BOOK REVIEWS

CIVIL LIBERTIES AND THE VINSON COURT. By C. Herman Pritchett. Chicago: The University of Chicago Press, 1954. Pp. xi, 297. $5.00.

Our leading contemporary historian of the Supreme Court has suggested the provocative thesis that:

"courts love liberty most when it is under pressure least." [1]

Professor Pritchett's little book provides ample materials with which to test this thesis. All of us are aware of the pressures brought to bear against liberty in the years 1946-1953, the years in which Fred Vinson was Chief Justice of the United States. The threat of a formidable enemy abroad and of subversion within produced among us a demand to give our leaders more and more authority, that they might be the better able to defeat these foes. Yet authority is the age-old foe of liberty.

Professor Pritchett has undertaken to show us how the Vinson Court struck the balance between the conflicting claims of authority and of liberty. Probably most of us know that the Vinson Court was not as militantly libertarian as was the Roosevelt Court. Pritchett lets us measure the exact amount that the pendulum has swung.

The first half of this book is a largely descriptive account of the way the Vinson Court handled the principal civil liberties problems with which it had to deal: prior restraints on speech; subsequent punishment of speech; legislative attempts to insure loyalty; the rights of aliens; racial discrimination; and procedural due process. This is followed by an examination of the philosophies of the members of the Court during the period under study. A chapter on "libertarian activism" is concerned with Murphy, Douglas, Rutledge, and Black. A chapter on "libertarian restraint" scrutinizes Justice Frankfurter. A third chapter covers the other six members of the Court. A concluding chapter presents the author's evaluation of these seven years, and his philosophy as to the role the Court should play in safeguarding civil liberties.

The result is an interesting book, an instructive book, a worthwhile book. The result is also a book which is not as good as it might be. The legal analysis is generally sound, and occasionally provocative, as far as it goes—but it does not often go very far. Shortly before reading this book I had occasion to go over the sections on civil liberties in the series of annual articles on the work of the Supreme Court by Professor John Frank. Pritchett falls short of the standard which Frank's analysis sets. Too often

1. Frank, *The United States Supreme Court, 1949-50,* 18 U. OF CHI. L. REV. 1, 20 (1950).

Pritchett is skimpy or superficial. Nor does Pritchett do a consistently good job of presenting the facts of the cases. Many of the civil liberties decisions of the Vinson Court make sense on a legal basis, but become less defensible if one regards the parties to the suits as human beings rather than abstractions. Now and again Pritchett tells us about the people involved. Too often he does not. Indeed the book never mentions what, on its facts, must be the most outrageous decision that nine decent men have come up with in a long time—the case of Jimmy Smith.[2]

Perhaps the most important fact to have in mind is that the Justices of the Supreme Court are decent men. Forty years ago the great Wigmore demanded to know how the Supreme Court could be "callous" to "plain thieving" when "[t]hat these judges entertain the soundest moral sentiments on this subject, no one doubts for a moment." [3] This puzzle is still with us. No one doubts for a moment that the members of the Court entertain sound human instincts, or that they are opposed to all forms of oppression and tyranny, no matter how pretty the legal disguise. Then how can they, term after term, give their approval to the most obnoxious sorts of restrictions on freedom?

The answer, of course, is that the Court, in the name of judicial self-restraint, has felt bound to ignore its personal beliefs.

> "Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime."

Thus Justice Frankfurter in the second flag-salute case [4] apologizing for his dissent. Today a majority of the Court share the Frankfurter position that they cannot elevate their personal convictions into a constitutional standard. Today a majority of the Court believe that they must defer to the legislative judgment, though this judgment mean a lifetime in a concentration camp for Ignatz Mezei,[5] the criminal conviction of a young college student for the peaceful expression of unpopular views,[6] or the denial of the right to petition of a misguided bigot.[7]

There is much to be said, in the abstract, for "libertarian restraint." Pritchett, who takes Justice Frankfurter as his particular hero, says it all. But the proof of this particular pudding is quite clear: the Bill of Rights becomes a pious admonition so long as the judges are unwilling to enforce it. Pritchett criticizes Black and Douglas for

2. United States *ex rel.* Smith v. Baldi, 344 U.S. 561 (1953). The facts are brilliantly presented in Selby, *The Smith Case,* Saturday Evening Post, Aug. 15, 1953, p. 30.

3. Wigmore, *Justice, Commercial Morality, and the Federal Supreme Court; The Waterman Pen Case,* 10 ILL. L. REV. 178, 184-6 (1915).

4. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 646-647 (1943).

5. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

6. Feiner v. New York, 340 U.S. 315 (1951).

7. Beauharnais v. Illinois, 343 U.S. 250 (1952).

> ". . . inadequate recognition of the fact that a Supreme Court justice has a task which is broader than that of safeguarding or enforcing one set of values. He must balance the competing claims of liberty and authority." [8]

This statement by Pritchett is undoubtedly descriptive of the thinking of a majority of the Supreme Court. It is also undoubtedly wrong. The task of a Supreme Court Justice is to enforce the Constitution. The Constitution embodies one consistent and courageous set of values, and it is these which the Court is sworn to safeguard and enforce. The competing claims of liberty and authority were balanced by our people when they adopted the Constitution. Our fathers knew perils, both from without and within, not less serious than those which confront our generation. They also knew how quickly authority can be converted into tyranny. They chose to tip the balance in favor of liberty. And they chose to codify their choice in a Constitution, rather than to leave it at the mercy of a hysterical legislature. It is a choice we can reject, but we must do so by the set processes for constitutional amendment, rather than by a mere legislative determination or the fortuities of changes in the membership of our highest court.

On this analysis the familiar labels applied by Pritchett are seen to be wrong. Who are the believers in "judicial self-restraint"? They are the judges who are willing to protect the Bill of Rights regardless of their own view as to the exigencies of the present time. Who are the devotees of "judicial activism"? They are the judges who substitute their own judgment, or their own unwillingness to interfere with the legislature, for the judgment which the people have expressed in the Constitution.

Proofs are not lacking that the Constitution is just another piece of "old parchment" to the Vinson Court. Thus we are confronted with

> ". . . the plain fact that the interest in speech, profoundly important as it is, is no more conclusive in judicial review than other attributes of democracy or than a determination of the people's representatives that a measure is necessary to assure the safety of government itself." [9]

Insistence that the Constitution be applied according to its terms is repeatedly characterized as "abstract" or "doctrinaire" [10] and we are warned that only "practical wisdom" can prevent us from converting the Bill of Rights into a "suicide pact." [11] It is left to a dissenting Justice to point out that an unprecedented and far-reaching restriction on free speech and the right to petition has been upheld on ". . . the bland assumption that

8. Page 248.

9. Dennis v. United States, 341 U.S. 494, 544 (1951). Compare Brandeis, J., in Whitney v. California, 274 U.S. 357, 372-8 (1927), spelling out the very limited respect due to legislative judgment in this field and the extraordinary nature of the rare case in which an infringement on speech is constitutionally permissible.

10. Niemotko v. Maryland, 340 U.S. 268, 288 (1951).

11. Terminiello v. Chicago, 337 U.S. 1, 37 (1949).

the First Amendment is wholly irrelevant. It is not even accorded the respect of a passing mention." [12]

Senator Bricker and his cohorts, greatly concerned about the preservation of the glorious Bill of Rights, recently asked for a constitutional amendment which would have said that the treaty clause means what it says. Perhaps the Senator should read Pritchett's book and see how the real threat to the Bill of Rights comes, not from treaties, but from Supreme Court Justices who, in their private lives, are passionately devoted to the concepts which the Bill of Rights embodies. Then he could give us a new amendment saying that the Bill of Rights means what it says.

It is obvious that I do not endorse the conclusions which Pritchett expresses. But I do endorse the book. With all its shortcomings, it is the most convenient way to see how much the Vinson Court yielded to the pressures against liberty. Fortunately we need not conclude that the Constitution is gone. Instead we may hope that in better days, when the pressures on liberty are less, the Court will love liberty more and will restore the Bill of Rights to its rightful place in our constitutional thinking.

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CASES AND MATERIALS ON THE LAW OF SALES AND SALES FINANCING. By John Honnold. New York: Foundation Press, 1954. Pp. xxxiv, 679. $8.50.

Were I a handicapper in the Casebook Sweepstakes I would assign Professor Honnold's streamlined entry maximum weight. For, it seems to me, his *Sales and Sales Financing* is clearly the class of its field.

What excites me about this book is not only its method, but the uniform excellence of its execution. Honnold's blend of cases, problems, forms, and commentary is about as satisfactory a solution as I have seen to the problem which plagues all law teachings: How to cope with the growth of law—the proliferation of statutes, cases and changing artifacts married to a broadening sense of relevance—and still maintain that attention to detail, that precision of analysis of particular problems in particular contexts, which is the hallmark of the lawyer and a prime responsibility of legal education. On the one hand, a student must have a sense of direction, an appreciation of the thrust of decisions, a "feel for the feel" of commercial law. On the other hand, he must learn the technique of the craftsman fashioning each part.

