

BOOK REVIEWS

Safeguarding Civil Liberty Today. The Edward L. Bernays Lectures of 1944 given at Cornell University by Carl L. Becker, Max Lerner, James Lawrence Fly, Robert E. Cushman, Francis Biddle, and an address by Edmund Ezra Day. Ithaca, New York: Cornell University Press, 1945. Pp. 158. \$2.00.

The Best Is Yet. By Morris L. Ernst. New York: Harper & Bros., 1945. Pp. 291. \$3.00.

Perhaps, to borrow a suggestion from Professor Cushman in one of these essays, the appearance of the *Chicago Tribune* each morning is sufficient evidence to those in Chicago at least that civil liberties are still alive and the press is still free. But in any case it is good to have these two books giving attention to so vital a matter, particularly as they are published just as America is emerging from a great war.

Collections of this sort are never easy to review. The Bernays lectures are not systematically related and do not attempt systematically to cover the civil liberty field. Mr. Ernst's book is a collection, too; a series of rather random observations, only part of which touch on the matter at hand. However, both books throw considerable light on various aspects of the problem, and, like all books about freedom, should have a particular relevance for members of the bar.

The central essay I found to be that by Professor Cushman under the title, "Civil Liberty and Public Opinion." As the title suggests, Professor Cushman finds civil liberty and public opinion "the two foundation stones upon which constitutional democracy rests." From their interdependence he builds four basic propositions, and the balance of his discussion as well as that of the other lecturers and of Mr. Ernst may be taken as amplifications of these points. They are: (1) public opinion can exist only where civil liberty is kept alive; (2) civil liberty can exist only when supported by public opinion; (3) today public opinion with respect to civil liberty shows dangerous evidence of inertia, confusion, and complacency; and (4) courageous and active leadership is necessary if we are to continue to have a public opinion which properly values civil liberty.

Thus, the late Professor Becker's essay, "Political Freedom: American Style," although primarily a plea for a realistic re-evaluation of the efficiency of our 150-year-old constitutional framework of checks and balances, serves to trace historically why the emphasis on civil liberty and public opinion has been peculiarly "American style." Professor Becker also underscores Professor Cushman's second and third points by stating repeatedly that we must not rely on the fact that our civil liberties are neatly catalogued in our state and federal constitutions. Simply as a matter of style, it is the two professors who carry the field against the other perhaps more practically engaged gentlemen; the polished prose and easy wit of Professors Cushman and Becker are a special delight.

In the same way, Mr. Lerner's entire paper, "Freedom: Image and Reality," may be taken as illustrative of Professor Cushman's third point that public opinion with respect to civil liberty today is at a dangerously low ebb. Our desire for liberty, says Mr.

Lerner, may be as great as ever but our commitment to it has seriously lessened. And in support he makes a rapid but vigorous survey of America at war, the "surveillance state," the spread of mass terrorism against racial minorities, and particularly the restricting and fearful attitudes toward our basic economic issues—labor relations, full employment, international trade.

Or again, Professor Cushman cites the failure of the courts to protect the Negro as proof for his second point that there can be no true civil liberty, regardless of the letter of the law, unless there is sufficient public opinion to implement it; and Mr. Biddle's paper serves as a full and illuminating exposition of this example as he traces in detail the fate of the Civil War civil rights acts at the hands of the courts. There is a nice historical parallel here: Professor Becker says the distribution of economic goods is the crisis of today, as the Negro question was the crisis of the Civil War period, and Mr. Biddle tells us that the civil rights statutes, originally passed to protect the Negro, are today used in part to protect the collective bargaining rights under the National Labor Relations Act. Mr. Biddle's paper also provides a valuable and generally encouraging summary of the work of the Civil Rights Section of the Department of Justice which, thanks to the Supreme Court, must work in as intricate and artificial a pattern of precedent as ever plagued a corporation lawyer.

Mr. Fly writes of the basic regulations of the Federal Communications Commission to insure that public opinion as formed through the medium of radio will be formed within a decent framework of civil liberty. It is Mr. Ernst who furnishes the most telling evidence of just what Mr. Fly and the Commission have been up against in getting public opinion favorable to their work. Mr. Ernst relates that he met Congressman Magnuson at a party soon after a speech by Congressman Miller of Missouri attacking Fly and the FCC had been given front-page coverage in the *New York Times*. Why, chided Mr. Ernst, didn't he reply? Wherewith Magnuson explained that he had known of Miller's speech and had prepared and delivered a careful reply, which he summarized for Ernst, immediately after, but not a word of it had been reported in the *Times*. You'd have thought, he mused, they would have at least appended a footnote: "Magnuson also spoke."

