Defining Our Legal Liberties

The Bill of Rights: Its Origins and Meaning, *by Irving Brant (Bobbs-Merrill. 567 pp. $7.50), holds that the first ten Amendments to the Constitution mean exactly what they say and should be so interpreted by the Supreme Court. Roger Baldwin is the founder of the American Civil Liberties Union.*

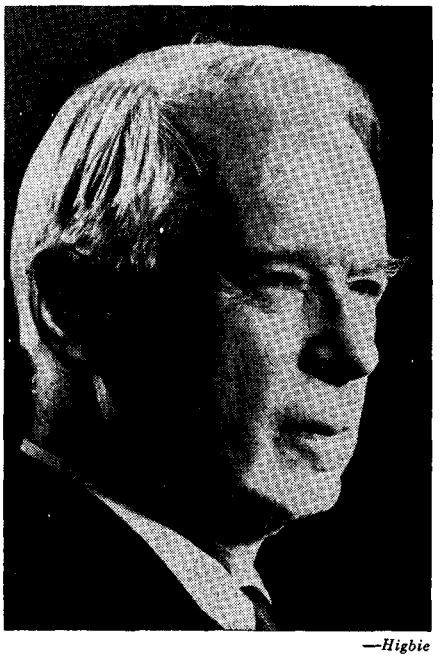
By ROGER BALDWIN

IRVING BRANT, editor and journalist by profession, is best known for his monumental six-volume life of James Madison, acclaimed as an outstanding work of scholarship. It is natural for so devoted a student of Madison and his times to turn to Madison's role as the author of the original Bill of Rights and to explore its origins in English law and its growth in later American Amendments and interpretations by the Supreme Court. Almost half the book deals with the English background; the rest with what Mr. Brant calls the American foreground.

This is not only a first-rate historical study written with anecdotal color; it is also an advocacy of the Bill of Rights as originally intended, to protect citizens from abuses of governmental power through intervention by the Supreme Court as the interpreter of the Constitution. Although Mr. Brant sustains the role of the Court as the ultimate power in our Constitutional system, he is highly critical of its record and of those justices who in recent years have subordinated the clear mandate of the Bill of Rights to consideration of national security, to deference to legislatures, and to claims asserted to be superior to rights.

Mr. Brant recognizes no superior claims. He is for the literalists on the Supreme Court who hold that the language of the Bill of Rights means exactly what it says on its face. When it commands that Congress shall make no law abridging the freedom of speech, it means no law, with no exceptions for Communists or other "subversives."

Mr. Brant is disturbed by recent tendencies in American life that the Supreme Court majority seeks to check. He writes: "This book is written at a moment when the Bill of Rights is the victim of prejudice and passion among an active minority, abetted by ignorance and passivity among the majority . . . and when the most enlightened Supreme Court in American history is moving against the blind forces of prejudice and apathy to restore our freedoms." But this is very recent. Of so short a time ago as 1950 to 1960, he writes, "the Bill of Rights went into and out of our Constitution with an ease to make one gasp, due to changes in the Supreme Court." Legally viewed, quite so; our rights are what a Supreme Court majority says they are. But in practice they rest on more or less slow acceptance depending on the resistance to one or another change. Only long-run tendencies of the Court are persuasive, and for over thirty years they have been even more favorable to expanding the Bill of Rights than Mr. Brant estimates.



—*Higbie*

Irving Brant—"in the purest libertarian tradition."

Despite his support of the present Court majority and the series of its decisions on free speech, racial equality, church and State, the rights of defendants, and one-man-one-vote, he would go further than the Court in applying the Bill of Rights. He would deny to Congress all power to investigate the political opinions and associations of citizens; he would abolish the "clear and present danger" yard-stick for penalizing speech or writings; he would not yield to any claim superior to that of the Bill of Rights. Mr. Brant is particularly caustic in scoring what he regards as the Court's frequent reversion in new forms to the ancient and discredited doctrine of seditious libel, contending that governments and their agents cannot be libeled by a free citizenry.

He answers the critics who hold that the Supreme Court in recent decisions has gone too far and too fast by stating that the "course taken by the Court has been forced on it by a hundred years of accumulated error." When Congress seeks to overturn a Supreme Court decision or restrict its jurisdiction—threatened but never yet accomplished—then the "Constitution ceases to be anything more than the gaunt skeleton of a frame of government." But our ultimate reliance, Mr. Brant holds, depends not on the courts but on the fitness of the people for self-government, and that in turn depends on the "freedom of the mind," protected by the philosophy inherent in First Amendment liberties. Thus the courts play a crucial role as guardians of self-government.

HE quotes Madison: "If we advert to the nature of republican government we shall find that the censorial power is in the people over their government, and not in the government over the people." If once accepted by the people, that "profound truth" will no longer pit people against government for the two "will be one." Acceptance of such a noble goal by the people awaits the remote day when the spirit of community transcends the concept of masters and servants.

