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Book Reviews

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THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS AND THE SUPREME COURT. By Robert J. Harris. Baton Rouge: Louisiana State University Press, 1960, Pp. xiv, 172. $4.00

RACE RELATIONS AND AMERICAN LAW. By Jack Greenberg. New York: Columbia University Press, 1959. Pp. viii, 481. $10.00

These two books complement each other very nicely. While they are both concerned with the "equal protection of the laws" in the realm of race relations, one deals primarily with the theoretical and constitutional origins, congressional background, and judicial application of that clause of the fourteenth amendment, while the other describes the legal doctrines of today that govern race relations in the United States along with the degree of success or failure of those doctrines.

Robert J. Harris, professor of political science at Vanderbilt University, has long been a careful student of American constitutional law. The material in his book, *The Quest for Equality,* was originally delivered as the 1959 Edward Douglass White lectures at Louisiana State University. In this study he attempts to relate the origins of "the equal protection of the laws" in political theory and the landmarks of Anglo-American constitutionalism to their legislative history in Congress and to examine the manner in which the United States Supreme Court has judicially construed that clause in cases coming before it.

An analysis of the major landmarks in ancient and medieval political theory which provides an historical basis for the American tradition of equality leads Professor Harris to conclude that there are two ideas implicit and explicit in the "equal protection" clause of the fourteenth amendment: first, the duty of government to protect all persons in their civil rights and, second, the equality of all persons before the law. From an examination of the congressional debates from 1886 through 1875, which concerned the proposal of the fourteenth amendment and subsequent efforts to implement its provisions by statute, he is convinced that the framers of the fourteenth amendment intended Congress to have positive power to assure the realization of this dual concept of equality.

Judicial interpretation of the fourteenth amendment in the pre-1900 cases had the effect of making the Supreme Court, and not Congress, the major organ for its enforcement, contrary to the expectation of its framers. Professor Harris' displeasure with Mr. Justice Brown's opinion in *Plessy v. Ferguson*[1] is quite evident

1. 163 U.S. 537 (1896).

from his characterization of it as "a compound of bad logic, bad history, bad sociology, and bad constitutional law,"[2] whereas he characterizes Mr. Justice Harlan's dissent as "sound logic, accurate history . . . , correct constitutional law, and . . . high moral assumptions and aspirations."[3]

"The Judicial Burial of Jim Crow" (the title of the concluding chapter) began around 1935 when the Court subjected to careful scrutiny instances of racial discrimination in the selection of trial and grand juries. These were followed by decisions dealing with restrictive convenants, suffrage, higher education; and "the burial" was finally realized with the decision in the school segregation cases and its extension to other public facilities and accommodations. Although praising the decision in *Brown v. Board of Education*,[4] Professor Harris shows keen disappointment in the opinion by Chief Justice Warren asserting that it lacked the "vigor and conviction of the dissents of the earlier Justice Harlan in other cases dealing with segregation, and it fell short of the legal craftsmanship of more recent opinions by Chief Justice Hughes, Justice Cardozo, and Justice Stone, which changed the course of the law by reversing earlier decisions."[5]

The Quest for Equality is a powerfully persuasive analysis of a subject of compelling interest to students of American constitutional law, and the more persuasive because it is the work of a native southerner.

Race Relations and American Law might well be characterized as a single volume treatise (in the legal bibliographic sense) on the law of race relations in the United States. It is a wide ranging and encyclopedic study by one who has been intimately involved with the subject. Jack Greenberg is the recently appointed general counsel of the NAACP Legal Defense Fund and appeared before the United States Supreme Court in the school segregation cases.

The book is so arranged that it has great utility as a reference tool. The first two chapters deal with legal problems which are common to all phases of race relations. Each of the remaining nine chapters is devoted to a particular phase of race relations: "Public Accommodations and Services," "Interstate Travel," "Elections," "Earning a Living," "Education," "Housing and Real Property," "The Criminal Law," "Domestic Relations Law," and "The Armed Forces." A lengthy section of appendixes (some eighty pages) makes readily available much useful information, particularly citations to state statutes and constitutional provisions relative to race relations.

