

June 1954

Book Reviews

William F. Zacharias

Donald Campbell

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

Recommended Citation

William F. Zacharias & Donald Campbell, *Book Reviews*, 32 Chi.-Kent L. Rev. 274 (1954).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol32/iss3/5>

This Book Review is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

BOOK REVIEWS

SUPREME COURT AND SUPREME LAW. Edited by Edmond Cahn, Bloomington, Indiana: Indiana University Press, 1954. Pp. ix, 250.

Justice Hugo L. Black, not always treated in kindly fashion in this series of essays on constitutional law, has proved himself to be both an accurate and an impartial book reviewer. He wrote, for reproduction on the dust jacket, that this work, one about courts, government and liberty, was "interesting and valuable reading—even for those who, like me, disagree with many of the views expressed." He also correctly predicted that "few who read the fascinating first chapter can refrain from reading all the others." Had he written more, he doubtless would have said that the essays, in general, represent a systematic stock-taking conducted by a group of outstanding experts on the doctrine of judicial review as a means of celebrating the one hundred and fiftieth anniversary of the historic decision in *Marbury v. Madison*¹ but, more to the point, with an eye on the future prospects of that doctrine and the extent to which it may have to be modified if it is to become a fully potent factor in government under a constitution. If he chose to say anything further, it would probably have been that some parts of the work, including the stenotype record of the discussions attendant on their oral presentation at certain meetings held last year at New York University School of Law, possess that irregular appearance typical of round-table conferences but that, in the main, the essays bear evidence of serious study and reflection, fulfilling the primary design of the enterprise.

To these thoughts, or probable thoughts, of Justice Black, this reviewer would add that Professor Cahn's brief, but welcome, introduction puts the *Marbury* decision in its best historical light by revealing how, through it, a constitutional system designed to be perpetual in its objective and virtually immutable in its content became changed in its basic theory to one of practical efficacy and adaptable in its application, depending more nearly on appeal to the courts, rather than to Heaven, for workability. His added sidelight into a little-known episode in the personal history of John Marshall and the probable effect it had on the *Marbury* holding may do much to settle the argument over whose ideas really do shine through the fabric of the great Chief Justice's text.

Concerning the other essays, it could be said that it would appear to be Professor John P. Frank's pessimistic view that the doctrine of judicial review, as currently applied, amounts to little more than an "empty

¹ 5 U. S. (1 Cranch) 137, 2 L. Ed. 60 (1803).

ceremonial," at least at the national in contrast to the state level. His thought tends to co-incide with the one held by Professor Hunt who doubts the efficacy of the Marbury decision itself as a potent constitutional force. He seems to believe the Supreme Court has accomplished more by way of making the Constitution into a truly supreme instrument of public policy through those processes inherent in the job of statutory interpretation. Mr. Curtis, author of a well-known work on the Supreme Court, by contrast, expresses the thought that the decision made it possible for the court to take over the function of interpreting and declaring an immanent law, partly controlling but at times yielding to the will of the public majority, so as to save the judges, in Ehrlich's metaphor, from being delivered up, bound hand and foot, without a will of their own.

Another enlightening essayist, Professor Freund, who has previously written on the subject of understanding the Supreme Court, comments first on the importance of a good lawyer-like presentation of the facts in constitutional law cases, not only the negative type of facts revealed in a "Brandeis" brief but as to those positive matters needed to overcome presumptions of constitutionality which stem from the Marbury holding. He gives even more basic and extended treatment to issues of federalism and to the importance of the proposition that the Supreme Court ought, as Marshall suggested it should, avoid decision on abstract constitutional questions except when a decision becomes necessary in the course of a controversy between parties whose interests are conventionally represented before the court. He differs, in this respect, from certain opinions advanced by Dean Bischoff on the point of a given litigant's status to challenge constitutionality. It is regrettable that these last-named individuals apparently wrote and spoke in advance of learning how the Supreme Court would hold with respect to certain cases then before it.² Their revised views could make interesting reading.