Finally, President Day's brief paper, "Freedom To Learn," and those portions of Mr. Ernst's book dealing with his distinguished practice in the civil liberty field may be taken as further comment on Professor Cushman's fourth point that there must be vigorous leadership, especially from the university and the bar.

So much then for the over-all framework of the discussion. Several points invite further comment.

Since the essays were written toward the close of a great war, it might be expected that the effect of the war on civil liberty would be the main theme. This, however, is not the case. In fact, I doubt if the discussions read much differently from those of a decade earlier. The reason, of course, is a happy one; contrary to widespread prediction we did not become a dictatorship in order to fight one, and the impact of the war on liberty was not radical either here or in England. Mr. Lerner, Mr. Ernst, and Professor Cushman all pause to note that the government's record is vastly superior to that in World War I. This is due in part, as Mr. Lerner suggests, to the comparative absence of any strong minorities opposing the war, such as harassed Wilson, but in part is evidence of democratic strength. The only glaring exception has been the shocking treat-

ment of Japanese-American citizens on the West Coast, which Mr. Lerner and Mr. Ernst note briefly.

The great wartime contribution to liberty was made rather by our enemies who proved for all time and almost beyond belief the degree to which control of public opinion can be manipulated, once civil liberties are suppressed.

Our wartime experiences, particularly with reference to wartime security measures, remind us once again that there are limits even to our greatest freedoms and that there is a measure of relativity to civil liberty. There is an exciting extension of this consideration at the beginning of Professor Becker's paper. He states that the Russians, for example, regard our highly prized liberties as rather poor, negative things and regard themselves as freer since their government provides the basic freedoms of job, education, place to live, medical care, etc., while ours merely leaves us alone. "One man's freedom," Professor Becker quips, "may be another man's bondage." Mr. Ernst adds the useful observation that although free speech is in an unsatisfactory state in Russia, she has done a notable job on removing race prejudice. This is not the place to deal with so fundamental a matter, other than to suggest that comparative law work in the civil liberties field sounds as though it might be very fruitful. Surely, a companion volume on civil liberty in Russia would be most welcome. Perhaps the restriction of civil liberty in institutions for which we have respect, such as Russia, the Catholic Church, and the U.S. Army, should invite our special attention and study.

Speculation about civil liberty in Russia raises another query which gives some signs of becoming the central issue of the day: namely, to what degree are civil liberties related to and dependent upon the economic form of the society? At the moment an opponent of economic planning, such as Professor Hayek, calls his book *The Road to Serfdom*, while the editors of the *New Republic* reply to his title by calling a symposium on full employment "The Road to Freedom." Professor Becker and Mr. Lerner both touch on this matter, but briefly.

Mr. Ernst and Professor Becker also furnish fodder for another query. May in some respects our liberties today be too broad? For Mr. Ernst the problem arises in connection with the activities of the American Communists who are his pet bugaboo and who have joined and plagued every liberal venture of his from the Scottsboro trial to the Lawyers' Guild. Says Mr. Ernst: "We still must find the technique for handling secret, underground, undemocratic minority controls of democratic organizations." For Professor Becker the matter arises in a variety of details of modern life:

Freedom of speech is an invaluable right and must be preserved, but does it necessarily include the right to publish scandal sheets and exploit the misfortunes of families, to employ fruity-throated radio announcers to misinform some of the people all of the time about the merits of commodities made and sold for private profit? . . . The right of persons charged with crime to a speedy and fair trial is an invaluable right, but is trial by jury as now conducted, which proceeds on the assumption that if two sets of skilled lawyers distort the facts in opposite directions the truth will emerge, the best method of securing the right?

