

BOOK REVIEWS

LIBERTY AGAINST GOVERNMENT. By Edward S. Corwin. Louisiana State University Press, Baton Rouge, 1948. Pp. xiii, 210, \$3.00.

This brief volume represents a synthesis of earlier writings by Professor Corwin, with the substance of a lecture given by him under the Edward Douglass White Foundation. In it the author sets out to find the origin of a higher law which he believes lies at the root of judicial decisions limiting the exercise of the legislative power under our constitutional system. He believes that he can trace the persistence of an idea from the days of Cicero to the latest decision of the Supreme Court. This idea is that there are rights representing the conception of a universal justice which ought to but does not always animate human legislation. The author traces the persistence of this idea from the Stoic philosophy of Cicero through the common law of England, and finds it, under the guise of natural law, a part of the thinking inherited by the American colonists.

He seeks the application of this overriding principle in the field of the liberty of the individual against government authority or, in other words, the right of an individual to be free from the restraint of legislative controls which transcend the higher law. The inquiry, so far as this nation is concerned, resolves itself into a search to discover how this higher law or natural right finds a place in our constitutional history.

Professor Corwin is of the view that the concept of "due process of law," which in some form was embodied in most of our state constitutions, has been made to serve as the vehicle for the application by courts of the concept of a higher law which has been invoked to nullify attempted regulation by the government.

He stresses the importance accorded the rights of property in the early days of our history, and traces how state courts came to condemn, as beyond the power of government, legislation which they found to invade the sanctity of private property. He shows that these courts, seeking a rationalization of this result, were wont to rely upon the concept of "due process." He traces the use of this concept into the decisions of the Supreme Court of the United States and shows that at a later period the liberty of the individual against his government was carried so far as to make inviolate what was styled liberty of contract. He examines the conflict which existed for decades between the conceded power of regulation of individual conduct and the application of the principle that invasion of private rights must, in the view of the courts, be reasonable and not arbitrary. His conclusion is that the application of the higher law in safeguarding property rights has gradually receded, until what, in the days before the Civil War, were considered citizens' liberties safeguarded against governmental interference, have now well-nigh disappeared. He believes that the concept of liberty will be largely limited in the future to the fields of the personal freedoms of speech, of the press and of religion. His thesis is summarized in a subtitle, which is, "The Rise, Flowering and Decline of a Famous Juridical Concept."

The work is closely reasoned and exhibits the same virility that characterizes all of Professor Corwin's writing. It embodies the final comprehensive statement of views he has held for many years.

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AMERICAN ARBITRATION. By Frances Kellor. Harper and Brothers, New York, 1948. Pp. xiii, 262, \$3.00.

EFFECTIVE LABOR ARBITRATION. By Thomas Kennedy. University of Pennsylvania Press, Philadelphia, 1948. Pp. xi, 286, \$3.50.

Both volumes were prepared by persons eminently qualified to discuss the subject selected. Both authors drew fully upon their experience in the field of arbitration. The results, consequently, have an aura of authoritativeness lacking in many other works in the field.

Though both writers seek to impress the reader with the worthwhileness of arbitration, each does this differently. Miss Kellor, more obviously than Professor Kennedy, presents a partisan picture of arbitration. She gives a very positive record of the achievements of individuals and organizations in the entire arbitral movement. Professor Kennedy's treatise, on the other hand, is a more factual study. His is a view of but one segment of the economy: the full-fashioned hosiery industry, of which he was the impartial chairman. However, though he does deal with his material more analytically than does Miss Kellor, there is never any doubt that Professor Kennedy is espousing the impartial chairmanship as a system of maintaining industrial peace.

American Arbitration is an essay-like survey of all the applications of the arbitral process. A sketch of the origins of arbitration serves as a background to the comprehensive review of the history of arbitration in the United States since 1920. This survey emphasizes the growth, problems and achievements of arbitration organizations. In addition to such new material, the section on practices in commercial and labor arbitration deals with matters treated in Miss Kellor's earlier book, *Arbitration In Action*. Those familiar with the prior book will find in the newer one a thought-rephrasing or expansion, a bringing-up-to-date of certain subjects: the standards or code of ethics for arbitrators, the duties of administrators, the rules of procedure in arbitration, arbitration clauses, the motion picture industry arbitration system, the accident claim tribunal, the inter-American system of commercial arbitration.