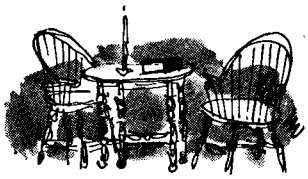
Mr. Brant's interpretation of the American Constitutional system, the role of the Bill of Rights and the Supreme Court in it, is in the purest libertarian tradition. But the long, hard road to his goal will continue to be marked by the impact on American liberties of a disordered world threatened by the catastrophe of atomic war, yet groping for the stability of law and peace. Without the concepts of the Bill of Rights, law would fail to provide a base for those personal and minority rights by which peaceful change is achieved. Even with the concepts of the Bill of Rights, the controversial struggles to make practice fit principle will, for a long future as in the long past, tax the determination of all those who, like Mr. Brant, are devoted to protecting the rights of each as security for the rights of all.

Defenders of the Unpopular: Some years ago, when McCarthyism was a pall over the land, an enterprising reporter discovered that the man in the street would not sign a petition in favor of the first ten Amendments to the Constitution. More important, many people did not know what the Bill of

Rights contained, and some doubted the need for the "radical notions" expressed therein.

No ogre dominates the Senate and frightens the White House into silent submission today, but civil liberties are still denied. People who exercise their right to free speech and petition by demonstrating against U.S. participation in the Vietnam war are branded "Vietniks" by the anonymous *Time* magazine essayists. Fair trial, religious liberty, and the other rights are constantly questioned and misunderstood by the respectables as well as the knuckleheads.

The Noblest Cry: A History of the American Civil Liberties Union, by Charles Lam Markmann (St. Martin's, $7.95), is an invaluable account of the ACLU's defense of the unpopular, the individual, and often the minority views of people and organizations. A solid



piece of work, written with clarity and passion, the book merits a place in schools and libraries because it provides the forgotten facts about the good fight for basic liberties across the years. The parallels to today's campus revolts, pacifist revivals, and civil rights demonstrations keep leaping off the pages of yesterday's legal defenses by the ACLU.

That radical document, the Bill of Rights, remains the north star in the hundreds of cases given here of attempted civil rights blackouts. To name some: fingerprinting as a condition of employment by teachers; wiretapping and electronic eavesdropping; government aid to church-related educational institutions; restrictions on birth-control information and devices; restrictions on travel, teaching, and fair trial.

"It should be obvious from these examples," the author says, that the ACLU grinds no axe. "It does not concern itself with the merits of Communism, Fascism, homosexuality, continence, unionism, free enterprise, pacifism, militarism, racial purity, religious worship, atheism, Sunday baseball, etc. It does concern itself, and solely, with the protection of the fundamental rights of everyone to speak, meet, read, and write about these or any other subjects and, in his private life, to enjoy what the late Justice Brandeis called the greatest civil liberty of all: the right to be let alone."

The Noblest Cry (José Ortega y Gasset defined the phrase as the right which the majority accords to minorities) is a primer for those who do not understand the libertarian response—and a tribute to those who do.

—HERBERT MITGANG.

Crime and the Ultimate Punishment

***The Power of Life and Death,** by Michael V. DiSalle (Random House. 214 pp. $4.95), sets forth arguments for abolition of capital punishment. James F. Fixx, SR's feature editor, is a member of the Citizens' Advisory Committee to the New York City Department of Corrections.*

By JAMES F. FIXX

THOSE who argue that the death penalty acts as a deterrent to capital crimes might do well to ponder the case of one Charles Justice, an inmate at the Ohio State Penitentiary in the early years of this century. Assigned to duty in the death house, Justice observed that the electric chair's clamps were too loose for a small man and that the electrodes therefore made poor contact. Justice put his ingenuity to work, tinkered with the chair, and finally managed to design a new system of iron clamps that immobilized the condemned man's limbs (the clamps are still in use). If anyone ever had good reason to reflect on the death penalty, certainly it was Charles Justice. Yet only a few months after his parole he returned to the penitentiary charged with first-degree murder. He was found guilty, sentenced, and soon died in the same electric chair he had done so much to improve.

The story of Charles Justice comes, in its sadly ironical way, very close to the central theme of Michael V. DiSalle's passionate and persuasive argument against the death penalty. Those who favor its retention insist that without it crimes like rape, murder, and kidnaping would proliferate uncontrollably. Yet it is possible to cite case after case, as DiSalle does, in which knowledge of the death penalty served as no deterrent at all. (It is instructive, for example, to consider cases in which murderers chose to commit their crimes in a state having capital punishment instead of driving a few miles into one without it.) It is understandable that after a particularly loathsome crime outraged citizens—and jurors—should be tempted to demand a penalty of death, but it is nevertheless a fact that not a shred of evidence exists to show that execution fulfills any need except a desire for revenge.

DiSalle came by his thesis the hard way—by observing, during his term as Governor of Ohio (1958-63), a hundred and more men and one woman who had been sentenced either to death or to life imprisonment, and by having to pass on their appeals for clemency and parole. Often his deliberations were made in an-

"Do you promise to love, honor, and relate to one another?"