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FREEDOM AND RESPONSIBILITY IN BROADCASTING. Edited by John E. Coons. – THE LAW AND ITS COMPASS. The 1960 Rosenthal Lectures. Lord Radcliffe. – A CENTURY OF CIVIL RIGHTS. Milton R. Konvitz. WITH A STUDY OF STATE LAW AGAINST DISCRIMINATION. Theodore Leskes. – SHOULD UNCLE SAM PAY-WHEN AND WHY? SELECTED OPINIONS OF MARVIN JONES.

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Book Reviews

FREEDOM AND RESPONSIBILITY IN BROADCASTING. Edited by John E. Coons. Evanston: Northwestern University Press. 1961. Pp. 248. \$5.00.

In May 1961 the present Chairman of the FCC, Newton Minow, made a speech on the quality of broadcast content wherein he described a famous day and night which he spent before his television set. The Chairman, by means of a now celebrated simile, likened what he saw to a "vast wasteland." The speech, and especially the simile, aroused a debate whose clamor still continues. Whatever the merits of the position taken by many in the broadcasting industry that the Chairman's indictment was too harsh, all will agree that the speech has sparked some much needed reflection concerning the health and welfare of radio and television in America.

Symptomatic of this recent and welcome tendency toward some rather intense introspection on the part of leaders within the industry is the book which is the subject of this review. This book is a complete record of a symposium on freedom and responsibility in broadcasting that was held at the Northwestern University School of Law on August 3 and 4, 1961. The book is edited by John E. Coons, Associate Professor of Law at Northwestern, who served as Director of the symposium. The book comprises the addresses of the principal speakers: Leroy Collins, Newton N. Minow, Louis L. Jaffee, and Roscoe L. Barrow. The book also collects the thoughtful remarks of the other knowledgeable participants who were invited to join in the colloquy with the principal speakers. These included distinguished newspaper men such as Ralph McGill, seasoned FCC lawyers such as W. Theodore Pierson, and veterans of the broadcasting industry such as Morris Novik.

The participants made clear that the problems presented by a desire to improve the quality of broadcast content are by no means new ones. The battle is a venerable one by this time and the positions of many of the adversaries have long crystallized. There are those such as W. Theodore Pierson who rely on (1) Sec. 326 of the Federal Communications Act of 1934 (the anti-censorship provision) and (2) a strict con-

struction of the first amendment for the view that there is simply no legal basis for any governmental regulation of broadcast content. There is, on the other hand, the antipodal view of the present Chairman of the Commission who asserts that FCC regulation of programming has received judicial approval. Thus, renewals have been denied by the Commission on the basis of past programming on two occasions. In each case, the Commission has triumphed in the courts.¹

As is so often the case, both sides claim too much. Regulation of program content has never on its own terms received the specific imprimatur of a federal court. On the other hand, no federal court has ever said, *in haec verbis*, that the latitude of the broadcast licensee is precisely equivalent to the freedom of the newspaper editor. Professor Louis M. Jaffee, the distinguished administrative law authority, has in his usual salient fashion pointed out the practical consequences of the imprecise character of the licensee's sway over broadcast content and the Commission's power to regulate the same. Each side is content to make the assertion of power and each resists putting its claims to the test for fear that a definitive solution will be worse than the ambiguous status quo. Thus, Professor Jaffee says (p. 44) :

As a lawyer, I am no lover of it (government by the raised eyebrow). Yet it is more or less just what TV has been living with for some years . . . *Neither side wishes to run the risk of clarification. Each derives from the situation some positive power; each must adjust itself to, must manipulate, the margin of doubt.* (Emphasis supplied)

The Commission has now, however, resorted to press a little beyond the "margin of doubt" and to journey, instead, rather tremulously but nonetheless determinedly, into the yet unexplored realm of programming regulation.² The Chairman has told the industry that in the future it will at least be expected to perform according to its promises. Thus, the Chairman pointed out in his address at Northwestern (p. 31) :

On July 13, 1961, we informed every broadcaster of a change in the Commission's renewal policy. In the past we granted renewals even though there had been a substantial failure to live up to the programming representations, . . . This will no longer be the case. We have put our licensees on notice that 'proposals v. actual operation' is of vital concern to the Commission,

The above-quoted regulatory measure is couched carefully in terms of subsequent punishment in order to avoid the fatal and unconstitutional stigma of prior restraint. Whether Chairman Minow's new regulatory measures are valid is a matter that undoubtedly will be brought to the courts.

Where exactly the new frontier of programming regulation will end is at this time

¹ *KFKB Broadcasting Assn., Inc. v. F. R. C.*, 47 F 2d 670 (1931); *Trinity Methodist Church South v. F. R. C.*, 62 F 2d 850 (1932).

