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Civil Liberties in the United States: A Guide to Current Problems and Experience, by Robert E. Cushman

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BOOK REVIEWS

CIVIL LIBERTIES IN THE UNITED STATES: A GUIDE TO CURRENT PROBLEMS AND EXPERIENCE. By Robert E. Cushman. Ithaca: Cornell U. Press. 1956. Pp. 248. $2.85.

They are fighters, so they say, for freedom's rights;
More closely scanned, it's serf with serf that fights.
Mephistopheles in GOETHE'S FAUST, ii, 6962-3.

This volume is one of a series entitled "CORNELL STUDIES IN CIVIL LIBERTIES," of which the author is the advisory editor. It is divided into nine chapters of unequal length, which treat the present status of freedom of speech, press, assembly, and petition; academic freedom; freedom of religion and the separation of church and state; the right to security and freedom of person; the civil liberties of persons accused of crime; civil liberties and national security; and racial discrimination. Two more chapters are called "Military Power and Civil Liberty" and "Civil Liberties of Aliens," but they consist only of two or three pages each, which do not exactly enrich the reader's knowledge on these matters. Each chapter is concluded by a highly selective bibliography.

Of course, it is not possible in a book of this size—or any one-volume book at that—to give a satisfactory list of everything that has been written on civil liberties during the past twenty years or so. The monthly, nay, weekly output in books, law review articles, essays, reviews, and court decisions on this subject is unequalled even by Lincoln, the Civil War, and sex. It is a psychological truism that he who talks too much and too loud about a given subject has a feeling of guilt and uncertainty. He wants to convince the world that nothing is wrong, whereas the opposite is true and not all is as it ought to be. In, say, France or Switzerland, one hears comparatively little about the citizens' respective freedom rights, yet they are assuredly present in those countries. Could it be that civil liberties ought to be seen but not heard?

This and similar considerations lead, or should lead, to the primary question that is at the bottom of every discussion of freedom, namely, *whether man wants freedom.* Dostoyevski's Grand Inquisitor[1] does not think so. As a matter of fact, he presents the most forceful argument that was ever written in support of the thesis that man does not truly

1. DOSTOYEVSKI, THE BROTHERS KARAMAZOV, Part V/v.

want freedom. Rather, he wants leadership, "some one to worship, some one to keep his conscience, and some means of uniting all in one unanimous and harmonious antheap," provided all this is being done in the name of freedom, that is to say, by a leader who succeeds in convincing man that he is free. And the Grand Inquisitor expressly informs us that the human race not only wants to be led but also wants conformity. "For the sake of common worship they have slain each other with the sword. They have set up gods and challenged one another, 'Put away your gods and come and worship ours, or we will kill you and your gods!'" Whether or not this masterpiece in political science applies to all mankind is not easy to say; but there are perturbing signs that it is indeed made to fit our other-directed society, the one of the species *homo Americanus*. *"Tomorrow Is Already Here"*[2] is a book that has for the time being put the last convincing touch upon this reviewer's mind that we are, and by and large, have been for a very long time a nation that aims if not exclusively then at least preponderantly at money, omnipotence, and conformity rather than at individual freedom. Unfortunately, it is no argument against this assertion that Americans appear to like certain freedoms, notably the freedom from bolshevism, as has been so vividly demonstrated by the recent upsurge of sympathy for the Hungarian refugees. To express a political predilection is not in itself a sign of an objective respect for freedom. Would we have taken refugees from Spain, waiving quota and visa requirements, under similar but reverse circumstances? We have still not recognized the communist dictatorships of China, North Korea, North Vietnam, and Outer Mongolia; but we did recognize Franco's government within a few days after his troops had entered Madrid even though the civil war, that is, the resistance of the lawfully elected government, was not over yet. And we recognized in word and deed Germany's annexation of Austria.[3] And if we did not actually help in creating the present Guatemalan government, for the "election" of which 77% of the voters had been disfranchised, we certainly have recognized it. Maybe we are "right" in doing all this, to the list of which can be added, on the domestic scene, the decision of the Immigration and Naturalization Service that members of the Nazi party are not members of a totalitarian party;[4] but then our love for freedom is merely borne by the political necessity to fight bolshevism.

