that contains few surprises. It is a conscientious summary of issues that have come before the Supreme Court under the First Amendment; it is careful, kind and fair. Mr. Konvitz is a somewhat uncritical supporter of the "liberal" view of these issues. Justices Black and Douglas are not men of his temper, but he is a man of their opinion. What stirs him to argument is never a judgment of theirs but, characteristically, such an opinion as Justice Jackson's dissent in *Kunz v. New York*[1] or Justice Frankfurter's distinguished concurrence in *Dennis v. United States*.[2]

It cannot be said that Mr. Konvitz wins most of these arguments. He attacks Justice Frankfurter's *Dennis* opinion most sharply where its strength is greatest, on the simple but basic proposition that the wisdom and constitutionality of a statute are not congruent. To Mr. Konvitz, this is perverse doctrine, at least in the area of the First Amendment. Yet on any close

1. 340 U.S. 290, 295 (1951).
2. 341 U.S. 494, 517 (1951).

logical analysis, Justice Frankfurter is clearly right—otherwise Mr. Konvitz must hold that all that is legislated without conceivable constitutional complaint in these areas is wise, a conclusion that would seem illiberal to harder hearts than his. What leads him to overstatement here is his distress that Justice Frankfurter, who plainly doubts the wisdom of the Smith Act and the *Dennis* prosecution, should have refrained from basing his judicial opinion on his personal doubts. In important cases involving the Bill of Rights, Mr. Konvitz would have the Court defend the right, and since it has no mandate to deal directly in righteousness, it must necessarily act on the premise that in these matters what is wrong is also unconstitutional. Like so many of us, Mr. Konvitz wants the Court on the side of his wisdom. It is a serious weakness of his book that it scarcely touches the question of limits upon the power of the federal courts themselves, except to regret them.

In his hope for an active Court, if in little else, Walter Berns is in agreement with Mr. Konvitz. He too wants the Court to act on the side of wisdom, but he defines it very differently, and his principal target is precisely the position of "liberalism" that Mr. Konvitz in general supports. Mr. Berns has written a bold and fresh-minded book, one which indicates both the contribution that political theory can make to the study of constitutional law and some of the reasons why many lawyers prefer not to accept any such contribution.

Mr. Berns begins with *Winters v. New York*,[3] where the Court held unconstitutional a state statute under which a purveyor of low magazines had been convicted. Contrasting the fate of Winters, whose merchandise seems clearly mischievous, with that of Edmund Wilson's publisher in *Doubleday v. New York*,[4] Mr. Berns asserts and argues his belief that the root of the trouble lies in a basic "libertarian" misunderstanding of the First Amendment. His claim is "first, that freedom and justice are not always compatible and that the Supreme Court knows it, and second, that despite every effort, wise decisions in First Amendment cases cannot be had without doing what our liberal courts refuse to permit: distinguishing between good and evil."[5]

Mr. Berns's first claim is an attack on the so-called "preferred position" doctrine, and he makes a good job of it. His analysis is sharper than that of Mr. Konvitz, and he has the better case. Mr. Berns has a good time carving up the majority opinions in *Terminiello v. Chicago* [6] and *Saia v. New York*;[7] and it is an illuminating fact that these startling opinions, one protecting a foul-mouthed and peace-breaking agitator and the other the right to use a loudspeaker in a park, receive no serious attention from Mr. Konvitz. Mr. Berns makes it amply clear that the problem of reconciling the requirements

3. 333 U.S. 507 (1948).
4. 335 U.S. 848 (1948).
5. P. 47.
6. 337 U.S. 1 (1949).
7. 334 U.S. 558 (1948).

of the First Amendment with other interests of the state is much harder than Mr. Konvitz makes it. As a sample, and no more, I would acknowledge the profit of being directed to the notable comment of Chief Justice Qua in the Strange Fruit case: "In dealing with such a practical matter as the enforcement of the statute here involved there is no room for the pleasing fancy that sincerity and art necessarily dispel obscenity."[8] The proposition is unpleasant, but it rings of reality.