² The Commission has, of course, from time to time set down programming guidelines. There is, for instance, the "balanced presentation" or "fairness" doctrine requiring a licensee to present all facets of a particular viewpoint. In terms of the "fairness" doctrine the broadcast licensee occupies the status of Cardozo's hapless tortfeasor. He need not present a particular issue but if he does he can withdraw his hand "with impunity" only if he presents all the facets of that issue. The "fairness" doctrine is stated in precatory terms and has been enforced with remarkable mildness. See Barron, *The Federal Communications Commission's Fairness Doctrine: An Evaluation*, 30 GEO. WASH. L. REV. 1 (1961).

by no means clear. One thing that these provocative pages make abundantly clear, however, is that that frontier is now being opened with a determination and a vigor that will make the FCC a greater source of creative controversy than perhaps at any time in its history.

JEROME A. BARRON*

THE LAW AND ITS COMPASS. The 1960 Rosenthal Lectures. Lord Radcliffe. Evanston: Northwestern University Press. 1960. Pp. xi, 99. \$4.50.

Lord Radcliffe, the author of this slim volume, is one of England's most eminent judges. The lectures are an inquiry into "what in the end the law stands for and what are its final purposes" (p. 4). The future development of society depends on how men observe the law and such observance will be possible only if men believe that law embodies "an order of living that commands the best part of themselves" (p. 12). The book is an attempt to find such an order.

A brief review can give only a hint of the eloquent riches contained in this book. Its three main divisions discuss: law and religion in England; the doctrine of public policy and the reluctance of English judges to use it extensively; and a plea for the re-introduction of natural law into judicial thinking. This review will briefly sketch each of these three topics with some closing comments.

Lord Radcliffe's threshold premise is that law cannot be self-sufficient for then it will be just a technique. It must be "a part of history, a part of economics and sociology, a part of ethics and a philosophy of life. It must still stand rooted in that great tradition of *humana civilitas* from which have grown the institutions of the Western liberal world" (p. 93).¹ In his first chapter, "Pillars of Society," he describes how, in the medieval period when the common law was first developed, law was a part of the divine order and to be judged by divine law. During this period, society was still a unity, with divine law, natural law and positive law all closely related elements of a single overall "harmony of the world" (p. 5). He notes the subsequent fragmentation of society and the resulting decline of the doctrine that Christianity is a part of the law of England, the triumph of liberalism and tolerance having left no room for any preferred treatment in matters of religion. Lord Mansfield's unsuccessful attempt to replace the declining legal significance of Christianity with a body of equity derived from natural law is also set forth.

Having given something of the historical background, Lord Radcliffe then discusses the English judges' failure to make wide use of the doctrine of public policy as a

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¹ One is reminded of Judge Learned Hand's observation that "it is as important for a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him." *THE SPIRIT OF LIBERTY* 81 (1953).

means of applying moral principles to law. Here, he sets out perhaps the most profound conception in the book—that law has concentrated too much on

... what the State or the public requires in its own interest and too little upon what the public should guarantee to the individual for the protection of his essential dignity... [which] affords the true basis for a doctrine of public interest to be applied by the courts as a substantive part of the law (p. 57).²

Examples of how this proposed focus would operate in contractual relations are given and the conclusion summarized as follows:

We must see ourselves, therefore, as committed for good to the principle that the purpose of society and all its institutions is to nourish and enrich the growth of each individual human spirit. This is the only permanent public policy for countries such as ours: and there are no considerations of convenience, or material welfare, or national prestige that can weigh heavily enough to counter-balance it (p. 65).

In the third and final chapter, "Not in Feather Beds," Lord Radcliffe sets forth what he considers to be the compass by which a free society's law may be guided. Whereas America has its compass in the Federal Constitution and the Bill of Rights, England, without a written constitution and with a doctrine of legislative supremacy, has a more acute problem in finding an appropriate compass. Lord Radcliffe's proposal is that such a guide may be found in the law of Nature or a law of God, which is part of "the great tradition of *humana civilitas*" (p. 93). As he sees it, Western civilization is committed to natural law and to three constituent doctrines thereof, to wit:

[M]an is by nature a rational and social being... [T]he growth of each individual towards responsibility and the freedom to choose the best that he can discern is a purpose which must never be conditioned by or made subservient to other purposes... [T]here is at all times and in all ways an ideal fitness of things which corresponds to these beliefs and... by ourselves and working with others we are bound to do what we can to see that this fitness prevails in human affairs (p. 95).

