BOOK REVIEWS

CASES ON LABOR LAW. By Alexander Hamilton Frey. Callaghan & Company, Chicago, 1941. Pp. xx, 979. Price: $7.50.

Professor Frey explains in his preface that the "Labor Law" treated in this collection of materials is primarily the law of labor unions and not all the law of master and servant, and wage and hour regulation, and workmen's compensation and the numerous other subjects which have an important place in modern labor law. This restriction is wise, and is probably in accord with the expectations of teachers and students. Even so restricted the book is larger than can be covered in the usually allotted time. But most of the cases will be interesting to students because of their relation to current or recent widely published events, so that it may not be necessary to omit many of them, even though they cannot be discussed at length in class.

The skill with which the author has designed the book is apparent from the chapter headings. The first, "Need for Unionization", is a six page essay by the author. The following three chapters, headed "Devices of Employers to Hinder Unionization", "Devices of Workers to Foster Unionization", "Conflicts over Terms and Conditions of Employment", are full of the material needed for an understanding of one of the most important domestic problems of our times, and as a background for the consideration of the legislative efforts to solve or alleviate that problem.

These legislative efforts are next taken up in chapters entitled "Anti-Injunction Statutes", "The National Labor Relations Act" and "Labor and the Sherman Act". Some three hundred pages are devoted to the National Labor Relations Act. The selection of cases seems to me to be good, considering how few could be chosen from the total product of that prolific enterprise. Sixteen pages could have been saved by not reproducing the Board's Rules and Regulations, which are quite conventional and have never provoked much discussion. Some six of the pages so saved could have been used by not deleting from the Supreme Court's opinion in the *Waterman Steamship* case[1] the court's recital of what it regarded as evidence tending to support the Board's decision, which had been set aside by the Circuit Court of Appeals as not being supported by substantial evidence. One set of men, constituting a Board, unanimously concluded that certain facts had been proved; another set of men, constituting a Circuit Court of Appeals, unanimously concluded that far from the facts having been proved, there was no substantial evidence tending to prove them; and a third set of men, constituting the Supreme Court of the United States, unanimously concluded that the same testimony and documents did constitute substantial evidence tending to prove the facts found by the Board. This history is easily worth some of the time and study of the future lawyer, part of whose work will be that of trying to produce conviction in favor of his client in the minds of judges or boards. If nothing more, the study might give him hope that somewhere in the hierarchy a tribunal might agree with him, and that the litigation might fortunately end at that point.

The chapter on "Labor and the Sherman Act" is a lively one. The cases are new and the problem timely. Probably the points of view are

1. National Labor Relations Board v. Waterman Steamship Corp., 309 U. S. 206 (1940). FREY, at 730.

adequately presented by the principal, concurring and dissenting opinions of these cases, but one wishes that the tribulations of the Assistant Attorney General in charge of enforcing the Anti-Trust Law had been expressed for the students in his own pungent words. The Walter bill which Mr. Arnold thinks would help to cure the evils of the Supreme Court decisions might have been printed. Similarly, a printing of the Smith bill to amend the National Labor Relations Act, which bill was passed by the House of Representatives in 1940, if included at the end of the chapter on the Act, would have furnished a good basis for final discussion of the merits or demerits of the legal and administrative doctrines covered by that chapter.

The volume concludes with three chapters devoted to topics of expanding importance in the modern law relating to labor unions: "Employer-Union Contracts", "Inter-Union Disputes", and "Internal Regulation of Labor Unions".

Interesting cases and other writings on labor law are coming out so continuously that the latest book, if it is competently done, has in its lateness an advantage over the older ones. For the same reason, even this latest book will need to be supplemented, in teaching, by still later important decisions. Those who teach and study labor law should be grateful to Professor Frey for providing them this excellent material for a course which should be as interesting and as improving as any in the law school.

J. Warren Madden.†

OUR CONSTITUTION: TOOL OR TESTAMENT? By Beryl Harold Levy. Alfred A. Knopf, New York, 1941. Pp. xviii, 315. Price: $3.00.

