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Book Reviews

BOOKS REVIEWED

Civil Liberties and the Constitution. Paul G. Kauper. Ann Arbor: University of Michigan Press. 1962. Pp. xxii, 237. $6.00.

The Constitution, as a protection of civil liberties, is an object of considerable interest. Unfortunately, even among the legal profession, the general understanding is inexact and often beclouded by emotional reactions. It was a service, therefore, when Professor Paul G. Kauper of the University of Michigan Law School published in this little volume the text of the lectures he gave at the 1961 Special Summer School for lawyers held at that school. While this is basically a handbook, it is not exactly light reading, for the author has successfully avoided the pitfall of popular oversimplification while compendiously summarizing the basic problems and the operative principles. This is a book which the law student and the lawyer could well read with profit.

In his opening treatment of the problem of church and state, Professor Kauper reveals that he does not adhere to the absolutist school of constitutional interpretation and he asserts "the problems in this area cannot be solved by resort to doctrinaire absolutes, verbal formulae, or metaphors." (p. 19.) After pointing out that critical church-state issues turn on the interpretation given to the establishment clause of the first amendment providing that Congress and, by interpretation, the states shall make no law respecting an establishment of religion, the author examines the Sunday closing laws, birth control legislation, aid to education and religion in public schools.

In each case, he favors the balancing of the competing interests at stake. For instance, he criticizes Mr. Justice Black's dictum in *Everson v. Board of Educ.*[1] that Government cannot aid any or all religions, as contrary to accepted practice and an extension of the establishment clause far beyond its nature and purpose. There are some who seek to find in the few Supreme Court decisions on church and state a clear prohibition against general federal aid to parochial schools. Professor Kauper, however, finds nothing to support such a conclusion. Indeed, he states that, "if the actual holding in *Everson* means anything, it points in the opposite direction." (p. 14.) Especially in view of the later holding in *Zorach v. Clauson*[2] and the Court's allowance there of a measure of government cooperation with religions, the author finds it surprising that the *Everson* dictum is quoted as if it were the last word on the subject.

Professor Kauper ably employs the Sunday closing law cases[3] to support his conclusion that governmental action serving a valid public purpose does not become invalid merely because it "operates simultaneously to promote religious interests either generally or of a particular group." (p. 22.) In fact, as the author recognizes, an overzealous adherence to the supposed principle that Government cannot aid religion may well discriminate against religion and impair its free exercise, contrary to the further express command of the first amendment.

Cutting through many of the intricately constructed arguments against Government support for religion, Professor Kauper makes the trenchant observation, "it seems

1. 330 U.S. 1, 15-16 (1947).

2. 343 U.S. 306 (1952).

3. E.g., McGowan v. Maryland, 366 U.S. 420 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961).

to me that so much of the opposition to aid for parochial schools stems from a feeling against these schools as though there were something almost un-American about them." (p. 45.) While not taking a position on the desirability of aid to parochial schools as a matter of policy, he concludes that "Congress may grant some assistance to these schools as part of a program of spending for the general welfare, so long as the funds are so limited and their expenditures so directed as not to be a direct subsidy for religious teaching." (p. 51.) The last qualification, however, raises some serious doubts. Who is to say, for example, at what point government aid to language teaching in a parochial school becomes aid to the teaching of catechism in that school through the release of funds which the school formerly had to devote to its language program but which it now can spend on catechisms? To determine a specific case on the directness or indirectness of the subsidy would seem to invite arbitrary and unpredictable distinctions.

Professor Kauper believes in a sensible pragmatic approach to the first amendment. His practical turn of mind is shown by his opinion that acceptance of public assistance by parochial schools will require "submission to controls that properly accompany grants of public funds." There are some who overemphasize the fairness aspect of the problem, properly complaining that to aid public but not parochial schools would be invidious discrimination, and they appear to beg the question whether any aid is desirable at all. There is no such thing as free federal money, and Congress is under an obvious duty to regulate the expenditure of funds it appropriates. Those who uncritically advocate federal aid would be well advised to consider the inevitability thereupon of some federal control. This is especially important in light of the school prayer case, *Engel v. Vitale*,[4] which may be the forerunner of future decisions ensuring that publicly controlled schools will be wholly secularized.