Miss Kellor concludes *American Arbitration* with a complete chronology of arbitration activities since 1920, and an exhaustive catalogue of individuals who have contributed to the arbitration movement. Any attempt to cover such an extensive subject must of necessity be cursory, as is Miss Kellor's book.

This second work of Miss Kellor does not measure up to her first as a contribution to the literature of arbitration. *Arbitration In Action* is both a primer and a practical guide for those interested in the arbitral process; *American Arbitration* is primarily of academic interest, though the re-discussion of the material noted above is of some practical value.

Effective Labor Arbitration is a book in the style and fashion of Suffern, *Conciliation and Arbitration in the Coal Industry of America* (1915); Barnwell, *Arbitration in the Men's Clothing Industry* (1926); and Bogardus, *Industrial Arbitration in the Book and Job Printing Industry of New York* (1934). There is the same opening: an introduction to the industry under surveillance, its development, operation and problems. Professor Kennedy's description of the full-fashioned hosiery industry is clear and concise. It is here that his intimate association with the industry manifests itself. It is in this respect that Professor Kennedy's book differs most from the "observer" studies listed above.

Having laid his groundwork well, Professor Kennedy writes of the background of the impartial chairmanship, its powers, procedures and operation. He traces a grievance from its inception through the stages of settlement; he classifies the cases brought to the chairman according to the issues involved, and discusses each category. A compilation of the results achieved and an evaluation thereof conclude the study.

Though the other works listed above deal with the problems of the industry studied, none seeks to make a case study and analysis such as is found in *Effective Labor Arbitration*. Suffern, Barnwell and Bogardus are more concerned with a rather general historical survey of the industry dealt with, touching upon only the major conflicts arising therein. Thus Suffern dismisses two hundred cases brought before the Anthracite Conciliation and Arbitration Board in one page.¹ Barnwell devotes more space to the cases than does Suffern; but he doesn't attempt to evaluate the arbitrations. Instead, he merely records general observations on the "thousands of cases [that] have been decided."² Interestingly, some of Barnwell's comments find parallels in Professor Kennedy's work: the conclusion that arbitrators do mediate,³ that "splitting the difference" is generally not advisable,⁴ and that established arbitration in an industry generally tends to be limited to the interpretation of contracts, leaving the making of new wage levels and the like to collective bargaining.⁵

While Bogardus' thesis most closely approaches in character Professor Kennedy's book, it too deals primarily with the broad major problems of the industry. Bogardus' listing of twenty-four arbitration cases, the date of award, the arbitrators and issues involved, is as close as any other writers' approach to Professor Kennedy's work. Not only has Professor Kennedy discussed his groups of cases, but he has made a thorough tabulation of the 1,566 grievances presented for determination to the arbiter in the hosiery industry. The tabulations present a complete picture of the nature and disposition of the cases. These tables provide a valuable appendix to *Effective Labor Arbitration*.

Apparently neither book is directed to the legal profession, but is designed for the consumption of industry and commerce at large. Miss Kellor's general, primer-like book was probably intended for those unfamiliar with arbitration. Professor Kennedy's more practical treatise was for an audience having previous experience with the arbitral process. Miss Kellor's seems to be a fervent cry for all to rally 'round the standard of arbitration, holding forth the process as an instrument of peace in all phases of human endeavor. Professor Kennedy contents himself with impressing the reader with the value of the one type of arbitration, pointing to the experiences of the hosiery industry as a guide to other industries.

Leon Ehrlich †

1. SUFFERN, CONCILIATION AND ARBITRATION IN THE COAL INDUSTRY OF AMERICA 256 (1915).

2. BARNWELL, ARBITRATION IN THE MEN'S CLOTHING INDUSTRY 56 (1926).

3. *Id.* at 54, 55; KENNEDY, EFFECTIVE LABOR ARBITRATION 57 (1948).

