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Freedom of Association. Charles E. Rice. New York City: New York University Press. 1962. Pp. xix, 202. $6.00.

This review is of a most welcome volume, for if ever an idea or belief needed advancement it is the present one, namely, that "freedom of association" should cover a multitude of forms and methods; and to the extent that *Freedom of Association* provokes discussion it can only be for the general good. Thus a reading of Professor Rice's heady volume is highly recommended, and this is true whether one agrees or disagrees with his views or his presentation; as for this reviewer, a concurring opinion is rendered, for the volume makes one think.

In the Foreword, Professor Robert B. McKay writes of the author that "he argues persuasively that freedom of association is not simply another and essentially distinct freedom within the framework of the First and Fourteenth Amendments. More significantly, the recognition of freedom of association as a separately cognizable right provides a new perspective with which to understand freedoms long articulated, and to strengthen further the liberties they are meant to safeguard." (p. ix.) Professor Rice examines this freedom of association by adopting, as a jumping-off point, the 1958 decision in *NAACP v. Alabama ex rel. Patterson*.[1] In particular, Mr. Justice Harlan's statement is quoted: "'It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.'" (p. xvii.)

But, it may be asked, why bother if this freedom has been given the Supreme Court imprimatur? The reason is, as Professor Rice writes concerning one aspect of religion, that the particular problems were resolved in the past by reference to free exercises of religion, and "the purpose here is to show that the issues could have been resolved by reference to the newly recognized freedom of association, with, in some cases, more satisfactory results." (p. 48.) What this implies, of course, is that wherever applicable the new freedom of association is to be used as a lever to force the re-examination of old decisions elsewhere, to permit any questionable limitations in these other areas to be either removed or diminished, and, in effect, to permit constitutional lawyers to have a field day in the Supreme Court. The logic of these conclusions does not mean, however, that the Court will accept the fact of re-examination; they will probably contain this new freedom within new banks to be hewed as a branch of the old stream.

How does the author propose to effectuate his plan, as extended to all items embraced within the volume? It appears that there are two overall divisions, with each further subdivided. These two divisions are, first, the theory and background of the new freedom and, second, illustrations of its conjunction with, or application in, selected areas. The former is divided by the author into jurisprudential (ch. I.) and American (ch. II.) background; the latter into freedom of association and religion (ch. III.), livelihood (ch. IV.), political parties and pressure groups (ch. V.), and, lastly, subversive associations (ch. VI.). A final chapter on "Basic Principles" (ch. VII.) sums up the author's views in seven enumerated paragraphs.

1. 357 U.S. 449 (1958).

The jurisprudential background is "primarily concerned . . . with the right or duty to join an association, and not with the function of associations themselves as alternative, *i.e.*, pluralistic, centers of political and social authority." (p. 1.) However, "we cannot here essay a survey of all who have written on the question." (p. 2.) What the author seeks to do is to show merely that jurisprudents in the past have discussed the right to associate, that the Founding Fathers could not have been ignorant of this, and that the principles involved have a more enduring basis than ordinarily might appear.

With these caveats the author gives us a sketchy analysis of pre-seventeenth and eighteenth century philosophers, and then provides slightly more on Hobbes, Locke, Harrington and Rousseau, with other names appearing throughout. In these eighteen pages, Professor Rice whets our appetites, but leaves us drooling. For example, in these times we cannot omit the associational concepts of Communism, *e.g.*, Marx, and through him into Hegel. But neither of these is mentioned (although the chapter on subversive associations is the lengthiest). Regardless, and solely as a jurisprudent, Hegel's views, as expounded in his *Philosophy of Right,* should be referred to,[2] especially since von Gierke is mentioned. (p. 17.) This, however, involves omission; what of commission?

To use but one illustration, Professor Rice begins with Plato and then discusses Aristotle, Augustine and Aquinas (and mentions in one paragraph some others). Next he devotes three pages to Hobbes, three to Locke, one to Harrington and others, and three to Rousseau and others, concluding with two pages on other jurisprudential aspects.[3] But Hobbes is suspect, for he had an axe to grind; Locke's contract theories necessarily had to permit associations, but obviously not those which breached the original contract; and Rousseau's "nature-boy" view extolled all forms of individualism, so that his antipathy to associations is understandable. But where is Jeremy Bentham, to whom so much is owed, and especially his *Theory of Fictions*?[4] And why is the interest theory in jurisprudence, as developed by Jellinek, Paschukanis, Gény and Pound, not given some form of mention? Similarly, Brandeis' or Madison's views in the famous Paper No. 10 in *The Federalist* are also omitted. Since Laski's view on "the partition of sovereignty among coordinate entities" (p. 17.) is mentioned, why not at least footnote Galbraith's current views on countervailing powers?[5]

The second chapter, on the "American Background of Freedom of Association," is examined in a threefold division of time, first, "before the Revolution, both proximate to and remote from that event"; second, "between the start of the Revolution and the Constitutional Convention of 1787"; and, third, "those which resulted from the charter produced in that Convention." (p. 19.) The first two periods are each

2. Hegel, Philosophy of Right (T. M. Knox transl. 1942).

3. What happened between Aquinas and Hobbes? Does not the gestation period of the common law deserve some mention at this stage? See, e.g., Forkosch, The Doctrine of Criminal Conspiracy and Its Modern Application to Labor, 40 Texas L. Rev. 303, 473 (1962).

