

January 1955

## BOOK REVIEWS

Follow this and additional works at: [https://digitalcommons.nyls.edu/nyls\\_law\\_review](https://digitalcommons.nyls.edu/nyls_law_review)



Part of the [Law Commons](#)

---

### Recommended Citation

*BOOK REVIEWS*, 1 N.Y.L. SCH. L. REV. (1955).

This Book Review is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

## BOOK REVIEWS

ACADEMIC FREEDOM IN OUR TIME. By Robert M. MacIver. New York: Columbia University Press. 1955. Pp. xiv, 282, and 44 (appendices, bibliography, and index). \$4.00.

FROM the informality of the faculty dining room to the formalism of academic meetings and conferences, the principle of "academic freedom" has run the gamut of shades of meaning, intractable differences, and congenial conciliation. At the very outset of his labors, Dr. MacIver has clearly and admirably set forth his version of this often misunderstood and maligned pedagogical canon. It is a right claimed by the accredited educator, in the discharge of his obligations as teacher and as investigator, to interpret his findings and to communicate his conclusions. The exercise of this right—if it is to have any meaning whatsoever—is to be free of subjection to any interference, molestation, or penalization because the communicated conclusions are unacceptable to some constituted authority either within or without the academic seat. The freedom of the scholar within his field of study, the author stresses, is the core of the doctrine of academic freedom. This statement of general principle may be dissolved into three specific freedoms: the institutional freedom, the professional freedom, and the functional freedom. These freedoms are claimed by the educator, respectively, within the institution of higher learning wherein he functions, as a right granted to a member of a professional body, and lastly, in the performance of his various classroom tasks.

The substantive content of the volume presents a vista designed to bring out the significance of academic freedom and its relation to living society. A sharp analysis of the contemporary situation surrounding academic freedom together with a revealing study of the problems it presents from the specific fields of scholarly endeavor on the part of the author.

By way of historical introduction to this writing, it is significant to note that little mention was made in our country, at the opening of the present century, of serious perils to academic freedom. With the advent of World War I when, it is noted, censorial activities went far beyond any reasonable considerations of national security, the record changed. The picture, in recent times, may be gathered from a report issued by the American Association of University Professors to the effect that it has had before it, for the years 1945 to 1950, a total of two hundred and twenty-seven separate cases, exclusive of a number of presentations which were not classified as cases.

Dr. MacIver begins his studies by presenting a background which delineates public opinion in our country, against which the problems of academic freedom are to be considered. He stresses the point that in the absence of a vigorous comprehension of the structure of public opinion, the real dangers to academic freedom will not appear in their proper perspective; the proper and effective measures to meet them cannot be applied.

The role and impact of legislative committees, patriotic establishments, special interest organizations, and pseudo-educational associations are analyzed in detail. Against this verbal iconography of forces of public opinion which relates to the problem of study, Dr. MacIver proceeds to point out the characteristics of academic government in our country. The components of institutional life, namely, the Governing Board, the President, and the Faculty, are all analyzed as to functions, obligations, and rights as institutional relationships.

Perhaps the most significant segment of the volume deals with a broad survey, as well as detailed descriptions, of the various forms of contemporary attacks on aca-

democratic freedom. These are characterized as falling into two categories: the "established" forms, with their economic, religious, and social-tradition aspects; and those engendered by communism on the campus.

Of especial worth to the student and teacher alike is the highly illuminating and provocative section on the need to stimulate and nurture the freedom of the student to express his views and beliefs, as well as to question and differ. The vitality of these companion concepts, whether it be the classroom, platform or press, is predicated upon the absence of repression or penalization. The author's views on the obligations of the teacher to his prescribed subject, students, colleagues, institution, and the public; and his rights in emanation from his function and consequent service to society are matters which should be the grave concern of every educator.

It may be truly said that any book dedicated to a subject which wears the cloak of controversy finds its chief value in the proposed solutions. This Dr. MacIver has admirably accomplished in his concluding pages.

The particular problem of academic freedom in our denominational seats of higher learning forms one of two appendices; the other contains the results of a survey and study of academic freedom at the University of Colorado.

An excellently prepared and rather exhaustive bibliography and a well constructed index add much to the use of this book as an instrumentality of reference.

It is to be noted that the publication under consideration is companion to *The Development of Academic Freedom*, by Hofstadter and Metzger; both sponsored by the Louis M. Rabinowitz Foundation and undertaken by the American Academic Freedom Project.