4. BARNWELL, *op. cit. supra* note 2, at 54; KENNEDY, *op. cit. supra* note 3, at 69.

5. BARNWELL, *op. cit. supra* note 2, at 56; KENNEDY, *op. cit. supra* note 3, at 34.

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BEING AN AMERICAN. By William O. Douglas. The John Day Company, New York, 1948. Pp. ix, 214, \$2.75.

The last public address made by William O. Douglas before his appointment to the Supreme Court expressed the conviction that "It is our generation's destiny, in time of great distress, to make democracy live, to make the democratic ideal survive the many assaults that beset it."¹ Insight into Justice Douglas' conception of democracy and the general methods he would employ in preserving and promoting the democratic ideal is provided by this collection of thirty-two speeches and public statements made by the Justice since becoming a member of the Supreme Court.

Basic in Justice Douglas' philosophy is his faith and pride in the American heritage of fundamental liberties protected by the Bill of Rights. Freedom of religion, speech, and press; the right to be secure against unreasonable searches and seizures; the guarantee of a jury trial in criminal prosecutions; the right to counsel; the provisions against double jeopardy and self-incrimination; the outlawing of bills of attainder—all these, and others, reflect the American character and are true to the genius of our people.² Their existence in the democracies and their absence in totalitarian countries constitute the most important differences between the democracies and Nazi Germany and Communist Russia. But civil rights are not automatically guaranteed, for in the final analysis they depend upon the will of the people. They exist as much, perhaps more, for those who disagree with us as for those who put their faith in the dominant economic, social, or religious creed of the day.

A logical corollary to Justice Douglas' devotion to civil liberties is his abiding confidence in humankind. To him the proclamation of the Declaration of Independence that all men are created equal is no mere Fourth of July oration. It is, instead, a part of his basic philosophy. The common people are both worthy and capable of real freedom. They must have a vital stake in America, for the more people who experience a sense of participating in a common enterprise, the greater will be the country's strength. We must, therefore, be relentless in our efforts to eliminate discrimination against minorities and we must increase the standards of living and the opportunities for those in the lower economic strata of our country.

A third essential in the Douglas creed is the conviction that the blessings of democracy must not be restricted to the citizens of a few important nations. On the contrary, the people of the world are on the move, and it is up to us to show them the way. In any endeavor to promote the democratic ideal outside our borders we shall of course be opposed by the Communists. The only real answer to the Communists is effective democratic government. At home we must make democracy work, for our leading position with the rest of the world is only as good as we make life in America. Abroad we must be prepared to offer practical programs of social reconstruction in order to eliminate the conditions on which communism thrives. Although we cannot force our views on other nations, we must stand ready to suggest practical programs and to help work them out with financial and technical assistance.

1. DOUGLAS, *DEMOCRACY AND FINANCE* 290 (1940).

2. In this and the succeeding three paragraphs, Justice Douglas' views are, with a few exceptions, expressed in quotations taken from the addresses appearing in *BEING AN AMERICAN*. Quotation marks have been omitted on the ground that to have included all would have unduly burdened the text.

Like Brandeis, Justice Douglas recognizes that preservation and promotion of the democratic ideal both here and abroad involve much more than faith, good will, and good intentions. Men of courage and competence, men of humility and with the quality of selflessness, men trained in the democratic faith and with a sense of responsibility—upon these depends the future of democracy.³ Lawyers have a special responsibility because their traditions, experience, and public functions have peculiarly fitted them to protect the individual. They can perform no higher function than to organize to that end. Although too often lawyers have assumed a vested interest in the legal system and too frequently have expended their energies in striving to turn the clock back, the bar should serve state and nation as diligently and competently as it serves its clients and should place democracy's interest ahead of any single group's interest. To the busy lawyer who might urge that he has neither the time nor the ability "to save the world," the Justice would reply, "To every man born under God is given the solemn obligation to serve his fellow man in time of need, and the call to that duty brooks not the counter-calls of lesser things."⁴