Mr. Levy's volume is one of a number of treatises on the Constitution and the Supreme Court which flourished during, and just preceding, the famous controversy over President Roosevelt's proposal for the reform of our highest tribunal. Had this book appeared earlier it would have greatly contributed towards clarifying the issues involved in that abortive attempt. As it is, the author's arguments lack the attraction of novelty.[1]

Though the point of view and the arguments in support of it are not original, the treatment of the material is. The author attacks the problem of the Supreme Court from its biographical angle, and has called on both psychoanalysis and dialectic materialism for the supply of evidence. For this purpose Mr. Levy has selected four judges of the Supreme Court, two of them being former chief justices (John Marshall and Roger Taney), the other two, associate justices (Oliver Wendell Holmes and Louis Dembitz Brandeis). If only four were to be chosen, Mr. Levy was not wrong in his selection, though the book would have gained much in completeness, and therefore in importance, if others, like Miller, Field, Hughes and Cardozo, were also sent to the operating table.

In each case the author recounts the family background, education, beliefs and philosophy, or *weltanschauung,* of the judge before he joined the court. Thus the lives of these persons are treated as a psychological drama, with the United States of the time providing the stage and background, the justices themselves being the *dramatis personæ,* and the con-

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1. Also, it is untimely, for the Supreme Court of more recent years is not "what it used to be." The time may not be far distant when the new Supreme Court will be attacked by its former defenders, and many of Mr. Levy's arguments against the court that was, will be used against the court that is.

stitutional cases and their decisions comprising the situations, crises and *dénouements;* the latter, happy or otherwise, depending on which side gained the irreducible minimum of the majority of one.

That man acts in accordance with his prejudices, Mr. Levy proves to the hilt in the treatment he metes out to our first great chief justice, John Marshall, who, in the estimate of the author, is the *bête noire* of our judicial history. All evil begins with Marshall, and were it not for his decision in *Marbury v. Madison* there would have been no Civil War. (That is quite possible, for without Marshall's decisions we might not have become a nation in the first place.) Marshall was a judicial statesman, not a jurist, and his contributions during the early formative years of our national life, and his reputation in history, should be judged from a political and social, not from a juristic, point of view. The author himself annihilates all his attacks on Marshall by his concession that "Marshall's desire to consolidate the union was prophetic."

The period of "Power Rampage" was followed by the period of "Due Continence" when Taney succeeded Marshall to the chief justiceship. Taney is pictured as a man who committed only one error which, however, was big enough to cast a shadow over an otherwise brilliant judicial career. This estimate has been gaining ground in recent years, and rightly so. In Taney, the Chief Justice was no more "a crafty judge who sophisticates the law to his mind" (as Jefferson previously had called his cousin Marshall). Rather was judicial continence the rule of the day. The state legislatures were allowed to function freely, though Taney too, and this adds to his greatness, extended the power of the national government. By his decision in the famous case of *Genesee Chief v. Fitzhugh,* Taney extended federal jurisdiction to navigable rivers, thus laying the foundation for many reform measures of the New Deal.

Holmes, who is treated with especial respect and affection, is the jurist par excellence. He is "above the battle", and in spite of his economic conservatism he was an expounder of constitutional realism and legislative experimentalism. To Holmes "the life of the law has not been logic but experience." He therefore rebelled at blind imitation of the past. But even this detached jurist, who said that general propositions do not decide concrete cases, conceded that a judge deciding a case is guided fundamentally by an "inarticulate major premise". Law, said Holmes, is a window on life. The window through which Holmes viewed life was open to all phases of our complex existence, and the eyes which penetrated life itself were those of a philospher and a seer.

Brandeis, the last of the four justices treated in this book, was, like the first one treated there, not primarily a jurist, but a social engineer who functioned through the law. Having established himself first as a people's lawyer, he continued the same work during his later years as the junior member of the famous pair of "Holmes and Brandeis dissenting". But unlike Holmes, the skeptical aristocrat, Brandeis was not detached and above the battle. He was one of the early advocates of social security, unemployment, sickness and old age insurance. Brandeis quotes Charles Henderson to the effect that "a lawyer who has not studied economics and sociology is apt to become a public enemy." (Unless, one must add, he possessed the mind and soul of a Holmes.) Also, study of economics and sociology would not in itself make one a great lawyer unless, like Brandeis, he were a moralist, a hater of oppression of any sort and a humanitarian to boot. Before the New Deal, he was one of the leading reformers who advocated the extension of democracy to our economic life. His decisions, generally written in dissent, read like essays on the social and economic prob-

lems of our day, and did yeoman work in preparing the field for the inevitable reform.

