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Book Review [Principals, Politics, and Fundamental Law: Selected Essays]

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Book Reviews

**PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW:
SELECTED ESSAYS:** BY HERBERT WECHSLER. CAMBRIDGE:
HARVARD UNIVERSITY PRESS. 1961. Pp. xvi, 171. \$4.25.

Felicity of style, political sophistication and penetrating insight mark four suggestive essays which Professor Herbert Wechsler has gathered together under the somewhat ambiguous title, *Principles, Politics, and Fundamental Law: Selected Essays*.

Formerly an Assistant United States Attorney General, Professor Wechsler now occupies the Stone Chair of Constitutional Law at Columbia Law School. In 1959 the author was chosen by his former colleagues at the Harvard Law School to give the Holmes lecture. The result of that engagement, "Toward Neutral Principles of Constitutional Law," a brilliantly stated thesis in legal philosophy, has now been published by the Harvard University Press together with three earlier articles, "The Political Safeguards of Federalism," "Mr. Justice Stone and the Constitution," and "The Issues of the Nuremberg Trial."

The *raison d'être* for this slim volume is the Holmes lecture, "Toward Neutral Principles of Constitutional Law." Professor Wechsler opens by plunging into the considerable controversy aroused by the previous year's Holmes lecturer, the late Judge Learned Hand. It is the author's view that the supremacy clause clearly vests the power of judicial review in the federal courts, including the Supreme Court, no less than in the state courts. Granting the power of judicial review, and granting the caution that American courts are primarily *law* courts,¹ the author comes to the central question: What are the standards or criteria for deciding cases?

Courts differ from other organs of government in that courts must give reasons for their decisions. Professor Wechsler denies the Austinian view that law is a mere fiat. He also denies that criteria are ascertained by those who "make the test of virtue in interpretation whether its result in the immediate decision seems to hinder or advance the interests or the values they support."² The inconsistencies of such *ad hoc* standards may be inevitable in politics, but a higher standard is demanded of courts: for, ". . . the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is

¹ "Only when the standing law . . . provides a remedy to vindicate the interest that demands the protection against an infringement of the kind that is alleged, a law of remedies that ordinarily at least is framed in reference to rights and wrongs in general, do courts have any business asking what the Constitution may require or forbid, and only then when it is necessary for decision of the case that is at hand." WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW: SELECTED ESSAYS* 10 (1961).

² *Id.* at 17.

involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."³

Professor Wechsler is seeking a standard which will enable courts to choose among competing values, a standard that can reconcile the language of the Constitution with historical interpretation and with the application of precedent—a standard that is above all consistent. He finds this standard in general and neutral principles. "A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."⁴ As the author further explains:

The demand of neutrality is that a value and its measure can be determined by a general analysis that gives no weight to accidents of application, finding a scope that is acceptable whatever interest, group, or person may assert the claim. So too, when there is conflict among values having constitutional protection, calling for their ordering or their accommodation, I argue that the principle of resolution must be neutral in a comparable sense (both in the definition of the individual competing values and in the approach that it entails to value competition).⁵

Professor Wechsler's thesis is buttressed with brief but penetrating analysis of a number of recent cases. The *Burstyn* case,⁶ he points out for example, turned on a meaning and application of the word "sacriligious," and specifically left open the question whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. When in five subsequent cases, involving different films censored under different standards, had the Supreme Court met this standard in overruling the censorship by per curiam opinions?

If the reasoning of the *White Primary Case*⁷ were consistently applied, would it not prohibit the organization of parties along racial lines, and would not such prohibition infringe the First Amendment? And admitting the desirable results of the *School Desegregation Case*,⁸ do the reasons given by the Court for the decision bear up under analysis? If segregated schools were held unequal because of the factual finding of their harmful effect on Negro children, what of a finding of a harmful effect on Negro school children from hostility of white students in a school integrated by force? And if the gravamen of the decision was, instead, that racial segregation denies equality to the group against which it is directed (*i.e.*,

³ *Id.* at 21.

⁴ *Id.* at 27.

⁵ *Id.* at xiii, xiv.

⁶ *Burstyn v. Wilson*, 343 U.S. 495 (1952).

⁷ *Smith v. Allwright*, 321 U.S. 649 (1944); *rehearing denied*, 322 U.S. 769 (1944).