FRANKLYN C. SETARO

ASSOCIATE PROFESSOR OF LAW  
NEW YORK LAW SCHOOL

FOUNDATION OF AMERICAN FREEDOM. By A. Mervyn Davies. New York and Nashville: Abingdon Press. 1955. Pp. 253. \$3.50.

A REMINDER of our obligation to Calvin and Calvinism has been emphatically made by *Foundation of American Freedom*. This timely study of the philosophical basis of American democracy serves to show that religious and secular ideals and ideas are inseparably intermingled in the fabric of our national thought, government and action.

Mervyn Davies seeks to demonstrate how John Calvin—autocratic authoritarian that he often was—nevertheless founded a movement which opened the doors of history to liberal democracy and the American Constitution. Step by step, Mr. Davies tries to build a logical and factual structure to show how this seeming paradox of history took place.

He introduces us to Calvin himself, his work, and his thought, and then traces the early development of Calvinism. He vividly portrays the exciting period of the "continental divide" when the nations of Europe moved either toward or away from the political ideal of freedom. Only the countries in which Calvinism had taken strong hold chose freedom.

The history of Calvinism—particularly Puritanism—in England is given considerable attention, since American political concepts came largely from an English background. In America itself, where liberal democracy reached its finest expression, the strongly Calvinistic governments of the original colonies had implications of democracy in spite of their narrowness on some points. Above all, Mr. Davies seeks to prove

how Calvinistic ideals ultimately made possible the successful revolution and establishment of a democratic form of government as set forth in the Constitution. He sets forth his thesis in the following sequence: *The Nature of Calvinism; Calvin and Geneva; Seeds of Democracy; Calvinism and Liberty; Crucial Years: A Study in Contrasts; The Continental Divide; The English Story; The Unfinished Revolution; Invention of the American Idea; The Crowning Achievement; Calvinism and Our Day.*

Mr. Davies seems to establish that Calvin and Calvinism gave us all our basic democratic principles, our belief that "the foundation of authority is laid in the free consent of the people, the right of free discussion, the idea of the separation of church and state, the search for 'truth wherever it appears,' the insistence that God alone is Lord of the conscience."

Our heritage from Calvinism offers a strong faith that can undergird our nation in today's crisis as surely as it laid the foundation for our freedom. Here for all who would grasp more clearly the American concept of freedom is surer understanding of its basis. Here, too, is a vivid reminder that our nation's strength rests ultimately on a rugged religious faith. While Mr. Davies may not have established that democracy rests on Calvinism, he had made a telling argument to the effect that there are basic elements in American democracy that are Calvinistic.

A striking phenomenon of the American culture has been the unqualified acceptance of organized religions, usually Calvinistic in origin. At the same time, it has been to a considerable extent apathetic toward its formal theological tenets. One cannot help but be impressed by such protestations of faith, accompanied by such apathy. These religious tenets sprang out of the need to rationalize and comfort, to console in times of sorrow, to sustain in the face of an earthly existence beyond human endurance, holding forth a promise that in the hereafter faith and forbearance, as well as good works, would be the believer's reward. From its earliest colonization, Americans found this continent to be a cornucopia of the good things of life. Except for the Negroes held in slavery, life was for living, rather than as preparation for death. For the most part, Heaven was conceived of as a place enjoying the same conditions as America, only "bigger and better."

As a matter of logic, it may seem strange that Americans did not reject a theology which urged that man was conceived in depravity and eulogized the next life rather than this one. But the answer is not a logical one. The Calvin tradition was too deeply ingrained, together with its institutions and dogma. Santayana has pointed out that Americans do not reject old ideas but simply change their attitudes to them, while retaining the old form. "We do not nowadays refute our predecessors, we pleasantly bid them good-bye." Almost from the inception, Americans did this, with those inherited religious doctrines which appeared so inconsistent with the passing panorama. It is well to remember that the Northampton congregation which, in the mid-eighteenth century, dismissed Jonathan Edwards, did not find it convenient to refute his doctrines but merely to avoid them. The revolt, in short, was moral and social, not intellectual. Americans rejected the application of Calvinism rather than the philosophy, the conclusions rather than the premises or the logic.

Although the theological rigidity of Puritanism wore off in the course of the eighteenth and nineteenth centuries, many of its moral and political implications persisted. Two centuries of reaction could not dissolve the Puritan inheritance of respect for the individual and for the dignity of man, of recognition of the ultimate authority of reason, of allegiance to principles rather than to persons, to the doctrine of government by compact and by consent, and to spiritual and moral democracy. These things, along with Puritanism's deep-seated moral purpose, its ceaseless search for salvation, its passion for righteousness and for justice, and its subordination of

material to spiritual ends, entered into the current of secular thought and retained their vitality long after the theological and metaphysical arguments which sustained them had been forgotten.