An evaluation of the overall performance to be found between the covers of this book might be expressed in the form of Professor Powell's suggested Restatement on the subject of congressional power over interstate commerce.³ To paraphrase, with apology to the brilliant source,

² On the question of saving interstate commerce from local taxation, see the holding in *City of Chicago v. Willett Co.*, 344 U. S. 574, 73 S. Ct. 460, 97 L. Ed. 559 (1953), noted in 31 CHICAGO-KENT LAW REVIEW 353. Dean Bischoff must have enjoyed the decision in *Barrows v. Jackson*, 346 U. S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953), noted above at p. 226, for the court there, despite Chief Justice Vinson's dissent, settled a grave constitutional issue with respect to civil rights when the parties whose "equal" rights were up for vindication were not directly involved in the litigation.

³ He is, at page 96 of this book, said to have submitted a draft reading: "*Black letter text*: Congress has power to regulate interstate commerce. *Comment*: The states may also regulate interstate commerce, but not too much. *Caveat*: How much is too much is beyond the scope of this Restatement."

such a restatement could read: "*Black letter text*: The Supreme Court has the power to make supreme law. *Comment*: How this power is to be exercised is not a matter over which agreement exists. *Caveat*: The extent to which disagreement exists is not for this reviewer to state." Everything else is left to the judgment of the reader.

W. F. ZACHARIAS

EXAMINATION OF INSURANCE COMPANIES: Lectures delivered before the Examiners of the New York State Insurance Department. Adelbert G. Straub, Jr. New York: New York State Insurance Department, 1953. Volume 1, pp. xviii, 571; Volume 2, pp. xxx, 787.

An in-service training program designed to extend over a period of three years could well be expected to be both a detailed and a comprehensive analysis of a job to be done. It is not surprising, therefore, to learn that the two volumes here considered are but part of a set eventually intended to run through six volumes and a complete index. It is astonishing, however, to find, under the apparently dry title given to this set, so many pages of interesting, absorbing, and almost exciting information.¹

By means of this group of lectures, given and to be given by eminent authorities whose activities range through law, medicine, accounting, and finance, it is the plan of the New York State Insurance Department to instruct its junior and assistant examiners in the proper pursuit of their duties while, at the same time, giving them an educational background in the field of insurance, in current practices in the insurance business, and the problem faced in the nation's largest non-governmental financial activity. By putting these lectures into printed form, the Department has also made this mountain of information open to examination by others.

Turning to the volumes currently available, it may be noted that the detailed treatment of the subject, as found in the first volume, deals definitively with agencies of regulation operating in the insurance field² and with forms of insurance coverage. It is doubtful whether any other

¹ Consider, for example, the fact that Benjamin Franklin, in 1752, formed an organization to cover risk of loss by fire which would not insure residences surrounded by shade trees. The competitive nature of the insurance business was quickly revealed when another group was promptly organized to insure houses only if they did have shade trees around them! These are not isolated instances of pleasurable reading for even the most technical of the lectures presents lively, as well as valuable, thoughts on the subject.

² The importance of the New York State Insurance Department in the field of regulation may be seen from the fact that it exercises jurisdiction over the largest of the American life insurance companies, as well as over several of its closer competitors. It also examines into the affairs of literally hundreds of other companies whose activities range from fire and marine insurance on the one hand to medical expense indemnity plans on the other.

published treatise presents the compressed and clear, yet precise, description of current areas of underwriting activity which may be found therein. The chapter on life insurance, for example, makes plain the basis for arriving at equitable premiums. Chapters dealing with Non-profit Hospitalization and Medical Indemnity insurance and with Group Insurance Retirement and Employee Welfare Benefit plans throw light on areas which have, most recently, been the subject of intense public interest. Matters of this character should prove helpful to lawyers who are not specialists in insurance law for they, by referring to this volume, may enhance their preparedness for the anticipated client with an insurance claim. The thread of legal thought is never conspicuously brought to the foreground but it does run persuasively through almost every part of this volume.

