

1960² in England, an outgrowth of the Nathan Committee Report,³ was directed at involving a central governmental agency in increasing the effectiveness of charitable endeavors. Although it is too early to evaluate the impact of the legislation, the experience of both England and Canada should be useful to the federal and state governments of this country as the inevitable trend toward closer supervision and scrutiny continues.

Government, at both the state and national levels, now provides increased welfare assistance in a greater variety of forms than ever before. As a result we are experiencing a new political and social phenomenon in which government and private charity sometimes complement, sometimes duplicate, one another in similar charitable activities. The resources involved in these activities in these times are massive. Moreover, the opportunities for abuse in solicitation, in operation, in acquiring improperly tax benefits and other subventions at the state and national level make demonstrably clear the importance of institutional mechanisms for proper protection of the public and for the effective fulfillment of the charitable purpose.⁴ The need, therefore, for a proper ordering of these important functions in a complex society becomes ever more pressing. Mrs. Fremont-Smith's final chapter: "Prospects and Recommendations" is well worth thoughtful examination and reflection as one considers the problems raised in this most difficult area.

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MR. JUSTICE MURPHY AND THE BILL OF RIGHTS. Edited by *Harold Norris*.† Dobbs Ferry, New York: Oceana Publications, Inc., 1965. Pp. xxiii, 568.

It is my unhappy duty to report that this is a disappointing book. The difficulty is not that the subject is unsuited for book-length

² Charities Act, 1960, 8 & 9 Eliz. 2, c. 58.

³ COMMITTEE ON LAW AND PRACTICE RELATING TO CHARITABLE TRUSTS, REPORT (1952).

⁴ See *House Select Committee on Small Business, Chairman's (Patman) Report*, 87th Cong., 2d Sess. (1962); TREASURY DEPARTMENT, REPORT ON PRIVATE FOUNDATIONS submitted to Committee on Ways and Means, 89th Cong., 1st Sess. (1965).

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treatment. Justice Murphy was one of the modern Supreme Court's more colorful characters; and though controversial, because he perceived of civil liberties problems less as a lawyer than as a moralist, so many of his libertarian protests have been vindicated by subsequent decisions that a reappraisal of his civil liberties contributions is certainly in order. This is the first book to appear concerning Justice Murphy's judicial career. Unfortunately, it fails its subject, both conceptually and in execution.

The central flaw is an unclear focus. In format, the book is an edited volume containing over seventy opinions by the Justice, a few of his speeches, excerpts from commentaries, and introductory essays by the author which are designed to link these materials to current issues. The author's purpose is frankly polemical. "Justice Murphy's opinions taken together constitute a tract of our times," he asserts.¹ By reprinting them, he hopes to enlist the "moral passion and intellectual fervor of Justice Murphy's defense of civil liberties" in the cause of citizenship education of lawyers and laymen, and to accord Murphy himself "a degree of recognition more proportioned to his contribution . . ."² There is insight here, because Justice Murphy was a gifted evangelist. He entered the high court calling it a "Great Pulpit"; and his best known opinions, such as his dissents in *Korematsu v. United States*³ and *In re Yamashita*,⁴ stung the moral conscience of contemporaries. Nevertheless, the results are mixed. Nowhere does the author attempt to "flesh out" Murphy as a person or his credentials for such a role. Nowhere does he analyze the actual influence of Murphy's opinions on current libertarian judges or whether the similarity of view is only incidental. Nowhere is there a critical evaluation of his work, beyond excerpts from commentaries by Thurgood Marshall, Archibald Cox, and others, which were written shortly after his death in 1949. Opinions, in the main, are left to speak for themselves.

This method works well enough in subjects such as criminal procedure and equal protection in which the Justice was assigned a sufficient number of cases or wrote sufficient dissents to elaborate a complete position. The method works less well in subjects such as

¹ NORRIS, MR. JUSTICE MURPHY AND THE BILL OF RIGHTS I (1965).

² *Id.* at xvi, xv.

³ 323 U.S. 214 (1944).

⁴ 327 U.S. 1 (1946).

the first amendment, in which Murphy wrote peripherally or not at all. Since opposing opinions are not included, the reader must depend on the introductory essays for orientation; and gaps inevitably result.