In addition to providing a valuable reference tool in the law of race relations in the United States, Mr. Greenberg attempts to give the subject matter a unifying theme by posing the following questions: "Can the law alter race relations? Can it create or end discrimination and prejudice? Have the thousands of laws and law suits . . . been able to cause or prevent social change?"[6] He answers

2. P. 101.
3. P. 102.
4. 347 U.S. 483 (1954).
5. Pp. 149-150.
6. P. 2.

these questions in the affirmative, stating in "The Prospect," (a one page conclusion):

> Law has demonstrated its capacity to change race relations, and in the future this ability will grow. A legal rule might falter or rebound if it ran counter to the other forces of life; the inherent frailties of legal procedure might stultify efforts to use law for social change in other circumstances; but in the nation and the world in which we live the application of legal rules governing race relations is bound to continue to bring social practices into line with the legal norm.[7]

Thus the author would disagree with the thesis of sociologist William Graham Sumner that "stateways cannot change folkways."

In attempting to discuss comprehensively in a single volume such a large and important subject as *Race Relations and American Law,* Mr. Greenberg has been singularly successful.

FREDERICK C. SPIEGEL*

POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (2d edition) Two volumes. By Thomas I. Emerson and David Haber. Buffalo, N. Y.: Dennis and Co., 1958. Pp. xvii, 757 and vi, 777. $36.00

BILL OF RIGHTS READER (2d edition). By Milton R. Konvitz. Ithaca, N. Y.: Cornell University Press, 1960. Pp. xx, 849. $8.25

These publications do not readily lend themselves to review for two reasons: first, both are in their second edition and are well established works, quite thoroughly reviewed in their earlier versions; and second, the content of these volumes consists of selections of cases and materials in the field of civil rights which are not ideal subjects for review. However, a few comments describing certain features of the revised editions with some evaluation as to their utility may be in order.

The two volume work by Professors Emerson and Haber, law teachers at Yale and Rutgers respectively, have provided us with the most comprehensive collection of legal materials in the field of political and civil rights. With the multitude of books being written in the field of civil liberties, nothing as yet can be classified as an overall legal treatise on the subject. This work comes the closest to filling that bill.

The materials are grouped under seven chapter headings which are as follows: "The Right to Security of Person," which is a somewhat deceiving chapter title since it actually deals with the federal enforcement of civil rights; "The Right of Franchise;" "Right of Political Organizations and Political Expression," a lengthy

7. P. 371.

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chapter of 503 pages constituting the major part of the first volume; "Other Problems of Freedom of Speech;" "Academic Freedom;" "Freedom of Religion" and "Discrimination." For each of these topics the authors provide generous portions of the opinions (including concurrences and dissents) of pertinent cases and lengthy excerpts from significant articles, books, classic works, documents and statutes. The authors include helpful introductory and transitional commentary relating the various subtopics in each chapter. The extensive notes and bibliographic references are outstanding and will prove invaluable to the student of civil liberties. The materials provided in chapter one, dealing with the federal enforcement of civil liberties, is as good a documentary source on this topic as is available anywhere.

Those familiar with the first edition will be disappointed with the revised edition in two respects. First, a large and important area of civil liberties has been omitted, that being the rights of individuals in criminal proceedings, a subject included in the earlier edition under the heading "Fairness in Governmental Procedures." The authors refer to this as "our most painful omission" and justify the deletion by stating that "the material is treated in courses and texts on criminal law."[1] To the many nonlawyers who have not had the benefit of such courses the utility of this work is definitely lessened.

A second disappointing feature can be attributed to the publisher. Eight years ago this reviewer, as a graduate student, took a course on the Constitution and civil liberties, the textbook used being the first edition of this work by Emerson and Haber. It was a single volume publication, priced at seven dollars and fifty cents, and was ideally suited as a text for the course. A few years later, this reviewer, upon entering the ranks of the college teaching profession, instituted such a course eagerly anticipating the use of an updated edition of that text. However, this revision has been made available only in a two volume edition consisting of over 1500 pages and priced at thirty-six dollars. The publisher might well consider making subsequent editions available in both the reference edition as it now appears and in an abridged single volume text edition.

In spite of these criticisms, this publication is an outstanding contribution to the literature of political and civil liberties in the United States and should have wide use.

The *Bill of Rights Reader* is a collection of cases designed for the general reader who is interested in civil rights. Its author, Milton R. Konvitz, professor of industrial and labor relations and professor of law at Cornell University, has been one of the country's most prolific writers in the field of civil liberties, having authored or edited more than ten books on this general subject.

