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Book Reviews

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BOOK REVIEWS

THE RIGHT OF THE PEOPLE. By William O. Douglas. Doubleday & Co., Garden City: 1958. Pp. 238. \$4.00.

"Man is a child of God entitled to dignified treatment."

God knows, God has given William O. Douglas dignified, indeed generous treatment. God has given him many gifts. Silence is not one of them. But the impeccable Douglas prose which rolls through *The Right of the People* reveals a talent which, I rather think, should not be "lodged in him useless." The Justice's latest book searches a solemn "Douglas subject," the guarantees of the first amendment. On this subject his mere speaking, however soft or splendid it might be, poses a problem.

Nine books, a flow of dissenting opinions, his propensity—even when in agreement with his brethren on the bench—for concurring opinions make manifest that Mr. Justice Douglas does not long to be silent. But there are those who would quiet Douglas' extrajudicial utterances because he is a member of the high court. There are those, too, who would prefer an inaudible Douglas simply because he is Douglas. With the latter I have no concern. The former state an issue. Is it proper for a Justice of the Supreme Court to expound his views on unresolved issues which are reasonably certain to come before the Court? Justice Douglas must think it proper; he does not hesitate to do it here.

We are told, for example, that to exact loyalty oaths from tenants in government housing projects or from churches which seek tax exemption is to "ape the totalitarian system," (p. 134) that "religious liberty extends to atheists as well as theists," (p. 139) that a member of the armed forces may not be subjected to a second court martial for the same offense, and that a coerced confession used against a soldier would vitiate a military trial. (p. 183). The objection to such comments is certainly understandable but are we not certainly to understand that Justice Douglas is a man of intelligence and integrity? And if intelligence and integrity be docile is it not reasonable to assume that as a member of the Court he will listen and be taught in the particular circumstances of the particular case which may eventually decide those particular issues?

At any rate, Justice Douglas has chosen to be heard;¹ he speaks for a large and audible segment of the legal fraternity and, if only for that reason, he demands attention. In fact he demands scrupulous attention—because, I am afraid, his dicta are not always accurate and his conclusions sometimes look in vain for a provable premise. For example, we meet almost immediately the statement that "in recent years as we have denounced the loss of liberty abroad we have witnessed its decline here." (p. 12). The Justice does injustice to his own Court. This Court has carried freedom to the brink of license. Indeed, it would seem that the only freedom we have lost in the last decade is the "freedom" to discriminate. We are told, too, that the communists in the early 1950's were "the most unpopular people in the land, incapable of commanding enough votes to get elected to any office, no matter how lowly." (p. 51). Is this not to ignore the fact that proven communists or their agents did hold appointive office in this government with access to the confidences of government? Is the Justice in a position to know or to ascertain what quantity of critical information reached Russia through the manipulations of even a few communists or communist allies? Will not these considerations more accurately reflect the threat of communism to our security?

Something at least slightly short of accuracy is evident, also, when Justice Douglas states as the holdings of *Schwabe v. Board of Bar Examiners*² and *Königsberg v. State*

1. "To be heard" is precise. The book is substantially the North Lectures delivered at Franklin and Marshall College in the spring of 1957.

2. 353 U.S. 232. (1956).

Bar³ that "membership in the Communist party during the years before World War II did not, in and of itself, justify a state's refusal to allow an applicant to practice law." (p. 111). Neither New Mexico in the former case nor California in the latter made prior membership in the Communist party an automatic disqualification for the practice of law. And, as I read the majority opinions of Mr. Justice Black in both cases, he declined to pass on that issue, holding vaguely but expressly to the point that prior membership in the Communist party cannot be equated with bad moral character. A final illustration is the somewhat puzzling proposition that it would take a "courageous junior [in the State Department] to support Nehru, when the Western World has been led to think that Nehru is a friend of Communism." (p. 122). Here is the technique of the implied assertion, a cardinal sin, I suspect, of every lawyer. Justice Douglas does not say that Mr. Nehru is *not* a friend of communism. He simply slips it in by implication as though the casual implication is automatic proof of its veracity. At the same time he bluntly states that it requires courage to support Nehru policies as though that would be the only virtuous course to follow. Or would the Justice have us believe that it is commonplace to be right but that it takes courage to be wrong and only those who have the courage to be wrong should have our benediction? Perhaps the "courage" about which he speaks is, in fact, only a euphemism for the advocacy of socialism.

