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Book Review

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BOOK REVIEWS

JUSTICE REED AND THE FIRST AMENDMENT: THE RELIGION CLAUSE. By F. William O'Brien, S.J.¹ Washington: Georgetown University Press, 1958. Pp. xi, 264. \$5.00. Father O'Brien has written a painstaking and well-documented study of a justice whose work in the shaping of our constitutional law has often been overlooked. The book shows both the good and the bad points that are to be expected in the work of the political scientist addressing himself to legal topics.

The political approach to Reed's opinions develops a persuasive synthesis of his views in terms of a commitment to pluralist and federalist democracy, with a strong faith in the ability of Americans to solve equitably on a local level the more or less inevitable irritations of communal living. This faith seems more admirable as we deal more with cases involving true compromises, less so as we deal with cases in which the element of coercion is stronger, or where the conscientious commitments involved are less susceptible of compromise. Thus, Father O'Brien parts company with Reed when it comes to the latter's opinions in the two flag-salute cases. This reviewer would be disposed to part company with both of them somewhere among the cases involving the efforts of the Jehovah's Witnesses to propagate their faith. At the same time, as a variable to be considered in judicial determinations about civil rights, Reed's pluralism is well worth taking into account, and we are indebted to Father O'Brien for pointing it out.

We are also indebted to him for two provocative, if not wholly unanswerable, points of a more technically legal nature. One concerns the possible applicability to establishments-of-religion of the "implicit in the concept of ordered liberty" test that was adopted in *Palko v. Connecticut*² and applied generally in cases involving procedural due process. He argues that nothing implicit in the concept of ordered liberty is violated by religious establishment such as that existing in England. A fortiori, it would seem this is true of the plan under consideration in *McCollum v. Board of Education*.³ This argument, of course, is connected with the ideas of pluralism and judicial restraint. It is the lightness of the burden the religious establishment imposes on the non-members that can be pointed to as making the establishment tolerable. The judiciary, in other words, should not interfere with the adjustments made in the local community unless someone is hurt by them. Herein lies the most telling objection to the majority decision in *McCollum* — a technical rendering of it might be that the substantive content of due process is irrelevant unless someone is deprived of life, liberty, or property. This objection could have been dealt with in terms of standing, but was not properly reducible to considerations of judicial administration.

The other of these points involves the possibility of a connection between the use of religious freedom in *Kedroff v. St. Nicholas Cathedral*⁴ and the familiar debate about whether the protection of the fourteenth amendment is available to a corporation. Father O'Brien points out that there is no showing that the interference of the state with the right of the

¹ Member of the faculty, Georgetown Univ.

² 302 U.S. 319 (1937).

³ 333 U.S. 203 (1948).

⁴ 344 U.S. 94 (1952).

Russian Orthodox Church to apply its own canon law to its internal disputes in any way affected the liberty of any particular person to worship as he pleased. The point is, as has been suggested, provocative. Father O'Brien in posing it, however, ignores both the history of the struggle of hierarchical churches to free themselves from the American legislative and judicial bias for congregational government, and the methodological connection between freedom to adhere to a hierarchical church and legal recognition for the authority of the hierarchy over the adherents. One wonders if Father O'Brien would have asked the same question in the same way if the foreign prelate whose rights were involved were not the Communist-dominated Moscow Patriarch.

The bad points in the book arise from the same source as the good points. For all his careful scholarship, for all his impressive array of legal bibliography, Father O'Brien never quite escapes from the fact that his materials are unfamiliar to him, and his professional preoccupation different from that of lawyers. He consistently underplays the methodological, administrative, or institutional aspects of any problem, and treats as peripheral issues that lawyers would regard as central.

A particularly striking example of this is his treatment of the problem of prior restraint in the Jehovah's Witnesses cases. In his first chapter, dealing with *Lovell v. City of Griffin*,⁵ *Schneider v. Irvington*,⁶ and *Cantwell v. Connecticut*,⁷ he does not mention it at all, but says "The *Lovell*, *Schneider*, and *Cantwell* decisions were products of the Court's deep suspicion of discretionary power in the hands of local assemblies or administrators." He thus sets the stage for his plea for decentralized government. Later, when he comes to *Jones v. Opelika*,⁸ he points out that Reed distinguishes *Lovell*, *Schneider*, and *Cantwell* on the basis of prior restraint, then hurries on to say "Justice Reed makes an even more important observation when he notes the difference between a regulation of the religious rite and one which touches operations merely incidental to it."⁹ Prior restraint is similarly ignored or brushed aside throughout the discussion. Nowhere is there an attempt to consider the real problems to which the doctrine is addressed, or the possibility of its furnishing an integrating element for the line of cases or some significant part of them.

