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BOOKS REVIEWED

Law, Liberty and Morality. By H. L. A. Hart. Stanford: Stanford University Press. 1963. Pp. 88. \$3.00.

Law, Liberty and Morality is an essay by H. L. A. Hart that originated as the 1962 Harry Camp Lectures presented at Stanford University.

A Professor of Jurisprudence at Oxford University, the author discusses the relationship between law and morals. He formulates the discussion around certain questions: Is the fact that certain conduct is by common standards immoral sufficient to justify making that conduct punishable by law? Is it morally permissible to enforce morality as such? Ought immorality as such to be a crime?

The inspiration for the discussion is obviously the Wolfenden Report,¹ which was presented to the British Parliament in September, 1957 by a committee drawn from the clergy and from the fields of medicine, sociology, psychiatry and law, the chairman of which was Sir John Wolfenden, C. B. E. The Wolfenden Committee had been charged with considering the state of criminal law relating to both prostitution and homosexuality. Written in nontechnical language, the report is an important work of general interest, and of particular interest to those concerned with a sound philosophy of the criminal law. Interest in the report has been renewed by the Profumo scandal.

As to homosexuality, the Committee recommended that homosexual practices between consenting adults in private should no longer be a crime;² as to prostitution they recommended that, though it should not itself be made illegal, legislation should be passed to drive it off the streets on the ground that public soliciting was an offensive nuisance to ordinary citizens.³ The principles underlying these recommendations are set forth in Section 13 of the Committee's Report as follows:

[The] function [of the criminal law], as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, [or] inexperienced. . . .⁴

Professor Hart says that these principles "are strikingly similar to those expounded by Mill in his essay 'On Liberty'"⁵ one hundred years ago.⁶ He refers in particular to Mill's observation that "the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others."⁷

Mill's position has twice been sharply challenged—the first time by Sir James Fitzjames Stephen, the great Victorian judge and historian of the common law;⁸

1. Report of the Committee on Homosexual Offenses and Prostitution (Authorized American ed. 1963).

2. *Id.* at 48.

3. *Id.* at 155-57.

4. *Id.* at 23.

5. Hart, *Law, Liberty and Morality* 14 (1963).

6. Mill, *On Liberty* (1859).

7. Hart, *op. cit. supra* note 5, at 4 (quoting Mills, *On Liberty* ch. I).

8. Stephen, *Liberty, Equality, Fraternity* (2d ed. 1874).

the second by Lord Devlin, a member of the present House of Lords, in his essay *The Enforcement of Morals*.⁹ Both argued that the use of the criminal law to enforce morality was justified.

A considerable portion of the essay deals with Mill and criticisms of his philosophy. After examining their arguments in detail the author demonstrates that the critics fail to recognize distinctions of vital importance for legal political theory, and that they espouse a conception of the function of legal punishment that few would now share.

Professor Hart's assumption that the principles underlying the recommendation of the Wolfenden Report are based on Mill's essay is, however, not supported by any evidence. They are more likely derived from the Thomistic philosophical concepts that the function of criminal law is limited, that primarily human law should implement the moral law only where violations thereof affect the common good, and that sanctity will always remain an individual affair.¹⁰ At the request of the committee, seven Catholic clergymen and laymen appointed by the late Bernard Cardinal Griffin, Archbishop of Westminster, submitted a report¹¹ which advised, among other things:

It is not the business of the State to intervene in the purely private sphere but to act solely as the defender of the common good. Morally evil things so far as they do not affect the common good are not the concern of the human legislator. . . . Sin as such is not the concern of the State but affects the relations between the soul and God. . . . Attempts by the State to enlarge its authority and invade the individual conscience, however high-minded, always fail and frequently do positive harm. . . .¹²

Whatever the origin of the Wolfenden principles, it is the failure to apply them, not only in legislating as to sex deviation but to antisocial conduct generally, that is the great weakness of the criminal law in the United States.

JOHN M. MURTAGH*

Freedom of Speech and Press in America. By Edward G. Hudon. Washington, D.C.: Public Affairs Press. 1963. Pp. xiv, 224. \$4.50.

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." These simple words of the first amendment to the Constitution, as was suggested by Benjamin N. Cardozo many years ago with respect to the great generalities of the Constitution, "have a content and a significance that vary from age to age."¹ In this unusually scholarly volume on the evolution of the first amendment doctrine in the United States Supreme Court, Dr. Edward G. Hudon, assistant

9. Devlin, *The Enforcement of Morals* (1959).

10. 2 Farrell, *Companion to the Summa* 393-411 (1939).