The most frustrating of these gaps concerns church-state relations. Frank Murphy was not only the first Roman Catholic whose appointment to the Supreme Court rested explicitly on religious criteria; he was the Court's most experienced member in dealing with the problem, the first Catholic Justice to interpret the establishment clause directly, a devout Catholic who advanced a pragmatic Jeffersonianism toward the difficult issues of public policy raised, the swing-man in *Everson v. Board of Education*,⁵ and a judge who felt so deeply about the *McCullum*⁶ decision that he organized clerical rebuttals to the intemperate criticism of a Roman Catholic Cardinal.⁷ The author could have enlightened us about these matters had he drawn upon the Justice's papers at the University of Michigan. Instead, his reliance upon published opinions forces him to use the writings of other Justices and to conclude, inexactly, that "Justice Murphy's stress was on the 'freedom of religion,' clause and not so much on the 'establishment clause.'"⁸

Finally, the inevitable unevenness of the method is accentuated by including in the introductory chapters, materials about more recent civil liberties issues, such as loyalty programs, which have little relation to Murphy as a jurist. Apparently, the book is intended to serve as a kind of civil liberties reader with Justice Murphy's opinions as a springboard to contemporary issues. For the reader, however, it lacks the scope and fluency of the Emerson and Haber collection;⁹ and the causal links between Justice Murphy and current issues are insufficiently drawn.

The conceptual weakness is aggravated by deficiencies in editing. The materials not only contain errors, but present Murphy as a libertarian purist without mentioning "the other Murphy," which made him such an enigmatic and interesting character. The reader

⁵ 330 U.S. 1 (1947).

⁶ *McCullum v. Board of Educ.*, 333 U.S. 203 (1948).

⁷ See case materials in MURPHY, PAPERS, on file Michigan Historical Collections, University of Michigan.

⁸ NORRIS, *op. cit. supra* note 1, at 159-75.

⁹ EMERSON & HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* (2d ed. 1958).

does not meet the Murphy whose earliest political allies were the American Legion, William Randolph Hearst, and Father Charles E. Coughlin. There is no hint of the Attorney General Murphy who provoked a political storm and a personal clash with Solicitor General Robert H. Jackson by vigorously prosecuting alleged spies and alien propagandists in 1939, the Murphy whom cabinet colleagues predicted would be the first New Deal Justice to go conservative, or the "libertarian" who was capable of writing FBI Chief J. Edgar Hoover after he arrived on the bench: "Unless we are pudding-headed we will drive from the land the hirelings who are here to undo the labors of our Fathers."¹⁰ The author quotes Charles A. Beard's tribute to Murphy's civil liberties contributions as a politician, but not Beard's public retraction of same for Murphy's alleged witch hunting in the Detroit Loyalist prosecutions of 1939.¹¹ In three separate places the author repeats a "damning-by-faint-praise" memorial by Chief Justice Fred M. Vinson, but attributes it to Chief Justice Harlan F. Stone—who had been dead for over four years!¹²

In sum, the foregoing criticisms are not meant to imply that the book lacks positive values. The opinions themselves are a useful compilation for those without a legal library; and if fairly read, they should go far toward refuting professional myths that Murphy was all evangelist and technically incompetent as a lawyer. Libertarians and Murphy buffs will be glad to see inclusion of a few pre-Court speeches on libertarian themes, though they might wish for more. Especially is this so of the addresses on religious toleration directed to Catholics and Father Coughlin's movement, in which Murphy rose to great heights as an orator-polemicist.¹³ The author's intro-

¹⁰ See GERHARDT, ROBERT H. JACKSON: AMERICA'S ADVOCATE 161-98 (1958); 3 ICKES, THE SECRET DIARY OF HAROLD L. ICKES 70 (1954); Letter from Frank Murphy to J. Edgar Hoover, Sept. 7, 1940, on file Box 92, MURPHY, PAPERS, Michigan Historical Collections, University of Michigan.

¹¹ NORRIS, *op. cit. supra* note 1, at 61-62 n.1. Cf. Letter from Charles A. Beard to Arthur Krock, N.Y. Times, April 3, 1940, p. 22, col. 6.

¹² NORRIS, *op. cit. supra* note 1, at xv, 3, 12. The memorial is found in 340 U. S. xx, xxiv (1951).

¹³ See, e.g., MURPHY, *Democracy and Religious Freedom; Irish-Americans and the New Fight for Freedom*, SELECTED ADDRESSES OF FRANK MURPHY, GOVERNOR OF MICHIGAN 69-75 (1938); Address by Frank Murphy, "The Challenge of Intolerance," 91 CONG. REC. pt. 2, 81-82 (App. 1945); Address by Frank Murphy, "Interdependence for Americans," 91 CONG. REC. pt. 12, 3836 (App. 1945); Murphy, *The World We're Coming To*, 42 COMMONWEALTH 398 (1945).

ductory essays are solid and workman-like, and the opinions do carry contagious libertarian conviction. A teacher so inclined might well fuse these materials into an effective vehicle for civil liberties discussion groups. Of itself, however, the book is incomplete as a tract and unconvincing as an encomium to Mr. Justice Murphy.

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