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Book Reviews

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BOOK REVIEWS

CIVIL LIBERTIES AND THE CONSTITUTION. By Paul G. Kauper. Ann Arbor: The University of Michigan Press, 1962. Pp. xii, 237. $6.00. Professor Kauper is one of our most eminent teachers of constitutional law. In the summer of 1961 he delivered a series of lectures at the Special Summer School for Lawyers at the University of Michigan Law School. His book is based on those lectures, and he tells us that no substantial departure has been made from the text of the lectures as originally prepared and delivered.[1] His language is clear and precise, his thoughts are mature and well considered, his subjects are of momentous public concern. He has performed a noteworthy service to the profession. Many students of constitutional law will be grateful for his masterly exposition of some of the most confusing aspects of that fascinating and exasperating subject.

Those who have taught constitutional law for any considerable number of years discover that there are certain concepts and relationships that students year after year have difficulty understanding. Kauper's book does not, of course, elucidate all of these matters, for it is not a systematic treatise but a discussion of selected problems in the area of civil liberties. Nevertheless, it is remarkable how many of the knotty skeins that bedevil students become tractable in the author's deft treatment.

There are five different groups of constitutional problems with which the author deals. To each group he has devoted a separate chapter. The first of these is entitled "Church and State: Co-operative Separatism." The words uttered in 1961 at the very beginning of Kauper's lectures are even more timely in 1962:

> Nothing is better calculated to stimulate argument, arouse controversy, excite the emotions, and even produce intense visceral reactions than a discussion of church-state relations. Always a subject of lively interest, it has received added attention and emphasis in recent months.[2]

Kauper's temperate discussion of church-state problems should give no offense. He does, however, remark on the passing of the "so-called Protestant era in American history"[3] merely as a matter of fact, which statement of fact, of course, must cause dismay in some quarters, where the fact itself is not yet accepted as such.

The recent cases with which the author is concerned relate to the separation issue rather than freedom of worship. The general ideas about religious freedom developed by the Supreme Court are summarized. In this connection the author states:

> Nonestablishment as a rule requiring neutrality as between religions is thus an important facet of the central concept of religious freedom.[4]

The author sums up the Court's interpretation of the separation principle as follows:

> In short, nonestablishment means that the government can do nothing to aid religion or force religion on any person. In terms of the right of the individual, this means that a person enjoys a constitutional right to be free from any governmentally sanctioned religion and free from any imposition by way of taxes to support religion.[5]

He points out, however, that scholars disagree on what was intended by the language of the First Amendment and that many practices in aid of religions (tax exemption, commissioning of chaplains, etc.) cast doubt on the validity of an interpretation which would deny any kind of governmental aid to religion.

Following a discussion of the Sunday closing law cases, the author presents his critique of the separation principle and develops his ideas concerning co-operation between church and state in a number of areas where such co-operation is permissible.

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1 Text at ix.
2 *Id.* at 3.
3 *Id.* at 4.
4 *Id.* at 9.
5 *Id.* at 12.

The second chapter relates to obscenity and censorship. The general area is reviewed. The significance and implications of recent decisions in this area are then discussed. Particularly helpful to the student is the author's clear statement of the distinction between substantive due process cases, on the one hand, and cases concerned with First Amendment freedom on the other.[6] The President's remarks concerning prayer when he was requested by newsmen to comment on the School Prayer case[7] are similar to those with which the author concludes his discussion of obscenity problems:

> So far as the morals of children and youth are concerned, the primary responsibility rests on the home, the school, and the church for more effective leadership in guiding the tastes and habits of children, and any legislation outlined to this end should, as far as practicable, deal narrowly and specifically with the problem in respect to minors rather than operate as a broadside restriction on the reading and viewing tastes of the entire adult community.[8]