11. *Homosexuality, Prostitution and the Law: The Report of the Roman Catholic Advisory Committee*, 230 *Dublin R.* 57 (1956).

12. *Id.* at 61.

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1. Hudon, *Freedom of Speech and Press in America* 167 (1963), quoting Cardozo, *The Nature of the Judicial Process* 17 (1921).

librarian of that Court, traces the variance in the meaning of those prohibitions over the years.

The rights of freedom of speech and press have acquired a greatly enhanced importance in American life today because of the temper of the times and the expanded media of communication—and because of the application of the first amendment prohibitions to the states through the instrumentality of the fourteenth amendment.² With the increase in importance of the rights, the need for basic standards by which to measure their scope has become urgent. There has been considerable judicial vacillation, owing in no small measure “to the lack of a basic philosophy to serve as a stabilizing influence”³ in the Court’s interpretations.

After the commotion engendered by the Alien and Sedition Acts of 1798⁴ had subsided,⁵ the application of the first amendment prohibitions lay quiescent for many decades, until the twentieth century—in particular, until the extension of the prohibitions to the states by the Supreme Court in 1925.⁶ In this century, the quest for the true meaning of the rights, in an ever-increasing number of cases, has found an answer first in one theory and then in another.

In the World War I Espionage Act cases⁷ and the State Criminal Syndicalism Act cases,⁸ the theory of “use-abuse” or “liberty versus license” was devised, invoking a distinction between freedom of speech and press that was considered “right” and freedom of speech and press that was considered “wrong.” The inflexibility of this theory and its quite severe restraint on speech and press contributed to its being supplanted by a less rigid standard—the “clear and present danger” doctrine which was originated by Holmes and Brandeis in minority⁹ and concurring¹⁰ opinions even while “use-abuse” was still being applied. But this doctrine was held in abeyance during the 1930’s while Charles Evans Hughes was Chief Justice, and the Old English concept of “previous restraint” was resorted to,¹¹ as it is even today when no other theory is deemed appropriate.¹²

During the 1940’s “clear and present danger” predominated in an atmosphere

2. E.g., *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Gitlow v. New York*, 268 U.S. 652 (1925).

3. *Hudon*, op. cit. supra note 1, at 172.

4. Act of June 18, 1798, ch. 54, 1 Stat. 566; Act of June 25, 1798, ch. 58, 1 Stat. 570; Act of July 6, 1798, ch. 66, 1 Stat. 577; Act of July 14, 1798, ch. 74, 1 Stat. 596.

5. There is no specific point in time when the furor died down. The Sedition Act expired March 3, 1801. See *Hudon*, op. cit. supra note 1, ch. V.

6. *Gitlow v. New York*, 268 U.S. 652 (1925).

7. *United States ex rel. Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407 (1921); *Pierce v. United States*, 252 U.S. 239 (1920); *Schaefer v. United States*, 251 U.S. 466 (1920); *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919); *Masses Publishing Co. v. Patten*, 246 Fed. 24 (2d Cir. 1917).

8. *Fiske v. Kansas*, 274 U.S. 380 (1927); *Whitney v. California*, 274 U.S. 357 (1927); *Burns v. United States*, 274 U.S. 328 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Gilbert v. Minnesota*, 254 U.S. 325 (1920).

9. *Gitlow v. New York*, supra note 8, at 672.

10. *Whitney v. California*, 274 U.S. 357, 372 (1927).

11. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

12. *Smith v. California*, 361 U.S. 147 (1959).

which accorded civil rights a "preferred position."¹³ It was extended to cases involving picketing,¹⁴ the activities of Jehovah's Witnesses,¹⁵ contempt of court,¹⁶ and even provocative speeches under circumstances bespeaking disorder and animosity.¹⁷ Throughout, Mr. Justice Frankfurter expressed his objection to the application of "a literary phrase not to be distorted by being taken from its context,"¹⁸ which he believed Holmes never intended to be "a technical legal doctrine or to convey a formula for adjudicating cases."¹⁹ The doctrine of "clear and present danger" had served satisfactorily in cases where the accused had acted generally in good faith; but in the 1950's, the communist conspiracy cases involving designs upon the national security demonstrated its inadequacy. The Court—or, at any rate, five of nine Justices²⁰—turned to the theory of "balancing of interests" despite serious objections by the dissenting members.²¹ The present trend seems to be away from "balancing" in favor of "toning down" first amendment issues and treating them as questions of evidence.²²

Dr. Hudon believes that the lack of a basic philosophy regarding the first amendment has not been caused by "insufficient data by which to determine the interests entitled to protection under it."²³ He believes that adopting the technique of recourse to the legislative history, used so extensively today in construing statutes to determine the "intent" of Congress, would reveal the natural-law environment in which the Constitution and the first amendment found expression, and provide a basis for a stabilized interpretation. This would not entail an adherence to the natural law on the part of the Court any more than it now requires the Court to support the arguments upon which the Congress has been persuaded to enact a particular law. Those arguments simply explain what the Congress intended by its enactment—which binds the Court as well as the parties.