4. See, e.g., Ogden, Bentham's Theory of Fictions (1932).

5. The differences between "right" and "freedom" in their philosophical and semantic connotations, and then in their judicial (Supreme Court) analysis and application, might well have received a degree of attention, especially since Professor Rice quotes Art. 20 of the Universal Declaration of Human Rights.

broken into the fourfold illustrative subdivision previously mentioned, that is, from the points of view of religion, labor, politics, and subversives (respectively chs. III, IV, V and VI). Each of these is discussed briefly, and but a few comments can be made. Concerning the "Position of Labor" in the pre-Revolution period, Professor Rice states that combinations of workmen for the purpose of bettering their work or payment did not come into existence until the Industrial Revolution, and that it was the factory system in England which crystallized the felt need of the workers for concerted action. By the end of the eighteenth century English common law "had anathematized most forms of concerted economic action to raise prices or wages as criminal conspiracies." (p. 22.) It seems to me that long before the so-called Industrial Revolution there were combinations of workers, and the factory system brought about trade unions as "the" form of concerted action; also, that English common law had condemned these early combinations of workers as conspiracies per se, so that "to raise prices or wages" was of no moment. It was not until the American states, in effect, showed their abhorrence for this doctrine that England followed suit in the 1820's.[6] Furthermore, Professor Rice does not distinguish (p. 23.) between the colonial guilds of master craftsmen (in effect the equivalent of modern trade associations) and the early combinations of wage earners which were prosecuted as conspiracies (pp. 31-32.);[7] nor does he feel that the early "friendly societies" were of any consequence in the development of labor unions.[8]

Political parties and pressure groups before the Revolution are felt by the author to include the "inter-colonial committees of correspondence, initiated by Samuel Adams in 1772," and the "Continental Association, formed by the First Continental Congress in 1774 and designed to implement a policy of nonimportation of British goods," (p. 25.) but these are not to be labelled as insurrectionary associations. Professor Rice also indicates that "subversive in the usual modern sense of the term—that is, which was marked principally by implacable opposition to the very foundations of society," or "which nurture a deeper hostility to the basic norms of society," (p. 26.) is the norm. But had not "the colonists engaged in two revolutions, the first to determine whether there should be any rule from abroad, and the second to determine who should rule at home . . . ."[9] In that day, and under those conditions, the committees and associations were subversive groups.[10] In the subdivision on the

6. See Forkosch, A Treatise on Labor Law § 223 (1953).

7. See, e.g., Forkosch, A Treatise on Labor Law § 95, at 229 n.1 (1953) referring to the error of Brentano as corrected by the Webbs on the English scene.

8. But see the analysis of these in England as methods of avoiding a conspiracy prosecution, Forkosch, Treaties on Labor Law 375 (1953), and in America for the additional purpose of providing insurance benefits so as to build an esprit and a chain to the union. Forkosch, The Legal Status and Suability of Labor Organizations, 28 Temple L.Q. 1 (1954).

9. Forkosch, Constitutional Law 1 (1963).

10. Unfortunately, our biases color our views, but in reading history we cannot utilize today's concepts under present conditions for application to, and interpretation of, prior centuries; in the Revolutionary Era it was the so-called Western Civilization (of England) which was found there and here, and the colonists were not attempting to overturn these principles but, rather, to apply and to expand them here as they saw the light. But while not subversive of these principles, the committees and associations were definitely subversive of the political relationship (and, of course, I use the term here in a different

changes effected by the Revolution the author gives a good, albeit sketchy, view of the disestablishment of churches and the extension of religious freedom (pp. 28-30.), and then goes slightly into the development of labor associations (p. 31.); political parties (p. 32.) and insurrectionary associations (p. 33.) are also dealt with quickly.

