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Book Reviews

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BOOK REVIEWS

THE SUPREME COURT REVIEW. Philip B. Kurland, Editor. Chicago: The University of Chicago Press, 1960. Pp. ix. 326. Seven essays on subjects involving as many different areas of the law have been placed between hard covers and offered to the public as the first volume of what is intended to be a series of annual publications concerning the work of the Supreme Court of the United States. The editor in his brief preface points out the unique character of the undertaking, namely, a publication devoted exclusively to the presentation of sustained, disinterested, and competent criticism of the professional qualities of the Supreme Court's opinions. As the editor notes, the need for such criticism has been expressed by Professor Henry Hart and the desirability of, even the necessity for, such criticism has been announced by members of the Court themselves. The editor, contributors, and all others responsible for the appearance of this sorely needed annual review have put not only the legal profession but all citizens of the United States in their debt. One can easily imagine the great benefits that might have accrued to all of us had a publication of this sort been in existence in 1954, for example: The legal profession and the people generally are to this day not clear about the great decision of that year concerning segregation in the schools. Perhaps it would be advisable for the future issues of the review to be open for the consideration of important decisions of the past which are still a matter of lively interest and controversy.

Although the review is issued under the auspices of the University of Chicago Law School, most of the contributors to the first issue are not members of the faculty of that school. Presumably the best essays are to be selected regardless of academic geography. The first three essays deal with constitutional questions raised in recent cases. Professor Harry Kalven, Jr.'s[1] brilliant article on the law of obscenity is the first of these. In it he examines recent opinions (that is, in cases from 1957 to 1959), as well as earlier ones. It is to be hoped that in a future issue he will bring his great learning and discernment to bear on a criticism of the Court's decision of January 23, 1961, on the validity of the Chicago film censorship law.[2] The value of the present essay is not impaired by reason of the January decision. It remains required reading for all lawyers who are involved in problems of the law of obscenity.

Professor Edward L. Barrett, Jr.[3] contributes the second article, which is devoted to a discussion of rights under the fourth amendment. This essay is occasioned by six cases decided during the 1959 term. Perhaps the most noteworthy of these is the *Elkins* case[4] in which the Court repudiated the silver platter doctrine; articles obtained as the result of an unreasonable search and seizure by state officers, without involvement of federal officers, may no longer be introduced in evidence against a defendant over his timely objection in a federal criminal trial. Professor Barrett's concern, however, is with the thesis that the Court in applying the fourth amendment "has unintentionally created a situation in which concern with protecting the rights of those charged with crime has resulted in extending greater protection to property interests than to personal liberty."[5] This thesis he has thoroughly substantiated and what he has done is an admirable example of first-class professional criticism of the course of decision in fourth amendment cases.

The third article, the contribution of Professor Kenneth L. Karst,[6] is a thoughtful plea for more knowledge and less hunch concerning what he terms (following the lead of Professor Kenneth C. Davis, whose Administrative Law Treatise he cites) "legislative facts." He states that "the court's legislative function requires

1 Professor of Law, University of Chicago.
2 Times Films, Inc. v. City of Chicago, 81 S. Ct. 391 (1961), noted at 36 NOTRE DAME LAWYER 406 (1961).
3 Professor of Law, University of California, Berkeley.
4 Elkins v. United States, 364 U.S. 206 (1960).
5 Text at 49.
6 Associate Professor of Law, Ohio State University.

it to be informed on matters far beyond the facts of the particular case."[7] And he continues: "These 'legislative facts' of broader application need illumination so that the court can make the best possible prediction of the effects of its decision."[8] Professor Karst discusses many recent cases in the light of an argument for what he calls particularity. This reviewer has the feeling that the article would be more illuminating to the profession if more time and space had been available to the author.

The remaining four articles deal with matters of great importance, no doubt, but of much more specialized interest than the first three. In the field of labor law Professor Bernard D. Meltzer's[9] elaborate analysis of the *Chicago & Northwestern* case[10] points out deficiencies in the Court's treatment and advances explanations for such deficiencies. In the field of admiralty jurisdiction, Mr. David P. Currie[11] exposes the difficulties in applying or rejecting, as the case may be, provisions of state law in cases involving injuries occurring on navigable waters. Mr. Currie begins his discussion with a treatment of *Hess* v. *United States,*[12] decided in the 1959 term. He then convincingly demonstrates that the present state of the law concerning the application of state law in admiralty cases is "the devil's own mess."[13] And he concludes with some suggestions for improvement.

In the field of federal taxation, Professor Charles L. B. Lowndes[14] propounds the thesis: "It is time to rescue the Supreme Court from federal taxation; it is time to rescue federal taxation from the Supreme Court."[15] To this reviewer Professor Lowndes' article is by far the best in the entire volume. At the outset he states the thesis previously quoted. He lucidly explains what the Court has done badly in federal tax cases and suggests that it be relieved of jurisdiction of those cases except those that involve constitutional questions or criminal prosecutions. Whether one agrees with his conclusions or not, one must acknowledge that his argument has great force and that he has stated it admirably.

Finally, in the field of antitrust law, Dean Edward H. Levi[16] writes on *United States* v. *Parke, Davis & Co.*[17] The facts of this case, involving resale price maintenance, are set forth at length and the various opinions carefully analyzed and compared with prior related decisions. Dean Levi concludes that "it is a matter of concern that the law should have failed to provide itself with a meaningful structure of theory"[18] in the matter of the price-control problem, but there is hope "that a future case will make of *Parke, Davis* an important step"[19] in the development of such a structure.

