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## Book Reviews

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## BOOK REVIEWS

THE RIGHT TO COUNSEL IN AMERICAN COURTS. By William M. Beaney. University of Michigan Press, Ann Arbor: 1955. Pp. 268.

For many years to come, jurists and political scientists will be greatly indebted to Professor Beaney of Princeton University for his comprehensive study of one of America's most important procedural rights, the right to counsel. In *The Right to Counsel in American Courts*, the author approaches the object of his study with scholarly circumspection and scientific caution. The philosophical and ethical aspects of the inquiry are admittedly for the author and for the present reviewer beyond question. As to the existence, scope, and exercise of such a right in juridical guarantees, the answer is more conditioned and variable than unreflecting and uninformed thought would at first suppose. The sixth amendment of the Federal Constitution guarantees the right of counsel in criminal prosecutions. But it was not until 1938 that the Court in *Johnson v. Zerbst*<sup>1</sup> interpreted the constitutional provision to extend to all criminal proceedings before the federal courts excepting such instances where the accused has manifested competent waiver of counsel. The fortunes of the right to counsel intrinsic to the concept of a fair trial have not however fared so propitiously in state proceedings. In *Powell v. Alabama*,<sup>2</sup> the Supreme Court almost but fell short of raising the state civil right to the federal level. The Court has seen in the due process clause of the fourteenth amendment the requirement that in all capital cases there be an offer of counsel and that a denial of it by the state exposes the adjudication to reversal for its omission of one of the most significant indices of a fair trial. Dr. Beaney proposes that until such time as the Supreme Court incorporates the right to counsel into the fourteenth amendment that the states themselves might by judicial construction or by statutory law equalize this right of state constitutions with the interpretation given to the sixth amendment of the Federal Constitution. Dr. Beaney enlarges upon the grave situation which confronts the accused whose penury places him in greater disadvantages before the bench and he strongly urges that the method of providing counsel (at present within the discretion of the trial judge) be improved to remedy these disabilities. He recommends that there be a more extensive resort to public defenders and state-aid agencies. The concluding appraisal of the author is that the right to counsel in criminal cases is not enjoyed as consistently and widely in the United States as the needs of justice require and much of this blame rests on the inadequate and indefinite legal guarantees of a right fundamental to the concept of a fair trial.

Some sort of inventory must be made here of the contents of the book in order to indicate schematically at least, the uncompromising thoroughness with which Dr. Beaney devoted his learning and methodology to bear upon this civil right which strangely indeed has received less studied attention from scholars than the other civil rights and upon which the other constitutional rights depend so vitally.

After the introductory chapter, the author surveys the history of the right to counsel in English and early American law. Chapter III examines the interpretative construction put by the federal courts on the sixth amendment. Chapter IV makes a similar study of the state constitutional provisions for the right to counsel and the meaning given it by the state courts. Chapter V, "Right to Counsel, Due Process, and the Federal Courts," appraises the federal review by the instrumentality of the

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1. 304 U.S. 458 (1938).

2. 287 U.S. 45 (1932).

fourteenth amendment of the state criminal procedure. The last chapter, "The Right to Counsel in Practice," analyzes the more important phases of the practical problem complicated by generalities of provision, uncertainties of conditions, indefiniteness of methods of appointment and of the manner of establishing competent waiver, and of the presumption in favor of the discretionary exercise of judgment of the trial judge. The author's deep appreciation of the disabilities peculiar to the accused indigent who cannot provide his own counsel finds expression in suggestions for remedies. Precisely five hundred and seventy cases adjudicated by the Supreme, federal, and state courts are brought to bear upon the problem. Reliance is placed upon court records, briefs of counsel, personal attendance at a number of proceedings, personal interviews of judges, lawyers and prosecutors, and an intimate knowledge of numerous law review articles on the subject; the author has not spared himself to the grateful satisfaction of his readers. The format of the presentation is refreshingly clear. Each chapter marks off the progression of the study by titles and subtitles and the argumentum of the chapter is summarized in a conclusion which purges the topical study into a balanced perspective and sharpens the issue into focus. The pages are adequately footnoted. A Select Bibliography of books, documents and articles, Table of Cases, and an Index are handsomely printed and further graced by two Appendices of table charts which map out the "State Constitutional Provisions Regarding Counsel" and the "Duties of State Courts Under Statutory Provisions Regarding Counsel." The University of Michigan Press should be commended for a splendid publication of a valuable volume. The author does not hurry the reader along but leads him with a sure footed step through a maze of variables. His style of writing is a facile instrument of his thought. Perhaps Dr. Beane may now prepare for us a companion study of the practice of the use of counsel in non-judicial, administrative and political proceedings.

The objective which Dr. Beane set for himself was the examination of the meaning and scope of the right to counsel in federal and state courts according to the variant laws pertinent to each. His approach is historical and legal, legislative and judicial. The further back we move in the history of Anglo-American law it was in the lesser rather than in the more serious violations of law that the government inclined to sanction assistance for the defendant. Excepting treason cases for which counsel was allowed, and, at the end of the seventeenth century, provision made for the indigent defendant, right to counsel in English felony cases was nonexistent prior to a statute of 1836 which permitted full representation by retained counsel. Amongst the Colonists, defense by retained counsel was allowed in all criminal cases and in early states history, appointment of counsel in capital cases was generally provided for by statute. More likely than not the sixth amendment of the Federal Constitution was intended to guarantee the right to retain counsel since the provision for the appointment of counsel in federal capital cases was stipulated in the Congressional Act of 1790. In American constitutional history, three cases loom as central to the perplexing involvements of the problem as it has endured to this day. In 1938 the Supreme Court ruled in *Johnson v. Zerbst* that failure to appoint counsel constituted a jurisdictional defect which accordingly voided the conviction. Defendant in a federal criminal proceeding may not be tried without counsel unless competent waiver of counsel is manifest. In accordance with this decision, Rule 44 of the Federal Rules of Criminal Procedure stipulated that defendants be advised of their right to retain counsel and in instances of indigence the courts should offer to appoint counsel. In state proceedings, however, the situation has not been very much clarified. There is neither uniform provision in state constitutions for the appointment of counsel nor, where such provision is made, does it depend on identical conditions nor extend to