*Foundation of American Freedom* is a forcible reminder that America's concept of government rests to a great extent upon a religious basis. This fascinating exposition of the development of that basis offers all who would cherish and preserve "freedom's holy light" in our land a richer understanding of its meaning.

SIDNEY H. ASCH

PROFESSOR OF LAW  
NEW YORK LAW SCHOOL

THE LAW OF THE UNITED STATES OF AMERICA—SOURCES AND TECHNIQUES (LE DROIT DES ETATS-UNIS D'AMÉRIQUE—SOURCES ET TECHNIQUES). By André Tunc and Suzanne Tunc. Paris: Librairie Dalloz. 1955. Pp. 527.

The Tuncs are not newcomers to the study of American Law. In addition to many monographs on various problems of American law published in various French Law Reviews, this extraordinary couple has produced during the last few years three outstanding French books on American law. Of these books two are on the history of the American constitution and its legal system,<sup>1</sup> the third considers the sources and techniques of the law in the United States, both Federal and State.

André Tunc is Professor of Law at the University of Grenoble, France. Mrs. Suzanne Tunc is a Doctor of Laws. Both are former members of the staff of the International Monetary Fund. Both have lived in the United States and have studied at American law schools. Their knowledge of this subject is thus not derived merely from American law books read in Europe. Professor Tunc is a well known man at Harvard Law School, at Tulane and other universities, as is Mrs. Tunc. The three Tunc books were published as Volumes IV, V, and VI of the series "The Systems of Contemporary Law" issued by the Institute of Comparative Law of the University of Paris.

This review is confined to the third volume. In this volume the Tuncs have assumed the difficult but very useful task of thoroughly acquainting the French lawyers and legal theorists with the problem of how law is established and administered in the United States, and above all to familiarize them with the "spirit" of that law, by which term the authors mean its essential characteristics and peculiarities.

This book is not due merely to the quality of intellectual and scientific curiosity of which the authors are possessed. It is a product of the genuine interest of the French and European practitioners and scientists in the fundamentals of the law of the country which has recently assumed such a leading part in the destiny of their own country. This interest is widespread in Western Europe, especially in France, and this book is well calculated to satisfy an existing need.

The book starts by recalling that the law of the United States, contrary to that of Continental France, consists of the laws of the nation and the laws of the States.

It reviews the fact that a great part, and in some fields the overwhelming part, of that law, contrary to that of France, is judge-made law. It emphasizes the great difference existing not only between the American and the French legal systems, but

<sup>1</sup> Tunc (A. et S.), *Le Système Constitutionnel des Etats-Unis d'Amérique*. Tome I: Histoire Constitutionnelle. Tome II: Le Système Constitutionnel Actuel (Domat, 1954).

also between the American and other European legal systems, including that of Great Britain, which consists of the supremacy of the Judiciary over the Legislature. This supremacy exists in the Court's power to exercise constitutional review over the legislature's enactments, a device unknown in Europe, including England.

The book is divided into two main parts of unequal length, one entitled "The Real Sources and The Techniques" embracing over 330 pages (pp. 27-362), the other called "The Formal Sources" covering 95 pages (pp. 363-458).

In the first part the authors discuss the history of the common law in America, before, during and after the colonial period, and the very nature of the common law. In a long and exhaustive section they study the force of precedents in American law concluding with a comparison of that force in the legal systems of the United States, England and France. Great attention is given to the problem of the courts' techniques for finding, stating and construing the common law. The impact of the determinations of the dicta and of the principle of stare decisis, together with its correctives, the distinction and the reversal, are expounded, and interesting differences existing between European, English and American judicial techniques are shown.

Having devoted nearly half of the book to the study of those problems of the common law the authors pass on to the study of the statutory law and of its relation to the common law. Several very interesting subsections (pp. 262-286) deal with the attitudes of courts towards statutes, emphasizing the great difference between the approaches of American and European courts. A special chapter reports on the official and private efforts made to codify the law or portions thereof. Another chapter describes the attitude of American courts towards theories and treatises and doctrine in general, this also being a matter on which the French and American courts greatly differ. An excursion is made into legal education and the French reader is acquainted with the differences in the basic approach, the functions and the methods of American and European law schools.<sup>2</sup>

The second part of the book, the one entitled "*The Formal Sources*," acquaints the French reader with the great repositories of the courts' decisions, the various law reports, and with the devices for their better use, such as digests, annotated reports, Shepard's citations, etc. A special chapter reviews the collection of statutes and the systematized editions of statutory law. Another chapter discusses law reviews, bar association publications and the like.

