Fordham Law Review

Volume 40 | Issue 1 Article 7

1971

Book Reviews

BOOKS REVIEWED

Riparian and Littoral Rights. By Carroll Dunscombe. New York: The William-Frederick Press. 1970. Pp. 84. $3.00.

As its title suggests, *Riparian and Littoral Rights* by Carroll Dunscombe is primarily a study of the rights of waterfront property owners in navigable waters. Although Mr. Dunscombe emphasizes Florida law, there are ample references to the laws of other jurisdictions to provide the reader with an overall national view. However, since no text of less than one hundred pages can give more than a brief overview, *Riparian and Littoral Rights* should be regarded as a starting point for further research rather than as a definitive treatise.

The author begins by distinguishing riparian and littoral rights: the owner of riparian property—land which is bound by the shore of an inland navigable river or lake—has various rights in the waters; the owner of littoral property—land which abuts on an ocean or gulf—has no rights beyond the high-water mark. The navigable character of waters is determined principally by reference to their ability to sustain commerce,[1] although federal courts will consider the effect of reasonable improvements in their determination of navigability.[2] The author devotes several chapters to a consideration of the interests reserved to riparians alone, such as consumptive use rights, view, and accretion.[3] He also discusses those rights such as fishing, swimming, and boating, which are held in common with the public[4] as well as loss of riparian rights by means of adverse possession, prescription or physical erosion of the land.[5]

Most of the book is concerned with the legal aspects of dredging and filling. Since states frequently grant riparian owners the right to fill out to the channel,[6] it is possible for many owners to obtain the full benefit of their location by

1. See, e.g., Marine Stevedoring Corp. v. Oosting, 398 F.2d 900 (4th Cir. 1968), rev'd on other grounds sub nom. Nacirema Co. v. Johnson, 396 U.S. 212 (1969); Wisconsin Pub. Serv. Corp. v. FPC, 147 F.2d 743 (7th Cir.), cert. denied, 325 U.S. 880 (1945); In re River Queen, 275 F. Supp. 403 (W.D. Ark. 1967); United States v. 2,899.17 Acres, 269 F. Supp. 903 (M.D. Fla. 1967); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909); People ex rel. Erie R.R. v. State Tax Comm'n, 266 App. Div. 452, 43 N.Y.S.2d 189 (3d Dep't 1943), aff'd, 293 N.Y. 900, 60 N.E.2d 31 (1944).

2. E.g., United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); Rochester Gas & Elec. Corp. v. FPC, 344 F.2d 594 (2d Cir.), cert. denied, 382 U.S. 832 (1965); Davis v. United States, 185 F.2d 938 (9th Cir. 1950), cert. denied, 340 U.S. 932 (1951); Pennsylvania Water & Power Co. v. FPC, 123 F.2d 155 (D.C. Cir. 1941), cert. denied, 315 U.S. 806 (1942). See also People v. System Props, Inc., 2 N.Y.2d 330, 141 N.E.2d 429, 160 N.Y.S. 2d 859 (1957), modifying 281 App. Div. 433, 120 N.Y.S.2d 269 (3d Dep't 1953).

3. C. Dunscombe, Riparian and Littoral Rights, chs. 9, 17, & 21 (1970) [hereinafter cited as Dunscombe].

4. Id., chs. 11-12.

5. Id., chs. 7-8, 16.

6. Id. at 6. See generally United States v. Smoot Sand & Gravel Co., 248 F.2d 822 (4th Cir. 1957); Norfolk Dredging Co. v. Radcliff Materials, Inc., 264 F. Supp. 399 (E.D. Va. 1967).

taking whatever steps are necessary to reach navigable waters. The right to fill out to the channel, however, is subject to superior governmental authority. For example, in the exercise of its commerce power, the federal government can regulate and even prohibit dredge and fill operations in federally designated navigable waters. By use of the public trust doctrine,[7] under which the sovereign holds the submerged beds under navigable waters in trust for the benefit of its citizens, the states may also restrict the riparian owner's right to fill. Since the federal government acquired submerged beds from Great Britian and Spain subject to a "public trust" and conveyed them on the same terms to the states upon their admission to the Union,[8] an argument can be made that alienation of these sovereign lands by the states to riparian owners may violate the public trust doctrine.

Mr. Dunscombe takes the position that littoral owners have no right to fill since their property interests do not extend beyond the high-water-mark.[9] He interprets the California Tidelands decision[10] as excluding any state claims beyond the high-water-mark, thus prohibiting any grants to the beds of such waters to littoral owners.