Lord Radcliffe's invocation of natural law is hardly unfamiliar to American ears.³ The three "commitments" quoted above are indeed fundamental to a free society, in one form or another, and perhaps the secular theorist who refuses to ground them on some other-worldly foundation may well be hard-pressed to justify them to the absolute skeptic. But a natural law theory of jurisprudence contains assumptions and implications which have been disputed among secular thinkers since philosophy first began. For one thing, characterizing principles as "natural law" implies that they are grounded on the external world; further, that this foundation endows them with a verifiability and universality usually attributed solely to the conclusions of the

² This focus on the individual citizen's interest, rather than on the state's, is similar to Edmond Cahn's "consumer perspective." CAHN, *THE PREDICAMENT OF DEMOCRATIC MAN* 23 (1961).

³ See, e.g., BUCHANAN, *REDISCOVERING NATURAL LAW* (Center for the Study of Democratic Institutions 1962).

physical sciences. Both of these propositions have been vigorously debated for centuries.⁴

Secondly, natural law is necessarily derived from some theory of human nature, and the claimed universality of natural law in both space and time implies that human nature is fixed and ascertainable; further, this claimed universality implies that the particular theory of human nature is similarly of universal applicability. As to these matters as well, there has been no lack of disagreement.⁵

In short, how one reacts to the natural law theory of jurisprudence suggested by Lord Radcliffe will depend on one's fundamental assumptions about man and the world in which we live. Nevertheless, Lord Radcliffe's eloquence and penetration make these lectures valuable reading, whatever one's fundamental assumptions.

HERMAN SCHWARTZ*

A CENTURY OF CIVIL RIGHTS. Milton R. Konvitz. WITH A STUDY OF STATE LAW AGAINST DISCRIMINATION. Theodore Leskes. New York: Columbia University Press. 1961. Pp. vii, 293. \$6.00.

The book *A Century of Civil Rights* by Milton R. Konvitz, *With A Study of State Law Against Discrimination* by Theodore Leskes is in reality two books. So well, however, do they complement one another that save for the purposes of analysis and review, this matter would hardly merit comment. The fact is, though, that Konvitz has attempted the well nigh impossible task, if we can believe his title, of encompassing one hundred years of a tremendous socio-legal revolution into approximately one hundred and seventy pages. In a volume as small as this, the author necessarily writes with broad strokes. One gets a sense of too much compression, some omission.

Notwithstanding the foregoing observation, the book by Konvitz and Leskes has much to recommend it. It shows a definite sense of expertise in the field of civil rights on the part of its authors and a keen insight into the underlying issues which bottom the problems of race in the United States today.

Beginning his portion of the work with an examination of the American slave system, Konvitz speculates on the nature of this system as compared with other slaveholding societies. One need not completely agree with his theories about American slavery to be convinced that there was something singular added to that system which apparently had not existed in any other, and that this peculiarity has had a definite bearing upon relations between black and white in the United States over the last hundred years. "*The Negro question lies far deeper than the slavery question*" (p. 9).

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⁴ For a recent attempt at developing a concept of natural law which applies to both "the laws that scientific method seeks, and the laws that underlie human law," see BUCHANAN, *supra* note 3.

⁵ Many of the arguments for and against a natural law jurisprudence are debated in HUTCHINS, *et al.*, TWO FACES OF FEDERALISM 15-16, 81-126 (Center for the Study of Democratic Institutions 1961).

In addition to the usual slave-master relationship, American slavery, says the author, was a racial arrangement in a bi-racial society. Notwithstanding the loss of the rebellion, the white southerner sought to continue this arrangement through the black codes and the suppression of the free interchange of any ideas to the contrary. To this unyielding attitude reconstruction was the only answer.

Briefly, Konvitz discusses the Civil War Amendments and the rise, fall, and resurrection of civil rights legislation from its inception to the recent Acts of 1957 and 1960. This is a useful resume of these various acts. The point made is that present civil rights legislation is inadequate.

The core of the work undoubtedly lies in the author's notions concerning lunch counter "sit ins." He approaches this aspect of civil rights after having dealt with the transition from the separate but equal doctrine of *Plessy v. Ferguson*¹ to the no-segregation edict of the Supreme Court in the "Segregation Cases." The transition treatment seems a bit thin. Moreover, the author's premise that "separate but equal" was not an absolute constitutional evil but an imperfect good just does not seem to hit the mark. Moving on to the "sit-ins" the author grapples with the legal issues posed by the fact circumstances of these actions. Paradoxically, Konvitz draws great strength from the Civil Rights Cases of 1883 wherein the United States Supreme Court struck down federal legislation designed to afford to citizens of color the very principles which the sitters-in now claim. Konvitz's constitutional analysis of the problem is demonstratively keen. The one adverse criticism that might be made is that he tends to oversimplify what to most lawyers are exceedingly difficult and complex legal matters.