The usefulness of the volume would be greatly enhanced if it were provided with an index and table of cases. Perhaps future issues will be equipped with such traditional aids. But, just as it stands, *The Supreme Court Review* should be accorded a warm welcome by the profession. May the project begun with such a high degree of accomplishment continue *ad multos annos.*

*Roger Paul Peters**

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7 Text at 77.
8 *Ibid.*
9 Professor of Law, University of Chicago.
10 362 U.S. 330 (1960).
11 Law clerk at the United States Court of Appeals for the Second Circuit.
12 361 U.S. 314 (1960).
13 Text at 158.
14 Professor of Law, Duke University.
15 Text at 222.
16 Dean of the Law School and Professor of Law, University of Chicago.
17 362 U.S. 29 (1960), noted at 36 NOTRE DAME LAWYER 81 (1960).
18 Text at 326.
19 *Ibid.*

* B.A., LL.B.; Professor of Law, Notre Dame Law School.

FREEDOM AND CIVILIZATION. By Bronislaw Malinowski. Bloomington: Indiana University Press, 1960. Pp. xiv, 338. $2.25. This is a paperback edition of a work originally published posthumously in 1944. It was written while the author was teaching at Yale University during the early years of World War II and was motivated by a desire to clarify on anthropological grounds both the issues of the war and the problems in finding peace which the democratic powers would face when the war was over. Malinowski's method was an exploration of "Freedom" and his thesis was that "freedom, justice and democracy supply the best conditions for sound cultural development."

As a cultural anthropologist, Malinowski's first concern was to define and describe the significance of human freedom as it influenced human action in a social and cultural context. Culture and freedom are each the cause and effect of the other, he said. On the one hand, culture is said to be "the real context in which human freedom is born and by which it is specifically limited."[1] But, on the other hand: "Culture is the gift of freedom."[2] Generically, freedom is understood as "the conditions necessary and sufficient for the effective run of any process or any activity."[3] But, culturally, freedom is defined by "those cultural conditions under which human beings can mature their purposes, execute them efficiently and reap the benefits of their labors."[4]

Malinowski saw freedom in a social and technical context. It was to him an objective attribute of human action and not a subjective feeling. Nor was it a purely individualistic thing: "It implies the benefit from action and responsibility for action by individuals and groups alike."[5] What distinguishes his approach from the usual philosophical and political discussion of the concept is that he is particularly concerned with the natural and cultural conditions of human freedom in an effective, existential context. As he understood it, human freedom is not something absolute and indeterminate but is, on the contrary, both relative and predetermined.

Freedom is thus always freedom under law or discipline, whether the controlling force is the law of nature or the law of society. And, since freedom is not defined in an individualistic context, what distinguishes it from tyranny and slavery is not the absence of restraint, but rather the presence or absence of abuse of power and authority. If power is exercised by those in authority so as to prevent their subjects from full participation in the planning, execution and enjoyment of their labors, the result is tyranny. What he was most concerned to avoid was a concept of freedom which equated it with an absence of authority. Effective freedom, according to Malinowski, was always subject to the authority and discipline of the institutions of society. In the anthropological context, human culture is an instrument of human power; it is designed to preserve human life and to increase the dimensions of human freedom.

Malinowski was perhaps writing more of what culture ought to do than what it does. He may be criticized for failing to distinguish clearly between the normative, ideal functions of culture, and its actual, historical functions. He would, perhaps, have agreed that the distinction has importance if culture is to be defined in terms of institutions which satisfy human needs and promote human freedom. The notion of the dysfunctions of cultural institutions was implicitly recognized in this work — especially in his uncompromising criticism of the totalitarian political system — but he did not appreciate sufficiently in theory the role of normative ideals and creative individuals in transcending the given, historical and cultural values of their generations and opening up new perspectives of freedom.

1 Text at 319.
2 *Id.* at 320.
3 *Id.* at 77.
4 *Id.* at 82.
5 *Id.* at 95.

Nevertheless, Malinowski's effort remains the most comprehensive and acute analysis of the concept of freedom in modern anthropological literature. It is a book full of brilliant insights, insights which often surpass the rigid formulas the author proposes in the name of objective, behavioral science.

*David Bidney**

FEDERAL TAX FRAUD LAW. By Ernest R. Mortenson. Indianapolis: Bobbs-Merrill Co., Inc., 1958. Pp. vii, 312. $12.50. As enforcement of the federal tax laws is intensified, a higher percentage of taxpayers will be brought within the tax fraud net. President Kennedy's recent request for a substantially greater number of enforcement personnel, notably more special (or fraud) agents, than were provided for in the last Eisenhower budget, presages sharply stepped-up investigative activity. Fraud cases already represent an important segment of tax practice; stepped-up investigations of tax returns will increase their importance.

Mr. Mortenson's book, therefore, will likewise increase in its vitality. As a former government tax official and later a private practitioner, he obviously brings to his subject a well-rounded background in the field. He has been able to translate this knowledge into trenchant, penetrating prose which illuminates his subject with real clarity. He has succeeded in making understandable an area of tax practice which is frequently quite difficult to document.

At the outset, the author includes an excellent introductory chapter which sets the stage for the more detailed development to follow. This introduction is virtually a capsule summary of the entire work. It will be most valuable as a quick reference to many points when time does not permit lengthier study. It is also a handy refresher.

This excellent introduction is followed by an enlightening step-by-step analysis, *The Evolution of a Tax Fraud Case.* Here the experienced background of the writer is most evident in his intensely practical approach to and explanations of "twilight zones." Such matters as "right to copy of transcript," "representation by counsel," "conference with the special agent," and "informers" are explained as only an accomplished veteran could explain them. Apt citations of authority are included to all such points that have been considered by the courts. One trouble in this area is that many trenchant questions have never been considered by the courts. This is just where the superior personal knowledge and experience of the author fills the void.