⁸ *Brown v. Board of Education*, 347 U.S. 483 (1954).

that the existence of inequality depends upon the attitudes of the racial groups), does this not require an inquiry into the motive of the legislature? Disclaiming an intent to rewrite the opinion, Professor Wechsler suggests a general and neutral standard to support the desegregation decision: that state-enforced segregation is a denial of freedom of association, and that freedom of association should prevail over the argument against imposing association on those who find it repugnant.

Does the author's call for a standard of judicial decision making based on general and neutral principles put him wholly at odds with the sociological school epitomized in Holmes' dictum that the life of the law has been not logic but experience? Probably not, if the reader notes the discussion of Mr. Justice Stone. Professor Wechsler there points out how that eminent jurist sought to draw the line between individual liberty and government action for the common good. He also quotes with approbation Mr. Justice Stone's contention that the judge "must open his eyes to all those conditions and circumstances . . . in the light of which reasonableness is to be measured;" and that the judge's standard of reasonableness is not his own, but rather "a considered judgment of what the community may regard as within the limits of the reasonable."⁹

Emphasizing the consistency of Mr. Justice Stone's philosophy, rather than the growth of his thought, Professor Wechsler briefly surveys the Justice's constitutional philosophy; his role on the court from his days as a liberal dissenter to the post-crisis period during which the earlier dissents "had become the major premises of the Court;"¹⁰ his activity in enlarging the governing powers of the states; and his espousal of the "preferred position" doctrine of the guarantees of the First and Fourteenth Amendments.

Professor Wechsler's political sophistication is strikingly evident in "The Political Safeguards of Federalism." The chief objective of judicial review, he claims, is to maintain national supremacy against attempted nullification by individual states. The most efficacious limitation upon the expansion is provided, however, not by the Supreme Court but by Congress.

It is the role of the states in choosing the central government—in choosing the Congress and, as units in the electoral college, the President—that makes the Executive as well as the Congress responsive to strong local attitudes. Thus, the expansion of the national government is not a natural or unlimited tendency, but rather a response to a nationwide demand. For, even though the President is the unifying force in American federalism, his election by the states voting as units in the electoral college insures his responsiveness to sectional feelings.

⁹ WECHSLER, *op. cit. supra* note 1, at 89.

¹⁰ *Id.* at 94.

Direct popular election of the President is a practical impossibility since the small states would not consent to such diminution of their influence. The strength of the larger states in the presidential electoral college partly compensates for their under representation in Congress. On the other hand, Professor Wechsler prefers the present constitutional arrangements to the oft-proposed constitutional amendment to divide the states' votes in the electoral college; e.g., giving each presidential candidate a portion of the state's electoral college vote dependent upon the candidate's proportion of the state's popular vote. With cogent argument and figures drawn from the past presidential elections, he shows that any proportional division of state votes in the electoral college would (a) increase the strength of the smaller states and sectional influences, especially the strength of the Southern states; and (b) increase the danger of throwing the presidential elections into the House of Representatives, where states vote as units, thus also increasing the strength of local influences in selecting the President.

In Professor Wechsler's view, the present method has two defects which present the danger of local influences dominating the election of the President; either a third party, or the running of unpledged electors, may force an election into the House of Representatives. The first, of course, was the possibility narrowly avoided in 1948; but since the author was here writing in 1954, he may be credited with prescient wisdom in pointing to the possibility of a disputed election being decided by unpledged electors. This was narrowly avoided in 1960.

Somewhat less satisfactory to this reviewer is the defense of the Nuremberg tribunal, read before the American Historical Association in 1946. Professor Wechsler insists he wishes "to reiterate a defense of the trial and judgment that the passing years have not induced me to repent, despite the vogue that hindsight has accorded their disparagement."¹¹

The author's is a lawyer's case. One grants the practical wisdom in his argument that the Nuremberg trial was perhaps a necessary alternative to a bloodbath of private revenge. Time, in making clear to everyone the nature of the ideological conflict between the West and the Soviet Union, raises grave doubts that the Allies undertook "to build a world of just law that shall apply to all,"¹² at least in the sense of a commonly shared understanding of the meaning of the words "just law." Moreover, to answer the argument that victory carries immunity from punishment, by saying that the Nuremberg verdict would be a future deterrent to aggression, suggests "the victory of optimism over experience." It does not convince, let us say, the skeptical mind of an historian, so aware of the irrationalities and contingencies in human affairs and of the limited

¹¹ *Id.* at xii.