The "American Background of Freedom of Association" is concluded with the "Meaning and Effect of the Adoption of the United States Constitution," which is subdivided into the "Constitutional Convention" (p. 34.), the "Terms of the Constitution and the Bill of Rights" (p. 35.), "The Federalist" (p. 37.), and "Tocqueville." (pp. 38-41.) What emerges is the very definite conclusion that all of the Founding Fathers and other politicians felt that associations were as much a part of the new nation as were the states, and, further, that Tocqueville later found existing an even greater degree of association life than could have been foreseen, and that an indispensable (coin-face) function and condition of associations was the number and freedom of the newspapers. Additionally, Tocqueville cautioned that state or federal control of associations was dangerous, but some restrictions were required. Professor Rice concludes with a quotation which, as I see it, sets the tone for and gives the views of this work: "Thus I do not think that a nation is always at liberty to invest its citizens with an absolute right of association for political purposes; and I doubt whether, in any country or in any age, it be wise to set no limits to freedom of association." (p. 41.)

These background preliminaries out of the way, the next four chapters are devoted to association in the fields of religion, labor, politics and subversion. At the outset of his treatment of religion the author distinguishes between, on the one hand, the right to believe or not to believe in a particular religion and to join or not to join it with others, and, on the other, the correlative right to practice outwardly these beliefs (which may conflict "with the duty of the State to maintain peace and order.") (p. 42.) He shortly repeats "that the basic rights of personal religious belief, and to join or not join a religious association, enjoy a practical invulnerability to restriction by the Federal Government or the states." (pp. 47-48.) Immediately, this is followed by, "We now turn to a consideration of the corollaries of those basic liberties." (p. 48.)

The observation may be made that Professor Rice is leaving the constitutional freedom of association, and venturing into the right of such a religious association to practice outwardly what it believes; he calls this a "correlative right," but conditions it by the (correlative?) duty of the state to maintain order. In a sense, therefore, any absolute freedom is now conceded to be, or to become, a conditional one, *i.e.*, the right to practice must now be weighed in a balance with the state's duty and the conditional answer so found. To this reviewer the central point of the volume is given here, namely, that the author does not really assert an absolute but a conditional freedom to practice. Mr. Justice Black, however, has done just this with respect to speech, contending that it is not able to be hemmed in by, for example,

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sense than does Professor Rice) and of the application of certain "rules of law" to them, e.g., quartering of soldiers, taxes, nonimportation, shipping; so too, however, were the Founding Fathers "subversive" of the political arrangements under the Articles of Confederation when they proposed a new arrangement of people, not states, as the base for the United States.

(the correlative obligation of) the laws of slander,[11] and if association is now unconditionally embraced within speech, then it logically follows that it, too, should be so treated; that is, that a corollary of absolute free speech involves the right to be free of the consequences (a slander suit), and so a corollary of absolute religious belief and association also involves the right to be free of the consequences (actions in its support and its propagation). Professor Rice refuses to go this far, accepting the conditional right and seeking to extend it, *i.e.*, to reduce the conditions under which it may be exercised. His examinations of religion, *et al.*, are geared to the analysis of these existing conditions, for without a knowledge of the limitations one cannot attack them. In all of this, and the approach of the author, this reviewer concurs, for the methodology and views of Mr. Justice Black in this area are unacceptable.[12]

Professor Rice's analysis is excellently conceived, and his divisions and subdivisions give his procedure. With respect to associations and religion, he first sets up the general issues and then gives the constitutional provisions which relate to these; then he examines the freedom to support, etc., and not to join or support, religious associations, as well as the freedom not to practice religion, with his own general conclusions winding up the chapter. In his examination of the freedom to support and practice the tenets of religious associations, the author particularizes in subdivisions relating to: 1. Mormons, 2. Jehovah's Witnesses, 3. Other Police-Power Regulations, and 4. Associations and Persons Objecting to Military Service. In examining the "coin-face" freedom not to join or support, two subdivisions are given: 1. The Meaning of the Establishment Clause of the First Amendment, and 2. Public Subsidies to Religious Associations.

In venturing into the past activities of the Mormons, Jehovah's Witnesses and other police-power regulations, as well as the federal attitude towards the conscientious objector, Professor Rice's analysis points up the accommodations which the Supreme Court has sought to make. Some people have castigated the High Bench, some have suggested impeachment, and state judges have denounced the consequences. But, on the whole, and in the light of our history, traditions and desires, the nation has been positively aided in many ways by this somewhat flexible attitude in the area of action. And necessarily so, if the Holmesian concepts (clear and present danger) and illustrations (the fire-in-theatre one) are to be followed.[13] It is, however, when the author next ventures into the exceedingly controversial area of the "support" of religious associations that a degree of hesitancy in drawing particular conclusions, or seeking to follow out the logical inferences of his overall position, is observed. For example, Professor Rice feels that "the semantic difficulties occasioned by the absolutist language of the First Amendment prohibition [against the establishment of religion] and by the restricted historical meaning of an establishment of religion could be mitigated by application of the new freedom of association which is still in a plastic state." (p. 63.) He then examines certain activities, including

11. Black, The Bill of Rights, 35 N.Y.U.L. Rev. 865, 867 (1960).

12. There is, however, much to commend an absolutist conclusion, especially if we look at Russia. Its constitution states that freedom of religious worship and freedom of anti-religious propaganda is recognized for all citizens. The ideal, regardless of agreement or disagreement with it as such, is clear; its effectuation, however, is a series of contradictions.