These are at best minor irritations. But the opinions do serve as pieces in the mosaic of Justice Douglas' over-all reflection on freedom. He is certainly entitled to be heard as to those opinions. The philosophy, if any, of the Justice has, however, been a greater gadfly to many people. Opinions necessarily send off puffs of philosophy but *The Right of the People* expounds not so much a philosophy as a single repetitious theme. The burden of these collected lectures is that "freedom to believe has been conceived as absolute under the First Amendment, only action being subject to regulation in the public good." (p. 110). Unfortunately, while Justice Douglas may tell us only his second thoughts he does not mind telling them twice, thrice and many times over.

The stated theme is certainly safe enough and sound enough. But certain of the Douglas variations on the theme strike discordant notes. Believing and preaching are distinct concepts which Douglas does not pause to distinguish. Consider an example or two. In freedom of speech he conceives freedom to believe what a person chooses to believe as an absolute freedom—absolute and unrestricted to the point of protecting freedom of expression regardless of the *words* which are spoken. His concept of free speech is a completely uncontrolled freedom to teach, preach or say what one will so long as the words are not brigaded with action. It is not words, only conduct which may be regulated. This, he argues, must necessarily be because there is no immutable measure of right and wrong, no reasonable guide for the censor's pen and because the terminal point of censorship is the reduction of all literature to that which is proper and safe for children. So, too, for religious liberty he proposes a total absence of discrimination and in his non-discriminatory haste to be secular he becomes secularistic to the point of excluding God entirely from public education.

These are but illustrations. In brief, for Justice Douglas conformity is a major evil and dogma a vicious word. He finds no virtue in the attainment of truth but only in the *search* for information. He rejects Judge Learned Hand's tenet that the prohibitions of the first amendment are admonitions of moderation. He objects to moderation because it begets uncertainty—not recognizing that human laws can never achieve infallibility. That aversion for uncertainty requires the absolute license which he finds in the first amendment. It leads him to overlook the obligations of citizenship and at the same time poses a paradox. All along he professes belief in a Supreme Being and in the essential dignity of man. It is, in fact, that faith in the dignity of man which is the taproot of

3. 353 U.S. 252. (1956).

his absolute liberty. The words put at the outset of this review are the words of Justice Douglas. In more complete context, which seems to set the basis for his concept of liberty, he writes, "Man is a child of God entitled to dignified treatment. The state is the servant of the citizen, not the all powerful being that can require the citizen to do its bidding or suffer the consequences." (p. 145).

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THE LAW OF CATHOLIC MARRIAGE. By Rev. James E. Risk, S.T.L., J.C.D.
Callaghan & Co., Chicago: 1958. Pp. 187. \$7.50.

This book is subtitled "A Manual of the Laws of the Catholic Church on Marriage For the Use of American Lawyers," and in his foreword to the work Father Risk reveals his purpose in writing.

"As certain features of statute law may prove elusive to the layman in legal matters, so also may ecclesiastical law present difficulties to those unfamiliar with its prescriptions as well as its basic principles. In our own country an acquaintance with the canons on marriage may help the lawyer to appreciate more readily the position of his Catholic clients. To encourage this acquaintance is the exclusive purpose of this manual."

