Book Review

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THE MORALITY OF CONSENT. By ALEXANDER M. BICKEL. New Haven and London: Yale University Press. 1975. pp. 156. $10.00.

Bickel perceives two traditions in Western political thought—liberal and conservative—competing for control of our judicial policy. That is not news. But his definition of each is news.

Contrary to what lawyers and the informed public may suppose, the two traditions are not so-called "strict construction" and liberal construction. Nixon said he wanted strict construction but his appointee, Blackmun, told the Judiciary Committee he didn't know what that meant. "He means us, Hugo," Douglas told Black. No one could construe the first amendment more strictly than Black and Douglas!

Nor does Bickel mean Frankfurter's optimal judicial restraint as against the Black-Douglas-Warren zeal to expand judicial surveillance of infringement on civil liberties.

No, because Bickel is more than your garden-variety of legal scholar. He is familiar with the history and political philosophy behind current trends. Wonder of wonders, he flashes his legal thought against the background afforded educated men (an increasing rarity nowadays), not simply educated lawyers.

The one—the liberal—he sees as stemming from Locke; the other—the conservative—he sees as stemming from Burke.

Before attacking Bickel's disjunction, which seems to me confusing, I may point out that it may be more than a coincidence that Bickel's mentor-hero, Burke, dispraised clarity in favor of "infinity" which has no bounds and cannot be clear and distinct. *Vide* Burke's *On the Sublime and the Beautiful.* Incidentally I may also add that it was Burke who remarked that the study of law sharpens the mind by narrowing it.

Locke propounded the theory of natural rights (the secular heir of divine rights) which no government can take away. Natural rights came to be enshrined (not too strong a word) in our Bill of Rights. Jefferson wrote from abroad that these rights should not be left to inference; it was upon his insistence that they were added in the first ten amendments. Jefferson acknowledged Locke's influence. Locke's framework is actually the framework of our own Constitution. It is absurd, therefore, as I see it, to contrapose Burke to Locke and to take a stand, as a constitutional scholar, upon a platform which rejects Locke.

The reason, I think, why Bickel, the Harvard-geared professor of constitutional law at Yale whose early death is much lamented, adopted this position is that his first fidelity was to the Harvard-axis among law professors. A former Frankfurter law clerk, he piously adhered to the Frankfurter conception of civil liberties. The guarantees of the first amendment—the

basic freedoms which distinguish our polity from those we contemn—were diluted into mere "monitions" (Harvard man, Learned Hand's words)—not given the more ample swathe which their status in the Constitution affords them. Unlike other provisions granting power, they *deny* power. I do not say they should be absolute and unqualified by judicial interpretation. But I do see them as deserving more vigilance from the Court (when they are curbed by legislation) than the attention paid to constitutionality of ordinary, commercial legislation. Justice Stone long ago made this distinction in his famous Footnote Four in the *Carolene*[1] case. He tied the protection of minorities to the fluidity of political and electoral processes. If a minority is treated prejudicially and cannot make its voice heard in this process, then the ordinary presumption of constitutionality for legislation (presumed to express the will of the people) becomes nugatory. I would incline to go further and cherish minority rights as an intrinsic feature of our pluralistic society.

Bickel wants, above all, to castigate the Warren Court for actively moving into the area of protection of civil liberties. He believes, as do his fellow true-believers, that the Warren Court led us down the primrose path of moral imperatives which should better be left to a slower, consensual legislative process. There is no question that he believes this sincerely and defensibly. But he could have made the point without the muddle of Locke and Burke.

And surely it is carrying things too far to suggest that the Warren Court's assertion of power, cutting through technicalities to a moral core, helped create the climate of Watergate. Come on, Professor Bickel.

Of course there is much, much more packed into this little book. The discussion of civil liberties is brilliant and goes deeper than Rawls in his *Theory of Justice.* Incidental insights are plentiful and thought-charging. And I heartily agree with one of Bickel's best points: that we in this country are engaged in a continuous process of conversation (on and off the bench) designed to minimize violence and provide a "morality of consent."

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1. Carolene Prod. Co. v. United States, 323 U.S. 18, n.4 (1944).

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