similar cases. Further, the problem is plunged into greater complexity since there is no explicit uniform method of establishing a genuine waiver of counsel. In the endeavor to level off federal-state practices, the Court had held in *Powell v. Alabama* that the due process clause of the fourteenth amendment operated as a limitation upon state policy concerning counsel in criminal proceedings. Justice Sutherland, speaking for the Court, maintained that due process had been denied because of failure of *effective* appointment of counsel in a capital case where the defendants were illiterate, youthful, and strangers to the community. The logical development of this Court ruling might have extended to cover all criminal proceedings save for the alternate ruling in *Betts v. Brady*.<sup>3</sup> The denial by the Maryland trial court to appoint counsel for the indigent defendant in a non-capital case was deemed by the Court not to be violative of due process since the trial had been conducted fairly. The injection of a fair trial rule robbed the reasoning of Sutherland, given in the earlier *Powell* case, of unconditioned application, and now subjected the right to counsel to many variables and assumptions which diminish the possibility of a clear-cut rule for capital cases and for non-capital cases. Four of the justices, Douglas, Murphy, Black, and Rutledge, endeavored to incorporate the entire Bill of Rights, including the sixth amendment, into the fourteenth. But they could not prevail against the fair trial rule of the *Betts* case except by expanding that to include in the circumstances of each case singly before the court the appointment of counsel as an element constitutive of fair trial.

In the event that the states do not establish better legal guarantees and more reliable methods for providing counsel, the author does not see much hope for the reduction of the large number of cases up for review by the Supreme Court save by a broader construction of the fourteenth amendment as formerly espoused by the four "incorporators," or by making the fair trial rule inclusive of the assistance of counsel.

"The alternate seems obvious. The Supreme Court, either by declaring that under modern conditions due process in criminal proceedings requires counsel, unless waived, or by formulating a new application of its fair-trial doctrine, should take the firm position that a trial cannot be fair unless counsel assists every defendant who wants or needs the aid of counsel." (p. 235).

JOSEPH F. COSTANZO, S.J.†

HAWAII UNDER ARMY RULE. By J. Garner Anthony. Stanford University Press, Stanford, California: 1955. Pp. 204.

Although it is a matter of common knowledge that the preservation of human rights is more difficult under the stress of war, few Americans realize the speed with which cherished constitutional safeguards may be lost. The American, who constantly boasts that his is a government of laws and not of men, is justifiably proud of his English legal heritage when he refers to the writ of habeas corpus. Mr. Justice Story, writing of the writ of habeas corpus, said that it is, ". . . justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his immediate discharge."<sup>1</sup>

3. 316 U.S. 455 (1942).

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1. 2 Story, Constitution § 1339 (1851).

Hence, in times of crisis, subversion, and international tension, any discussion of martial law, with its consequent suspension of the writ of habeas corpus, assumes particular importance. It is with this in mind that the American should undertake to read *Hawaii Under Army Rule*.

The book is a case history of martial law in Hawaii during World War II. It relates chronologically, and with a reasonable degree of restraint, all of the key facts commencing on December 7, 1941 through February 25, 1946, at which time the Supreme Court in *Duncan v. Kahanamoku*<sup>2</sup> held military trials of civilians in Hawaii to be illegal.

The story told in this short, interesting, and well-written book begins to unfold at 11:30 A.M. on December 7, 1941, only a few hours after the Japanese attack on Pearl Harbor. It was at that time that Joseph B. Poindexter, Governor of Hawaii, issued a proclamation invoking the powers conferred upon him under the Hawaiian Defense Act. At 3:30 of that fateful day, he issued a proclamation placing the Territory under martial law and suspended the writ of habeas corpus pursuant to section 67 of the Hawaiian Organic Act.<sup>3</sup> In the opinion of the author, Governor Poindexter's proclamation went beyond the provisions of section 67 of the Hawaiian Organic Act insofar as it not only suspended the writ of habeas corpus and proclaimed martial law, but also proclaimed:

" . . . and I do hereby authorize and request the Commanding General, Hawaiian Department, during the present emergency and until the danger of invasion is removed, to exercise all of the powers normally exercised by me as governor; and I do further authorize and request the said Commanding General . . . during the present emergency and until the danger of invasion is removed to exercise the powers normally exercised by judicial officers and employees of this territory. . . ." (p. 5).

Simultaneously with the issuance of the Governor's proclamation, Lt. Gen. Walter C. Short issued a proclamation in which he announced to the people of Hawaii that he assumed the position of "Military Governor of Hawaii" and had "taken charge of the Government of the Territory." Part of the General's proclamation was in the nature of a promise which, according to the author, was probably generously fulfilled. It provided:

"I shall . . . shortly publish ordinances governing the conduct of the people of the Territory with respect to the showing of lights, circulation, meetings, censorship, possession of arms, ammunition, and explosives, and the sale of intoxicating liquors and other subjects.

"In order to assist in repelling the threatened invasion of our island home, good citizens will cheerfully obey this proclamation and the ordinances to be published; others will be required to do so. Offenders will be severely punished by military tribunals or will be held in custody until such time as the civil courts are able to function." (p. 6).