¹² *Id.* at 157.

knowledge upon which action is based. An historian may ask such questions as these: Is aggression always easily determinable? Does any leader or nation engaging in war consider the contingency of failure? Were not some of the worst crimes against humanity committed in Germany and in occupied countries *after* the Allies had announced plans for post-war criminal trials and *after* it was apparent to many reasonable men (and to large numbers in all belligerent countries) that Germany had lost the war?

Reservations about this last selection should not, however, dim one's praises of the other essays, or of the volume as a whole. Throughout the book, Professor Wechsler's splendid scholarship, selectivity of detail, and fluency of expression contribute to enjoyable reading; and students of jurisprudence and of American constitutionalism should find these essays illuminating and rewarding.

*Bernard L. Kronick**

THE VOICE OF MODERN TRIALS. EDITED BY MELVIN BELLI. SAN FRANCISCO: THE BELLI FOUNDATION. 1960. 3 VOLS.; 8 12 INCH LP RECORDINGS. \$35.00.

A veteran innovationist, Melvin Belli, in "The Voice of Modern Trials," has entered the field of legal education by offering recordings demonstrating the techniques of contemporary lawyers in civil and criminal cases.

In his introduction to Volume I, Mr. Belli asserts that being told is not being shown. Physicians and medical students are instructed theoretically in the classroom and are then shown in the operating room. Even the general public can now observe actual surgical procedures on television.

Belli contrasts the academic impression instilled by the medical profession with the histrionics and carnival atmosphere which movie and television script writers have created in respect to trials. The daily felony of ignorance is being compounded, he says, in that we do not utilize the actual courtroom trial to impress upon people the beauty and majesty of the law. Since filming of trials is prohibited by Bench and Bar, Mr. Belli is endeavoring, by means of recordings, to provide modern trial education for law students and lawyers. The trial transcripts of some of America's outstanding cases are presented.

The success of Mr. Belli's efforts will undoubtedly be widely disputed. Some of the most obvious weaknesses are, (1) a record may be misleading to the student and beginning practitioner; (2) it may lack the spontaneity

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of an actual trial; (3) the average trial contains few of the dramatic facts present in the cases used.

Arguments in favor of this medium are, (1) that it provides an opportunity to hear the techniques employed by trial specialists; (2) the records can be played at the student's convenience, covering the subjects of his choosing; (3) techniques may be studied more closely; (4) it affords the busy practitioner the opportunity to examine the technical skills utilized in many important trials which would not otherwise be available to him.

During the last decade, audio-visual aids have revolutionized the field of education. This medium, still in its infancy, will undoubtedly play an even more important role in the future, bringing to the law student, through the use of films and recordings, advantages similar to those presently enjoyed by the student of medicine. Into this hitherto unexplored field, Mr. Belli, with his "The Voice of Modern Trials," has taken the first step. We are concerned here with the first three volumes of this series.

Volume I presents excerpts from three of Mr. Belli's own cases—an opening statement in a wrongful death action, a closing argument involving a personal injury case, and a closing argument in an admitted liability wrongful death action.

Volume II is the work of Stuart M. Speiser and David C. Quinn, partners in a New York law firm specializing in airplane accident cases. They present jury arguments by plaintiffs and defendants in a hypothetical airplane accident case.

Volume III is edited by the noted Illinois trial lawyer and scholar, John Alan Appleman, presenting three long-playing records on the techniques of cross-examination.

It is Mr. Belli's intention to supplement these first three volumes by introducing additional records covering all phases of the law, including voir dire examination of a jury, further examples of cross-examination, opening statements, and closing arguments, and direct examination and cross-examination of medical witnesses. These records will feature, as have the first three, outstanding contemporary trial lawyers, along with lectures on each subject. Films of trials reenacted by these specialists of the courtroom, together with films of surgical procedures and techniques, will also be forthcoming.

Particularly impressive is Belli's opening statement in a railroad crossing accident case, actually tried by him in a southern state. Normally, a crossing case is rarely won without some unusual fact which will favorably motivate the jury. Without it, the jury usually feels that the driver should have seen the oncoming train. In the case in question, pictures which the defendants had submitted on pre-trial were prematurely discredited by an unequivocal accusation that they did not reflect the condition of the crossing at the time of the accident. Mr. Belli also alluded

to certain facts from which he expected the jury to infer that the crossing was hazardous and that in such case, under the law of the forum, the defendants were held to the duty of exercising more than ordinary care.