2. JUNGK, TOMORROW IS ALREADY HERE (1954).

3. See BRANDWEINER, *The International Status of Austria*, in LAW AND POLITICS IN THE WORLD COMMUNITY 221, 231-40 (Lipsky ed. 1953). This reviewer received letters within two weeks after Austria's annexation that bore the dateline "Vienna, Germany" and the letterhead "American Consulate General," instead of "Legation."

4. In the Matter of B., Board of Immigration decision 445, May 27, 1953.

In other words, we must humor our allies regardless how mephitic they are. Maybe so; but this is a far cry from political tolerance, which is indeed the backbone of civil liberties.

Of course, not everybody, in fact, not even a respectable minority, seems to share my conviction. Most of my compatriots are of the opinion that we have all, or at any rate most, of the freedoms we ought to have, small infractions here and there notwithstanding. And if these staunch believers are subconsciously or even semi-consciously disturbed in their belief, then they start to talk and write about civil liberties. *Quod erat demonstrandum.*

Of this kind is the learned author's small book. He deals with civil liberties as a category whose objective as well as subjetcive goodness is not to be questioned, as something desired by everybody, something that is here to stay if not even expand. The author's treatment is dogmatic rather than either comparative-legal or transcendental. Yet occasional inspections of the factual social situation are added. Within this framework the book might not be a poor guide to post-World War II developments; but the frame is much too narrow to provide an adequate survey, however brief, of the status of civil liberties in the United States.

One can think of several ways of doing such a survey. For instance, an author could establish a catalogue of legally protected civil liberties, describe their content in detail, especially against whom they are enforceable, and discuss noteworthy violations and how they have been dealt with. Such a treatment would amount to a legal textbook much like one on any other subject. Another method, not infrequently found among political scientists, would be to establish a list of civil liberties, not as they are created and protected under existing, positive law, but rather as they ought to be. This naive, eighteenth-century natural law method, however, can be implemented or preferably superseeded by what might be conceived as a third method, viz., that of comparing the existing civil liberties of positive law with that of other nations, especially with the United Nations' Human Rights Covenant, which must be considered foreign law until the United States ratifies the Covenant,[5] which unfortunately seems to be a deferment *ad Kalendas Graecas.*

Or, a book on civil liberties might amount to a treatise that addresses itself to the question of how "free" are the men and women of America *in fact?* An inquiry of this kind would differ from the legal text of our

5. *Convention for the Protection of Human Rights and Fundamental Freedom of Nov. 4, 1950,* 45 AM. J. INT'L L. SUPP. 24 (1951), which has been ratified by most democracies. It is not to be confused with the legally not binding *Universal Declaration of Human Rights of Dec. 10, 1948,* 43 AM. J. INT'L L. SUPP. 127 (1949). See KELSEN, PRINCIPLES OF INTERNATIONAL LAW 144-46 (1952).

first category in the same way as a description of crime in America would differ from a text on criminal law. This sociological approach would be particularly fruitful in the civil liberties field. Law is a social technique. It is a means by which society attempts to accomplish a desired result. This is done by imposing sanctions on the conduct that is contrary to the lawmaker's desire. Thus if a given society does not wish unmarried people to have sexual relations, it will threaten unmarried intercourse with criminal sanction. If the lawmaker wants automobile drivers to be careful, he might impose both civil and criminal sanctions on violators of the statutorily expressed wish. The lawyer knows that the law will be flouted many times and the sanction actually not imposed. Many drivers are reckless without being caught and even more people conduct their sex affairs quite regardless of the desires of the legal order. Yet, for what we might call a primer on the subject of tort or criminal law, it is neither necessary nor customary to describe the factual efficacy of the law in conjunction with a description of the law itself. Only on a higher level of inquiry will the scholar ascertain and describe the effect of the law on human behavior, such as whether illegitimacy or traffic accidents have decreased and, if so, whether this can causally be ascribed to the legal system.