The author states that the text of the Governor's proclamation was never communicated to President Roosevelt, but rather, the Governor sent to the President a terse telegram in which he informed the President that he had declared martial law and had suspended the writ of habeas corpus. President Roosevelt acknowledged receipt of the Governor's telegram and approved the suspension of the writ of habeas corpus. Mr. Anthony consequently emphasizes that neither the Governor's proclamation, purporting to turn over the powers of his office and the powers of the judicial officers of the Territory to the Commanding General, nor the Proclamation of the

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2. 327 U.S. 304 (1946).

3. 48 U.S.C.A. § 532.

Commanding General, in which the General assumed the role of Military Governor, were ever submitted to the President for his approval. (p. 6).

Concerning the responsibility for the initiation of martial law in Hawaii, the author asserts that "it is clear that martial law was initiated by the army and that both Governor Poindexter and General Short thought that it would be of short duration unless the raid proved to be a prelude to a land invasion." (p. 6). He is, therefore, in sharp disagreement with Lt. Gen. Robert C. Richardson, Jr. and Secretary of War Robert P. Patterson who have declared that martial law was declared by the civilian Governor who turned over his powers to the military commander. The author declares that neither Secretary Patterson nor General Richardson had any knowledge of the facts surrounding the initiation of martial law and quotes Governor Poindexter who states that it was General Short who called at his office and requested that the Governor declare martial law and suspend the writ of habeas corpus. At that conference, preceding the declaration, the Governor asked the General how long martial law would continue. The General replied that ". . . he was unable to say, but if it developed that this was a raid only and not a prelude to a landing, martial law could be lifted within a reasonably short time." (p. 8). It is clearly the position of Mr. Anthony that it was the Army that initiated martial law in Hawaii and he states that the contrary is a "myth," ". . . carefully nurtured by the War Department. . . ." (p. 9).

After a discussion of the facts surrounding the declaration of martial law, the author recounts a first-hand story of what actually happened in Hawaii. By order of the Military Governor all courts were thereafter closed, ". . . army personnel moved in," (p. 10) and thus began a regime of government under "military orders." Specific reference is made to many of these orders and the author demonstrates that they cover the entire sweep of government with the sole exception of taxation. As the author views the situation, whenever any civilian problem arose, the quick answer was another military order. In the opinion of the author, the orders themselves were ineptly and carelessly drawn by people who were apparently serving an apprenticeship in the art of draftsmanship in the office of the Military Governor. (pp. 13, 15).

The book reminds the reader that there was nothing ". . . resembling disloyalty, disorder or misconduct on the part of the civil population which justified the proclamation of martial law on December 7, 1941 or its continuance in the days that followed the attack." (p. 19). The caustic criticism of the Army may lead the reader to believe that the author is anti-military and wishes to injure the dignity and good name of the Army. Although in all fairness such is not the case; it is written by an attorney who served as Attorney General of Hawaii from October, 1942 through December, 1943.

In five terse chapters Mr. Anthony traces the declaration of martial law, the organization of the military government and its vast operations, the military government and the courts and the termination of martial law. Apart from the accurate statement of the several cases that arose to test the legality of martial law, the book tells the reader about incidents that traditionally are out of place in legal decisions. Hence, the reader may not otherwise know of them. For example, a shocking incident is recounted concerning a deputy marshal who, while attempting to serve papers upon General Richardson, was assaulted by the Military Police who prevented the service. The author observes that the ". . . spectacle of a commanding general of the United States Army evading the process of a middle-aged deputy United States marshal as though he were a fugitive from justice did not add to the prestige of the Army." (p. 68).

The writ of habeas corpus was not used in Hawaii until July 30, 1943. In the

chapter on "Military Government in the Courts" the author relates the hassle between Judge Delbert E. Metzger and General Richardson whereby the court prepared a citation of contempt against the General and the General retaliated by a military order prohibiting all pending and future habeas corpus proceedings in Hawaii and providing penalties for the infraction of the order.

In this small book there is much that is worthy of thought. The author points out that a military government is ". . . essentially like any other form of bureaucracy. Its tendency is to expand not liquidate." (p. 98). In a terse concluding chapter the author states that the conflict he described between the military and civil authorities illustrates the validity of the caveat that, "eternal vigilance is the price of liberty." Although the author admits that it is perhaps natural that in time of war the general populace will look to the military for leadership and direction, he warns that "there is danger in overlooking the necessity of keeping the military subordinate to the civil power." (p. 121). He quotes the words of Clemenceau that "war is too serious a business to be left to the generals." (p. 121).

The author's concluding thought may justify repetition:

"Despite the profound mistrust of military rule which we have inherited and which dates back to the founding of the nation, in the wake of the recent war there seems to be abroad a notion that because one has excelled in the arts of war he therefore will excel in the arts of peace or in the arts of government. Hence we find posts in our government which require the highest qualities of statesmanship filled by persons whose chief recommendation for elevation is their proficiency in military affairs. This tendency, if unchecked, may work a gradual but radical change in our form of government." (pp. 122-23).

Perhaps many readers will not agree with some of the opinions and inferences drawn by the author even if they were to agree with the facts that he relates. Nevertheless, no one can close the pages of this book, with its thorough documentation, without having had cause to reevaluate this important chapter of American history.

EDWARD D. RE†

THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES. By Richard Hofstadter and Walter P. Metzger. Columbia University Press, New York: 1955. Pp. 527;

ACADEMIC FREEDOM IN OUR TIME. By Robert M. MacIver. Columbia University Press, New York: 1955. Pp. 329;

COLLECTIVISM ON THE CAMPUS: THE BATTLE FOR THE MIND IN AMERICAN COLLEGES. By E. Merrill Root. Devin-Adair, New York: 1955. Pp. 403.

