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Foreword and Prologue

David J. Danelski

Robert B. McKersie

Foreword and Prologue

Abstract

Milton Konvitz (Ph.D. '33) embodied the spirit of Cornell University. An authority on civil rights and human rights, and constitutional and labor law, he served on the Cornell faculty for 27 years, holding dual appointments at the Law School and the School of Industrial and Labor Relations. This section includes the foreword by Robert B. McKersie and the prologue in four chapters: (1) The Making of a Scholar; (2) Civil Rights; (3) Fundamental Liberties; and (4) Judaic and American Ideals.

Keywords

Faculty, lecture, teach, career, scholarship, Milton R. Konvitz, America, university, law, civil, right, immigration, Cornell, alien, liberties, idea

Comments

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RIGHTS,
LIBERTIES,
AND
IDEALS

RIGHTS, LIBERTIES, AND IDEALS: The Contributions of Milton R. Konvitz

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Foreword

When I arrived as Dean at the School of Industrial and Labor Relations in 1971, it soon became clear that the School was undergoing a very important transition: A handful of distinguished faculty members, who had been with the School since its founding just after World War II, were in the process of retiring. A number of events were organized to commemorate the distinctive contributions that these individuals had made to the School over two and a half decades. One of these was a *Festschrift* type of conference, later to be recorded in a publication edited by David Lipsky, entitled *Union Power and Public Policy.*

Given the stature of the faculty members involved, it was decided that "group treatment" was insufficient. Accordingly, younger faculty members and administrators put their heads together to design other means so that the distinctive contribution of the founding faculty could be memorialized. A committee consisting of Charlotte Gold and Professors Kurt L. Hanslowe, James O. Morris and A. Gerd Korman fashioned the concept of an extended essay and annotated bibliography on the wide ranging and distinctive career and scholarship of Milton Konvitz.

The committee was fortunate in persuading Professor David J. Danelski, then a member of the Government Department of Cornell University and now of Stanford University, to undertake the challenging assignment of summarizing, interpreting and codifying the career and writings of Milton Konvitz. Professor Danelski has rendered an invaluable service in preparing this volume for publication.

I would also like to note the leadership provided by Dean Charles M. Rehmus in seeing this project through to a conclusion. Many loose ends remained at the time that Dean Rehmus came to the School and he has exercised considerable skill in presiding over the final phases of this project.

Finally, I would like to express my thanks to a small committee of alumni chaired by Dr. Jacob Seidenberg who raised funds to help pay for costs associated with this project. It is a testimonial to the impact that Professor Konvitz has had on thousands of Cornell Alumni that it took no substantial effort for the committee to accomplish their task. We appreciate the help our alumni gave us in creating this fitting tribute to a beloved and respected member of the ILR School's founding faculty.

ROBERT B. MCKERSIE

Prologue

On December 3, 1974, Milton Konvitz gave his last lecture in one of two courses on American ideals he was teaching that semester. At the end of the lecture, he told the class that he was completing his career as a teacher but that his life's work would continue. No worthwhile work, he said, is ever finished. "The word 'and' trails after every sentence," he quoted William James. "Something always escapes. 'Ever not quite' has to be said of the best attempts made anywhere in the Universe at attaining all-inclusiveness." Then he said:

> And yet the human mind and the human heart seek all-inclusiveness, wholeness. This is why we look for the universal in the particular, why we so desperately seek to find a law that would embrace whatever we know and whatever we do. The soul always reaches out for infinity. It is like listening to a great symphony, or sometimes even only to a lovely melody: when it is ended, the notes continue, the inner ear continues to listen, the heart seeks to penetrate the great infinite silence that is always the beyond.

That is the way it would be for him. He would stop what he was doing for the past 36 years, 28 of them at Cornell. Just as the clock told him that time had come to end a

lecture, the calendar was now telling him that the time had come to quit teaching. He concluded his lecture with these words:

> But the word 'and' trails along—my life and work are by no means finished. The taskmaster is still persistent. There is more work to be done, and there are more days to dawn.
>
> When William James found in New Hampshire, in the region of the White Mountains, a house that he knew at once he wanted to have as a summer home, he wrote to his family about it. 'Oh,' he wrote, 'it is the most delightful house you ever saw; it has fourteen doors all opening outside.'
>
> Essentially, what I have tried to do in this American Ideals course is to take you into a house with ever so many doors, and all of them opening to the outside. The greatest deprivation is that which we impose upon ourselves—our self-made prisons, the doors that we ourselves close and lock, and after a while we sometimes even throw away the key, so that by the time the end comes, we discover that we had not even lived. If you take anything away with you from the course, let it be this: let your life be a house with at least 14 doors, and all of them opening to the outside.
>
> And as for me, there are still many doors that I have not yet walked through. They are beckoning, and I hope that I still have enough of the spirit of adventure that will take me through some of them. Like Thoreau, I long ago seem to have lost a hound, a bay horse, and a turtledove, and am still on their trails. This is why I must walk through more doors. And I hope that you will do the same all the days of your life.

Professor Konvitz will be remembered as an exceptional teacher. What he wrote of Emerson could also be said of him. He had students, not disciples. He sent them on their quest for truth and justice guided by their own candles, and he broadened and deepened their lives by helping them discover and disencumber their own powers.

Konvitz's students had to figure out where they stood on the important issues of their time, but they had no doubt where he stood. First and foremost he believed in love—love of God, love of one's neighbor, and love of one's self. By love of one's self he did not mean self indulgence; he meant treating one's self lovingly, intelligently, respectfully, com-

passionately, properly. He meant developing one's God-given potential, devoting one's self to his or her vocation as Emerson did. The proper conception of self love is a key to understanding how human beings should treat one another. "Love thy neighbor as thyself." Yes, love thy neighbor intelligently, respectfully, compassionately, properly. Acknowledge that others are equal before God. Acknowledge that they are made in the image and likeness of God and are thus free to eat at the tree of knowledge and free to choose their paths in life whether they lead to the City of God or to Sodom and Gomorrah. And in loving one's self and one's neighbor, one loves God. For Konvitz, in wrestling with the question that was central for Emerson—*"What is he?"* What is man?—answered it the same way Emerson did. He quoted *Psalm 8:* "Thou hast made him little less than God and dost crown him with glory and honor." Thus to love man properly is to love God. Konvitz put it more elegantly on Edward R. Murrow's radio program in 1953 when he stated his basic beliefs in these words: "To feel the steadfast love at the sight of a living creature, an almost unbearable pity for all things that are born and suffer and die: in this is the love of God."

The students in Konvitz's courses knew that the person standing before them was not only an exceptional teacher but a rare human being who always sought to be true to himself. They heard him for the last time on December 4, 1974.* At the end of his lecture that day, he told them that he would never teach again. He reminisced about his early teaching at New York University and the first time he taught a course in civil rights. He said that his central interest was always his teaching of the American Ideals course at Cornell. Almost every one of his books, he said, derived from the course. It was not an abstract interest for him, but, as he put it, "the very tissue of myself." Keeping the course current, he said, kept him current. Keeping it

*[The text of the statements on December 3 and 4 appears at a later point in this volume.]

fresh and alive kept him fresh and alive. It was Emerson's law of compensation in operation. He said:

> I have, of course, deep and complex feelings about having come to the end of my teaching career. I will not try to analyze my feelings; there can be such a thing, I believe, as too much subjectivity—which is not healthy. But believe me, one thing I do *not* feel, and that is self-pity. This is a poison which all my instincts reject.
>
> If there is any one feeling that predominates, I am sure that it is a deep feeling of gratitude. In the religious tradition which is my own, we are required, when we reach an event significant in one's personal life, to utter a blessing that thanks the Giver of Gifts for the gift of life that has brought one to the happy event. It is this emotion of thanksgiving that I feel most of all at this moment.
>
> For I have been among the most fortunate of men. I have spent my days and years doing exactly what I so much wished to do. Instead of the State of New York and Cornell University paying me, I should have been willing to pay them for having allowed me to do the work that I most wanted to do. I have never learned the difference between work and play, between work and leisure, between daytime work and nighttime relaxation—I never knew where one ended and the other began.
>
> I say all this so that you may know that my interests are not of a kind that I can suddenly drop them. I shall go on with my work. Schopenhauer said that essentially a thinker has only one or two ideas, and then he spends his entire life trying to understand them, to unravel them, to explain them to himself and to others. I still have a lot of work on the one or two ideas I once acquired, and I intend to work on them in the future as I have in the past.
>
> I cannot help but recall some lines from Tennyson's 'Ulysses':
>
> Tho much is taken, much abides; and tho'
> We are not now that strength which in old days
> Moved earth and heaven, that which we are, we are;
> One equal temper of heroic hearts,
> Made weak by time and fate, but strong in will
> To strive, to seek, to find, and not to yield.
>
> As I leave you, I look upon you as representatives of the many thousands of students whom I have been privileged and honored to have had over the years, and I want to thank you for all the supremely wonderful things that you have

> brought to me and done to me. You taught me many lessons—lessons in courtesy, consideration, mutuality of regard and respect, mutuality of honor, mutuality of human dignity. For these and so much else that is beyond expression, you have my sincerest thanks.

Thus, Milton Konvitz's teaching career formally concluded. His career as a scholar, however, would continue. By 1974 it already had been an extraordinarily productive career that characterized a life of service.

1/*The Making of a Scholar*

> Know then that the world exists for you. . . . What we are, that only can we see. All that Adam had, all that Caesar could, you have and can do . . . Build therefore your own world.
>
> —Ralph Waldo Emerson

I

Milton Ridbaz Konvitz was born on March 12, 1908, in Safad, Palestine, where, three years earlier, his grandfather, Rabbi Jacob David Ridbaz had founded his seminary, the Yeshivat Ha-Ridbaz.[1] Milton's earliest memory was of being carried to Hebrew school in a prayer shawl by his father at the age of three. He remained at school all day, for when he went home, he recalled, it was dark, and the teacher led the way with a lantern. By the time Milton was five, he was studying the sacred texts of the Torah, and by the time he was seven, he was studying the Talmud.

When war broke out in Europe in 1914, his father Rabbi Joseph Konvitz was in the United States seeking financial assistance for the seminary. Concerned that his eldest son would be drafted by the Turks and that his family would suffer hardship in Safad, he made arrangements for them to come to the United States. They arrived in 1915 just before the war closed regular passage across the Atlantic. The

1. Unless otherwise noted, the sources for this chapter are several taped conversations with Milton R. Konvitz in the summers of 1977 and 1978.

Konvitzes had no intention of settling in America. But by the time peace came, their children had become so Americanized they were reluctant to leave. So Rabbi Konvitz put off his return to Safad, and it soon became clear that the United States would be home to the Konvitz family. From 1915 until his death in 1944, Rabbi Konvitz led orthodox congregations in Elizabeth, Trenton, and Newark, and for many years he was head of the Orthodox Rabbinate of the United States and Canada.[2]

Meanwhile, Milton educated himself for what would be an extraordinary career of scholarship. A precocious child, he spent a year in the first grade and then completed the remaining seven grades in four years, an unusual accomplishment for someone who had spoken no English when he arrived in America. Soon after he began high school, he became ill and was out of school for a year, but he made up the work and went through high school in the normal four years.

Milton loved books and learning. He spent much of his free time in libraries and used-book stores. In bookstores, he would examine book after book, usually not knowing the authors; if a title interested him, he would start reading the book, and if he liked what he had read, he would often buy the book for his library. Thus, while in high school, he had picked up George Long's 1893 translation of *The Meditations of Marcus Aurelius,* read a few pages, and was impressed. He continued to read and decided to buy the book. Surely it was worth a quarter. The book is still in his library. It was typical of his encounters with great writers. Once when he was fourteen or fifteen he noticed a little book of Emerson's essays on the new-book shelf of the Trenton library. He picked it up, started to read one of the essays, and found that he was unable to stop until he had finished. From that day on, he has been an avid reader of

2. After the death of his father in 1944, Konvitz wrote an essay expressing his grief, "On My Father," *Jewish Morning Journal,* June 30, 1944, p. 7; and a poem, "Lament for My Father," *Jewish Frontier,* XI (November 1944), pp. 26-27.

Emerson. He found that Emerson incited his own thinking. A sentence from Emerson called to mind his own thoughts on the subject. It was as though Emerson had been in the room with him, talking to him. Later Konvitz wrote that there are thinkers who talk to us and there are those who answer us. The latter have disciples and establish schools of thought, and their texts are used to separate the orthodox from the heretical. "But they who speak to us are teachers who seek to liberate the mind from dominant traditions and schools. They have pupils but not followers. Their purpose is to set each man on his own quest, guided by his own candle. If their teaching has any content, it is that each man's world is his own creation, that each man's world is his own confession. They seek to broaden and deepen life by helping each man to discover and disencumber his own powers. They engage the soul in a dialogue and not in a catechism. It is to this small company of thinkers who speak to us that Emerson preeminently belongs."[3]

The little book of Emerson's essays that had fired young Konvitz's mind had been edited by Stuart P. Sherman, an English professor at the University of Illinois. Milton noticed that Sherman edited the Sunday literary supplement of the *New York Herald Tribune* and wrote a long essay each week on some outstanding American or European writer. Each week he turned eagerly to Sherman's essay and read it. Milton also read his books.[4] Through Sherman's writings he was introduced to Hawthorne, Anatole France, Thoreau, Mencken, and other American and European writers. Milton was struck by Sherman's idea of Americanism. To be an American, wrote Sherman, meant to hold certain ideals that are a permanent part of the

3. Milton Konvitz, Introduction, in Milton Konvitz and Stephen Whicher (eds.) *Emerson: A Collection of Critical Essays* (Englewood Cliffs, N.J.: Prentice-Hall, 1962), p. 11.

4. Among Sherman's books that Milton read were *Americans* (New York: Charles Scribner's Sons, 1922); *The Genius of America* (New York: Charles Scribner's Sons, 1923); *Critical Woodcuts* (New York: Charles Scribner's Sons, 1926); *The Main Stream* (New York: Charles Scribner's Sons, 1927).

nation's life. They are the spiritual mold in which one's thoughts and feelings become American. They establish our fellow citizenship with Franklin and Jefferson. The notion of American ideals shaping one's political and moral conscience would remain with Konvitz, and looking back to his high school and college days, he would say that Sherman was important in his Americanization. When Sherman died in 1926, Milton felt that he had lost a friend.

Milton was not only taken with Emerson's ideas; he was taken with the literary form that Emerson used—the essay. While still in high school he read the great essayists Montaigne, Sainte-Beauve, Matthew Arnold and James Russell Lowell, and later, in college, he read Carlyle, Lamb, Ruskin, Hazlitt, George M. Brandes, Paul Elmer More, Llewelyn Powys, and Odell Shepard. He enjoyed reading essays, and many of his own writings are best characterized as finely crafted essays.

As Konvitz grew older, he began to read philosophy. As a student in high school, he read Marcus Aurelius, Epictetus, and Schopenhauer; then one of Mencken's works led him to Nietzsche. After Nietzsche, he read, while he was in college, Spinoza, Plato, Kant, Maimonides, Leibniz, Aristotle, Royce, James, Berkeley, Hume, and Locke, and later he read Thomas More and Erasmus. And he read and reread Emerson, which prepared him for the idealist philophy of Plato, Kant, and Royce. He especially admired Emerson's life—his singular devotion to his vocation, his commitment as a thinker, his unimpeachable honesty and integrity, and he liked Spinoza and Kant for the same reasons. He admired Erasmus for his courage and honesty and More for his brilliance.

At sixteen, Milton went to New York University. He lived at home and commuted on the Hudson tubes to Washington Square five days a week. In college he did not have much of a social life. On Sundays he would usually go to a concert in New York. He published his first essay, which was on the British Poet Laureate, Robert Bridges,

while still an undergraduate.[5] After receiving his bachelor's degree in 1928, he enrolled simultaneously in New York University's law school and graduate program in philosophy. The next year he published two essays, one on Robert Frost and Edward Arlington Robinson and the other on Spinoza and Maimonides.[6] That year he became an editor of the *New York University Law Quarterly* and was awarded first prize for the best law note in the *Quarterly*. He especially enjoyed his work in philosophy. One of his professors was William Curtis Swabey with whom he studied Spinoza. He travelled to Swabey's office at University Heights once every two weeks for a tutorial that lasted an entire afternoon. He also had a seminar on Aristotle's *Physics* with Professor Philip Wheelwright.