Mr. Levy concludes with a chapter on "The Constitution Today"; in which he distinguishes between the clear cut provisions of the Constitution and what he calls the "Constitution in Action". Thus, regarding the clauses relating to interstate commerce, due process, bill of rights, it is the Supreme Court, not the Constitution, that year after year, by interpretation and application, gives them substance and meaning. Mr. Levy would like the justices to be more frank about their function and declare openly that it is their own personal opinion that they are expressing, and not necessarily that of the fathers of the Constitution.[2] Once the cloak of tradition is removed, the author would like the judges to practice restraint and be guided by the presumption of constitutionality of any law brought before them. The Constitution would then become our servant and not our master, and the weight of policy would fall upon our legislators, the wise men of today, rather than on the Supreme Court, who are (or, should one say, were) the spokesmen for the wise men of 1789. Where all wisdom is that of fallible men "it is preferable to have the wisdom of men who are alive." The Constitution itself should be looked upon as a tool in a dynamic world and not as an untouchable testament. It certainly should not rest with one judge to decide the trend of our social and economic policies.

The book was written in 1940 and published in 1941. It thus appeared too late to be justified as a polemic. If the book was intended to be of permanent value, it appeared prematurely. Mr. Levy is a very capable, even brilliant, lawyer; but he is still a very young man. He should have waited a few more years and, with a little less fire and more judicial detachment, he could have presented us with a better-rounded volume.

As it is, the book is of value to lay readers who by perusing it become acquainted with four of our greatest judges as well as with some of the outstanding cases in our constitutional history. The book is written very interestingly, with brilliant touches of phrase and metaphor. The fire and spiritedness which forced the author to write this book cannot help but affect even the most phlegmatic reader.

Aaron M. Margalith.†

FREE SPEECH IN THE UNITED STATES. By Zechariah Chafee, Jr. Harvard University Press, Cambridge, 1941. Pp. xiv, 634. Price: $4.00.

The renewal of the author's writing in behalf of freedom of speech, whether because of foresight or good fortune, is most opportune. For once again, a discussion of the World War espionage cases is of extreme importance. No one can describe adequately the spirit of intolerance and abuse prevalent at that time unless he was an active participant in affairs of that era. Professor Chafee was. His criticisms were directed against the decisions of the district courts and of the Supreme Court of the United States when they misapplied the test of "clear and present danger". These comments provoked unusual discussion and criticism.[1] Now, in retrospect, his original position is still maintained. Too widespread in the wartime

2. Between the two periods of his service on the high bench, Chief Justice Hughes did just that.

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1. See Chafee, *"A Contemporary State Trial—The United States* versus *Jacob Abrams,* et als." (1921) 35 HARV. L. REV. 9.

administration of the Espionage Act was the human frailty of preconceived convictions. Juries were prone to convict because of what they felt rather than because of what they heard. To aid these convictions, judges formulated "constructive intent" and applied the tort law of "indirect causation". Recital of this unparalleled persecution in the United States should have the sobering influence of preventing a repetition during this war. To aid this effort, practical checks are available. An adequate, though not voluminous, record for appeal can be prepared by an agreed statement of facts. Present also are the committees for the defense of individual rights [2] to eliminate the possibility of imprisonment resulting through inadequate defense.

Professor Chafee denounces the state enforcement of local espionage statutes and post-war sedition laws, the administration of which was subject to even greater abuse than the Federal administration. To prevent a revival of these statutes and this frontier justice, we must formulate a public opinion awake to the evil. A legal method may also be available: application to wartime limitations on freedom of speech of the principle recently reiterated, that when Congress has occupied the field, state legislation is invalid.[3] However, this doctrine is nebulous; it is expressly rejected in the tax cases, and only limitedly applied in the commerce cases. Furthermore, such extension may be severely doubted because crimes of sedition and syndicalism may involve offenses against the states irrespective of whether they are also offenses against the Federal government.[4]

The other sections of the book deal with the peacetime trend following World War I. Exceptionally interesting are comments on the cases which arose during this era: the red flag salute, newspaper gag law, and deportation statute. The present trend toward removal of Communists is scathingly denounced. Especially in peacetime, Professor Chafee's philosophy is embodied in these words:

> "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?" [5]

Otherwise, there would occur the well-known evils of suppression: an underground system of dissemination, violence, rise of martyrs. With this in mind, it is startling to realize that a peacetime sedition statute has been concealed within the Alien Registration Act of 1940. Naturally, the author attacks its constitutionality and its utility. However, this must remain a problem for the future.

