

BOOK REVIEWS

THE OUTLOOK FOR INTERNATIONAL LAW. By J. L. Brierly. Oxford: Clarendon Press; New York: Humphrey Milford. 1944. Pp. 142. \$2.00.

This little book is one of infinite wisdom. A product of great learning, presenting conclusions reached after sober reflection, it is nicely reasoned, lucidly and succinctly written. It contains thoughts to be taken into consideration by those who build the international order after the war. While only recently available here, it was published in England in 1944. Dumbarton Oaks, San Francisco, the atom bomb have all followed. Of course, there may not be unanimous agreement with all the author's conclusions, but neither statèsmen nor scholars can safely fail to study and reflect upon them.

This is a book of great moderation and patience. It does not attempt to sell a specific nostrum. It recognizes that no matter what kind of an international order is constructed the world may not come to a sad and quick end. Nor is the perfect order likely to be born full-grown. We should profit by past experience (and are fools if we don't). This book is not out of date because of San Francisco. No one can rightly suppose that the present Charter of the United Nations is the final order. Some think it doesn't go far enough; some that it goes too far; some that the atom bomb already has us practically bogged in primeval muck unless we immediately have some other order. Apart from all such impatient views, change will come sometime, somehow, as it generally comes to be believed necessary—perhaps not by the day after tomorrow morning, however. As quoted from John Morley: "In politics we have an art in which development depends upon small modifications. . . . To disdain anything short of an organic change in thought or institution is infatuation."¹

Mr. Brierly begins by pointing out that in building the international order "international law will be one of the instruments that the architects will use."² We will not start anew, for we have an existing system, not "a sort of sociological maid of all work, but a highly specialized instrument."³ Its primary function is to define or delimit the respective spheres in which each state is entitled to exercise authority without trespassing in the sphere of other states. International law does not have the function of regulating all international life. Its normal use is not usually realized because it mostly is not dramatic and is not publicized. But in issues of high politics, states have not heretofore allowed law to dictate policy.

In discussing "War and the Law," the author concludes that the classical attempt "to establish in international law a distinction between legal and illegal war always contained a large element of unreality."⁴ The difficulty has been in determining the "aggressor" and in organizing a collective security which would be overwhelming. These are vital points which must be met through any effective international order. "Vital Interests" exist. But each state should not be entitled to define its own interests without distinguishing those that are reasonable from those that are not. Indeed, vital interests exist inside a state and are recognized by

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municipal law. "Like factions within the state, so states in the society of states must be forbidden to use physical force against one another except in circumstances which are defined by law."⁵ The Kellogg Pact failed because there was no effective organization to back it up. Law does not create order; it can only help to sustain order after it has been firmly established.

Mr. Brierly thinks that the Covenant of the League of Nations will be thought by historians to have been the biggest single step taken towards the goal of international order.⁶ It was not a pacifist document. The principle that war is always a matter of general concern was sound. Under the Covenant, each state was to decide for itself whether it was obliged to take any action because another state had resorted to war in disregard of its covenants. Under the Charter, the Security Council will decide upon action. But the states will furnish the means for taking such action, and it will still be true that "in the last resort all we have to rely on is the willingness of states to keep their promises, whatever the system by which the decision is arrived at."⁷ The machinery is improved, but unless the states carry out their agreements with the Security Council, the machinery will produce nothing. There must be "good arms" to back "good law."

The author makes a happy quotation from Mr. Churchill in the Commons in 1938: "What is there ridiculous about collective security? The only thing that is ridiculous about it is that we have not got it."⁸ The rule of law is meaningless without the rule of force to support it. "The part of the problem of enforcement which is vitally urgent is the subjection to law of the use by states of armed force, and for this generation that will certainly be a sufficient task."⁹ The obvious method is the establishment of a strong central government. Federations on less than a world scale are no solution; they would only reduce the number of states. Mr. Brierly thinks a world federation at this time is not feasible. We need waste no time quarreling about the idea—would the United States agree to it? Not in January, 1946, notwithstanding the atom bomb. We should do the best we can now and rely upon future growth for betterment. Sound indeed is the statement that order "must be secured, if at all, by a sufficient number of states being willing to cooperate or combine together to establish and maintain it."¹⁰ Neutrality is no way out for a state which is appraising whether the risks of cooperation are balanced by the prospective benefits. "It is an expensive way of providing collective security to have to improvise the system after war has begun."¹¹ "It is of the essence of such a system that states should declare beforehand what they will do in future circumstances,"¹² for the great value is in its deterrent effect. It is essential that there be performance when it is due. The system must also be built upon power to perform. Smaller powers have an essential role as well as the greater ones. "The details of the system are not a matter on which lawyers have any special competence,"¹³ statesmen should decide them.