Professor Kauper applies his welcome common sense also to questions of obscenity, censorship and antisubversive legislation. In each case, he illustrates the pragmatic nature of American constitutionalism and favors a balancing of competing interests. Only such a balancing can justify the imposition of restrictions on the Communist Party and, at the same time, the voiding of similar strictures against the National Association for the Advancement of Colored People. But the author does recognize that the absolutist approach of Mr. Justice Black has some merit in that it highlights the fact that, within the limits of what is free speech, there can be no abridgment of that freedom. The problems arise in deciding what is protected free speech and what constitutes an abridgment. In making those decisions even the abstractionists must resort to a weighing and balancing of competing considerations. It must be noted, however, that Professor Kauper's positive program for combating Communism is less stellar than his analysis of the legal problems involved. He minimizes the efficacy of criminal sanctions against domestic conspirators and suggests instead that we "challenge Communism in the open market place of ideas" and shore up "democracy at home." (pp. 125-26.) The author seems to designate "poverty, disease, ignorance, and exploitation" as our major nemeses. He appears not very impressed by the conspiratorial, messianic nature of Communism and the rapidity with which it is achieving its objectives while we seek to pacify its agents and pursue aims extraneous to its elimination as a militant threat.

In another chapter of this solid book, Professor Kauper clarifies the distinction between private and state action which is so essential to fourteenth amendment interpretation. Properly, he concludes that in such cases as the trespass prosecutions

4. 370 U.S. 421 (1962).

of the "sit-in" demonstrators, the real question is not whether there is "state action" in convicting the defendants (there obviously is), but whether that state action results from an untenable preference of the rights of the property owner over the rights of the excluded Negro. Again, the problem is seen as one of the balancing of competing interests.

The final chapter is devoted to a discussion of the effect of the federal system upon civil liberties. Distinguishing "civil liberties," *i.e.*, liberties or freedoms that may be asserted as against the exercise of governmental power, from "civil rights," *i.e.*, the rights and privileges that a person may assert against other persons, the author dwells on the expanding role of the federal government. In addition to its power to enforce the rights protected under the due process and equal protection clauses of the fourteenth amendment, Congress can employ several of its specific powers in dealing with civil rights as well as civil liberties. Thus, for example, Congress can exercise its power over interstate commerce to prevent racial discrimination by interstate carriers even where the usual state action is not present. Significantly, the author acknowledges the efficacy of federal executive action and the federal equity decree in enforcing constitutional guarantees, but he seems to believe that full protection of the right to vote and other rights will await further action by Congress.

This book is a worthwhile contribution. It provides a ready introduction to the deeper intricacies of constitutional law, and it is to be recommended particularly for the law student or attorney who is unable to devote extensive research to civil liberties questions.

CHARLES E. RICE*

Render unto Caesar: The Flag Salute Controversy. David R. Manwaring. Chicago: University of Chicago Press. 1962. Pp. x, 321. $5.50.

Every decision of the Supreme Court teaches something, but it is doubtful that many decisions of the Court contain more lessons, or more variegated ones, than does *West Virginia State Bd. of Educ. v. Barnette*.[1] It teaches, *inter alia*, the following: (1) that a controversy which makes no sense except in terms of religious liberty can be satisfactorily disposed of without reference to religious liberty; (2) that when the Constitution forbids laws "abridging the freedom of speech," it means also those abridging the freedom of nonspeech; (3) that placing the palm of the right hand above the right eye in salute is a form of speech and that refusal to do so is, therefore, an exercise of the freedom of nonspeech; (4) that the Court follows the law reviews as much as it does the election returns; (5) that the common assumption among lawyers that dismissal for want of a substantial federal question means that the appellant's claims are so wanting in merit that the Court will not waste its time hearing oral argument thereon is erroneous, and that such a dismissal means only that the appellant's counsel may have better luck next time and what has he got to lose by trying again, furthermore, no additional significance or meaning accrues by reason of the fact that the dismissal for want of a substantial federal question is the third or fourth such dismissal on the same question within a

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1. 319 U.S. 624 (1943).

period of a few years;[2] (6) that on occasions, not only may the Court decide a case before hearing oral argument or reading the parties' briefs, but it may write a truly great opinion without any help from the briefs or oral argument so that constitutional law practitioners (such as this reviewer) may be entirely expendable.

There are many other lessons that can be learned from *Barnette*, but these are enough to show why it is such an interesting and exciting case. It is to Professor Manwaring's credit that his book conveys much of this interest and excitement.

