

of securities is entitled to have. As previously indicated, the second specific suggestion has been incorporated in the definition of "public offering" at least since 1935.

Undoubtedly, direct placement needs more research and more first-hand investigation. Professor Corey has been a pioneer, setting up targets for criticism, and establishing landmarks for others to embellish.

MYER FELDMAN†

CIVIL LIBERTIES UNDER ATTACK. By Henry Steele Commager, Robert K. Carr, Zechariah Chafee Jr., Walter Gellhorn, Curtis Bok, and James P. Baxter III. Edited by Clair Wilcox. William J. Cooper Foundation Lectures, Swarthmore College. Philadelphia: University of Pennsylvania Press, 1951. Pp. 155. \$3.50.

PROFESSOR Paul Freund of the Harvard Law School once remarked that the charge against the Joint Anti-Fascist Refugee Committee (placed on the Attorney General's list of subversive organizations) seemed to be that they were "prematurely anti-fascist." In the same vein, many books in recent years which have protested against infringements upon civil liberties have seemed to lack popular response because they were "premature" protests—protests against restrictions which had not percolated down far enough into the national system to cause widespread concern. With the publication of Alan Barth's *The Loyalty of Free Men*, Walter Gellhorn's *Security, Loyalty and Science*, and now, six lectures gathered in *Civil Liberties Under Attack*, the time seems to have become "mature" for re-examining our civil freedoms, 1951 edition.

The issuance of this book is reminiscent of May, 1920, in the period of the notorious Palmer Raids and the anti-radical terror which followed World War One. Then, twelve of America's most distinguished attorneys—essentially conservative men like Roscoe Pound, Felix Frankfurter, Ernst Freund, Zechariah Chafee Jr. and Francis Fisher Kane—issued a report to the American people on the illegal practices of the U.S. Department of Justice, as a response of conscience to the severe restrictions upon civil liberties then current.¹ In this volume, six nationally prominent, essentially conservative writers have again assembled to report on the status of our liberties.

Although dealing with separate topics, two conclusions are presented by each of these authors: first, that restrictions upon civil freedoms in the United

†Attorney, Securities and Exchange Commission. The views expressed in this review are those of the writer, and are not to be construed as those of the Securities and Exchange Commission or any other member of its Staff.

1. To the American People, Report Upon the Illegal Practices of the United States Department of Justice, Washington, D.C. (National Popular Government League, May, 1920).

States today are frighteningly widespread and involve the interests of the overwhelming majority of American citizens, and secondly, that we are reaching a decisive point at which our most traditional notions of free inquiry, human dignity and social progress are either to be reaffirmed or else radically altered, and perhaps substantially lost.

Professor Henry Steele Commager in "The Pragmatic Necessity for Freedom" uses his crystal prose to examine the basic rationale upon which our traditional notions of freedom lie. Realizing that the legal approach or the natural-rights-of-man analysis both have certain weaknesses, Professor Commager submits that the conclusive case for freedom of dissent lies in realizing "the practical consequences of conduct which denies or fetters freedom." He sees these as threefold. First, that we are being forced to an official standard of orthodoxy which creates—through the censorship of public opinion—a climate in which the nation is denied the independent thought and original analysis it desperately needs. Second, that "first rate men and women will not and cannot work under conditions fixed by those who are afraid of ideas." Such conditions force loyal individuals who have self-respect and are intellectually honest to seek other work or to turn to antiquarian research, thus depriving us of needed talents without making our institutions any safer. The third consequence is that our society becomes one governed by fear—fear to inquire, fear to teach, fear to join, fear to read, and fear to defend traditional freedoms.

Professor Commager illustrates this by citing the effects upon our society of the House Un-American Activities Committee attack on the Lawyers Guild, the banning of Professor Mark Van Doren's books from the Jersey City public school libraries, the University of California loyalty oath, Senator McCarthy's blasts at the State Department and the growing movement of guilt by association. His standards are clearly stated when he writes: "It is, you see, with the practical consequences to our society of the limitations on freedom that we are concerned. We do not protect freedom in order to indulge error. We protect freedom in order to discover truth. We do not maintain freedom in order to permit eccentricity to flourish; we maintain freedom in order that society may profit from criticism, even eccentric criticism. We do not encourage dissent for sentimental reasons; we encourage dissent because we cannot live without it."

In the second selection, Professor Robert K. Carr examines "Progress in Civil Rights" in a refutation of five "fallacies" which "mark the arguments of those who are opposed to moving in the directions recommended by the Civil Rights Committee and the President." Professor Carr brings to this long needed systematic treatment a moderate yet uncompromising analysis and a wide factual reservoir gained from his position as Executive Secretary of President Truman's Committee on Civil Rights.