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As to the machinery for the settlement of international disputes, Mr. Brierly finds the existing machinery of international judicature to be in the main satisfactory, and far ahead of other international organization. This court machinery has been substantially continued through the Statute of the International Court of Justice adopted at San Francisco. But judicial decision will not be the most important part of the settlement of international disputes. "The most difficult disputes, those that endanger international peace, are not likely to be settled by courts."¹⁴ Next the book deals with "peaceful change,"¹⁵ concluding: "It looks therefore as though the only kind of procedure of peaceful change that is likely to be practicable in any future with which we need concern ourselves is one in which third states may be able to influence, but not to decide, the manner in which a demand for a change in legal rights is to be dealt with."¹⁶ The author sees no way in which there can be assurance that all disputes will be settled. The veto power in the Security Council certainly gives no such assurance. As Mr. Brierly says there is no such assurance in the institutions of our national public life, how can we expect it in international affairs?

This stimulating book commands attention. It should particularly be read by those who think that international law is a sham and by those others, also misguided, who "seem to think that it is a force with inherent strength of its own, and that if we had the sense to set the lawyers to work to draft a comprehensive code for the nations, we might live together in peace and all would be well with the world."¹⁷ Both these groups will profit by reading it as will those already better informed.

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SAFEGUARDING CIVIL LIBERTY TODAY. The Edward L. Bernays Lectures of 1944 given at Cornell University by Carl L. Becker and others. Ithaca: Cornell University Press. 1945. Pp. x, 158. \$2.00.

In the dim recesses of the reviewer's mind there is lurking a statement made by an author now unknown to him, but it seems to the reviewer that his analogy was particularly apt. He stated that the French treat liberty as a mistress, always to be wooed in order to be retained; the English treat her as an old friend, nothing to get excited about but always good to have and worthwhile retaining; the Americans treat her as a family drudge and eventually, through constant abuse, will cause her to leave them. We are perhaps a long way from losing our "drudge" but we are sufficiently well on the road that an examination of some ways to retain our liberties is worthwhile.

This slim volume is one of the evidences that "good things come in small packages," and, being short, it is even more to be recommended in

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this day when too often quantity is deemed a substitute for quality. The articles were originally delivered as lectures and therefore the reader is fortunate to receive the authors' views in a lively and refreshing style that is rarely found in an article prepared for publication. While all the material is interesting and shows much thought on the part of the lecturer, little is presented in the usual scholarly style complete with footnotes and other annotations. Former Attorney General Biddle's paper, however, is printed with a few notes to supply the professional reader with case and statutory citations to the text, but even this article is primarily designed to be of interest to the lay reader.

Although these lectures were independently prepared with only the title of the series set forth to guide the lecturers, there are common threads running through all of them: all feel there is at present considerable abuse of civil liberties in our country, that the abuse is by the government, public officials acting under color of office, private groups, and private individuals; all believe that the best safeguard against further abuse and the prevention of continuing encroachments upon such liberties is an informed public opinion in the hands of a people energetic enough to make their voice articulate and their will felt. This view is set forth particularly well in Professor Robert E. Cushman's lecture, "Civil Liberty and Public Opinion," in which he advances four propositions and ably defends the accuracy of his views:

"First, public opinion can exist only where and when civil liberty is kept alive. Second, civil liberty will exist only so long as it is supported and defended by public opinion. Third, public opinion with respect to civil liberty today shows dangerous signs of being confused, timid, and complacent. Fourth, courageous leadership and sound education are vitally necessary if we are to keep alive a public opinion which values civil liberty and will demand its effective protection."¹

Professor Becker discusses "Political Freedom: American Style" and at the outset introduces the reader to the proposition that *freedom* is little more than a word of art, meaning all things to all men at all times, and different things to different men at different times. After a brief excursion into semantics he identifies *freedom* with liberty and individualism, and then proceeds to show how the separation of powers, the limitations on the government to keep its activities at a minimum, etc., reflected a fear of encroachments on individual liberty by the state, and failed to provide a safeguard against abuses by individuals. Consequently, he asserts, the excesses of democracy have, in some instances, led to a tyranny of the majority, and thus the prophylaxis breeds the disease it was to prevent. A mere listing in a statute of the liberties to be secured is no insurance of their sanctity, and his suggestion for safeguarding them is that the political power be united with political responsibility, and that politics be taken seriously by each and every individual.