Those readers who are unfamilar with water rights are cautioned that some of the general statements in the book may not accurately reflect the law in every jurisdiction. This is particularly true of the right to fill, which is often subject to statutory regulation. The common law consumptive use doctrines have been modified by statute in some states,[11] and the right of accretion has been similarly limited in others.[12] Furthermore, development rights may also be subject to local zoning ordinances.[13]

In addition, events subsequent to the publication of this book may qualify

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7. For a discussion of the public trust doctrine see Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892); McDowell v. Trustees, 90 So. 2d 715 (Fla. 1956); State v. Nichols, 241 Iowa 952, 44 N.W.2d 49 (1950); Nugent ex rel. Collins v. Vallone, 91 R.I. 145, 161 A.2d 802 (1960); City of Madison v. Tolzman, 7 Wis. 2d 570, 97 N.W.2d 513 (1959). See Sax, The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970).

8. See generally United States v. Holt Bank, 270 U.S. 49 (1926); Shively v. Bowlby, 152 U.S. 1 (1894); McKnight v. Broedell, 212 F. Supp. 45 (E.D. Mich. 1962); State v. Longyear Holding Co., 224 Minn. 451, 29 N.W.2d 657 (1947).

9. Dunscombe 1.

10. United States v. California, 332 U.S. 19 (1947), noted in 14 Brooklyn L. Rev. 118 (1948) and 35 Calif. L. Rev. 605 (1947) and 5 Wash. & Lee L. Rev. 85 (1948). For a thorough discussion of this decision see Naujoks, Title to Land Under Navigable Waters, 32 Marq. L. Rev. 7 (1948); Sullivan, The Tidelands Question, 3 Wyoming L.J. 10 (1948).

11. E.g., Iowa Code Ann. §§ 455A.1-.39 (Supp. 1971); Kan. Stat. Ann. §§ 82a-701 to -725 (Supp. 1970). See also Heath, Water Management Legislation in the Eastern States, 2 Land & Water L. Rev. 99 (1967); Plager & Maloney, Emerging Patterns for Regulation of Consumptive Use of Water in the Eastern United States, 43 Ind. L.J. 383 (1968).

12. E.g., Fla. Stat. Ann. § 253.151 (Supp. 1971).

13. See, e.g., MacGibbon v. Board of Appeals, 347 Mass. 690, 200 N.E.2d 254 (1964).

some of the principles discussed therein. In particular, the effect of the *Zabel*[14] case and the enactment of the National Environmental Policy Act[15] on the issuance of dredge and fill permits by the United States Army Corps of Engineers must be evaluated. Whereas formerly protection of navigation was the only concern, it now seems that environmental interests must also be considered. This change in policy may substantially limit the riparian owner's right to fill. Moreover, a growing body of state and federal environmental legislation will doubtlessly have a considerable impact on the future development of waterfront property.

In view of the author's limited objectives, there are few deficiencies attributable to anything other than the book's brevity. The consumptive use doctrines of both riparian and prior appropriation jurisdictions received only the briefest consideration.[16] Pollution control was also slighted, reference being made to the federal statutes[17] but not to common law remedies or state legislation. Compliance with state pollution control statutes will very likely become a significant problem in the development of waterfront property, particularly in areas around small lakes.[18]

A less important criticism of the book is directed towards the inaccuracy of some citations. Nonetheless, *Riparian and Littoral Rights* will give the average practioner an adequate grounding in the fundamentals of water law and should be a useful addition to his law library.

RICHARD C. AUSNESS*

Authority and Rebellion. By Charles E. Rice. Garden City: Doubleday & Company, Inc. 1971. Pp. 252. $5.95.

Sociologists define *anomie* as a condition of social "disorganization" or "unorganization."

In this condition, the society does not possess consensus with respect to societal goals or else does not possess consensus regarding means of achieving agreed-upon societal goals. Consequently, the individual is confronted with alternative goals or means, or he exists under conditions in which the norms of many members of the society are unknown to other members. He finds that behavior which is 'right' or 'correct' in one

14. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971), noted in 12 B.C. Ind. & Com. L. Rev. 674 (1971).

15. National Environmental Policy Act, 42 U.S.C. §§ 4321-47 (Supp. V, 1970). See also Hanks & Hanks, An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969, 24 Rutgers L. Rev. 230 (1970).

16. Dunscombe 76-77.

17. Id., ch. 13.

18. See generally Johnson & Morry, Filling and Building on Small Lakes—Time for Judicial and Legislative Controls, 45 Wash. L. Rev. 27 (1970).