Perhaps the chapter most useful to the student of constitutional law is the third and central one concerning freedom of association. It is based on five cases decided during the 1960 term of the Supreme Court.[9] The first four involved the Communist Party or membership therein; the last involved the National Association for the Advancement of Colored People. The first four were decided "against" freedom of association; the last went the other way. The dramatic contrast in result is attributable to the different characteristics of the two organizations in question. The unlawful objectives of the Communist party are patently different from those of the NAACP. For, "the purposes of the NAACP are not directed toward unlawful ends."[10]

In the light of the decisions in the five cases previously cited, the author explains what is meant by the right of association and the related freedom of nondisclosure in regard to association membership. He describes the right of association as follows:

> The recently developed right of association has its chief significance as an independent right in respect to an organization that is aimed at improvement of conditions or advancement of the interests of the members of the organization, but not identifiable as a political party. This freedom of association emerges as a fundamental right protected under the Due Process Clause.[11] * * * Certainly, it embraces the right to join with others in an association to pursue common ends — social, political, and economic.[12]

The author also discusses the freedom of nonassociation suggested in the recent decisions which sustained legislation authorizing closed shop agreements,[13] and a state integrated bar arrangement.[14] These agreements and arrangements are preferred to the dissent of individuals because of public interests that are considered more important. This notion leads into the discussion of freedom of political association and the First Amendment and judicial techniques in interpretation of the First Amendment. Here the author approves of the balancing technique but is

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6 See particularly text at 54 and 55 for a brief discussion of the idea that the Fourteenth Amendment incorporates the First Amendment freedoms and the practical effect of this idea. See also text at 72 and 73 for a discussion of the thesis concerning a distinction between the First Amendment as a limitation on Congress as opposed to the Due Process Clause as a limitation on the states.

7 Engel v. Vitale, 370 U.S. 421 (1962).

8 Text at 89.

9 Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961); Scales v. United States, 367 U.S. 203 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); Konigsberg v. State Bar of California, 366 U.S. 36 (1961); and Louisiana v. NAACP, 366 U.S. 293 (1961).

10 Text at 98.

11 *Id.* at 102.

12 *Id.* at 103 and 104.

13 International Association of Machinists v. Street, 367 U.S. 740 (1961).

14 Lathrop v. Donohue, 367 U.S. 820 (1961).

doubtful about whether it was properly applied in the famous *Barenblatt* case.[15] He states that the weakness of that case "in applying the balance-of-interest technique is that the Court did not adequately consider and weigh the necessity of getting the information in this particular way."[16] He is referring to the notorious use of the investigative power of congressional committees to aim at exposure "without serving any substantial purpose related to the legitimate congressional interest into the penetration of Communism into various fields of activity."[17]

The chapter closes with an eloquent passage too long to quote here concerning the proper legal and political methods of dealing with the Communist challenge.[18]

The fourth chapter deals with the long and complicated aftermath of the *Civil Rights Cases*.[19] Students will find his exposition of problems of private and governmental action very helpful. The principal cases are explained concisely and clearly. Dissatisfaction because of the lack of neat generalization in this area should be tempered by the significant comment that Kauper makes:

> Any attempt at generalization is hazardous since it is evident that the Supreme Court itself is still groping its way in this area and has not yet attempted a definitive rationale.[20]

Nevertheless, the author does attempt some conclusions that are worthy of the reader's attention. He ends the chapter with the remark that "significant developments and changes are obscured by formal adherence to old formulas."[21] The old formulas to which he refers are those embodied in the tag "state action" with respect to the interpretation of the Fourteenth Amendment.

The last chapter is devoted to the role of the federal government in the field of civil liberties, that is "the power of the federal government through its various organs — namely, the judicial, the legislative, and the executive — to take appropriate steps in regard to the basic rights of the individual as they are allegedly violated by actions of the states or their officers."[22] One of the crucial sets of problems discussed in this chapter is that of dealing with the right to vote. Recent developments with respect to this right receive careful treatment.

The author in the five areas that he covers has provided interesting and informative reading for lawyers who desire a quick brush-up on recent developments in constitutional law. As has already been indicated, law students will also find the book an excellent review book with regard to those specific areas. It provides the background for the cases decided in the 1961 term (which, of course, were decided after the book was written) and also, in all likelihood, for those of many succeeding terms. A table of cases and an index make the book readily usable for reference purposes.