An extremely helpful aspect of this chapter, and of the entire book as well, is the use of those documents which will be confronted in tax fraud cases. An example is the letter directed to taxpayers who have failed to keep sufficient records as required by the tax laws. To see a reproduction of the document should prove a boon to the practitioner who must deal with it in a future case.

After discussing the development of a tax fraud case, a hypothetical case is followed from beginning to end. All pertinent written data, *e.g.,* the taxpayer's statement under oath before the Intelligence Division, is reproduced in its entirety. Even government documents, such as the joint report of the special agent and revenue agent, with accompanying tax computations, are included. The value of these reproductions is that the practitioner will know what to expect when he sees one of them in a future case.

One of the most vexing questions in every tax fraud case is the extent to which the taxpayer should disclose his records and other evidence to the government agents. A thorough discussion of this problem is contained in chapter 3. The sensitive perception of the author is exemplified by his keen observation that

> Even where the decision is made to cooperate, only in the rarest of circumstances should the taxpayer prepare, or sign a net worth statement

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* Professor of Anthropology and Philosophy, Indiana University.

> prepared by the Government. Such a statement may be the principal evidence leading to ultimate conviction.[1]

Experience in tax fraud cases proves the solid worth of this statement. Such accurate advice makes this work invaluable for the practitioner, be he general or specialist.

Claiming the constitutional privileges against self-incrimination, so familiar to all television viewers, is especially well treated. The reverse, or waiver of these constitutional privileges, is equally explained and annotated. Much misinformation is dissipated in these perplexing areas.

Unlike most federal tax matters, fraud may lead to the invoking of criminal sanctions by the government. The precise statutory provisions for such sanctions are carefully set forth and explained. Such aspects as "insanity," the "multiplicity of sanctions," "sanctions for others than taxpayer," and "conspiracy" cover questions that may be seldom met; but can be crucial when they do arise.

One of the chief virtues of this treatise is its repeated emphasis of the vital theme that, regardless of the prevailing rule of law on the disputed point, the *facts* of each case are all-important. A cogent explanation of the use of indirect evidence points up this justified emphasis. The indirect methods which have been most frequently employed are (1) net worth increase, (2) expenditures, and (3) bank deposits. Often a combination is used, or one method may be used to corroborate another. These methods have assumed increasing importance with the passing years, especially since the Supreme Court's decision in *Holland v. United States*.[2]

If a taxpayer-client should be the object of criminal sanctions, his counsel must cope with specific evidentiary problems. Here Mr. Mortenson is particularly effective, because he speaks with the voice of a trial lawyer — there is no substitute for the crucible test of trial. For example, his discussion of the use of memoranda by witnesses for the purpose of refreshing recollection is competently handled. This is an elusive evidentiary area which will be easier to cope with after studying Chapter VI.

Since criminal sanctions are the most lethal weapon in the government tax armory, more space is devoted to this subject than to any other. Excellent chapters on *The Framework of a Criminal Tax Trial* and *Trial of a Criminal Tax Case* are included. At first thought it might appear that a disproportionate portion of the work is devoted to the criminal trial. When it is realized that the criminal phase of a tax fraud case dominates all thinking and decisions of counsel until that phase is concluded, no other phase can be of such transcending importance. Hence, Mr. Mortenson's emphasis is not misplaced.

In the final stages, civil penalties and collection procedures are explained. For those who will not participate in criminal cases, the civil aspects of tax fraud law will prove vital. The author has not slighted these phases; he has simply subordinated them to the "life or death" aspect of the criminal sanctions.

Mr. Mortenson has achieved the elusive goal of contributing a treatise which will be of high value to both the specialist in tax law and the general practitioner who is more rarely called upon to handle a tax fraud case. For the specialist it may tend to serve more as a check-reference than a source work, but for either it will be reassuring to have a compact text-reference on the ready shelf.

Testing this work by real life cases reflects its authenticity. It rings true, because the author knows his subject and expresses himself clearly. Many cobwebs have been swept from obscure corners. Little, if any, fat remains on the sinewy frame of the text. This is a work which fills a real need in the federal tax library.

*Lester M. Ponder**

1 Text at 50.
2 348 U.S. 121 (1954).
* B.S., J.D.; member of the Arkansas and Indiana Bars; partner, Barnes, Hickam, Pantzer & Boyd, Indianapolis.

WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION. By John Courtney Murray, S.J. New York: Sheed and Ward, 1960. Pp. xiv, 336. $5.00. Idiomatically speaking, John Courtney Murray, S.J., is "in." In many quarters he is second only to a fellow Jesuit, the late Pierre Teilhard de Chardin, in the amount of interest and acclaim. Hence, it is possible that his recent book, *We Hold These Truths,* will receive a measure of the consideration it deserves.[1]

Father Murray's appeal is universal, because his thought is not compartmentalized or superficial. For example, whether the emphasis is theological or legal (and not ruling out a relationship between the two domains), he carries the inquiry well beyond the traditional borders. Upon the lawyer he presses ultimate questions, which are more comfortably ignored. And upon the theologian he urges a consideration of practical ramifications which ought not be evaluated solely by means of deduction from authority. He maintains that "few of the real problems today are susceptible of solution, or even of statement in legal language."[2] Rather, "the Basic Issues today can only be conceived in metaphysical and theological terms. They are issues of truth. They concern the nature and structure of reality itself — meaning by reality the order of nature as accessible to human reason, and the economy of salvation as disclosed by the Christian revelation."[3] But this ordering results in no real downgrading of law's importance, as the following will attest:

> It is not too much to say that there has been a virtue in the Western tradition of law which warrants us in calling it redemptive, at least in a terrestrial sense. Western man has sought in the idea of law a manifold redemption — from the arbitrary despotisms of uncontrolled power; from the threat or fact of injustice to his person and to his property; from dispossession of his human and civil rights; from the degredation that ensues upon social inequalities destructive of his personal significance and worth; from the oppressive evils of an inequitable distribution of wealth; from the multiple rapacities that seem to lurk in the human enterprises of commerce and trade; from the disruption of life by irrational forces of passion, caprice, and chance that militate against the "life of expectability," to use Sir Ernest Barker's phrase for the high human good that is guaranteed by the rule of law.[4]

Surely this must be ranked among the most eloquent tributes on record.

It is not possible to type this book, any more than it is possible to type Father Murray. The questions treated cover a wide range, and his approach is expansive. Actually, many of the essays have been published, as single items, before. And while each bears a relationship to the others, the end product does not form a completed whole. Nor, I dare say, did Father Murray intend that it should. For he asks as many questions as he undertakes to answer. This book, then, is a beginning, not an end. One hopes that a substantial part of the future elaboration will come from his own pen.

In times of crisis men turn more readily to an investigation of fundamentals. Even self-examination may come into vogue. So, today, Americans are discussing, with a sense of urgency, national "purpose" and "goals." The importance of these efforts can scarcely be underestimated. Father Murray puts the case with characteristic directness:

> What is at stake is America's understanding of itself. Self understanding is the necessary condition of a sense of self-identity and self-confidence, whether in the case of an individual or in the case of a people. If the American people can no longer base this sense on naive assumptions

1 Father Murray was recently given the cover story treatment by *Time* magazine. The author of the article said it was "the most relentlessly intellectual cover story I've ever done" and made this optimistic prediction: "In the months to come, serious Americans of all sorts and conditions — in pin-stripes and laboratory gowns, space suits and housecoats — will be discussing his hopes and fears for American democracy." Time, December 12, 1960, pp. 13, 64.

2 Text at 199.

3 *Ibid.*

4 Text at 155.

> of self-evidence, it is imperative that they find other more reasoned grounds for their essential affirmation that they are uniquely a people, uniquely a free society. Otherwise the peril is great. The complete loss of one's identity is, with all propriety of theological definition, hell. In diminished forms it is insanity. And it would not be well for the American giant to go lumbering about the world today, lost and mad.[5]

In these reflections the author does not advance novel doctrine. On the contrary, he establishes an essential continuity between the truths we hold as a nation and those which animated the Western tradition. Thus, the familiar principles of limited government, such as constitutionalism (government under the rule of law), inalienable and inherent rights of the individual, and consent of the governed (government by the people), are placed in the totality to which they belong. But his treatment does not amount to a mere restatement or re-presentation. He carefully examines the American experience, both with a view of showing America's unique contribution and providing a guide for future action. This is capped by a forthright consideration of the vexing problem of religious pluralism as it affects civic unity, which involves, among other things, an analysis of the first two provisions of the first amendment.[6] His judgment is as significant as it is encouraging. As "articles of peace," these provisions have stood the test of time, just as good law must. As he states, "For over a century and a half the United States has displayed to the world the fact that political unity and stability are not necessarily dependent on the common sharing of one religious faith."[7] Moreover,

> religion itself, and not the least the Catholic Church has benefited by our free institutions, by the maintenance, even in exaggerated form, of the distinction between church and state. Within the same span of history the experience of the Church elsewhere, especially in Latin lands, has been alternately an experience of privilege or persecution. . . . It would be difficult to say which experience, privilege or persecution, proved in the end to be the more damaging or gainful to the Church.[8]

He does not minimize the difficulties which "creeds at war" create, nor does he entertain great expectations.[9] Still, as difficult as the task may be, unprecedented effort must be made. As a beginning he suggests: "We could limit the warfare, and we could enlarge the dialogue. We could lay down our arms (at least the more barbarous kind of arms!), and we could take up argument."[10] All in all, the American experience is a hopeful sign for the future. The more so because of world-wide implications, since "the quest for unity-amid-pluralism has assumed a new urgency in the mind of post-modern man."[11]

Topics for the dialogue abound. One which Father Murray would place on the agenda, and thereby put the discussants under severe strain, is what he calls "the segregationist pattern of American public education."[12] He is not here referring to racial segregation in schools, but "the segregation of religion, in the concrete pluralist sense, from public school premises, and the segregation of the religious school from public aid."[13] He protests that the denial of aid to the religious school does not square with the fact of our pluralist social structure. He does not expect an early solution of the problem, but does make it clear he believes that, in time, *McCollum v. Board of Education* will seem as anachronistic as *Plessy v. Ferguson.*

Another "unfinished argument" which the author would take up involves the

5 *Id.* at 5, 6.

6 "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

7 Text at 72.

8 *Id.* at 73-74.

9 "My own expectations are modest and minimal. It seems to be the lesson of history that men are usually governed with little wisdom. . . . Religious pluralism is against the will of God. But it is the human condition; it is written into the script of history. It will not somehow marvelously cease to trouble the City." *Id.* at 23.

10 *Id.* at 23.

11 *Id.* at 133.

12 *Id.* at 145.