13. This writer prefers the Hand formula, i.e., a balancing one. See also Rice, Freedom of Association 88 (1962).

the public aid controversy, but does not make any application of his views, and concludes only that the new theory of association, "as at least an alternative rationale" (p. 64.), may be of aid in the solution. Similarly, in examining the sumptuary laws, the author does give us an excellent analysis of the cases, but nothing of a "teeth-entering" conclusory nature. His general conclusions restate, albeit better, what has been said above, namely, that there is an absolutist principle to join or not join a religious association, but that it "does not apply to any act beyond the bare affiliation" (p. 71.); that "the rights to practice . . . and to support [such associations] are subject to reasonable regulation . . ."; that the negative rights not to practice, and involving the sumptuary laws, are "subject to limitation of an uncertain degree . . ."; and finally with respect to the negative right not to support a religious association, that it, too, "is subject to limitation of an uncertain degree. . . ." (p. 72.)

In the discussion on freedom of association and livelihood the accent is on labor unions, but politics and lawyers are not overlooked. There are seven subdivisions, the opening one on "General Issues," and the final one on "General Conclusions." The second, third and fourth concern the historical development of labor associations in this country, the right to join them and the duty to join them. The fifth discusses compulsory membership and freedom of political association, and the sixth takes up the integrated bar.

The historical development of labor in the United States is an excellently compressed summary, as are the subdivisions which follow, but with all of which this reviewer does not fully agree.[14] The summaries give most of the important cases, refer to numerous texts and essays, but leave this reviewer unsatisfied and unfilled. Perhaps it is because a point of view is missing, although perhaps a point of view discolors the facts and produces the theories. Nevertheless, much of Professor Rice's chapter on unions may well be read from one person's point of view. The historic basis for American unionism has been pictured in terms of a struggle against, rather than for, the conspiracy doctrine, for example, or the changing pattern of production. It appears that one should utilize the for, rather than the against, approach, as it is the long-range union desires with which association is here to be discussed. In this sense the conspiracy doctrine is but one pinprick in labor's anatomy,[15] and its early efforts on behalf of free education, for example, should command importance.[16] The laborer's affirmative long-range desires have been primarily for security for himself, and the devil take the hindmost; in this the unions have not only reflected the desires of their members, but also "coin-reflected" the attitudes of their rivals, the entrepreneurs.[17] What I am suggesting is that unions, as associations, are the

14. Professor Rice indicates that because labor unions were unincorporated, and therefore at common law were not recognized as legal entities, they could not be sued; he then says that positive law, i.e., statutes, had to be construed to overcome this. Elsewhere I have pointed out that unincorporated unions were held liable as defendants, in certain instances, but here waiver or estoppel was utilized, or else federal equity receiverships, i.e., the courts, were involved. See note 8 supra.

15. Although, as I have pointed out, a rather deep one at the time, whose effects are still to be found today. See note 3 supra.

16. See Forkosch, A Treatise on Labor Law 261 n.99 (1953) for other reforms for which labor fought, e.g., from imprisonment for debt.

17. For example, this may be seen in modern-day union fears of automation. Statis-

alter ego of their membership; that unions are necessary in the light of history and the projected future; that without these associations the workers cannot attain their goals or better themselves; that so long as countervailing power is required only such associations can function in our present form of democracy; and that any judicial (or legislative) overmuch of impairment of this freedom of association *and* activity renders innocuous labor's lot. From this practical approach the efforts of union leaders, of Congress and of the judiciary over the years can be seen to be corollaries of the concept of freedom of association. And to the degree that the Webbs' "Industrial Democracy" parallels our political democracy, then nonunionists, as members of the working community (the state), may conceivably be required to participate (vote) or pay for union services (taxes).[18] Unions, however, cannot develop into a competing state, nor can any one or more associations of entrepreneurs, and beyond the point of reasonableness (whatever that means generally) labor associations must expect to be controlled in their activities, *e.g.*, external where picketing harms nonparticipants, internal where national policies necessitate.[19] In other words, labor associations are free and yet not free, just as with religious and other associations, depending upon what aspect is involved, *e.g.*, freedom to join voluntarily and to believe, but not freedom to act or compel others to join or to act in all respects.

