

## BOOK REVIEWS

### ONE MAN'S STAND FOR FREEDOM. By Irving Dilliard. New York: Random House 1963. Pp. 504. \$7.50.

Much can be said against compilations of the works of men whose career and production of more works continues unabated. Selectivity and evaluation are necessarily tentative.

Irving Dilliard, former staff member of the St. Louis Post-Dispatch, has attempted to overcome that difficulty in his book on Justice Hugo LaFayette Black by choosing only opinions relating to the Bill of Rights and arranging them chronologically. The result is a collection of seventy-five opinions, sans citations and footnotes, made readable for the layman and referable for the lawyer. Of the 97 Justices who have been appointed to the Supreme Court, only 16 have served as long as Justice Black. The collection in Dilliard's book corroborates his conclusion that "beginning with the very foundations of the Republic, no one else has stood up so resolutely over so long a period in times so trying for the sacred freedoms of the individual American under the Bill of Rights."

Black's first significant civil liberties decision was rendered in 1938, in reversing a conviction of two counterfeiters who appeared without counsel at time of trial and sentencing. *Johnson v. Zerbst*, 304 U.S. 458. He brushed aside the contention that they had failed to demand counsel at the trial, by stating: "The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution. . . ."

In 1942, Black dissented in *Betts v. Brady*, 316 U.S. 455, when the majority would not compel a state court to require counsel for a defendant in a serious criminal case. "The Sixth Amendment makes the right to counsel in criminal cases inviolable by the Federal Government," he wrote. "I believe that the Fourteenth Amendment made the Sixth applicable to the States."

And he was consistently maintaining the same posture in 1962. In *Carnley v. Cochran*, 369 U.S. 506, nearly a quarter of a century after *Johnson v. Zerbst*, he was still insisting that it was time "to abandon this vague, fickle standard for determining the right to counsel of a person prosecuted for a crime in a state court" and make

it mandatory in every case "whether it is their life, their liberty, or their property which is at stake in a criminal prosecution."

Right-to-counsel cases are merely one of numerous examples of the theme Dilliard urges: that in term after term, the same issues come up repeatedly. The form is slightly different, the names and locale vary, but Bill of Rights tests have arisen again and again, "some have been won and then lost, others have been lost and then won." Throughout his judicial career, Black has spoken up for the individual and his rights. He has been remarkably unwavering—with two noteworthy exceptions, and in one he publicly recanted.

In *Minersville School District v. Gobitis*, 310 U.S. 586, Black went along with the 8-1 majority (only Harlan Stone dissented) compelling Jehovah's Witnesses school children to salute the flag, despite contrary religious scruples, or to be expelled from school. That was in 1940. By 1942, he had misgivings, as did Justices Douglas and Murphy. The three made a confession of judicial error unparalleled in court history. Their dissent in *Jones v. Opelika*, 316 U.S. 584, related, "Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided." They added gratuitously that our form of government "has a high responsibility to accommodate itself to the religious view of minorities, however unpopular and unorthodox those views may be."

Yet there are limits to that concept, Black was to reason out further the very next year. By then Justice Rutledge had succeeded Byrnes, and in another flag salute case, *West Virginia v. Barnette*, 319 U.S. 624, Jehovah's Witnesses children won the right to refrain from saluting. In a concurring opinion, Black noted that "no well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. . . . Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers. . . ." In this instance, mere words of loyalty, he found, did not require such obedience. Our domestic tranquility did not demand little children to participate in a ceremony which causes them fear of spiritual condemnation. "If," he wrote, "their fears are groundless, time and reason are the proper antidotes for their errors."

In the foregoing cases, there was a demonstrable metamorphosis. Not so, however, in the other judicial aberration in Black's career, the *Korematsu* case, 323 U.S. 214. He chose to find the Japanese exclusion order during the war was not "because of racial prejudice,"

and that even though there was no evidence of the petitioner's disloyalty, it was proper to exclude him from the coast because "there were disloyal members of that population whose number and strength could not be precisely and quickly ascertained." This, of course, was hardly protective of Fred Korematsu's rights as an individual American citizen. It stamped him with collective blame for the conduct of others whose only relationship with him was common racial ancestry. Justice Roberts found "a clear violation of constitutional rights"; Justice Murphy wrote that in the absence of martial law the exclusion order went over "the brink of constitutional power" and Justice Jackson held this to be an unlawful military expedient.

Black departed from principle, and rationalized that this was wartime, that the court cannot second-guess the military from the calm perspective of hindsight, and besides, "hardships are part of war, and war is an aggregation of hardships." This was not one of Mr. Justice Black's lofty contributions to jurisprudence.

It might be noted parenthetically that Black held a Japanese resident alien could not be deprived of a civil claim against an individual (*Ex parte Kawato*, 317 U.S. 69), but even there he suggested that an all-powerful government might take such steps.

With the foregoing exceptions, Dilliard's compilation reveals a steadfastness to principle that justifies the tributes paid to Mr. Justice Black in 1962 on his 25th anniversary as a member of the court. It is inevitable that there will be more laudatory evaluations in the period ahead as he approaches the inexorable termination of a magnificent judicial career.