The second volume, opening with an intriguing chapter on applied psychology, useful in connection with the human approach to insurance company examinations, contains a series of chapters dealing separately with the objectives contained in the function of examination and regulation. The techniques to be applied in that connection are satisfactorily described by leading staff members of the New York State Insurance Department who concentrate their specialized experience into a most readable form. Both volumes are replete with charts, exhibits, tables and forms. If the promise contained in the first two volumes is carried into execution, the entire set should be in the hands of every salesman, broker, agent, auditor, executive, and lawyer employed by any insurance company. The value thereof should not be overlooked by workers in insurance departments of other states.

D. CAMPBELL

ENEMIES OF THE STATE. Francis X. Busch. Indianapolis, Indiana: The Bobbs-Merrill Company, Inc., 1954. Pp. viii, 299.

Encouraged by the acclaim accorded to the first three volumes in his series of notable American criminal cases,¹ Mr. Busch has again furnished his readers with another spirited and non-technical account of four more cases of unique importance in the annals of criminal justice. The theme of this volume, in contrast to themes found in earlier ones, bears directly on situations existing when the national government, treated as a political entity rather than as an organization generally concerned with inimical conduct, found its safety directly endangered to a greater or a lesser degree. The selection of cases designed to carry out this theme could not be

¹ For reviews of *Prisoners at the Bar* (1952) and *Guilty or Not Guilty* (1952), see 30 CHICAGO-KENT LAW REVIEW 292-3. The third in the series, entitled *They Escaped the Hangman* (1953), was reviewed in 32 CHICAGO-KENT LAW REVIEW 105-6.

improved upon. The treatment given to those cases matches the high standard of performance previously displayed. Once again, a capable lawyer, possessed of a warm yet forceful style of expression, has reduced long and complicated records to understandable size without passing over a single significant fact or losing the least of those emotional or other factors which make records of this character important to all citizens.

The first of the current condensations deals with the trial of Mrs. Surratt and others for complicity in the assassination of President Lincoln. Mr. Busch's account adds nothing new. It does, however, emphasize the native wisdom of seeking to attain justice through a fair and impartial trial with the aid of a jury in contrast to the perversion of justice which can flow from a summary proceeding before a military or other non-judicial tribunal. Americans should learn from this case, if they have not already done so, that true liberty cannot be guaranteed so long as star-chamber methods are tolerated. In sharp contrast, the fourth condensation, treating with the prosecution of the Rosenbergs for transferring atomic bomb secrets to Russia, reveals a proud record, despite propagandist efforts to besmirch it,² of due administration of criminal justice taken in full conformity with every aspect of constitutional due process.

The second of the subjects treated, not limited to a single proceeding but covering all of the actions arising from the Teapot-Dome scandal of the Harding administration, provides a masterly synthesis of a complicated story, one pointing to the moral that no man, rich or poor, of high or low estate, is above the law, nor should be. One aftermath of that prosecution, not mentioned by the author, is ironical in character. The very thing which began it all, a degree of concern by the Navy Department over adequate storage facilities for, and the presence at Pearl Harbor of, a usable supply of oil to provision the Pacific fleet, instead of a supply of unusable crude oil in the ground, became a vital factor in the safety of the nation some twenty years later. Rightful apprehensions in that respect, of course, afford no justification for the shameful bribery in high places which followed. The whole story does, though, serve to illustrate an American sense of awareness concerning the problems of the future as well as a determination to be prepared to meet them despite occasional lapses on the part of public officials from the paths of rectitude.