In his opening paragraph of the chapter on "Freedom of Association and Political Parties and Pressure Groups" Professor Rice indicates that the "election of officials and the administrative conduct of government would be impossible without political parties. Because they are essential, the right to associate in political parties is constitutionally protected, as is the related right to associate in pressure groups which exercise the right to petition the government." (p. 100.) Whether or not impossible, the constitutional theory of our government does not include parties; while their existence has never been denied, even before and during the Philadelphia Convention and the ratifying state conventions, they did not begin to fit into place in our

tically, this process is most rapid where effective unions are found, the members now pressing their unions to demand job security for them, which is another pressure upon employers not to hire, and so forth.

18. This analogy is found in the Supreme Court's decisions on the integrated bar. See Rice, Freedom of Association 97-98 (1962). The right-to-work laws may thus be seen to be an impairment of the activities of labor associations, but the counter to this is the public policy. Professor Rice's analysis and conclusions do not argue from the association idea but seek to resolve the conflicting claims. In this I believe he is not true to his earlier announced effort to see if the association concept may be broadened or used to understand other concepts.

19. The discussion on "Compulsory Membership and Freedom of Political Association" can also be resolved. There Professor Rice concentrates solely upon International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) which involved union shop compulsory membership under the Railway Labor Act, and union expenditures on political causes which were opposed by some members. In Massachusetts v. Mellon, 262 U.S. 447 (1923), the Supreme Court side-stepped a similar approach on the national scene, because of the dollar minuteness and the consequent lack of injury, but on the state level in New York, for example, a taxpayer's suit permits this. In other words, the political-individual analogy permits the inference to be drawn that, assuming judicial relief is able jurisdictionally to be rendered, the judiciary will intervene in this area.

scheme of political government until a decade or two after the adoption of the Constitution. Thus it would appear that historically, at least, political parties were not thought of as requiring constitutional protections, and this includes the Bill of Rights. Professor Rice agrees with this, for his first sentences on the right to form political parties give such general background and the legal development of the right. However, all this is not of significance, for without political parties today our federal government would find it rough going. Regardless, the author cautions that "the issue of the right to form a party is practically always translated into the issue of the right to place that party on the ballot. In examining the right of access to the ballot . . . therefore, we will see the practical extent to which the right to form a political party is subject to qualification and limitation." (pp. 101-02.) In effect, this approach rejects the absolutist view and accepts the relativist one.

The right to form and join pressure groups, however, may be traced to the right of petition, but the author feels this right, while "not absolute, is fundamental and constitutionally protected." (p. 108.) It would thus appear that since a direct relation with a constitutional clause is now found, which was not the case with respect to political parties, then this right concerning pressure groups is, or may well be, an absolute one. Again, Professor Rice concludes that while the *Patterson* case upholds the right to form and join pressure groups, the activities of that (incorporated) association are subject to restrictions, *i.e.*, that no overall absolute is found in this area of external activity (I exclude, of course, reference to illegalities). The author does refer to a suggestion concerning barratry statutes which have been used to prevent the NAACP from seeking out clients, but this adopted suggestion concerns the seeking of desirable social gains and the concept of equality rather than as an included right under associational freedom.[20]

In his final and longest chapter, on "Freedom of Association and Subversive Associations," Professor Rice defines these groups as hostile "to the basic values of our society." (p. 120.) It is this reviewer's feeling that if any basic constitutional "freedom to engage in association" is to be furthered and expanded, it is in this area that significance can be attained; as originally noted, Mr. Justice Harlan's language is to engage in association "for the advancement of beliefs and ideas," and these beliefs and ideas were not qualified or otherwise defined. As quoted by Mr. Justice Brandeis (concurring, with Mr. Justice Holmes joining him), "you really believe in freedom of speech [association], if you are willing to allow it to men whose opinions seem to you wrong and even dangerous. . . ."[21] If limitation to what Professor Rice mentions in his opening sentence occurs, namely, "the integrity and desirability of their aims" (p. 120.), then at the outset he must concede that it is he (or the Supreme Court) who passes upon these aims in the light of background, and so forth.

But why does the author limit his examination to a certain few associations? He feels that "subversive" is too "vague and shifting" a term and so he treats as subversive only those associations which have been the targets of major legislative or administrative restriction. He calls this a "pragmatic approach," and will "not endeav-

20. See NAACP v. Harrison, 202 Va. 142, 116 S.E.2d 55 (1960), cert. granted, 365 U.S. 842 (1961).

21. Scrutton, L. J., Rex v. Secretary of Home Affairs, 2 K. B. 361, 382 (1923), in Whitney v. California, 274 U.S. 357, 377 n.4 (1927).