Editorial writer Max Lerner writes of "Freedom: Image and Reality" and discusses the wide gulf between liberties on paper and liberties as practical affairs in the world in which we live. Of the former, it is agreed that as a nation we desire freedom and we pay lip service to the ideal. However, when the concept is viewed as an actuality, we, as individuals—and collectively the individuals constitute the nation—are careless in retain-

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ing so precious a possession. Mr. Lerner states "that while the desire for freedom has in some ways grown, the commitment to it has lessened."² He is alarmed at racial terrorism directed at Jews, Negroes, Mexicans, Japanese-Americans, and others. He finds the causes in racist impulses and in economic conditions. In a dynamic society the stationary forces opposing normal progress breed dissent and discontent, and they, in turn, foster intolerance:

"Freedom does not thrive in a state with hermetically sealed frontiers, shrunken perspectives, and a closed mind."³

The former Chairman of the Federal Communications Commission, James L. Fly, discusses "Freedom of Speech and the Press." He sets as his ideal a free competition in the world of ideas, but his exposition indicates that only a control of channels of communication by the government can insure free publication of all ideas. This suggestion appears to be merely a substitute of a public authority for a private one. The article was quite interesting, especially in the description of the function and operation of the Commission, but unfortunately the problem of preventing any tyranny over the mind of man remains unanswered. Complete government control is as undesirable as unbridled private competition, and a middle of the road position merely softens the possible abuses but certainly does not eliminate them.

The most interesting lecture, from the lawyer's point of view, is that of former Attorney General Biddle in which he discusses "Civil Rights and the Federal Law." In a brief exposition Mr. Biddle traces the origin of our civil liberty statutes and then shows how the original strict enforcement was succeeded by a counter-swing of the pendulum in the opposite direction so that for many years the rights were more noted in their breach than in their observance. Especially of interest is the description of some of the wartime activities of the Department of Justice. It is to be noted that its functions were concerned with preserving essential liberties and that unlike the Justice Department of World War I there was no program of witch-hunting, mass indictments, and the like. This article, more so than any other in the volume, defies abbreviation, and only by a careful reading of the entire lecture will one be able to appreciate it fully.

A commencement address by President Edmund E. Day, of Cornell, rounds out the volume. It is very fitting that the final selection is entitled "Freedom to Learn" since it is this very freedom upon which most other liberties depend. An enlightened electorate exercising an independent franchise is perhaps the only guarantee of our liberties, and such an electorate depends on the opportunity to learn. Mr. Day asks for an elimination of personal bias and the development of a true, intellectual integrity. On a nation-wide scale this is indeed the ideal, and like many ideals, it is a goal to be sought though never to be realized. So perhaps it is with perfect liberty—always to be sought, though never fully realized.

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WILLIAM HOWARD TAFT, YALE PROFESSOR OF LAW AND NEW HAVEN CITIZEN. By Frederick C. Hicks. New Haven: Yale University Press. 1945. Pp. xiv, 158. \$2.50.

It is not surprising that William Howard Taft, Kent Professor of Law in Yale College, has received little attention from the biographers who have treated of William Howard Taft as Solicitor-General, Circuit Judge, Governor-General of the Philippines, Secretary of War, President, and Chief Justice of the United States. The eight quiet years spent in the academic halls at New Haven hardly supply material for popular biography. Their account does, however, make an interesting contribution to the picture of Taft the man.

President Taft's decision to accept the Yale offer of a professorship, after his defeat in the election of 1912, was not lightly made; he deemed it worthy of discussion with the members of his cabinet, who are reported to have given their wholehearted approval. Reluctance to enter the practice of law, a desire to escape from the political limelight, and a sentimental attachment to Yale seem to have been the motivating considerations. Displaying characteristic modesty, Taft declared that he accepted the position not without some misgivings, for in a professor's chair "far more than on the bench is one's ignorance and forgetfulness likely to be exposed."¹ Also characteristically, he insisted upon resigning from the Yale Corporation on becoming a professor in its employ.

Shortly after his arrival he most emphatically quashed the suggestion that he become Dean of the Law School, a position which he undoubtedly could have had by mere acquiescence, and he consistently shunned University executive and administrative posts. The new professor took his duties most seriously: he even attempted to read all the numerous quizzes given in his undergraduate college course, and upon one occasion made a two hundred mile trip from Lawrence, Massachusetts, in order to attend a routine faculty meeting.

Like so many men who turn to an academic career late in life, Taft was not a good teacher. His engaging personality and his wide experience made him an interesting lecturer, but his classes became surprisingly dull when he attempted to conduct recitation or discussion. In the Law School his teaching techniques were not stimulating. A casebook was used, but he rarely took any interest in grappling with conflicting legal theories or in reconciling cases. There was very little critical or analytical discussion. He was sincerely interested, however, in his students, and no doubt they gained much from the association. The man's great qualities of humor, humility, and devotion to public service, which emerge from the pages of Mr. Hicks' book, must have had their effect in the classroom.

The author has chosen and arranged his material well and has performed a real service in making available this little-publicized chapter in the life of the tenth Chief Justice and the twenty-seventh President of the United States.

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