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Book Review (reviewing Sidney Hook, *The Paradoxes of Freedom* (1962))

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BOOK REVIEWS

The Paradoxes of Freedom. By SIDNEY HOOK. Berkeley and Los Angeles: University of California Press, 1962. Pp. xi, 152. \$4.95.

Professor Paul Freund once observed that "to understand the Supreme Court of the United States is a theme that forces lawyers to become philosophers."¹ It appears that the theme also compels philosophers to become lawyers. *The Paradoxes of Freedom*, a large part of which is devoted to the problem of understanding the Supreme Court and its work, is not philosopher Sidney Hook's first foray into constitutional law nor, it is to be hoped, his last, but only his latest. The three theses that he develops in this volume, based on his Jefferson Memorial Lectures at the University of California, are: (1) the philosophical, logical, practical and legal inadequacies of the "absolutist" positions reflected by Mr. Justice Black,² Professor Charles L. Black, Jr.,³ and Dr. Alexander Meiklejohn,⁴ the last another philosopher concerned with the constitutional meaning of the Bill of Rights; (2) the inconsistency between the Court's power of judicial review and democracy; and (3) the inconsistency between the right of revolution and democracy. It is a stimulating book with some of which everyone will agree; with all of which no one will agree.

Were it not for the great distinction of the men who have lent their names to "absolutist" theory, I should have said that Professor Hook's first chapter was devoted to thrashing a straw man. Indeed, by Professor Black's own admission, the pretence to absolutism is merely rhetorical.⁵ But Professor Black cannot be treated as the authoritative spokesman for the cause. For example, in 1961, Professor Black announced: "No one would argue . . . that . . . 'free speech' . . . includes mere personal slander. . . ."⁶ Only one year later, Mr. Justice Black asserted: "I have no doubt myself that the provision, as written and adopted, intended that there should be no libel or defamation

¹ FREUND, ON UNDERSTANDING THE SUPREME COURT 7 (1949).

² See *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960).

³ See *THE PEOPLE AND THE COURT* (1960).

⁴ See *POLITICAL FREEDOM* (1960); *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

⁵ See Mendelson, Book Review, 28 U. CHL. L. REV. 582 (1961).

⁶ C. L. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, Harper's Magazine, Feb. 1961, p. 65.

law in the United States . . . just absolutely none so far as I am concerned."⁷ But, perhaps, Mr. Justice Black, too, however authoritative his voice, speaks only for himself, for in the same interview in which he contradicted Professor Black he rejected Dr. Meiklejohn.⁸ It may well be true, therefore, that Professor Hook is dealing with a mythical enemy insofar as he talks of an "absolutist" position rather than a plethora of views that may be treated under this shibboleth. But Hook not only puts forth arguments in contradiction of the positions actually taken by the absolutists, he makes out an affirmative case for the "balancers."

Despite the repeated charge by Mr. Justice Black that those who would reject the absolutist position must resort to natural law to resolve constitutional problems of civil liberties, it is clear that Hook falls outside the category of natural law adherents. His intellectual predecessors are Hobbes, the early Hume, Bentham, and Dewey, rather than Aquinas. His essential premise is that intelligence and reason are the only valid guides; there is no other source for adequate evaluation. All "rights" must be justified by a "reflective judgment that some shared goal, purpose, or need—some shared interest, want, or feeling—requires the functioning presence of these rights."⁹ Moreover, there can be no valid abstraction such as "freedom." The right to a freedom "cannot be determined unless the freedom demanded is specified and considered in a concrete social and historical context."¹⁰ Thus, changing social conditions require the creation of new rights and the destruction of old ones. (No demonstration of this proposition is more concrete than the Supreme Court's decision in the *School Segregation Cases*, with which even the most ardent absolutists must concur despite the absence of literal authority in the Constitution.) As a matter of logic,¹¹ as a matter of ethics,¹² as a matter of experience,¹³ "freedoms" thus created will necessarily conflict with each other: "there simply cannot be two absolute rights if they can conceivably conflict."¹⁴ To treat each of them as absolutes is to make impossible the resolution of conflicts among them. Which shall give way to another must be determined in each specific case by an intelligent appraisal determining which will provide the greater utilitarian benefit to society.