Academic freedom, a very old concept and reality, is neither democratic nor undemocratic, in essence, despite the cant nowadays about the aim of the Academy being to "teach democracy," and all the confused identification of prescriptive freedoms with doctrinaire egalitarianism. These three books, though differing about much, all rise superior to the notion that academic freedom is somehow a product of "democracy" and ought to be employed simply to advance "democracy." Professors Hofstadter and Metzger's thick book is dispassionate, by and large; Professor MacIver's, rather belligerently liberal; Professor Root's, passionately "radical conservative." All three are serious studies, containing passages of some wisdom. But their philosophical postulates are in conflict.

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Perhaps, before examining these books, I ought to make clear my own view of the essence of academic freedom, about which I have written a good deal at one time or another, especially in my book by that title, an essay in definition. Academic freedom—I think that these four authors and the present reviewer agree in this—is a body of rights possessed by those scholars and teachers in an institution of higher learning; and those rights exist to protect the members of the Academy from the hazards incident to the conservation and pursuit of Truth. Academic freedom existed, and continues to exist, in societies quite unlike our American society, and in societies markedly undemocratic. Democracy, properly defined, is not a moral ideal: rather, it is a political description, although a vague one, of a certain political condition of a certain particular society. As Dr. Eric Voegelin says, "Theory is true, not 'democratic.'" Although the survival of academic freedom is important for the future of American democracy, it is still more important for the future of Truth. We ought not, therefore, to attempt to bind academic freedom to some particular ideology or social condition. Academic freedom is not, *per se*, "democratic," or "monarchical," or "feudalistic," or "oligarchical," or "aristocratic." As Tocqueville wrote, there commonly is a higher degree of freedom of opinion and expression in aristocracies than in democracies; he knew of no country in which opinion was so restricted as in democratic America—though restricted by an impalpable conformity to popular shibboleths, rather than by positive laws. All academic freedom is genuinely undemocratic in one sense, that the Academy is a kind of intellectual aristocracy within which ideas unpopular with the crowd still may be investigated and expressed. The end of the Academy is to elevate the private reason, independent of particular ideologies.

Now academic freedom is in some danger among us; and that danger, in part, results from the fact that we live in a democratic society. Doctrinaire egalitarianism is hostile toward all special privileges and bodies of immunities: academic freedom is such a complex of privileges and immunities. Some of the levelers who dislike academic freedom are outside the walls of the Academy; others are inside those walls; and certain people who give ardent lip-service to academic freedom really have no respect for that body of liberties. The present controversy over academic freedom seems to have been brought on by a conflict of the views of certain academicians with the established views of American society. And no amount of expostulation will resolve this conflict; we need to resort to first principles. These three books help to remind us what those first principles of academic freedom are.

Every right, as Professor MacIver reminds us, is married to some duty. Academic freedom has its responsibilities. To assert an abstract academic freedom, unqualified and irresponsible, is to expose the rights of the Academy to that destruction which always follows hard upon the doctrinaire assertion of the Jacobin theory of rights. It is no use for partisans of the Academy to pretend that the Academy owes no responsibility to any authority, divine or human; nor is anything to be gained by repeating, like an incantation, that the whole aim of the Academy is to "serve the people." The Academy has duties toward society; and if it neglects those duties, it must lose its privileges and immunities; but it is not simply a servile instrument of an abstract People. It is one of the responsibilities of the Academy to preserve the established moral and social values of the civilization in which the Academy has its being. In America, the Academy has the duty of respecting, and maintaining, our principles of republican government, liberty under law, equality before the law, and private rights. The Academy, I think, has no right to be a nest of subversives. But academic freedom is more than a perpetual exercise in political debate. True freedom of the mind does not abide any test of conformity to ideology. The best things in human existence are above politics. The Academy is not simply a classroom for

democracy, or for any other especial form of politics. To reduce the Academy to that level would be to place its freedom in frequent jeopardy.

Yet though the theory of academic freedom prescribes no especial form of politics, still it enjoins a decent respect for the rights of the society in which the Academy exists. The Academy ought not to tolerate within its walls any body of persons who do not hold, or at least tolerate, that decent respect. The Communists do not hold that decent respect. It is my thesis, then, that the Communists have no right to the liberties of the Academy. If we endure their presence there at all, it is because we feel that they constitute no present danger to the Academy or to society, or else that the profession of Communism by some particular academician is merely a private vagary, little influencing his work within the Academy. I do not mean that the rising generation ought to be kept ignorant of Marxism, or of any other body of political notions; in our age, ignorance is a weak bulwark against error. It does not follow, however, that merely offering instruction in Marxism will expose the errors of Marxism, any more than general discussion of Nazism and Communism in Germany saved the Germans from those ideologies. Our established system of education offers courses in good literary composition, but it does not offer courses in bad literary composition. Because we inculcate marital fidelity, we do not feel impelled to appoint an adulterer to a professorship of adultery, in the theory that the truth will prevail in a full and frank democratic discussion. Because we teach Christian brotherhood, we are not obliged to appoint a Jew-baiter to teach racial hatred, so as to be "fair to both sides."

The Academy, if it is to enjoy any rights, must acknowledge some principles of truth, and not constitute itself as a mere sophistical debating society, doubting everything, sneering at all things prescriptive. Marxism is false; every man who studies history with any degree of impartiality, or who acknowledges the classical and Christian principles of justice, now knows this. The Academy sins if the Academy places falsehood on the same platform with truth. And when the college or university offers instruction in a subject, it implies that there is some truth in that subject. If the rising generation already could perceive every difference between truth and falsehood, it would not need to enter the Academy at all. By treating Communism as entitled to have its say, the Academy would give Communism some implicit sanction. I repeat that we ought not to keep the rising generation ignorant of Marxism; I think, on the contrary, that the study of Marxism is an important part of any thorough course of study in politics; but such studies ought not to be supervised by doctrinaire Marxists, or offered as "one point of view"—presumably as good as any other point of view. The clever Communist, moreover, ordinarily does not teach "Marxism 101." He may teach literature, or physics, or history. He does not present his case frankly; his methods are insinuation, subtle indoctrination, and organization of Communist cells among students. He is not a naïve heretic, but, as Professor Sidney Hook says, a conspirator. Of all people, the Communist is least interested in frank discussion, or in the liberties of the Academy.