or to formulate an independent substantive definition of a subversive association." (p. 121.) But has not the author given just such a definition, albeit a vague one, in saying these associations are hostile to the basic values of our society? The difficulty is that Professor Rice then turns to Webster for a definition of "subvert," which is a verb and not an adjective. This distinction, it is submitted, is meaningful; Southerners who fought in the Civil War were subversives, but of a kind not embraced within the basic values standard, for they, too, desired the overall same kind of society as did the Northerners, but with a degree of federalism incompatible with the desires of the latter (and when they lost they were treated as having engaged in "insurrection or rebellion" and as "enemies" and disabled in many respects, as in the fourteenth amendment, section 3). Perhaps it may be argued that the South was the one which desired to retain the (earlier) basic values, and the North which sought to overthrow these. Much along these lines could be developed, but it suffices to ask, were the proponents of the sixteenth, or eighteenth, or other amendments, hostile to basic values? Or did the values of our "society" not then include a degree of freedom to decide, each for himself, the liquor question? Why then was the twenty-first amendment required? Do basic values include religious freedom? But is not the question really one of the degree of toleration? And is not the same true for speech, publication, motion pictures (also a part of free speech), picketing,[22] and so on? Why seek to define a verb when, as with all these others, no agreement is had with the noun (or adjective) until it is sought to effectuate (the verb) the term? It would appear that Professor Rice's approach in previous chapters will also be found in this.[23]

In his opening comments Professor Rice stated his purpose in this chapter was to determine whether a right exists to associate for subversive ends "and to note the disabilities which the individual may incur by so associating."[24] It seems to me that here the heart of the past and the present is to be found, and that is not the right to associate for subversive ends but what happens to the individuals who do so. The right to associate for these ends is one thing, whereas the right to activate these associational ends is another, or, as pointed out above, it is the distinction between the noun and the verb. As the author has disclosed, these verbs contain counter verbs, but the nouns do not or should not—except, that is, when the Communist Party is involved. Again, for clarity, I speak solely of the (innocuous?) noun, not effectuated beyond the mere act of associating, and without anything added.[25]

22. On motion pictures, see Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), overruling past decisions and holding these to be a form of free speech; on picketing, see discussion and analysis in Forkosch, A Treatise on Labor Law §§ 193-99 (1953).

23. Professor Rice states it is his "purpose here, building upon those principles hereinbefore discussed in relation to other associations, to determine whether there is a right to associate for subversive ends . . . ." Rice, Freedom of Association 120 (1962).

24. "A further question is whether the right of subversive association is, like the associational rights hereinbefore discussed, an independent constitutional right or whether it really is only a less than fundamental product of the restraints imposed upon government by due process and other constitutional guarantees." Ibid.

25. If it be argued that this is impossible because the individuals must speak among themselves, and now they activate their beliefs and must thereby further their ends, then of course nothing much can be said to counter these views; when extremes are

The discussion on the laws which began in 1798, continued through the Civil War and into our two world wars, is of great interest and well compressed. He gives us the flavor of the day and some of the reasons behind these counter statutes. While not agreeing fully with him in his analysis,[26] these are well done and generally sound, and his discussion of the cases is complete. It is when the Communist Party and its members (past or present, actual or implied) are discussed that Professor Rice's pages really shine. He gives a most excellent analysis of the overall problems involved in free speech (association) and its relation to "subversion," to "subvert," and to hysteria.

The initial case is *Dennis v. United States*,[27] and Professor Rice points out immediately that no one, whether as counsel on either side or as the writer of one of the five opinions, raised the question of freedom of association, but all "five opinions emphasized the freedoms of speech and press and the issue of a clear and present danger." (p. 139.) The plurality-majority rejected "the contention that the power of Congress to regulate the unlawful advocacy depends upon the 'success or probability of success' of the subversive movement" (p. 139.), while Mr. Justice Frankfurter wrote that " 'no government can recognize a "right" of revolution, or a "right" to incite revolution if the incitement has no other purpose or effect.' " (p. 140.) Mr. Justice Jackson argued against "the coordinated activities of 'an aggressive international Communist apparatus,' the strength of which is in 'selected, dedicated, indoctrinated, and rigidly disciplined members,' " and desired to limit the clear-and-present-danger test "to the sort of case where 'the issue is criminality of a hot-headed speech on a street corner, or circulation of a few incendiary pamphlets, or parading by some zealots behind a red flag, or refusal of a handful of school children to salute our flag,' . . . ." (p. 140.) Justices Black and Douglas "dissented separately, finding no sufficient clear-and-present danger to justify the restriction on free speech involved in the act." (p. 140.)

