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434 pp., \$16.95

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*Reviewed by Michael M. Burns**

Since embarking on a career in the law, I have regarded William O. Douglas as one of a handful of outright "heroes." Such unsophisticated adulation — or at least the admission thereof — hardly befits my professorial station. As academics, we tend to be observers, not participants — self-appointed social critics, often cynical, arrogant and judgmental, removed from the fray, attuned to our intellects but rarely to our hearts. We forget to have fun, and having heroes is fun. That is not to say that I, as an adult, have felt the same way about William O. Douglas as I did, as a child, about Willie Mays. What I admired, and virtually all that I knew, about Mr. Mays were his professional accomplishments at homeplate and in centerfield. On the contrary, my admiration for Justice Douglas has less to do with his judicial opinions than with the inspirational quality of his broad-ranged, extrajudicial life experiences and, in turn, his deeply-held personal values.

Given these predilections, it is not surprising that I found *The Court Years* far less interesting than Justice Douglas's first volume *Go East, Young Man*.¹ *The Court Years* is largely a collection of disjointed anecdotes, some of which are noteworthy, loosely gathered under poorly selected chapter headings. In addition, the stylistic inconsistencies, due to the editors' contributions following the author's death, disturb the flow and take their toll on the reader. Lawyers will find the discussion of cases rather elementary and largely unrevealing; general readers will understand the explanations of cases but will find little of interest regarding the legal process or the human frailty of the justices, especially if their bubbles have already been burst by *The Brethren*.² Notwithstanding these criticisms, I recommend the book,³ although I

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1. W. O. DOUGLAS, *GO EAST, YOUNG MAN* (1974).

2. B. WOODWARD & S. ARMSTRONG, *THE BRETHREN* (1979).

3. I would be greatly surprised to learn that there are, in fact, people who read

am sure that even Justice Douglas himself would not regard it as a great work.

On a purely informational level, there *are* some interesting anecdotes and observations. For example, Justice Douglas expresses his regrets about his *Korematsu* opinion,⁴ explains his writing both the majority and minority opinions in *Meyer v. U.S.*,⁵ and gives a behind-the-scenes view of the justices negotiating prior to the decision in *Brown v. Board of Education*.⁶ He discusses the offers he received from two presidents of the United States to be their running mates and the movement to draft Justice Douglas as a presidential nominee,⁷ and reveals the naivete of the Bible-toting, proselytizing Robert F. Kennedy traveling through Russia.⁸

Many of us will find passing enjoyment in the tidbits of personal gossip — information which is of admittedly marginal intellectual value but which is no less intriguing than the slick pages which we skim in the waiting room of our dentist's office or at the supermarket check-out counter. Who among us can deny a sense of gleeful voyeurism when a person of Justice Douglas's stature describes Lyndon Baines Johnson as "Machiavellian,"⁹ "obsessed with the desire to be loved,"¹⁰ and as one who "gave the heritage of America away to the fat cats and the official vandals who have despoiled us;"¹¹ or Richard Nixon as an "underhanded,"¹² "deceitful,"¹³ "amoral,"¹⁴ "unethical,"¹⁵

book reviews in the back pages of law journals for the purpose of obtaining advice on whether to invest the necessary time and money in a book, but if such an audience exists, it deserves an opinion.

4. W. O. DOUGLAS, *THE COURT YEARS, 1939-1975*, at 279-80 (1980) [hereinafter cited as *THE COURT YEARS*].

5. *Id.* at 173-74.

6. *Id.* at 113-15.

7. *Id.* at 281-83, 289-90.

8. *Id.* at 306-07.

9. *Id.* at 317.

10. *Id.* at 333.

11. *Id.* at 318.

12. *Id.* at 342.

13. *Id.* at 343.

14. *Id.* at 351.

15. *Id.*

expedient¹⁶ liar with an ego whose appetite was “devastating,”¹⁷ or General Curtis E. LeMay as “The Stone Age Man.”¹⁸ In the category of celebrity trivia, is it widely known that Justice Douglas’s butler Rochester was the man “after whom Jack Benny was to name a famous radio and movie character?”¹⁹

The book does contain, in addition, numerous thought-provoking ideas and inspiring passages. The source of this inspiration is, I suggest, the depth of Justice Douglas’s own life experience, particularly his childhood poverty and polio and his wilderness trips and world travels throughout his life, references to which we find primarily in his earlier books. If we are to accept Chief Justice Hughes’s piece of advice to the newly arrived Justice Douglas — “[Y]ou must remember one thing, at the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections”²⁰ — one’s life experience, one’s developing instinct, and one’s view of mankind, become the vital ingredients in judicial decisionmaking.²¹