13 *Ibid.*

matter of censorship. In a chapter entitled "Should there be a law?" he underscores the limited value of censorship statutes, cautioning against expecting very much in the way of moral uplift from such laws.[14] We must resist the temptation to expect law to accomplish the moralization of society, even though legislation does seek to secure that end. For, while affirming that law and morality are related, and that the premises of law are ultimately found in the moral law, he insists law must not moralize excessively. Otherwise it tends to defeat even its more modest aims, by bringing itself into contempt. In short, the law is required to be tolerant of many evils that morality condemns.[15] However, Father Murray does make positive proposals, both as to the areas of permissible censorship and the procedures to be followed in exercising this function. His balanced approach stands in sharp contrast to much "all or nothing" writing on the subject, and, it is hoped, will help to decrease the heat as it increases the light.

Perhaps the most significant problem which Father Murray addresses involves the idea of "Christian humanism," or in general, the relationship and attitude of the Christian to the world. While this may seem to some as no more than an intramural argument, the consequences are very far-reaching indeed. He notes two dominant orientations or tendencies. One he calls "eschatological humanism," the other "incarnational humanism." The first, making a strong appeal to Scripture, emphasizes man's transcendental goals and thereby encourages an attitude of withdrawal or even "contempt" for the world. Within the earthly City man is a stranger, a pilgrim, and finds here no abiding home. Aware of sin as a permanent human fact, he expects little in the way of human progress and achievement. And affirming the centrality of the Cross, which represents the inversion of all human values, he is particularly skeptical of "Heaven on Earth" panaceas.[16] But, as Father Murray points out, the tendency towards an "incarnational humanism is founded on accents laid on other, and no less Christian, principles."[17] The end of man is indeed transcendent, supernatural; but "it is an end of *man* and in its achievement man truly finds the perfection of his nature. Grace perfects nature, does not destroy it — this is the central point of emphasis."[18] All that God made is good, and in the perspectives of incarnational humanism there is a place for all that is natural, human, terrestrial. Moreover, all things must be restored in Jesus Christ. A decidedly optimistic view, its spirit can be seen in these words of Cardinal Suhard:

> It means that nothing escapes Redemption, that all is washed in His blood . . . and that henceforth the world is a sign of love. Far from fleeing it, the Christian has as his task to fulfill it and to assume it. . . . At the same time his course is laid down and his participation in the temporal justified. Instead of closing his eyes to progress, the Christian

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14 Indeed the whole criminal code is only a minimal moral force. Particularly in the field of sexual morality the expectations are small; as I have suggested, they are smaller here than anywhere else. It is a sort of paradox, though an understandable one, that the greater the social evil, the less effective against it is the instrument of coercive law. Philip Wylie may have been right in saying that American society "is technically insane in the matter of sex." If so, it cannot be coerced into sanity by the force of law. In proportion as literary obscenity is a major social evil, the power of the police against it is severely limited. Text at 167.

15 *Id.* at 166.

16 [T]he crucifixion was not only an act in history; it was also the utterance of a judgment and the promulgation of a law. The law says that he who would save his life must lose it; the things of this life have their value in that they provide the material for renouncement. Only through this renouncement, this acceptance of a similitude of Christ's death, is there resurrection to the true life. The judgment permanently shatters the illusion that is nonetheless a permanent temptation of the human spirit — to want salvation to come here on earth in some manner of new or renewed "Kingdom of Israel," a realm of peace and plenty, ruled by the elect of God. *Id.* at 188.

17 *Id.* at 189.

18 *Ibid.*

> believes in it and works for it to fulfill creation and hasten the Second Coming in which the universe — Mystical Body and all creation — will produce the triumph of Christ the King by realizing its plenitude and the achievement of the total Christ. [19]

It is the author's view that these two orientations of Christian thought are not mutually exclusive, but complementary. Yet it requires the best of efforts to construct a synthesis. Fortunately, this problem is engaging the attention of fertile minds,[20] and one hopes that here, too, Father Murray will in future writings return to the subject, especially as it relates to American life and institutions.

Much else awaits the reader of this book, such as an incisive chapter on "Doctrine and Policy in Communist Imperialism," and a discussion of the relevance of natural law to the solution of contemporary problems. Seldom is a publisher given to understatement, but in this instance Sheed and Ward is certainly justified in regarding "the publication of this book [as] a significant event in the history of modern American thought" and in stating that the author treats the areas of concern "with a clarity of thought and sharpness of expression equal to their gravity."

*Edward J. Murphy**

A LIVING BILL OF RIGHTS. By William O. Douglas. Garden City, New York: Doubleday & Company, Inc., 1961. Pp. 72. $1.50.

> This booklet, which covers ground familiar to lawyers, does not profess to be a treatise. It states a philosophy or point of view concerning the Bill of Rights. It is written in the manner of articles of faith.[1]

Thus, Mr. Justice Douglas of the United States Supreme Court introduces this terse, little book, which he may proudly add to his repertory of publications. Sometimes great minds reach a quintessence of perfection in the expression of a noble ideal when they present it in a simple, clear-cut fashion for the average lay reader. This perfection the author may have reached in this book.

To the legal mind, often cluttered with legal maxims, principles, and complex analogies, the author, one of the very liberal associate justices on the United States Supreme Court in the last 20 years, appears to be almost a radical civil libertarian. Some of his dissenting opinions, which claim that individuals in particular cases were denied individual rights,[2] seem almost to sacrifice the welfare of society for the preservation of the rights or scruples of one individual. To some extent, this book will demonstrate that the author still holds fast to his *full* individual rights

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19 EMMANUEL CARDINAL SUHARD, GROWTH OR DECLINE? 74 (Fides ed. 1948). This book originally appeared as a pastoral letter from the late Cardinal-Archbishop of Paris. Father Murray, writing the *Foreword* to the present edition (at 9-11), commented:

> [It is] a singularly profound statement of the Church's contemporary mission. . . . I should plead, too, for action towards "incarnating" the answer [of Cardinal Suhard] in the whole complexus of American religious, civic, and social life. Here in the United States, too, "the world needs the Church for its life; the Church needs the world for its growth and fulfillment." . . . We in America have abundantly reaped the seed of Catholic thought and life sown in Europe. . . . It is our time for sowing, that others — in Europe and all over the world — may reap.