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group is 'wrong' or 'improper' from the point of view of other groups in which he has membership; or, in the condition of *anomie,* he literally does not know how to behave, for he does not know what is expected of him.[1]

In short, anomie is polarized moral confusion, twice confounded.

Does anyone seriously doubt that American society is approaching or has already entered a state of anomie? One and the same individual may proclaim his reverence for human life during a Monday sit-in against the war and then subvert the right to life in a Tuesday march in favor of legalized abortion. In the sit-in, he castigates the Catholic Church for failing to provide strong moral leadership for the anti-war effort; in the march, he deplores the Church's stand against abortion as an attempt to impose sectarian morality upon a pluralistic country. On Wednesday, an advocate of unrestricted abortion speaks passionately of a woman's absolute right to control her own body; on Thursday, he espouses compulsory birth control as a panacea for society's ills, while all the time agonizing over the intemperate slaughter of baby seals, bald eagles and oak trees. On Friday, the counter culture condemns both the robber barons of big business and society's indifference to the poor; on Saturday, the counter culture exacts retribution by "ripping off" (stealing from stores, cheating public utilities and filing dishonest welfare and unemployment claims), so that a professor of sociology, in all seriousness, can conclude that "[t]here's no longer any distinction between political dissent and deviant behavior."[2] On Sunday, a group of businessmen sponsor a newspaper advertisement calling for population control as a means of improving the quality of life; on Monday, they dump tons of pollutants into our waterways. And so starts another very anomic week. The mainstream of shared, disciplined morality, so long a channel for the American idea of ordered liberty, has given way to a multitude of egomoralistic eddies swirling against one another. The American polity has been tossed about, confounded and polarized. The consensus is gone.

The concerned lawyer can hardly remain indifferent to the anomie of America, even less so the lawyer-jurisprudent-teacher, for traditionally in America, law and morality have interacted. "That morality is indeed a source of law is hardly debatable . . . ." writes Professor Freund of Harvard, "[b]ut morality and law are in reciprocal relation. Moral attitudes and standards may themselves be a product of law."[3]

When the moral consensus begins to topple, law is shaken, and the tremor in law causes a further breakdown in morality. Hence, the lawyer must ask: Why is the consensus toppling?

Professor Charles Rice of Notre Dame, a lawyer-jurisprudent-law teacher, has devoted a large part of his career to finding the answer. In *The Supreme Court and Public Prayer* (1964), he exposed the banishing of traditional religious exercises from our schools for what it really is: not government neutrality but the

1. E. Sutherland & D. Cressey, Principles of Criminology 103 (7th ed. 1966).

2. Professor Irving Louis Horowitz, quoted in Drosnin, Ripping Off, The New Life Style, N.Y. Times, Aug. 8, 1971, § 6 (Magazine), at 13, 52.

3. P. Freund, On Law and Justice 42 (1968).

establishment of agnostic Secular Humanism as the American state religion.[4] In *The Vanishing Right To Live* (1969), he laid bare the hedonistic anti-life forces which are eroding the great American ethic of the sanctity and equality of all human life *qua* human life. In his latest book,[5] Professor Rice probes the ethics of the ethicists. A major portion of the responsibility for the collapse of the moral consensus must rest with the churches whose job it is to shape the ethics of society. The anomie of America may be both a reflection and a result of the anomie within the churches—in this case, the Catholic Church.

Is the church in a state of anomie? Has the disorientation of Catholicism really affected society? Read Archbishop Fulton J. Sheen's recent indictment of a secularized and undisciplined Catholic Church:

> In the physical universe, energy does not perish but is transformed. In like manner, religious values are lifted into a higher case or degenerate into a lower one. When the nuns gave up their long habits, the girls put on maxi coats; when the rosary as a devotion was dropped, the hippies put beads around their necks; when mysticism evaporated into an irrelevant ideal, youths sought the ecstasy not through the long haul of asceticism, but the short trip through pharmaceuticals; when seminaries, schools and convents dropped discipline, which is an inner violence against our vices, the street mobs picked up violence but directed it this time against neighbor, race and state. When the pulpits no longer resounded with that Name 'above every name,' the young began calling themselves 'Jesus People.'
>
> These young crusaders stand as an indictment of the church which joined 'Coxey's Army,' substituting the social gospel of the secular city for the Christ Gospel of salvation.[6]

Archbishop Sheen has drawn the indictment. Professor Rice marshals the evidence.

In his first two chapters he lays the foundation for his proof. There is *Disorder In The Ranks* of the Church (Chapter I) and America is fast degenerating into *The Anti-Life Society* (Chapter II): substantial factor and foreseeable result.