A marvelous feature of teaching constitutional law is the opportunity each year to share anew with students the values which have inspired the first amendment and the views of those who have shaped its meaning. In a chapter in which Justice Douglas observes that “[b]ehind the Nixon drive for conformity was a hasty disrespect for the First Amendment,”²² the author reflects upon his own world travels and upon the views of Thoreau, Gandhi, Faulkner and Solzheznitsyn,

16. *Id.*

17. *Id.*

18. *Id.* at 250.

19. *Id.* at 269.

20. *Id.* at 8.

21. For example, Justice Douglas suggests that the mass picketing of Justice Hugo Black’s house in response to the revelation that he once had been a member of the Ku Klux Klan “colored his decisions in all subsequent cases involving picketing, mass demonstrations, and protest marches.” *Id.* at 20. Legal commentators have had difficulty in reconciling Justice Black’s professed “absolutism” with his position in “symbolic speech” cases, which, as Professor Alan Dershowitz observes, “is little more than speech on a stick.” Dershowitz, *Inside the Sanctum Sanctorum*, N.Y. Times, Nov. 2, 1980, at 9, col. 1. Justice Douglas’s explanation may be the best we are going to get.

22. *THE COURT YEARS* at 262.

noting that:

The philosophy of the First Amendment marks a bold venture, judged by the problems of this troubled world. It is bold because ideas are dangerous — more dangerous than guns. Ideas unite people; they pass over borders in spite of the battalions that guard those borders. They live on and on — throughout time. Many still walk to the measure of the ideas of Zoroaster, Buddha, Jesus, Mohammed and other men and women with powerful concepts in religious, political or educational work. So when we honor Gandhi, we honor the best in Eastern and Western civilization — the power of the mind and the right of the mind to be free — to consider, believe and speak what one thinks is the truth. . . . The values the First Amendment protects are necessary in a multiracial, multireligious, multi-ideological society of the kind we profess to be. The First Amendment sets us apart from most other nations. It marks the end of all censorship, it allows the ability of the mind to roam at will over the entire spectrum of ideas, and the sanctity of one's beliefs. It — not our bombs or air force or missiles or manufacturing skills or merchandising methods or GNP — sets us apart. A symbol of our health is the respect we show to First Amendment values.²³

Perhaps the one institution most readily associated with free speech and independent thought is the university. During the McCarthy "witch hunt" era, this was not the case, and Justice Douglas emphasized the invaluable quality of debate and conflict:

With the passage of the loyalty security programs, university environments did not relax; rather they hardened. The lessons of conformity and the rewards it brought became subtle influences in academic circles. Faculties walked more and more in goose step to the tunes of the Establishment. Universities were no longer places of ferment but became more and more institutions dispensing information on how to get ahead and sedatives that made students less and less responsive to the mighty forces of rebellion that were making the nation seethe.

I believed, with William M. Birenbaum, that 'a campus without disruption is polluted, like a river without fish or a defoliated forest along the Ho Chi Minh Trail. . . .'²⁴

23. *Id.* at 263, 266.

24. *Id.* at 110.

Justice Douglas's travels helped mold his views on foreign policy as well, views which stood in vivid contrast to the parochialism and provincialism of our nation during the Korean War period:

[T]o understand what was happening, a person would have to leave the country, go into the back regions of the world, lose himself there and become absorbed in the problems of the peoples of different civilizations. When he returned to America after a few months, he would probably be shocked. He would be shocked not at the intentions or purposes or ideals of the American people, but at the arrogance and intolerance . . . reflected in many of our attitudes toward Asia. He would find that thought was being standardized, that the permissible area for calm discussion was being narrowed, that the range of ideas was being limited, that many minds were closed to the reception of any ideas from Asia. . . .

We thought of Asia in terms of military bases, not in terms of peoples and their aspirations. We wanted the starving people of Asia to choose sides, to make up their minds whether they were for us or against us, to cast their lot with us and against Russia.

We did not realize that to millions of these people the difference between Soviet dictatorship and the dictatorship under which they lived was not very great. We did not realize that in some regions of Asia it was the Communist Party that had identified itself with the so-called reform programs, the other parties being mere instruments for keeping a ruling class in power. We did not realize that the choice between democracy and Communism was not, in the eyes of millions of illiterates, the critical choice it was for us.