Honnold's solution to this near dilemma is not revolutionary. Fewer cases than tradition would prescribe; an increasing use of explanatory text; a major emphasis upon statutes and problems—all this is part of an increasingly familiar pedagogical pattern. But, unlike similar offerings, Honnold's is selective rather than comprehensive in its approach. No

12. Beauharnais v. Illinois, 343 U.S. 250, 268 (1952).

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survey course this. The editor is content to leave problems undiscussed. He is not content to leave those he raises without providing the wherewithal to probe deeply. Skim milk is rarely permitted to masquerade as cream.

Viewing the role of the commercial lawyer principally as that of counselor, Honnold has built his cases and materials around contemporary problems. The point of attention is practical problems in a modern commercial context. He is never far from the frontiers of the law, more often than not driving beyond to as yet unlitigated issues. The detailed treatment he gives to Sales Financing—about half the book is devoted to chattel mortgages, conditional sales, trust receipts and factoring problems—is in line with this basic objective. Here is a mass of relatively virgin statutory material of modern origin serving as the foundation for millions of credit dollars. Add one dose of recession—or even "rolling inventory adjustment"—and the student will be litigating Honnold's problems in court instead of class.

In the normal law school curriculum, Sales is apt to be the student's first intimate contact with legislation. Honnold emphasizes this aspect. His cases and problems require a close reading of, and pondering upon, the language of the Sales Act. Here in the statute is the principle, the rule, the "black letter": How apply it to contemporary commercial practices and practicalities? How square it with other provisions? Does the Uniform Commercial Code provide a different solution, or simply a different analysis? A better one? An easier one to apply? Cases are used to give flesh to doctrinal bones, and these are further supplemented by case briefs, notes and forms. The pedagogical technique, as Honnold himself states it, is "a shift from eyestrain to mental effort." [1]

Admittedly something is lost by this approach. Except for glimpses here and there,[2] one gets little feeling for the history of Sales—for the struggle of the common law to adjust itself to the changing methods and mores of merchants so vividly painted in the articles of Karl Llewellyn [3] and Grant Gilmore.[4] Nor is there much emphasis upon its doctrinal history—that crazy-quilt of principles of property, contract and tort blending with and reluctantly bending to mercantile necessities. There is a fascination in this history—a rich diet for philosopher and historian and a fine training ground to demonstrate and practice the skills and consequences of symbol manipulation.

But much is gained from Honnold's method. Presumably a law school curriculum is designed to equip students with a number of skills. The subject matter and scope of a course is of real significance only as it adapts well to a learning process. Different teaching methods tend to develop

1. Preface, page ix.
2. Particularly the material on warranties, where one could scarcely proceed without historical perspective.
3. *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939); *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939).
4. *Chattel Security*, 57 YALE L.J. 517, 761 (1948).

different skills, give different insights, provide different perspectives. All are valid, and the raw material of sales and chattel security can be moulded to almost any method.

My preference for Honnold's emphasis on current problems derives from my preconception as to the psychological attitude of the advanced law student. First year courses—however denominated—are fundamentally courses in the philosophy, history and way of the common law. Much of the material is musty—though it serves its purpose well. The gap between professor and student is at its greatest; the old shell game is endlessly played. Gradually it serves its teaching function. The tautologies of doctrine are exposed; the student's capacity to analyze and argue is sharpened; he is acquiring a lawyer's sense of relevance. He too can hide the pea under the shell, or smuggle the rabbit under his coat. And he has some sense, one hopes, of the stream of history. It is time to add a new ingredient to the educational potpourri.

The great weakness of the traditional casebook has often been that it fails to take account of the student's increased capacity and skill. The cast and setting are changed—but the plot remains the same.

The case-*cum*-problem method provides a promising variation on the common theme. But the method cannot be separated from its execution. If it is merely a device to cover more ground—to cram more "law" down the student's throat, it is a poor teaching tool. But if, like *Sales and Sales Financing,* it has intensity, as well as grace and skill, it is a welcome change. Its keynote is, I think, its complete honesty and fairness. Honnold has included no "hospital cases." His text, materials and forms are straightforward efforts to provide background. His problems are real ones. His notes contain searching, not "clever," questions. He provides no knowingly false leads. If confusion there be, it is not of his making. In essence his is a partnership with the reader.

