

problems in Barendt's analysis originate not so much in his assumption that philosophical reasoning may be valuable, as in his method of importing philosophy into constitutional interpretation. By asserting that philosophical principles tell us *what the first amendment means*, Barendt not only transforms the amendment but also elevates particular philosophical principles to a status that they have not earned and may not merit. Such an approach reduces the incentive to evaluate philosophical arguments seriously and realistically. When scholars forego the temptation to pass off their philosophy as interpretation of what the Constitution means, they will likely find themselves forced to do better philosophy.

THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS. Edited with an introduction by Melvin L. Urofsky.¹ Bethesda, Md.: Adler & Adler. 1987. Pp. xxiii, 448. \$24.95.

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In a recent assessment of the Justice who served longer than any other on the Supreme Court of the United States, a distinguished legal historian described William Orville Douglas as "the anti-judge," a man whose fierce individualism and idiosyncratic style challenged two of the dominant assumptions of modern American jurisprudence: that appellate jurists should remain aloof from most forms of political engagement and that their opinions ought to display a decent regard for precedent and the trappings of legal scholarship.³ Bill Douglas seldom paid obeisance to the judicial, political, or social conventions of the time, because in his conception of human nature they remained the principal enemies of the authentic self. He looked upon life as a series of obstacles to be overcome and battles to be won by the heroic self against the oppressive institutional arrangements of society. A loner and a narciss-

proper moral to draw, since I have made a meager attempt of my own to develop a "philosophical" rationale for protecting speech. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649 (1987).

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3. White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 VA. L. REV. 17 (1988).

sist, he found it difficult to sustain intimate bonds with wives, children, or colleagues.

Professor Melvin Urofsky, whose editorial skills helped to bring us five volumes of Louis Brandeis's letters, now gives us an equally large and clear window upon the life of another major figure in our legal history. In addition to an excellent introduction, he has chosen a rich sample of letters and memoranda from Douglas's personal papers that covers the full range of his controversial public and private life: the professorial years at Columbia and Yale, his days at the SEC, his relations with other Justices, spouses, and children over a half-century, his nonjudicial writings, the abortive impeachment efforts of the early 1970s, and his final days in retirement. The annotations are lucid and crisp, never obtrusive. Professor Urofsky has shown once again that he is a master craftsman in this scholarly genre. The volume adds important new colors to the portrait of Douglas drawn by his biographer, and sketched in his own autobiographical writings.

Douglas carefully sculptured a self-image and a public persona that combined elements of Horatio Alger, Peck's Bad Boy, and Gaius Gracchus. He saw himself as the poor lad from the small town who, by virtue of his intellect and will power, overcame the social and physical handicaps of family misfortune, infantile paralysis, and assorted childhood phobias to scale the heights of the nation's power structure. He was the radical, outspoken professor of law who defended academic freedom and fought against the traditionalists in legal education; the two-fisted chairman of the Securities and Exchange Commission who cleaned up the stock exchanges; the rugged outdoorsman who met the challenges of nature in mountain passes, fields, and streams; the world traveler and statesman without portfolio who offered sage advice to the leaders of Third World countries struggling against colonialism, communism, and poverty; the fast-track jurist who always kept abreast of his case load and who routinely cut through legal technicalities to promote justice and equality; a tribune of the people and popular rights who endured frequent political attacks from conservatives because of his unswerving devotion to liberty and fair play.

Like all legends that are partially self-created, there was exaggeration as well as truth to Bill Douglas's. If he tended to embellish his family's humble circumstances, the bout with polio was real enough. Although he never got rich tutoring students to put himself through Columbia Law School, he made a more comfortable living than he later recalled. He probably left the Cravath organization in the late 1920s more out of boredom and to escape the drudg-