When Professor Hook comes to deal with specific constitutional problems, most of what he has to say is unassailable proof of his own position, and of the fallacies of the absolutist positions. But he weakens his case somewhat by resorting to some classic examples that are not necessarily useful to his posi-

⁷ *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549, 557 (1962). A most convincing refutation of Mr. Justice Black's historical position is to be found in LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH IN EARLY AMERICAN HISTORY* (1960).

⁸ 37 N.Y.U.L. REV. at 559.

⁹ P. 4.

¹¹ P. 13.

¹³ P. 6.

¹⁰ P. 5.

¹² P. 6.

¹⁴ P. 25.

tion. Let me suggest two such instances. The first is his demonstration that freedom of religion does not extend to all practices required by religious sects; for example, bigamy commanded by religious beliefs may be punished despite the requirement of the first amendment that "Congress shall make no law . . . prohibiting the free exercise" of "religion."¹⁵ From this he would show that the first amendment does not mean that "Congress shall make no law," but rather implies that "Congress may make some law" that might be an inhibition on freedom of religion where circumstances warrant. The difficulty of using the freedom of religion clause as a measure of the scope of the other freedoms specifically guaranteed by the Bill of Rights is that the Constitution itself provides a qualification on the freedom of religion clause in its specification of the separation clause. When the two religion clauses are read together rather than separately, as they should be,¹⁶ a different standard is provided for problems of religious freedom than for those rights arising under other constitutional provisions. It is not helpful, therefore, to attack the absolutist position by proving the non-existence of absolute rules derived from the freedom of religion clause.

The second of Professor Hook's examples that troubles me refers to the potential conflict between the right to freedom of the press and the right to a fair trial:

What does the Constitution tell us to do in the event that the fair trial requirements of the Fifth and Sixth Amendment conflict with the free speech protection of the First—a not infrequent occurrence? When does free speech about a trial make an individual liable to contempt of court, when not? It is not the Constitution which tells the judge when speech or publication constitutes contempt of court but the circumstances of the case read in the light of an informed intelligence. Sometimes the judge sacrifices the rights of a defendant—to a degree quite shocking to the moral sensibilities of our British cousins—because of the importance of the public's right to know. Sometimes he fines or jails the enterprising reporter and publisher despite their shrill cries about freedom of speech.¹⁷

I have two difficulties with this example, however much I may agree with the position suggested. The absolutist, who is a literalist, may validly assert that the language of the first amendment specifically prohibits infringement of the freedom of the press; the fifth and sixth amendments do not specifically provide for a right to a fair trial but only specify some of the attributes of a fair trial plus the amorphous right to due process of law. Therefore, they might say that there is no conflict of absolutes at all. (Presumably, they would not go so far as to say that the first amendment limits the power of the legislature to infringe freedom of speech and press, but not the power of the courts to do so.) On the basis of recent Supreme Court decisions, as distinguished

¹⁵ *Reynolds v. United States*, 98 U.S. 145 (1878).

¹⁶ See KURLAND, *RELIGION AND THE LAW* (1962).

¹⁷ Pp. 53-54.

from the language therein, the absolutist proposition could be sustained. In these cases the Court has consistently preferred the right of the press where the question has arisen in a review of contempt proceedings.¹⁸ More important, perhaps, is the fact that it is possible to reconcile these two "absolutes" by precluding trial of the newspapers for contempt and reversing criminal convictions where the trial has been improperly affected by newspaper publicity, thus vindicating both the right to freedom of the press and the right to a fair trial.¹⁹ And there is much to be said for this resolution of the problem, so long as the tainting newspaper story is the result of press releases and statements issuing from the prosecutor's office. Such a rule might have a desirably inhibiting effect on the prevalent tendency of prosecutors to try their cases in the newspapers. But where the fault does not lie with the prosecutor—and there are other ways of curbing him—the price of multiple trials may be unduly burdensome both to the government and the defendant. Indeed, the burden of a second trial on the defendant, even where the prosecutor is at fault, might alone justify a resolution of the conflict in the manner suggested by Professor Hook. All that can be said for this conclusion has been said by Mr. Justice Frankfurter in *Bridges, Pennekamp*, and *Craig*,²⁰ and in *Maryland v. Baltimore Radio Show, Inc.*²¹

Except for details such as those specified, the presentation by Hook of the case against the absolutists seems to me to be conclusive. Even if the adherents to the doctrine attacked are small in number, the book is valuable as an excellent brief against the cause and should help to prevent the doctrine from spreading among those who are willing to think about it.