It is this integrity which is psychologically so important in harnessing the energy and drive of the sophisticated student. He feels he can get his teeth into some real problems of the type he will face as practitioner. He enjoys egalitarian treatment. He sees for himself the complexity of commercial problems, policy-wise and proof-wise. He sees the importance to counseling of predicting what problems are likely to occur in what context. And he isn't able to get off the hook with a facile generality.

The organization of *Sales and Sales Financing* is largely a function of its method. The book is divided roughly in two halves, the first devoted to sales and the second to security. The sales material is in turn subdivided in two parts: the first deals with the "contract," principally warranties; the second with control over the goods and remedies. By postponing problems of the seller's lien and rights of bona fide purchasers of goods and documents, the editor effects a smooth transition into problems of competing security devices—the second half of the book. Here the various possibilities are paraded roughly in order of seniority, then driven

in tandem through the hazards of bankruptcy, dishonesty and competing liens. The book concludes with default rights and public regulation.

Except for the space devoted to financing, the problems discussed are generally what we would expect. The breakdown of cases, materials and problems within the broad outline is, of course, functional. The problems are those of merchants, not semanticists. Interrelated legislative provisions are read in terms of practice not theory. This presentation facilitates comparison of the most significant provisions of the Code with the Sales Act [5] in terms of operative results. The very different approaches of Williston and Llewellyn come through quite effectively. And if the editor's general sympathy is with the Code, he does not spare its provisions the rigors of close examination—with interesting possibilities.

Honnold has not attempted—I think wisely—to include the law of negotiable instruments as part of *Sales and Sales Financing*. Where essential to understanding particular aspects of documentary transactions, brief explanatory notes and excerpts from the NIL have been inserted. The problem area is thus flagged without diverting attention from the point of emphasis—distribution of goods. The law of negotiable instruments is left for another course; space thus saved is used to examine more intensively than is customary other aspects of financing sales. Whether one approves or deplores this omission is largely a matter of taste. "Integrating" negotiable instruments into "commercial" law is currently fashionable—despite the fact that by "integration" is meant nothing more than random inclusion.

No teacher is ever very satisfied with his own teaching efforts. One defense mechanism is to find fault with those of his colleagues. What faults I find in *Sales and Sales Financing* stem, I think, from envy more than judgment. I would have wished that Honnold had been a little more profligate in his use of cases. He cuts very close indeed to the bone—and one misses old friends. There are, too, times when I think he is untrue to his general thesis of close examination. Letters of credit are scantily treated and without more might well have been omitted. The same is true of accounts receivable financing, which despite its growing commercial importance, is barely mentioned. Finally, a more complete reproduction of typical state statutes in the field of financing might usefully have been added to his pocket-part supplement.

Inevitably there are points of emphasis where I would part company with the editor. For example, his section on the remedies of buyer and seller is, for my taste, too little and, perhaps, too late as well. Yet were I to charge him with merely skimming the surface of difficult and—to me—fascinating material, the excellence of the few cases he includes would blunt the force of my argument.

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5. The same procedure cannot be so extensively or usefully followed in the Sales Financing half of the book. Article 9 of the Uniform Commercial Code represents such a departure from existing law that it must be, and is, treated in a separate section.

Finally, there is still too little of the raw material of business practice. Comparatively, Honnold does as well as anyone. He has included a variety of forms and excerpts on practice such as selections from the Revised American Foreign Trade definitions. Furthermore, his cases and case briefs have been selected with a close eye on their descriptive, as well as their doctrinal, content. Yet, I remain dissatisfied and vaguely disturbed. I continue to feel that we are training commercial lawyers who know too much about law and too little about commerce to serve their clients well. But if this fear is founded, the fault is less with Honnold than with the rest of us. The type of material I think important—*e.g.,* industrial and trade organization, financial structure, marketing methods—does not yet exist in usable form, if, indeed, at all.

In sum, *Sales and Sales Financing* is a stimulating and teachable book. I like its method and admire its execution. Best of all, from the teacher's viewpoint, is the clarity with which relevant material is presented. By using a minimum of explanation and a maximum of suggestion he forces the reader to put the pieces together himself, and thus gain honest understanding. The result is that much valuable class time is saved for fruitful discussion, exploration and argument rather than wasted in routine explanation. Professor Honnold has done the dirty work and done it well. The classroom professor is freed of a chore and can lead—or follow—his students along the path of his—or their—choosing.

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