While Konvitz was studying philosophy and law at New York University, he wrote two articles for philosophical journals—one on the ideas of Bradley and Fite and the other on utilitarian justice.[7] The latter's discussion of uniformity and equality was a forerunner of much of his mature work. To Konvitz these concepts did not necessarily have the same meaning. Uniformity is a guarantee of equality, he wrote, only "if the law is uniformly enforced among equals." Then he went on to write:

> Equality before the law can mean only one thing, namely that a court cannot be a respecter of persons: that's a privilege that only people have. And such an equality it is the duty of a court to enforce even at the risk of making itself unpopular and the community less happy; and this must be true even in a state whose guiding political principle is Utility, for the basis of this principle is the postulate that every individual counts for one, and only one.[8]

5. Milton R. Konvitz, "Robert Bridges," *The Arch* (1927), 31-32.

6. Milton R. Konvitz, "Frost and Robinson," *The Arch* (1929), 9-10; "On Spinoza and Maimonides," *The Open Court,* XLIII (1929), 160-168.

7. Milton R. Konvitz, "Bradley's Ideal Morality and Fite's Moral Ideal," *The International Journal of Ethics,* XLI (1930), 1-13; "Utilitarian Justice: Technical and Discretionary," *Philosophical Review,* XL (1931), 69-78.

8. *Ibid.*

This passage is important because it would be the premise of Konvitz's life-long defense of civil rights: courts have an obligation to protect the constitutional and legal rights of every individual, for individuals are equal before the law. In this formulation, Konvitz suggests a solution to the problem of the potential conflict between equality and freedom. In the public sphere, which is regulated by law enforced by the courts, equality must take precedence over freedom. Only in the private sphere—and then where not regulated by law—may freedom take precedence over equality. Konvitz's basic premise about the obligation of courts to enforce equality according to law even if a majority of the community opposes it anticipates to some extent the preferred freedoms doctrine, which the Supreme Court later adopted.

In 1930, two years after he had graduated from college, Konvitz received a master's degree in philosophy and a law degree, which probably violated some rule against receiving two degrees at the same commencement, but if it did, the infraction was overlooked. His master's thesis was entitled "Universals and Individuals in Spinoza and Leibniz."

When Konvitz began college, he already had some idea of what he would like to do in life. He never thought of becoming a rabbi like his father and grandfather before him. When he was an undergraduate he wanted to study Jewish philosophy, become proficient in that field, and write about it. His article on Spinoza and Maimonides in 1929 was a tentative step in that direction. But he had to be practical. In 1930, there were only two scholars in the field of Jewish philosophy. One was Harry A. Wolfson, a young Harvard University professor. The other was Isaac Husik, a University of Pennsylvania professor, whose book, *A History of Medieval Jewish Philosophy*, was the standard work in the field. Konvitz lived philosophy perhaps more than any other student at New York University, but he did not believe he could make a living in philosophy. So he would become a lawyer.

In 1931, Konvitz began his legal apprenticeship, which

was required in order to take the bar examination in New Jersey. In 1932, he passed the bar examination and was admitted to practice, but instead of looking for a job with a law firm, he applied for graduate fellowship in philosophy at Cornell. Cornell offered him one of its Sage Fellowships, and he accepted it.

In the fall of 1932, Konvitz made his first journey to Ithaca. His fellowship was for one year, and he made the most of it. That year he completed all the work for a Ph.D., including the writing and defense of his dissertation, and received his doctorate in June of 1933. Members of his doctoral committee were George H. Sabine (political theory), G. Watts Cunningham (metaphysics), and Richard Robinson (history of philosophy). His dissertation was a study of the early 20th century British philosopher, Samuel Alexander, entitled: "Meaning and Value: A Study in the Axiology of S. Alexander."

II

In June 1933, Konvitz would have liked nothing better than a job teaching philosophy at some college or university. He was a scholar; he had already published several articles, and he wanted to teach. And nothing would have pleased him more than to stay at Cornell. But Sabine, his major professor, urged him to be realistic. Because of the Depression, there were few jobs in philosophy anywhere in the country and none at Cornell. Further, there were very few Jews in academic life, and Konvitz knew that anti-Semitism was at the time a fact of life in academia. Besides, he was fortunate to have a law degree and to be admitted to the bar; he could get a job. Sabine knew how much his student loved the life of the mind, but he nonetheless urged him to practice law. Konvitz reluctantly left Ithaca for Jersey City and a job in a law firm. In 1935, at the age of 27, he went into practice for himself, and in 1938, when public housing under federal law began, he also became general counsel for the Newark

Housing Authority. But Konvitz did not relish the practice of law. He yearned for the life of scholarship and continued to write. And in summers he would return to Ithaca to use the Cornell library.

Dean Frank H. Sommer, of the New York University Law School, knew of Konvitz's scholarly ambitions and was eager to have him on the faculty, but the Depression kept him from making any appointments. In 1938, however, he created a part-time position for Konvitz and asked him to teach a new elective course on legal method. This was the first of many courses Konvitz was to create and teach at Washington Square over the next eight years. Among the courses he created was one in public housing law that eventually covered not only the legal aspects of public housing but also planning and conservation. He also created and taught courses on judicial administration, civil liberties, and civil rights. Because the courses were new, Konvitz had to develop his own materials, which he did during summers, usually in Ithaca. The courses in civil rights and public housing were among the first of their kind in the country.

At New York University, Konvitz was a highly productive scholar. Between 1940 and 1943, he published twenty-three articles, and fifteen of them dealt with civil liberties and civil rights. During this period he was active in the New Jersey Urban League, the American Civil Liberties Union, the American Jewish Committee, the American Jewish Congress, and the American Association for Jewish Education. While teaching at New York University, he also offered courses at the New School for Social Research. He worked closely with Henry Hurwitz on the *Menorah Journal,* and with Elliott Cohen on *Commentary.* He maintained a regular column or department in the *New Leader, Twice-a-Year,* and *Common Ground.* At the New School, his close friends were Horace M. Kallen, Felix Kaufmann, and Max Ascoli. He was a member of a small discussion group that met weekly at the Rand School and included Sidney Hook, Max Nomad, Daniel Bell, I. N. Steinberg,

Rubin Gotesky, Herbert Solow, and Sol Levitas. At N.Y.U. he was closely associated with A. I. Katsh, who pioneered in the study of modern Hebrew at colleges.

In 1943, Roger Baldwin, founder of the American Civil Liberties Union, asked Konvitz if he would become staff counsel of the organization and take the place of a young lawyer who was being drafted. Konvitz had worked for the ACLU only a month when the lawyer who had been drafted returned because the army had rejected him. The ACLU could not afford two lawyers; so Konvitz looked for a job elsewhere. Several days later Thurgood Marshall invited Konvitz to join the staff of the National Association for the Advancement of Colored People Legal Defense and Education Fund. Konvitz became the third lawyer on the NAACP staff and worked with Marshall and Edward R. Dudley, who later became Ambassador to Liberia and a New York State Supreme court judge. Marshall did most of the trial work for the NAACP. Konvitz's contribution was primarily analysis and scholarship: he spent most of his time writing briefs and memoranda. Among the important cases he worked on were *Smith v. Allwright* (1944)[9]—the Texas white primary case—and *Screws v. United States* (1945)[10]—a federal civil rights case in which a Georgia sheriff was prosecuted for beating a black person to death.

From 1944 to 1945, Konvitz did some soul searching and gave considerable thought to his future life. He felt he was being crushed by his many undertakings and the demands on his time from the many organizations and agencies that called for his involvement and help. At one and the same time, he was teaching at both New York University and the New School for Social Research, and he was assistant general counsel to the NAACP and general counsel to the New Jersey State Housing Authority. Despite such involvement, he continued to write, and his output was enormous. In 1944 and 1945, he wrote thirty-one articles and completed most of the work for two scholarly books. In addition, he

9. 324 U.S. 649 (1944).
10. 325 U.S. 91 (1945).

revised his doctoral dissertation for publication. But he was doing too much. He felt hard pressed emotionally and spiritually. He concluded that as long as he stayed in New York City, he would not have the peace of mind needed to do serious, scholarly work, and he wanted to do that more than anything else.

Thus, in 1945 Konvitz told his friends that he would like to leave New York City and take a full-time teaching position in law or philosophy. William Hastie, at that time dean of Howard University Law School—later a distinguished U.S. Court of Appeals judge in Philadelphia—was appointed Governor of the Virgin Islands by President Truman, and he asked Konvitz to succeed him as professor of constitutional law at Howard. Although he had several other offers, Konvitz was inclined to accept the Howard position; but in the summer of 1945, when the Konvitzes took their vacation in Ithaca, Konvitz's former teacher, George Sabine, who was then vice president for academic affairs at Cornell, asked him if he would be interested in a position in the newly created School of Industrial and Labor Relations. Showing interest, Konvitz was interviewed by Irving M. Ives, dean of the school, and President Edmund Ezra Day. Thereupon he was offered an associate professorship. He did not immediately accept the offer. In New York, he discussed it with Marshall and Hastie, who advised him to accept, saying that they thought he could do more for civil rights at Cornell than at Howard. Thus the matter was decided; Konvitz accepted the Cornell offer, and in September 1946 he became a member of the founding faculty of the first such school in the country. Three years later he was promoted to a full professorship, and a few years later he also joined the faculty of Cornell Law School.

And so in August 1946 he and his wife Mary—they were married in 1942—and Josef, their son who was a few weeks old, moved to Ithaca. Although offered many distinguished professorships and high administrative positions, he chose to remain at Cornell, where he was regarded as one of the university's most eminent teachers and scholars.

III

Cornell proved to be the intellectual haven Konvitz thought it would be. It was a symbolic coincidence that his Cornell doctoral dissertation—*On the Nature of Value*[11]—was published the year he joined the Cornell faculty. Also in 1946, Konvitz's *The Alien and the Asiatic in American Law*[12] was published. It was the first book in the Cornell Series on Civil Liberty, which at that time was edited by Robert E. Cushman. The book was a study of legislation and Supreme Court decisions concerning aliens and American citizens of Asiatic descent that demonstrates that statutes and judicial decisions often reflect popular myths on race and racial differences. It was a prescient work that showed the direction that constitutional interpretation would take in reconciling the American ideal of equality with public policy.

In 1947, Konvitz's book, *The Constitution and Civil Rights,*[13] was published. He had begun the work before *The Alien and the Asiatic in American Law* and had finished it just before he came to Cornell. The book exposed and criticized statutes and court decisions requiring or permitting discrimination against black people; it also analyzed federal and state civil rights acts and showed how law might be used as an instrument to achieve the ideal of racial equality. Like *The Alien and the Asiatic in American Law,* it was a prescient work that pointed the way to court decisions like *Brown v. Board of Education* (1954) and legislation like the Civil Rights Act of 1964.

In the early 1950s, Konvitz returned to the subject of the rights of aliens, but instead of simply revising *The Alien and the Asiatic in American Law,* he wrote a new book on the subject, *Civil Rights in Immigration,*[14] which was pub-

11. Milton R. Konvitz, *On the Nature of Value: The Philosophy of Samuel Alexander* (New York: King's Crown Press, 1946).

12. Milton R. Konvitz, *The Alien and the Asiatic in America Law* (Ithaca, N.Y.: Cornell University Press, 1946).

13. Milton R. Konvitz, *The Constitution and Civil Rights* (New York: Columbia University Press, 1947).

14. Milton R. Konvitz, *Civil Rights in Immigration* (Ithaca, N.Y.: Cornell University Press, 1953).

lished in 1953. In explanation, he quoted Paul Valery in the preface: "To take up an idea again, consciously, is to renew it, to modify, enrich, simplify or destroy that idea." *Civil Rights in Immigration* renewed and enriched the ideas of its predecessor.

In 1954, Konvitz published the first edition of his *Bill of Rights Reader,*[15] which was one of the first casebooks on civil rights and liberties. It was followed three years later by *Fundamental Liberties of a Free People,*[16] which analyzed historically the constitutional development of freedom of religion, speech, press, association, and assembly in the United States.

In 1961, Konvitz returned to the subject he had considered in *The Constitution and Civil Rights,* when he and Theodore Leskes wrote *A Century of Civil Rights.*[17] Leskes brought up to date Konvitz's initial coverage of state laws prohibiting racial discrimination, and Konvitz, in addition to covering federal civil rights legislation, wrote trenchant essays on slavery and its consequences and the constitutional developments underlying the demands for civil rights. The book was written during the year when Konvitz was living at Princeton as a member of the Institute for Advanced Study. During that year he also wrote three major articles for the fourteenth edition of the *Encyclopedia Britannica,*—"Aliens," "Censorship," and "Civil Liberties," and he also completed work on the book, *American Pragmatists,* which he edited with Professor Gail Kennedy of Amherst College.

In 1963, Konvitz published *First Amendment Freedoms,*[18] a casebook that grew out of *The Bill of Rights Reader.* A mammoth work of almost a thousand pages, it

15. Milton R. Konvitz, (ed.) *Bill of Rights Reader* (Ithaca, N.Y.: Cornell University Press, 1954).

16. Milton R. Konvitz, *Fundamental Liberties of a Free People* (Ithaca, N.Y.: Cornell University Press, 1957).

17. Milton R. Konvitz and Theodore Leskes, *A Century of Civil Rights* (New York: Columbia University Press, 1961).

18. Milton R. Konvitz, (ed.) *First Amendment Freedoms* (Ithaca, N.Y.: Cornell University Press, 1963).

was unique not only for the breadth of its case coverage but also for its generous presentation of Supreme Court justices' concurring and dissenting opinions.

A year at the Center for Advanced Study in the Behavioral Sciences at Stanford in the mid-1960s gave Konvitz an opportunity to reflect on his previous work on civil rights and liberties and to bring his ideas together in broader perspective. The result was *Expanding Liberties,*[19] which is perhaps Konvitz's most important work. His essays in the book, on various aspects of First Amendment freedoms, civil rights, and human rights, are among the most subtle and sophisticated in the literature. At about the same time he wrote an article for *Law and Contemporary Problems* that explored the philosophical and historical foundations of the right of privacy.

In 1968, Konvitz gave the Paley Lectures in American Culture and Civilization at the Hebrew University at Jerusalem. Later in the same year these lectures were published as a book with the title *Religious Liberty and Conscience.*[20] The United States Supreme Court has cited in its opinions *Religious Liberty and Conscience* as well as several other works by Konvitz.

In 1972, Konvitz edited a book entitled *Judaism and Human Rights,*[21] which contained several of his own essays as well as the work of other leading scholars in the field. The work was followed by *Judaism and the American Idea,*[22] which was published in 1978. Both works deal with the relationship between Judaic and American ideals.