A forty page bibliography is appended, listing under 46 headnotes the principal recent treatises and other works on various topics of American law published in English, whether written by American or foreign authors. This bibliography is sponsored by the United Nations' UNESCO and by the International Committee on Comparative Law.

A final chapter, entitled "Conclusions", contains the authors' prognostications on the future of the common law in the United States, including its relation to the ever growing body of statutory law. The latter, the authors suggest, is increasingly invading the areas which are traditionally the true domain of the common law, and, in particular, has practically taken over in such fields as administrative law.

The information given on the various topics is backed by substantial references listed in the numerous footnotes, and hundreds and hundreds of cases are referred to. The authors display a great knowledge of American law and their attempt to render

<sup>2</sup> This portion of the Tunc's treatise is a much needed expansion and modernization of the subject, on which the most substantial prior French work is Robert Valeur, *L'enseignement du droit en France et aux Etats-Unis* (the teaching of law in France and in the United States), Paris, 1928 (Marcel Giard).

the same palpable to French readers will no doubt result in great benefit. This book is the successful accomplishment of a difficult but worth-while task.

IVAN SOUBBOTITCH

PROFESSOR OF LAW  
NEW YORK LAW SCHOOL

*YOUTH AND THE LAW.* By Frederick J. Ludwig.<sup>1</sup> Published under the auspices of the Youth Counsel Bureau. New York: The Foundation Press. 1955. Pp. 386. \$5.50.

MR. LUDWIG has produced a scholarly compendium dealing with the special relationships existing between the law and the youth of our society. In one volume, topics such as Civil and Criminal Responsibility of Youth, Parental Responsibility, Children at Work and the Interrelation of State and Federal Procedure and Treatment are considered in detail. Other questions particularly treated are those which arise with regard to the problems of youth and narcotic addiction, youth as sex criminals, protection of youth from sex criminals and the use of age as the line of demarcation for criminal responsibility.

The author has sought to make available an answer to many troublesome questions frequently addressed to the Youth Counsel Bureau and he has added to his compilation of authoritative factual data, his personal views pertinent to such matters as a Unified Adolescent Court system, the enlargement of youthful offender treatment, punishment as a deterrent to crime by youth, prevention of narcotic addiction, as well as many others.

A particularly interesting feature of this work is the preparation of comparative clinical studies of the laws of various states, e.g. Table 4, pages 153 to 167, comparing, state by state, the Statutory Responsibility of Parents and Others for Juvenile Delinquency, with sub-headings of Adult Responsibility, Age, Child, Prior Adjudication of Delinquency, Treatment upon Conviction, Imprisonment, Fine, Suspension, Probation, Bonds, Court having Jurisdiction.

In over twenty years of experience in the Criminal Courts, this reviewer has observed the manner in which public interest and emphasis has shifted from one phase of crime to another, viz: recidivism and the Baumes Law; the change from a misdemeanor to a felony (based upon a fixed amount of narcotics) by legislative enactment and statutory definition, of the crime of narcotics possession, together with the development of mandatory minimum sentences for such violations; weapons and the Sullivan Law; and, today, Juvenile Delinquency and Crime by Youth.

Man has always felt the evils of disease, an attack on the body; and of crime, an attack on the body politic; and some more cynical members of our society are quoted as saying that we will forever be besieged by them. Knowledge and understanding are necessary in order to prevent these evils from becoming epidemics, as well as for the treatment of the individual cases. Youth today, with cars, movies, television and other expressions of the advancement of society, still has the characteristics borne by youth from time immemorial.

It was particularly interesting to this reviewer to learn from Mr. Philip Heimlich, Director of the Youth Counsel Bureau, that our modern statutes, in fixing criminal liability at specified age levels, are very similar to the provisions contained in the Talmudic Law of centuries ago.

<sup>1</sup> Professor of Law, St. John's University School of Law.

Youth and the Law can be used to great advantage by everyone who comes into contact with any of the fields covered therein and the reviewer understands that the volume is finding its place onto the desk of many a Judge, Chief of Police and Social Worker.

J. MICHAEL SOLOMON

MEMBER OF THE NEW YORK BAR