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The Bill of Rights by Learned Hand and The Right of the People by William O. Douglas

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vain, when I told him that in Myron Taylor Hall we had a book which referred, not once, but 18 times, to the rule “de minimus.”

A final protest to the publisher. I grow old, and my eyes are dim, so that I cannot see. As I gaze upon the pages of this book I say: “The words are Avins’ words, but the print is the print of Oceana Publications; I discern it not, because their hand is chary of large type.”

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Here are two excellent little books that must be read, and must be read together—their significance, in conventional legalese, is joint and not several. Here from two eminent members of the Federal Bench, are the briefs on either side of the argument over the ultimate meaning of the Bill of Rights. The effect of reading them as companion volumes is not to be convinced of the validity of one argument over the other, but rather to be struck by the importance of the problem—to be reminded again that the theoretical justification of the very foundation of our constitutional system is still the subject of sharply drawn controversy.

Judge Hand addresses himself to the “well worn”1 problem of the proper scope of judicial review of legislation in matters relating to the First, Fourteenth and Fifth Amendments of the Constitution. Considering first the justification of the power of judicial review, Hand finds nothing in the text of the Constitution itself from which that power can be inferred.2 From a short survey of the conditions that produced the Constitution and a briefer analysis of the needs of the government it created, Hand concludes that the power of judicial review was reasonably implied by the necessities of our triangular-structured government. Somewhere, he argues, there must reside power to finally arbitrate boundary disputes between the respective departments, and it is this function which the Court seemed best suited to fulfill.3 Sharply distinguished from this function, however, is that of question-

2 Id. at 10.
3 Id. at 29.
ing the wisdom of choices made within departments, and it is upon the assumption that this distinction can be made that Hand rests his argument for a limited judicial review confined strictly by the need that produced it.

With the foundation thus laid, Hand inquires into the proper scope of judicial review in matters relating to the Fifth and Fourteenth Amendments. He implies what he has said before, that the Amendments are hortatory or admonitory only, "not definite enough to be guides on concrete occasions, prescribing no more than that temper of detachment, impartiality, and an absence of self-directed bias that is the whole content of justice." He concludes that the proper scope of review is "only to set the ambit of what is legislation and not to redress any abuses in the exercise of power."

Passing to the proper task of the Court when legislation infringes upon rights guaranteed by the First Amendment, Hand first insists that a legislature is as competent a protector of liberty as it is a guardian of property, and that therefore, except in some extreme cases (not elaborated) the scope of judicial review should be as limited in this area as in the others. Almost grudgingly, Hand admits that freedom of speech is freedom from majority (legislative) action and that therefore perhaps some "third chamber" is needed to give that freedom meaning. But he concludes that even if this were true, the courts are certainly not so constituted as to be effective in these complicated adjustments of conflicting values.

Douglas' book is broader and deals only indirectly with the question to which Hand addressed himself. Douglas has undertaken an essay on the whole range of civil rights. Freedom of Expression, the first major subdivision, explores the category of infringement upon speech through its various contexts in education, the arts, the press, group action, etc. Limits upon this freedom are discussed under the headings of Libel and Slander, Threats to Law and Order and Government Security, and Obscenity. Included is a short discussion of Censor-
ship. The second major division of the essay concerns The Right To Be Let Alone and tours through the maze of legislative investigations, loyalty programs, academic freedom, self-incrimination, unlawful search, etc. The final section on The Civilian Authority is a restatement of the traditional principles of military subordination.

Douglas treats these weighty matter throughout with admirable candor and simplicity. With most topics there is a touch of history, a brief glance at case development, and finally an evaluation of the present situation brought to focus through discussion of recent Supreme Court decisions. The text, written for the layman, should serve admirably as a primer on current constitutional litigation in this field. But Douglas does not pretend to the office of the disinterested reporter. He is throughout an advocate, and his cause is that of a strong, active and vigilant judiciary, whose members, armed with the clear commands of the Bill of Rights, are urged with the rest of us to “become the champions of the virtues that have given the West great civilizations” and to make “those virtues truly positive influences in our policies.” Indeed, so much is Douglas the advocate, one has the distinct impression that the book is really a collection and organization of Douglas’ dissenting opinions in the area of civil rights—a brief documented account of that philosophy of civil liberty which has been the polestar of Douglas’ dissenting conscience.

The book is important precisely for that reason. It gives us an opportunity to compare two diametrically opposed conceptions of the judicial function with respect to civil rights legislation—a comparison at the basic level where the real disagreement lies. On the surface we have two divergent views of the proper scope of judicial review. Hand takes the position that the Court should not inquire into the wisdom of legislative choice, and that even in civil rights matters the Bill of Rights is no warrant for that sort of inquiry. Douglas on the other hand considers it the duty of the Court to be ever vigilant in protecting liberties from legislative encroachment and deems the First Amendment (from which “... [a]ll notions of restraint... are absent”) to be a clear command to this effect. When one begins to dig beneath the surface of these short volumes, he finds that each opinion

