

I could go on almost indefinitely. But this is a game any number can play. Perhaps the reader may want to amuse himself by thinking up other instances in which application of the Kurland imperative would wreak havoc with existing practices and patterns. It is hardly an overstatement to suggest that faithful and consistent application of Professor Kurland's doctrine would effect a revolutionary change in our society and that it is the organized religious bodies, particularly the Catholic Church, that would suffer most from the change.

A substantial part of this change could be avoided if the Supreme Court would retrace its steps and hold that the fourteenth amendment does not impose upon the states the mandate of church-state separation imposed upon the federal government by the first. (In respect to the federal government, the nonavailability of taxpayers' suits under the doctrine of *Massachusetts v. Mellon*⁷⁴ might render immune from judicial interferences many of the practices violative of the religion-blind interpretation of the first amendment.) But Professor Kurland repeatedly insists that the no establishment and free exercise clauses are inseparable so that the ban on laws prohibiting the free exercise of religion would likewise be inapplicable to the states. If this be so, I can see no logical or historical reason to distinguish the free exercise of religion from the other first amendment guaranties of the free exercise of speech, press, and assembly, and all that *Gilow v. New York*⁷⁵ has accomplished toward incorporating the first amendment in the fourteenth⁷⁶ would go down the drain.

What hath Kurland wrought?

Reviewed

EX-COMMUNIST WITNESSES: FOUR STUDIES IN FACT FINDING. By Herbert L. Packer. Stanford: Stanford University Press. 1962. viii + 279 pages. \$4.95.

Professor Packer has taken the trouble to write a short and immensely readable book; it deserves equal concision from a reviewer,

74. 262 U.S. 447 (1923).

75. 268 U.S. 652 (1925).

76. *Id.* at 666.

even if he cannot match the author's urbanity and clarity of expression.

The main purpose of Professor Packer's undertaking was to assay the reliability of those who testified about a vexed problem—the extent and consequences of Communist penetration into public affairs in this country—with the special insights and disabilities of having themselves been Communists. He is not concerned with the witnesses who had been planted by the police; their insights and disabilities raise separate and ancient problems. He practically ignores the psychopaths and derelicts, like Manning Johnson and Paul Crouch, whose fabricated testimony is a lasting stain on the government agencies that sponsored it. From the regiment of putatively genuine ex-Communists a selection was necessary. Four figures commended themselves because of the importance of their stories and, as the event proved, because of the neat contrasts that evaluation of those stories permitted. Even with this limitation the records that had to be combed and analyzed ran to 200,000 pages.¹ No wonder this book has been some time in preparation!

The method was essentially to study transcripts of appearances before congressional committees and administrative bodies and of testimony in criminal and, occasionally, civil cases for evidence of consistency or inconsistency, of corroboration or contradiction, of plausible recollection as opposed to implausible invention or fantasy. These records Professor Packer approached with the lawyer's trained eye and the historian's spirit of inquiry.

The results, on the whole, are inconclusive in the sense that no stunning demolition occurs; conversely, none of the witnesses comes out qualified to sit at the right hand of George Washington.

One of the author's major conclusions is that we might have more satisfactory answers to the unresolved questions of reliability and veracity if it were not for shortcomings in all the forums in which the witnesses were heard. I will revert to this point later. Inconclusive or not, the rehearsal of the famous episodes to which the witnesses testified is generally absorbing.

The first witness, Whittaker Chambers, opens up the case of Alger Hiss.² Professor Packer unavoidably finds himself drawn into the intricate controversy, following Hiss's conviction in his second trial for perjury, whether the defense theory of "forgery by

1. P. vii.

2. Pp. 21–51.

typewriter" justified a new trial. It is impossible to deal with this question in a review which is committed to brevity. I will only say that the analysis, while considering the possibility of a frame-up, points to some familiar and some unfamiliar difficulties in establishing and accepting it. While the typewritten documents were central to the issues of the trial (nominally perjury, in fact espionage), acceptance of the verdict still leaves unresolved tantalizing questions about the extent and duration of Hiss's Communist connections. Professor Packer recalls a number of questions (for example, did Chambers give Hiss and others oriental rugs as gifts from the party?) that were not satisfactorily cleared up either in the congressional hearings or in the trial and that might still be capable of solution if some other witnesses could be compelled to testify, perhaps by a forced grant of immunity. However, the author reluctantly recognizes that further inquiry will probably never be made. His final appraisal of Chambers is that he was "a largely convincing witness."³ Is Professor Packer perhaps a little beguiled by what he characterizes as Chambers's "gift of self-expression"?⁴ I recall from my own reading of *Witness*⁵ that it conveyed a sense of plausibility, even in its most fantastic passages, because of the skill in narration and description which made Chambers a senior editor of *Time*. Be that as it may, one comes back to the typewritten documents and, in the absence of a convincing demonstration that they were in fact forged (not simply that they could have been), perhaps we are compelled to concur in the author's call for a "suspension of disbelief"⁶ on the part of those who are still troubled by the strange case of Alger Hiss.