In addition to the works mentioned above, Konvitz edited eight other books. Among these were the writings of the legal theorist, Alexander H. Pekelis, *Law and Social*

19. Milton R. Konvitz, *Expanding Liberties: Freedom's Gains in Postwar America* (New York: Viking Press, 1966).

20. Milton R. Konvitz, *Religious Liberty and Conscience* (New York: Viking Press, 1968).

21. Milton R. Konvitz (ed.), *Judaism and Human Rights* (New York: W.W. Norton, 1972).

22. Milton R. Konvitz, *Judaism and the American Idea* (Ithaca, N.Y.: Cornell University Press, 1978).

Action,[23] and the addresses of Cornell's late president Edmund Ezra Day, *Education for Freedom and Responsibility,*[24] which Konvitz did at the request of the Day family. Perhaps the most important of these books were two works on Emerson: *Emerson; Twentieth Century Views* (with Stephen E. Whicher),[25] and *The Recognition of Ralph Waldo Emerson.*[26] The other works Konvitz edited were *Freedom and Experience* (with Sidney Hook),[27] *Essays in Political Theory* (with Arthur E. Murphy),[28] *American Pragmatists* (with Gail Kennedy),[29] and *Aspects of Liberty: Essays Presented to Robert E. Cushman* (with Clinton Rossiter).[30] In addition, Konvitz has edited, from 1952 to 1980, seven published and four as yet unpublished volumes of a code of laws and a revised code for the government of Liberia, two volumes of the opinions of the Liberian Attorney General, and twenty-seven volumes of the opinions of the Supreme Court of Liberia. He was the founding editor of the *Industrial and Labor Relations Review,* and edited its first five volumes. Together with Robert Gordis and the late Will Herberg, he founded the learned quarterly journal *Judaism,* and he wrote major articles for *International Encyclopedia of the Social Sciences,* the *Encyclopedia of Philosophy,* and the *Dictionary of the History of Ideas,* as

23. Milton R. Konvitz, (ed.), Alexander H. Pekelis, *Law and Social Action; Selected Essays* (Ithaca, N.Y.: Cornell University Press, (1950).

24. Milton R. Konvitz (ed.), *Edmund Ezra Day: Education for Freedom and Responsibility* (Ithaca, N.Y.: Cornell University Press, 1952).

25. Milton R. Konvitz and Stephen E. Whicher (eds.), *Emerson: Twentieth Century Views* (Englewood Cliffs, N.J.: Prentice-Hall, 1962).

26. Milton R. Konvitz (ed.), *The Recognition of Ralph Waldo Emerson* (Ann Arbor, Mich.: University of Michigan Press, 1972).

27. Milton R. Konvitz and Sidney Hook (eds.), *Freedom and Experience* (Ithaca, N.Y.: Cornell University Press, 1947).

28. Milton R. Konvitz and Arthur E. Murphy (eds.), *Essays in Political Theory Presented to George H. Sabine* (Ithaca, N.Y.: Cornell University Press, 1948).

29. Milton R. Konvitz and Gail Kennedy, (eds.) *The American Pragmatists* (New York: Meridian, 1960).

30. Milton R. Konvitz and Clinton Rossiter (eds.), *Aspects of Liberty: Essays Presented to Robert E. Cushman* (Ithaca, N.Y.: Cornell University Press, 1958).

well as for the *Encyclopedia Britannica.* For many years he has been co-editor of the scholarly quarterly *Jewish Social Studies* and chairman of the editorial board of the monthly magazine *Midstream.*

IV

There is a pattern of movement in Konvitz's work from the particular to the universal, from the concrete to the abstract, from the practical to the ideal. The problems he focused on were often the same, but he had deeper insights concerning their solution because the levels of analysis and the considerations he brought to bear on them changed. His work in the mid-1940s—*The Constitution and Civil Rights,* and *The Alien and the Asiatic in American Law*—focused on civil rights—rights protected or granted by law. By the time Konvitz wrote *Fundamental Liberties of a Free People* in 1957, he was concerned primarily with natural rights, rights that people have whether their constitutions or laws grant them or not, rights men have simply because they are men, for example, "the rights of thinking, speaking, forming and giving opinions."[31] Konvitz called those rights "fundamental liberties." Then he moved beyond them to consider the ideals that underlie all rights, such as justice, human dignity, equality, freedom, and the rule of law. Although there were intimations of ideals and their importance in Konvitz's work in the mid-1940s, and there was movement toward explicit use of ideals in constitutional analysis in his work in the mid-1950s and early 1960s, ideals did not become dominant analytically in his work until the publication of *Expanding Liberties* in 1966; after that, they were Konvitz's main concern. Thus the movement in Konvitz's thought is from civil rights to fundamental liberties to ideals. That progression is the basis categorizing his thought in this analysis and in the ordering of the chapters that follow.

31. Quoted in Konvitz, *Judaism and the American Idea,* p. 185.

2/*Civil Rights*

> The ultimate aim of government is not to rule, nor to restrain by fear, nor to exact obedience, but contrariwise, to free every man from fear, that he may live in all possible security; in other words, to strengthen his natural right to exist and to work without injury to himself or others. No, the object of government is not to change men from rational beings into beasts or puppets, but to enable them to develop their minds and bodies in security, and to employ their reason unshackled; neither showing hatred, anger, or deceit, nor watched with the eyes of jealousy and injustice. In fact, the true aim of government is liberty.
>
> —Baruch Spinoza

Few scholars in this century worked with more devotion than Milton Konvitz to secure civil rights for the downtrodden in American society. He saw discrimination as one of the nation's major problems, and he saw law as both the source and the solution of the problem. His research revealed that laws not only often permitted discrimination against black people, Asiatics, aliens, and others but sometimes even *compelled* it. Statutes and judicial decisions that permitted or required discrimination, he believed, had to be exposed, discredited, and repealed or overruled. That would be a first step in the solution of the problem; the second step, he thought, would be positive action by government. Konvitz saw that just as the law could be an instrument of discrimination, it could also be an instrument of antidiscrimination and social reform. He believed that the crucial battles for civil rights had to be fought in legislatures and the courts. "Laws," he acknowledged, "will not usher

citizens declare to be the 'vast difference' between American Democracy and Hitlerism."[4]

In the early and middle 1940s, Konvitz fought the battle for civil rights in his columns in *The New Leader* and *Common Ground.* They were often written in answer to articles by well known writers or public figures like Arthur Krock, Mark Sullivan, and Robert Moses. Here are three examples:

1. In 1943, soon after a riot in Harlem, Arthur Krock wrote in his *New York Times* column that a majority of white people want racial separation in housing and generally in public and private facilities, that their feelings about black people are one of the "facts of nature," that most black people are willing to have things as they are, and that everything would be fine except for their radical leaders who stir them up to revolutionary frenzy. Konvitz answered that in our democracy, the rights of the majority are not unlimited. Minorities have constitutional rights that majorities may not legitimately deny. If majorities were not so limited, we would have a species of totalitarianism—tyranny of the majority. Thus the question is not whether majorities want segregation but whether the Constitution permits it. As for Krock's statement that when black leaders call for change they are in effect stirring up deep and dangerous feelings in their people, Konvitz answered that the activity of the National Urban League and the NAACP may indeed stir up strong feelings in black people, but that has political value. What should black people do? Suffer wrongs quietly rather than seek vindication of their rights? No, he answered, they had a right to express their grievances so that white people could learn of the evils and suffering caused by racial segregation and exclusion.[5]

2. In 1943, Mark Sullivan argued in the *New York Herald Tribune* that because the qualifications for voting

4. *Ibid.,* p. 6.

5. Milton R. Konvitz, "The Anti-Poll Tax Bill and the Constitution: An Answer to Sullivan and Krock," *New Leader,* July 17, 1943, p. 4.

are constitutionally left up to the states, a state may constitutionally require a poll tax and a federal statute prohibiting it would be unconstitutional. The argument was wrong, wrote Konvitz, because a poll tax was not a qualification for voting, and the Supreme Court had so held in *Breedlove v. Suttles.* It was a tax and thus a strong case could be made for the constitutionality of a federal statute eliminating it.[6]

3. Writing in the *New York Times Magazine* in 1943, Robert Moses objected to an anti-discrimination provision at the New York State Constitutional Convention because he believed the term "civil rights" was meaningless and because "[y]ou cannot legislate tolerance." What bothered Konvitz was the implication that little or nothing could be accomplished by black people through the law. Thus he struck back with these words:

> The term "civil rights" is no looser than the term "due process of law" and "equal protection of the law," as those phrases are used in the Federal Constitution. Congress and the courts have put flesh and bones on these phrases, so that they do have significance.
>
> In our society you amount to something, as a member of a group, if you have economic power, the law, or social opinion on your side; and the law is important as attracting either or both of the others. Without the law, the Negro stands naked and undefended. With the law—the legislatures and courts—on his side, he is on the high road with hope in his heart.[7]

But when Konvitz wrote these words in 1943 he was aware that laws—both statutes and court decisions—were used to oppress black people in the United States. In *The Constitution and Civil Rights,* which he wrote a few years later, he surveyed the cases and statutes that supported racial discrimination. He devoted an entire chapter to an analysis of the *Civil Rights Cases,* which had been decided by the Supreme Court in 1883. The decision in those cases,

6. *Ibid.*

7. Milton R. Konvitz, "How Should Negroes Fight for Their Rights—Robert Moses and Discrimination," *New Leader,* Aug. 14, 1943, p. 4.

he wrote, was of far-reaching social importance, for it meant:

> 1. Race distinctions with respect to enjoyment of facilities in carriers, inns (hotels, restaurants), theatres, and places of public accommodation and amusement generally, violate no constitutional guarantee.
> 2. Individuals are free to make such distinctions without interference from the Federal government.
> 3. States are free to make (or even compel) such distinctions without violating any constitutional guarantee.[8]

His survey of state statutes compelling or permitting racial discrimination in education, transportation, hospitals, and other areas of life revealed more than 250 specific provisions in no less than 23 states.[9]

Despite these depressing findings, Konvitz's main point in *The Constitution and Civil Rights* was that there was still hope that law could be used as an instrument to end racial discrimination and to realize the ideals of freedom and equality for black people. He based his hope on three developments—the Supreme Court's recent decision in *Screws v. United States* (1945),[10] movement in Congress to protect the rights of black people, and the enactment of state civil rights statutes.

Screws v. United States was a federal prosecution of a Georgia sheriff and two other state law enforcement officers for violating the civil rights of a black man who had been beaten to death soon after he had been arrested. When state officials took no action in regard to the killing, Screws and his deputies were indicted under Section 52 of Title 18 of the U.S. Code, a provision that makes it a crime punishable by a fine of $1,000 or imprisonment for one year to deprive a person of his constitutional rights under color of law. They were convicted and appealed. When their case was argued before the Supreme Court, one of the justices asked a question concerning the constitutionality of Section 52, and soon thereafter the NAACP petitioned the Court to file an

8. Konvitz, *The Constitution and Civil Rights*, p. 27.
9. *Ibid.*, pp. 230-41.
10. 325 U.S. 91 (1945).

amicus brief on the question. Konvitz was with the NAACP at the time and worked on the brief. The brief argued that Section 52 was not unconstitutionally vague, and a majority in the Supreme Court accepted that position. "Just as the decision in the *Civil Rights Cases* is of the utmost significance for what it took away from the Negro (or failed to give him)," wrote Konvitz in *The Constitution and Civil Rights,* "so the decision in the *Screws* case is of the utmost significance, for what it left remaining to the Negro."[11] The case meant that black people still retained at least a measure of protection of their constitutional rights under the few surviving criminal and civil provisions of federal civil rights acts. Moreover, it also signalled that these provisions were no longer dead letters.

At the time of the *Screws* decision, Congress had before it an anti-lynching bill and a fair employment practice bill, and both had strong NAACP support. In countering arguments that the anti-lynching bill was unconstitutional, Konvitz argued that the Supreme Court's decision in *Screws* provided an effective answer, for it had held that the concept of due process applies to police matters preceding a trial, and that includes lynching.[12] Konvitz had no doubt about the constitutionality of federal legislation against discrimination in employment under the commerce clause, but he thought it was ironic that the evil could be reached only in the guise of regulating interstate commerce. "It is through a back door," he wrote, "that the new concept, the new 'immunity' of the right to work at gainful employment, will be received into the Constitution."[13] But whether it came through the back door or the front door, he believed it was high time that right received constitutional recognition.

Konvitz also saw a sign of hope in the enactment of state civil rights statutes. Massachusetts had been the first state to enact such a statute in 1855 when it forbade schools to make any distinction in the admission of students "on account of

11. Konvitz, *The Constitution and Civil Rights,* p. 61.
12. *Ibid.,* p. 80.
13. *Ibid.,* p. 96.

race, color, or religious opinions," and ten years later it banned discrimination "in any licensed inn, in any public place of amusement, public conveyance or public meeting." In 1947, Konvitz could report that 18 states had civil rights statutes of one kind or another. He warmly encouraged the enactment of such statutes and reprinted as appendices to *The Constitution and Civil Rights* the American Civil Liberties Union Model State Civil Rights Bill, the Civil Rights Bill for the District of Columbia, and the civil rights provisions of all the states that had them.[14]

Konvitz had been right about law being an important instrument in realizing the ideal of equality for black people, but Congress was slow to act. In 1948, it was President Truman, not Congress, who ended the policy of racial discrimination in the armed forces by executive order. "In the history of civil rights in the United States," Konvitz later wrote, "this order ranks among the most important steps taken to end racial discrimination."[15]

The same year, the Supreme Court declared restrictive racial covenants unconstitutional in *Shelley v. Kramer,*[16] thereby eliminating at least some racial discrimination in housing. Konvitz applauded that development and also a series of decisions in the Supreme Court indicating the demise of the separate-but-equal doctrine in education. In cases like *Sweatt v. Painter* (1950)[17] and *McLaurin v. Oklahoma State Regents* (1950),[18] the Vinson Court laid the foundation for overruling *Plessy v. Ferguson* (1896).[19] After those decisions, the Warren Court's decision in *Brown v. Board of Education* (1954) was, as a practical matter, in Konvitz's opinion, inevitable.

But there was resistance to the enforcement of *Brown,* and Konvitz was especially critical of President Eisenhower's lack of support of the decision. Eisenhower had said

14. *Ibid.*, pp. 145-229.
15. Konvitz, *Expanding Liberties,* p. 260.
16. 334 U.S. 1 (1948).
17. 339 U.S. 629 (1950).
18. 339 U.S. 637 (1950).
19. 163 U.S. 517 (1896).

publicly that law could not advance ahead of morals; law to be effective had to command the respect of public opinion, and he suggested *Brown* did not. In 1961, in *A Century of Civil Rights,* Konvitz wrote:

> From the record it is clear that Eisenhower did *not* help form a public opinion to support the school desegregation decision, and by his failure to help the forces of law, he gave a measure of respectability to those who believe that the Supreme Court demanded too much too soon. Eisenhower not only failed to support *Brown v. Topeka;* he went beyond moral and legal neutrality by arguing, time and again, that the law must fail when it is in advance of morals. This line of thought did not state but strongly intimated that the Supreme Court had gone too far or had moved too fast and that its decree was, therefore, morally insupportable.[20]

The main thrust of *A Century of Civil Rights,* however, was the same as *The Constitution and Civil Rights*—that law was the appropriate instrument for ending racial discrimination. *Brown* had been a stimulus for the civil rights movement that brought men and women—both black and white—to the South to bear witness to what they regarded as injustice, and some of them did not come home alive. President Kennedy used the prestige of the presidency to support the cause of equality for black people; after his assassination, President Johnson did the same; and finally Congress did what Konvitz had urged for two decades: it enacted the Civil Rights Act of 1964. Though Congress had finally acted, Konvitz thought it deserved little credit. The Civil Rights Act of 1964 was one of the most important enactments in American history, but Konvitz believed it did not make up for Congress's do-nothing record since 1875. Further, the act had been wrested from Congress. Reflecting on this in 1966, Konvitz wrote:

> This fact about Congress has disturbing implications for the theory of democracy that places primary stress on the legislature, and for idealistic theories of law that are oblivious of such profane things as economic and political power. The Civil Rights Act of 1964 was not freely given by but wrested from Congress by the power exerted by Presi-

20. Konvitz, *A Century of Civil Rights,* p. 256.

> dents Truman, Kennedy and Johnson; by the social forces let loose by the Supreme Court under Chief Justices Vinson and Warren; by the forces exerted by the spreading network of state civil rights and F.E.P. acts; by the Negroes acting as a pressure group; and by the international community observing us and freely commenting on what it saw.[21]

Yet Konvitz acknowledged that power alone did not explain the nation's progress in civil rights. The NAACP had no power in the Supreme Court other than the power of conscience, and Harry Truman's stand on civil rights, Konvitz believed, was not a bid for power, for "he was not one to gather grapes of thorns or figs of thistles."[22] Power and conscience both played a part in movement toward the realization of the ideal of equality for black people in the United States. Konvitz would agree with Josiah Royce who said that "ideals win the battle of life by secret connivance, as it were, of numberless seemingly unideal forces."[23] Though there was still much to be done, Konvitz believed there was now hope that discrimination against black people would at least diminish, for finally the laws were for them instead of against them.