The first volume also contains an excellent illustration of the skillful presentation of argument by utilizing the closing argument in a case involving Maureen Connolly—"Little Mo" to the tennis world. When she returned in triumph from England, after having won the championship at Wimbledon, the City of San Diego presented her with a horse. She was riding the animal along a road when they were struck by a cement truck, and Miss Connolly sustained injuries to her legs which would prevent her again participating in tournament tennis. This truck, equipped with a faulty exhaust system, was traveling at a speed of twenty miles per hour, approaching the scene. Testimony of the driver himself revealed that he had been warned to stop by children one hundred and fifty feet from impact, and admitted that he could stop his truck at that speed in about twenty feet. The law, Mr. Belli told the jury, provides that one must slow or stop if necessary, upon approaching anyone on horseback and it further prohibits anyone from driving any vehicle with a faulty exhaust system. Such conduct on the part of the driver, he eloquently argues, amounted to wantonness, and the jury should award exemplary damages to prevent future tragedies.

In his closing argument, Mr. Belli dwelt at length on the character and reputation of Miss Connolly, to whom he referred as "this little plaintiff." He pointed out that the entire world would be interested in what transpired in that courtroom and the resultant verdict. In the process of this closing argument, he tries in the somewhat nebulous evidence giving rise to exemplary damages, and concludes with a compelling plea for a substantial verdict in plaintiff's favor.

The first volume bears out Mr. Belli's argument as to the effectiveness of using examples to illustrate a given point. In arguing damages in the Connolly case (and in the admitted liability wrongful death case), Belli first creates the proper atmosphere and frame of reference. The value of a race horse or a locomotive, he insists, can be arrived at by simple mathematical computation, and if the horse or the locomotive cost a million dollars, there would be no hesitation in awarding such an amount, should liability exist. He then assures the jury that the same cold logic must be employed in assessing damages.

In Volume II, a hypothetical airplane accident case is used in order to bring out more facets of this specialty of the law. David Quinn gives the defendant's closing argument, and Stuart Speiser represents the plaintiffs.

This is a *res ipsa loquitur* case, involving an Instrument Landing System radio approach to LaGuardia Field. It is followed by an analysis of the arguments and a lecture by Mr. Belli.

This volume stresses the necessity of being properly qualified before attempting what might be called "specialized" litigation.

Mr. Quinn is very convincing in his argument placing liability on the government, or, in the alternative, insisting that the occurrence was the result of an act of God.

Mr. Speiser countered with exhaustive illustrations to prove that the government was not liable, and proceeded to show that the accident, far from being an act of God, was the fault of the defendant airline.

In Volume III, Mr. Appleman presents over two and one-half hours of cross-examination techniques. This subject is covered by excerpts from actual court cases which illustrate the various methods of approach.

This is a difficult topic and it is not possible for the listener to fully appreciate the effectiveness of the various examinations through the recording. Of the three volumes reviewed, this was the least effective. The questions and answers, read from trial transcripts, lose much of their spontaneity. Since the listener is not informed as to all aspects of the case from which the illustrations are drawn, the skill of approach to each witness and the wording of the questions, is not fully appreciated. This criticism, however, should not be interpreted as an attempt to disparage the significance of this volume.

One technique which the plaintiff's lawyers fail to employ to its fullest advantage is that of calling the defendant as a witness. This presupposes, of course, that counsel for the plaintiff is aware of what the defendant's testimony will be. The effect of this is to take away much of the sting of defendant's case.

In these examples, Mr. Appleman illustrates how admissions can be elicited, the most impressive of which is a description of plaintiff's injuries by the defendant. Also utilized is the technique of pitting co-defendants one against the other to bring forth damaging admissions. Beginning practitioners should note with care Mr. Appleman's example of how the professional witness can be impeached by demanding exhaustive detail about which the witness will generally know very little.

In addition to the above, Mr. Appleman devotes a large portion of this album to the discussion and illustration of cross-examination of medical witnesses, showing how doctors can be successfully examined and impeached in given situations.

Little would be gained by further reiterating in detail the salient features of each record in these three volumes of "The Voice of Modern Trials." In the words of Mr. Belli, to be told is not to be shown, and it is recommended that the reader listen to these recordings so that he may be shown their value. For, to this writer, an important step has been made in the field of legal education.

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