These are my views on the aspect of academic freedom most heatedly discussed just at present; and I offer them for what they are worth, and acknowledge my criticism of these three recent books to be undertaken in this light. I maintain, in short, that we are not obliged to tolerate, in the Academy or out of it, those who would not tolerate us if they had power; nor are we obliged to tolerate those who would subvert the civil social order under the cloak of freedom of study and teaching. Academic freedom, like the Bill of Rights, is not a suicide pact.

*The Development of Academic Freedom in the United States* is a well-written and valuable volume. No study of this thoroughness has been published before. Like

Mr. MacIver's book, this work was made possible by a grant from the Louis M. Rabinowicz Foundation, and is published under the auspices of the American Academic Freedom Project at Columbia University, after more than four years of research. An executive committee and panel of advisers, consisting for the greater part of eminent liberals (among them Mr. Henry Steele Commager, Miss Sarah G. Blanding, Mr. Frank P. Graham, Mrs. Eugene Meyer, Mr. J. Robert Oppenheimer, Dean Erwin N. Griswold) had general supervision of the Project. It is the more satisfying, then, that despite some suggestion of "anti-anti-communist" tone among the committeemen and advisers, Messrs. Hofstadter and Metzger's volume is really what it declares itself to be, "an analytical history," moderate in judgments and generally the product of what Burke called, approvingly, "a liberal understanding." It is divided into two parts: "The Age of the College," by Mr. Hofstadter, and "The Age of the University," by Mr. Metzger. The dividing-line is the period between 1865 and 1890, when the true university began to arise in America.

Being substantially pragmatists, the two authors are not much interested in the philosophical basis of academic freedom. Their accounts of the historical development of such rights, however, are thorough and tolerant. Mr. Hofstadter's description of medieval universities is interesting and even sympathetic; its tone may be suggested by this penetrating sentence: "In the Middle Ages tradition was, if Taylor is right, particularly formidable; but to say that it suppressed originality and destroyed the power of the scholastics to produce novelty would be to fly in the face of the intellectual resourcefulness of academic men during the twelfth, thirteenth, and fourteenth centuries." (p. 12). Again, "the medieval universities were ecclesiastical agencies founded at a time when the Church was still effectually guarding its institutions from the incursions of lay power. Both the church principle of ecclesiastical independence and the guild principle of corporate self-government provided the universities and society at large with dominant models of autonomy." (p. 12). It must be said, however, that despite honest attempts at impartiality, Mr. Hofstadter sometimes slips into the habit of using "conservatism," "orthodoxy," and "clerical interests" as devil-terms. Yet he understands and approves such conservative educators as Henry Philip Tappan, at the University of Michigan, and Francis Bowen, at Harvard. All in all, Professor Hofstadter's work is a model of scholarly writing.

Mr. Metzger's section is similarly perceptive and good tempered. His sympathies, it is true, are with the innovator and the liberal, but he recognizes the values of tradition, as in this interesting distinction between freedom *in* the colleges and freedom *for* the colleges:

"The shift from conserving to searching portended great changes in the conception of academic freedom. As long as conserving was the foremost ideal, academic freedom was a freedom *for*, not *in*, the colleges. The conserver, taken as an ideal-type within the ranks of the men of knowledge, regards the knowledge inherited from the past as the seasoned wisdom of the race or the afflatus of God. As priest, he celebrates it; as scholastic, he systematizes it; as fundamentalist, he applies it, reverencing *ipsissima verba*. The pre-Civil War academic, by filling all three roles, maintained a certain intellectual autonomy—a freedom and isolation as a member of the community of the educated. In a New World, peopled by the uprooted, he kept alive a respect for traditions. In a democratic society, tending to be plebiscitarian in taste as well as in politics, he resisted the attempts of public whim and vulgarity to depreciate the college education. A good part of his opposition to a more secular university and a more vocationalized curriculum stemmed from his desire to protect very fragile values from the crush of a rough society. He sought the freedom not to acquiesce in the philistinism of his age." (p. 317).

Mr. Metzger traces with care the course of our universities through "Darwinism and the New Regime," "The German Influence," and "Academic Freedom and Big Business." He criticizes understandingly the 1915 Report of the Committee on Academic Freedom and Tenure of the AAUP. By no means what Professor Hook calls a "ritualistic liberal," Professor Metzger is severe upon the somewhat inconsistent attitude of the AAUP Committee on Academic Freedom in Wartime, in 1918: "The unnerved professors of the Committee bear witness that not all the casualties of war are to be found upon the battlefield." (p. 504). He ends upon a note of confidence, though alarmed at the slender thread upon which our academic freedom hangs.

When we turn to *Academic Freedom in Our Time*, we enter into the heated atmosphere of current controversy; and Professor MacIver often adds to the heat, without casting proportionate light. It is rather saddening to find him quoting, as if he needed reassurance, gentlemen much his inferiors in judgment and scholarship, like Professor Henry Steele Commager and Dr. Harold Taylor. For Dr. MacIver is a highly distinguished political scientist, and when he sticks to his last, this is an informative book. He lucidly implies, for instance, that academic freedom is a natural right, or body of rights—that is, rights growing out of the nature of the function performed: "This freedom is not to be thought of as a privilege, not as a concession, nor as something that any authority inside or outside the institution may properly grant or deny, qualify or regulate, according to its interest or its discretion. It is something instead that is inherently bound up with the performance of the university's task, something as necessary for that performance as pen and paper, as class-rooms and students, as laboratories and libraries." (p. 11). I endeavor to make precisely this point in my own *Academic Freedom*, but Mr. MacIver makes it better.