A first glance at the author's discussion of the prosecution of Alphonse Capone for income tax evasions, constituting the fourth member

² As time goes by, it would seem as if each new generation of the American populace must be subjected to at least one such barrage, whether emanating from devious sources or put on by well-motivated but misguided partisans. Compare the situation in the Rosenberg case with that which occurred some thirty years ago in relation to the Sacco-Vanzetti case. The parallel will become complete when another author turns out a second "Winterset."

of the current quartet, would lead one to the impression it was outside the general frame of reference. True it is that any person who fails to provide proper financial support for his government is, to the extent he is derelict, an enemy of the state but one would rarely think of the tax dodger as being on the same plane as the traitor, the assassin, or the delinquent official who breaches the public trust. Nevertheless, as Mr. Busch points out, the real significance in the Capone case lies not in the crimes charged but in the lesson offered with respect to the tragic impotence which can paralyze local law enforcement whenever and wherever average citizens, being the only real supporters of law and order, are willing to sacrifice principle for moments of peace, pleasure, or profit. Fighting against the internal "racket," the word itself forms a grim and relatively recent addition to language, can be more deadly and desperate than meeting attacks from without. The battle will be lost, despite an occasional successful prosecution, if ordinary people do not soon wake up and join in the fight. If the author's inclusion of the Capone case helps to drive home that thought, none will cavil with his choice of subjects. Instead, all will join in waiting for additional volumes from his pen.

THE LEGAL AID SOCIETY: New York City, 1876-1951. Harrison Tweed. New York: The Legal Aid Society, 1954. Pp. ix, 122 (Paper).

Seventy-five years of history involved in the job of securing equal justice under law to all, particularly the poor who might otherwise have gone without fair treatment, have gone into this compressed but stimulating report. While dealing to a large extent with the personalities of those who pioneered, or have served, in the legal aid movement in the New York City area, the report also gives a complete factual account of the litigation handled, the advice given, the legislative reforms accomplished, and the policies adopted by the largest of the American organizations operating in the field. A chart included in an appendix reveals the significant fact that financial support, once virtually denied by practicing lawyers who feared a potential inroad upon their own incomes, has climbed progressively over the years, with a relatively larger share coming, in recent years, from the legal profession than from other sources. Other graphs disclose interesting data with respect to case loads handled, areas of disputes covered, and the geographic distribution of clients represented. A detailed bibliography of material on legal aid work has also been supplied, thereby making this report one of the most complete presentations on the subject.

To write about one legal aid organization and its problems is, in effect, to treat with the legal aid program at large for the concerns of the

one are substantially the same as those which face all such groups. Financial deficits, lack of professional interest, difficulty in securing enough devoted personnel are but a few of the hardships which have fallen upon those who have struggled to bring justice to the needy. It is to their everlasting credit that they have not succumbed. By their efforts, the bar has been saved for the time being from the threat of socialization under government domination. It is clear, however, for all to read from this report, that the day has not yet arrived when full and equal justice for every one can be said to be an assured fact. Since the road to that end still lies open, calling for an even greater voluntary effort, the publication of this historical document serves to warn lawyers throughout the country that the time has not yet come for complacent relaxation. Those who would be worthy ministers unto justice should not fail to heed its message.

JUSTICE: An Historical and Philosophical Essay. Giorgio Del Vecchio; translated by Lady Guthrie with introduction and additional notes by A. H. Campbell. New York: Philosophical Library, Inc., 1953. Pp. xxi, 236.

This first English translation of a brief essay on the philosophical quality of justice, originally given by the author as an address before the University of Rome, bears evidence of the fact that, not infrequently, the informal spoken word becomes magnificently complicated when the time comes to place it in print. The text of an oration which may have consumed as much as an hour and a half to deliver, easily set out in some sixty pages, has here become overwritten and underscored with a volume of documentation, at least twice as long as the original text, which lacks the grace of providing additional illumination on the point. Much of the foot-noted material, instead of being helpful, remains in untranslated form in so great a variety of modern and ancient languages as to be beyond the ken of most readers. It is doubtful, therefore, that any substantial use will be made of this book. It does, however, reveal the author's natural law approach to the subject as he comes to the conclusion that justice, as applied in a work-day world, amounts to little more than the "delimitation and intersecting of the mutual claims between subjects." This, in essence, could be said to be little more than a reiteration of the civil law injunction to "live honestly and to render unto each his due."