II

The fact that Konvitz wrote *The Constitution and Civil Rights* and *The Alien and the Asiatic in American Law* about the same time in the mid-1940s is not surprising, for they deal with the same subject—denial of civil rights because of discrimination. Only the victims of discrimination were different. The source of discrimination in regard to black people and Asiatics—racism—was the same. Indeed, in the post-Reconstruction period, southern and western members of Congress regularly voted together in supporting anti-black and anti-Asiatic legislation. Many state and federal laws, though ostensibly dealing with aliens, were in fact aimed at Asiatics, for example, the

21. Konvitz, *Expanding Liberties*, p. 265.
22. *Ibid.*, p. 266.
23. Quoted in *Ibid.*, p. 376.

anti-alien laws in California. Thus there was for Konvitz an obvious connection between laws concerning aliens and Asiatics. Race and alienage were also connected in another way. Birth in the United States did not in itself guarantee first-class citizenship. Prior to World War II and even later, black and Asiatic citizens were denied basic rights because of their race; they were in a real sense, if not in a legal sense, aliens in the land of their birth.

Konvitz's concern for the rights of aliens quite likely stemmed from the fact that he had been an immigrant. Earlier in this chapter it was pointed out that as a Jew he keenly felt the injustice of discrimination against black people and that he associated their treatment in the United States with the treatment of Jews in Nazi Germany. He probably made a similar association between Japanese-Americans who were sent by the government to "relocation centers" in 1942 and Jews who were sent to concentration camps in Germany in the 1930s. Justice Roberts made that association in his dissenting opinion in *Korematsu v. United States* (1944) when he referred to the relocation centers as "concentration camps."[24] That the treatment of Jews was in Konvitz's mind when he wrote *The Alien and the Asiatic in American Law* is clear. After stating in the book's preface that the number of persons of Japanese, Chinese, and Filipino ancestry in the United States was relatively small—less than 250,000—he wrote: "That the smallness of a minority group is not always a factor tending to eliminate prejudice or intolerance is shown tragically by the history of the Jews in Germany under Hitler; for the fact that the Jews constituted only 1 per cent of the total population did not save them from the wrath of the Nazis."[25]

Konvitz was severely critical of the Japanese-American relocation and the Supreme Court's decisions upholding it. "The Japanese-American cases," he wrote, "are in the class of trials of Sacco and Vanzetti, and Dreyfus; they go beyond

24. 323 U.S. 214 (1944).
25. Konvitz, *The Alien and the Asiatic in American Law*, p. viii.

the 'limit of tolerance in democratic society' when viewed as upholding imprisonment on the basis of an expansion of military discretion; they are 'a threat to society, and to all men.'"[26] He believed the relocation was based on racist attitudes, and the following statement by Justice Murphy also expressed his views:

> I dissent . . . from this legalization of racism . . . All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.[27]

As Konvitz pointed out, however, American law and policy did not reflect Murphy's view. Resident aliens did not enjoy the same constitutional guarantees as citizens. They were subject to deportation without full due process protection. For some, race was a bar to citizenship, and those who became citizens could, under certain circumstances, be denaturalized. The right to own land and to work in certain occupations—for example, law, dentistry, accounting, and even mining and plumbing—was, in some states, denied them.

Konvitz discussed these matters in *The Alien and the Asiatic in American Law,* but he focused particularly on the exclusion of aliens from the United States. Asiatics suffered most under the exclusion policy, which was transparently racist. Konvitz quoted a Supreme Court opinion in an 1884 case that stated Congress felt it was necessary to exclude the Chinese "to prevent the degradation of white labor and to preserve to ourselves the inestimable benefits of our Christian civilization."[28] Subsequent legislation excluded the Japanese and other Asiatics. World War II, however, had an effect on American exclusion policies, and thereafter American attitudes toward Asiatics changed. In 1943, President Roosevelt asked Congress to end the Chinese exclusion

26. *Ibid.,* p. 279.
27. Quoted in *Ibid.,* p. 266.
28. Quoted in *Ibid.,* p. 8.

policy, acknowledging it had been an historical mistake; obviously it was an embarrassment since China was an ally at the time. Konvitz believed that Congress should repeal all racial barriers in immigration laws, but at the time he wrote—1946—he thought that was "extremely doubtful."[29] "Repeal of the Chinese exclusion laws," he declared, "was a little miracle."[30] If ending the Chinese exclusion policy was a little miracle, passage of the Immigration and Nationality Act of 1952 must be viewed as a big one, for it abolished virtually all racial and color bars to immigration and citizenship. Konvitz applauded Congress' action but only with one hand. "Surely it is disturbing," he later wrote, "to recall that it took a World War, a Cold War, and a Korean War to bring to an end racial discrimination in our immigration and naturalization policies. Had the Chinese, the Japanese, the Indians, and other nations of Asia been given quotas on the basis of equality with some European peoples, our quota laws would have given them an annual total of approximately a thousand immigrants, which has been their combined quota since 1952, with no visible ill effects on the American people; yet monstrous events had to take place before Congress could be moved to perform an act that had more symbolic than tangible reality."[31]

After the race and color bars to citizenship fell in 1952, Konvitz focused his attack on the national quota policy in immigration in *Civil Rights in Immigration,* which was published in 1953. The purpose of the book was obviously to influence policy, and Konvitz openly gave his opinions, and not dispassionately. As one reviewer wrote, "Dr. Konvitz, an immigrant himself, writes with his heart as well as his head."[32] Konvitz urged that the national quota system be abolished. He believed that the United States should act on its ideals of freedom and equality and admit all persons

29. *Ibid.*, p. 29.
30. *Ibid.*
31. Konvitz, *Expanding Liberties,* p. 342.
32. William M. Kunstler, Book Review, *Virginia Law Review,* 40 (1954), p. 102.

regardless of their origins. He also urged procedural reforms in deportation and took the position that no person should be deported or denaturalized unless admission or naturalization had been obtained by willful and material fraud. On October 5, 1965, Congress enacted House Resolution 2580, which ended the national quota system as of June 30, 1968. "The act," wrote Konvitz, "is not perfect but it wipes out a form of discrimination that was an affront to millions of Americans and to democratic ideals."[33]

Looking back in 1966 on more than two decades of the development of civil rights in the United States, Konvitz could conclude that "the vexing and explosive problem of prejudice against the Oriental has, providentially, been largely ended."[34] Despite lack of diplomatic relations with the People's Republic of China, there had been since World War II "no ostensible discrimination against the approximately one million aliens and Americans of Oriental or Asian descent."[35] He wondered, however, whether the prejudice in the United States against Asiatics might not have been transferred to black and Hispanic peoples.

Konvitz was also concerned about the plight of American Indians, who were the first group in the United States to be segregated by law when the Indian Removal Act was enacted in 1830. He believed that the nation could "reasonably be expected to help effectively a half-million Indians, who are American citizens, to attain 'the adjustments they enjoyed as the original possessors of their native land.' "[36]

III

The quotation from Spinoza at the beginning of this chapter underlies much of Konvitz's thought concerning the importance of civil rights. He believed that the object of law is to give all men a fair and equal chance to develop their

33. Konvitz, *Expanding Liberties*, p. 343.
34. *Ibid.*
35. *Ibid.*
36. *Ibid.*, p. 349.

minds and bodies, to live without fear and in security; that is, to strengthen and protect their natural rights to exist and work without injury to themselves or others. But when law requires or permits discrimination against black people, aliens, Asiatics, and others, as it clearly did in the 1940s when Konvitz wrote *The Constitution and Civil Rights* and *The Alien and the Asiatic in American Law,* it not only operates contrary to its function, it infects the body politic and causes further injustice. Thus he did not find it surprising that black people in certain areas of the United States did not receive fair trials, notwithstanding the Supreme Court's insistence on equal administration of justice. Writing before *Brown v. Board of Education,* Konvitz explained that one reason why the black person was denied due process was that

> the law itself has placed the Negro in a position of inferiority. If it is legal to discriminate against a person because of his race or color in certain relations, why not in others? The law says that some forms of discrimination are legal and others are not, but the average citizen has no time or capacity for subtle distinctions. To him the matter is plain: if the Constitution permits him to stop a Negro from sitting near him in a train or bus or school, or from living in the same house or street or neighborhood, or from working in the same shop, or from buying in the same store, then obviously it permits white folk to keep Negroes out of jury rooms; and if the law sees a distinction where there is none, then the law is an ass. By giving constitutional approval to some forms of discrimination, the courts open the door to the practice of illegal discrimination.[37]

So there were two steps that had to be taken to secure civil rights for black people, Asiatics, aliens, and others. First, discriminatory laws and policies had to be abolished or declared unconstitutional, as they were, for example, in the Immigration and Nationality Act of 1952 and *Brown v. Board of Education* (1954). Second, new laws like the Civil Rights Act of 1964 that guarantee equality in education,

37. Milton R. Konvitz, "Discrimination and the Law," in R.M. MacIver, (ed.), *Discrimination and National Welfare* (New York: Harper & Bros., 1949), p. 52.

employment, public accommodation and in other areas of public life, had to be enacted. In the past 25 years both steps have been taken. The promise of securing civil rights for everyone, however, has not yet been fulfilled, but there has been some progress largely because law has been an important instrument of social change. Konvitz was correct when he said almost three decades ago: "Laws will not usher in a millenium; but in a democracy we have no more effective instrument of social reform, either to bring it about or to confirm it, than legislation and court decisions."[38]

38. Konvitz, "How Should Negroes Fight for Their Rights?—A Reply," p. 8.

3/*Fundamental Liberties*

> The God who gave us life gave us liberty at the same time; the hand of force may destroy but cannot disjoin them.
>
> —Thomas Jefferson

Milton Konvitz agreed with Jefferson that individual liberties were God-given. Freedom of thought, belief, conscience, and association are fundamental because they stem from our nature, or, as Konvitz would put it, they are liberties we possess because we have been made in the image and likeness of God. Those liberties are, for the most part, personal and private, and were never given up to government by the people. That is one reason why they should be preferred and protected by the judiciary. Another reason is that fundamental liberties—particularly the freedom of thought, expression, and association—are necessary for the operation of the democratic process. Those freedoms are beyond the reach of majority rule, for otherwise minorities might never have a chance to become majorities. Thus the judicial process must keep the democratic process open, and judges must scrutinize strictly any legislation infringing those freedoms. The presumption of constitutionality and judicial restraint might be appropriate in regard to legislation regulating other matters but not in regard to legislation limiting fundamental liberties.

Konvitz shared Justice Jackson's view that the guaran-

tees of liberty in the United States cannot be enforced without "the support of an enlightened and vigorous public opinion which [is] intelligent and discriminating as to what cases really are civil liberties cases and what questions really are involved in those cases."[1] With that in mind, Konvitz chose to serve the cause of liberty with scholarship. He wrote both as a constitutional lawyer and as a social critic, and he wrote for the specialist and the general reader. He sought to enlighten public opinion and make it vigorous in support of liberty. With careful scholarship, he traced the roots of the tree of liberty, chronicled and predicted its growth, explained its function, and demonstrated its significance for the good life.

I

"Religious freedom," wrote Konvitz, "is . . . not only the crowning feature but . . . also the basis of American society."[2] America was a haven for those escaping from religious persecution in the Old World, but they did not feel bound to establish colonies in which all could enjoy religious freedom. Yet their concern for their own religious freedom affected their outlook on the religious freedom of others, and that was the beginning of a process leading to the guarantee of religious freedom in the First Amendment. Konvitz explained it this way: "What they wanted and demanded for themselves, they in time were forced to recognize as a proper value for others. Religious persecution gave way to religious exclusion; exclusion gave way to reluctant toleration; toleration gave way to religious freedom; religious freedom developed into separation of church and state."[3] At the heart of this process was "the conviction that

1. Robert H. Jackson, *The Supreme Court in the American System of Government* (Cambridge, Mass.: Harvard University Press, 1955), p. 82.
2. Konvitz, *Fundamental Liberties of a Free People*, p. 6.
3. *Ibid.*

the *summum bonum* in the life of man is the worship of God in conformance with one's own—and only one's own—beliefs."[4] In matters of conscience, "it was considered intolerable to delegate to others the power to dictate with respect to them. To have religion supported by force meant to put expediency in the place of conviction, and pretense in the place of sincerity; it meant the subordination of life's supreme and most sublime value to considerations that were ephemeral and petty. With the passage of time this came to mean that the state had no business to intervene in the relations between man and God."[5] The roots of religious freedom in the United States thus were firmly planted in the soil of both freedom and religion, for those who founded the nation were religious individuals committed to both. Having the same commitment, Konvitz reflected it in his writings.

His interpretation of the Establishment Clause in the First Amendment is a good illustration. The essential meaning of the provision, Konvitz believed, was in the preamble to the Virginia Bill for Religious Liberty, which had been drafted by Jefferson, supported by Madison, and quoted by the Supreme Court in *Everson v. Board of Education* (1947), as follows:

> Almighty God hath created the mind free; that all attempts to influence it . . . are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercion on either . . .; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern. . . .
>
> That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever. . . .[6]

4. *Ibid.*
5. *Ibid.*, pp. 6-7.
6. Quoted in Konvitz, *Expanding Liberties*, p. 28.

Using the above quotation as his text, Konvitz explained the Establishment Clause as follows:

> The essential meaning is clear: I am not to be compelled to support *even my own religion.* For God created me a free man; my mind must remain free. For if I perform a religious act which the state requires of me, how can I be sure that its performance is a sacrifice or an act of my heart? When the act is compelled by Caesar, it becomes an act that is rendered *unto Caesar,* even when Caesar compels it as ostensibly an act to be rendered unto God. In any case, I am no longer absolutely free; my mind has been invaded by Caesar; and though I might freely render the act, had Caesar not pushed me to it, his pushing me removes my freedom, or at least renders my act ambiguous, and thus partly idolatrous insofar as it may look toward Caesar, insofar as Caesar's shadow falls upon it, or upon me as I perform the act.[7]

While the Establishment Clause protects against coercion to do what one *does believe,* the Free Exercise Clause of the First Amendment protects against coercion to do what one does *not believe.* "Taken together," wrote Konvitz, "their purpose is not to degrade or weaken religion in any respect whatsoever, but, on the contrary . . . to recognize and to implement the belief that 'Almighty God hath created the mind free'; and that man is not man unless his mind remains free; and that God is not served except by a mind that is free. Had God wanted a coerced worship, He would have created not man but an unfree agent; and what God did not choose to do, the government, *a fortiori,* may not do."[8] The interpretation is truly Jeffersonian.

Konvitz not only clarified the protection of freedom of religion by legal and historical analysis; his thought often cut to the creative edge of constitutional interpretation. The questions he explored in his Paley Lectures in American Civilization and Culture at the Hebrew University in 1968 are illustrative:

> What is religion? Is it possible to formulate a definition without seriously hurting the spirit of the First Amendment?

7. *Ibid.*
8. *Ibid.,* p. 29.