One last point on the theoretical level. Professor Cushman bases the value of civil liberty on political values only. The function of civil liberty is to make possible the free formation of public opinion which in turn is the motive power of democracy. Or as President Day says: ". . . the basic considerations [behind free speech and press] have to do with the obvious requirement of intelligence in the electorate." Or again Mr. Fly, for the point is a popular one, states the significant purpose is "the diffusion to the

public of the ideas and the information necessary for intelligent self-government." We have only a half quarrel with this emphasis. It is always useful to remember the vital connection between civil liberty and democracy but it appears unnecessary and a little jingoistic to confine its value to the political field alone. After all, one of Mr. Ernst's most celebrated cases involved the importation of Joyce's *Ulysses*. And Mr. Fly might have noted that Milton, whom he quotes, wrote his great defense of freedom back in the days when there was not so much talk of democracy. What concerned Milton was not that without free speech and thought the electorate would be unable to form intelligent political opinions, but that men would be unable to form intelligent opinions, and that there would be a net loss of the truth possessed by mankind. That is still not a bad rationale.

There is much other material in the two books worth comment. The influence of Martin Dies, which Professor Cushman has treated eloquently; the influence of the FBI, which worries Mr. Lerner, although Mr. Ernst has some very nice things indeed to say about J. Edgar Hoover; the pressures on universities not to do anything that would tend to strain public relations, which President Day discusses and which might have prevented the Bernays lecture series itself; the fact that our chief intolerance today seems to center on economic issues; the association of civil liberties with the lunatic fringe and the widespread feeling that too active an interest in civil liberty makes one a little suspect somehow, as both Professor Cushman and Mr. Ernst note; and always, our failures to resolve the Negro problem.

But by way of concluding we should like to touch on one other characteristic of modern America, what Mr. Ernst and Mr. Fly call "the concentration of control of the pipelines of communication" into startlingly few hands. It is not the force of government impinging on civil liberty which we need so much watch today, Mr. Fly states, as it is other forces within the society. Mr. Ernst puts the problem well:

I've spent a good portion of my life defending books and movies and radio and unpopular left-wing movements from governmental restraints. But I'm convinced that the impact of state controls—postal, movie, censorship, sedition laws, obscenity statutes, police ordinances—all together exclude from the market place of thought only a negligible number of ideas. Much more material is banned through consolidation into a very few hands of the controls over communication—movies, radio, and the press. Our faith in freedom of speech is predicated on only one theorem. We hold that in the clash of ideas truth will rise to the top in the market place. But there must be a market, as wide as possible and free. . . .

And again: "About thirty men realistically dominate the conduits of thought through the ether, the printing press and the silver screen. . . . The cartelization of the mind of America is well on the way." The statistics are compelling: the five movie majors own their own theatres and collect 70 per cent of the box-office money of the nation; since 1900 while the population has increased from 76 to 135 million the number of daily newspapers has declined from 2,350 to 1,850, and many of these are absorbed in the national chains; in 120 cities the only paper owns the only radio station, and so on. In the case of radio there is some chance for a frontal attack on the problem through the FCC, and Mr. Fly's summary indicates that several effective steps have been taken. But with reference to the movies and press any direct solution is difficult to see. Application of the antitrust laws will help and Mr. Ernst suggests certain minor controls—graduated postage subsidies, incentive taxes, etc. But as both he and Mr. Fly em-

phasize, it is necessary that means of communication be charged with public interest to a degree far greater than as yet realized in our law.

All the papers in varying degrees hit the corollary problem. If it is imperative that a free market place be available, it is also imperative that it be used. It is here that the university and the bar have their traditional and special responsibility. The men who have the truth and who have the ability to present it are perhaps charged with a public interest, too. Collections of this sort suggest that university courses, particularly in law school, might well be more sharply devoted to the civil liberty field as a subject.

Since much of Mr. Ernst's book is not related to civil liberty, it deserves brief separate mention. Mr. Ernst has written, as he intended, a casual, informal series of short notes on anything and everything that has interested, aroused, or irked him in the course of a busy life. He writes as a man who has neither wasted nor forgotten a moment in the last thirty years. Mr. Ernst tells a story about George Bernard Shaw which has its relevance to Mr. Ernst's book. Shaw explained that he had no moral objections to liquor but that he didn't drink because when sober he could reject 90 per cent of his ideas before he got them on paper.

Although Mr. Ernst's book is too loosely and hastily compiled to be a good book, it is frequently good reading. Further, its very informality gives it value as an ingenuous reflection of Mr. Ernst's personality. Since Mr. Ernst is a distinguished lawyer the book is a useful and revealing addition to the sparse literature on what makes a successful lawyer tick. Mr. Ernst has been so natural about it all that he has even included some letters he once wrote to a baby and a short story of his, which, as he says, he has never been able to get into print before. The dust jacket says that Thurber does not like the title and has started a game of suggesting a new one. We have a suggestion: "The Importance of Being Ernst."