The disorder in the ranks is not defined in terms of liberal or conservative. These are, as Rice points out, misleading labels because they imply a certain legitimacy in the opinions held. The issue is one of orthodoxy.[7] A non-orthodox view is simply not a valid one. One can no more be a little bit unorthodox than a little bit pregnant.

Rice lists nine prevalent doctrinal abuses[8] of which two are of particular in-

4. See Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961), to the effect that Secular Humanism is a religion.

5. C. Rice, Authority and Rebellion (1971) [hereinafter cited as Rice].

6. Sheen, Jesus People and the Churches, N.Y. Times, Aug. 8, 1971, § 4 (The News of the Week in Review), at 11.

7. Rice 3-4. Professor Rice recognizes that an orthodox Catholic may be politically conservative or politically liberal and still remain orthodox. Indeed, a recent book, written by a politically liberal Catholic, parallels the conservative Rice's call for orthodoxy in a number of particulars. See J. Hitchcock, The Decline and Fall of Radical Catholicism (1971).

8. Rice 13-14.

terest to lawyers: the assault on the teaching authority of the Church, and the undermining of natural law by the proponents of "situation ethics," a thinly disguised species of egoistic moral relativism.

The Church has never claimed to be a democracy. It is an integral part of Catholic belief that the Pope exercises unique and supreme authority in the Church and that to deny this authority is to deny a central dogma of Catholicism.[9] Certainly Papal authority differs from civil authority in a democracy, but if the Pope's dogmatically defined power can be challenged over and over again by members of the Church who, having rejected a crucial tenet of Catholicism, nevertheless purport to remain Catholic, then it becomes somewhat easier to comprehend the mushrooming rebellion in the less dogmatic, secular areas of society, for instance, the growing number of lawyers who set out to destroy the legal system while still calling themselves lawyers. "And if respect for authority is not restored in the Church," Professor Rice tells us, "it will hardly be restored elsewhere."[10]

Professor Rice astutely identifies the forces within the Church which have contributed to the erosion of orthodoxy and authority. They include those who have suffered "a simple loss of faith,"[11] those who engage "in fruitless challenges to the internal authorities of the Church in a misdirected notion of renewal"[12] and those whose "misdirected notion of pluralism . . . has inhibited the Church from contesting the secularization of American society in some important respects,"[13] in particular, "certain priests" who support legalized abortion on the ground that the Church has no right to speak on public issues of moral import outside the confines of Church walls.[14]

When these categories are considered in the context of the assault on reverence for human life and the secularization of the Church in the name of relevance, one finds a sad parallel in history. In support of Nazi anti-life policies, the rebellious *Deutsche Christen* also spoke of the need for secularization and relevance to the social revolution. They too were a minority whose militance intimidated their fellow churchmen into the notorious "retreat to the sacristy." Priests and ministers, cowering in their churches, rationalized their silence on the ground that the secular doings of the Nazi state were outside the scope of their ministry. Finally, there were those hard-core Nazis in high places who, along with their loss of faith, pursued a vigorous anti-church policy to further Nazi social goals. When in May, 1935, Bishop Clement Von Galen spoke out against the Nazis,[15] Minister of the Interior Frick responded with a denunciation of Church intrusion into secular affairs. He began his tirade, "[w]e Nazis demand a separation of Church and State in the entire public life of the country."[16]

9. Id. at 60-63.
10. Id. at 5.
11. Id. at 3.
12. Id. at 7.
13. Id.
14. Id. at 12.
15. J. Conway, The Nazi Persecution of the Churches 127 (1968).
16. Id. at 113.

Those of us who, in the past few years, have been told that our Catholicism disqualifies us from taking public positions on controversial issues,[17] have recalled with sadness the Galen-Frick exchange. Involved orthodox Catholics who read Rice with an eye to history will realize how near they are to being up against the wall.

The Nazi analogy does not escape Professor Rice. In his discussion of the anti-life society he identifies the abortion movement with "the principle that underlay the Nazi extermination of the Jews. It is the principle that an innocent human being can be killed if his existence is inconvenient or uncomfortable to others or if those others consider him unfit to live."[18] But, Rice notes, abortion is not an isolated evil. It is part of the general corruption associated with the new morality which rejects absolute moral norms (the natural law) in favor of an egotistic moral permissiveness (situation ethics). Of course, when one denies the existence of objective morality he must perforce deny a moral basis for law. Law, in turn, ceases to function as a guardian of unalienable human rights and exists only for the purpose of coercing the masses into conduct deemed socially useful at the moment.