With the testimony of Elizabeth Bentley, the one-time "Red spy queen," we come to a more diffuse and suspect tale.⁷ Miss Bentley was profuse in her identification of spies. Only two cases were subjected to the test of adversary proceedings. One was the perjury prosecution of William Remington, bearing on his denials of Communist Party membership. Here Miss Bentley was corroborated in some respects by the testimony of Remington's estranged former wife. However, the Remington case is vitiated—though perhaps only in collateral respects—by deplorable irregularities on the part

3. P. 222.

4. *Ibid.*

5. CHAMBERS, *WITNESS* (1952).

6. P. 221.

7. Pp. 52-120.

of the prosecution. It is an almost incredible but little-remembered fact that the grand jury foreman who browbeat Mrs. Remington in the jury room had a financial interest in the book that Miss Bentley was writing about her experiences. When the first conviction was reversed on other grounds, the prosecution, presumably to avoid this taint, brought a new indictment based on charges of perjury in Remington's testimony in the first trial. Professor Packer's mild observation is that Remington was "brought to book in a way that does not reflect credit on the administration of justice."⁸ Indeed it does not; but perhaps this has more to do with the spirit of the times and the ethics of prosecutors than it does with Miss Bentley's reliability.

The other case which is impressive to me was a loyalty proceeding against William Henry Taylor, at the time an employee of the International Monetary Fund. Miss Bentley had publicly identified Taylor as a member of the Silvermaster espionage ring, though she later conceded she had no personal acquaintance with him. After an initial finding by the loyalty board that Taylor had been a spy and was possibly still a Communist, his counsel, Byron Scott, mounted a tremendous counterattack and won a reconsideration and reversal by the board. This is clearly a repudiation of Miss Bentley's charge; but there were many other intriguing elements in the case. In an independent review of the materials relating to it (in this one instance, thinking Professor Packer's judgment too cautious, I went behind his recital), I observed that the board made a great point of saying that it had neither depended on nor rejected her testimony. The fact remains, however, that she was almost surely wrong in her secondhand identification.

Professor Packer's overall judgment on Miss Bentley is one of some mistrust, though he says that "in lawyers' terms" she "has made out a prima facie case."⁹ One is certainly left with some reservations about J. Edgar Hoover's strong endorsement of her reliability which he made in 1953 in connection with Attorney General Brownell's selective disclosures about the espionage accusations against Harry Dexter White.¹⁰

For some readers, interest will flag with the accounts of Louis Budenz and John Lautner, both functionaries in the open party

8. P. 90.
9. P. 223.
10. P. 72.

who had no significant spy stories to tell. Yet the chapter on Budenz is a masterly selection from the appalling tangle of charge and countercharge about the communization of China. It confronts Budenz and Owen Lattimore (whom Professor Packer characterizes as "a self-assured amateur politico and inveterate busybody"¹¹) to the disadvantage of both. Budenz's specialty was a long (as time went on, a lengthening) list of names of people he said were Communists because he, Budenz, had been so "officially" advised by his Communist superiors. What in any other context would be rank hearsay from an unreliable source became for many the purest distillation of truth. Lattimore fought back savagely, and an attempt to try him for perjury collapsed (a fact which Professor Packer barely notes).

Budenz's record is an example of the pressure on many of these witnesses, especially those who have made new careers as professional ex-Communists, to come forward with always new disclosures. Professor Packer, noting that Budenz had an excessively rigid and monolithic view of the party and its supporters, suggests that many of his identifications, which were almost surely mistaken, could have been the result of self-deception and not of "conscious untruth."¹² I think this is too charitable. I am especially dismayed by Budenz's testimony before the Cox committee investigating charitable foundations, in the course of which, as Professor Packer says, "he rattled off the names of a number of eminent scholars" (and others) on the basis of his inexhaustible "official reports."¹³ I will not resurrect these particular slanders; but I invite the skeptical reader with a strong stomach for exhumation to dig up this list. Budenz's view of the party and its collaborators was seriously challenged by Bella Dodd in 1950; she in turn colored and exaggerated her views as time passed. The deterioration in the quality and plausibility of her testimony, strikingly similar to that of Budenz, is described by Iversen.¹⁴

