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Berns: Freedom, Virtue and the First Amendment

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Unfortunately, Stanlis does not make an open admission that Burke was not a political or legal philosopher. He was a very practical man of public affairs. His strongest arguments are taken from English legal tradition, not from natural law as such. In fact, many interesting questions are raised by Burke relative to the permanence and content of natural law, but no solution is given. If Burke chose to be a statesman rather than a theorist, England undoubtedly profited from the choice. This book shows how vital natural law principles can be in their application to the problems of state.

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Freedom, Virtue and the First Amendment. By WALTER BERNS. Baton Rouge: Louisiana State University Press, 1957. Pp. 264, Index. $4.00.

Walter Berns here shuffles a goodly number of mixed and dated Supreme Court decisions, assorted quotations from the classics, some random remarks by justices, professors, lawyers, and students, and concludes that, as applied to the first amendment, there exists some monumental judicial obfuscation and confusion. One conclusion, that virtue holds a higher place in our society than constitutionally guaranteed freedom of speech, on superficial examination, seems valid; it is only upon our discovery that reasonable men may differ as to the make up of virtue, that this premise becomes somewhat uncertain.

His essay holds that the freedoms of the first amendment were not and are not intended to be absolute; that neither a "Headquarters Detective" magazine, a Terminiello in Chicago, or a Eugene Dennis advocating Communist theory is entitled to the protection of the first amendment. To sustain his theory, he relies upon isolated attacks upon concepts from time to time advanced by the court and the individual justices.

A subordinate idea, and one both novel and with some genuine appeal, is that rational men do know virtue, and that virtue needs no definition. This premise has some charm. Much is to be said for the theory that honest men know what is basically right, and what is basically wrong. Yet this theory is disproved by the very system used by Berns to sustain it. He cites decision after decision in which reasonable men do differ as to the proper boundaries of freedom of speech. Moreover, men of profound scholastic attainment are quoted by the author as showing that there can be no arbitrary boundaries upon these freedoms.

Aside from the conclusions of the author, the book provides a valuable service in an appraisal of the several first amendment opinions, and the patterns that emerge from a comparative study of a generation or two of such writings. The reliance of the court upon a jury instruction in a Terminiello case, its avoidance of a head-on clash in another; its forbearance toward the Jehovah Witnesses sects; its denial of the right to a pacifist to address a policeman in rather rough language; its denial to Eugene Dennis the right to advocate his Communist beliefs; all these are accurately examined and competently analyzed.

There is genuine value, and solid contribution by Berns, as he measures the stands taken in one decision against obliquely different or almost opposite stands in another. In this area of study, the work is of stable value. The con-

sistency and direction of judicial growth can best be gauged by a frequent examination such as this.

Another contribution lies in an examination from a particular point of view, such as pressed by this writer. The several opinions are also measured against Berns's own concept of the low position of the first amendment and the rights there concerned. In this phase, however, the study cannot rank as a profound examination of the court or even of the first amendment. Berns maintains throughout a flippant and superficial attitude toward the several justices by name, and to many students, such as Zacharich Chafee, whose works rank high in American literature on the subject. Without a pause for definition, he cavalierly identifies Justices Black and Douglas as "libertarians" and "liberals," and then uses the term as one of casual derision, without at any time thinking himself called upon to establish basic definitions for his terms and premises. While he has competently studied major findings in a limited area of judicial constitutional examination, he attempts to draw from his study sweeping conclusions from which no basis in the study exists for support. He fails to bring perceptive thinking on his own part to sustain the theory that constitutional guarantees are intended to be less than stated by the words of the framers. No more so, does he bring valid argument to sustain his premise that the court today holds freedom of speech in an unduly preferred position. Aside from being repugnant to much that is part of American constitutional heritage, these concepts offer no constructive precepts to replace those they would destroy.

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Municipal Law. By CHARLES S. RHYNE. Washington, D.C.: National Institute of Municipal Law Officers, 1957. Pp. xxi, 1125.

This single volume on Municipal Law consisting of 980 pages is difficult to appraise primarily because of the great divergence of statutory law on the material covered. The subject of municipal law is vast and complex so that the approach of an analysis of this book necessarily becomes at best, subjective. The volume in question is, in fact, as its name implies, a restatement of municipal law containing a new approach and summary of the law as it exists today.

The author's approach to the subject is satisfactory. The study is along traditional lines, introducing the subject matter with searching text analysis and differentiating the text with the often conflicting decisions of the courts of the various jurisdictions. The Table of Contents and the Index are both excellent; however, the author neglects to include in this volume a Table of Cases so necessary to professional use of such a text. It is also to be noted that while the volume contains many citations from the several states, it does not afford a sufficient digest of the opinions to apprise the municipal attorney of the rationale of the case. While general principles of law are sought to be given, in most instances they might have been qualified to the extent that there is not a unanimity of holdings by our several courts with respect to the text matter.

The volume does contain excellent chapters on several topics which are new, such as Housing, Slum Clearance, Urban Redevelopment, Urban Renewal, Extraterritorial Powers and Relations, Parking and Parking Facilities,