Rice traces this regressive process with specific reference to sexual morality. The emphasis on sexual permissiveness, at the expense of a natural law of human sexuality, has resulted in the separation of the unitive and procreative purposes of the sexual act. Sex is thus degraded to the level of casual recreation, and the role of law "becomes not the promotion of virtue and the strengthening of the family, but merely the prevention of the socially inconvenient consequences of vice, such as babies."[19] There being no universal moral law, the socially demoralizing effects of pornography are ignored and "the copulation explosion" is met by a public policy of abortion and contraception. The end result, Rice predicts, will be coercive government control of human reproduction.[20]

Rice's charting of the path from situation ethics to totalitarianism recalls to mind a warning issued fifty years ago by the German protestant theologian, Ernst Troeltsch. Troeltsch deplored the tendency of German thought to discard all concepts of a universal natural law in favor of a morality which "becomes altogether a matter of the inner self." The moral code is thereby divorced from rules of law, and the rights of man, instead of being considered natural rights, became mere gifts of the state to be granted or withheld according to what seems to be socially useful to the success of state programs.[21] Troeltsch's warning went unheeded with disastrous results.

Professor Rice's warning cannot be ignored. Scientists, journalists and legisla-

17. E.g., Hall, Commentary, in Abortion and the Law 224, 231 (D. Smith ed. 1967): "[T]he Catholic in opposing reform would impose his minority will upon the entire public . . . ." But see Lemon v. Kurtzman, 403 U.S. 602 (1971): "Of course, as the Court noted in Walz, 'adherents of particular faiths and individual churches frequently take strong positions on public issues. . . .' We could not expect otherwise, for religious values pervade the fabric of our national life." Id. at 623 (citation omitted) (italics omitted).

18. Rice 17.

19. Id. at 18.

20. Id. at 31.

21. Quoted in H. Kohn, The Mind of Germany 320-22 (1960).

tors are already urging various plans for compulsory family limitation. These run the gamut from denial of tax exemptions to licensing of parenthood, based among other things on "financial responsibility."[22] A not-so-subtle system of coercion is presently to be found in aggressive government efforts to induce the poor to limit their families—to which leaders of the poor have responded with charges of racism.[23] We seem to have come a long way down the anti-life road.

Rice proceeds from *The Anti-Life Society* to a discussion of *Humanae Vitae* (Chapter III), Pope Paul's antidote for the anti-life poison. *Humanae Vitae* is, as Rice indicates, a coherent exposition of the natural law of human procreation. Pope Paul dealt with every aspect of a controversy largely generated by the "interlocking directorate" of the self-styled "Catholic Establishment."[24] The encyclical speaks for itself, but some aspects of it are of particular interest to lawyers. The Pope's prediction that the legitimization of contraception would provide a foundation for government coercion seems to be coming true in the United States. The encyclical also anticipated the cry of women's lib for emancipation from child-bearing by pointing out that contraception poses a threat to the dignity of women. If the procreative purpose of the sexual act is denigrated, then women are in danger of becoming mere instruments of selfish enjoyment.[25]

Adverse reaction to the encyclical was a typical Establishment mix: one part situation ethics; two parts condescension, and a dash of the population explosion.[26] Although demographers are in the process of exploding the overpopulation myth,[27] dissidents swallowed it whole. Rarely did they discuss the natural law. Presumably it, like God, was dead. Finally, while challenging Papal authority, many spoke as though they themselves were clothed with infallibility. The Church's ability to confront effectively the anti-life movement in America most certainly suffered from the strife within. "Her internal disarray," Professor Rice observes, "has impeded the Church from giving to the world the leadership she alone can provide in the face of the rising anti-life tendencies."[28]

Professor Rice makes a sound doctrinal argument that *Humanae Vitae* may be considered infallible teaching. Even if it is not, the encyclical is at least the authentic teaching of the Church to which Catholics must give external and internal assent.[29] In support of his thesis, Rice includes a well-documented chapter on the situs of *Authority* (Chapter IV) within the Church. The doctrinal intricacies of Church authority and infallible teaching may be of minimal interest to the lawyer, particularly if he is not Catholic. However, the revolt against legitimately exercised authority must command the lawyer's attention because it extends well beyond the boundaries of the Church.