And Professor MacIver is very good on the ends of higher education, especially in his demolition of the devotees of pragmatic research. He says of the 1948 Report of the President's Commission on Higher Education, "here we have the spectacle of a body, itself largely composed of educators, entrusted with an educational survey of national importance, recommending for the advancement of higher education that its vital principle, the cultivation of the mind, be still further diminished to make way for other things." (p. 277). He has no patience with cant in the discussion of higher education, nor in the discussion of democracy:

"If every man is as good as his fellow, the scholar is entitled to no more respect, even in his own field, than his untutored neighbor. . . . Since the many never rule, and since any form of government—monarchy, dictatorship, or any sort of oligarchy—may be in accord with the will of the majority, and even of their suffrage, democracy cannot be identified along this line. The distinctive feature of democracy is not the rule of the majority but the fundamental rights it assures to the minority." (pp. 249-50).

Yet despite this prescience and this candor, Dr. MacIver's book is vitiated by two serious deficiencies: first, a scarcely concealed hostility toward the theological assumptions in which all freedoms have their sanction; second, a really surprising indifference toward the threat which Communism presents to academic freedom.

If pragmatism seems to be a strong influence upon the minds of Mr. Hofstadter and Mr. Metzger, the premises which govern Mr. MacIver's thought are those of an old-fangled rationalism, dominant in the Scottish universities which he knew in his youth and pervasive in Mr. MacIver's books ever since. Although endeavoring, in the interest of impartiality, to leave some place in the Academy for the man of religious convictions, nevertheless Dr. MacIver cannot help making it clear that he thinks theology or anything of that sort, really unworthy of a university. So far as academic freedom is concerned, he writes, "the word truth can be relevant only to

knowledge that depends on investigation, that can always be questioned and retested, and that is never accepted on the ground that it is the deliverance of any authority, human or divine." (p. 4). He implies that "denominational colleges" really do not fit into the theory of academic freedom at all, relegating them to an appendix. "To the scholar who is under theological discipline," he says, "*one possible conclusion from the facts is ruled out in advance while to the scholar not so obligated it remains open.*" (p. 286). (Dr. MacIver's italics.) (Here he is using as an example the population problem in Puerto Rico, to suggest the dismaying irrationality of Catholics, apparently; he does not mention Ireland.) On the next page he recants, in part, and confesses that ". . . those who are loyal believers in a theology [do not] feel any less free in their own search for knowledge than those who do not accept it." (p. 287). But the implication remains that they are fools, nevertheless. That freedom is submission to the will of God; that the search for truth may be all the more hopeful because a scholar does not disregard or leave in doubt the first principles of human nature—these considerations have no place in Dr. MacIver's analysis of academic freedom.

Since Dr. MacIver feels a hostility toward authority, tradition, and theology as queen of the sciences, it follows that he depreciates the Academy as an institution for conserving the wisdom of our ancestors, and emphasizes its role as the agency of innovation and experiment. "The modern university is not understood as merely or even mainly the purveyor of accepted knowledge. One of its greatest functions is to prevent doctrine from becoming dogma and truth, however understood, from degenerating into prejudice." (p. 258). For Dr. MacIver, all questions are forever open, and the dogma of Progress is the only dogma he professes. As with his remarks on theology, so with his remarks on accepted knowledge: he recants, in part, on his next page. He does acknowledge the existence of "permanent realities." Yet one gathers, from the general tenor of his remarks, that he believes we are living in an age subject, if not to totem and taboo, at least to the dead hand of custom and received opinion. In this, as in much else, Dr. MacIver seems to dwell in the nineteenth century, and exhibits no consciousness that the great danger, nowadays, is the dissolution of belief in any abiding realities; and that in the middle of the twentieth century it is the role of the university as conservator, rather than as innovator, which requires emphasis. We are not in any peril of stagnation; but we see all about us the consequences of the assumption that we were born yesterday.

This rather rigid nineteenth-century rationalism of Professor MacIver's directly affects his judgments on the present controversy over Communism in the Academy. Professor Sidney Hook recently tore Mr. MacIver limb from limb on this score, in the pages of the *New York Times* Book Review; so I shall only suggest here the curious myopia of Dr. MacIver when he looks at our present political spectrum on the campus. "It happens that in this country, so far as the universities are concerned," Dr. MacIver writes, "the organized attack [on academic freedom] comes almost entirely from certain right-wing groups, just as in some other countries it may now come more often from the left." (p. 124). These right-wing groups that Dr. MacIver has in mind are interestingly disparate: he brackets the name of Mr. Allen Zoll with that of the distinguished economist Professor Ludwig von Mises, and confounds the ideas of Mr. Max Eastman with those of Mr. William Buckley Jr., and flogs various dead horses, including the *Educational Reviewer*, a magazine which ceased publication more than two years ago. His performance is the more surprising because he also writes that "conservatism is at least as congenial to scholarship as is liberalism—so far as the two are not really one." (p. 260).

And here is a truly astounding generalization of Mr. MacIver's: "There is no

scintilla of evidence that the policies or programs of any of our institutions of higher learning have been influenced or are in danger of being influenced by communist educators." (p. 260). No scintilla of evidence? Where has Professor MacIver been these past ten years? Has he never looked into the books of Mr. Hook, or Mr. Burnham, or Mr. Hicks? Has he never glanced at the names of professors subscribed to Communist and Communist-front petitions? One would think that he had succeeded in insulating himself absolutely against the climate of opinion that prevailed on a good many campuses during the 'thirties and 'forties, and which lingers at more than a few colleges. It is pleasant to think that Mr. MacIver has been untroubled by any awareness of this disagreeable business; but I believe that a gentleman so unwilling to face facts is an unsure guide to academic freedom in our time. This baneful influence is waning among us now, I am convinced; and often it was exerted more directly by naive fellow-travellers than by Communist Party members; but to claim that such influence never existed is to fly in the face of Mr. MacIver's own rationality, let alone Providence. Deny a fact, and that fact will be your master. If there were space, I could cite several cases, from my private knowledge, of cliques very like Communist cells still at work—and that not ineffectually—on college campuses. I think that the great tendency of ideas and interests in our time will undo these cliques, presently, without the need of formal repression; but that does not mean we can afford to ignore their activity, or to affirm that they simply do not exist.