This is not quite so in the field of civil liberties. As far as I can see, every writer, even of a small guide like Professor Cushman's present book, pays much attention not only to the law of civil liberties and its violations by those to whom the law is usually addressed—state and federal governmental agencies—but also to "violations" by others, such as private groups. Thus our author treats in the chapter on the freedom of speech, press, assembly, and petition not only such alleged violations as have occurred, say through governmental, especially postal, censorship, but also through "private curbs on speech and press." Actually, however, it is untenable for an author to speak of violations of civil liberties if he does not purport to deal with law violations. For instance, the author states correctly that "any minority group has the right to propagandize its own views with regard to objectionable literature or art." But it is a non sequitur to say that if those minority groups are organized, start to impose secondary boycotts, etc., "a civil liberty issue" is "involved." Just what does the author mean by saying "that a person's right to boycott a movie, which he thinks objectionable, should not extend to a secondary boycott by which he undertakes to run the movie or theater out of business for showing the picture he does not like?" Does the author's word "should" mean a reference to a legal norm? If this were so, then certainly the reader ought to be apprized of it. Unfortun-

ately, however, we all know that there is no law against the activities of pressure groups, wherefore the "should" can be read only to mean "should, in my opinion" or "should according to decent person's opinions." If I cannot borrow one of the best novels of our time[6] from the public library because the librarian succumbing to the Biblebeltism of certain pressure groups refuses to buy books that by some of those worthy citizens are being regarded as "sexy," then this is indeed not a violation of anybody's civil liberties. It is merely a state of affairs. Civil rights are either legally protected or they are not "rights" but mere postulates.

Moreover, it is a most unfortunate understatement to keep speaking of "pressure groups" in the sense of organized boycotters. Arthur Miller's *"Death of a Salesman"* is one of the best of the very few American dramas that are destined to become classics. It is being shown all over the earth, be it communist Russia or conservative anti-communist West Germany or Belgium. It is totally unpolitical. But it has seldom been produced on any legitimate stage since the author had trouble of some sort or other with a congressional committee. Howard Fast's biographical novels on George Washington, whom the author glorifies without trying to make him a sort of secret radical, and Thomas Paine, in whom the author shows greatness by contrasting his hero favorably with bloodthirsty revolutionists and radicals of his day, were lavishly praised by practically every reviewer. But the author seems to be a communist—I do not know whether Stalinist, Titoist or Bulganinist—and went to jail for it. As a result, the American editions of his subsequent books cannot or at any rate are not being accepted by commercial publishers.[7] And as to his novels written before Fast's "exposure," *"Citizen Tom Paine"* has been expunged from the list of Modern Library book titles! Thus one cannot readily accept MacLeish's statement that "there is no need to despair of the future of the printed book."[8] His article deals with Ezra Pound, whose poems, fortunately, are being published and sold as if no treason trial had ever taken place. But Pound was "only" a fascist. Our attitude, were he a leftist, would be quite different. The official praise of dissent might extend to anti-communists even though they be fascists but not so easily to anti-fascists. Be all this as it may, this attitude of disrespect toward nonconforming artists and intellectuals has nothing to do with "pressure groups." The publishers' and producers'

6. DE BEAUVOIR, THE MANDARINS (Friedman transl. 1956).

7. FAST, SPARTACUS (1951), was published by the author himself. No film company would dare to make this excellent historical novel, or CITIZEN TOM PAINE at that, into a movie.

8. MacLeish, *In Praise of Dissent,* New York Times Book Review, Dec. 16, 1956, p. 5.

refusal to publish or present the Millers and the Fasts is not generated by vociferous minorities. The publishers, theaters, and cinemas could well bear that and they might even enjoy the additional publicity which such group boycotts invariably create. But what if the boycotter is the average American? Then a nonconforming publisher would loose his business; and that he, another average American man, will not risk. No civil liberty law can eradicate this state of mind. If it were different, the congressional committees would be as harmless as they would be in foreign democracies.[9]

In America, one of our greatest actors, Charles Chaplin, was abused by the Attorney General. This was automatically followed by a general removal of his plays from the screens. In Europe he was afterwards received by Princess Margaret of England, the President of Italy, and other chiefs of state. In Germany *during* World War I, Karl Liebknecht, the radical socialist, received a penitentiary sentence for treason; but the Berlin bar refused to recommend his disbarment. In Vienna a great many conservatives and capitalists for whom any radical was anathema used to read the communist scandal sheet *Der Abend* for a variety of reasons, mostly sensationalism, and in France anybody can buy and read *L'Humanité* openly. How many could dare in God's own country to let himself be seen with a copy of The Daily Worker?