We forgot that democracy in many lands was an empty word; that its appeal was hollow when made to illiterate people living at the subsistence level. We ask them to furnish staging grounds for military operations whose outcome, in their eyes had no perceptible relation to their own welfare.²⁵

Unfortunately, Justice Douglas, with so rich and varied a background, is not our average lawyer. The legal profession, which exerts such disproportionate power over people's lives, includes among its members many who have never left the halls of academia and/or the halls of justice, to say nothing of our nation's borders. I see lawyers and judges making decisions for people whose life experiences are light

25. *Id.* at 65-66.

years removed from their own. I see applicants for law professorships who appear to have acquired nothing but fees and degrees and who rarely define their "experience" as including anything beyond the law. I see law students with little sense of the "renaissance person" which the fine tradition of our profession rightfully demands. And I know personally that along with the intellectual excitement and comfort of academia can come a subtle strangulation from stale air behind ivy-covered walls. If I am fortunate, I will get that periodic kick in the rear from Justice Douglas, pushing me out the office door and reminding me of the differences between experience and understanding, between empathy and sympathy.

Provocative ideas which challenge our complacency are laced throughout *The Court Years*. When "[m]any people in the nation felt a glow of sadistic satisfaction"²⁶ in viewing newspaper photographs of Ethel Rosenberg's face as the electric charge hit her, showing "visible liquid excretions through the skin,"²⁷ Justice Douglas was reminded of having witnessed the custom in Afghanistan whereby a murderer was put in a wire cage and hung from a tree while passersby assaulted him with rocks and denunciations until he died of pneumonia.²⁸ While concluding that "capital punishment is barbaric,"²⁹ the author dares us to acknowledge our "orgasm of delight,"³⁰ to admit to our societal hypocrisy, and, if I may extrapolate, to consider televising our executions.

Self-important lawyers will undoubtedly cringe when Justice Douglas reminds us that "nothing in the Constitution"³¹ requires the President to appoint a lawyer to the Supreme Court; and that during his final year on the Court, in an attempt "to see if fresh air blowing from other disciplines would ventilate the law,"³² he selected law clerks from fields other than law: sociology, government, psychiatry and economics.³³ Alternatively, he once suggested that the justices "experiment

26. *Id.* at 82.

27. *Id.*

28. *Id.* at 83.

29. *Id.*

30. *Id.*

31. *Id.* at 281.

32. *Id.* at 174.

33. *Id.*

with doing our own work”³⁴ without the aid of clerks.

In numerous writings and speeches throughout his lifetime, Justice Douglas attributed his well-known concern for “the underdog” to his childhood polio and poverty, including, of course, his experiences riding freight and his contacts with society’s outcasts. Another manifestation of these experiences is less attractive — that is, the insecurity which breeds an apparent self-righteousness and vindictiveness, qualities which surface periodically in *The Court Years*. There is a preoccupation with personal attacks, noted above, which says as much about the speaker as the subject, and, at times, with self-serving, bitter remarks (“[Ike] of course, had the palatial suite in Ward 8 and I was in the ordinary room down the hall.”)³⁵ To be sure, Justice Douglas, if not entirely forthright, at least acknowledged this insecurity in a revealing passage about his friendship with Joseph Kennedy’s four daughters:

But though I admired them all, I never dated any of them. It would have surprised Joe to know that his friend who took a freight train across the country to law school could never marry a rich woman. The barrier was too great for me to surmount; and I never allowed it to be tested by becoming intimate with any of these wonderful Kennedy women.³⁶

When speaking of Robert F. Kennedy, he noted sympathetically that “Bobby, being small in stature, was always overcompensating,”³⁷ behavior which Justice Douglas himself exhibited as a polio-victim-turned-avid hiker, but which he might well have denied while preferring a description carrying less Napoleonic connotations.

Perhaps the most striking, though not entirely unexpected, aspect of *The Court Years* — and one which is particularly difficult to accept in a “hero” — is Justice Douglas’s failure to acknowledge women. The one exception is, predictably, his mother, Julia Fisk Douglas, a strong-willed, self-sacrificing woman with deep New England roots, who alone raised the children after their father’s early death.³⁸ “[O]ut of reverence for Father . . . [she] drummed into my ears from my earliest

34. *Id.* at 172.

35. *Id.* at 300.

36. *Id.* at 302.

37. *Id.* at 305.