*Roger Paul Peters**

MY LIFE IN COURT. By Louis Nizer.[1] Garden City, New York: Doubleday & Company, Inc. 1961. Pp. 524. $5.95. — This "story of famous trials by a modern master lawyer"[2] has been on the top of the best-seller list for many months. As there have been many books by and about lawyers concerning various trials, one might question why such a book must be reviewed here. However, there are several reasons for reading this book including the pragmatic one of preparing

15 Barenblatt v. United States, 360 U.S. 109 (1959).
16 Text at 121.
17 *Ibid.*
18 See text at 125 and 126.
19 109 U.S. 3 (1883).
20 Text at 151.
21 *Id.* at 166.
22 *Id.* at 169.

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1 Attorney at Law, New York City, New York.
2 Front page, fly leaf.

to answer the many questions it may provoke from clients. Its popularity among the "lay" public for such a long period of time is evidence of its general excellence. It is readable, entertaining and extremely interesting.

Of greater importance is the fact that the author in telling in detail his adventures in the courtroom provides many tips on legal strategy and procedure which will be helpful to all lawyers. The secret of the success of this master lawyer is clearly indicated. This is simply his thorough preparation of both the law and the facts together with a forecasting and preparation for most of the probable eventualities of trial. This lesson illustrated time and again should have strong effect on the thoughtful lawyer reader.

Nizer has taken five areas of law and describes some of his major cases in these areas. He explores them at length and includes parts of the actual transcript. This has the effect of taking one right into the courtroom as well as clearly showing his strategy in eliciting favorable testimony. The cases described are not the notorious criminal cases which are the source of most books on trials. Instead, the author recounts cases in the fields of libel, divorce, plagiarism, negligence and corporation law and makes them as intensely dramatic as the most suspenseful criminal trial.

Adding to the significance of this work are the author's comments and explanation of his various practices and procedures. He describes the legal theory involved and makes it easily understood for the lay-reader. In this he does a real service to the profession by presenting many points of American jurisprudence which undoubtedly have been either unknown or not understandable to those outside ing profession. He provides the lay-reader with a perspective on the actions of the ethical attorney who is attempting to obtain for his client his full legal rights. His readable explanations of what a lawyer does, and more important why he does it, presents a most effective picture of the work of the legal profession. Coupled with all this are the author's digressions into his own personal philosophy and the general philosophy of law. The author injects these discourses into his narrative story of the individual cases, thus adding a factual example to explain a legal theory or, conversely, giving an explanation of a legal theory practice or procedure to explain what happened. Such coupling of theory, philosophy, and jurisprudence with exciting court cases makes for great reader interest.

Another point of interest to lawyers is the setting forth of one of Nizer's fundamental methods of approaching facts. He calls it the "rule of probability," and cites many illustrations of the working of the rule as he goes through the cases in the book. The author's words best describe this rule:

> . . . Through cumulative experience we can anticipate with reasonable certainty how people will react to certain stimuli. By applying this "knowledge" to any set of facts, we can judge whether the conduct described is probable. If implausible, it must be rejected as untrue no matter what assurance the client or witness gives of his recollection. Either he is innocently inaccurate, or he is deliberately lying, or there are surrounding circumstances which make the implausible plausible. (A proven eccentric in other matters may perform a bizarre act without challenging credence; a tendency to alcoholism may explain a lapse in communication, etc.) The rule of probability rarely misleads. . . .[3]
>
> The magical qualities of this rule are endless. The jury decides the case because of the rule of probability. It accepts one version as against another because it accords with its own standard of experience. The judge, when he is faced with conflicting testimony, decides on the basis of probability. We talk of the credibility of witnesses, but what we really mean is that the witness has told a story which meets the tests of plausibility and is therefore credible.[4]

The author indicates in his prologue that he has always been thrilled by the opening of the courtroom doors. He offers the reader an opportunity to open

3 Text at 10.
4 *Id.* at 11.

those same doors. Nizer truly fulfills the promise of this "opening statement."