A great part of the lawyer's work today necessarily involves marital matters, and since a Catholic frequently is involved in these legal causes, it is expedient and opportune that a lawyer clearly understand the position of the Church on marriage. Father Risk desires to present this knowledge to them in a manner similar to their training in their civil law by quoting the actual canons together with a succinct commentary upon them. For this reason he excludes from his considerations any historical or academic descriptions that would be of interest more to the scholar than to those seeking an acquaintance with ecclesiastical legislation. Immediately one recognizes the competency of Father Risk to complete his task. He is himself a Professor of Canon Law at the Gregorian University in Rome, which position indicates his standing in his field and at the same time places him close to those sacred congregations whose daily work is handling marriage cases. He combines, then, theoretical knowledge with the insight of a practical observer of the adjudication of marital cases in ecclesiastical courts. His position, together with his scholarship, enables him to learn interpretations in ecclesiastical law immediately, and the volume has the tremendous advantage of presenting the latest decrees and practices of the Holy See. Father Risk fulfills his purpose admirably. The statutes or canons are translated into English from the official text of the Code of Canon Law and are made accurate and simple in their reading. In his commentary he presents the teachings of canonists and theologians in concise, simple fashion presenting the highlights of interpretation and the various opinions that are relative to the law. His grasp of his subject is evident in his ability to present a summary commentary upon the law that is accurate, understandable, and indicative of the latest developments in the evolution of its interpretation.

Where a point may be disputed he indicates his own opinion and on all occasions presents accepted teachings. By the use of copious footnotes Father Risk reveals further sources for development of various considerations, and for certain canons gives a fuller explanation by defining terms or expressing the theological background of the law. The author has included in his work an excellent bibliography. If the purpose of the book is merely to present the laws of the Church on marriage with a brief commentary it may be said that Father Risk has fulfilled this purpose in admirable fashion, helpful not only to an American lawyer but also as a review to any ecclesiastical student.

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It may, however, reasonably be asked what precisely would interest the American lawyer in the ecclesiastical law of marriage? The presentation of the statutes with their commentary is interesting and informative, but it does seem unlikely that the lawyer will find this very helpful practically speaking.

In our country a civil law is not at the same time a canon law, and while the author's explanation of the various statutes is highly accurate, it would be beyond the civil lawyer's competency to advise his client concerning a matrimonial cause in an ecclesiastical court. It would be well, however, for him to appreciate that the meaning of legal terms differs greatly in the civil and the canonical, as for example, such expressions as void, annulment, and the like. A civil lawyer would run the risk of harm to his clients if he assumed the responsibility of advising them concerning a matrimonial cause to be adjudicated before an ecclesiastical tribunal. Though this obviously is not the purpose of the book, nonetheless, it is a necessary caution to readers with the admonition that a fuller and more detailed knowledge would be required before a lawyer would be competent to express any opinion.

One regrets, however, that excellent though the purpose be, the book has not gone far enough. A manual for American lawyers concerning Catholic marriages should contain necessary information that would be of immediate concern in their practice, for example, the handling of a divorce or separation action when Catholics are involved or when there is a valid marriage between non-Catholics. Further, the course of training of an American lawyer necessarily establishes the competency of a civil court to adjudicate matrimonial actions even to the dissolution of the bond. I feel it would have been helpful if appendices were added to the work to discuss the competency of Church and State over marriage and the obligations of a Catholic lawyer who considers accepting any separation or divorce action. Father Risk omits entirely any indication of the moral responsibility a lawyer bears in assisting in a separation or divorce action that has not received ecclesiastical approbation or that does not involve a manifestly invalid marriage.

Further, while again American lawyers do not act as advocates in ecclesiastical actions, it is a notable omission that in the work there is no presentation of statutes concerning ecclesiastical trials nor even a summary account of them. Briefly then, Father Risk's work is to be commended in the fulfillment of its purpose, the presentation of the laws of the Church on marriage with a competent commentary on each. I question, however, the value of the work for American lawyers in that its information is not of immediate practical value, and the brevity of the commentary can cause confusion in the meaning of terms and the practice of the Church. The book, however, does have a splendid value in its excellent English bibliography that may prompt a lawyer to study further the legislation of the Church that seeks to protect the sanctity of marriage and the happiness of the parties.

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