When Black refused in 1962 to vacate orders of the Court of Appeals compelling admission of James Meredith to the University of Mississippi (*Meredith v. Fair*, 371 U.S. 828), he was no "Johnny-come-lately" to the cause of equal rights for Negroes. From the outset of his judicial career, he became a champion of minorities in their striving for constitutional guarantees. The second opinion he wrote was *Pierre v. Louisiana*, 306 U.S. 354, in which a murder conviction was reversed because of systematic exclusion of Negroes from jury service. Undeviatingly he held in *Smith v. Texas*, 311 U.S. 128, that "if there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand"; he voted for certiorari in *Rice v. Sioux City Cemetery*, 349 U.S. 70, involving the right of an Indian to be buried in a chartered cemetery and concurred in *Bates v. Little Rock*, 361 U.S. 516, that the First Amendment protects freedom of association regardless of race.

Most significant, perhaps, have been Black's opinions in the broad field of freedom from unwarranted governmental interference. That the individual is paramount as against an overreaching bureaucracy—even in the area of law enforcement—has been his consistent belief. Thus we find him protecting peaceful picketing as a form of free speech in *Milk Wagon Drivers Union v. Meadowmoor*, 312 U.S. 287; permitting criticism of courts in *Bridges v. California*, 314 U.S. 252; voiding a conviction because of an inquisitorial confession in *Ashcraft v. Tennessee*, 322 U.S. 143; permitting public employees to participate in public affairs and political campaigns (*United Public Workers v. Mitchell*, 330 U.S. 75); holding California's alien land law violated the Equal Protection Clause (*Oyama v. California*, 332 U.S. 633); prohibiting summary deportation of aliens, in peace or war (*Ludecke v. Watkins*, 335 U.S. 160); speaking out against test oaths (*American Communications Association v. Douds*, 339 U.S. 382); holding teachers should not be penalized for their thoughts and associates (*Adler v. Board of Education*, 342 U.S. 485); finding that a House committee exceeds its power when it exposes for the sake of exposure (*Barenblatt v. United States*, 360 U.S. 109); ruling that the exclusionary rule applies to state prosecutions (*Mapp v. Ohio*, 367 U.S. 643).

The other area in which Black's influence has been manifest is First Amendment cases involving religion. While in *Everson v. Board of Education*, 330 U.S. 1, he found the First Amendment did not prohibit New Jersey from using tax funds to transport pupils to parochial schools, in *McCollum v. Board of Education*, 333 U.S. 203, he held religious instruction in public schools violated principles of separation of church and state. A majority agreed with him. But in *Zorach v. Clauson*, 343 U.S. 306, he was in the minority, insisting "released time" was also invalid. His words were simple and eloquent: "State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government should not be allowed, under cover of the soft euphemism of 'cooperation' to steal into the sacred area of religious choice."

Dilliard's book concludes with an interview with Justice Black by Professor Edmond Cahn of New York University Law School on April 14, 1962. In it, Black confirms the views expressed in his controversial James Madison lecture that there are absolutes in the Bill of Rights. "I want this Government to protect itself," he said, but "I think it can be preserved only by leaving people with the utmost freedom to think and to hope and to talk and to dream if they want to dream. I do not think this Government must look to

force, stifling the minds and aspirations of the people. Yes, I believe in self-preservation, but I would preserve it as the founders said, by leaving people free. I think here, as in another time, it cannot live half slave and half free."

Certainly it must be said that the public acts of Hugo LaFayette Black square remarkably well with his words.

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**IN SEARCH OF CRIMINOLOGY.** By Leon Radzinowicz.  
Cambridge, Massachusetts: Harvard University Press.  
1962. Pp. vii, 254. \$4.75.

At the 1963 California State Bar Convention, Chief Justice Phil S. Gibson, in the course of an address to the profession, stated: "History will judge the quality of a civilization by the manner in which it enforces its criminal laws." This remark by the Chief Justice indicates the larger problem to which the author of the new book *IN SEARCH OF CRIMINOLOGY* has addressed himself.

In a sweeping appraisal of the origins and growth of criminology, which he defines as "a study of crime, its conditioning, its prevention, and its treatment," the author uses a broad canvas of time and space. Placing the origins of what we would concede to be modern criminology in turn-of-the-century Italy, he traces its development through France, Austria, Germany, Belgium, and the Scandinavian countries. The impetus of this study, both in connection with its impact on the criminal law and its teaching in the various colleges and law schools, passed then from pioneer Italy through Central Europe and eventually to America. Initially the Italian positivists negated free will in their concept of criminal responsibility and based their view upon the needs of society, concerning themselves not with the guilt of the offender but with his potential danger to the community. It is interesting to note that in this area discussion continues to be of paramount interest today, as witness the expanding interest in mental illness as it relates to criminal responsibility. California has recently created a Governor's Commission for just such a study; it is probably, in my opinion, the most expanding and complex concept in our criminal law.

The author outlines the development in Austria of a methodology of investigation under Hans Gross, where a criminal clinic was estab-

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