ery of commercial practice than because he objected to the firm's money grubbing or its corporate clients. He resigned his faculty post at Columbia to protest President Nicholas Murray Butler's appointment of a new law dean, but not before he had in his pocket a lucrative offer from Yale. At the SEC he broke the old boy network of floor traders and specialists who had run the New York Stock Exchange like a private club and gave a greater voice in the industry to public brokerage firms, over-the-counter dealers, and accountants, but this hardly constituted a proletarian revolution on Wall Street. An absolutist with respect to the speech and press guarantees of the Bill of Rights, he displayed far less concern for civil liberties in cases that touched the establishment clause, the fourth amendment, and the death penalty. Although he was an outspoken critic of racial discrimination, his dissent in *DeFunis v. Odegaard* would have dealt a serious setback to voluntary affirmative action programs designed to overcome this tragic heritage. And despite a long judicial tenure punctuated by frequent controversy, Douglas did not leave behind a coherent jurisprudential legacy comparable to that of Felix Frankfurter, his great antagonist, or Hugo Black, his sometime ally.

As one might expect, Douglas's years on the bench dominate this volume. A good sample of his correspondence with and opinions about other Justices is included, as well as longer discussions that focus on particular issues: school desegregation, abortion, capital punishment, freedom of speech, and criminal due process. The disintegration of his personal and professional relationship with Frankfurter constitutes a chapter in itself. In 1932, Professor Douglas of Yale, after reading Professor Frankfurter's famous essay on the Constitution's compact clause, told the latter: "Truly, Felix, there are passages in the article which for sheer beauty of content and style have seldom been equalled in legal literature." By 1954, following a sharp conflict between them over a minor ICC case, Douglas complained that Frankfurter had refused "rather insolently" to answer one of his questions. "We all know what a great burden your long discourses are," Douglas added. "So I am not complaining. But I do register a protest at your degradation of the Conference and its deliberations." Shortly before a stroke forced Frankfurter into retirement, Douglas wrote a memorandum that he never sent to the other Justices which described his chief antagonist as "an ill man," protested his "continuous violent outbursts against me," and threatened a boycott of the conferences in order to protect Frankfurter's health and life.

At his nastiest, Douglas claimed that Frankfurter sided with

Vinson, Reed, Clark, and Jackson in the *School Segregation Cases* and voted on railroad reorganization matters to protect the financial interests of his close friend, Max Lowenthal. The first allegation badly misrepresents Frankfurter's position on civil rights⁴ and does not find support in Richard Kluger's authoritative account of the long history of the *Brown* litigation.⁵ The second, which includes Douglas's suggestion that Frankfurter himself may have had an economic stake in the outcome, is sheer innuendo lacking any solid proof. In one respect, however, Douglas was absolutely right about his relationship with Frankfurter: "Twenty-odd years have shown," he wrote, "that I am a disturbing symbol in his [Frankfurter's] life." In addition to their clashing jurisprudential styles, both men jockeyed for positions of influence in Washington, and Douglas's relaxed code of fidelity, including three divorces, was no doubt a constant reminder to Frankfurter of his own marital ordeal.

That Douglas had a stormy relationship with Frankfurter (and later with Chief Justice Warren Burger) comes as no great surprise in the wake of numerous books about the Court published in the past decade. But several of Douglas's observations about two liberal heroes, Earl Warren and Hugo Black, may raise a few eyebrows. Despite his public image as the convivial humanitarian, Warren could be a tyrant when dealing with Court employees, law clerks, and even other Justices. Seven years after Warren's arrival, Douglas confided to retired Justice Sherman Minton that "in retrospect it was a sad day. His [Warren's] attitude toward the Court is the attitude of a prosecutor to his staff." One of Warren's outbursts against Frankfurter led even Douglas to express sympathy for the latter: "I've never been a Felix fan, as you know. But I never dreamed I'd be here when a Chief Justice degraded the Court like Earl Warren is doing. It's a nasty spectacle. Perhaps the old boy is off his rocker." A month later he complained to Minton that Warren had fired a Negro barber long employed by the Court after the police arrested him for drunkenness. "The CJ thinks the Court is a bureau in Sacramento, and that he runs it. . . . I don't know of a soul who respects him any more. I have defended him in public and in private. But no more. . . . The truth is, I think, that Earl Warren is a cheap politico with a Christ complex."

Douglas also documents the anger and panic stirred in Warren and Black by the rising militancy among black civil rights demonstrators. In the summer of 1963, a Mississippi court issued a sweep-

4. Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-60: An Oral History*, 100 HARV. L. REV. 817 (1987).