At other times, Father O'Brien takes an excessively technical view of law. In his discussion of Reed's opinions in *Jones v. Opelika* and *Murdock v. Pennsylvania*,¹⁰ for instance, he is much impressed with the distinction Reed makes between religious activities as such and commercial or quasi-commercial activities calculated to support the ministers of religion. He does not state, let alone answer, Douglas' point that "freedom of religion is not reserved to those who can pay their own way." Reed's opinion, standing beside Douglas', is a rational choice between competing alternatives, although this reviewer would not agree with it, but the same opinion, as stated by Father O'Brien, stands alone as a

⁵ 303 U.S. 444 (1937).

⁶ 308 U.S. 147 (1939).

⁷ 310 U.S. 296 (1940).

⁸ 316 U.S. 584 (1942).

⁹ Text at 21.

¹⁰ 319 U.S. 105 (1943).

serious oversimplification. What emerges is a picture of a distinction discerned by Reed and those who voted with him, which the rest of the Court was too obtuse to understand.¹¹ Father O'Brien ends his discussion by interpreting this whole line of cases in political terms: "In his opinions in *Opelika* and *Murdock*, Mr. Justice Reed evinced a greater regard for federalism than was manifested by several others on the Bench in the same cases."¹²

Another example of an insufficiently subtle approach to legal technicalities is furnished by Father O'Brien's treatment of the "silence-of-Congress" argument in *Girouard v. United States*.¹³ In that case, it may be recalled, the Supreme Court made it possible for a conscientious objector to become a citizen of the United States, by overruling earlier cases that had interpreted the oath of allegiance as a commitment to bear arms. Three justices, Reed among them, dissented on the ground that Congress had repeatedly been urged to change the result of the earlier cases, but all such proposals had died in committee, and that Congress had since enacted a comprehensive revision of the Nationality Act, without making any change in this regard. The argument of the dissenters here is a respectable one on which reasonable men may differ. Father O'Brien is not to be blamed for accepting it, but he seems to embrace it a good deal too warmly. There is a powerful moral force behind the result reached by the majority in *Girouard* — a moral force that is entitled to consideration even by those who are unwilling to give it dispositive weight in the particular legislative context. Father O'Brien disregards this in a way that only a positivistic jurisprudence could approve. Nor is he at all fair to Douglas when he ignores the articulation of this moral element in the latter's majority opinion, and refers to "an ingenious interpretation of one of the amendments adopted in 1942,"¹⁴ as if Douglas intended to stand or fall on this.

Even on the technical level he attempts to deal with, Father O'Brien's legal analysis is far from satisfactory. Thus, in his discussion of Reed's dissent in *McCollum*, he takes the distinction—between "purposeful" and "direct" aid and other aid—with which Reed summarizes his whole position, and suggests as a "slight" criticism that the whole distinction is invalid. He supports this invalidity by stating an a priori definition of what is "nonpurposeful," and then showing that not all of Reed's examples of practices that have been considered valid fall within this definition. One more schooled in legal analysis would instead have used the examples to clarify the definition of the terms. Father O'Brien's definition of "nonpurposeful" aid is aid "given by the government for a purpose altogether other than religious."¹⁵ This reviewer would suggest that "nonpurposeful" aid is calculated not to achieve some purpose other than religious, but to provide the religious citizen with the same kind of aid a government anxious to serve the people provides for other conceptions of the pursuit

11 A suggestion by a former law clerk of Stone's that might have led to a more subtle interpretation of these cases is dismissed with a footnote reference to another case, with no indication of how the other case disposes of it. Text at 24.

12 Text at 32.

13 328 U.S. 61 (1945).

14 Text at 54.

15 Text at 195.

of happiness. Such an interpretation accords with the examples Reed gives; this fact seems to warrant some confidence that it is nearer what Reed is driving at than is another interpretation the examples refute.¹⁶

To sum up, this book, despite the valuable insights it contains here and there, is basically a work of legal analysis by an amateur. The failure of the author to grasp the subtleties of legal technique leads him to vacillate between a political interpretation of law on the one hand and a positivistic interpretation on the other. That so much careful research by a scholar obviously competent in the field of political theory should fail to make more of a contribution to an understanding of the legal materials he deals with suggests a serious failure of communication between the two disciplines. Clearing this up would lead to the shedding of a good deal more light on the Supreme Court for everyone concerned.