> Does the First Amendment protect nonreligion and atheism along with religion? Is it possible to protect religion without at the same time protecting, to some degree, nontheistic and even antitheistic beliefs?
>
> Does the Constitution protect conscience when it professes to be nonreligious?[9]

The First Amendment does not define religion. Courts have attempted definitions, but usually they have been conventional, and Konvitz found them wanting. For guidance on the matter, he turned again to Jefferson's writings, particularly his *Notes on Virginia* (1801), in which Jefferson wrote that government has authority over only such "natural rights as we submitted," and "the rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty Gods or no God. It neither picks my pocket nor breaks my leg."[10] Konvitz found in Jefferson's statement support for the proposition that government has no constitutional right to define religion. Certainly it has no right to question the truth or falsehood, or the sincerity or the hypocrisy, of religious beliefs. Thus Konvitz believed that courts are required to give wide latitude to claims of freedom based on religion. Like other preferred freedoms, it is entitled "breathing space" for error and even dishonesty. "The First Amendment," Konvitz acknowledged, "was not written with the intention to protect imbecility and mendacity, no more than that the guarantee against self-incrimination in the Fifth Amendment was put in for the protection of criminals. But just as there is no protection of the innocent unless the guilty are protected, so there is no protection of the truth and of sincerity unless the false and dishonest are also protected."[11]

Constitutionally, theism and atheism are opposite sides

9. Konvitz, *Religious Liberty and Conscience*, p. 25.
10. Quoted, *Ibid.*, p. 53.
11. *Ibid.*, p. 49.

of the same coin. Atheism, wrote Konvitz, cannot be defined without an essay on the history of the term's usage, and he illustrated what he meant with these words:

> The Romans called Jews and Christians atheists because they would not pay the customary honors to the imperial cult. The ancient rabbis called atheists 'Epicureans' because the latter denied that the gods interfered in human affairs. Plato called atheists those who believed that gods could be influenced by sacrifice or flattery to interfere in human affairs. The rabbis of the Talmud called Adam the first atheist because, by hiding from God, he denied God's omnipresence. To some, anthropomorphic beliefs are atheistic; to others, the denial of a providential rule of the universe by a being with exaggerated human traits is atheistic.[12]

It is obvious that atheism is difficult—perhaps impossible—to define, and to attempt to define it for purposes of the First Amendment is to court disaster. Konvitz supplied the reason: "A hairline often separates the theist from the atheist; the same man may be both at the same time, or either one or the other on successive days or moments."[13] Konvitz argued passionately in the following statement that an atheist might even bear witness to God:

> [J]ust as the believer may commit sins against God and nature and man, so the atheist may truly bear witness to the being of God who is the creator of nature and of man, including him who is an atheist. For we must constantly remind ourselves that though we may have beliefs founded on supernatural revelation, we may be part atheist if we do not believe that God has revealed himself also in nature, which includes the mind, heart, and body of man.
>
> But in His natural revelation, God may be *deus absconditus,* the God Who hides Himself and yet reveals Himself in man's intelligence, in man's compassion and love, in man's justice—in his conscience. And on these qualities believers in God, fortunately for the world, hold no monopoly.[14]

The problem of defining "atheism" is linked with defining

12. *Ibid.*, p. 57.
13. *Ibid.*, p. 58.
14. *Ibid.*, p. 72.

"religion"; thus "for the Supreme Court to attempt to define either term would make of the Court an ecclesiastical tribunal sitting to decide issues of orthodoxy and heresy."[15] The conclusion to be drawn from Konvitz's analysis is that the First Amendment protects "atheism" as well as "theism" and that for religion to be fully protected by the Constitution, nontheistic and even antitheistic beliefs must to some degree also be protected.

Konvitz has urged the Supreme Court to extend the protection of the Free Exercise Clause to conscience even when conscience "purports to speak in a language ostensibly nonreligious."[16] Quite likely the Court will do so in the future, for Konvitz's argument is persuasive. His position is that conscience is in some sense prior to religion as evidence that man has been made in the image of God. "Religion," wrote Konvitz, "may enhance or degrade man; it all depends on what it is. But without conscience, man has no dignity; without it, man is not man."[17] But religion is based on conscience; therefore, in order to protect religion fully, it is necessary to protect conscience. A fuller version of the argument in Konvitz's own words is as follows:

> Since every man, believer or nonbeliever, is made in the image of God, every man has human dignity, and a conscience that purports to him, rightly or wrongly, to be the voice of God. This at least is how the believer reads the facts. Everyone, therefore, believer or non-believer, has a conscience that has the power to impose on him duties 'superior to those arising from any human relation.' He owes supreme allegiance to the commands of his conscience. It is not, therefore, a question of 'religion' or 'religious belief' or belief in any relation to a Supreme Being or God. It is entirely a matter of human dignity and conscience. A believer, then, must affirm of his nonbelieving neighbor that he, too, is made in the image of God, and that he, too, has a conscience, which has its rights and duties.
>
> . . . .
>
> [I]f the religious person believes that religion is always

15. *Ibid.*, p. 58.
16. *Ibid.*, p. 105.
17. *Ibid.*, p. 104.

> rooted in conscience, it is conscience that is primary and religion that is derivative. Religion must honor conscience as a child honors its parents.
>
> To protect religion fully, it is necessary to protect conscience, on which it is based and without which it could not long exist. One day the Supreme Court will feel itself compelled to recognize this fact and to give it constitutional dignity.[18]

Konvitz thought that if Jefferson and Madison had foreknowledge of events to come, they might have written the religion clause as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof [or of conscience].[19]

Madison in fact included the protection of conscience in his first draft of the First Amendment, and there is reason to believe that it was his intention that the provision as finally approved protect freedom of conscience. He not only wrote the first draft of the amendment but apparently the final version as well. "The wording, completely in line with Madison's ideas," wrote his biographer, Brant, "undoubtedly came from him, since his House associates . . . had taken no part in shaping or discussing previous drafts of the article, and it was repugnant to the views which the Senate members were appointed to defend. . . . Madison and his colleagues knew what they were doing. English history had demonstrated to them that without complete religious liberty, *without freedom of conscience* and separation of church and state, there could be no freedom of speech, or of the press, or the right of assembly."[20] This statement also reflects the views of Jefferson, who often mentioned "rights of conscience" in his writings.

If the Supreme Court adopted Konvitz's position that the First Amendment protects freedom of conscience whether or not it is connected with religion, it would take a

18. *Ibid.*, pp. 102-04.
19. *Ibid.*, p. 99.
20. Irving Brant, *The Bill of Rights* (Indianapolis: Bobbs-Merrill Co., 1965), p. 67.

big step toward solving a problem inherent in the tension between the Free Exercise and Establishment Clauses. The Free Exercise Clause protects certain actions if based on religious conscience but not if the same actions are based on nonreligious conscience. That disparity of protection appears to violate the Establishment Clause. If Konvitz's position were adopted and freedom of conscience was generally protected, the problem would not arise, for both religious and nonreligious claims of conscience would be treated the same.

II

Konvitz has a coherent theory of freedom of expression that coincides at significant points with constitutional doctrines developed by the Supreme Court. To begin with, he was not, like Justice Hugo Black or Professor Thomas Emerson, an absolutist. He took the position that freedom of thought is absolute but conceded that freedom of speech and press in some circumstances may be limited. He was critical of previous restraints on publication (censorship) but acknowledged that a few exceptions may be permitted—for example, publication in wartime of sailing dates of transports or the number or location of troops. He stressed, however, that the exceptions "only serve to place in a strong light the general condition of freedom of the press, which means principally, though not exclusively, *immunity from previous restraints or censorship.*"[21] He acknowledged, of course, that a publication that may not be restrained under the Constitution might, however, be subsequently punished if it otherwise did not come within the protection of freedom of the press. He accepted a two-tiered approach to the protection of expression. He generally would subject political expression to the clear-and-present danger test, but he wanted the test supplemented by other doctrines such as preferred freedoms. For expression that comes within the rubrics of libel, slander, fighting words, and obscenity, he allowed other approaches,

21. Konvitz, *Fundamental Liberties of a Free People*, p. 175.

though not necessarily the approach taken in Justice Murphy's opinion in *Chaplinsky v. New Hampshire* (1942), which placed those categories of expression beyond the pale of the First Amendment.[22] When libel was granted some First Amendment protection in *New York Times v. Sullivan* (1964),[23] and Justice Brennan introduced the notion of the "breathing space" doctrine to protect expression, Konvitz applauded the development and applied it to other fundamental liberties.

Konvitz's short history of the clear-and-present danger test in *Fundamental Liberties of a Free People* remains as one of the best in the literature. When Judge Learned Hand transformed the test to mean "the gravity of the evil as discounted by its improbability" and a plurality of the Supreme Court accepted it in *Dennis v. United States* (1951),[24] Konvitz wrote that the Holmes-Brandeis test had been reduced to a phrase and suggested that we had lost "a constitutional jewel."[25] The jewel, however, was only mislaid, not lost. *In Expanding Liberties,* Konvitz could write in 1966 that the clear-and-present danger doctrine continues "to have appeal and vitality." But the lesson of *Dennis* was not lost on Konvitz. The clear-and-present danger doctrine by itself, he believed, could not adequately protect freedom of expression. "Standing alone," he wrote, "it can be emasculated, as it was in the *Dennis* case, or lead to sophistical rationalizations for decisions that in fact deny the fundamental liberties, as in *Schenck v. United States* [1919], *Frohwerk v. United States* [1919], and *Abrams v. United States* [1920]."[26] The mention of *Schenck* is both appropriate and ironic, for it was in *Schenck* that Justice Holmes first stated the test when he wrote: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. . . . The question in every

22. 315 U.S. 568 (1942).
23. 376 U.S. 254 (1964).
24. 341 U.S. 494 (1951).
25. Konvitz, *Fundamental Liberties of a Free People,* p. 340.
26. Konvitz, *Expanding Liberties,* p. 292.

case is whether the words used are used in such circumstances, and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[27] This was the test articulated in an opinion that sought to justify Schenck's imprisonment for expressing his views. Holmes later used the test—but always in dissent—in an effort to keep men and women from losing their liberty for speaking their minds. In *Gitlow v. New York* (1925), for example, he wrote in dissent that the defendant's publication of a newspaper did not create a clear and present danger and then went on to say:

> It is said that this Manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.[28]

In the same spirit, Konvitz wrote in discussing *Feiner v. New York* (1951):

> A great many pages have been written by judges and commentators who seem to be burdened with the fear that the First Amendment may be used to keep out of prison men who have the compulsion to shout 'Fire!' in crowded theaters when there are no fires. There is much less cause for this fear than is generally assumed. Among the things that inflame the passions of men sufficiently to convert them into raging, destructive mobs, soap-box or platform speech probably ranks near the bottom of the list. After a crowd becomes a mob, speech may direct the rioters toward one objective or another; but no case in our system of law has

27. 249 U.S. at 52.
28. 268 U.S. at 673.

> raised First Amendment questions in such a factual setting. Because of this relatively baseless fear, Feiner, the college student in Syracuse, was sent to jail with the blessings of a Supreme Court majority. The clear-and-present-danger rule, when coupled with the 'preferred position' and the 'breathing space' doctrines, can serve to keep the courts from succumbing too easily to fears that are more rooted in emotions than in facts. The ideas that may incite to action create no 'clear' and no 'present' danger. Their work is slow, devious, and invisible, and is beyond the reach of the law and its processes. When ideas openly incite, more often they incite persecution of the speaker rather than the action intended and hoped for by him.[29]

Konvitz did not accept Justice Murphy's position in *Chaplinsky* that all libel was beyond the pale of First Amendment protection. Long before the Supreme Court determined the constitutionality of group-libel statutes in *Beauharnais v. Illinois* (1952),[30] Konvitz had opposed them. In the mid-1940s, he wrote a memorandum on the subject for the NAACP national board. It was a hot issue at the time, and the American Jewish Congress, which favored such laws, wanted the NAACP's support but did not receive it because the NAACP board accepted Konvitz's arguments. After the Supreme Court upheld the constitutionality of Illinois' group-libel law in *Beauharnais,* Konvitz wrote that he believed the Court had erred, for the arguments against the wisdom and constitutionality of such laws—particularly their potential for punishing political speech—were persuasive.[31] Thus Konvitz welcomed the Supreme Court's decision in *New York Times v. Sullivan* (1964), in which Justice Brennan, partially rejecting the *Chaplinsky* dictum, wrote that "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amend-

29. Konvitz, *Expanding Liberties,* p. 301.

30. 343 U.S. 250 (1952).

31. Konvitz, *Fundamental Liberties of a Free People,* p. 152. Recently judges have also questioned the soundness of *Beauharnais v. Illinois.* See *Collin v. Smith,* 578 F.2d 1197, 1204 (7th Cir. 1978). Compare, however, Justice Blackmun's dissent, joined by Justice Rehnquist, in *Smith v. Collin,* 436 U.S. 953 (1978).

ment."[32] The Court went on to hold that the New York Times was not liable to Sullivan even though it committed errors in its publication, because Sullivan was a public official and the *Times* had not acted maliciously. In justifying this holding, Brennan wrote that erroneous statements are inevitable in free debate and they must be protected if freedom of expression is to have the "breathing space" it needs to survive. Using *New York Times v. Sullivan* as a point of departure, Konvitz wrote:

> [F]reedom to speak or publish the truth can be enjoyed only if one has the freedom to misstate facts, exaggerate events and issues, vilify men and institutions, say things that will make men angry or stir them to dispute—in short, engage in 'excesses and abuses.' One does not need to say that error has its rights. There is wisdom in Pareto's saying: 'Give me a fruitful error any time, full of seeds, bursting with its own corrections, and you can keep your sterile truth for yourself.' He said this of Kepler, but it applies equally to many others.[33]

Konvitz's analysis of obscenity in relation to freedom of expression is sensitive and balanced. He had no doubt that erotic works of the imagination like Lawrence's *Lady Chatterley's Lover,* Wilson's *Memoirs of Hecate County,* and Miller's two *Tropics* were constitutionally protected under the First Amendment, but he acknowledged other erotic expression might not be entitled to such protection. He put it this way in *Fundamental Liberties of a Free People:*

> Eventually, one may hope, the Supreme Court will put literary works squarely and fully under the protection of the First Amendment. It will be impressed with the contention that there is little or no information supporting the belief in a causal relationship between reading a book 'that suggests or incites sexual thoughts and the conduct of the reader'; that a line should be drawn between dirt-for-dirt's sake, or 'under-the-counter' pornography, and literary works like Edmund Wilson's novel. . . . The Supreme Court may fail, as others have failed, to agree on a definition of 'obscenity' that will work successfully in all situations to separate literature from pornography, but it can help clear the air by

32. 376 U.S. at 269.
33. Konvitz, *Expanding Liberties,* p. 292.

> manifesting an attitude which will show . . . an awareness 'that stamping on a fire often spreads the sparks, that many past suppressions are now considered ridiculous, that the communication of ideas is just as important in this field as in any other, and that healthy human minds have a strong natural resistance to emotional poisons.'[34]

These lines were written just before the Supreme Court decided *Roth v. United States* (1957),[35] a case that attempted to do what Konvitz said was difficult if not impossible to do, namely, define obscenity. Maintaining that obscenity was beyond the pale of First Amendment protection, Justice Brennan, writing for the majority, defined the standard for determining obscenity as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. He then went on to say that obscenity was that which was "utterly without redeeming social importance."[36] Although Konvitz welcomed the thrust of the Supreme Court decision in *Roth*, he was critical of several things in Brennan's opinion.

First, Konvitz believed that the historical argument supporting the *Chaplinsky* dictum that obscenity was outside the protection of the First Amendment was unwarranted. He acknowledged, however, that if the Court had not accepted that argument, it would have been faced with the conclusion that obscenity was protected by the First Amendment; at that point, the Court would have "to grapple with obscenity under the clear-and-present danger test, and this ordeal it wished, understandably, to avoid."[37] In seeking to avoid the entanglement of obscenity and the clear-and-present danger test, Konvitz believed that the Court was probably right, though he wished that it had found some other way of avoiding the entanglement.