It is in the final chapter of this book that Konvitz scintillates. Here, he dissects the argument that racial equality must be left to voluntary conduct, exempt from legal sanctions and shows it for what it is. Herein, he argues that the public policy in areas inhabited by two-thirds of all Americans in 1954 was against racial segregation and discrimination, and that southerners who say that law cannot change mores have relied on the power of law to prevent change in mores.

Leskes portion of the work is a well done description of what the states have done and are doing in the area of public accommodations and fair employment, educational, and housing practices. It is well to have this material in the book. Federal activity or lack of activity in the area of civil rights so predominates that there is a tendency to overlook what the states can do and are doing. Leskes points out the effectiveness of the administrative process as opposed to the judicial process in this area.

Undoubtedly the authors could defend the absences of certain materials, but when a book which purports to run the gamut of civil rights makes no or only footnote mention of "blood, sweat and tears" cases like *Missouri ex rel. Gaines v. Canada*, *Registrar of the University of Missouri*,² *Sweat v. Painter*³ and *McLaurin v. Oklahoma State Regents*⁴ and only whispers over the questions of voting rights or personal security, something is left to be desired.

¹ 163 U. S. 537 (1896).

² 305 U. S. 337 (1938).

³ 339 U. S. 629 (1950).

⁴ 339 U. S. 637 (1950).

On balance Konvitz and Leskes have done an admirable job. In this reviewer's opinion the book is a welcome addition to the growing literature on civil rights.

DORSEY EDWARD LANE*

SHOULD UNCLE SAM PAY—WHEN AND WHY? SELECTED OPINIONS OF MARVIN JONES. Privately Published.

Harrison Tweed reviewing William Prosser's *The Judicial Humorist* in the *American Bar Association Journal*¹ wrote, "Humor is rarely at its best unless it is spontaneous. Judges who try too hard forget the need of brevity and overstrain their power to compel attention." Marvin Jones, Chief Judge of the United States Court of Claims, is one of those rare judges whose humor is spontaneous. He does not have to "try too hard." Perhaps it is his Texas background. Maybe it is his many years of politicking and speech-making.² Whatever the reason, Judge Jones is gifted in having judicial humor.

At the request of friends and colleagues, Judge Jones compiled some of his choice opinions that have human interest in his *Should Uncle Sam Pay—When and Why?* It was the judge's desire that the opinions would have appeal to lawyers and laymen alike and that they would be representative of the type of controversy over which the United States Court of Claims has jurisdiction and the problems with which that court is confronted. The result is the compiling of twenty-eight cases from the Court of Claims Reports. Both the caption given to each case and the case itself represent the judge's wit.

For human interest I was particularly struck by "The Ubiquitous Jeep, What Is It?" That case is found in the reports under *Union Pacific Railroad Company v. The United States*.³ "The jeep, having been everywhere else, is now in court" is the opening statement of the opinion. That was the case wherein Judge Jones, delivering the opinion of the court, decided that the wartime jeep was a passenger vehicle, not a freight vehicle, and thus subject to a certain rate. Even though the jeep "did much hauling," it was primarily a passenger vehicle. Judge Jones wrote, "I have seen my father haul everything from ploughshares to a crosscut saw in a buggy, but that hardly made the buggy a freight vehicle" (p. 11).

For humor there is nothing better in the book than "Two Dogs, A Cat and Government Red Tape."⁴ What was the Court of Claims to do with a woman who refused to travel without her two dogs and a cat? The State Department refused to allow the

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¹ 39 A.B.A.J. 313 (1953).

² Chief Judge Jones is one of the few men who have held important positions in all three branches of the federal government. He was a member of Congress for twenty-four years representing the Eighteenth District in Texas. During World War II he served as assistant to James F. Byrnes, who was Director of Economic Stabilization. He was appointed United States Food Administrator and Chairman of the Allied Food Board during World War II.

³ 117 C. Cl. 534 (1950).

⁴ *C. C. M. Pedersen v. The United States*, 115 C. Cl. 335 (1950).

plaintiff per diem expenses because he and his wife were delayed in Egypt en route from Turkey to the United States during the spring of 1945. The government contended that the cause of the delay was the plaintiff's refusal to travel without her pets. There are some amusing passages about dogs. But, even though "the dog has been able to awaken affection in the hearts of every race of people," (p. 7) Mrs. Pedersen's refusal to leave without her animals and charging the delay in time of national peril was not justified.

One wonders why a commercial publishing company does not acquire the rights to republish Judge Jones' book. It deserves a wider circulation.

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