Professor Hook's second essay is less cogent. His proposition is that the Supreme Court's power of judicial review, because it is inconsistent with democracy, must be shackled by a requirement of unanimity. Absent a unanimous Court, its majority conclusion that legislation is unconstitutional should be ignored. His premise is not that the American Constitution demands a perfect democracy in the sense that all citizens must assume direct responsibility for the conduct of the government. This would be an ideal to which no government, with the possible exception of the New England town meeting, has aspired, although the Greek city-states are often said to have achieved such Olympian heights.²² Although, as Hook concedes, "many have been the

¹⁸ *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941).

¹⁹ *Cf. Black*, *supra* note 7, at 555-56.

²⁰ *Supra* note 18.

²¹ 338 U.S. 912 (1950).

²² "We often hear it laid down as an axiom that Greek democracy differs from modern because it did not use the representative principle. This is of course a complete mistake. . . . No state has ever been composed of citizens all of whom have the leisure or desire or the knowledge to attend to public affairs. The Greek City State differs from our modern democracies in enlisting not all but merely a far larger proportion of its representatives in active public work." ZIMMERN, *THE GREEK COMMONWEALTH* 158 (Mod. Lib. ed. 1956).

meanings given to the word 'democracy' in the history of thought,"²³ if his thesis is to be accepted, the reader must acquiesce in Hook's own definition:

No democracy can exist which does not recognize the responsibility of governmental power to the adult citizens affected by its decisions. This responsibility requires the operating presence, not paper indication, of mechanisms of freely given consent and control. By virtue of their operation, the dominant trends of public opinion about general or specific questions of public welfare determine public policy.²⁴

Throughout this chapter he indicates that the "responsibility" of which he writes must flow directly from the governmental body to the people. At least in the case of the Court, the indirect controls, that of the legislature over the Court's jurisdiction, the power of the legislature to authorize additional appointments, the President's power of appointment, the people's power of constitutional amendment, even considered cumulatively rather than separately, do not satisfy Hook's demands.

Not only do you have to accept Hook's definition of democracy but also his definition of judicial review: "by judicial review I shall refer only to the power of the United States Supreme Court to nullify *Congressional* legislation and Executive action, and not to its function as a supreme court in the national system of law which of necessity entails the power to override *state* legislatures. . . ." ²⁵ While this distinction between review of state action and review of federal action may reasonably be derived from the supremacy clause, so that, as a matter of construction, it can be said that the Constitution authorizes judicial review of state action only, the distinction can hardly rest on the proposition that with reference to the national government the Court's power is undemocratic but with reference to state action it conforms to Hook's demands for democracy. If it is unresponsive to the popular will in the first instance, it is equally unresponsive in the second. It would be interesting to learn how Professor Hook would resolve this paradox of his own creation, but such explanation is not forthcoming in this volume.

Equally difficult to understand is his proposal to require a unanimous Court to declare unconstitutional action of the national government (and even this to be subject to revision by a two-thirds vote of the legislature). Certainly this requirement would be a serious limitation on the powers of the Court. It is true, of course, that such a requirement would enhance the power of the legislative and executive branches of government vis-à-vis the judiciary. But it does not make the Court's action more democratic, *i.e.*, more directly responsive to the mandate of the people. (Incidentally, it does not explain how the federal trial and intermediate appellate courts are to act under the circumstances.) In fact, only two possible amendments of the judicial power would really satisfy Hook's thesis: direct election of the Justices and abolition of the power of

²³ P. 63.

²⁴ P. 64.

²⁵ P. 67. (Emphasis in original.)

judicial review. The perils and costs of each of these apparently provide sufficient reason for Hook not to have chosen them; they do not explain his choice.