The Justice's speeches, and therefore the excerpts set forth in the preceding paragraphs, probably will be criticized for being phrased in idealistic, generalized terms. It must be remembered, however, that they are *speeches* meant to stimulate the thinking and solicit the sympathies of particular audiences rather than to blue-print a specific course of action. More important is the fact that a man of Douglas' position and attainments has consistently employed the phraseology of idealism in addressing his countrymen. Similar statements from others perhaps could be dismissed as the mountings of starry-eyed visionaries. But when one of the ablest justices of the Court who has demonstrated unusual talent for practical administration as Chairman of the Securities and Exchange Commission bids us search for the Holy Grail, we cannot so cavalierly ignore his precept. Finally, despite their generality, these addresses teach lessons which can readily be perceived by the conscientious reader. At the very minimum, they urge the practitioner to devote time, energy, and money to protecting civil liberties; to represent indigent defendants; to select juniors on the basis of merit and not for reasons of race, creed, or color; to enter public service; to exercise influence in his capacity as public official, corporate director, or institutional trustee so as to further the democratic ideal.⁵ Law teachers will find in these speeches an admonition to oppose discriminatory admission policies; to select faculty colleagues for their teaching and scholarly abilities irrespective of race, creed, or color; to speak out in the community in favor of civil rights; to acquaint law students with their inheritance of liberty and with their responsibility for preserving and promoting that inheritance. And I think that the conscientious law student who reads these papers will conclude that steps should be taken to eradicate discriminatory practices in the selection of members of law clubs and legal fraternities.

3. The substance of this sentence appears in DOUGLAS, *op. cit. supra* note 1, at 295.

4. Quoted from an address to the Yale Law School Association on May 13, 1948, printed in 34 A. B. A. J. 674, 676(1948).

5. In his Yale Law School address, *supra* note 4, the Justice went much further: "The questions will fairly be asked: What do I propose? Shall business cease? Shall the settlement of all questions be deferred while lawyers among others, set out in search of the Holy Grail? My answer is that a Holy Grail is desperately needed; and without a mass dedication to its discovery there may indeed be no Courts, no business, no people to worry about."

The affirmations of Douglas, the speechmaker, find support in the actions of Douglas, the man and the Justice. He devoted several years to government service with the Securities and Exchange Commission; he resigned his law school teaching position because the president of the university appointed a dean without consulting the faculty; and his Supreme Court opinions and votes on issues involving the Bill of Rights, although not as consistently in favor of the individual as those of Justices Murphy and Rutledge, reflect an unusual sensitivity to civil liberties. Pritchett has noted, however, that "Douglas was the only justice on the Court who supported the government in every one of the non-unanimous wartime freedom decisions."⁶ And in cases involving the search and seizure clause of the Fourth Amendment there have been curious departures from his usually liberal position.⁷ But these blemishes, if such they be, cannot obscure the fact that his record is one of courageous liberalism and that by his words and actions he has striven "to make democracy live, to make the democratic ideal survive the many assaults that beset it."

Clark Byse †

WASHINGTON WITCH HUNT. By Bert Andrews.* Random House, New York, 1948. Pp. 218, \$2.50.

Mr. Andrews' book was inspired by the events of late 1947 in which a shocked and temporarily aroused public forced the State Department to recognize, and somewhat modify, the unnecessary and unjust dismissal without a hearing of ten employees accused of disloyalty. Though the story of Mr. "Blank" and his associates is still fresh in many minds, it is here told with a completeness, and with a simplicity and clarity, that make it even more significant, and even more disturbing, than it was as it developed in the daily press a year ago.

Neither in this chapter, which comprises the first third of the book, nor in the succeeding descriptions of the efforts of Dr. Condon to obtain a hearing on charges made against him by the House Committee on Un-American Activities, and of the so-called "Hollywood" hearings before that same Committee, does the author attempt much more than a statement of the facts of public record and of the accused. In his evaluation of the role of the Federal Bureau of Investigation in the State Department matter, he is content to rely upon answers given him by the Director, with no attempt to correlate them with other actual case histories.

One may indeed suggest that Mr. Andrews does not seem fully to appreciate—or in any event to make clear—that "facts" in this field can be highly misleading. That is the very essence of a system of secret evidence by unidentified people. We are justified in a skepticism, not only as to Mr. Hoover's assurances, on the one hand, but also as to the protestations of accused and their counsel on the other. The unfortunate truth is that no one, in or out of the government, knows exactly what the "facts" are.

