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BOOK REVIEWS

THE BILL OF RIGHTS. By Learned Hand. Harvard University Press. Cambridge: 1958. Pp. 77. \$2.50.

The Bill of Rights is a concise summary of Judge Hand's philosophy of judicial review, as embodied in three Oliver Wendell Holmes Lectures delivered at Harvard this year.

The lectures (chapters in the book) are provocatively entitled "When a Court Should Intervene," "The Fifth and Fourteenth Amendments," and "The Guardians"; and, as the titles suggest, the theory grows more controversial with each chapter. The power of the Supreme Court to declare statutes unconstitutional, Judge Hand concludes, after an analysis reminiscent of the French Theorists of legislative supremacy, is not a logical deduction from the structure of the Constitution, despite the arguments of Marshall and Hamilton. It is, however, a "practical condition upon its successful operation." (p. 15). Despite the spurious Holmesian antinomy between logic and law, we may here agree that Judge Hand is correct: the power of the Supreme Court to review the constitutionality of statutes is, on one or the other justification, necessary, and we may also conclude that without Marshall's brilliant usurpation "the whole system would have collapsed." (p. 29).

In the next two chapters, however, Judge Hand expresses his fear that the Supreme Court has overextended this acknowledged power. He fears the Court as a "third legislative chamber," (pp. 42, 55, 70) and a group of "Platonic Guardians," (p. 73) whence the title of the last chapter.

He points out the difficulties encountered by the courts with the definition of such terms as the "police power," and its existentially exhaustive correlative, "violation of due process," and characterizes the Court's attempt to delineate their respective boundaries with vague formulae of fairness as "a patent usurpation." (p. 42).

Following the geriatric tendency for security current in the country today, Judge Hand is distressed at the unpredictability introduced into the law by the Court's assumed power to annul statutes on the merits even in close cases of controversial value analysis. (pp. 55, 72).

The Court should restrict its power to declare statutes unconstitutional to "extreme occasions," he holds. These occasions are nowhere defined. But, as an example of a case which is not extreme, Judge Hand offers *Morey v. Doud*,¹ (p. 45) in which the Court (in a six to three decision, with Justice Black among the dissenters since only an economic and not a "preferred" right was involved) set aside an Illinois statute which, *by name*, excluded the American Express Company from licensing requirements for money-order companies.

Although Judge Hand's position may give comfort to those who fear a resurgence of the pre-1937 Court which struck down so much worthwhile economic and social legislation with the sword of "due process,"² it should be remembered that Judge Hand rejects (pp. 50-51) the distinction between personal and property rights, refusing to give to the former the "preferred" position which is the only way of making the Court's recent policy of self-restraint in matters of economic and social legislation ("political questions") consistent with the undiminished scope of its civil rights protection (the "first amendment rights"). Such a hands-off policy as Judge Hand recommends would thus effectively emasculate even the first amendment.

1. 354 U.S. 457 (1957).

2. See Schwartz, *The Supreme Court 191-98* (1957).

The *Doud* case, therefore, presents us with a concrete example on which to choose between Judge Hand's and more traditional theories of constitutional interpretation. Judge Hand chooses the will of the people as expressed through their legislatures as supreme: their decision should not be interfered with by the Court, even though embodied in a statute so patently discriminatory as that in the *Doud* case. The facile argument for legislative superiority is rhetorically persuasive. However, the virtue of the United States Constitution is not solely in the acknowledged vagueness of such terms as "due process," which allows for its remarkable accommodation to changed conditions, and hence its perennial vitality, but also in that the Constitution and its Court represent, in a very special sense, and more so than any ephemeral legislative enactment, the real will of the American people: their conscience.

It is the beauty of the Constitution and the Court which implements it that the otherwise helpless individual citizen will be protected from the momentary emotional excesses of even the overwhelming majority of his fellow citizens. Unlike Judge Hand, I have enough faith in the American people to believe that such protection as much represents their will as any statute passed by any legislature.