Second, Konvitz was appalled that the Court in sustaining its conclusion that obscenity was beyond First Amend-

34. Konvitz, *Fundamental Liberties of a Free People*, pp. 169-70.
35. 354 U.S. 476 (1957).
36. *Ibid.*, at 484.
37. Konvitz, *Expanding Liberties*, p. 185.

ment protection, said that obscene writings are "utterly without redeeming social importance." "This is a strange and dangerous position," he wrote, "for the Court has no right to go into the question of the *value* of publications. To a Roman Catholic the publications of the Jehovah's Witnesses may be 'utterly without redeeming social importance,' and of course Jehovah's Witnesses feel at least as strongly about Roman Catholic publications. There was a time when almost every solid citizen thought that all works of fiction were totally without value, and that no intelligent person, having the world's work to do, should waste his time on them, and even now there are millions of men who firmly believe that their own 'sacred scriptures' are the only books worthy of any man's time."[38] As it turned out, a different problem arose in regard to the "utterly without socially redeeming importance" standard. Pornographers used it in an effort to bring all kinds of erotic expression under First Amendment protection. In exasperation, a majority of the Supreme Court rejected that standard in *Miller v. California* (1973) and substituted as a test whether "works which, taken as a whole, . . . do not have serious literary, artistic, political, or scientific value."[39] Konvitz's criticism applies equally to both formulations: the Court, quite simply, has no right to determine the value of publications.

Third, Konvitz feared that the Supreme Court in determining what is obscene might leave the meaning of liberty to local communities rather than the national community. "We are slowly overcoming the idea," he wrote, "that equality should be left to 'community standards'; should we now open the door to 'community standards' as criteria for the meaning of liberty, on the meaning of freedom of speech and freedom of the press? The idea is a frightening one, and it is very strange indeed that three Justices of the Supreme Court, including the Chief Justice, should propose it seriously. It is a capitulation to the states'

38. *Ibid.*, pp. 185-86.
39. 413 U.S. at 24.

rights attack on the Court that is the very opposite of creative statesmanship and concern for the integrity of the Constitution."[40] In *Miller v. California,* a majority of the Supreme Court realized Konvitz's worst fears: it held that relevant community standards for determining obscenity under the *Roth* definition were local, not national.

Fourth, Konvitz perceptively pointed out that the definition of obscenity in *Roth* was different from other kinds of legal definitions. "The reference to 'prurient interest' in the Roth decision," he wrote, "is only a sign that points in the direction in which the mind is to move when it seeks to identify the obscene—as distinguished from the seditious, the libelous, or any other kind of offensive material. In obscenity cases, then, we work not from but *toward* a definition; and the definition is found not in a verbal formula abstract from the obscene material, but in the material itself: the configuration, the *Gestalt,* that is 'obscene' 'defines' the 'obscene,' just as the facts of an automobile collision 'define' 'negligence' and just as the facts of a fair trial 'define' 'due process of law.' "[41]

Despite his criticism of *Roth* and its progeny, Konvitz—at least until 1966—approved of the Court's attempts to grapple with the problem of obscenity in the interests of protecting freedom of expression. The Court's assertions that obscenity is unprotected by the First Amendment notwithstanding, some obscenity, he said, is now *in fact,* if not in law, constitutionally protected. The Court has given a secure place to works of the imagination and has treated them with the same care and respect that it has shown for words that appeal to the political or social intelligence or to the religious concern. The Court, Konvitz believed, "was justified in seeking a way out of saying that the Constitution protects obscenity; for that could easily have been twisted into the charge that the Court 'approves' immorality and sin!" What the Court has done, Konvitz concluded,

40. Konvitz, *Expanding Liberties,* p. 221.
41. *Ibid.,* p. 237.

is let in the back door what could not come in through the front door—"by providing 'obscenity' ample 'breathing space'! The Court nowhere has said that it was giving obscenity 'breathing space,' but a careful review of the cases can leave no doubt that this, in effect is what has happened."[42]

Konvitz did not explicitly take exception to the *Chaplinsky* holding that fighting words are beyond the pale of protection of the First Amendment, but the logic of his position on libel and obscenity would seem to carry over to fighting words. Although the Supreme Court has not used the expression "breathing space" in regard to fighting words, it has in fact given breathing space to such expression. Indeed, in no case after *Chaplinsky* has the Court used the fighting-words doctrine to justify punishment for expression, a development consistent with Konvitz's theory of free expression.[43]

III

Konvitz hailed the Supreme Court's official recognition of freedom of association as a right protected by the First Amendment in *NAACP v. Alabama* (1958).[44] For a unanimous Court, Justice Harlan said that association is broad and cannot be limited to certain ends. "[I]t is immaterial," he went on, "whether the beliefs sought to be advanced by associations pertain to political, economic, religious or cultural matters." "With this sentence," Konvitz commented, "the Court in effect revised Locke, who . . . failed to extend his argument for freedom of religious association to associations formed for secular ends. This language of the Court makes freedom of association as wide a constitutional net as possible, encompassing all human interests. . . . [I]t surely must be conceived of as broadly as freedom of speech

42. *Ibid.*, p. 239.

43. Gerald Gunther, *Cases and Materials on Constitutional Law* (Mineola, N.Y.: Foundation Press, 1980), pp. 1219-20; 1235-38.

44. 357 U.S. 449 (1958).

and press and must be interpreted and applied in the spirit of the humanist who affirms with Terence: *Homo sum; humani nil a me alienum puto*—'I am a man; I count nothing human indifferent to me.' "[45]

The Communist cases in the 1950s raised dramatically the issue of constitutional protection of association, and the most important of the cases was *Dennis v. United States* (1951).[46] Konvitz believed the Court in that case emasculated the clear-and-present danger test and "reduc[ed] it to a phrase" when it upheld a legislative policy aimed at crushing the Communist Party in the United States.[47] Konvitz gave serious thought to the problem and presented his views systematically in 1957 and again in 1966.

His 1957 statement in *Fundamental Liberties of a Free People* shows some inner struggle, but he finally concluded that if he were driven to take a final position on the case, he would have to say the Communists were persecuted. But he said he would add "that the prosecution was a beast that could neither bear nor throw off his load, and now we are in the same predicament with respect to the conviction: we can neither bear nor throw off its load. This is another instance of the justness of Thoreau's bitter observation: 'Things are in the saddle and ride mankind.' "[48] In expressing his constitutional views on the case, he chose Chief Justice Hughes' statement in *DeJonge v. Oregon* (1937), which upheld the right of the Communist Party to conduct an open meeting in Portland, Oregon:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.

45. Konvitz, *Expanding Liberties*, p. 66.
46. 341 U.S. 494 (1951).
47. Konvitz, *Fundamental Liberties of a Free People*, pp. 307-33.
48. *Ibid.*, p. 340.

> Therein lies the security of the Republic, the very foundation of constitutional government.[49]

In the nine years that intervened between *Fundamental Liberties of a Free People* and *Expanding Liberties,* the Supreme Court had decided a series of cases that limited the holding of *Dennis* and the Smith Act, upon which the Communist prosecutions were based, to the point where the Act became almost a useless relic. But Americans had gone to jail for conspiring to organize the Communist Party of the United States, and one person was jailed for merely being a member of the party.[50] Reflecting on the Communist cases in the mid-1960s, Konvitz went considerably beyond his 1957 statement:

> The Smith Act and the cases which it spawned do not add up to a chapter in American history that can be read with pride. It has a nightmarish effect that evokes the question: Was it all real? Could it possibly be that mature, sophisticated men, in high office, could have thought that America's security and freedom would be strengthened by these actions?[51]

What troubled Konvitz about the Communist prosecutions was that they aimed to punish persons for *who* they *were* rather than for *what* they *did.* It was like the discrimination problem discussed in the previous chapter. Just as persons had been denied rights because of their race or alien status, Communists had been denied rights because of their political affiliation. And in the back of Konvitz's mind was the treatment of Jews in Nazi Germany because they were Jews and not because of anything they did. Here is the way he put it:

> We cannot, as a civilized community, undertake to attack persons, through criminal or quasi-criminal sanctions, not for what they *do* but for what they *are.* It goes against our conscience to give men a status and then treat them differently from all other men merely because we see them as having that status. This is the basic objection, perhaps, to laws that call for different treatment of persons

49. Quoted in *Ibid.*
50. See Konvitz, *Expanding Liberties,* p. 127.
51. *Ibid.,* p. 133.

> on the basis of their race, color, or religion—treating them for what they are rather than what they do.[52]

Soon after the Supreme Court decided *Dennis v. United States,* McCarthyism became a phenomenon to be reckoned with, and one of the questions hotly debated on campuses was whether Communist professors should be dismissed. On this question Konvitz disagreed with his friend, Sidney Hook, whose position was that membership in the Communist party by itself was evidence of professional unfitness because the Communist professor was required to betray his academic trust. Konvitz had no problem with the case of the hardened Communist, for he betrayed his own incompetence with his own words. His colleagues had no alternative but to dismiss him, for "a person who, in his lectures, professional writings or relations with his students, follows the party line rather than his own conscience and intelligence has no place in the teaching order."[53] As for other Communists, the problem is more difficult. Each case, Konvitz believed, had to be viewed separately. The professor was entitled to a hearing at which proof of incompetence because of party membership was presented. But the charge had to be incompetence, not party membership, and that charge had to be proven to the reasonable satisfaction of the faculty review committee. Members of such a committee, Konvitz wrote, "ought to make every effort to be, at one and the same time, hard toward those whose guilt is hard, and soft toward those whose guilt is soft. Only in this way will their judicial process be a sword against the guilty and a shield for the innocent."[54] And here some account should be taken of the "breathing space" of the Communists' right of association. Konvitz did not use that term, for it would not be coined for another decade and then in the Supreme Court. But that is what he had in mind when he wrote:

> Emphasis on academic justice as a guarantee of aca-

52. *Ibid.*, p. 164.
53. Milton R. Konvitz, "Academic Freedom, Justice," *Cornell Daily Sun,* April 23, 1953, p. 4.
54. *Ibid.*

> demic freedom may mean that some Communists may talk themselves out of punishment that they justly deserve; but—if I may paraphrase Justice Holmes—for my part I think it a lesser evil that some criminals should escape than that a university should play an ignoble part. And the university does play an ignoble part, I think, when a faculty member who enjoys tenure is dismissed by the administration without allowing for effective faculty participation in an orderly judicial process or in the administration of the disciplinary rules.[55]

Konvitz understood that the associational rights of Communists were our rights too. He shared Justice Black's conviction that "no matter how often or how quickly we repeat the claim that the Communist Party is not a political party, we cannot outlaw it as a group, without endangering the liberty of all of us."[56]

IV

Certain themes run through Konvitz's discussion of fundamental liberties. They are privacy, breathing space, and preferred freedoms with its implication of active judicial protection of fundamental liberties.

The relationship between privacy and fundamental liberties begins for Konvitz with western civilization's distinction between the "inner" and the "outer" man, for with that distinction comes a cluster of interrelated dualities—the spiritual and the material, the soul and the body, the sacred and the profane, the realm of God and the realm of Caesar, church and state, rights that are inherent and inalienable and rights that government may give or take away, solitude and society, and private and public.[57] Fundamental liberties are rooted in the domain of the inner man, that private space where man can become and remain himself; they are inherent and inalienable rights that protect and enhance

55. *Ibid.*, p. 7.
56. Quoted in Konvitz, *Expanding Liberties*, p. 167.
57. Milton R. Konvitz, "Privacy and the Law: A Philosophical Prelude," *Law and Contemporary Problems*, 31 (1966), p. 273.

individual beliefs, thoughts, conscience, emotions, sensations, and solitude.

Konvitz agreed with both Justice Brandeis who said that privacy is the most comprehensive of rights and Justice Douglas who said that privacy is at once the core and edge of liberty.[58] It is difficult to say where the domain of the inner man ends and the domain of the outer man begins. That is so, wrote Konvitz, because marking off "the limits of the public and private realms is an activity that began with man himself and is one that will never end; for it is an activity that touches the very nature of man; and man's nature is, to a considerable degree, made and not given. *Man* constantly transcends himself, and in the process of transcendence he discovers new dimensions, new heights, and new depths. . . . Once man's power of self-transcendence is posited, it becomes impossible to confine the self within marked-off limits and to say positively, '*This* is the self, *this* is man's "own person," and the rest is not self.' "[59] Thus, as man changes, develops, transcends himself by the exercise of his inalienable liberty, his private space also changes and develops.

Freedom of religion is rooted in the private aspect of religion, in the individual conscience, which, Konvitz has written, "is, for modern man, the source and depository, the energy and the agency of religion."[60] Although the notion of privacy of religious conscience goes back to Socrates and the Stoics, Konvitz believes the most relevant manifestation of the idea for constitutional purposes is in the writings of Thomas Jefferson. Freedom of religion for Jefferson was freedom of the mind, and "insofar as it concerned *public law,* religion was to be regarded—and guarded—as a wholly *private matter,* a matter of private conscience."[61]

For Konvitz, the link between freedom of thought and belief and privacy is obvious; hence that freedom is abso-

58. See Konvitz, *Fundamental Liberties of a Free People,* pp. 128-52.
59. Konvitz, "Privacy and the Law," p. 275.
60. Konvitz, *Religious Liberty and Conscience,* p. 86.
61. *Ibid.,* p. 87.

lutely protected against governmental intrusion. Freedom of expression is also related to privacy but in diverse ways. Libel laws, which limit speech, protect privacy. Privacy considerations, on the other hand, argue against obscenity laws. What one chooses to read or view to stimulate images or sensations that are personal, particularly in one's own home, Konvitz would agree, is none of the government's business. It comes within the concept of privacy, and in one case—*Stanley v. Georgia* (1969)—the Supreme Court has so held.[62]

Konvitz also viewed freedom of association as linked to privacy. In *NAACP v. Alabama,* the Supreme Court held that in protecting freedom of association it had to also protect "associational privacy." Commenting on that case, Konvitz wrote:

> Not every exercise of freedom of association needs to be secret. If all organizations were secret, society would not be open and free. Still, in an open and free society, there must be protection for 'associational privacy,' so that, paradoxically, society may be and remain open and free.[63]

Konvitz's linking of privacy and fundamental liberties has important practical consequences. Because privacy is not only at the core but also the edge of those liberties, it provides independent protection of them. When the question is one of privacy, it is usually not necessary to determine whether a fundamental liberty protects some activity such as membership in a church or political party, one's reading, or the use of contraceptives. A prior question—one that is essentially Jeffersonian—is whether it is any government's business in the first place. If it isn't, the inquiry ends at that point and the matter is settled in favor of freedom.

Privacy is related to the doctrine of "breathing space" for fundamental liberties. Justice Douglas said that privacy emanates from the core of liberties to their edge creating a penumbra, a zone of privacy protected by the Constitu-

62. 394 U.S. 557 (1969).
63. Konvitz, *Expanding Liberties,* p. 83.

tion.[64] That zone of privacy is the "breathing space" that Justice Brennan said First Amendment freedoms, which are "delicate and vulnerable," need to survive.[65] That space is necessary so that the spirit of the Constitution can give the document life. It is an area that allows for a margin of error in favor of freedom. Konvitz found the doctrine appealing. In discussing it, he wrote:

> It is, of course, *man* who in the first instance needs the 'breathing space'; and it is *his* needs that generate the penumbras and emanations. How much 'breathing space' does he need? Which of his emanations are so essential to him that they *must* become a part of the very definition of the 'life,' of 'liberty' that makes up his 'own person'? There is no definitive answer to such questions, since man himself can never be fully delineated. His nature changes as it emerges, as it is created. Society, through conscience and its various organs, must constantly examine and re-examine what it considers to be the nature of man, and its decisions will in turn contribute to the emergent nature of that which it examines. In the process of explication there is no room for absolutizing. We have noted, for example, that property is no longer a supreme value in our constitutional scheme. But surely a man's home is his property, and his bedroom is his property, and these certainly come close to his very skin and bones.[66]

The preferred freedoms doctrine was important to Konvitz, for it provides the rationale for judicial activism in the defense of fundamental liberties. Writing in 1966, Konvitz believed that overall the Court did a good job in fulfilling that role. Discussing the Court's decisions in regard to freedom of religion, he wrote:

> [P]aradoxically, authentic religion has found its strongest ally in one of the branches of Caesar's realm, the United States Supreme Court. Like an artist, the Court has taken parts of reality and experience which we hardly or seldom had noticed, and has given them shape and form. Many people, seeing the representations, were at first shocked; the Court, they thought, should perform only a single task—to

64. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
65. *New York Times v. Sullivan*, 376 U.S. at 272.
66. Konvitz, "Privacy and the Law," p. 277.