38. GO EAST, YOUNG MAN, Chapters I and II.

days" her conviction that through the Douglas blood stream was acquired "an indomitable will and capacity for achievement."³⁹ She would even recite a little speech nominating her son William for President of the United States.⁴⁰ The pressure on a child of meeting such expectations — especially in a household where venting emotion was deemed inappropriate — was bound to create a festering anger, which eventually seeped out, coloring not only his personal relationships but his view of gender roles in society.

When a man chooses to write about thirty-six years of his life, it is not insignificant that he refers to his wife only three times, never by name, and only in passing as part of an unrelated anecdote. It may be that Justice Douglas chose to write about his public, not his private, life. That, however, does not explain the nature and the infrequency of his reference to women in public life. Of the 612 people whom the author mentions by name in this volume, only forty-one are women and, of those, twenty-one are noted merely as wives, mistresses and secretaries. Of the remaining twenty, only a handful are recognized for qualities which would complement either sex: Lady Bird Johnson for strength and wisdom,⁴¹ Rose Kennedy for nobility,⁴² and Bessie Margolin⁴³ and Constance Motley⁴⁴ for superb advocacy in arguments before the Supreme Court. Other women were noted for delicious crab chowder,⁴⁵ loveliness, modesty and reticence,⁴⁶ and for unreasonable nervousness about bears.⁴⁷

Justice Douglas does not discuss his opinion in *De Funis v. Odegaard*⁴⁸ and *Kahn v. Shevin*,⁴⁹ yet they are relevant in this context. *De Funis* involved a challenge to a law school "affirmative action" admissions program designed to help members of certain racial and ethnic

39. THE COURT YEARS at 393.

40. *Id.*

41. *Id.* at 312.

42. *Id.* at 309.

43. *Id.* at 184-85.

44. *Id.* at 185.

45. *Id.* at 224 (Mrs. Harlan Fiske Stone).

46. *Id.* at 292 (Mrs. Harry Truman).

47. *Id.* at 220 (Mrs. Charles Evans Hughes).

48. 416 U.S. 312 (1974).

49. 416 U.S. 351 (1974).

groups who were perceived to have suffered from societal discrimination. Justice Douglas wrote at length in opposition to the program, asserting that implicit in such "benign" discrimination is the assumption that the preferred minorities "cannot make it on their individual merit,"⁵⁰ thereby creating an impermissible "stamp of inferiority."⁵¹

In *Kahn*, however, decided just one day later, Justice Douglas rejected a challenge to Florida's \$500 property tax exemption for widows but not for widowers, deferring to the state's remedial policy of "cushioning the financial impact of spousal loss"⁵² on women in an effort to rectify the effects of past discrimination. There is no mention of perpetuating the perception of inferiority, and we are left to ponder why offensive paternalism in one context is regarded as a generous helping hand in another. Old-fashioned chivalry, perhaps.

Justice Douglas would have us believe that he was in the vanguard of promoting women's rights. He reminds us that in 1944 he became "the first Justice to have a female law clerk . . . the very able and the very conscientious Lucille Lomen."⁵³ Twenty-eight years later he hired two more female clerks.⁵⁴ Of the fifty-four clerks he employed during his tenure on the bench, three were women. Although expressing the view that any law which drew a line between men and women was inherently suspect, Justice Douglas alluded to oral arguments by "four wondrous Amazons . . . who droned on and on in whining voices."⁵⁵

Judging from his comment that a "wife [is] more dependent on social affairs,"⁵⁶ I would surmise that, in his introspective moments, Justice Douglas would have acknowledged a certain discomfort with women outside their traditional roles. He may have shared more than a love for the first amendment with his "hero," former Senator Sam Ervin of North Carolina, who said of his opposition to the proposed Equal Rights Amendment: "I am trying to protect women and their fool

50. 416 U.S. at 343.

51. *Id.*

52. 416 U.S. at 355.

53. THE COURT YEARS at 171.

54. *Id.* at 416. Justice Douglas hired Janet Meik and Carol Bruch for the 1972-73 term. An account of the abusive manner in which he treated the outspoken Bruch is provided in THE BRETHERN at 240-43.

55. *Id.* at 185.