Obviously, the balance between individual and societal values is always a delicate one and difficult to appraise, and its primary evaluation resides with the legislature. As a counsel of prudence to the Court to avoid a hasty substitution of its judgment for that of the elected representatives of the people, this book is, therefore, worthwhile. On the other hand, as an argument against the Court's power to perform its customary function of invalidating legislation which fails to meet the standards of natural justice embodied in the Constitution, even though that decision necessarily involves the judges' personal opinions of what those standards are, the argument can only be wholeheartedly rejected.

ROBERT A. KESSLER†

EDMUND BURKE AND THE NATURAL LAW. By Peter J. Stanlis. University of Michigan Press. Ann Arbor: 1958. Pp. 311. \$5.75.

No writer, remarked Leslie Stephen, has received or deserved more splendid panegyrics than Edmund Burke, who has "endured," added Harold Laski, "as the permanent manual of political wisdom without which statesmen are as sailors on an uncharted sea." Noble praise this, which might be taken as proof positive of Laski's having satisfied William Hazlitt's requirement: "It has always been with me a test of the sense and candour of anyone belonging to the opposite party, whether he allowed Burke to be a great man"; that is, it might have been so taken had not Laski utterly misconceived Burke's position as fundamentally utilitarian and pragmatic. So also did G. K. Chesterton, who, misled by the revolutionary "natural rights" eloquently rejected by Burke, denounced him as "the atheist," praised Robespierre as "the theist." Like men of greater scholarly pretension and less humane wisdom, Chesterton in an atmosphere of positivistic scholarship had misread Burke as well as the writings of Henry Buckle, Leslie Stephen, W. E. H. Lecky, and John Morley. Their influence extended also to Charles E. Vaughan, Elie Halévy, John MacCunn, George Sabine, F. J. C. Hearnshaw, and has found its most recent expression in the pronouncement of Professor Oscar Handlin of Harvard: "Intellectually, the weightiest attacks upon the conception of a natural and universal law took their points of departure in the writings of Burke and Montesquieu." In Chesterton's judgment on Burke there speaks not merely his most unfortunate

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paradox, but the failure of a century of scholarship against which have been raised, from time to time, the intermittent protests of Lord Percy of Newcastle, Russell Kirk, Leo Strauss, Ross S. J. Hoffman, and Paul Levack. However, their shrewd and perceptive comments have been only intimations of the full scale study, the best ever written on Burke's political thought, by Professor Peter J. Stanlis of the University of Detroit.

Dr. Stanlis' *Edmund Burke and the Natural Law* is more than the negation of the positivistic interpretation of Burke; it is rather an incontrovertible demonstration of his thesis that Burke, "far from being an enemy of the Natural Law, . . . was one of the most eloquent and profound defenders of Natural Law morality and politics in Western civilization," and that "the true nature of Burke's cardinal political principles cannot be understood apart from its connection with the Natural Law." To advance such a thesis against the cumulative forces of a petrified scholarly tradition requires of Dr. Stanlis more than mere boldness; it demands not merely a thorough and intensive reading of Burke against the great historical events of his age, but a comprehensive and philosophical grasp of the great traditions of the Natural Law.

These Dr. Stanlis deftly traces. To the time of Hobbes in the mid-seventeenth century, the Natural Law had been regarded as "an emanation of God's reason and will, revealed to all mankind," providing a universal ethical norm apparent to "right reason" and sharply distinguished from the positive laws which "were the products of man's reason and will and applied only to members of particular communities." For the pivotal century which followed him, Hobbes' philosophy was the watershed and the ultimate source of the revolutionary "natural rights." Not only did Hobbes transfer the origin of Natural Law from God to an *a priori* "state of nature," but he wrought a revolution in human psychology, establishing a mechanistic conception of man that "made him out to be an a-social individualist whose nature existed prior to the state, and whose membership in society was voluntaristic." Although it has long been the popularly accepted supposition that Hobbes' successor, John Locke, reacted vigorously against the philosopher of Malmesbury and reverted to the Natural Law tradition stemming from Aristotle and flowing through Cicero, Aquinas, and Hooker, the hard fact is that Locke presents rather a softened and modified version of the Hobbesian position, substituting for Hobbes' "fear of death" the more seductive correlative of the desire for pleasure, thus extending Hobbes' identification of the Natural Law with self-interest and perpetuating the confusion of powers with rights and exalting "private will above normative law." With Locke, the Natural Law becomes grounded in private reason, and its grand tradition is not so much destroyed as it is rather utterly confounded, thus passing into the intellectual currents of the eighteenth century.