*Robert E. Rodes, Jr.**

¹⁶ In a footnote, Father O'Brien suggests another interpretation of Reed's "non-purposeful" formula, which would avoid "even the slight criticism in the text . . ." Text at 148. This is that government should favor religion "primarily because of the civil and temporal blessings its teachings and activities concomitantly shower on the state," a doctrine that Father O'Brien characterizes as "an old and noble tradition." Whatever may be said about the nobility of this tradition, there is no indication that Reed supposed it to be the doctrine required by the first amendment when it forbids an establishment of religion, and less indication that he would have been justified in doing so. See *Barnes v. First Parish*, 6 Mass. 401 (1810), in which this doctrine was used in support of the Congregationalist Establishment.

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THE LAWYER AND ADMINISTRATIVE AGENCIES. By Frank E. Cooper.¹ Englewood Cliffs: Prentice-Hall, 1957. Pp. xx, 331. \$7.50. Although administrative agencies and administrative law were unknown long after most of our basic legal concepts were well recognized and deeply rooted, they have had and are having such a profound effect that very few areas of law are untouched by their development. The title of this book is overly ambitious, for it is obvious that any attempt to deal "with the problems that the attorney faces in representing clients before administrative tribunals"² must limit itself or run the risk of superficiality. But the book itself avoids both alternatives by treating the fundamental differences between administrative law and other fields of law in very general terms and then discussing in somewhat more detail the actual conduct of an administrative proceeding. The bird's-eye view quickly narrows and the practical problems confronting the lawyer practicing before an administrative agency are thus given more attention. A lawyer faced with his first challenge by an administrative agency will, therefore, find the book an excellent starting place.

¹ Professor of Law, University of Michigan Law School.

² Text at v.

Although the author makes the broad charge that "some agencies" do not give effect to what the legislature intended, he does not level an accusatory finger at any particular agency. Thereafter he takes the reader through an agency proceeding. He begins with the initial notice received by a client from the agency and concludes with the appeal from an adverse agency decision. However, since he does not confine himself to any one problem or one agency, it becomes, at times, difficult to follow the proceeding.

There is usually wide latitude for the exercise of administrative discretion in the application of law by an agency to particular facts. This makes it difficult to catalogue guiding legal principles or to establish a precise formula for the solution of the many problems faced by a respondent involved in an administrative proceeding. Nevertheless, Mr. Cooper does list the major bases for attack upon unwelcome actions and briefly refers to the leading cases in the field. This may be a valuable aid to the lawyer who is seeking a point of departure, but it oversimplifies, in some instances, the complex considerations which affect any exercise of discretion.

The author emphasizes throughout his book that counsel appearing before an administrative agency should, nay must, employ many of the techniques that he would use when appearing before a legislative committee. There is a good deal of discussion concerning the necessity for obtaining the good will of the staff and of the members of the administrative agency, of obtaining a reversal of an initial decision by using the administrative agency's approach to the problem even though the lawyer may feel this approach is improper, and of the use of lobbying techniques. In so far as this analysis of the relationship between the lawyer and the administrative agency involves an acceptance of the idea of government by men rather than government by laws, most agency officials would disagree with the basic premise.

There is no doubt that staff consultation and advice can relieve a lawyer practicing before an agency of many of his difficulties.³ But interpretations issued by an agency, on either a formal or an informal basis, are often the only way in which a client can be protected. Every agency action must be responsive to the law under which it operates. No matter how many years a member of the staff of an agency has operated under the statute, he invariably turns to a consideration of the statute before expressing an opinion. Similarly, the members of each board or commission must depend upon the statute under which they operate, or the rule promulgated thereunder, for authority. When any departure from the statute seems required by the "public interest," it is time to recommend new legislation rather than strain existing legislation or wrench the language used into an unrecognizable result.

Necessarily, the author refrains from discussing any agency in detail and uses the major administrative tribunals only to illustrate the way in which particular problems are handled. This is just enough detail to pique

³ The author of this review was pleased by the book's reference to the Securities and Exchange Commission as possessing "an outstanding record of accomplishment" in issuing interpretations of security laws. See text at 45.

the reader's curiosity and not enough to gain a full understanding of any single agency's practice and procedure.

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* Special Counsel, Securities and Exchange Commission; Professorial Lecturer in Law, American University Law School. The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's colleagues upon the staff of the Commission.