An appendix, dealing with the philosophical basis for a system of penal justice, carries over into the radical suggestion that an office should be created to exercise surveillance over the way of life of those who have not satisfied their legally recognized debts, nor discharged their responsibility for crimes, by imposing upon the debtor, or the criminal, a series of definite tasks, determined according to capacity and with due regard

for humane considerations, in an effort to bring about reparation for wrong. While not offered as an argument for imprisonment for debt, or for the more modern form of body arrest for non-payment of certain judgments, these being forms of punishment rather than providing for reparation, the author's suggestion for what is, in a sense, a degree of slavery will strike a strange, almost fascistic, note in that part of the world which is striving to uphold the dignity of the individual man.

HOW TO PREPARE A CASE FOR TRIAL. Elliott L. Biskind. New York: Prentice-Hall, Inc., 1954. Pp. xii, 206.

One criticism addressed to current methods of legal education turns on the premise that law schools using the case-method, and most schools do follow that method, devote too much attention to "appellate court" law and too little attention to the working out of cases at the trial level, where confused and confusing fact issues must be resolved before law can be applied. The suggestion has been made that each school should establish a Chair of Facts, or something equivalent thereto,¹ to the end that students may learn not only the importance of facts in the legal process but also something with respect to the manner by which facts may be gathered and assembled for presentation to courts. Thereafter, traditional courses in Evidence and Trial Procedure could be made to cover those points of law and procedure which deal with actual fact presentation and the etiquette of the courtroom. If a course of the type suggested should be established, the instant publication, written by a New York lawyer who specializes in trial work and in counseling others on the handling of cases, could well become the "bible" of that course for it covers the subject from initial interview with the client to the selection of the jury whose function it will be to fix the probable truth of the facts and make possible the application thereto of the controlling law.

Noting that cases, quite frequently, are won or lost in the lawyer's office rather than in the courtroom, the author here offers the benefit of his experience, gained in the preparation of cases, to both practicing lawyers and students who may have an interest in deriving a complete understanding with regard to the true meaning of preparation. Specific guides are suggested, tested forms for organizing material are supplied, satisfactory techniques are worked out, and much cogent advice is offered. Not keyed to the system of any one particular state, nor belabored with distracting footnotes, the book provides a refreshing, illuminating and non-technical discussion of a subject matter which should be understood by every lawyer, whether he tries cases or not.

¹ See, for example, Marx, "Shall Law Schools Establish a Course on 'Facts,'" 5 J. Legal Educ. 524-36 (1953).

GUIDE TO PENSION AND PROFIT SHARING PLANS. Robert S. Holzman. Mount Vernon, New York: Farnsworth Publishing Co., Inc., 1953. Pp. 64 (Paper).

Despite interest shown these days in employee welfare plans, there is little literature which explains, in forthright and simple terms, exactly what such plans are, how they operate, what they will do for both employer and employee, and what tax advantages can be obtained from them. This little booklet should dispel some of the mystery for, by means of a series of questions and answers written in language easily understandable by laymen, it defines the subject, discusses the intricacies thereof, and provides a non-technical guide through the field. It could be an invaluable aid to the management team, both as a presentation piece and as a teaching and training instrument for employees. It is doubtful, however, whether it would serve to satisfy a lawyer who faced the job of preparing a pension or profit sharing plan from scratch.¹

¹ In that connection, see Donovan, "A New Approach to the Profit-Sharing Trust," 32 CHICAGO-KENT LAW REVIEW 107-26 (1954), which analyzes the points a lawyer would need to keep in mind.