Against this backdrop of a Natural Law tradition almost hopelessly distorted and perverted, Dr. Stanlis proceeds to examine Burke's politics in relation to the Natural Law; to limn his encyclopedic knowledge of its classic statements in Aristotle, Cicero (especially), Hooker, Suarez, Puffendorf and Grotius; and to sketch his massive reading in political and legal history, his thorough knowledge of English common law and his awareness that the common law is not to be identified with but does have a reciprocal relationship with the Natural Law. Yet even more important than Burke's thorough knowledge and understanding of the Natural Law principles is the unremitting consistency with which he applied them in the arena of practical, day-to-day politics throughout his long and distinguished parliamentary career and in his political writing from 1761 through 1797, in the crucial issues of his age; in his attack upon the repressive English commercial policy toward Ireland, the Popery

Laws, the economic and civil disabilities imposed upon the Irish; in American affairs, where Burke's appeal to the Natural Law is "almost always indirect, through the British constitution, which was for him merely the practical means of guaranteeing the 'rights' of Natural Law throughout the empire"; in the constitutional crisis precipitated by the Middlesex election of 1768; in the trial of Warren Hastings; and, of course, in his writings and speeches on the French Revolution. By apt quotation, thorough analysis, cogent interpretation, Dr. Stanlis establishes the undeniable consistency of Burke's adherence to the Natural Law as well as his careful and perpetual distinction between the Natural Law and the chartered rights of men which have no validity unless they rest, ultimately, on the Natural Law.

If anything remains to be said about Burke and the Natural Law, it is the unravelling of the mystery of how a century of scholars, by no means illiterate men, could have been misled into the supposition that Burke was a pre-Benthamite and a forerunner of Mill. Something of their confusion can be attributed to the conceptions current, in the eighteenth century, of the Natural Law, and something also to their readiness to read into Burke their own conceptions. Because the revolutionary "natural rights" which Burke had attacked were "abstract," they hastily concluded that he opposed all theory and all speculation, despite his protest: "I do not vilify theory and speculation—no, because that would be to vilify reason itself." At the same time, they eagerly noted and underscored Burke's constant appeals to "expediency," "circumstances," "diversity," "moderation," "practical results," and "prudence," all of which to the positivist mind betokened Burke's groping toward utilitarianism and his opposition, like their own, to the eighteenth century shell of the Natural Law tradition. True, Burke's conception of the Natural Law was not that more popular and widespread conception promulgated by Puffendorf and other seventeenth and eighteenth century thinkers who regarded Natural Law principles, like those of contemporary mathematics, as forever fixed and as being applicable "to political problems by a literal-minded, rule-of-thumb process . . . without equity or legal temperance." Having themselves been hopelessly separated from the pre-Hobbesian Natural Law tradition to which Burke had reverted, and observing in him his obvious rejection of the dry husk of a lifeless tradition into which it had withered, the positivist historians concluded that he was their forerunner.

Nothing could have been further from the truth. As Dr. Stanlis makes evident, it was not the utilitarian school which Burke anticipated; it was rather "the classical and Scholastic Natural Law of Cicero and Hooker" to which he had returned. Beyond the specious appeal of nature's simple plan and over the remains of Hobbes and Locke, Burke had snatched an insight more profound and complex of man and society, a vision which he never lost. Intensely, humbly, genuinely aware of the proliferating variety and diversity of God's creation, Burke steadfastly opposed all attempts to impose abstractions upon society. He would readily have agreed with St. Thomas that "laws are laid down for human acts dealing with singular and contingent matters which have infinite variations. To make a rule fit every case is impossible." Hence, in the grand tradition, Burke could only oppose, vehemently and magniloquently, that speculative dialectic of revolutionary "natural right," lavish in the promise which it could never fulfill to reorder society according to its rationalistic blue print, irrespective of the infinite combinations and diversities imposed upon the human race by specific times and places in its history. Adamantly opposed to revolutionary eruption, Burke yet acknowledged change as the great law of nature, but change guided by the doctrine of prescription and a sense of historical continuity, directed by a circumspect prudence and with constant reference to the Natural Law.