Rice recounts the reaction to the encyclical at a Fordham University sym-

22. Rice 33.
23. Id. at 34.
24. Id. at 36-37.
25. Id. at 42.
26. Id. at 43-48.
27. Id. at 48-52.
28. Id. at 224.
29. Id. at 53-82 passim.

posium. One Jesuit priest simply refused to accept it as true and another told the Pope, "[w]e demand that you do not speak to us in this way."[30] The implication is clear. The situs of teaching authority within the Church has moved from Rome to the Bronx. If the Bronx does not agree with what Rome says, the Bronx may silence Rome. *Bronxa locuta est, causa finita est.* Thus do self-willed anti-authoritarians become super-authoritarians. As Rice says, "[t]hey inevitably erect for themselves tight little ghettos far more arbitrary and closed than they claim the Church to be."[31]

The *Discordant Ideas* (Chapter V) the dissidents promulgate are based primarily on situation ethics which deems law to be not binding, but advisory. The individual is always free to rationalize the uniqueness of his own situation, reject the applicable law, and do whatever he wants under the umbrella of "conscience." No wonder that in the broader context of American society, a sociology professor can equate deviant behavior with social protest.

In ensuing chapters, Professor Rice roots out a good deal of deviance within the Church. The maladies of secularism, anti-authoritarianism and the do-your-own-thing syndrome have spread into *The Clergy And Religious* (Chapter VI), *Ecumenism* (Chapter VII), *The Liturgy* (Chapter VIII), *Elementary and High Schools* (Chapter IX), and *The Catholic University* (Chapter X). With respect to the last, he reminds us that "[a] number of Catholic Universities have deliberately undertaken to secularize themselves in order to qualify for government aid."[32] Yet many still claim to be Catholic, particularly in fund-raising appeals to alumni. "For such a University to claim to be Catholic in anything but a sentimental sense," Rice asserts, "is to work a deception on its students, their parents, and the public."[33] Deceptive advertising is nothing new in this country. If a "Catholic" university can engage in it, why not a reducing pill manufacturer?

Professor Rice's concluding chapter deals with the relationship between church and state in America. He contends that the Supreme Court has distorted the original purpose of the establishment clause of the first amendment, which was intended to prevent preferential treatment of any particular Christian sect. By equating theistic and nontheistic religions, while at the same time banishing God from our schools, the Court has, in effect, "established" agnosticism as the state religion.[34] Fine, up to this point. But then Professor Rice accuses the Bishops of softening their stand against the anti-life society in the hope of gaining in exchange financial support for Catholic schools.[35] I agree that the pro-life movement ought to rank higher on the Bishop's lists of priorities; however, having been called upon from time to time to consult with the United States Catholic Conference on the abortion issue, I cannot agree that the Bishops' stance has been motivated by the hope of financial gain. (Indeed, this suggestion is unworthy of

30. Id. at 45.

31. Id.

32. Id. at 187. See generally W. Gellhorn & R.K. Greenawalt, The Sectarian College and the Public Purse: Fordham—A Case Study (1970).

33. Id. at 189.

34. Id. at 203-210.

35. Id. at 202.

the book). Nor can I fault the Bishops on their unequivocal stand against legalized abortion. Further, I would concede that a prudential judgment on their part might lead them to reject Professor Rice's suggestion that Catholic legislators who support legalization of abortion should be excommunicated.[36] Professor Rice himself admits that "we must assume, at least in most cases, that the reluctance of bishops to exercise their authority is probably due to their judgment that, in prudence, the error should be tolerated for the time being to avoid worse upheavals. And such a judgment is entitled to our assent."[37]

Yet Rice may be correct in his call for a new militancy. We have, as already noted, come a long way down the anti-life road. Perhaps what we need now is an American counterpart of the *Bekennende Kirche,* the Confessing Church which opposed the Nazi regime at great personal sacrifice to its adherents. If so, the Catholic Church must assume the role. It is something for many of us to think about.

Professor Rice says that his book is essentially an optimistic one. I share his optimism, but on a long term basis. Rice is a radical; anyone in this day and age who celebrates orthodoxy and defends authority would have to be so classified. He is, of course, not radical chic, and the whole lexicon of non-orthodoxy will be trotted out against him: he will be accused of a "legalistic attitude" at odds with "the spirit of Vatican II" which opts for "openness" and requires a "redefinition" of dogma to make it "relevant to the real world." But someday, when the world is sated with the killing of babies, Rice will come into his own Picture this, perhaps 100 million abortions from now: a group of Jesuit seminarians are in animated conversation. In the course of their research for *Rethinking Catholicism IV,* they have come across a book by Charles Rice, an old time radical orthodox Catholic. They are moved; orthodoxy is for them. To witness their dedication to this newly rediscovered faith they have donned distinctive clerical garb and taken a private vow of celibacy. Then the thunderbolt! "Why not start a Catholic university? We will turn out Rices by the hundreds to change the world. After all, Jesuits used to run universities, true centers of Catholic orthodoxy. What shall we call our school? Many of those old Jesuit universities adopted place names, sometimes the name of a section of a city. Why don't we call it . . . ?"