Mr. Berns has less luck with the second and larger part of his argument. The road from Supreme Court decisions to the knowledge of good and evil is a rough one, whichever direction the traveler takes. Perhaps here the ride is bumpier than usual, because Mr. Berns combines a keen desire to reach his goal with real uncertainty as to what it is. Moreover, the problem is compounded by the method he has chosen. He starts with the cases, but moves from each case no further than his complaint about it; he does not go on to the construction of a manageable theory which might then lead back to different judgments in the cases. Moving with darting arguments among dozens of cases, he sometimes gives evidence of the very "angry confusion" he himself finds in the opinions. Even when he takes the high battleground of jurisprudence and sets his lance at Dean Pound—in a passage which is talented and telling—he seems to be clearing the field for a hero who never enters. Mr. Berns is right, I think, in his conviction that Justices must be guided not only by the Constitution, the statutes and their learning in the law, but also, at least some of the time, by their own view of justice. But it is impossible to get from his book any clear sense of the ways and means of knowing what justice is and how to serve it.

Indeed, in his eagerness to criticize the failings of others, Mr. Berns has erected some misleading guideposts. The liberties protected by the First Amendment are not absolute, but neither are they irrelevant. "Freedom," says Mr. Berns, "must be compatible with moral principle, or at worst, not incompatible."[9] But this proposition seems to overlook the possibility that freedom itself may be a principle with claims upon notice and support. There are real dangers in restriction, and some of them are moral dangers; Mr. Berns knows these dangers, but this knowledge does not sufficiently affect his argument. He is much more successful in attacking the general position of Justices Black and Douglas than he is in an attempt to dispose of Sidney Hook's defense of heresy. The energy of honest conviction is cousin to the pride that would repress what it thinks evil—and is that good?

More serious, perhaps, and closer to the central thesis of the book, is the weakness in Mr. Berns's discussion of the way in which the Court is to serve justice. This part of his analysis will properly distress many lawyers—for like Mr. Konvitz he seems to give little thought to the fact that the Court

8. Commonwealth v. Isenstadt, 318 Mass. 543, 553, 62 N.E.2d 840, 846 (1945). But I agree with Mr. Berns in believing that the argument is better than the particular result.

9. P. 225.

is only one agency of government, one not endowed with all the powers of government, one responsible only within the terms of due process of law. His assumption appears to be simply that, because Murray Winters was doing a bad thing, the Supreme Court should have sustained his conviction. The argument is briefly stated this way: "The purpose of the Supreme Court is . . . to make the Constitution conform to justice. Supreme Court Justices seek to make the law of the Constitution conform as closely as possible to what is right as they see the right."[10] This sentiment is at least cavalier, and at worst deeply cynical, about the whole nature of the judicial process; too much in Mr. Berns's book is tuned to this key.

In a passage of much higher sensitivity at a later point, Mr. Berns proves that he knows better. Taking serious issue with Justice Frankfurter on the question of "judicial self-restraint," he is yet respectful of many elements in the opposing argument. By the time he has conceded that "many of the problems arising under the First Amendment can only be solved on the scene by local officials, who must, therefore, be permitted to exercise their good judgment"[11] and that "of course the power of judicial review must be used with moderation,"[12] he has redrawn the issue so that in fact his difference with Justice Frankfurter is more one of degree than kind. The greater the pity, therefore, that in the main line of his argument there is so much that is less restrained and that nowhere is there any real effort to examine the question of the role of the Supreme Court as but one part of a large government.

Yet all these complaints are not what matters most about Mr. Berns's book. It is the first product of an excellent mind hard at work on real issues, and it is a book that is instructive by the very power of its errors. And that, in a higher degree, is the meaning of Judge Hand's book, too.

Learned Hand is a wonder, and so is this little book of his Holmes Lectures at the Harvard Law School. Those who heard the lectures delivered to overflow crowds in Austin Hall will not quickly forget the extraordinarily high level of attention which carried through to the double testament of the last two paragraphs: one a quotation of Franklin's defense of the Constitution, and the other Judge Hand's salute to the law school that taught him. In part, of course, the audience came in tribute to the man—but it remained in deep concern with what he was saying.

What he was saying is simple enough in its conclusions: first, that only necessity, not the Constitution itself, justifies the Supreme Court in asserting the right of judicial review; second, that the due process clauses have been and are being applied to the merits of legislation in a way that has no basis in law "except as a *coup de main*";[13] third, that "the interests mentioned in

10. P. 162.
11. P. 179.
12. P. 187.
13. P. 55.

the First Amendment" are not "entitled in point of constitutional interpretation to a measure of protection different from other interests";[14] and finally, that for himself he prefers the most severe self-restraint on the part of the Supreme Court. At one point Judge Hand attacks the famous "clear-and-present-danger" doctrine, concluding, "I doubt that the doctrine will persist, and I think that for once Homer nodded."[15] His own view might be crudely stated as follows: the Supreme Court should act to invalidate state or federal legislation, whether or not it affects the Bill of Rights, only when there is a clear and present danger of a breakdown of constitutional government—it is to defend the Constitution's continuance, and not to interpret its relation to the merits of legislation, that the Court may use this power.