The first case described by the author is the libel suit brought by Quentin Reynolds against Westbrook Pegler. The case stemmed from a nationally syndicated column written by the latter describing the former's effort during the war. The discussion of this case is practically a book in itself as is the description of the Loew's corporation proxy battle at the end of the book.

This libel case is of interest because of the famous personalities involved. In this story appear many of the leading characters of World War II, some of whom were character witnesses for the Plaintiff Reynolds. The discourses interspersed in the recounting of this case embrace such diverse subjects as the law of defamation, the types of witnesses who might confront an examiner, methods of cross-examination, the technical arts of the opening statement, cross-examination and summation and on jury challenges and jury tampering. Some of his asides or epigrams are well turned, for example:

> . . . A trial is a contest in accordance with rules designed by legal philosophers over the centuries. The scales of justice are maintained in balance by a sensitive mechanism, adjusted with such nicety that they record the minutest evidentiary weight. But if a heavy hand of influence can be secretly laid upon one of the scales, to what purpose all the painstaking craftsmanship derived from ancient tradition?
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> The civilized procedure of trial by jury is slow, painful, and expensive, but it takes man one more step away from the jungle. It is as essential to democracy as voting, because the judgment of the jury is but another way of obtaining the consent of the governed.[5]

This case well illustrates Nizer's painstaking preparation. Before the trial he read almost every column written by the defendant over many years. He also read almost everything written by the plaintiff in newspaper columns, books and stories and then he indexed them all so that he could readily pull them out for proof of a point or impeachment.

He describes[6] the preparation of his notes for cross-examination including the use of varied colored ink in setting forth all the answers given to the same question during pre-trial depositions, in pleadings or in other writings. The worth of all this is reflected by the fact that the verdict was for $1 compensatory damages and $175,000 punitive damages.

The next section consists primarily of his down-to-earth discussion of domestic relations law and the problems confronting the parties, the lawyers, the court and society before, during and after the trial. Numerous examples of unusual cases are given to forcefully illustrate his points. To a lay-reader this discussion will be most enlightening, especially in its description of various psychological difficulties, social and legal problems involved in this type of case. The worth of a lawyer as a counselor who helps heal the mental anxiety of clients in such cases is well expressed by the author:

> I think that is why a lawyer, entirely apart from his technical knowledge, is specially equipped to lead a client to serenity. He telescopes a lifetime of experience in concentrated study of clients in distress. He combines the insight of his observation with the skills of persuasion, which are his special talent, to reach the mind of his anguished client and bring it solace and calm.[7]

The next case involves the plagiarism litigation over "Rum and Coca-Cola" a song which Nizer claimed was taken from a folk song written by his client. This was a most unusual case. Of interest to the lawyer-reader is the articulate explanation of the elements of proof in such a technical action. He describes how he obtained the evidence and had it admitted to prove each of these elements.

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5 *Id.* at 66.
6 *Id.* at 101.
7 *Id.* at 215.

It was frequently necessary for him to show analogies to other types of cases. The use of this method could be of practical help to many attorneys in difficult cases. His use of numerous charts which thoroughly analyzed the songs involved in their melodic, rhythmic, harmonic and stylistic aspects are vivid examples of the use of demonstrative evidence to simplify and explain technically difficult propositions.

The next section describes the libel suit of Professor Foerster against Victor Ridder, a newspaper publisher. The description of the battle between different German political and social philosophies in Germany and America during the rise of Hitler and World War II is fascinating. However this chapter demonstrates a weakness in Nizer's approach.