WHEN YOU GO TO THE TAX COURT: PROCEDURE AND PRACTICE. Chicago: Commerce Clearing House, Inc. 1957. Pp. 316. \$4.00. The federal government today is collecting the amazing sum of about eighty-billion dollars a year in federal taxes. There is hardly a transaction that does not have its tax consequences and potential tax dispute with the Commissioner of Internal Revenue. Administrative procedures in the Revenue Service are provided to settle these disputes where possible but a large number must be finally determined by the courts. It is here that the Tax Court of the United States performs its important function. The Tax Court is the first independent forum where a taxpayer can challenge the right of the government to extract more tax from him than he has declared that he owes in his federal tax return; the Tax Court is given original jurisdiction in deficiency cases. The taxpayer must commence his action in the Tax Court and against the Commissioner of Internal Revenue unless he chooses and can afford to pay the government's demands first. If he pays the amount alleged to be due by the government, he can sue the United States for a refund in a federal district court or the Court of Claims.

Technically, the Tax Court is an administrative agency under the Executive Branch of the Government which was created by Congress in 1924 as the Board of Tax Appeals. Its name was changed by Congress to the Tax Court in 1942 and its sixteen members were designated judges. Tax Court decisions are reviewed by courts of appeal and the Supreme Court of the United States in the same manner as are the decisions of federal district courts. It is in substance a court and conducts its proceedings accordingly. The Tax Court has jurisdiction over income, excess profits, estate and gift taxes and is the appeal body from administrative determinations in renegotiation proceedings. The court is divided into sixteen divisions of one judge each; and cases are usually heard by a single judge. Sessions of the court are held in all of the large cities of the United States. Judges are appointed for a term of twelve years by the President of the United States with the advice and consent of the United States Senate.

In the fiscal year 1957, 5,295 cases were filed with the Tax Court, and it is anticipated that about 5,800 cases will be filed in 1958. Every lawyer who fully represents his client will be concerned with the decisions and

precedents of the Tax Court and will eventually find himself before the court challenging the government's right to obtain more taxes from his client.

No man likes to play a dangerous game in the other fellow's back yard because his opponent is in familiar surroundings; he suffers the uncertainties of being in a strange place. The Commissioner of Internal Revenue is represented in the Tax Court by attorneys in the Office of the Chief Counsel of the Internal Revenue Service. The Tax Court is their regular forum and they are able and experienced advocates familiar with the rules and the know-how of Tax Court practice.

How then can a general practitioner of the law best prepare himself, in the limited period of time he is usually allowed by his client, to go into a strange court and meet able opposition in surroundings familiar to them? The book *When You Go To The Tax Courts: Procedure and Practice* is written for the lawyer who in a short time wants to know all about how a tax dispute arises, his client's right to a forum, how he gets there, the rules of the court, how and where he can appeal and perhaps above all, to be familiar with forms and examples of how it is done. How are the pleadings and briefs set up? Is there an opening statement before the trial? Is there an oral argument after trial? What rules of evidence are followed?

This is the Seventeenth Annual Edition covering "Procedure and Practice Before the Tax Court of the United States," and Commerce Clearing House has answered all questions that its experience in the tax field has shown that a novice having his first trial or a veteran trial lawyer appearing in the Tax Court for the first time should need to know.

The book, however, is more than just a "how to do it" manual. It contains the Tax Court Rules of Practice, rules for appeal from the Tax Court to the various circuit courts of appeal, forms used by the Treasury Department, the Tax Court and circuit courts and a text discussion of problems involving litigation in the Tax Court annotated with the case authority. Thus, the book has value for the experienced practitioner who specializes in taxes. It is an annotated text book, a procedure reference book, a form book, and a collection in one place of useful information that is otherwise difficult to obtain quickly. The grouping together in one chapter of rules of evidence to be used in the Tax Court and the rules governing the testimony of witnesses make the book a valuable reference to have at hand during a trial in the Tax Court.

The discussion in the book relating to pleadings in the Tax Court may be subject to some criticism. Tax problems are complicated and often the problem involved is not clearly defined or understood by the parties prior to going to court. A taxpayer, however, has the burden of proof on all issues except fraud and it is imperative that he fully understands the issues and his burden in the case. A taxpayer has the right to have the issues clearly stated and defined in the pleadings prior to the trial of the case.

The discussion dealing with the Commissioner's answer to a taxpayer's petition recognizes that the answer is very often little more than a general denial of the allegations in the petition of the taxpayer. The petition is the opening pleading and is addressed to the Commissioner's determination in the notice of deficiency or the so-called ninety day letter. Very often

the notice of deficiency is not clear or complete so that the issues are not clearly defined by the pleadings prior to trial. The chapter on the Commissioner's answer states in this case "Probably the best way out of the situation where the taxpayer does not understand the basis upon which the Commissioner's Counsel intends to rely is to go to him informally and ask him. Unless there are special circumstances the attorney handling the case for the Commissioner will be willing to state where he stands."