His technique may be observed in a precis of his argument against the first "fallacy," that we should improve civil rights conditions by private action,

not by laws. Pointing out that this is not a question of choosing *between* law and private action but of utilizing both, Professor Carr reminds us that "organized societies have traditionally coped with the anti-social acts of individuals in their midst through laws enforced by government," citing sanctions against murder, kidnapping, arson and burglary. He urges that deprivations of civil rights should be treated in similar fashion: "If one man willfully and deliberately interferes with another man's right to vote, why should not he be punished under law?" Thus, even though in the broader sense, "it may be impossible to change human *nature* by law . . . human *behavior* is subject to social control by law," and though law may not destroy the practice it seeks to control, it is a creative force in deterring such a practice. Noting that seventeen states and the District of Columbia have laws providing for the compulsory segregation of the races, Professor Carr concludes that "the ruling classes in these states have been unwilling to let the issue of segregation be determined on a private, voluntary basis . . . The choice is not between 'law' and 'private, voluntary action;' the choice is between 'good law' and 'bad law'—between a moral law and an evil law."

In similar fashion, Professor Carr treats the four remaining arguments: that we are making adequate progress without law; that if we are to have governmental action it should be confined to state and local levels; that we must not try to move too fast in securing civil rights; and that Negroes are satisfied and indeed prefer segregation. Closing on a note of immediacy, Professor Carr writes: "If democracy is to hold its own with communism in this appeal for the respect and loyalty of the peoples of Asia, Africa and even South America, we cannot delay much longer in making it clear to the world that American democracy does not involve racial discrimination or interference with civil rights along racial lines."

Under "Investigations of Radicalism and Laws Against Subversion," Professor Zechariah Chafee Jr. rejects the notion that American radicalism is foreign or Kremlin controlled, or to be viewed in the McCarran Act, Smith Act attitude. He classifies United States communists as "American problem children" and suggests that "Instead of tearing ourselves to pieces with fears of what a vague mob with a hated label may do to us in the future, it will be wise to look at them as individual men and women, here and now." To reclaim these Americans, Professor Chafee urges that we break down our approach toward radicals into component parts—use our existing legislation and investigation powers against those who are in fact trained spies "without behaving as if the meeting at Peekskill to listen to Paul Robeson was an overseas session of the Politburo," and leave the remaining problems of radicalism to be dealt with within the broader framework of our free institutions. Using this breakdown approach, Professor Chafee goes on to criticize the attitude, the technique and the enabling law under which the present attack upon civil freedoms is being waged—namely, the development of an "American party line" of thought control; the current indecencies of Congressional investigat-

ing committees; and the potpourri of controls called the McCarran Act. His discussion of each of these three areas is a skillful interweaving of historical guides, penetrating analysis and probing questions.

At his best in the section dealing with legislative committees where he suggests a practical system of reform to be put into law, Professor Chafee is in the entire essay a man afraid of only one thing—that we may so shackle ourselves with a national self-hatred and controls that we will be unable to bring our power of freedom to bear upon the problems of the future.

In the fourth area, "Security, Secrecy and the Advancement of Science" the loyalty program receives a restrained but equally lethal treatment at the hands of Professor Walter Gellhorn. The professor writes that "almost with a single voice, American scientists assert that we are overdoing our secrecy." Looking to the security program in practice, Professor Gellhorn finds that scientific advance is being impeded; that clearance indignities are diverting loyal scientists from government service and depressing the morale of those who remain; that not "one single case of espionage" has been produced by the loyalty program, and that the program has achieved one major result: "It has thrown the weight of the government of the United States behind the dangerous theory that entertaining an unsound opinion or advocating an abhorrent idea is itself an offense against society."

Thus, in Professor Gellhorn's view, "The program should be abandoned as a mistaken approach to a real problem," leaving the Federal Bureau of Investigation to detect spies. He suggests a sane security procedure, without guilt by association, to guard our scientific data. This conception would leave science free for the essential interchange of discoveries for the general welfare while retaining a check on the military researches which should be kept secret. The keynote to the problem for Professor Gellhorn, as with Professors Com-mager and Chafee, is a reasoned self-confidence: "The answer to fear, as J. Robert Oppenheimer has well said, cannot always lie in dissipating its causes or in yielding to it. Sometimes it lies, simply enough, in courage."

Judge Curtis Bok's deceptive essay, "Censorship and the Arts" brings to mind Schopenhauer's warning that "any book that is at all important ought to be at once read through twice." At first reading, Judge Bok seems to have contributed a light resume of legal censorship since 1501 when the modern principle was established by Pope Alexander VI; a rich sampling of the treatment given art, music and literature by United States censors; and a few delicately choice phrases ("... the whole question of legal censorship comes down to whether we have faith in people or whether we fear they won't have the courage and moral stamina of our convictions."). This puckish, Franklin P. Adams approach is only the coverlet for a penetrating analysis, however; a delightful contrast to the somewhat heavy tone which rings through the collection generally. By innuendo, a perceptive phrasing of issues and a professed inability to find a "pat answer," Judge Bok drives home in a disarming, effective style the need for a standard of orthodoxy flexible

enough to accommodate shifts in truth, opinion and taste, and the need that our society realize that "The odd thing about truth is that it keeps changing its clothes."