20 A notable example is TEILHARD DE CHARDIN, THE DIVINE MILIEU (1960).

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1 Text at 5.

2 *E.g.*, Roth v. United States, 354 U.S. 476 (1957); Mr. Justice Douglas, dissenting at 513-14, declares:

> I do not think that the problem can be resolved by the Court's statement that "obscenity is not expression protected by the First Amendment" . . . The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position.

position.[3] But its "articles of faith" seem to point out an underlying philosophy of the preservation of individual rights for the welfare of the society and for all of the individuals of that society, not the preservation of individual rights to the detriment of society.

This altruistic, common-good oriented justification for the preservation of an individual's rights pervades the author's treatment of three fundamental freedoms "which are often challenged in this tense and complex era."[4] First treating the *freedom of expression,* the author emphasizes that such a freedom makes it possible for ideas to reach into time and space. The American government "cannot afford to shackle freedom to think and freedom to speak since these are the mainsprings of mankind's achievements."[5] In his discussion of this freedom, Mr. Justice Douglas twice alludes to a passage from John Stuart Mill:

> Mill's statement emphasizes that the suppression of an idea is not only a wrong to the individual who would express it; "it is robbing the human race." Freedom of expression is a two-sided right. It is a right to speak, to write, to paint. It is also a right to hear, to read, to see, to know. Communication necessarily involves two or more people.[6]

With regard to *freedom of religion and conscience,* Mr. Justice Douglas' terseness of expression is rivaled only by the baldness of his social justification for this freedom:

> What a man thinks would not seem to present even a limited possibility of injury to society. Hence a man's beliefs, his thoughts, should be immune from regulation by governments.[7]

The author's justification for *freedom from discriminatory treatment* is probably the most pragmatic of his rationales. Some will not call it an altruistic or social justification, but rather an egocentric philosophy. Whatever it is, it justifies an equality under the law that *every man* will always experience.

> No group is immune from the risk of discrimination. Today those of darker skin — Negroes, Orientals, Italians, Mexicans, Indians — are most apt to be the victims of prejudice which leads to illegal discrimination. Most of the peoples of the world, however, have yellow, red, brown, or black skins; and lighter-skinned people may well find themselves at some times and places in the minority. Even in the United States violent prejudices have broken out against those with white skins who are Jews, Catholics, Mormons, or Jehovah's Witnesses, or of German, Italian, Irish, Slavic, or other origin. If we permit government to discriminate against any racial, religious or ethnic group, then any other group may find itself the victim of the contagion of discrimination. The only safeguard for each of us lies in full enforcement of the constitutional command of equality under the law for all.[8]

This booklet does more than display the author's point of view as to each freedom of the Bill of Rights; it also gives conventional statements of the legal doctrines constituting the Bill of Rights — those freedoms in the federal Constitution itself and in the amendments thereto. Even its explanation of the "state action" doctrine,[9] that is, the constitutional view that the guarantees of individual freedoms

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3 Text at 38:

> But when the inquiry gets into the area of individual beliefs, there is an invasion of the citizen's right of privacy. Courts then are supposed to protect the individual from going to jail for contempt when he refuses to answer. Courts, however, are not always reliable guardians. In 1959, a man named Uphaus went to prison in New Hampshire for refusing to deliver to state officials a list of people who attended a conference with him. Uphaus v. Wyman, 360 U.S. 72 (1959). It was against his "scruples" to do so. He was not a criminal but a dedicated religious man who believed it was none of the government's business with whom he had discussions.

4 *Id.* at 5.
5 *Id.* at 24.
6 *Id.* at 25.
7 *Id.* at 30.
8 *Id.* at 42-43.
9 *E.g.,* Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Peters) 242 (1833); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872); Civil Rights Cases, 109 U.S. 3 (1883).

are what people are entitled to *against every governmental action,* is forceful. However, Mr. Justice Douglas does not stop there. His book, which is dedicated "To our high school students from Alaska to Puerto Rico, from Maine to Hawaii,"[10] has a meaningful message for them about individual liberties which is beyond the "state action" idea.

> [T]he courts and the law can, at best, give only a minimum protection to our liberties. They can deal, for the most part, *only with actions of government officials.* They normally have no authority to protect minority groups and opinions from unpopularity and social ostracism by private groups. We need a spirit of liberty which extends beyond what a court can supply, and which accepts in our daily living and behavior the attitudes of toleration of unorthodox opinions and respect for the dignity and privacy of each human being, *which our Bill of Rights reflects.* Our spiritual health depends on our attitudes and habits at the village and city level and the vigor with which we react to injustices.[11]

With these thoughts, Mr. Justice Douglas expresses a real message for adults as well as high school students, the American Civil Liberties Union[12] as well as the White Citizens' Council. Although the Bill of Rights guarantees fundamental individual freedoms against contrary state action, state action is only the result of the heartbeat of individual and collective American thoughts, beliefs and actions.