56. *Id.* at 129.

friends from themselves.”⁵⁷

Justice Douglas declined invitations to be a guest at the “summer encampment” of the Bohemian Club, an exclusive men’s club in California, because “I knew I would chafe as a captive of an elitist group of men, most of whom I did not admire.”⁵⁸ His objection was apparently grounded on his perception of the club’s practices regarding social class — perhaps including implicit qualifications of race, national origin and religion — but not on the club’s policy of excluding women. For though he rejected the Bohemian Club, he was a member of the Order of the Jungle Cock, whose members were to bring to each annual meeting “a young man fifteen years of age and teach him fly casting.”⁵⁹ This club could hardly be described as having an influential membership, yet helping to perpetuate these “rites of passage” for young men did little to stem the tide of sexism.

Whatever the effects of Justice Douglas’s childhood on his view of women, his exposure to the wilderness surrounding Yakima, Washington was the source of satisfaction and enrichment throughout his life. His love for the outdoors and involvement in environmental causes is legendary and is manifest in his earlier writings, both on and off the bench. In only a few brief passages in *The Court Years* does Justice Douglas write of his deep appreciation of nature, but the passages are significant for they succeed in expressing a perspective which transcends the sense of professional self-importance which he might otherwise have maintained. When he returned home and shut out the world at the end of a work day, it was with humility that he regarded the bevy of quail, the Canadian geese, and “[m]ost impressive of all . . . the white whistling swans that often settle for a rest on the river below me and then take off in a tremendous armada.”⁶⁰ These lesser species, he concluded, are “not craven, corrupt or deceitful,” but are simply “bent on using the biosphere to sustain and perpetuate their lives, not to destroy it nor to exclude all others.”⁶¹

Those who have read Justice Douglas’s earlier works know that he pulls few punches when speaking about other public figures and about

57. The Miami Herald, October 16, 1970, § C, at 4, col. 3.

58. THE COURT YEARS at 241.

59. *Id.* at 182.

60. *Id.* at 391-92.

61. *Id.* at 392.

controversial issues, yet he does not readily reveal much of himself, and we are forced to read between the lines. So often, it seems, we are best able to acquire a feeling for Justice Douglas's human qualities through his accounts of others. In one remarkable passage, he speaks with deep affection of a friend, whose description, in the eyes of this reader, bears an uncanny resemblance to the Justice himself:

I had been drawn to Frank Dobie, distinguished author and teacher, by his book *The Voice of the Coyote*. Dobie loved that canine as did I; and out of his love grew an expertise in the importance of coyotes to our environment and the up-lift that their calls give the spirit of man. . . . Dobie was a free spirit like Walt Whitman in many ways; he was steeped in Texas folklore, he was teacher extraordinary. He also spoke out on controversial issues and made clear his stand. . . .

Dobie criticized universities that suppress plays, as well as newspapers that suppress news or distort it. . . . When the [Texas] legislators proposed to close the university to students from other states on the ground that they occupied housing needed for Texans, Dobie spoke up. The danger of outside students, Dobie said, was that "they bring new ideas," and he added, "There are few people who need ideas more than Texans do."

As a result of this kind of statement, Dobie was a ready target for Texas orthodoxy. The powers that be denounced him as a troublemaker (which he was, in the same sense that Socrates was), and manipulated their rules and squeezed Dobie out of the faculty. He was a true Jeffersonian and his life was a dramatic illustration of First Amendment values. He would say, "Positive zest for life and positive opposition of the strangling of life go together." He once wrote in the student paper, the *Texas Ranger*: "I do not see how anybody who cherishes liberty for others as well as for himself can be intolerant of ideas. I do not see how a vast country, the life of which is bound up in vast complexities, can be governed wisely except by intellectual ability."

I was always indebted to the coyote for bringing Frank Dobie and me together. We communicated not through letters but through that wondrous canine and through the golden eagle, which was being cruelly slaughtered by ignorant and lawless Texans, and through the gnarled mesquite trees and live oaks which distinguish the Southwest. "I have never smelled incense in a church as refreshing to the spirit as the spring laden with aroma from a field of those wild lupines called bluebonnets," Frank once said.

His love for that environment was a part of his love of life. Another part was his love for the emancipators of the human mind — including Jefferson, Paine, Emerson and Thoreau. Freedom of the mind was beauty to Frank Dobie, a beauty he considered essential to all men who desire to stay fully alive.⁶²

Justice Douglas has been a hero of mine because of his commitment to the free flow of ideas and to the free flow of rivers. One who believes in the first amendment and in the environment is willing to listen to the words and sounds which surround us. Lawyers, in particular, are not good at listening. I guess what we have to say is too important.

62. *Id.* at 89-90.