In analyzing peacetime control of discussion, Professor Chafee suggests that we may possibly secure the prohibition of motion picture censors. Previous restraint on the issuance of books and plays is prohibited, and today it is accepted that the influence of pictures closely parallels that of books and plays. Also original is the proposed use of juries of people with "proper educational requirements" to eliminate the harmful effects of private, informal censorship. Since such a method would impose a previous restraint on publication, its constitutionality cannot be conceded.

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2. These are composed of members of the American Civil Liberties Union and of the Bill of Rights Committee of the American Bar Association.

3. Hines v. Davidowitz, 312 U. S. 52 (1941). See CHAFEE, at 293.

4. State and federal governments have been accustomed to punish crimes separately where the same act violates the law of each. For general authority see 15 AM. JUR. (1938) § 394, n. 12.

5. Professor Chafee's quotation of Milton, see p. 3.

The author's style makes possible a detailed grasp of these difficult questions. Adding to reading pleasure are the excerpts heading each chapter which describe accurately the chapter's contents. The appendix contains the state and territory statutes on various aspects of free speech listed in the first edition and here brought up to date. Faults in arrangement and content, as explained by the author, were caused by a lack of time, not by a failure to appreciate the problem. Similar subjects are discussed in separate chapters rather than as a connected whole—the problem of sedition being the outstanding example. The arrangement of material dealing with the peace era should have been grouped substantively rather than semi-chronologically. Regrettable in the extreme is Professor Chafee's decision to leave to labor authorities the analysis of recent labor cases, for these cases pose a basic issue: the scope of the freedom of speech guarantee.

Extension of the Fourteenth Amendment to protect freedom of speech, religion and assembly from state interference is noted with satisfaction. It is surprising, therefore, that the recent cases involving "peddlers of ideas", which solidified this protection, received "short shrift". The author argues in favor of freedom of speech against previous restraint, but is not quite so certain when the interest against which it is balanced concerns civic cleanliness. Furthermore, he is almost certain that the annoyance created by the ringing of door-bells in a house-to-house canvass deserves the protection refused by *Schneider v. State*.[6] It is difficult to reconcile this view with the protest of the espionage decisions: "Hard it may be for a court to protect those who oppose the cause for which men are dying in France, but others have died in the past for freedom of speech." [7] In this phase, Professor Chafee is subject to the criticism he once directed against Holmes: "His liberalism seems in these decisions to be held in abeyance by his belief in the relativity of values." [8]

No doubt, however, but that Professor Chafee ranks with Holmes, Brandeis, Hand, and Amidon in the twentieth century struggle to preserve this vital freedom. Severe criticism is directed against those who cry: "Debating is only fiddling while Rome burns. Away with all this talk; let's have action—now." [9] As the author convincingly states, we have a duty to perform which we once neglected: planning for a lasting peace. Such plans can succeed only if buffeted and tempered by public discussion. Maintaining freedom of speech for this vital purpose lies entirely within the power of the people. The appellate courts are awake to their responsibility. But " 'Nine men in Washington cannot hold a nation to ideals which it is determined to betray.' " [10] It was for abundant reason, therefore, that this book was styled for the layman.

Marvin Comisky.†

6. 308 U. S. 147 (1939).

7. CHAFEE, FREEDOM OF SPEECH (1920) 93.

8. *Ibid.* The author is specific concerning this balance.

On p. 510 he states: 'The process of reformulating the definition of freedom of speech . . . consists in treating each free speech problem as a conflict between the interests of the community in national safety from external or internal violence, in morality, and so forth, on one side, and on the other side the individual interest in speaking out coupled with this social interest in the gains from open discussion, which should be the biggest weight in the scale."

A general formula for use in determining this balance is contained in (1941) 89 U. OF PA. L. REV. 515, n. 13, 15.

9. Page 560.

10. Page x.

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