By any standard, *Barnette* is one of the milestones in the progress of American constitutional law, and Mr. Justice Jackson's eloquent and often quoted opinion in the case is a document that should occupy a prominent place in the literature of American liberties. On the whole, Professor Manwaring's book is an excellent account of the events leading to the decision, the decision itself and, somewhat abbreviated, its aftermath. The author has not contented himself with a study of published material but has examined the archives of the American Civil Liberties Union, which played a leading role in the entire flag salute controversy, and has personally interviewed many of the dramatis personae.

Professor Manwaring is not a lawyer. Indeed, he is not even a teacher of law, but of political science. Nevertheless, he exhibits little reticence in passing judgment on the strategy of counsel or on the soundness of arguments presented by counsel or adopted by courts. This reviewer, an active practitioner in the type of litigation related in this book, would feel quite uncomfortable if his strategy and claims were subjected to the same scrutiny as those of the attorneys in the various flag salute cases. No small number of the arguments condemned by the author as "frivolous" and "weird" seem quite reasonable, if not necessarily irrefutable, to this reviewer, who probably would have made the same arguments had he been counsel in the particular cases in which they were advanced.[3]

2. Conscientious objectors to military training in state universities apparently lack the perseverance of conscientious objectors to flag saluting. In Coale v. Pearson, 290 U.S. 597 (1933) (per curiam), the Court dismissed for want of a substantial federal question an appeal from a Maryland decision upholding compulsory military training against religiously motivated objectors in a tax-supported university. The next year, in Hamilton v. Regents of the Univ. of Calif., 293 U.S. 245 (1934), the Court found the claim sufficiently meritorious to warrant a full-scale hearing of an appeal, but affirmed without dissent the adverse state court decision. The objectors appeared to have lost hope at this point and abandoned the battle. Perhaps had they persisted they might have gotten a dissent the next time around and—who knows?—ultimately even a majority. Conscientious objectors to compulsory Sunday observance laws may have greater persistence and may be rewarded by better luck. In Friedman v. New York, 341 U.S. 907 (1951) (per curiam), the Court dismissed for want of a substantial question an appeal brought by this reviewer from a decision upholding a state Sunday law against an Orthodox Jew who observed Saturday as his Sabbath and refrained from secular business on that day. A decade later the same claim and the same arguments in support of it were deemed sufficiently reasonable not only to warrant the noting of probable jurisdiction but also to win the approval and acceptance of three of the nine Justices. Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961). It is safe to predict that the effort will again be made, and it is possible that in some future attempt two additional Justices may be persuaded, and victory will thus be achieved.

3. E.g., the author characterizes as "weird" the claim asserted in one case that a flag salute requirement that does not include private schools discriminates arbitrarily against

From a legal approach, the author views the flag salute controversy as a struggle between competing constitutional standards. On the one hand, there was the "secular regulation" rule: "*There is no constitutional right to exemption on religious grounds from the compulsion of a general regulation dealing with non-religious matters.*" (p. 51.) On the other, is the "weighing" standard: In any case in which a governmental regulation restricts the free exercise of religion, the reviewing court must weigh the particular circumstances to determine whether the social need for conformity with the regulation is great enough to override the individual's religious claim. (p. 48.) The courts which, before *Barnette*, upheld compulsory flag salute regulations accepted the former standard;[4] those which reached a contrary conclusion espoused the latter.[5] Paradoxically, Mr. Justice Jackson, speaking for the majority in *Barnette*, invalidated the regulation but quite patently refused either to adopt the "weighing" test or to reject the "secular regulation" rule.[6] He accomplished this feat by deciding the case not as one involving freedom of religion, but rather freedom of speech, even though in so doing he was required to interpret the first amendment's ban on laws abridging freedom of speech as encompassing not only freedom of silence (nonrecitation of the pledge of allegiance) but also of inaction (nonsaluting of the flag).

Complicating the problem is the presence of a third possible test: the "clear and present danger" test. Under this theory, a restriction on freedom of religion, as of any other form of expression secured by the first amendment, is constitutionally justifiable only if in the particular circumstances it is clearly and immediately necessary to avert a danger which the Government has the right to avert. (pp. 52-55.) This test, too, would seem to require invalidation of the compulsory flag salute regulation, at least as enforced against the insignificantly few Jehovah's Witnesses' children who conscientiously object to it, for can it be seriously urged that any grave danger to the republic exists if the idiosyncracies of this tiny minority are respected?