In his treatment of actual, positive-legal civil liberties and their violation by governmental authorities the author often treads on dubious ground. Civil liberty laws, notably the Constitution, have been construed as addressed to governments, state and federal. Governmental agencies, therefore, are the ones that must obey the mandate that there be freedom of the press or assembly, etc., which is the correlate of saying that only governmental agencies are capable of violating this law. Thus, if improper censorship is exercised against such classics as James Joyce's *"Ulysses,"*[9] it can be properly regarded as a violation of existing civil liberties and it has been so treated by the author. On the other hand, the activities of legislative investigating committees so far have not been found by either Congress or the courts to be an interference with civil liberties. However obnoxious those witch-hunting committees may be, their activities are, by and large,[10] lawful and hence not a "violation" of

9. One might argue that it is now a matter of record that the main, if not sole, purpose of these committees is "exposure" of their victims. See the quotations from committee chairmen in the dissenting opinion in Watkins v. United States, 233 F.2d 681, 688, 692-99 (D.C. Cir. 1956). We might imagine that such things take place in France. But we could not imagine that such an "exposure" of, say, Paul Sartre would have any effect on his books or plays, his standing as an honored member of the *Academic Française,* or in the community in general.

10. United States v. One Book Called "Ulysses," 72 F.2d 705 (2d Cir. 1934).

existing civil liberties. The exaction of loyalty oaths and the like from state-employed teachers, especially those with tenure, may or may not be labeled as contrary to civil liberties;[11] but the author treats the whole problem under the heading of "Academic Freedom," which again constitutes a confusion of the civil liberties as we have them with those that we, perhaps, ought to have. I say "perhaps," because I doubt whether even the most radical code of civil liberties would ever embody academic freedom in private schools.

In short, a book on civil liberties is yet to be written that describes with accuracy our civil liberties as they exist, at the same time sets forth the weaknesses of our particular civil liberty laws, and adds constructive suggestions for improvement.

The weaknesses, as I see them, can be readily divided into three groups: vagueness of the basic law; obsolescence of some existing civil liberties and lack of many others which by twentieth-century standards ought to be included; and narrowness of the group upon whom the obligation is placed to obey the laws pertaining to civil liberties.

The first fault, that of vagueness of the law, causes civil liberty rights to be ambiguous and uncertain. It has been correctly stated that the Supreme Court has the greatest imaginable discretion of law in view of the broad wording of the various clauses of the Constitution.[12] For example, it depends entirely on the Supreme Court rather than on any pre-existing catalogue of rights whether, under a constitutional clause that merely speaks of "equal protection of the laws," Negroes may or may not attend state schools or sleep in Pullman cars. Yesteryear it was that way, now it is this way. The Constitution is completely silent on whether and where an American citizen may travel. It needed a Supreme Court decision rendered as late as 1941 to state that he may do so within the forty-eight states;[13] but as to travel abroad we are still groping in the dark.[14] Foreign laws are usually far more explicit on these and a hundred other points, wherefore many individual freedoms are more strongly protected as well as more easily determinable in such countries

11. Violations, particularly of procedural liberties and rights have been most authoritatively treated in GRISWOLD, THE 5TH AMENDMENT TODAY (1955).

12. See Slochower v. Board of Higher Education, 351 U.S. 551 (1956) (dismissal of tenure-holding teachers in city college for claiming privilege against self-incrimination invalid). But see Black v. Cutter Laboratories, Inc., 351 U.S. 292 (1956) (discharge of private, contractual tenure-holding employee for similar reasons upheld).

13. "Who can deny that . . . the Supreme Court of the United States is not only a legal but . . . to a great extent also a political agency?" Kelsen, *Science and Politics*, 45 AM. POL. SCI. REV. 641, 660 (1951).

14. Edwards v. California, 314 U.S. 160 (1941). This decision, however, is not a true civil liberties case since it merely held that the prohibition against certain citizens to move to California placed an unconstitutional burden on interstate commerce.

as France, Switzerland, Western Germany, or Austria.