> Federal judges have life tenure; and even in states where judges are elected, they stand out against the popular opinion of the moment to preserve the enduring principles of our Constitution. But they are able to do so only because the majority of people in the United States, however much they may disagree with a particular decision, agree with the basic principles of our written Constitution, including the power which we give our courts to interpret and enforce it.[13]

For the attorney, this booklet may be of little practical significance. But it still merits recommendation for the appellate attorney's bookshelf, not for the legal and technical arguments that congest an appellate brief, but for that needed quotation in the brief or in the policy argument before the appellate tribunal. The "articles of faith" of the author as to fundamental individual freedoms are clear expressions of the usually inarticulate and unconscious judgments or policies that lie behind the logic of a decision in the civil liberties area.[14]

For the lay reader, this little book is valuable. It is so not only because of its information, but because of its challenge[15] and its message.

> What our Constitution says, what our legislatures do, and what our courts write are vitally important. But the reality of freedom in our daily lives

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10 Text at 4.

11 *Id.* at 65-66 (emphasis added).

12 See also Book Review, 36 NOTRE DAME LAWYER 239 (1961).

13 Text at 64-65.

14 Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 465--66 (1897).

> The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable . . . of founding exact logical conclusions.

15 Text at 4:

> Younger citizens, even before they reach college age, need to understand the way in which our ancient principles are often challenged in this tense and complex era. They should know how the Bill of Rights is put under heavy pressures generated by our society. This booklet is designed with the hope that it will excite interest in the field.

is shown by the attitudes and policies of people toward each other in the very block or township where we live. There we will find the real measure of A LIVING BILL OF RIGHTS.[16]

Thomas M. Clusserath

MR. TUTT AT HIS BEST. By Arthur Train. (Introduction by Judge Harold R. Medina.) New York: Charles Scribners Sons, 1961. Pp. xiii, 357. $4.50. Mr. Tutt is a lawyer-hero of the old school. Neither an urbane Perry Mason nor a pragmatic Paul Begler, he is the advocate of another generation, one who makes his literary mark defending impoverished criminals, destitute widows and friendless children from the studied malevolence of mortgagees, shysters and policemen. Only Mr. Tutt could free half a dozen murder defendants (some of doubtful innocence), defend a horse-thief, litigate two wills, confound three misers, do battle in several extra-judicial forums, and attend to the romance of Mr. Robert Dingle (the Dingle Korn Pops heir) and Miss Dizzy Zucker of Mud Island, Maine — all in less than 400 pages.

Tutt & Tutt was the creation of Arthur Train, a New York attorney of the 1920's, who practiced in the urban milieu that surrounds his hero (whenever his hero is not fishing). Possibly out of dissatisfaction with his geographical environment, Mr. Train invented Pottsville, a rural village that gives Mr. Tutt a place to fish, meet horse thieves, challenge the avaricious Squire Hezekiah Mason and lend country color to a character that is too magnificent to be confined to Manhattan. All of the 15 stories in this book were originally published in *The Saturday Evening Post;* they were collected by Judge Medina, who justifies the effort by explaining that "there is . . . a whole world that is a closed book to a very large segment of the legal profession."[1] That is the world of Mr. Tutt, and Judge Medina's effort is tacitly dedicated to the lawyer he once met, "whose record in Martindale-Hubbell's Lawyers Directory was respectable,"[2] but who said he had never been in a criminal court.

Tutt & Tutt are champions of the unattractive; only once in 357 pages does Mr. Tutt accept a fee. The junior partner, always referred to simply as "Tutt," is no relative of Mr. Tutt's, but is in every way the older lawyer's complement. "Mr. Tutt was the brains and the voice, while Tutt was the eyes and legs of a combination that at intervals made the law tremble, sometimes in fear and more often with joy."[3] But, partnership or not, Mr. Tutt dominates the stage; and from his physical description[4] to every detail of temperament, he is monumentally flawless. "He went through life with a twinkling eye and a quizzical smile, and when he did wrong he did it — if such a thing be possible — in a way to make people better."[5] And when he does battle even his creator cheers from the courtroom bench: "Will not the gods lend courage and strength to the kindly old lawyer, who never yet did aught but good, although mayhap he may have done it in queer ways?"[6]

A couple of his opponents are as evil as Mr. Tutt is honorable. They are Bloodhound O'Brien, "the yellow dog of the District Attorney's office," and Squire Mason. Mason is merely selfish, but O'Brien is a dedicated scoundrel, "the little czar, the Pooh-Bah, the high cockalorum of the Sessions."[7] He is in league with an

16 *Id.* at 69.

1 Text at viii.
2 *Ibid.*
3 *Id.* at 3.
4 *Id.* at 10: "[A] tall, grave, longish-haired lawyer with a frame not unlike that of Abraham Lincoln, over whose wrinkled face from time to time played the suggestion of a smile."
5 *Id.* at 7.
6 *Id.* at 99.
7 *Id.* at 100.

unscrupulous judge, "the Machiavellian Babson"[8]; "they were a precious pair of crooks, who for their own petty and selfish ends played fast and loose with liberty, life and death."[9]

But Mr. Tutt meets other, less culpable opponents. The tarnished criminal lawyer, for instance, "wasn't no crook, he wasn't! He didn't have to be. He was just a cog in an immense wheel of crookedness. And when the wheel came down on his cog, he automatically did his bit."[10] Abner Pettingill, Esquire, the prosecuting attorney in Pottsville, is not vicious either, but only "a pale-faced, chinless, pimply young man, renowned for his elocutionary prowess, with political ambitions, a cockatoo's comb and a roving Adam's apple."[11] And Judge Philo Utterback Quelch was at worst the victim "of something about him which made others dislike him more when he was trying to be affable than when he was being frankly nasty."[12]