The first amendment, as part of the Bill of Rights, was intended to make the Constitution itself more acceptable by spelling out the "inalienable rights" referred to in the Declaration of Independence and generally considered "natural." The Founding Fathers' belief in the doctrine of natural rights, a secularized version of natural law, explains the intent of the first amendment and supplies a norm for its interpretation. The rejection by the Court of the data available to show the

13. Hudon, *op. cit.* supra note 1, at 87.

14. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

15. *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

16. *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941).

17. *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Thomas v. Collins*, 323 U.S. 516 (1945).

18. Hudon, *op. cit.* supra note 1, at 108, quoting Mr. Justice Frankfurter in *Pennekamp v. Florida*, 328 U.S. 331, 353 (1946) (concurring opinion).

19. *Ibid.*

20. Justices Frankfurter, Clark, Harlan, Whittaker and Stewart.

21. *Braden v. United States*, 365 U.S. 431 (1961); *Wilkinson v. United States*, 365 U.S. 399 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Uphaus v. Wyman*, 360 U.S. 72 (1959).

22. *Garner v. Louisiana*, 368 U.S. 157 (1961).

23. Hudon, *op. cit.* supra note 1, at 172, quoting Nutting, *Is the First Amendment Obsolete?*, 30 *Geo. Wash. L. Rev.* 167, 171 (1961).

"harmonizing sentiments of the day"²⁴ that existed when the amendment was adopted is the pre-eminent cause of the failure to achieve an enduring norm.

In his introduction, Morris L. Ernst deprecates Dr. Hudon's belief in natural law, stating that "for a nonworshiper like me, this approach seems to be nothing but a bit of metaphysics,"²⁵ but he frankly acknowledges that the volume, which he describes as being in the tradition of Zechariah Chafee, caused him to debate with himself his own attitudes.

The volume, described by Mr. Justice Douglas as "in many respects the best analysis in English of the anatomy of our First Amendment rights,"²⁶ is sufficiently documented to satisfy the lawyer and scholar, yet not so technical as to discourage the layman.

In the words of Mr. Justice Douglas, "It is good that this book is available."²⁷

CHARLES J. ZINN*

The Emergence of the Modern Regulatory State. By James E. Anderson. Washington, D.C.: Public Affairs Press. 1962. Pp. xii, 172. \$4.50.

This history deals with the years 1887 through 1917, the period which saw the birth and first maturity of our national regulatory state. The purpose of the work, as stated in the preface, is "to examine the various ideas on regulation expressed during this era, the major patterns of thought existent, and the objectives of actual or proposed regulation," with a view to "a better understanding of economic regulation and its ideological environment, both during the era studied and the years since."¹ The sources employed are the *Congressional Record*, congressional hearings and committee reports, Supreme Court cases, reports of independent regulatory commissions, speeches and writings of government officials, books and articles by scholars and popular writers, and publications of business associations. From these the author has compiled a catalogue of ideas concerning, and the objectives of, economic regulation current during the period under discussion. This perhaps serves to give one the flavor of the matter, as a survey of English literature might do for that subject, without, unfortunately, affording any great understanding. A survey can cover a lot of ground, of course, but this is done at the expense of depth. Dr. Anderson's book is a survey, listing under appropriate headings a great many ideas concerning economic regulation. These ideas are stated summarily: A senator said this in a speech; an industrialist that; President Wilson something else. But a list is, after all, only a list. It requires a critical analysis of ideas and their implications to afford understanding. Thus, a short work can tell us a great deal about the modern state because, rather than merely cataloguing details, it looks for mean-

24. Hudon, op. cit. supra note 1, at x, quoting the Writings of Thomas Jefferson 118, 119 (memorial edition 1904).

25. Hudon, op. cit. supra note 1, at viii.

26. Id. at v.

27. Ibid.

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1. Anderson, Preface to *The Emergence of the Modern Regulatory State* at ix (1962).

ing.² Unfortunately, Dr. Anderson did not choose to analyze the thoughts he presented. Consequently the value of his book is limited. It does not give us the better understanding of the regulatory state that was intended.

EARNEST EARL PHILLIPS*

2. Hoffman, *The Spirit of Politics and the Future of Freedom* (1950).

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