> copy, to repeat, to repeat; but what they saw looked to their eyes avant-gardist. But only haters of life insist on life as mere repetition. Forces of life live by creating, by using the old to create the new, by interfusing the old and the new. The Court, in the church-state cases, even when its work showed obvious imperfections and failures, dealt with reality and experience in such ways that its work compelled men to think, rethink, feel, and reorder their own sense of reality and experience. Its work has had similar effect in other fields too—civil rights and the administration of criminal justice come readily to mind—but the impact of its work on religion and religious institutions is likely to be the most notable and enduring, for there it spoke directly to what is most vital and valuable to and in the spirit of man.[67]

Konvitz believed that the Supreme Court has also been creative in speaking for the people as well as to them. He put it this way in his discussion of community standards in obscenity cases:

> The Court has no way of discovering what are the prevailing community standards, for it cannot conduct opinion polls or engage in the Kinsey type of research. It really decides what the standards *should be* in the light of constitutional requirements, and trusts that the community will, eagerly or reluctantly, agree to embody the constitutional idea, as formulated by the Court, in its institutions and value systems. When the Court says that it 'finds' the community standard, it means thereby to express its sense of trust that society will not say that the burden of the law is too great to bear; to express the idea—as in the desegregation or reapportionment cases—that it speaks *for* the people as well as *to* them. Understood in these senses, the Court's 'report' on contemporary community standards is philosophically and constitutionally justified, and reasonable, provided we bear in mind that the Court's decisions themselves need to be taken into account as we discuss community standards, attitudes, and ideals.[68]

Despite the tests and doctrines—clear and present danger, privacy, breathing space, and preferred freedoms—Konvitz knew that judges balance freedoms against other

67. Konvitz, *Expanding Liberties*, p. 46.
68. *Ibid.*, p. 232.

interests, and sometimes freedoms are lost in the process. It concerned him, but he remained optimistic:

> [Freedoms] are always being 'balanced'; and in the tug of war between the state's men and the rights men, the constitutional freedoms have a precarious career. 'The louder he talked of his honor,' Emerson wrote, 'the faster we counted our spoons.' There are times when we must feel this way about Supreme Court opinions—there are the broad, generous, sparkling generalities, but a decision that takes away almost all that was promised. Yet it would be sinful to be dominated by such gloomy and petty thoughts as one reviews the record. The freedoms have much more than a fighting chance when they are challenged; and it is doubtful if men have a right to ask for more in a world in which certainty is generally only a snare or a delusion.[69]

Thus, Konvitz, like Jefferson, remained hopeful that liberty, though ever under attack, will in the end prevail.

69. *Ibid.*, p. 101.

4/*Judaic and American Ideals*

> I see myself indissolubly as both an American and a Jew. I could not, for the life of me, ever say where one ends and the other begins. I know, of course, that one can be an American without being a Jew, and that one can be a Jew without being an American. But my concern here is not with being but ideals and values. Ideals may have their sources in a specific tradition, but their nature is to transcend the limits imposed by time and space, by nations, states, churches, and other institutions.
>
> —Milton R. Konvitz

Konvitz labored a lifetime in a garden of "ideals that long for realization," a garden in which he observed and encouraged "the emergence and flowering of human values."[1] His commitment to humane ideals was so strong that at times he felt as if they had a life of their own and that when they were voiced by judges, legislators, and visionaries, the words expressing them seemed to come "from somewhere else."[2] Konvitz's conception of ideals was, however, complex, for he agreed with Josiah Royce, who wrote in 1892 that ideals are

> nobody's arbitrary invention, no gift from above, no outcome of a social compact, no immediate expression of reason, but the slowly formed concretion of ages of blind effort, unconscious, but wise in its unconsciousness, often selfish, but humane even in its selfishness. The ideals win the battle of life by secret connivance, as it were, of numberless seemingly un-ideal forces. Climate, hunger, commerce, authority, superstition, war, cruelty, toil, greed, compro-

1. Konvitz, *Expanding Liberties*, p. xv.
2. *Ibid.*

> mise, tradition, conservatism, loyalty, sloth—all these cooperate, through countless ages, with a hundred discernable tendencies, to build up a civilization. And civilization itself is, in consequence, a much deeper thing than appears on the surface of our consciousness.[3]

Thus to Konvitz ideals are the products of struggle and experience. They are imbedded in tradition, but their meaning is not wholly fixed. An ideal like freedom or equality becomes understood as men and women strive to achieve it. "Meanings are forced out of it," he wrote in 1958, "by events, by facts—even as events or facts are forced out of values. There is an inextricable interplay between facts and values, between events and ideals, between means and goals. Our ideals are never wholly set; our goals are never wholly fixed—they undergo changes as people seek to attain or to defeat them. And facts are never altogether cold, neutral, or profane, as if they had never been touched by values. Facts make policy even as policy makes facts."[4] To know the meaning of ideals, then, requires scholarship, mastery of history and tradition, and philosophical reflection; that, plus a deep understanding of the Scriptures, is what Konvitz brought to his ideals-oriented analysis of constitutional problems.

I

Konvitz's early training in Hebrew Scriptures and his boyhood reading—especially of Emerson and Plato—provided a basis for an interest in ideals. His doctoral dissertation on the philosophy of Samuel Alexander, which he wrote at Cornell in 1933, already showed a concern for ideals. The early pages of the published version of the dissertation—*On the Nature of Value*—contain a criticism of Joseph Wood Krutch's attempt to disvalue values, which Konvitz found

3. *Ibid.*, p. 376.

4. Milton R. Konvitz, "The Use of Intelligence in Advancement of Civil Rights," in Konvitz and Rossiter, eds., *Aspects of Liberties*, p. 88, note p. 79.

symptomatic of the times. He described Krutch's position as follows:

> With the pathos of one who lives on locusts and wild honey, he cries that the world has suddenly become empty of all truth, goodness, beauty. That which to our fathers was so variously lovely and good, is to the sons and daughters a place of darkness, inhabited by creatures who, in Carlyle's epithet, are barely more than featherless bipeds; men who claim no glorious heritage and foresee no splendid destiny; too puny on life's stage to be taken for tragic heroes, too honest to pretend to be heroic tragedians; tender in their copulations, but never knowing chivalry in love; only remembering, what their fathers have told them, that once upon a time, even when they went in to the daughters of men, human beings thought they were the sons of God; faintly and sadly recalling that their mothers would put them to sleep with bewitching tales of One called God, but who, they now know better (since the descent from the mountain of Nietzsche's Zarathustra), is as dead as the squirrel that gathered nuts in the woods some score years ago.[5]

Konvitz found Alexander's philosophy worthy of study, not because he agreed with all of it—he did not—but because it rejected the position described above. Alexander was a naturalistic philosopher who believed that right and wrong are man-made but are not for that reason artificial or conventional: " 'Right represents human nature at its best,' " wrote Konvitz explaining Alexander's views, "and what is best, as what is true, is the discovery not of unaided intuition or reason, but of experiment; 'it is an expedient struck out in an effort to maximise satisfactions.' "[6] That was not precisely Konvitz's view on values, but he found the notion of "right" representing human nature at its best, that is, as an ideal, appealing.

Konvitz believed that Supreme Court decisions reflected the development of American ideals; hence one semester of his course, Development of American Ideals—ILR 308—

5. Konvitz, *The Nature of Value,* p. 4.
6. *Ibid.,* p. 10.

was based almost entirely on Supreme Court opinions covering civil rights and fundamental liberties. The other semester—ILR 309—covered the basic sources of American ideals. Konvitz organized those sources under six headings for the purpose of reading assignments—Biblical sources: Genesis, Deuteronomy, Isaiah, Amos, Hosea, Micah, Ecclesiastes, Job, Jeremiah, Maccabees, the Gospels, and Corinthians; Hellenic sources: Sophocles, *Theban Plays,* and Plato, *Apology* and *Crito;* Hellenistic sources: Marcus Aurelius, *Meditations,* Apocrypha: Wisdom of Solomon; Renaissance sources: More, *Utopia,* and Erasmus, *Praise of Folly;* English sources: Locke, *Treatise on Civil Government* and *A Letter Concerning Toleration;* American transcendentalism: various selections from the works of Emerson, American pragmatism: selections from the works of Emerson, William James, Oliver Wendell Holmes, Jr., Horace M. Kallen, and Sidney Hook. These were not the only sources of American ideals for Konvitz, but they are mentioned again and again in his books. Also mentioned frequently are the writings of Jefferson, Madison, Paine, Lincoln, Thoreau, Whitman, Spinoza, Kant, and Maimonides.

Some of the works Konvitz assigned his students—the Bible, Emerson's essays, Marcus Aurelius' *Meditations*—he had read initially before he was sixteen. In college he had read Spinoza, Plato, Kant, Maimonides, James, and Locke, and while he was in law school, he had published an article on Spinoza and Maimonides. In view of his interest in these philosophers, it is not surprising that he had chosen to write his doctoral dissertation on the subject of values. His scholarly work clearly had direction from the beginning, and it led—inevitably, it seems—to serious thought and writing about ideals.

II

Konvitz's emphasis on ideals was not pronounced in his first two constitutional studies, but it was present. Both

American and Judaic ideals underline *The Alien and the Asiatic in American Law,* which he wrote in the mid-1940's. In the preface of that study, he wrote that Americans are no longer a loosely composed people; they "make up an organic, integrated society, molded by a common history and common ideals."[7] Konvitz believed that some of Justice Murphy's opinions discussed in the book identified those ideals. He quoted, for example, Murphy's statement in *Hirabayashi v. United States* (1943): "Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war."[8] Though often Murphy spoke only for himself, Konvitz thought that millions of Americans agreed with him that "the strength of this nation is weakened more by those who suppress the freedom of others than by those who are allowed to think and act as their consciences dictate," and that "only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land."[9]

The mention of Judaic ideals in the book was both subtle and profound. It was a quotation from Leviticus—the only reference to Scripture in the book—on the title page:

> And if a stranger sojourn with thee in your land, ye shall not vex him. But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself.[10]

Here we have the ideals of love and human dignity. Neither was discussed in the body of the book, but clearly both were the basis of his analysis of the rights of aliens and persons of Asiatic descent in the United States.

In *The Constitution and Civil Rights,* Konvitz's second book, he again mentioned ideals in the preface but did not

7. Konvitz, *The Alien and the Asiatic in American Law,* pp. viii-ix.
8. Quoted, *Ibid.,* p. 248.
9. Quoted, *Ibid.,* p. ix.
10. *Ibid.,* title page.

explicitly discuss them in the body of the book. He said that he hoped that the subject of the book would be important not only to "the Negro, the Asiatic, the Catholic, the Jew and other minority groups, but to the average American citizen who claims devotion to the ideals of democracy, a belief in equality, and dedication to the principles of freedom." "Freedom," he went on, "comes only from law; but not all law gives freedom."[11] The main point of the book was that law as an instrument was often misused, and as a result some Americans were second-class citizens. The remedy Konvitz saw was the realization of the ideals of equality and freedom through the proper use of law.

Ideals were prominently discussed in *Civil Rights in Immigration,* which Konvitz wrote in the early 1950s, and not only in the preface. One of the book's main points was that the immigration quota policy in the McCarran Act was inconsistent with basic American ideals. Senator McCarran's main argument for the quota system was assimilation. Immigrants from Northern and Western Europe, he argued, were more assimilable than immigrants from other areas of the world because of the similarity of their cultural background to principal components of the American population. Konvitz thought that McCarran had emphasized the wrong ideal. *"Freedom"* and *"individuality,"* he wrote, "are better keys than *assimilation* with which to unlock the treasures of the American genius, character, and culture."[12] Konvitz's evidence for the ideals of freedom and individuality came from Supreme Court opinions written by Justices Jackson, Murphy, and Frankfurter.[13] He then quoted the following statement from the Report of the President's Committee on Civil Rights, which had been issued in 1947:

> We abhor the totalitarian arrogance which makes one man say that he will respect another man as his equal only if he has '*my* race, *my* religion, *my* political views, *my* social

11. Konvitz, *The Constitution and Civil Rights,* p. viii.
12. Konvitz, *Civil Rights in Immigration,* p. 60.
13. *Ibid.,* pp. 60-62.

> position.' In our land men are equal, but they are free to be different.[14]

The final words of the statement—"In our land men are . . . *free to be different*"—he added, "echo the language of Jefferson, Madison, Emerson, Lincoln, Whitman, and William James."[15] At the end of his analysis, he concluded: "Were it not for our diversities, we would not be as free as we are. Were it not for our freedom, we would not be as strong as we are."[16]

Konvitz also appealed to Biblical ideals in making policy recommendations in *Civil Rights in Immigration.* In urging that aliens who entered the United States legally be subject to the same laws as others if they commit crimes or subversive acts, he quoted Leviticus: "Ye shall have one manner of law, as well for the stranger, as for one of your country: for I am the Lord your God."[17] And, in urging that citizenship be given generously even to ex-Communists, he quoted Paul's letter to the Galatians: "Brethren, if a man be overtaken in a fault, ye which are spiritual, restore such an one in the spirit of meekness."[18] Perhaps we are afraid, he said, but "to show fear in the face of aliens who admit *former* membership in the Communist Party is to debase ourselves and to place too great a reliance on fear." He then quoted John: "There is no fear in love."[19]

Fundamental Liberties of a Free People, which Konvitz wrote in the mid-1950s dealt generally with the American ideal of freedom. Konvitz did not, however, discuss it explicitly the way he discussed ideals in *Civil Rights in Immigration.* But in his next book, *A Century of Civil Rights,* which he wrote with Theodore Leskes in the early 1960s, Konvitz focused on the ideal of human dignity and considered it at some length. Quoting Whitehead, he said that before the idea of human

14. Quoted in *Ibid.,* p. 63.
15. *Ibid.*
16. *Ibid.,* p. 65.
17. *Ibid.,* p. 131.
18. *Ibid.,* p. 158.
19. *Ibid.*

dignity had shattered slavery it had become "a hidden living force, haunting humanity and even appearing in specialized guise as compulsory on action by reason of its appeal to the uneasy conscience of the age."[20] Today, he wrote, the right to human dignity means "the right to be free from humiliation and insult, the right to refuse to wear a badge of racial inferiority at any time or place. Without this sense of human dignity, one is not fully human."[21]

Beginning with the publication of *Expanding Liberties* in 1966, ideals—both Judaic and American—became the principal theme of Konvitz's work. *Expanding Liberties* discussed the nature of ideals, considered specific ideals like equality, applied ideals to specific problems, and concluded with a chapter devoted to the interdependency of ideals in the world. By that time, democratic ideals were universally recognized, and Konvitz saw progress being made toward their realization. He cited four developments as proof that progress had been made toward realizing democratic ideals almost everywhere: "the victory of women in their struggle for equal dignity and equal rights; the worldwide recognition of racial equality, and the rejection of any notion of racial superiority or the right to practice racial discrimination; the universal rejection of slavery, peonage, economic castes, or the right to exploit one group for the economic advantage of another; and acceptance of the idea that religious persecution and coercion of the conscience cannot be justified in the name of religion or on behalf of the claims of any social order."[22]

Judaism and Human Rights, published in 1972, and *Judaism and the American Idea,* published in 1978, dealt almost entirely with ideals. Konvitz's approach in his essays in these works was comparative. He viewed Judaic and American ideals in relation to each other and discussed their similarities, differences, common sources, and points of convergence. These later studies provide a basis for under-

20. Quoted in Konvitz and Leskes, *A Century of Civil Rights,* p. 4.
21. *Ibid.,* p. vii.
22. Konvitz, *Expanding Liberties,* pp. 375-76.

standing his earlier works. The ideals most important to Konvitz were love, justice, human dignity, equality, freedom, and the rule of law. Because they were fundamental in practically all of his works, they will be considered at some length.