13 Id. at 12.
14 Indeed, some of the language from Douglas dissents appears verbatim in this book. Compare, for example, the passage on p. 62 with the dissent in Roth v. United States, 354 U.S. 476, 512 (1957).
15 As Cardozo long ago pointed out, it is through their philosophies that judges are kept consistent with themselves, and inconsistent with one another. Cardozo, Nature of the Judicial Process, 12 (1921).
derives from a separate set of philosophical premises—one Positivism, the other Idealism—which represent the horns of that philosophical dilemma upon which American political and legal philosophy have long been impaled.¹⁷

In the technical jargon of philosophy, Hand is a Positivist and by this is meant simply that his philosophy comprehends a reality which can be exhausted by empirical description.¹⁸ In avoiding concern with propositions that cannot be the subject of empirical proof, the Positivist rigidly separates the is from the ought,¹⁹ conceiving statements falling in the latter category merely as expressions of personal preference;²⁰ and as such, immediate, absolute, and undetermined.²¹ In short, the ultimate sanction for a value statement lies in the fact that it is preferred; since a value choice is imperative in any statement of community policy²² the Positivist considers a choice “just” or “right” only when it is sanctioned by the cumulative preferences of the community as tabulated by a device such as majority vote.²³ Given this assump-

¹⁷ For a collection of essays dealing with this problem, see Burckhardt, Cleavage in Our Culture (1952). For a treatment of this dilemma which specifically explores its relation to political theory, see Myers, Warfare of Democratic Ideals (1956). For a glimpse of the still continuing debate in legal thinking, see Hart, “Positivism and the Separation of Law and Morals”, 71 Harv. L.R. 593 (Feb. 1958); Fuller, “Positivism and Fidelity to Law—A Reply to Professor Hart”, 71 Harv. L.R. 630 (Feb. 1958).

¹⁸ Professor Hart suggests that there are five or more meanings given to “Positivism” in contemporary literature: (1) the contention that laws are commands of human beings; (2) the contention that there is no necessary connection between law and morals or law as it is and ought to be; (3) the contention that the analysis (or study of meaning) of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of law, from sociological inquiries into the relation of law and other social phenomena, and from the criticism and appraisal of law in terms of morals, social aims, or functions; (4) the contention that a legal system is a “closed logical system” in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards; (5) the contention that moral judgments cannot be established or defended, as statements of fact can, by rational argument, evidence, proof. Hart, op. cit. supra note 17, at page 601, n. 25.

¹⁹ For example, note Hand’s insistence that one can discover what “is” legislation without considering its wisdom. Hand, op. cit. supra note 1, at 29.

²⁰ While Professor Hart urges that the Positivist’s separation of “is” and “ought” does not necessarily depend on relegating “ought” statements to the world of preference, (op. cit. supra note 17, at p. 626), Hand is clearly of this persuasion. Hand, op. cit. supra note 1, at 24, 38.

²¹ Hand, op. cit. supra note 1, at 38. Cf. A. J. Ayer, Language, Truth and Logic, 108, 109 (1946): “... sentences which simply express moral judgments do not say anything. They are pure expressions of feeling and as such do not come under the category of truth and falsehood. They are unverifiable for the same reason as a cry of pain or a word of command is unverifiable—because they do not express genuine propositions.”

²² Hand, op. cit. supra note 1, at 37.

²³ Truth, ultimately, to the positivist, is a matter of power, numerical or physical. Cf. Holmes: “I used to say when I was young, that truth was the majority vote of that nation that could lick all others... and I think that the statement was correct...” Holmes, “Natural Law”, 32 Harv. L.R. 40 (1918).
tion, the legislature, being the authoritative spokesman of community preference, is likewise by definition the only legitimate judge of community policy. For the court to question the wisdom of legislation is for the court to undertake the making of choices itself. Because this implies a standard of value apart from the cumulative expression of preference available as a guide to the legislature and because in the empirically defined reality of the Positivist these outside standards do not exist there is no legitimate warrant for an active judiciary. The Bill of Rights, having no foundation in Divine or Natural Law, becomes merely hortatory or admonitory.

In sharp contrast to the Positivism of Hand, is what may be called the Idealism of Douglas. In the reality of the Idealist, certain standards of value do exist apart from majority preferences. Sovereignty does not lie with the majority, says Douglas, but with all indivisibly and it is “dangerous” therefor to consider the legislature supreme. There are certain “natural rights” which “have a broad base in morality and religion” and which may be “implied from the very nature of man as a child of God.” These rights are considered a de facto limit on governmental, legislative or majority action. “Our system”, said Douglas in an earlier work, “presupposes that there is . . . the higher authority to which all laws are appealable. . . . Our civilization rests on the premise that there is a Supreme Being to whom not only man, but government, is accountable.” Citing an earlier work of Hand, Douglas concludes:

I disagree with the view of Judge Learned Hand that the prohibitions of the First Amendment, in terms absolute, are ‘no more than admonitions of moderation’. . . . The idea that they are no more than that has done more to undermine liberty in this country than any other single force. That notion is, indeed, at the root of the forces of disintegration that have been eroding the democratic ideal in this country.

We have thus two eminently respectable views of the meaning of the Bill of Rights—two widely held theories about the relation of democratic government to its citizens. The views are flatly incompatible.