5. R. KLUGER, *SIMPLE JUSTICE* 657-99 (1976).

ing temporary injunction against street protests in the state capital at Jackson. Douglas as well as Justices Goldberg and Brennan argued that the Court should review the restraining order or stay its enforcement because its language was so broad that even peaceful acts could be banned. Black, according to Douglas, reacted "rather violently" to these suggestions. "He [Black] reiterated what he has said before, that he thought it was time to clamp down on the Negroes. The Chief Justice seemed to agree with him." Black urged the Court to deny stays in any cases from state courts involving racial issues that summer "because he thought that it was time to bear down on the Negroes and to make it appear at least that the Court was handing out justice even-handedly." A decade later, when the Court in *Swann* upheld mandatory school busing as an appropriate desegregation remedy, Black vigorously opposed it in conference ("Brennan said it was because the word 'bus' did not appear in the Constitution") and in the end "capitulated very, very reluctantly."

His relationships with four wives (except the last), two children, and numerous law clerks were usually distant, chilly, and exploitive. Loving mankind in the abstract, but seldom face to face, Douglas filled his own emotional needs first. The divorce from his second spouse, Mercedes Hester Davison, was especially tempestuous. Two heavyweight Washington lawyers represented them, Clark Clifford for the Justice, Joseph L. Rauh, Jr. for Mercedes. Rauh, who specialized in civil rights and civil liberties cases and who had considerable distaste for divorce litigation, agreed to represent Mercedes only under duress when Abe Fortas begged for help by telling him: "You're one of the few guys in this town who Bill can't and won't push around." At one point in the negotiations, Douglas offered his ex-wife a Himalayan tent, a painting of a water buffalo, gazelle horns, and a cougar skin as credit against a \$2,500 note. He accused her of withholding much of his personal property, including a Persian carpet, a quarter horse, and, above all, "a little ax" purchased from Abercrombie and Fitch.

Douglas's views on foreign leaders and American foreign policy could be acute and pungent. After Sol Linowitz, the American ambassador to the OAS, defended the Guatemalan government, he received the following blast from Justice Douglas: "I still get nauseated at your misleading public utterances and the half-lies distributed to the public." He urged President Truman to reestablish diplomatic relations with the People's Republic of China, exploit Chinese nationalism, and detach the regime from Soviet influence. "What we are doing on a small scale in Yugoslavia we can do on a

grand scale in Asia." At other times, his perspective could be frightfully naive. He described Sukarno of Indonesia as "a great democratic leader," and Ngo Dinh Diem of South Vietnam as one who represented "the parliamentary tradition where free speech and free press are permitted, where opposing views are tolerated and even encouraged, where differences of opinion shape the course of events, where there is no dictator, where men debate and air their differences and then settle on a compromise solution."

Although he never left his ROTC unit in Walla Walla during World War I, Douglas qualified for burial in Arlington National Cemetery and was interred there in 1980 near Warren, Black, and Oliver Wendell Holmes. Although it is doubtful that Douglas knew Woody Guthrie "from my hobo days," as he later claimed, he insisted that "This Land is Your Land, This Land is My Land" be sung at his funeral. "It reflects not a socialist dream," he noted, "but . . . the right to move from place to place to look for a job or establish a new home, the right to move interstate without payment of a fee. . . . In other words, it expresses the vagrancy issue as I have expressed it and as it has become ingrained in the law." To the very end, he remained the Huck Finn of our judicial tradition, sharply critical of American society, but ultimately uncommitted, irresponsible, and self-indulgent, always anxious to escape Aunt Polly's grasp by fleeing into the wilderness.

AMERICAN BROADCASTING AND THE FIRST AMENDMENT. By Lucas A. Powe, Jr.¹ Berkeley, Ca.: University of California Press. 1987. Pp. x, 295. \$25.00.

CABLE TELEVISION AND THE FIRST AMENDMENT. By Patrick Parsons.² Lexington, Ma.: Lexington Books. 1987. Pp. iv, 168. \$24.00.

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As their titles indicate, these two books are both about broad-

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