The author, of course, only describes in the book the cases he has won. The impression of infallibility is thus naturally given. The bias of the author towards his own view of the evidence and his analysis of the witnesses and their testimony is shown graphically in the partial transcript of the examination of Dr. George Shuster given in this chapter. Perhaps this reviewer did not appreciate the full import of what the author tried to develop through his cross-examination of Dr. Shuster. But a careful reading of these pages[8] actually arouses a sympathy for the witness which one feels must have been shared by the jury. If this was the case then the witness got the best of counsel. The cross-examination here appears to be of that type where words, phrases or even whole paragraphs are taken out of context from writings and the witness is not allowed to explain particular words used in these writings.[9] From the portion set forth in this book it appears that even years later the author considers each bit of his courtroom work either as of great significance or as producing great results. Yet the high reputation of Dr. Shuster appears unblemished and is increased in my view by his performance under such methods of cross-examination.

The next area of the book concerns two negligence cases. The first is a malpractice action arising from the death of a mother and child during childbirth. The obstacles before a plaintiff in this type of action are much greater than those usually encountered by plaintiffs in personal injury actions. This problem is well handled by the author. The second negligence action entitled "The Worth of a Man"[10] is a most instructive case for lawyers. It describes how Nizer was able to reach a settlement of $112,000 for the death in a railroad accident of a 30-year-old man who was making only $100 a week as an advertising copy writer. In this case Nizer found out the deceased had taken intelligence and other aptitude tests given to him by a neighbor psychologist at his home. He was able to get these in evidence and used them as proof of income which the deceased probably would have obtained during his lifetime. He also helped all plaintiffs' attorneys in New York by obtaining a favorable ruling on the use of new mortality tables. His digressions on settlement negotiations with insurance companies, examination of witnesses and the effect of certain evidence on juries should also be stimulating to lawyer-readers.

The last part of this book concerns itself with the proxy battle between stockholders of Loew's Incorporated. Primarily this case describes the work of a corporation lawyer outside of the courtroom in counseling his clients, forecasting problems and working out their solutions in advance. While one might think that such a case would not be interesting, the various strategies taken by the opponents, the dramatic directors' meetings, and the changed positions of the allies all make this case the most interesting of the lot. When the stage moves

8 *Id.* at 333-343.
9 *Id.* at 366.
10 *Id.* at 380.

to the courtroom, the author again shows that preparation determines the victor as he recounts how he obtained the pleadings and briefs and even the transcript in a case which had been decided directly against his legal position. Through such arduous effort he was able to evolve a theory of argument which resulted in a favorable decision from the same court which had only recently apparently rendered a directly contrary decision. This case also gives the author a chance to expound upon the various types of appellate argument.

It is believed that this book will help other lawyers in their lives in court.

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BOOKS RECEIVED

BIOGRAPHY

FINAL VERDICT. By Adela Rogers St. John.
New York: Doubleday & Co., 1962. Pp. 512. $5.95.

CHURCH AND STATE

CHURCH AND STATE IN AMERICAN LAW: CASES AND MATERIAL. Edited by John J. McGrath.
Milwaukee: The Bruce Publishing Co., 1962. Pp. 412. $7.00.

CRIMINAL LAW

CAPITAL PUNISHMENT — A WORLD VIEW. By James Avery Joyce.
New York: Grove Press, Inc., 1962. Pp. 273. $1.95.

NARCOTICS AND THE LAW. By William Butler Eldridge.
New York: New York University Press, 1962. Pp. 204. $5.00.

JURISPRUDENCE

JURISPRUDENCE; REALISM IN THEORY AND PRACTICE. By Karl Llewellyn.
Chicago: University of Chicago Press, 1962. Pp. 531. $8.95.

THE LEGAL MIND IN AMERICA. Edited by Perry Miller.
New York: Doubleday & Co., 1962. Pp. 309, $1.45.

PHILOSOPHY

THE GREAT IDEAS TODAY. Edited by Robert M. Hutchins and Mortimer J. Adler.
Chicago: Encyclopaedia Britannica, Inc., 1962. Pp. 560. $8.95.

TRIAL TECHNIQUE

MAN ON TRIAL. By Gerald Dickler.
New York: Doubleday & Co., 1962. Pp. 452. $5.95.

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