Robert M. Byrn*

36. Id. at 220.

37. Id. at 9.

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Credit Reporting and Privacy: The Law in Canada and the U.S.A. By John M. Sharp. Toronto: Butterworth & Co. (Canada) Ltd. 1970. Pp. xv, 124. $6.95.

Credit Reporting and Privacy: The Law in Canada and the U.S.A. by Professor John M. Sharp of the University of Manitoba proceeded, in his own words:

> [F]rom a growing conviction on the part of the author that there is a need for a book which explains, for the benefit of those millions who are affected by the credit reporting profession in the North American continent, the nature and working of the agencies involved and the main points at which the law extends to control or protect them.[1]

Although the scope of this book at first appears rather broad for its size in view of the author's intention to examine the applicable common and statutory law in the provinces of Canada and on the federal and state level in the United States, the author effectively achieves his primary goal which is an examination of the common legal and philosophical traditions applicable to credit reporting.[2] At the very outset of this book, Professor Sharp puts his subject into perspective:

> 'There have been some hysterical things said and written about reporting agencies. Some commentators seem to regard them as 'private Gestapo' operations which should be entirely abolished . . . . The reporting industry plays an extremely important rôle in the modern economy, and to prohibit its activities would . . . be foolhardy. However, these activities do involve serious risks to the privacy of individuals. . . .'[3]

In order to familiarize the neophyte reader with the terminology of the credit world this book begins with some basic definitions of the various types of credit bureaus, collection agencies and credit associations.[4] A sufficient detailing of the history and social utility,[5] as well as an examination of the operating

1. J. Sharp, Credit Reporting and Privacy: The Law in Canada and the U.S.A. vii (1970) [hereinafter cited as Sharp].

2. See also Miller, Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society, 67 Mich. L. Rev. 1089 (1969); Ruggles, On the Needs and Values of Data Banks, 53 Minn. L. Rev. 211 (1968); Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890); Westin, Science, Privacy, and Freedom: Issues and Proposals for the 1970's, 66 Colum. L. Rev. 1003 (1966).

3. Sharp 1 (footnote omitted).

4. Id. at 7. The distinctions between the various types of credit bureaus are more significant for Canadian readers than American readers since in Canada only nonprofit cooperative credit bureaus, as distinguished from commercial credit bureaus, may raise a "qualified privilege" defense in a defamation action. London Ass'n v. Greenlands Ltd., [1916] 2 A.C. 15; Macintosh v. Dun, [1908] A.C. 390 (P.C.) (Austl.). In the United States a "qualified privilege" defense can be raised by both commercial and nonprofit credit bureaus. See, e.g., H.E. Crawford Co. v. Dun & Bradstreet Inc., 241 F.2d 387 (4th Cir. 1957); Barker v. Retail Credit Co., 8 Wis. 2d 664, 100 N.W.2d 391 (1960).

5. Sharp 10-13. The social utility of credit bureaus is frequently mentioned as the basis for a "qualified privilege" defense in defamation actions against credit bureaus. H.E. Crawford Co. v. Dun & Bradstreet Inc., 241 F.2d 387 (4th Cir. 1957); Watwood v. Stone's Mer-

methods of the bureaus[6] are included. It is interesting to note the phenomenal growth of this industry both in the United States and Canada.[7] For example, in Canada the name of almost every adult credit user is recorded in the files of one credit bureau or another, and in the United States one credit company alone maintains files on over 45,000,000 individuals.[8]

The true value of Professor Sharp's book is contained in those chapters which deal with the law of defamation, privacy, confidentiality, negligent misstatements and statutory regulation, all of which are viewed in relation to the functions and reports of credit bureaus. This writer is especially impressed with the author's ability to examine the applicable law in all of the United States and Canada. Of course, on the statutory aspect of the subject, he is aided by the fact that as of the date of publication only three states, Oklahoma,[9] Massachusetts[10] and New Mexico,[11] had passed legislation regulating credit bureaus. As timely and thorough as Professor Sharp's study and research are, the theory of the law was growing so rapidly that as he was finishing this book the legislatures of several states, including New York, were enacting into law detailed regulations of the activities of credit bureaus. Since the publication of *Credit Reporting and*