In effect, all that Professor Rice has done with the *Dennis* case is what has just been quoted above, that is, he embellishes slightly but adds nothing save a comment that although it did not involve membership in the Communist Party "it is instructive as a modern example of the use of a criminal conspiracy statute to restrain subversive association." (p. 140.) To this reviewer it would appear that *Dennis*, in effect, determined the subsequent cases, because even Mr. Justice Jackson made an exception for the Communist Party, and all the Justices of the majority granted to Congress power to strike at the Party *qua* association; even the dissenters did not specifically reject this overall attitude, feeling that until the point of no return was reached, *i.e.*, where the clear-and-present-danger test could be held applicable, these (hot-air) members in an (ineffectual) organization could not be stopped. But the major point of the case, for our purposes, is that the Communist Party as an association was felt by five Justices (the majority of four plus Jackson)

drawn, and silly views urged to counter the right even calmly to speak and to discuss solely for ideational purposes, then the comment by Mr. Justice Holmes in Buck v. Bell, 274 U.S. 200 (1927), is apropos: "It is the usual last resort of constitutional arguments to point out shortcomings of this sort." Id. at 208.

26. See, e.g., Forkosch, Constitutional Law §§ 356-60 (1963) on some degree of background analysis which involves the Ku Klux Klan.

27. 341 U.S. 494 (1951).

to be itself "'an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis.'" (p. 140.) What these five Justices did, therefore, was to equate the Party with, for example, the Mafia, or the Thugs, and make it illegal per se; then, since present and knowing membership in such an association had to imply compatibility with its (illegal) ends (and methods), it did not require an overmuch of logic to conclude that, in *Dennis*, the individuals were guilty. This meant that an association per se could be held a conspiracy per se, *i.e.*, that the Party was per se illegal.

But how could this approach comport with any doctrine of relativism, as we have previously discussed? The very basis for relativism is that facts become the key to the determination, so that if facts are excluded we are in the field of absolutes. So, if in fact an individual member of the Communist Party was there because of ideological curiosity, sympathy, or even acquiescence, it was the idea and not its translation into present activity which intrigued him. How many bull sessions do sophomores hold in which they prove and disprove the existence of a God, or overthrow their college administration, or even overthrow the government? Against these consequences, and in the light of these concepts, a reasonable libertarian would have to concede that mere talk is cheap, and that merely associating for this purpose is not to be condemned—albeit leaving open, for a factual showing, the contrary.

Thus, by 1957 when *Yates v. United States*[28] was decided, and with a line-up which found Mr. Chief Justice Warren replacing Mr. Chief Justice Vinson, and Justices Reed and Minton having retired but Justices Brennan and Whittaker not participating because argument had been had before they were commissioned, it could be hopefully foretold that some talk was indeed cheap, and this is what to some extent did occur, although the majority also felt "that attendance by some defendants at otherwise lawful and orderly meetings of the Communist Party constituted, as to them, a sufficient 'overt act' to warrant a conspiracy conviction." (p. 142.) But the tendency here is shown, and this especially when "Mr. Justice Black hinted at the problem of association involved when he noted the apparent contradiction between this ruling, attaching a species of criminal liability to mere attendances at a lawful meeting, and *DeJonge v. Oregon*." (p. 142.) Thus, in 1958, the Supreme Court could well write that freedom to engage in association for the advancement of beliefs and ideas is a part of free speech although, because of its decisional background it could, even in 1961, reject the application of this new freedom in *Scales v. United States*[29] and *Noto v. United States*.[30] But even in this rejection the majority indicated that an association could embrace both legal and illegal aims, and a blanket prohibition would indeed create a real danger that legitimate political expressions *or association* would be impaired. In other words, when the licit and the illicit were found simultaneously occurring, then the Government could strike at the latter, with the former entitled to constitutional protections unless (and this is where the practical problems occur) the licit is so intertwined with and inseparable from the illicit that it, too, must also fail. It is this legal problem of proof which confronts the practitioner, the Government and the courts, and Professor Rice properly remarks that "the problem of proof in this connection is formidable. The court's analysis

28. 354 U.S. 298 (1957).
29. 367 U.S. 203 (1961).
30. 367 U.S. 290 (1961).

and the explicit language of Section 4(f) of the Internal Security Act of 1950 would prevent a deduction, from the mere fact of membership, that such a member possessed the requisite guilty knowledge and intent." (p. 145.)

In his last chapter, "Basic Principles" of the freedom of association, the author states that "freedom of association, as described hereinbefore, is a fundamental constitutional right, at least so far as association for the advancement of beliefs and ideas is concerned." (p. 176.) Then, later, he agrees that "the fundamental freedom to join and support associations, and to practice their precepts, can be qualified in the interest of public order. . . ." (p. 177.) If this is so then he must agree further that "although there is a fundamental general freedom of association, there is no constitutional freedom of subversive association. There is, however, a reflected right of subversive association which is of a subconstitutional order." (p. 177.) But this leaves the reviewer in a quandary—can there be just a little bit of a constitutional right or freedom? If it does exist as a freedom, then must it not be given the same treatment as the others get? There can be no hierarchy of freedoms.