6. PRITCHETT, *THE ROOSEVELT COURT* 130 (1948).

7. *E. g.*, *Davis v. United States*, 328 U. S. 582 (1946); *Harris v. United States*, 331 U. S. 145 (1947). See also PRITCHETT, *op. cit. supra* note 7, at 152-155.

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Yet the evidence which can be known deserves to be reported, and repeated here in permanent form. This recital is a strong indication that in our efforts to protect ourselves from without, we are sometimes destroying ourselves from within. Probably no thinking person would condone, for example, the action of the Committee on Un-American Activities in what can only be described as a deliberate refusal to allow Dr. Condon to answer the charges it made against him. That can be condoned by well-intentioned people only because they are so afraid of the external danger—the spread of Communism in its political aspects—that they do not consider even the most outrageous procedure as too high a price to pay for its suppression.

The difficulty, of course, is in determining what price we *can* afford to pay. It is not a new difficulty in government, nor is it one for which standards are lacking. But it is unique in one respect: our traditional arbitrators between the rights of society and the liberty of the individual under our Constitution have, in this field, left us to fend for ourselves. For better or worse, the courts have refused to intervene, and in all likelihood, they will not be persuaded to change their position.

The challenge, then, to weigh the bargain, and to make an effective announcement of the result, is on all of us, but particularly on those of us who are members of the bar. Lawyers should peculiarly appreciate the price we are paying in terms of constitutional guarantees, even if they have no greater appreciation than the layman of the need, in these times, to pay it. Every lawyer should make required reading John Lord O'Brian's article on "Loyalty Tests and Guilt by Association,"¹ which is a challenge to the bar and the bar associations which we seem not to be meeting.

There is no certain answer, and no permanent answer. But certainly there must be more that can be said and done than has been achieved by the American Bar Association, which seems tentatively to have committed itself to a ratification, as respects its own membership policy, of the guilt by association concept, and which passed over without comment at its last convention the current loyalty investigations.² The Loyalty Board of Review, which is in a position to control, at least to a considerable extent and in most departments, the activities of the executive branch, has shown, through its chairman, not only a willingness but an eagerness for assistance, particularly in those procedural aspects which rank very nearly in importance with the concepts of guilt.

Mr. Andrews' dramatic illustrations of what, in specific instances, procedure can mean, should leave no doubt as to the need for the best thought we can muster.

Charles A. Horsky †

1. 61 HARV. L. REV. 592 (1948).

2. See 34 A. B. A. J. 487 (1948), reporting a resolution of the Board of Governors that all members of the National Lawyers Guild are automatically disqualified for membership. And see 34 A. B. A. J. 899 (1948), for the discussions at the recent Seattle convention.

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BOOKS RECEIVED

- GOVERNMENT OF CITIES IN THE UNITED STATES. By Harold Zink. The Macmillan Company, New York, 1948 (rev. ed.). Pp. 637, \$5.00.
- THE TRUMAN PROGRAM. Addresses and Messages edited by M. B. Schnapper. Public Affairs Press, Washington, D. C., 1948. Pp. x, 261, \$2.95.
- TRAINING EMPLOYEES AND MANAGERS. By Earl G. Planty, William S. McCord and Carlos-A. Efferson. Ronald Press, New York, 1948. Pp. xiii, 278, \$5.00.
- THE SOCIAL POLITICS OF FEPC. By Louis Coleridge Kesselman. University of North Carolina Press, Chapel Hill, 1948. Pp. 270, \$3.50.
- MANAGEMENT-UNION ARBITRATION; A RECORD OF CASES, METHODS, AND DECISIONS. Foreword by John R. Steelman. By Maxwell Copelof. Harper & Bros., New York, 1948. Pp. 359, \$5.00.
- HUMAN RIGHTS IN THE MODERN WORLD. By Arthur Norman Holcombe. New York University Press, New York, 1948, \$3.75.
- MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS. By John P. Frank. Introduction by Charles A. Beard. Alfred A. Knopf, New York, 1949. Pp. xix, *iv*, 357, \$4.00.
- THE ROLE OF THE SOVIET COURT. By Professor I. T. Golyakov. Public Affairs Press, Washington, D. C., 1948. Pp. 20, \$1.00.