Professor Manwaring refuses to choose among these competing standards. Each, he says, has its drawbacks, and "which is preferable would seem almost a matter of taste." (p. 253.) The difficulty with the author's analysis is that these standards are hardly as distinct and independent as he assumes. A conscientious objector is bound by a "secular regulation" only if it accords with substantive due process, and one of the factors that is certainly relevant in determining that question is whether the regulation necessarily infringes upon religious rights protected by the first amendment, including the right to the free exercise of religion. While *Pierce v. Society of Sisters*[7] was not technically a religious liberty case, as is evident from the fact that a single decision and opinion encompass the secular Hill Military Academy as well as religious parochial schools, and the opinion does not even mention

children attending public schools. Manwaring, Render unto Caesar: The Flag Salute Controversy 65 (1962). He characterizes as "bordering on the frivolous" the Jehovah's Witnesses' "appeal to the equal protection clause of the Fourteenth Amendment, and repeated arguments by the school authorities that public education is a privilege withdrawal of which does not raise a constitutional question." Id. at 35.

4. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940); Gabrielli v. Knickerbocker, 12 Cal. 2d 85, 82 P.2d 391 (1938), cert. denied, 306 U.S. 621 (1939).

5. Minersville School Dist. v. Gobitis, 108 F.2d 683 (3d Cir. 1939).

6. 319 U.S. at 625-42.

7. 268 U.S. 510 (1925).

religious liberty, nevertheless, it is quite obvious that a unanimous Court held the "secular regulation" violative of due process, at least in part, because it interfered with the rights of parents to raise their children religiously. A state may, without violating due process, forbid the distribution of commercial handbills on public streets,[8] but it may not forbid similar distribution of religious handbills[9] because in the former case only business interests are affected whereas in the latter religious freedom is restricted.

So too, "weighing" is necessarily involved in any application of the "clear and present danger" test; the weightier the communal interest to be protected, the less clear and immediate the danger to it must be in order to justify governmental intervention.

But the real difficulty with Professor Manwaring's thesis is his assumption that constitutional controversies are resolved by constitutional tests. His whole book shows the unreality of that assumption. The explanation for the fact that children of Jehovah's Witnesses attending public schools may not today be compelled to salute the flag or pledge allegiance to it is not to be found in a judicial shifting from a "secular regulation" test to a "clear and present danger" or "weighing" test. It is to be found rather in facts such as the unanimous hostility to the contrary ruling in *Minersville School Dist. v. Gobitis*[10] on the part of many law reviews, including every Catholic law review in the country which commented on it. It was not a constitutional test that put *Gobitis* to rest; it was the enlightened conscience of the American people.

LEO PFEFFER*

The Nuremberg Trial. Joe J. Heydecker and Johannes Leeb. Edited by R. A. Downie. Cleveland and New York City: World Publishing Company. 1962. Pp. 398. $6.00.

To confine within the covers of a book under four hundred pages, a reasonably accurate record of the Nuremberg Trial is quite a job. The trial of the Major Axis War Criminals by the International Military Tribunal opened on November 20, 1945 and concluded on August 31, 1946. Excepting only the Japanese war crimes trial, this was the longest trial in history. Any account of a trial involving nineteen individual defendants, a sixteen thousand page trial record, over thirty-three hundred documents, two hundred and forty witnesses and well over a hundred lawyers necessarily involves an editing task of fantastic proportions. The authors have not attempted to "brief" the trial. Rather, they have taken a somewhat unique approach in that they have attempted to use the record of the trial as a framework of reference around which to weave a sequential historical record of the major facts and factors in Nazi history which brought the leaders of Nazi Germany to the dock at Nuremberg. Quite properly is the book subtitled, "A History of Nazi Germany as Revealed Through the Testimony at Nuremberg."

Here we find briefly and lucidly set forth the prime incidents in the course of conduct adopted by the leaders of Nazi Germany from 1933 to the Götterdämmerung

8. Valentine v. Chrestensen, 316 U.S. 52 (1942).

9. Schneider v. State (Town of Irvington), 308 U.S. 147 (1939).

10. 310 U.S. 586 (1940).