Edna Ferber, one of his closest friends, says on the cover that Mr. Ernst is a "cerebral" man. The adjective is a peculiar one, but it is remarkably apt. Mr. Ernst is literally full of ideas. I did not completely catalogue them, although to borrow one of Mr. Ernst's favorite phrases, it would be fun to do so, but I should guess there are at least two hundred theories between the pages of this book. And they are theories of the utmost diversity, from the technique of blowing one's nose to an Anglo-American commodity budget. Everything is grist for Mr. Ernst's mill, from the sight of paper toilet seat covers to the tranquil delights of sailing.

Perhaps the best notion of the flavor of the book can be gained from a rapid survey of Mr. Ernst's enthusiasms and peeves, although again the lists are not exhaustive. Some enthusiasms: Franklin Delano Roosevelt, of whom he writes very well, Brandeis, Nantucket, law, England, nature lore, sailing, Madison Square Garden, carpentry, world almanacs, Heywood Broun, keels, Dorothy Thompson, David Dubinsky, E. B. White, and the *New Yorker*, Ethel Waters, bowling, taxi drivers, Henry Wallace, people with mechanical aptitudes, Lloyds, Margaret Sanger, J. P. Morgan and Co., Jerome Frank, J. Edgar Hoover, Ted Husing. Some peeves: size, railway express, advertising, chrome on iceboxes, sailboat racing, nurr, Marcantonio, American Bar Association, Chase National Bank, Zionism, the current Lawyers' Guild, the glacial theory, doctors, Henry Luce, the way paper was rationed in the United States, Commissioner Paul Moss, drama critics, Tom Dewey, the rhythm method of birth control, Arthur Krock, theories as to the speed of light, and—above all—Earl Browder.

One major quality of Mr. Ernst will be apparent from the above lists. He is a liberal in the old-fashioned and valuable sense. He really does know and like people on both sides of the fence, and today it is particularly useful to have men who have enthusiasm for both David Dubinsky and the Morgan partners.

Whatever its defects of style and organization, Mr. Ernst's book is always warm, frequently charming, and sometimes incisive. From a full and rich practice he has much to say about law, not only in the civil liberties field, but in taxation, labor relations, ethics, criminology, and divorce as well. However, for the young law student and lawyer his book has a particular relevance. The law, says Mr. Ernst, is the "most exciting of professions." And his book does much to show why he finds it so. It is good indeed to have someone say that again and say it vigorously. We wish Mr. Ernst well and we trust that his title will prove truly prophetic.

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Taxable Income, Revised edition. By Roswell Magill. New York: Ronald Press, 1945. Pp. viii, 491. \$6.00.

Half a century ago a leading figure in American advocacy, Joseph H. Choate, sounded the tocsin in the Supreme Court of the United States: an income tax is communistic. His immediate purpose at that time was to have the 1894 act of Congress imposing an income tax declared unconstitutional. He succeeded,¹ but little did he and his generation foresee that within two decades Congressional authority to impose taxes on income—communistic² or no—would be formally imbedded in the organic law of the land.³ Now, thirty years thereafter, millions take for granted the fiscal necessity of taxes on income.

Since the adoption of the Sixteenth Amendment there have been nearly twenty-five complete revenue acts, each one adding either some new concept or statutory modification of what is to serve as the base for the imposition of a tax on income. This kaleidoscopic movement in statutory patterns and the liberality of inducement to litigate⁴ have combined to produce a plethora of court decisions and administrative pronouncements that is equalled nowhere else in the world. The time has long passed when any "tax expert" could truthfully say he was abreast of all that was going on in income taxation, if by that is meant a close daily acquaintance with all that is pouring forth from legislative, judicial, and executive halls.

Tax practitioners are fortunate in the celerity and competence with which the several standard tax services have for years been making available the latest developments in all fields of taxation. They have also been fortunate in the scholastic excel-

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¹ *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895).

² Actually, Mr. Choate said, "The Act of Congress which we are impugning before you is communistic in its purposes and tendencies, and is defended here upon principles as communistic, socialistic—what shall I call them—populistic as ever have been addressed to any political assembly in the world." *Ibid.*, at 532.

³ United States Constitution, Sixteenth Amendment.

⁴ The bon mot of Thurman Arnold that "taxation without litigation is tyranny" has become well known.