In the unfolding of history, Burke divined the manifestation of the Natural Law that for him, as for Cicero and Hooker before him, emanated from God, a living Natural Law whose life demanded development. No mere defender of the *ancien regime*, as Tom Paine chose ludicrously to depict him, neither did Burke anticipate, as some (Schlegel and Taine's followers) have opined, the Heraclitean flux of the Hegalians. "History," he once remarked, "is a preceptor of prudence, not of principles."

Burke's guiding principles, as Dr. Stanlis has demonstrated, were those of the Natural Law. If Burke found their manifestation in the march of history and not in the airy abstraction of the *philosophes*, if he regarded them as "useful," then it was because for him they were as real and living as the God from whom they emanated and as the men whom He had created and for whom He had intended the Natural Law. So it is that in Burke "there is almost always an attempt to show that true theory is embodied in practice, that although moral principles may be stated in abstract terms they become meaningful only when applied in specific situations." In brief, such are moral principles and the nature of men that their observation of these principles will ultimately, if only incidentally, prove to be of the highest usefulness to them. So Dr. Stanlis justly remarks that Burke "believed the reverse of Lecky's statement that 'all morals spring from and depend on utility.' To Burke a law or action was not good because it was useful, but utility was merely one of several positive social consequences of morality."

In reclaiming Edmund Burke for the great pre-Hobbesian tradition of the Natural Law, Dr. Stanlis has successfully sustained his important thesis, has forever reversed a century of positivistic scholarship, and has laid, for all time, that old ghost of Burke's alleged utilitarianism. He has written the definitive study of a major political and literary figure in the great mainstream of Christian humanism. He has done for Burke what Louis Bredvold did for Dryden, George Sherburn for Pope, Ricardo Quintana for Swift. *Edmund Burke and the Natural Law* is a landmark of high literary scholarship, but it is no book for the mere antiquarian. As Ross S. J. Hoffman and Paul Levack reminded us nearly ten years ago, since 1917 "men have experienced anew the kind of universal tumult in which Burke lived; and he has become relevant again." Burke is indeed relevant because the Natural Law which Dr. Stanlis has laid bare at the heart of Burke's politics is perennially relevant, and never more so than now, when the bankruptcy of latter-day political thought, stemming from Bentham and Mill, is everywhere painfully manifest. Thus perplexed and distressed, the twentieth century could well profit from Burke's own example and return, as did he, to the great tradition of the Natural Law, whose most eloquent advocate and exemplar he happens to be. In his thought, in a sense far deeper than any conceived or intended by Professor Laski, there is indeed *the* "permanent manual of political wisdom," and for that "manual" there is at long last the indispensable guide in Peter Stanlis' *Edmund Burke and the Natural Law*.

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A TREATISE ON THE LAW OF CONTRACTS. By Samuel Williston, 3d ed. Walter H. E. Jaeger. Baker, Voorhis & Co., Inc., Mt. Kisco: 1957. Vol. 1. Pp. xxii, 826. \$20.00.

One of the most difficult and, in a way, thankless tasks in the field of legal writing is that of editing a new edition of a treatise by one of the acknowledged authorities. Little can be added by an editor to the luster of Williston, Scott, Bogert, Mechem and others. By the same token, little of that luster automatically devolves upon the editor of a subsequent edition. Yet, the work that goes into the later editions must be as painstaking and imaginative as that which went into the original.

With this statement of the difficulties in mind, tribute must be paid to the work of Walter H. E. Jaeger on the third edition of Williston's *A Treatise on the Law of Contracts*, the first volume of which was recently published. The Williston presentation is scrupulously followed, but Professor Jaeger has not been bound by the past to the neglect of the present. He has skillfully deleted, added, and made minor reorganizations where necessary, either for clarity or to bring the statement of the law up to date.