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of 1945. True, the niceties of political hierarchy within the National Socialist Party are not set forth in sufficient detail to satisfy the student of the era. However, there is more than enough background information to provide the interested reader with a solid outline as a springboard for more particular research. Here will be found succinctly stated the theory of the Nuremberg Trials as well as an outline of the indictment charging conspiracy, crimes against peace, war crimes and crimes against humanity. There is adequate information to acquaint the reader with the personality and background of each individual defendant. For example, while there are indications that Hermann Goering was widely considered by his German contemporaries to be the "modern man of the Renaissance" with an I.Q. (as determined by American psychiatrists) of a surprising 138, nevertheless, the reader is quickly disabused of the image of geniality by repeated references to documentary evidence of his gross criminal conduct, such as the stenographic transcript of a meeting attended by Goering as early as November 12, 1938 quoting him: "It is absurd to empty and set fire to a Jewish store when a German insurance company has to cover the damage. . . ." (p. 168.) It is appropriate to note that the authenticity of not one of the documents introduced into evidence at the trial was questioned by any defendant.

This volume has greater significance than an ordinary work of this character in that it was written by two German newspapermen, one of whom had served for six years in the German Army during World War II and who had attended the entire trial. The book was originally published in German by Berlin publishers in 1958. With a background such as this, the reader avidly searches its pages for expressions of opinion by its German authors to learn the effect of the trial upon Germany and the postwar German. This search proves most unrewarding since there is only one indication in the entire book as to the effect the trial may have had in their country. The authors' research has been accurate. They have not flinched at disclosing the most bestial acts of torture and execution by their fellow countrymen but limit their comment on all the horrors set forth to the single question. "Have these things been consigned to oblivion already?" (p. 347.) Of course, the very fact of their authorship and the publication of this book in Germany is indicative of their intention that an impartial and continuing effort be made so that the Germany of today and the world shall not forget the horror unleashed upon the western world by the maniacal ideology of National Socialism.

While one should not criticize a book for what it is not, nevertheless, it is to be regretted that a volume which is clearly a result of considerable research should not have been the subject of more detailed annotation and identification of source material. While a reviewer cannot undertake the task of research to verify the accuracy of unannotated quotations; nevertheless, where one has participated in the work of the trial, it is only fair to note that this reviewer has no quarrel with either the accuracy of the documentary proof or the type of documents selected to reflect the fact and flavor of those momentous times. Of course, reference to many documents of prime interest has been omitted in the interest of brevity, but a sufficient number have been included lending great power and authenticity to this historical record. A prime example of the type of document used to verify and support the accuracy of the authors' job of reporting are the stenographic minutes of Hitler's conferences (the original notes and transcripts as unearthed by Army Intelligence and Office of Strategic Services personnel), Jodl's Diary and the German Army (O.K.W.) records (two carloads of which were captured by the American Army together with their cataloging personnel, who assisted at the trial).

The authors' work is one, which is in a sense, too strictly objective. In truth, it is repertorial in style and might well have been completely written in 1946, so substantially does it ignore the many years which have passed, the subsequent trials which resulted from this first major trial and the continuing efforts of the West German Government to apprehend the so called "lesser" war criminals. The book is clearly intended to have as wide a readership as possible and makes intelligible, on a broad basis, the highlighted war crimes which were written up in rather spasmodic fashion at the time of the trial. It does a good job of identifying the defendants and briefly advising the reader of the posture each defendant assumed or claimed to have had thrust upon him during the days when he controlled the destinies of the German people. The authors have skirted most of the complexities which plagued the allied staff of lawyers in their preparation for trial. Questions such as the interlocking relationships of governmental, quasi-governmental, paramilitary and political bodies are intentionally omitted, and to this extent, the work is guilty at times of an oversimplification of the complex issues involved. The problems of jurisdiction and international law, which have been and still are of considerable interest to all lawyers, have been almost completely ignored. Thus, we are left with a straight-forward, factual recital of the more important incidents indicating the proof of the crimes charged. But for the fact that this reviewer saw the documents, talked to the defendants and witnesses and worked with the lawyers and the judges, this could be a fantastic novel embodying the wildest imaginings of an Edgar Allan Poe. Indeed, the cold factual recital of the murder of millions of innocent victims is almost incredible even to the informed.

While one could have wished for a more definitive and detailed work from two such well-informed authors, the book is a valuable addition to the literature on this subject in days such as these when the Hitler technique of simulating and stimulating so called "aggressive" conduct by peace-loving nations is once again in vogue. A book which recounts and warns the world against submitting to the evils of power abused to the nth degree, of gross irresponsibility in high office, of amorality at all levels of government and of cruel disregard for the rights of the individual, is a book that can always be welcomed.

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