24 Hand, op. cit. supra note 1, at 38, 39.
25 Id. at 39.
26 Id. at 73.
27 Id. at 2, 34.
28 Douglas, op. cit. supra note 12, at 23.
29 Id. at 44.
30 Id. at 89.
33 Douglas, op. cit. supra note 12, at 33.
Morris Cohen has noted our almost schizophrenic attempt to accommodate both views.

The reason why all these arguments must logically break down is that they ultimately involve two contradictory absolutistic conceptions of what is law. One is that the law is the will of the sovereign, and the other that law is eternal reason or immutable justice. The notion that whatever pleases the sovereign is law comes to us from the Byzantine period of Roman law. The eighteenth century writers simply put the people in the place of the absolute emperor. The notion of law as reason comes to us from the Stoic philosophy. Ever since Blackstone acquired his dominance over American legal thought, his method of simply putting these two incompatible notions side by side, in the same definition, has prevailed. Now it is possible to construct a doctrine of restraints on the popular will in the interest of justice or reason; and it is also possible to construct a doctrine that what the people want, whether it be just or not, should prevail as law. But the combination of the two in the theory that law which judges make is both just and the will of the people, is a logically impossible feat.\(^3\)

As a matter of readily demonstrable fact, one can expect Judge Hand and Justice Douglas to decide cases differently in this area; thus these two books provide a vivid illustration of the intimate relation between philosophy and actual concrete judicial decision.\(^3\) Further, this reader is left with the feeling that neither of these theories fully explains the reality in which we work. The problem of value determination is one of the most vital we face and the contributions of Idealism and Positivism to the resolution of the problem are equally inadequate. From Plato's Guardians through the Inquisition to modern Fascism and Communism, history has demonstrated the danger of treating values as inherent in a higher reality\(^3\)—if ideals exist which are incapable of public demonstration, spokesmen and interpreters,

\(^3\) M. Cohen, Law and the Social Order, 137 (1933). See Myers, op. cit. supra note 17, at 3-17.

\(^3\) A relationship which our quest for certainty makes us reluctant to admit. Thus Patterson, Jurisprudence—Men and Ideas of the Law, 329 (1953): "To establish that any distinct philosophy of law had a decisive influence upon a particular judicial decision or the enunciation of any particular legal doctrine is rarely possible, for the generalizations of legal philosophy are usually too comprehensive and abstract to be decisive of legal issues in litigation." Re Hand and Douglas, quaere?

\(^3\) Although the Natural Law theorist, failing to see that "misinterpretation" is the ultimate fate of non-demonstrable Idealism, explains past mistakes on the basis of questionable expertise. "The . . . most serious difficulty about natural law must be recognized in the fact that natural law has been invoked, though falsely, by certain questionable experts on the natural law in order to justify, and even glory in, their anti-intellectual, anti-progressive, and anti-humanitarian bias. This irresponsible and immoral policy, parading under the name of natural law, has done almost irreparable damage to the cause of natural law. It has, in many instances, alienated from the natural law many people who, under more favorable circumstances, would have become its most persuasive adherents and spokesmen." Chroust, "Natural Law and Legal Positivism," 13 Ohio St. L.J. 178, 184 (1952).
Intimate with this reality, must ultimately be followed without question.37

On the other hand, Positivists would have us believe that real problems (such as the problem of value determination) are solved by wish or preference, or by the application of standards based on wish or preference. We all seem agreed that, at least in physical affairs, problems are empirical realities, demanding for their effective solution the insistent rigorous application of every available quantum of human intelligence to the task of creating tentative statements about a problem's causes and about the ends sought in its resolution. We have been delinquent in not carrying over this attitude to the central problem in the social sciences—the problem of value. The candid actualities of the problem-solving process have never been popular grist for the philosopher's mill. A philosophy so oriented is without a traditional metaphysical base, and thus almost by definition, not respectable as a philosophy. Thus while our behavior is and must be problem-oriented, our attempts at a consistent formulation of the basis of action result in profound theories whose only short-coming is that they fail to describe what is really taking place.

Because they forcibly demonstrate the existence of this problem these books are highly recommended.

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Professor Anderson is to be commended for his detailed analysis of C. Wright Mill's THE POWER ELITE.8 However, I believe Professor Anderson's critique failed to emphasize the enormity of Mills' undertaking, which, if fully appreciated, would lead to a higher regard, if not genuine enthusiasm, for this provocative book.

My enthusiasm for this volume stems only in part from agreement with certain of the conclusions. As a matter of fact, one could take 37"Such concepts as 'freedom of conscience,' 'free speech,' 'inalienable rights,' for example, established themselves as 'eternal truths,' after the manner of the platonic tradition, which meant that they did not have to justify themselves in terms of circumstance and function. . . . [As such] there is no escape from the necessity of relying on experts who can speak with authority on matters pertaining to eternal truth." Bode, "Cleavage in our Culture," in Burckhardt, op. cit. supra note 17 at 8, 9.

8 For the thorough discussion of Mills, The Power Elite, by C. Arnold Anderson and Harry L. Gracey. See 46 Ky. L.J. (Winter) 301 (1958).—Ed.