The term "Bill of Rights" as incorporated in the book's title is a convenient phrase which the author uses to include not only the first eight amendments, but also the Civil War Amendments and some of the provisions of the original Constitution, like those prohibiting bills of attainder and test oaths—in brief,

1. P. xv.

all provisions incorporating civil and political liberties wherever they may appear in the Constitution.

The book contains nearly one hundred cases with helpful introductory notes which provide the necessary background to the particular case. Professor Konvitz had the good judgment to let the Justices speak for themselves with generous excerpts from their opinions. He includes a few cases from courts other than the United States Supreme Court where the opinion might enlighten the reader with respect to a particular phase of the subject not yet dealt with by the Court. This book puts the reader in touch with many of the notable decisions and opinions of the "Warren Court," in the realm of civil liberties.

One misses some of the classic opinions of yesteryear authored by Justices Holmes, Brandeis, and Harlan I. No doubt space limitations dictated such omissions since the author's primary objective was to provide us with as many of the recent decisions as possible. Absolutely no reference is made to the cases and statutes dealing with the federal protection of civil rights, a very important phase of current civil liberties activity. To those who use this volume as a textbook in civil liberties courses (as the reviewer does), this omission definitely reduces the utility of the publication.

The author's stated objective in preparing this collection of cases is to make "a contribution to the education of that mythical character, the average educated American who is interested in the great issues and the great debates of his day."[2] For the persons who read this book this objective will be realized.

FREDERICK C. SPIEGEL*

LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY. By Leonard W. Levy. Cambridge, Mass.: The Belknap Press of Harvard University Press, 1960. Pp. xiv, 353. $6.50

THE FIRST AND THE FIFTH: WITH SOME EXCURSIONS INTO OTHERS. By O. John Rogge. New York: Thomas Nelson & Sons, 1960. Pp. ix, 358. $8.50

Both of these books deal with that freedom which Mr. Justice Cardozo referred to as "the matrix, the indispensable condition of nearly every other form of freedom,"[1] namely, freedom of expression, for only through the free and uncensored expression of opinion can government be kept responsive to the electorate and can governmental power be transferred peacefully. Both books have this feature in common, that the authors, to varying degrees, deal with the historical background and development of this fundamental freedom.

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2. P. viii.

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1. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

Professor Levy of Brandeis University, well known for his fine study of Chief Justice Lemuel Shaw,[2] presents a revisionist interpretation of the background and original meaning of the first amendment's clause on freedom of speech and press. As he states in the preface: "I have been reluctantly forced to conclude that the generation which adopted the Constitution and the Bill of Rights did not believe in a broad scope for freedom of expression, particularly in the realm of politics."[3]

This conclusion, based on intensive research in primary sources (the study is well documented), will prove to be a dissappointment to those civil libertarians who marshal support for their position on freedom of expression from "the intention of the framers" as reflected from a literal interpretation of the first amendment. It has been accepted in both law and history that those responsible for the first amendment had a very broad understanding of freedom of speech and press and intended to abolish the common law of seditious libel. Mr. Justice Holmes, for example, with Mr. Justice Brandeis concurring, declared: "I wholly disagree with the argument . . . that the first amendment left the common law as to seditious libel in force. History seems to me against the notion."[4] In his classic work on the subject, Zechariah Chafee alleged, "The first amendment was written by men . . . who intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law breaking, forever impossible in the United States of America."[5] More recently Justices Black and Douglas stated, "But the first amendment repudiated seditious libel for this country."[6] Numerous other writers have supported the same proposition. According to Levy: "The evidence suggests that the proposition is more presuppositious than plausible, or if plausible, unprovable."[7]

Impressive evidence is presented supporting the thesis that from the time of Milton to the adoption of the first amendment the libertarian theory accepted the right of the state to suppress seditious libel. Colonial America was not hospitable to advocates of odious or unorthodox ideas. Even the celebrated *Zenger* case produced no broad concept of freedom of expression. Speech and press were not free anywhere during the American Revolution and there was little change upon its successful completion. While some of our best constitutional authorities have argued that one object of the Revolution was to get rid of the English common law with respect to the freedom of speech and press, Levy asserts that: "It is closer to the truth to say that the Revolution almost got rid of freedom of speech and press, instead of the common law on the subject."[8] The Blackstonian definition of liberty of speech and press was provided by constitution or by statute in twelve States, including nine which guaranteed a free press.