It is the view of many tax attorneys that the taxpayer should not have to go to government counsel to ask what the issues are or where the government stands after the pleadings are complete. Both parties should know by that time what the fight is about and their position should be defined and limited by the pleadings.

In 1956, the Tax Court decided the case of *Peter and Grace Licavoli*¹ wherein the court dismissed the Commissioner's allegation of fraud in his answer which was based upon a net worth computation showing additional unreported income. The taxpayer previously had filed a motion to make the Commissioner's answer more definite and certain, which the Tax Court granted. The Commissioner's amended answer was still not adequate to supply the taxpayer with sufficient knowledge of the net worth computation. Thereafter, the Commissioner refused to comply with the court's order to plead further. The Commissioner's pleading of the affirmative matter was thereupon stricken from the pleading and the case by the Tax Court. In other recent cases not involving fraud, the court has granted a petitioner's motion to make the Commissioner's answer more definite and certain.²

The foregoing is really a criticism of an attitude on the part of some that Government Counsel is immune from admitting facts or pleading other facts that he knows to be true so that the parties can narrow the issues and in some cases understand the issues in the case. It is not a matter of the taxpayer's attorney going to government counsel informally to find out the issues. He has a right to have the issues set forth in writing in the pleadings and the Tax Court will back him up in enforcing that right.

*Wesley A. Dierberger**

¹ P-H 1956 T.C. Mem. Dec. ¶ 56,187, *aff'd.* — F.2d — (6th Cir. 1958).

² See "Memorandum to Accompany Order" in the cases *Appalachian Elec. Power Co. and affiliated corporations and the Ohio Power Co.*, Docket Nos. 63152, 63153, and 63394 and discussion at ¶ 5007, CCH TAX CT. REP.

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BOOKS RECEIVED

ADMINISTRATIVE LAW

***THE LAWYER AND ADMINISTRATIVE AGENCIES.** By Frank E. Cooper. Englewood Cliffs: Prentice-Hall, 1957. Pp. xx, 331. \$7.50.

BIOGRAPHY

THE FACE OF JUSTICE. By Caryl Chessman. Englewood-Cliffs: Prentice Hall, 1957. Pp. xvi, 271. \$3.95. A third publication by an author sentenced to death, militating for the abolition of capital punishment.

CONSTITUTIONAL LAW

***JUSTICE REED AND THE FIRST AMENDMENT: THE RELIGION CLAUSES.** By F. William O'Brien, S. J. Washington: Georgetown University Press, 1958. Pp. xi, 264. \$5.00.

RACIAL DISCRIMINATION AND PRIVATE EDUCATION: A LEGAL ANALYSIS. By Arthur S. Miller. Chapel Hill: Univ. of North Carolina Press, 1957. Pp. ix, 130. \$3.50. In the belief that denominational and other private schools play an important role in our educational system, the author analyses the problems involved in integration of private schools and the possible legal consequences.

CRIMINAL LAW

PSYCHIATRY AND THE CRIMINAL. By John W. McDonald. Springfield: Charles C. Thomas, 1957. Pp. xv, 227. \$5.50. The author sets forth the special problems associated with the psychiatric examination of the criminal suspect.

ETHICS

ETHICS IN PUBLIC SERVICE. By Don L. Kooken. Springfield: Charles C. Thomas, 1957. Pp. viii, 58. \$3.00. A former Captain of the Indiana State Police presents the obligations and responsibilities of the police officer to the public, together with the necessary qualifications of the individual who is to serve in the police service.

HOUSING

THE LAW OF MOBILE HOMES. By Barnet Hodes and G. Gale Roberson. New York: Commerce Clearing House, Inc., 1957. Pp. x, 457. \$14.75. A text devoted to the law of mobile homes covering statutory and case law.

NATURAL RESOURCES

HIGH DAMS AND UPSTREAM STORAGE. Edited by A. W. Stone. Missoula: Montana State University Press, 1958. Pp. 175. A compilation of a series of lectures delivered at Montana State University School of Law designed to convey the importance of water storage and resource development.

TAX

***WHEN YOU GO TO THE TAX COURT: PROCEDURE AND PRACTICE.** Chicago: Commerce Clearing House, Inc., 1957. Pp. 316. \$4.00.

* Reviewed in this issue.