What is meant is that we are giving this constitutional freedom of association to all "good" groups, and withholding it from "bad" ones; and, furthermore, we will determine what is and what is not, and when and when not, and under what circumstances, a group is "bad." If this be the constitutional freedom of association then at least it should be so stated, not overcast with a tarnished aura of constitutional semantics. To this reviewer it appears as if the Supreme Court has found itself impaled upon the horns of a dilemma and has sought to extricate itself through the device of factual proof. Perhaps this compromise is a correct one, perhaps not. It depends upon the individual. Principles may be effectuated in a totalitarian society without fear of consequence; in a democracy such as ours the effectuation is generally a compromise. So here, the principle of freedom of association is upheld, but its effectuation is compromised; where good associations are involved then "all" freedom is upheld, but with bad ones "some" freedom is withheld.

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Doing Business Abroad. Edited by Henry Landau. New York City: Practising Law Institute. 1962. 2 Vols. Pp. xxviii, viii, 732. $25.00.

This impressive work is the outgrowth of a forum conducted by the Practising Law Institute in New York in 1961 which, as stated in the foreword, was attended by more than 500 lawyers who practice in thirty-two states.

The papers read at the forum were revised for publication and the book contains some valuable additional papers. The work, as it stands, represents "the learning and extensive practical experience of 23 lawyers who have for many years specialized in the various phases of the problems which arise when an American industry does business abroad." (vol. 1, p. xxiii.)

Of these twenty-three authors, sixteen are practicing lawyers; three are executives of large American corporations; three are professors of law; and one holds the rank

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of Director in the Internal Revenue Service. Thanks to such a pooling of knowledge and experience it was possible to discuss the varied and intricate problems of doing business abroad in general, and in a certain number of European, Latin-American, African and Asian countries in particular.

The activities of American corporations which export American goods to foreign countries or invest their capital, patents and technical assistance to create enterprise abroad have expanded tremendously since World War II. This economic expansion has presented American business and its lawyers with many new legal problems dealing with foreign and international law as well as domestic law, especially tax law. An adequate technique of handling these manifold legal probems, some of which involve serious economic repercussions, must be devised by a legal profession which throughout its history has been almost exclusively thinking and acting in terms of its own law.

Until after World War II there were very few American law firms with offices outside the United States; there were also few which had regular contact with their professional colleagues abroad. In this respect there has been a significant change. Therefore, the interest of the work under review is not limited to a narrow circle of highly specialized law firms and attorneys, but extends to a large segment of the profession. The recent broadening of interest of American lawyers in legal difficulties encountered by American corporations and individuals doing business abroad is evidenced by the appearance in the United States, in recent years, of an increasing number of books,[1] law review articles and other publications dealing with international problems. There has also been a striking increase in the number of law school courses in the field—an area almost totally neglected in the curriculum a generation ago.

The material set forth in these two volumes is divided into fifty-four subdivisions, each presented by one of the contributing authors, some of whom offer more than one paper. Of these contributions seven deal with incentives and obstacles to foreign investment; two with labor problems; fourteen with legal aspects of business organization abroad, more specifically with partnerships and corporations created by Americans abroad or in which American business participates in various ways; two with the financing of foreign operations by various United States governmental, international or foreign agencies; seven with antitrust laws in foreign countries and with the foreign impact of the United States antitrust laws; two with analysis of basic civil law concepts and foreign litigation; two with state trading and sovereign immunity; fifteen with various problems of taxation, including that of foreign base corporations; and three with foreign licensing. The work ends with a skillfully drawn checklist of legal questions to be kept in mind when doing business abroad, an exhaustive bibliography and an index.

The book should be read with one eye on the more recent developments in the European Common Market. In the opinion of this reviewer, a chapter on the European Common Market and its effect on doing business abroad by Americans would

1. See, e.g., Legal Aspects of Foreign Investment (Friedmann & Pugh eds. 1959); 1-4 Southwestern Legal Foundation, Proceedings of the 1961 Institute on Private Investments Abroad and Foreign Trade (1959-1962); Katz & Brewster, Cases on International Transactions and Relations xl-xliv (1960) (bibliography); Landau, Doing Business Abroad at 656-700 (bibliograhy).

have been welcome, as would a discussion of the recent efforts toward the unification of some portions of Western European business law. Protection of American foreign private investment from confiscation and similar measures is a most important subject which, if included, would have completed the entire picture.

The Bar is much indebted to the Practising Law Institute, to the distinguished and able editor, Henry Landau, and to the twenty-three contributors to this publication. It will be a useful addition to any law library. Obviously, a work of such large scope covering a worldwide field cannot and does not pretend to be encyclopedic. However, its authors have touched upon the outstanding legal problems confronting American businessmen abroad and have contributed greatly to the American lawyer's and businessman's understanding of these problems and their ability to discuss them with foreign legal experts.

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