Professor Levy's study further reveals that the history of the drafting and

2. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957).
3. P. vii.
4. Abrams v. United States, 250 U.S. 616, 630 (1919).
5. CHAFEE, FREE SPEECH IN THE UNITED STATES 21 (1948).
6. Beauharnais v. Illinois, 343 U.S. 250, 272 (1951).
7. P. 3.
8. P. 182.

adoption of the first amendment's freedom of speech and press clause does not suggest and intend to institute broad reform. If the purpose of the first amendment was to eradicate the common law meaning of seditious libel both the framers of the amendment and those who ratified it might have been more explicit in stating it both in the Congress and in the debates during ratification. A spirit of tentativeness is evident in Levy's study at this point, largely due to the meagerness of the sources during the period from 1787 to 1791. He admits that:

> We do not know what the first amendment's freedom of speech and press clause meant to the men who drafted and ratified it at the time that they did so. Moreover, they themselves were at that time sharply divided and possessed no clear understanding either. If, however, a choice must be made between two propositions, first, that the clause substantially embodied the Blackstonian definition and left the law of seditious libel in force, or second, that it repudiated Blackstone and superseded the common law, the known evidence points strongly in support of the former proposition.[9]

He concludes that a broad libertarian theory of freedom of expression did not emerge in the United States until the Jeffersonian Party was threatened by the Sedition Act of 1798.

While *Legacy of Suppression* casts great doubt upon the authority of the past's original intentions as support for present preferences, Levy does assure his readers that the cause for freedom of expression is not lost for "the case for civil liberties is so powerfully grounded in political philosophy's wisest principles, as well as the wisest policies drawn from experience, that it need not be anchored to the past."[10] This most interesting and scholarly study will prove to be a major contribution to American constitutional history.

The First and the Fifth likewise deals with freedom of expression, "the first" protecting freedom of utterance and "the fifth," the right to silence. Author O. John Rogge, formerly Assistant United States Attorney General (Criminal Division) and long concerned with providing full protection to persons in the exercise of their civil liberties, dedicates the book to the United States Supreme Court and presents an historical justification of the absolute position of freedom of expression.

Mr. Rogge's analysis of the historical background of the first amendment runs counter to that of Professor Levy, arguing that the amendment constitutes an absolute proscription upon Congress from abridging freedom of expression. He draws most of his support from writings which come after the passage of the Sedition Act of 1798 and, according to Levy's study, of which Mr. Rogge did not have the benefit, it is doubtful whether these writings represent the feelings of the framers at the time of the adoption of the first amendment.

While maintaining that there exists no federal power to restrict speech, the author rejects the "incorporation theory" of Mr. Justice Black that the due

9. Pp. 247-48.
10. P. 4.

process clause of the fourteenth amendment incorporates the first amendment, thus proscribing the states from interfering with any of the rights guaranteed therein. He argues that the due process clause "supplies no basis for that theory historically and an erroneous one judicially."[11] He asserts that the States ought to have leeway under the due process clause to deal with necessary restrictions on speech and problems of sedition but "the leeway which the states will have will be small."[12] This would appear to make Mr. Rogge an absolutist with respect to the power of the federal government to interfere with speech but a relativist with respect to state power in that area. Mr. Rogge provides an extended discussion of some of the classic civil liberties cases through the 1958 term of the Supreme Court.

The author's discussion of the "right of silence" turns on the fifth amendment's prohibition against compulsory testimony on the part of a defendant. Two long chapters, totaling 140 pages, provide the reader with a very interesting historical analysis of this most important guarantee and of compulsory testimony acts. Mr. Rogge has long been interested in confessions by defendants, compulsory as well as noncompulsory, as demonstrated by his earlier book, *Why Men Confess*. His treatment of the right to silence might have been more complete had he included some discussion of the concept of this right under the first amendment as set forth by Chief Justice Warren in the *Watkins*[13] case and Mr. Justice Black in his dissent in the *Barenblatt* case.[14]

The "excursions" are very brief discussions of such related matters as freedom of privacy, political activity, movement, and knowledge; the rights of confrontation and jury trials in contempt cases; use of mails; and peaceful picketing, all treated in the last chapter.

While *The First and the Fifth* does not make as great a contribution to scholarship as that of Professor Levy, anyone interested in the study of civil liberties will find much of value in very readable form.

FREDERICK C. SPIEGEL*

11. P. 53.
12. P. 102.
13. Watkins v. United States, 354 U.S. 178 (1957).
14. Barenblatt v. United States, 360 U.S. 109 (1961).

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