Despite the hundreds of cases of alleged violations of academic freedom brought to the attention of the Association of University Professors in recent years, Mr. MacIver's book contains little evidence that positive injustice has often been done to persons of radical or liberal views. Dr. MacIver himself, indeed, often seems to be more greatly concerned with activities that lie upon the periphery of academic freedom than with the heart of the matter. He worries about the policies of the overseas libraries of the United States Information Service, which have very little to do with the Academy; he presents as one exhibit of what has been called "the climate of fear" the case of ". . . a professor of classics who received a Fulbright award to study in Italy but had it cancelled by the State Department because his wife had resorted to the Fifth Amendment." (p. 266). I doubt whether the boundaries of academic freedom can be extended to guarantee a Fulbright award to anyone who wants it; but if Professor MacIver is interested in Fulbright policies, he might investigate the great difficulties which conservatives, or conservative liberals, confront when they apply for such grants. An American professor as distinguished in the field of economics as Dr. MacIver is in political science informs me that a Republican might as well not bother to apply for a Fulbright—and that even under the present Republican administration. One of the questions asked concerning applicants for Fulbright grants is this: "Is the applicant a representative American?" A representative American, there is reason to believe, means to many of the people in charge of Fulbright appointments a scholar who subscribes to the line, say, of the *New Republic*. We certainly suffer from intolerance nowadays; but not all of it—and, I think, not the larger share—comes from Dr. MacIver's "right-wing groups." It is not right-wing groups who dominate our educationist bureaucracy or our great foundations.

Another odd excursion of Dr. MacIver's is his denunciation of the *Educational Reviewer*, a little monthly magazine now defunct, which was devoted to reviewing textbooks from a conservative point of view. Whatever opinion one may have had of this journal—and, unless it was unlike all other magazines, some of its reviews were good and some were not—simply to publish such a magazine is not to violate anyone's academic freedom. A man who writes a book, even a textbook, sets himself up for a mark to be shot at; such is the nature of things. The professor's right to

academic freedom does not include an exemption from any hostile criticism of his published works. Liberal or even radical textbooks receive approving reviews in a good many quarters. I find it difficult to understand how Professor MacIver, upon his own liberal principles, can grow furious over the mere existence of controversy. That the *Educational Reviewer* often urged state educational authorities, school boards, and professors not to adopt certain textbooks is not in itself sinister: choices among books must be made, and the supporters of the *Educational Reviewer* had as much right to express their preferences, whether sound or unsound in Mr. MacIver's eyes or my eyes, as had anyone else. We Happy Few have no just claim to a monopoly of reviewing and judgment, and only if a professor's book were suppressed by conspiratorial means would academic freedom be violated. Mr. MacIver quotes from what appears to have been a silly review of a book on economics. But I might quote from reviews still sillier in learned journals—take the treatment in certain quarters, for instance, of a work of profound scholarship by a professor of conservative inclinations, Dr. Eric Voegelin's *New Science of Politics*. We have to tolerate a great deal of silliness in book reviewing for the sake of getting books read at all. Such reviews deserve reprobation, as Dr. MacIver says; but they violate no one's academic freedom.

Endeavoring to refute the charge that American professors and teachers are radicals, Dr. MacIver contends that they are more conservative than the mass of the population. I think he is right, though his evidence is scanty. The teacher, after all, is by occupation a conservator of received opinion. Yet it is in the nature of the conservative, as F. J. C. Hearnshaw suggested, simply to sit and think, or perhaps merely to sit; and a Jacobin minority within any body of professors or teachers, by persistent agitation and intrigue, may come to dominate the community of scholars and to control—or at least to exert a veto upon—the policies of universities and colleges. This is the theme of Professor Root's book.

Dr. E. Merrill Root is a poet, and his book is a poet's book—though his prose style is not equal to his poetic style. *Collectivism on the Campus* is a world away from the two books of the American Academic Freedom Project: passionate, sometimes ingenuous, and infused with religious conviction. He is convinced that radicals and collectivistic liberals exert an influence upon our campuses out of all proportion to their numbers, and through the examination of a number of cases he supports his thesis strongly. It is true, as Professor Sidney Hook remarks, that Mr. Root does not prove any professor to have been discharged because of his conservative opinions: some have been denied promotion, and others have been let go if they lacked tenure, but an out-and-out case of discharge is not to be found here, unless it is that of Mr. W. T. Couch at the University of Chicago—which incident, however, in my opinion, had for its proximate cause the arrogance of certain administrators at the University, even though political opinions seem to have been in the background. Yet the fact that it is difficult to prove a professor was discharged because of conservative views does not mean that no such discharge ever has occurred. No college president ever would bluntly state that he had dismissed a professor because of that professor's conservatism: other formal pretexts would be found; they are rarely lacking. And a professor who has been dismissed because of his conservatism, even more than a professor who has been dismissed because of his radicalism, may find it expedient to say as little as possible about his dismissal if he wants employment elsewhere, the climate of opinion being what it is. The cases of discrimination against Dr. Alexander St. Ivanyi, Dr. Kenneth C. Colegrove, Dr. Felix Wittmer, and others cited by Mr. Root carry conviction. And his argument that many sincere educators exhibit dismaying naïvete when forced to make some judgment on the activities of the Left is also put with some strength.