The discussion of "Freedom in Education" by Williams College President James P. Baxter III, fails to strike at the heart of its subject as deeply as do most of the other analyses. Excellent in his outlining of the value of free inquiry to our society, the dangers of book control, lecture control and associations control upon the discovery of truth and the necessity for protected faculty self-expression, President Baxter loses speed somewhat when it comes to a program for the university system in the cold war crisis. He portrays well the scholar's responsibility for examination and dissemination of truth as the basis for the freedom afforded him. He decides that the minimum commitment of the communist party member renders him unable to meet this quest for objective truth, and concludes that there is no place for the communist party member on the campus faculty. But, President Baxter offers no compelling solution to the problem of eliminating the communist party teacher while preventing the smear campaigns and intellectual inquisitions which he so vigorously deplors. His solution of suspending the "avowed" communist, paying him his salary for the period his appointment has to run, or even until his retirement age, if necessary, is far from realistic. Would President Baxter draw the line of discharge at open party members or would he allow a board to decide who is a member of the communist party if the professor was not considerate enough to declare himself publicly? If so, what formula of identification would President Baxter install; party card, membership in "Communist-front" organizations, ideas in class or books? What then would become of all the arguments against guilt by association, teacher's oaths, and stifling atmospheres which make up the main thrust of the article? President Baxter almost suggests that *any* attempt to inquire into the political loyalty of faculty members should not be tolerated, but the injection of a vigorous attack upon communist scholarship and his insistence that the communist be ejected from the university leaves this vital question clouded. In his failure to come squarely to grips with the focal point of the current problem, President Baxter leaves his readers with a somewhat inconclusive contribution.

Considered as a whole, it will be difficult for the reader to find a book with as much constructive thought and lucid writing as this short 150 page collection provides. One may agree or disagree with any of the specific correctives offered by these authors, but their portrayals of eroded civil freedoms cannot help but transmit a feeling of urgency for protective action. And beyond its general appeal, there is a special significance to lawyers in this work. It is not accidental that of the six lecturers, three are professors of law and one is a judge. This is a call to conscience for the American legal profession, an invitation for the Bar to meet the present shrinkage of civil freedoms by assuming the leading role as defenders of our constitutional heritage. Already,

the general inaction of the American bar has been commented upon. Phillip L. Graham, publisher of the *Washington Post*, stated in a public address that the legal profession had failed to meet its obligation to support individual freedom and act as "America's ministers of justice." He said that "By and large, the attitudes of the bar have indicated silent acquiescence in, and even occasionally affirmative support for, innovations affecting personal freedom that would have raised the collective hairs of this association straight on end not many years ago."²

The bar has always had two historical roles to choose between: the indifference to civil freedoms which led to wholesale distrust of lawyers during the American Revolution, the Jacksonian period and the latter part of the 19th century; or the defense of individual liberty which marked the John Peter Zenger sedition trial in 1735,³ the New York City Bar Association's opposition to the Lusk Committee in the 1920's⁴ and the 1947 Letter to President Truman from twenty-two faculty members of the Yale Law School protesting the promulgation of the loyalty order.⁵

As Professor Commager phrased it, "Each generation has to vindicate these freedoms anew, and for itself." Four members of our profession have reported the ragged status of our freedoms, and it is now up to the bar as a whole to lead the march to the mending shop.

ALAN FURMAN WESTIN†

EFFECTS OF TAXATION ON EXECUTIVES. By Thomas H. Sanders. Boston: Division of Research, Graduate School of Business Administration, Harvard University, 1951. Pp. xiii, 229. \$3.25.

EFFECTS OF TAXATION ON EXECUTIVE COMPENSATION AND RETIREMENT PLANS. By Challis A. Hall, Jr. Boston: Division of Research, Graduate School of Business Administration, Harvard University, 1951. Pp. xv, 365. \$4.25.

UNTIL recently, the effects of taxation on personal initiative and corporate decisions have been largely matters for speculation. Some writers have consistently predicted dire consequences to the economy from any hoisting of tax rates. Others have asserted that tax changes would not have significant

2. N.Y. Times, Nov. 17, 1951, p. 8, col. 8.

3. 17 How. St. Tr. 675 (1735).

4. Statement of Special Committee of Association of Bar of City of New York, Reports, Vol. 21, 1920. The statement was directed to the legislature of the state of New York and was signed by Charles Evans Hughes, Morgan J. O'Brien, Louis Marshall, Joseph M. Proskauer and Ogden L. Mills.

5. N.Y. Herald Tribune, Nov. 27, 1947, p. 1, col. 6.

†Member of the District of Columbia Bar.