Some of our freedoms are obsolete. I cannot share the author's enthusiasm about the necessity of grand jury indictments or of jury trials in civil matters involving as little as a day's wages. On the other hand, an express official recognition—that is, a recognition by law rather than by natural-legal postulate—of the freedom of teaching, of the right to travel abroad even if the foreign office does not believe this to be "in the best interest" of the government, of a man's right to vote regardless of poll taxes or property requirements, of his right to be provided with work and a decent minimum standard of living, and of many more rights might be important and worthy of a protection in 1957 even though 170 years ago they were not so regarded. How far behind other nations do we wish to stay?

The last but not least weakness of our civil liberties system consists in the fact that, aside from relatively unimportant exceptions, the law gives redress only against governmental interference. This is of particular importance in a country so favorably inclined toward private enterprise. The majority of our colleges are privately owned and, therefore, under our system need not observe the recent interpretation of the Constitution's equal protection clause. A state[15] must not discriminate against colored applicants for employment, at least as a matter of law, leaving aside the question that the law on this point is more violated than observed; but private industries, including even a public utility, may do so with impunity. The state or federal government may not censor good books or movies, but, as was pointed out above, private groups or individuals can see to it that we are barred from them just as effectively; and, as a matter of present law, it is these private groups rather than the reader or the moviegoer that exercise their civil rights in so pressuring others. Their freedom of assembly is protected, whereas freedom to read is unenforceable against non-governmental organizations.

It is high time that some incisive study be made that covers the whole subject, co-ordinating rather than confusing law, fact, and future

15. Vociferous press releases about the new (!) "freedom to travel" notwithstanding, no court has as yet decided that an American citizen—like that of *every* other democracy—is free to go abroad whenever he pleases, unless he be a fugitive from justice. The courts have merely ruled that, before a passport may be denied, the "applicant" must be given a fair hearing—without saying just what is to be determined at such a hearing—and that an applicant must exhaust his administrative remedies before he may apply to the courts. Boudin v. Dulles, 235 F.2d 532 (D.C. Cir. 1956); Robeson v. Dulles, 235 F.2d 810 (D.C. Cir. 1956), *cert. denied,* 351 U.S. 907 (1956). In the Boudin case the passport was subsequently issued by the State Department, not in recognition of Mr. Boudin's freedom right, but because the Department changed its mind. The Robeson case has been pending for more than three years and is still pending at the time of this writing.

law. And such a legal inquiry should be coupled with the sociological investigation of how the American community is reacting to civil liberties. Without this investigation, an author's value judgments concerning "weak" or even "bad" law are strictly subjective. What is needed, therefore, is a sort of Kinsey report on the average attitude of the American populace toward this or that freedom ideal. This of course might bring us back both to Mephistopheles and his deeper counterpart, the Grand Inquisitor, with whom this review started.

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CASES AND MATERIALS ON BILLS AND NOTES. By William D. Hawkland. Brooklyn: Foundation Press. 1956. Pp. xxix, 504. $9.00.

Professor Hawkland's book dealing with less than 100 cases in 500 pages is a refreshing compromise to law schools that are interested in removing the "fat" from an expanding and over-crowded curriculum, and to teachers who now try to conduct the course in two hours from casebooks designed for twice that much time. This book deals almost wholly with instruments and transactions falling within the ambit of the Negotiable Instruments Law and in its organization falls somewhere between the functional approach of Steffen on one side, and the conceptual analysis to be found in the casebooks of Aigler, Britton, and Beutel. It is unique in that an effort is made to sketch the law of suretyship in seventy pages with dual objects of plugging the gap in a curriculum that does not make suretyship available and to facilitate an understanding of suretyship problems that overlap with bills and notes. In brief, this casebook deals separately with (a) promissory notes where the formalities of negotiable paper, defenses, and transfer are considered in sufficient detail; (b) drafts, preceded by an excellent introduction, but omitting decisions adequately illustrating some of the important problems arising where a draft is accompanied by documents of title, and (c) checks, where the risks of the paying bank are presented in a manner that makes this the best part of the book. Explanations in the footnotes are complete and well written. The author has performed a commendable service in carefully annotating the problems raised by his cases and footnotes into the changes achieved by the Commercial Code, a service that will be appreciated by the skeptic who hesitates to plunge head-long into the language of the new law.

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