Away from the battle, Mr. Tutt is a wise and kindly friend. He keeps two chairs in his office, one comfortable in an unattractive way, the other with its front legs shortened by an inch, "in order to make lingering uncomfortable."[13] The index of rapport between Mr. Tutt and the visitor to his office is largely a matter of which chair is indicated. His maxims speak for themselves:

> Now dirt may breed crime, but crime doesn't necessarily breed dirt. . . . Clothes don't make men; they only make opportunities.[14]
>
> Youth is just when it is right; it is cruel when it is wrong; and it is inexorably in any case. . . . No man is a hero to his children. He has far more chance with his valet.[15]
>
> Most men being worse than their lawyers, prefer not to have the latter find them out. . . . The law presents sufficiently perplexing problems for the lawyer without his seeking trouble in the dubious complexities of his client's morals![16]

The generation receiving Mr. Tutt second-hand may doubt some of his methods. But, if he drafts a codicil knowing that it will never be valid, and hides his motives behind lawyer-client privilege, he has, in the process, foiled the designs of a matrimonial adventurer. And, if he abuses process, secrets witnesses and bribes public and private officials, his design always works as he planned it and always works victory for the poor and homeless, defeat for the moneyed. That is what Mr. Tutt is out to do; otherwise, Mr. Train makes abundantly clear, he would be on Wall Street.

Mr. Train wrote with energy of a lawyer most of today's readers will consider unsophisticated. Not satisfied with maxims, he cites cases[17] and quotes whole paragraphs of the New York statutes.[18] Half of his stories turn on narrow points of law and fewer than half of them concern jury trial forensics.

The stories of Mr. Tutt pose small challenge to Pickwick and James Gould Cozzens, but their author is memorable on at least two counts. Mr. Train is bold in telling his readers (very few of them lawyers) that the business of law, if occasionally before juries and now and then in criminal court, involves also wills, contracts, securities and mortgages. And, in drawing on years in the courtroom and law office — as he must have — he has had the candor to call his product fiction rather than "trial tactics."

Thomas L. Shaffer

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8 *Id.* at 8.
9 *Id.* at 9.
10 *Id.* at 27.
11 *Id.* at 167.
12 *Id.* at 185.
13 *Id.* at 5.
14 *Id.* at 30.
15 *Id.* at 50.
16 *Id.* at 61.
17 *Id.* at 187: "Pierson versus Post, 3 Caines Cases 175, if I remember correctly"; at 174: "People versus Rogan, 223 Appellate Division 242. . . . People versus McCallum, 103 New York 587."
18 *Id.* at 251: "Listen I'll read it to you. It's Section 305 of the Real Property Law: . . . ."

BOOKS RECEIVED

CONSTITUTIONAL LAW

*A LIVING BILL OF RIGHTS. By William O. Douglas.
Garden City, New York: Doubleday & Company, Inc., 1961. Pp. 72. $1.50.

*THE SUPREME COURT REVIEW. Editor, Philip B. Kurland.
Chicago: University of Chicago Press, 1960. Pp. ix, 326.

CRIME

CRIME IN AMERICA. Editor, Herbert A. Block.
New York: Philosophical Library, Inc., 1961. Pp. 355. $6.00.

SOCIOLOGY OF CRIME. Editor, Joseph S. Roucek.
New York: Philosophical Library, Inc., 1961. Pp. 551. $10.00.

EQUITY

EQUITY AND LAW: A COMPARATIVE STUDY. By Ralph A. Newman.
New York: Oceana Publications, Inc., 1961. Pp. 280.

FAMILY LAW

*THE DIVORCE HANDBOOK. By Florence Haussamen and Mary Anne Guitar.
New York: G. P. Putnam's Sons, 1960. Pp. 256. $3.95.

*INTERSTATE ENFORCEMENT OF FAMILY SUPPORT: THE RUNAWAY PAPPY ACT. By William J. Brockelbank.
Indianapolis: The Bobbs-Merrill Co., Inc., 1960. Pp. vii, 195. $6.00.

*LAW OF MARRIAGE AND DIVORCE SIMPLIFIED. By Richard V. Mackay (3d ed. revised by publishers).
New York: Oceana Publications, Inc., 1960. Pp. 96. $2.00 (clothbound); $1.00 (paperbound).

FICTION

*MR. TUTT AT HIS BEST. By Arthur Train.
New York: Charles Scribners & Sons, Inc., 1961. Pp. xiii, 357. $4.50.

LABOR LAW

LABOR RELATIONS AND THE LAW (2d ed.). By Donald H. Wollett and Benjamin Aaron.
Boston: Little, Brown and Company, 1960. Pp. xxxii, 955. $12.50.

SCHOOL LAW

YEARBOOK OF SCHOOL LAW, 1961. By Lee O. Garber.
Danville, Illinois: Interstate Printers and Publishers, Inc., 1961. Pp. 249. $4.25 (clothbound); $3.25 (paperbound). This is the 12th Yearbook in the series begun by Dr. Garber in 1950. Among the particularly significant cases decided during the past year and discussed in this book are those dealing with *Legality of Bible Reading, Right of School Board to Require Vaccinations and Immunization as a Prerequisite to School Attendance, Liability of School District for Tort, Authority of a School Board to Contract with One of Its Members, Authority of a Board to Enter into a Union Shop Contract.* Added features in this year's number include an article on *The School Architect and the Law,* an annotated bibliography of recent studies in school law; and a complete index of all cases, listed alphabetically under the federal or state jurisdiction concerned.

TAXATION

THE TAX PRACTICE DESKBOOK. By Harrop A. Freeman and Norman D. Freeman.
Boston: Little, Brown and Company, 1960. Pp. xx, 581. $17.50.

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* Reviewed in this issue.