For my part, I am inclined to think that the intolerance of Right and Left within the Academy, as described by Mr. MacIver and Mr. Root, may now be diminishing because of a general alteration of political opinion at work in America, inside and outside the Academy. We may be becoming more intelligently conservative as a people; certainly the God that Failed no longer inspires the rising generation of scholars, though milder forms of collectivistic theory will have their vogue on campuses for a while yet. The ultra-conservative who suspected our colleges of being nests of subversives will have less reason to wax wrathful; and the Communist cell may shrink to the vanishing point, and the nervous and resentful "liberal" on the campus may cease to denounce any conservative colleague as an agent of malign reaction. I am inclined to think, in short, that although we will not be able to forget about threats to academic freedom, those threats, increasingly, will come from another quarter than directly political ideology.

The vociferous radical minority on our campuses will be fairly active for some years yet, nevertheless; at present they are thriving on, rather than shrinking from, the debate over "McCarthyism." When two near-Communists were forced to leave the faculty of Reed College in 1954, for good and sufficient reasons, the president also was compelled to resign, upon the protest of many members of the faculty against his action. It still is advantageous, at many colleges, for a radical teacher to cloak his incompetence or faults of character with the garments of the martyred reformer: Henry Mulcahy, in *The Groves of Academe*, suggests the type. As Professor MacIver suggests, "the scholar is under obligation to show the same regard for evidence on the platform that he does in the classroom and not to resort to cheap and prejudicial methods of persuasion. . . . As was said by John Dewey, 'lack of reverence for things that mean much to humanity, joined with a craving for public notoriety, may induce a man to pose as a martyr to truth when in reality he is a victim of his own lack of mental and moral poise.'" (p. 233).

An instance of this: at a Wisconsin college, a few months ago, the president suggested to the faculty that the college consider establishing a summer institute of conservative studies, to examine the foundations of our civilization in the light of present problems, and to bring together distinguished American and foreign thinkers for a discussion of the conservation of our society. At once the unfortunate president was assailed by a small clique of embittered radicals, who declared that nothing "conservative" had any place in a *liberal* arts college. This clique sent reports of the faculty discussion, which had been held confidentially by the faculty itself, to radical publications, and in other ways seriously embarrassed the president, who was new to his post. The leaders in the clique were instructors without tenure, who—well before the president's plan had been discussed, or even thought of—had been notified that their services would not be required in the coming year, for adequate reasons unconnected with private political opinion. Thus they were enabled to pose as martyrs, and perhaps to secure reappointment accordingly—or, at worst, to rouse a party in their favor and possibly obtain posts at another college on the strength of their heroic stand in favor of "liberalism." It was Professor Mulcahy all over again. The intemperance which afflicts our institutions of higher learning, I suggest, nowadays comes principally from the virulent Left, not from "right-wing groups."

Yet I think that the debate over ideology will grow less intense, during the next few years. The dispute probably will be transferred to the subject of lowered standards in our colleges and universities, what with the "rising tide" of students, and the consequently lowered status and degree of independence of the professor. The reality of academic freedom is dependent upon two conditions: first, that the professors are men of truly liberal understanding, dedicated to the preservation and the increase of

truth; second, that the students are reasonably serious and earnest young people, who actually want to be at a genuine institution of higher learning, and can benefit from being there. If the professor becomes a mere dominie, overworked and reduced to lecturing dully upon a mass of facts that the students should have acquired earlier; if the student becomes a bored boy or girl who has come along for the ride and a "snob degree," ignorant even of the rudiments of learning—why, then, the elevated discussion which gives academic freedom its sanction can be carried on no longer, and our institutions of higher learning will have become, in Dr. Robert M. Hutchins' phrase, mere custodial institutions, staffed by adolescent-sitters. I do not exaggerate. The educational imperialists are thrusting just this situation upon us. Dr. Milton Eisenhower, for instance, looks forward gladly to the day when the students will not have to see their professor, but will watch a television set, and the professor can "serve" hundreds or thousands of students at once; and the honors system in examinations can be abolished, too, for monitors will train their television cameras on whole rooms full of students. Just how much academic freedom there will be in such an "educational" plant, I think I know.

Both Mr. MacIver and Mr. Root discuss a most alarming case of this nature, the attempt of one of the educational imperialists, President Minard Stout of the University of Nevada, to discharge Professor Frank Richardson, because Professor Richardson obdurately believed in decent standards of scholarship in a university. Mr. MacIver says that this was ". . . a gross violation of academic rights" (p. 230); Mr. Root, that the administrators at Nevada were guilty of "militant intolerance." I may add that my own investigation of present conditions at the University of Nevada convinces me that—despite Mr. Richardson's being restored to his post by order of the Nevada Supreme Court—the arrogant policies of President Stout continue in full force. And we are going to encounter many cases of this nature during the next ten years, I am afraid.

Professor Ludwig Lewisohn of Brandeis University (quoted by Mr. Root) observes that "the only scholar, the only type of student who is still forced into a defensive position on American campuses today is the conservative teacher or student, the religious teacher or student." (p. 287). I fear that this is going to be increasingly true of the scholar who believes in conserving the best in liberal education, whatever may come of the present ideological argument. Early in the history of American academic freedom, as Messrs. Hofstadter and Metzger point out, the debate centered about theological questions; then it shifted to the slavery debate; then to Darwinism and related matters; then to economic discussion; presently to national loyalty; and now to Communism and radicalism. I think we are entering upon a stern struggle, in the realm of academic freedom, over the question of the whole meaning of liberal education, closely joined to the question of what is man, and what is human dignity. These three books, whatever opinion one holds of their authors' convictions, appear at a time when the gravest attention ought to be given to the first principles of academic freedom and the mission of the Academy.

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