cantile Agency, 194 F.2d 160 (D.C. Cir.), cert. denied, 344 U.S. 821 (1952); Erber & Stickler v. R.G. Dun & Co., 12 F. 526 (C.C.E.D. Ark. 1882); Wetherby v. Retail Credit Co., 235 Md. 237, 201 A.2d 344 (1964); In re Retailer's Commercial Agency, 342 Mass. 515, 174 N.E.2d 376 (1961); Barker v. Retail Credit Co., 8 Wis. 2d 664, 100 N.W.2d 391 (1960). Contra, Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 139 P. 1007 (1914). See also Johnson v. Bradstreet Co., 77 Ga. 172 (1886). See generally W. Prosser, Law of Torts § 110 at 809-10 (3d ed. 1964); Smith, Conditional Privilege for Mercantile Agencies (pts. 1-2), 14 Colum. L. Rev. 187, 296 (1914).

6. Sharp 13-22. For other discussions of the operating methods of credit bureaus, see generally Hearings on Credit Bureaus Before the Subcomm. on Antitrust and Monopoly of the Sen. Comm. on the Judiciary, 90th Cong. 2d Sess. (1968); Hearings on the Retail Credit Company Before the Subcomm. on Invasion of Privacy of the House Comm. on Gov't Operations, 90th Cong. 2d Sess. (1968); Karst, "The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data, 31 Law & Contemp. Prob. 342 (1966); Sesser, Big Brother Keeps Tabs on Insurance Buyers, New Republic, April 27, 1968, at 11 (vol. 158); Note, Credit Investigations and the Right to Privacy: Quest for a Remedy, 57 Geo. L.J. 509 (1969).

7. Sharp 8-10. See generally Nader, Dossier Invades the Home, Saturday Rev., April 17, 1971, at 18 (vol. 54). For a discussion of the growth of the credit industry see generally Miller, Personal Privacy in the Computer Age: The Challenge of a New Technology In An Information-Oriented Society, 67 Mich. L. Rev. 1089 (1969); O'Connor, The Right to Privacy: Bank Credit Reports, 87 Banking L.J. 771 (1970); Sesser, Big Brother Keeps Tabs on Insurance Buyers, New Republic, April 27, 1968, at 11 (vol. 158); Note, Credit Investigations and the Right to Privacy: Quest for a Remedy, 57 Geo. L.J. 509 (1969); N.Y. Times, Jun. 11, 1966, at 36, col. 3.

8. Sharp 10.

9. 24 Okla. Stat. tit. 24 §§ 81-84 (1951).

10. Act of June 20, 1969, ch. 442, [1969] Mass. Acts & Resolves 248, amending Mass. Gen. Laws ch. 93 (1932).

11. N.M. Stat. Ann. §§ 50-18-1 to -6 (Supp. 1969).

Privacy: The Law in Canada and the U.S.A., comprehensive legislation has also been enacted by the United States federal government.[12] In the provinces of Canada, however, there is no governmental control whatsoever over credit bureaus.

This reviewer was privileged to sponsor the Credit Data Reporting Act[13] in the New York State Senate during the 1969 and 1970 sessions of the Legislature. This new law, which was signed by the Governor on May 1, 1970, has as its main import the creation of a statutory right permitting a person who has been denied credit to learn the source of any credit report rendered on him, the contents of that report and the specific facts or allegations upon which it was based, and to dispute the accuracy of any erroneous information in the report. The Credit Data Reporting Act specifically sought to regulate the "secrecy provision" in credit bureau contracts which provides a statutory solution to the disclosure problem referred to by Professor Sharp in his book.

New York law now restricts the distribution of credit reports and requires a credit bureau to furnish upon request lists of the recipients of credit reports. Civil liabilities and criminal penalties are provided for violation of the Credit Data Reporting Act. Regulatory powers in this area are vested in the Banking Board.

Professor Sharp realized that his book would be published in the middle of a year witnessing great changes concerning his topic. His suggestions and directions for investigation by the reader of the details unique to individual jurisdictions are aided by the excellent bibliography at the end of the book. *Credit Reporting and Privacy: The Law in Canada and the U.S.A.* provides a valuable excursion into an area concerning a nebulous concept which we all cherish, our right of privacy.

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12. Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1970). Prior to the passage of this act, The Associated Credit Bureaus had adopted a self-regulatory code for consumer protection. N.Y. Times, Feb. 10, 1969, at 55, col. 5; id., Feb. 8, 1969, at 31, col. 3.

13. Credit Data Reporting Act, N.Y. Gen. Bus. Law §§ 370-76 (McKinney Supp. 1970). See also N.Y.S. Legislative Annual 88-89 & 491 (1970); N.Y. Times, May 24, 1971, at 47, col. 5.

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