The real defect in Hook's argument is his refusal to recognize that the judiciary's responsibility to the electorate differs from that of the executive and legislative branches only in degree and not in kind. None of the three branches is directly responsible in the sense that he would have them be. All three are responsive to the expression of an aroused public opinion, including the Court.²⁶ And, if the Court is least responsive, it must be recognized that it is also the least powerful of the three, "the least dangerous branch," as it was termed by *The Federalist* and more recently by Professor Bickel in his book bearing that title.²⁷

All of this leads me to prefer Judge Hand's conclusion²⁸ to that of Professor Hook. The power of judicial review should be exercised by the Court but only with the greatest restraint. Hook's opinion that self-restraint is no restraint can only be countered by the contradictory opinion of Mr. Justice Frankfurter, who has shouldered the burdens of judicial office on the High Court and demonstrated that such restraint can be real.²⁹

Professor Hook's third subject is one that departs from the realm of constitutional law. His proposition is that there is a "right" to use force for purposes of revolution only where the government is not a democracy. Where the would-be revolutionary is in a democratic country, he is free only to utilize peaceful means of resistance to government demands, and he must willingly accept the punishment for all such actions as violate the law. I find it difficult to believe that there is a rational method of delimiting the "right to revolution." Like the "laws of war," it is, for me, an anomalous concept, for revolution, like war, is essentially lawless. Given this bias, which Hook did not dissipate, I must leave the reader to discover for himself whether the "proof" is adequate to support his thesis.

²⁶ See TOCQUEVILLE, *DEMOCRACY IN AMERICA* 151 (Bradley ed. 1945).

²⁷ BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

²⁸ See HAND, *THE BILL OF RIGHTS* (1958).

²⁹ See, e.g., Frankfurter, *John Marshall and the Judicial Function*, in *GOVERNMENT UNDER LAW* 6 (1956); MENDELSON, *JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT* (1961).

In his reply to the letter of the other Justices on his retirement, Mr. Justice Frankfurter also refuted some of the allegations made by Hook: "The nature of the issues which are involved in the legal controversies that are inevitable under our constitutional system does not warrant the nation to expect identity of views among the members of the Court regarding such issues, nor even agreement on the routes of thought by which decisions are reached. The nation is merely warranted in expecting harmony of aims among those who have been called to the Court. This means pertinacious pursuit of the processes of Reason in the disposition of the controversies that come before the Court. This presupposes intellectual disinterestedness in the analysis of the factors involved in the issues that call for decision. This in turn requires rigorous self-scrutiny to discover, with a view to curbing, every influence that may deflect from such disinterestedness." 83 Sup. Ct. xvii.

In conclusion, I would say that I agree with Hook's first argument, I disagree with his second, and I am unable to reach a conclusion on his third. But I think that all three are valuable aids toward rational consideration of problems that are more or less lively political issues of the day. I can heartily recommend this volume to all who seek the help of the mind to resolve questions too frequently ignored by the intellect and resolved by emotion. All three essays stimulate thought, and no more should be demanded of any author.

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Political Justice: The Use of Legal Procedure for Political Ends. By OTTO KIRCHHEIMER. Princeton: Princeton University Press, 1961. Pp. xiv, 452. \$8.50.

What is Political Justice? In a sense all administration of justice, criminal and civil, is political, as it serves to maintain and at times to change, the social and political order of society. Kirchheimer deals with political justice in its more specific sense—the use of the law and the courts directly to influence the struggle for political power. Even in this narrower sense the term refers to a wide variety of phenomena, ranging from the judicial prosecution of the alleged revolutionary or traitor to the use of the courts by the political opponent who forces a member of the governing group into a defamation suit. This variety of forms in which political justice can appear is vividly illustrated by the author in the opening chapter of his book, in which he presents a concise historical survey and a detailed description of some typical political cases of recent times. The use of an accusation of common crime to discredit or destroy a political opponent is illustrated by the attempt of the Kentucky Democrats in the 1890's to wrest the governorship from the Republicans by preferring a specious murder charge against the Republican leaders. The story of this long forgotten, but by no means atypical, episode of American politics is instructive as well as thrilling. The equally specious, but successful, attempt of Clemenceau and Poincaré, through a treason charge to prevent Caillaux from attaining political power during World War I, and from using it to bring about a compromise peace, stands for what may be called political justice in its purest form. How a regime can be undermined by forcing a member of the governing group to defend himself against libelous charges before a judiciary sympathetic to the libellant's cause is demonstrated by the case of Friedrich Ebert, first President of the German Republic after the collapse of the monarchy.

While trial can thus serve as a weapon of attack, it is more frequently a weapon to defend an existing regime or government against its opponents. Political justice is a typical weapon of what Kirchheimer calls "state protec-