But no restatement here can be adequate to an argument trimmed to its hard outline by an outstanding craftsman of law and language. Time after time Judge Hand clears up in a page matters which are misunderstood at ten times the length in other writings. Both Mr. Konvitz and Mr. Berns, for example, can learn much from his swift summary of the many things in our politics that the Court will not decide; how shall it deal with wisdom when it will not even deal with constitutionality? And it is hard to deny the power of Judge Hand's demonstration that while the conclusion of *Marbury v. Madison* is right, the reasoning that Marshall used is much too thin for the task.[16] In the sweep of argument, even the segregation cases become merely an illustration of a point, but the comment made is penetrating: in reaching the conclusion it did, the Court could appraise the relative values at stake and overrule the legislative judgment of the states, or it could decide that full racial equality was a value above relative appraisal, but it could hardly do both. One suspects that Judge Hand would have tried to do neither.

The argument, however, is so broad and so deep that speculation upon its consequences for any one case, however important, smacks of courtroom gossip. In the good society as Judge Hand sees it—indeed under the Constitution as he believes it is—patterns of action would become so different from what we know that it is foolish to attempt to say what might be sound judgment in a single set of specific circumstances.

And that is why, though these short lectures are likely to become a permanent part of our constitutional commentary, they also seem wrong—even if it be impudence to say so. Perhaps the Court should never have begun to act on the merits—perhaps the whole set of cases that have given substance to due process and some particular protection to the Bill of Rights is properly conceived as a collection of mistakes. Yet the fact is that the Court has acted, that it has acted repeatedly, and that no modern Justice since Holmes has failed to act, in a fashion that breaks the rules Judge Hand has set.

14. P. 56.
15. P. 59.
16. 1 Cranch 137, 177, 178 (1803).

Ignorance prevents me from arguing about the nineteenth century, but my suspicion is that Judge Hand must search beyond the Civil War for company. We are stuck with the fact that behavior of this sort, for better or worse, is now a part of the Constitution "we are expounding." In the end, under stern limits and by rules of law, the Justices are called to action on the merits as well as the process. The nation expects it; the executive and the legislature have accepted it; and on balance, to one citizen, it is better so.

Yet even if Judge Hand is wrong in the end, he puts many things sharply right along the way. First, he is right in his appeal to history—the Constitution as it was is parent, at least, to what it is; without a past it has no serious present. Second, he is right in his persistent concern for craftsmanship; we may admit—as he might not—that in hard cases the law cannot carry the Justice all the way to judgment—still he must go as far as law will take him, and the distance can be great. Judge Hand's devotion to the sternest standards of his trade is magnificently illustrative of the constitutional lawyer at his best. Who else, for example, could have reset the language of clear-and-present-danger to make it effective in the world as it is, while at the same time looking skeptically at the whole line of law from which he worked?

Next, even if Judge Hand be wrong at the limit of his argument for restraint, he is right in his conviction that the dangers of a third legislature are grave, both in the degree to which such a role undermines the austere position of the Court, and in the degree to which it undermines the responsibility of elected officers of other branches. The Court may be the final arbiter, and the nation may require its help, but its thunderbolts must not be many, or for small objectives. At a choice, Hand's clear-and-present-danger doctrine seems at least as sound a guide as that of Holmes.

The fascination of constitutional law is not ended by these three books. In different ways they underscore its importance, and they leave its uncertainty intact. What they also suggest, when taken together, is that those who would study the relationship between justice and liberty in America must lift their eyes from the cases and consider the whole process of society. Mr. Konvitz and Mr. Berns, in quite different ways, are severely limited in their argument by the focal attention they give to the precise questions that have happened to come before the Supreme Court. It is Judge Hand, the true lawyer, who steadily remembers that those decisions are not all of society. The cases are absorbing, but the real test for the student is to go beyond them to the world of activity where decisions do not have the help of boundary lines and chosen adversaries. It is out in this wider area that the student might find help in telling, if Judge Hand be wrong, what is right.

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