Format, make-up, and type face are perhaps not the first thing that should be noticed or commented upon when one opens so important a work as the new Williston for review. Yet lawyers, whose eyes must have long been thought indestructible by publishers, and whose reading skills must long have been thought to need no assistance from the graphic arts, are ever appreciative of the improvements that are being made—and the typographical presentation of this third edition is worthy of comment. The type is extremely legible; the use of bold-faced numbers for the footnotes makes them easy to locate; and the use of short paragraphs, both in the text and in the footnotes, facilitates reading and use of the book for reference. These improvements serve a very practical purpose in helping the lawyer, educator, and student accomplish more in his working hours, and in leaving him less exhausted when he finishes.

Professor Jaeger's most signal personal contribution to the new volume may well be in his work on the footnotes. They have, of course, been brought up to date; but, more important, they have in many instances been greatly expanded. Few cases are cited without a clear indication of the reason. Professor Jaeger in his preface comments on the liberal quotation of pertinent language from court opinions, and on the use of "terse digests" to elucidate the reasons for citing the particular cases. To be sure these techniques are not new and both were used in the earlier editions of Williston. Professor Jaeger has, however, used them skillfully in the new volume. He seems also to have eliminated from the footnotes references that are, for one reason or another, now obsolete.

Turning to the text, the first volume covers eight of the twelve chapters that were the subject of the first volume of the second edition—Definition of Terms; Requisites of Informal Contracts; Making of Offers; Duration and Termination of Offers; Acceptance of Offers; Consideration; Promises Without Assent or Consideration; and Formation of Formal Contracts. New material that appears in these chapters deals with new subjects or with subjects that have increased in importance since the year 1936, when the second edition appeared. A brief new section "Consideration and Tax Statutes," for instance, calls attention to the effect that tax legislation, particularly the gift tax statutes, have had on the concept of adequate consideration. In the section on "Bonus, Pension and Other Benefits," a new paragraph discusses continued service in response to an offer of a pension or similar benefit as consideration to make the offer enforceable. Again in the chapter on consideration Professor

Jaeger in new sections discusses the differences between lack of and failure of consideration and the "growing tendency" toward contracts to make wills.

An even more significant departure and contribution to the third edition is in the expansion of the discussion of options in relation to irrevocable offers. Material from the second edition has been divided into separate sections for clarity, and sections refining the definition of options and discussing the exercise of options have been added. New sections, these in Chapter 8, "Formation of Formal Contracts," discuss bail, penal and other conditional bonds, in relation to recognizances; and government, municipal, and private bonds, in their contractual aspects and as to their negotiability.

Numerous other changes and additions have been made in the text to reflect not only the developments in contract law itself, but also the effect on that law of sociological and scientific changes during the past twenty years. Section headings have been improved, streamlined, to make them more readable and, in many instances, more clearly indicative of the subject matter covered. The order of sections within the chapters has been preserved, except as sections have been divided or added; and the numbering of the sections has also been preserved. This makes it possible for the lawyer or student to use the index to the second edition with the volumes of the third as they appear. New material is not, of course, found in the index to the second edition, but it can easily be found through the detailed table of contents as it will appear in each volume.

A glance at the condensed table of contents for the entire treatise, as it appears in Volume 1, indicates some rearrangement in the subject matter of the chapters, but apparently this will not result in a rearrangement of sections. Volume 9 of the second edition, dealing with war contracts and published in 1945, will probably be absorbed into a new chapter, Chapter 61, entitled "Government Contracts."

In all, Professor Whiteside's comment on the first edition, made in his review of the second edition, seems applicable to the third. Professor Whiteside said:

Practitioners have relied on its remarkably accurate statement of the law; judges have enriched their opinions from its masterly exposition; and teachers and students have found within its pages a story of the law's development together with a critical discussion of its foundations and an analysis of its reasoning.¹

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1. Whiteside, *Williston on Contracts: A Review*, 23 *Cornell L.Q.* 269 (1938).

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