III

For Konvitz, love is the ultimate ideal. What does it mean? "I spent a lifetime trying to define it," he once said in conversation. "Obviously it encompasses a lot of other values. But in trying to understand it, the starting point for me is the commandment: 'Love thy neighbor as thyself.' "

"Christianity," he went on, "emphasizes the first part of the commandment. Indeed, there is one version in the gospels that states only love thy neighbor. Judaism emphasizes that last part of the commandment. You begin with yourself. As God created you, you must love yourself. You must treat yourself lovingly. That does not mean egotistically. But it does mean treating one's self understandingly, compassionately, intelligently, properly. For example, a young Yehudi Menuhin, discovering he is a musical genius, should show his love for himself by working hard at the gift he possesses. That is neither egotistical nor self-indulgent. The same is true of a scholar working at his vocation. He treats himself lovingly when he refuses to be diverted by lesser pleasures and devotes his full energies to the pursuit of truth. On the other hand, a man who devotes all his time to making money without regard for other values abuses and destroys himself. He does not treat himself lovingly as the commandment requires. Now, if you love your neighbor properly, you will not indulge him. Loving your neighbor does not mean giving him everything he wants. To love your neighbor means to treat him as you should treat yourself. That takes judgment. We are not talking about romantic love or feeling. One might feel revulsion toward another yet treat him lovingly. The commandment requires objective not subjective love. A judge may feel enormous sym-

pathy for the poor and helpless, yet he must be impartial. He must be disciplined. His heart may break; nonetheless he must do what is right."[23]

Although love is Konvitz's ultimate ideal, he has not written much about it. The same is true of the ideal of justice. Occasionally one comes across a statement like the following, connecting justice with Judaism: "The ideal of equal justice was a basic Biblical commandment; for example, 'You shall do no injustice in judgment; you shall not be partial to the poor or defer to the great, but in righteousness shall you judge your neighbor.' "[24] But nowhere does he discuss the ideal generally or at length. One reason may be that justice is usually defined in terms of some other ideal or value. For Konvitz, justice appears to be defined in terms of love. If one loves his neighbor properly—as Konvitz described love—then he acts justly.

Other ideals—particularly human dignity—receive more attention than love and justice in his writings. Because the movement in Konvitz's scholarship has been generally from the particular to the universal and from the concrete to the abstract, a detailed discussion of the Judaic conceptions of love and justice may come in future writings. There are good reasons for considering human dignity before love, and they are in Konvitz's essay, "Human Dignity: From Creation to Constitution," in *Judaism and the American Idea.* In that essay he describes a disputation between two great ancient rabbis—Akiba and Ben Azzai—as to which is the most fundamental principle in the Torah. Akiba quoted Leviticus: "Thou shalt love thy neighbor as thyself." Ben Azzai quoted Genesis: "This is the book of the generations of Adam [man]. When God created man [Adam] He made him in the likeness of God."[25] After pointing out that the issue between the rabbis was not which was the greatest commandment but which was the most funda-

23. Conversations with Milton R. Konvitz, August, 1977.
24. Konvitz, *Expanding Liberties,* p. 383.
25. Konvitz, *Judaism and the American Idea,* p. 44.

mental principle, Konvitz gave his view as to the more convincing argument:

> Ben Azzai's answer is by far the more convincing one, for without it the love commandment has no metaphysical base; it stands as a naked assertion of God's will, in no way different from many other commandments. But the text chosen by Ben Azzai goes to the very nature of man, for it says that all men are the children of one father; that just as their father—Adam—was made in the image of God, so each man, a son of Adam, is made in God's image; that there is only one human family; that all human beings are born with equal human dignity; that all human beings are equal. It is on the basis of this principle—this *klal godol*—that God, the maker of Adam, can say to the children of Adam: 'Love thy neighbor as thyself.'[26]

Thus if we accord our neighbor true human dignity, we shall fulfill the requirements of the love commandment and justice.

What does it mean to say that man has dignity? It means, wrote Konvitz, that "he has a head on his shoulders and he walks upright; he has a moral sense, he has intelligence, he uncovers the secrets of the universe. He is a creature within the universe, yet he is of a nature that transcends the universe, and so he is at one and the same time the most noble thing in the universe and more noble than the universe."[27] It means God talks to him and that he talks to God. He can say to God: "Lord of the universe, listen to me, I am about to sing a lovely song; look at me, for I am about to create a beautiful painting; turn toward me, and You will see that in a moment there will be love in the world, as I take this woman to be my wife; watch, Lord, as I increase justice in the world by lessening a poor man's misery; I am about to create mercy and loving-kindness as I operate on a patient, or go into a strange distant land to fight malaria or sleeping sickness; and once more, Lord, look at me as I land on the

26. *Ibid.*

27. Milton R. Konvitz, "Man's Dignity in God's World," in Konvitz, ed., *Judaism and Human Rights*, pp. 27-38.

moon, and watch me as I discover stars that have not been in the heavens for thousands of years."[28]

Important in the God-man relationship in Judaism is its directness; nothing intervenes between God and man. It is at odds with the Socratic idea of the preeminent position of the state. On the day Socrates drank the cup of hemlock, he was still awed by the thought of all he owed Athens. It was the law of Athens that made his father and mother husband and wife and gave legitimacy to his birth. It had educated him—trained him in literature, music, dancing, and gymnastics. If it now required his death, so be it; he was a child of the state. In Judaism, man is a creature of God, not the state. This notion is as Lockean as it is Judaic; indeed, Locke's ideas in this regard were essentially Biblical, wrote Konvitz, "though admittedly weathered by the forces of many centuries of religious, intellectual, political, and economic history."[29] The consequence of this position is that men and women are more than citizens. They have rights above and beyond anything granted by the state; indeed, they have rights even against the state. Those rights are, as Jefferson said, inalienable and inseparable from man's God-given nature. Konvitz put it in these words:

> We cannot divest ourselves of this God-given nature. The time may come for us to become citizens of Athens or Rome or Jerusalem, but our citizenship will not be all absorbing. We will always retain certain rights and liberties, certain powers and dignities—prerogatives that we enjoy as gifts from the Giver of gifts, and which we can never lose.[30]

The realization of the ideal of human dignity, Konvitz suggested in this passage, begins with the belief that the goodness and wisdom of God are somehow reflected in all human beings and is achieved by human actions consistent with that belief, actions that show love for one's neighbor.

The distinction between man and citizen that arises inevitably from the ideal of human dignity has important consequences. The distinction is explicit in the title of the

28. *Ibid.*, p. 29-30.
29. Konvitz, *Judaism and the American Idea,* p. 36.
30. *Ibid.*, p. 38.

French Declaration of the Rights of *Man* and of *Citizen*. The American Bill of Rights applies to people, not just citizens, and the Thirteenth and Fourteenth Amendments protect the rights of "persons." The United Nations Declaration of Human Rights applies to "all human beings" and provides that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or status." These documents, Konvitz wrote, state the essentially Jeffersonian view that "since human rights are different from, though basic to, the rights of citizens, they are not dependent upon any constitution, upon the grant from any ruler or government. The fundamental human rights are provided for in the unwritten constitution of human nature—a constitution that is beyond the reach of any government or earthly power."[31]

The ideals of human dignity and equality are necessarily related because the former implies the latter. Thus the equality ideal has its roots in both the Judaic and American traditions. Its most significant statement, however, was Jefferson's in the Declaration of Independence. When Jefferson wrote that "all men are created equal," he knew that all men were not in fact equal; he had stated an ideal, a promise to be redeemed in the future. As Konvitz explained:

> When men are judged by any empirical test they are not equal: some are richer than others, some wiser, some swifter, some more beautiful. Yet the essence of democracy is equality. Men reject the empirical tests and assert their equality notwithstanding the evidence adduced by their eyes and ears and other senses. . . . The belief in equality is a transcendental belief, if you wish; it makes an assertion which may be true only in the world of noumena. But no matter: it is the cornerstone of the democratic faith and the essence of moral idealism.[32]

The Supreme Court took an important step toward the redemption of the promise of equality when it decided

31. *Ibid.*, p. 40.
32. Konvitz, ed., *Judaism and Human Rights*, p. 120.

Brown v. Board of Education in 1954. To Konvitz, the decision did not and could not turn on social science evidence or results of social experiment but rather on "a constitutional ideal, its meaning, implications, and applications." Discussing that ideal, he wrote:

> The ideal of constitutional equality is not the result of a social experiment; it is a force that is intended to generate experiments in the faith that they will work toward the enhancement of 'life, liberty and the pursuit of happiness.' There were no social psychologists or sociologists to advise Jefferson as he worked on the Declaration of Independence, or Madison as he worked on the Bill or Rights, or the Congress as it drafted and passed the Thirteenth and Fourteenth Amendments. The constitutional requirement is that the state must treat its citizens—all men—as equals, *as if* all the weight of scientific authority *in fact* supported the proposition that all men are *in fact* equal, no matter whether such scientific authority in fact exists or not (as it did not exist in 1776, or 1789, or 1865, or 1868, and may or may not have existed in 1954.)[33]

In *Brown,* the ideal of equality moved toward realization through an arm of the state—the Supreme Court—by application of a constitutional principle—the equal protection clause of the Fourteenth Amendment. Though the ideal is imbedded in the equal protection clause, Konvitz stressed that it was "not granted by any constitution but found in the constitution of man himself."[34]

Like equality, freedom is implied in the ideal of human dignity, and again Konvitz found its most significant statement in the writings of Jefferson: freedom is God-given, inalienable.

In making a plea for religious freedom in Israel in 1949, Konvitz gave his personal conception of the ideal as follows:

> Now I personally do not eat non-kosher food, but I make my choice as a free man; I choose kosher food with a free will; and since I choose it freely, my act has spiritual value to me. If I had no choice but to eat only kosher food, because the law so decreed, I would choke on it. Having eaten the

33. Konvitz, *Expanding Liberties,* p. 170.
34. Konvitz, ed., *Judaism and Human Rights,* p. 25.

> bread of freedom, the bread of compulsion would be bread of affliction. . . .
>
> . . . if a man has no freedom to sin, he has no freedom to do good[.][35]

The conception is Jeffersonian. "Almighty God hath created the mind free," Jefferson wrote. Adopting that statement, Konvitz added: "[m]an is not man unless his mind remains free; and . . . God is not served except by a mind that is free."[36] This is the essence of the ideal for Konvitz. It is intimately related to freedom of conscience, which has sources in the Old and New Testament and in the writings of Sophocles, Plato, and St. Thomas Aquinas; freedom of religious conscience became the basis for religious toleration, which had been urged by Spinoza, More, Erasmus and Locke; and religious toleration became the basis of religious freedom in the First Amendment. But the core of the ideal of freedom—the free mind—embraces nonreligious as well as religious conscience; it embraces all thought, profane as well as sacred, and the expression of thought; and it also embraces association of human beings who share similar ideas and attitudes. It is this core notion of the ideal that makes certain liberties fundamental.

Konvitz saw the ideal of the rule of law as a necessary condition for the protection of freedom and other democratic ideals. He said that "no people can be free, no democracy can continue to exist, if the rulers selected by the people do not consider themselves bound by the law. There must be limitations on rulers if the individual's rights are to be preserved. The citizen's rights are measured by the restrictions on government. There must, in other words, be a constitution which defines clearly how far the government may go in this matter or that delegated to its authority. Israel had such a constitution in the Torah. No one was above it. Only under the Torah could kings rule and judges

35. Milton R. Konvitz, "A Plea for Religious Freedom in Israel," *Commentary*, 8 (1949), pp. 224-25.

36. Konvitz, *Expanding Liberties*, p. 29.

judge. As God is righteous, so must the king be, as God defends the weak, so must the king. Only justice is the foundation of a people's happiness and stability. . . . Without law there is not freedom. Unless a people meditate on the statutes and delight in the Law, they will not be able to walk at ease; unequal strength will lead to unequal justice; and when justice is dead, said Kant, it is better not to be alive."[37]

Americans, Konvitz believed, are committed to the rule of law. They might show displeasure with specific Supreme Court decisions and might even abuse them, but they accept generally the Court as final interpreter of their fundamental law. Even presidents must abide by the Court's decisions, as the Steel Seizure case in 1952 and the Nixon Tapes case in 1974 show. That is not to say that Americans believe the Supreme Court is infallible or that it has not made mistakes; it made serious errors in cases like *Dred Scott* and *Plessy v. Ferguson.* But the institutionalization of self-criticism in the form of the dissenting opinions and later overruling of erroneous decisions has tended to redeem the Court in the eyes of the people. Indeed, dissenting opinions and the willingness to overrule decisions has, in Konvitz's opinion, "contributed to the high and secure position the Court enjoys in national judgment and esteem."[38]

The same is true in Judaism. Konvitz wrote "the fact that the Jewish people accepted the teachings of the school of Rabbi Ismael that 'The Torah speaks in the language of man' and that therefore there were bound to be differences of opinion over what law is and requires, in no way weakened the halakhic (legal) hold over the mind and heart of the Jew."[39]

Important as the rule of law is, it is not absolute. There are dangers in respecting it too much, Konvitz thought, for it might become an idol. There are times when moral claims become superior to the claims of the state, when a person

37. Konvitz, ed., *Judaism and Human Rights,* pp. 138-39.
38. Konvitz, *Judaism and the American Idea,* p. 58.
39. *Ibid.*

not only has the right but the duty of civil disobedience. But to Konvitz civil disobedience—nonviolent resistance to unjust laws—was compatible with the rule of law. He stressed that "nonviolent resistance means to affirm the general legal order and the rule of law; and that by trying to purify that order, to remove from it an intolerable evil, it acts to conserve rather than to destroy. By reminding us that laws must be just if they deserve respect and observance, nonviolent resistance refreshes the living mainsprings of law and order."[40]

In his consideration of civil disobedience, Konvitz discussed an instance of mass nonviolent resistance reported by Josephus in which a large assembly of Jews insisted that the Romans not place statues of the Emperor Gaius in the Temple, for that would violate God's law, and they would resist it even if it meant death. To those Jews it was not a question of the right of civil disobedience; they had the *duty* of civil disobedience. Judaism required disobedience to laws commanding the doing of an immoral act, killing another, and idolatry, and such disobedience was compatible with the rule of law. Konvitz explained it this way:

> It was not a question of what one's conscience dictated, but what the law—the Higher Law, the law that is superior to what purports to be the law of the state—demanded. An act could, therefore, appear to be an act of civil disobedience while in reality it was an act of obedience—disobedience of a lower law, which was in fact no law at all when tested against the Higher Law, like a statute, ordinance, or court judgment that is without legal force because it is unconstitutional.[41]

Man knows the Higher Law through his conscience, wrote Konvitz, but in Judaism "conscience is not a voice that speaks *out* of man; it is a hearing agency given to man so that he may *hear* the voice of God."[42] Thus, according to that view, conscience has a reporting but not a legislative function. It does not make law but tells the individual when

40. Konvitz, *Expanding Liberties*, p. 306.
41. Konvitz, *Judaism and the American Idea*, p. 105.
42. *Ibid.*, p. 106.

a law transcending life requires certain action and whether it has been violated. "The law," Konvitz wrote, "calls to the person; the call is heard in and by the heart; but it is not the voice of man that is heard but the voice of God or the law. Man is true to himself only by being true to the law."[43]

Whether one views conscience as having only a reporting function or a reporting and a legislative function, it provides the moral basis of law. Konvitz viewed that moral basis and the ideals implicit in it as more important than law. He stated his position clearly in *Expanding Liberties* in a single italicized sentence:

> *Law itself is subject to the moral judgment; and justice, human dignity, and human rights are more fundamental than law.*[44]

For Konvitz, then, the rule of law is important for the protection of freedom and equality that the ideal of human dignity requires. But law is instrumental; it may give rights and it may also deny them. So the ideals of human dignity, equality, and freedom are more important, and they are important primarily because through them love and justice can be realized.

Thus, Konvitz's thought comes together in a coherent philosophy in which law, rights, liberties, and ideals are interdependent. Law is important because it guarantees rights; rights are important because they are the basis of liberties; and ideals give life to law, rights, and liberties.

43. *Ibid.*, p. 107.
44. Konvitz, *Expanding Liberties*, p. 305.