Lautner we can pass by quickly. He has perhaps the unique distinction of appearing "as a principal witness in no less than 25 proceedings relating to the issue of Communist penetration."¹⁵ Professor Packer characterizes his testimony, despite some incon-

11. P. 173.

12. P. 177.

13. P. 176.

14. IVERSEN, *THE COMMUNISTS AND THE SCHOOLS* 313-23 (1959).

15. P. 183.

sistencies and errors exploited by successive cross-examiners, as "stolid, pedantic, and relatively unshakable."¹⁶

Professor Packer's major didactic purpose, which he interweaves with his testimonial analysis, is to explore the adequacy of the fact-finding processes we have used to draw out and to test these murky stories. He finds serious inadequacies in all of them. Congressional investigations, ideally, could be a very powerful instrument. Their shortcomings in real life are painfully apparent. Professor Packer lays particular and deserved stress on the downright sloppiness (my word, not his) of many of them. Staff work is poor; loose ends never get tied up; committee members drift in and out of the hearing room, dropping red herrings on the trail and haring off on irrelevant scents.

An administrative tribunal could also be effective. The principal agency in this field has been the Subversive Activities Control Board, which has had the limited, tendentious, and, many would say, superfluous task of determining formally whether the Communist Party and other organizations are Communist-dominated. Court proceedings, of all the possibilities, are best for tackling the credibility of witnesses; but the issues properly presented to courts and juries are narrow ones: Did Joseph Stalin advocate the overthrow of the government by force and violence?—answer yes or no. Trials are not suited for historical research.

They order these things better in England. So we often think when governmental machinery is in need of overhaul. Professor Packer looks respectfully at the formal, infrequently used Tribunal of Inquiry and at the more familiar Royal Commission of Inquiry and finds them good. Their adaptability, when one moves from creation by an omnipotent Parliament to support from our divided and jealous executive and Congress, creates many problems as Professor Packer shows. I must confess that the suggestion that we attempt such an adaptation does not excite me very much. We are stuck with congressional committees and will have to do what we can to persuade them to function efficiently and fairly.

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One leaves this elegant essay with feelings tinged with melancholy and resignation. The events recounted already seem far away and long ago. Professor Packer refers unobtrusively in his preface

16. P. 224.

to "times of trial"¹⁷ in which he was supported by Stanford's Dean Carl Spaeth, to whom the book is fittingly dedicated. It is hard today to understand how even the prospect of this study should have ruffled academic and official feathers six or seven years ago. Now passions run hot about other matters than the impact of domestic communism. One has difficulty in recalling how fevered they were then, whipped by the gales of the McCarthy era. It is often a reproach to scholars that their analyses appear too long after the event to shape public opinion at a time of crisis. But perhaps this is just as well. Emotions recollected in tranquillity are less deceptive. Although we may always hope to avoid a recrudescence of the excesses of the first decade of the Cold War, the hope is probably a vain one. We shall doubtless again have to struggle with "the weaknesses, the pathology of fact-finding processes,"¹⁸ that this book explores. It will give us some guidance for the future. Beyond that, it will be a striking reminder to historians of the uncertainty of the past.

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Received

- AUTOMOBILE INSURANCE AND RATE REGULATION.** By Frederick G. Crane. Columbus, Ohio: Bureau of Business Research, College of Commerce and Administration, The Ohio State University. 1962. xiii + 161 pages. \$5.00.
- CONSTITUTION OF THE UNITED STATES 1787-1962, THE.** Edited by Putnam F. Jones. Pittsburgh: University of Pittsburgh Press. 1962. 76 pages. \$2.00. Papers delivered at a symposium commemorating the 175th anniversary of the United States Constitution and the University of Pittsburgh.
- EXTREMISTS, THE.** By Mark Sherwin. New York: St. Martin's Press. 1963. vii + 242 pages. \$5.00. This book is a forthright survey of the right-wing extremists—who they are, what they are fighting, and where they are leading their confused adherents.
- FREEDOM OF ASSOCIATION.** By Charles E. Rice. New York: New York University Press. 1962. xix + 202 pages. \$6.00. This is the first comprehensive study of an issue central to our time—the right of men to associate freely in order to promulgate their ideas.

17. P. viii.

18. P. 1.

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