Holmes had the excuse of youth; I have none. And so I, too, must join the chorus who speak of Llewellyn as T. S. Eliot does of one of his practical cats, Mr. Mistoffelees:

"And we all say: OH!
Well I never!
Was there ever
A Cat so clever
As magical Mr. Mistoffelees!"

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Mr. Justice Black, the Supreme Court, and the Bill of Rights. By CHARLES L. BLACK, JR. Harper's Magazine, February 1961, p. 63.

In a recent article in *Harper's Magazine*, Professor Charles Black sought to explain and buttress Mr. Justice Black's position on the Bill of Rights. The argument is so new and appealing—its implications with respect to the judicial process are so provocative—as to invite consideration in a learned journal. Since Professor Black wrote in broad and non-professional terms, it seems appropriate to respond in kind.

No past or present Justice, and no responsible commentator, has ever suggested that the Bill of Rights gives an absolute right to say whatever one might choose to say at any time and any place. To quote Professor Black, "No one would argue, for example, that . . . 'free speech' . . . includes mere personal slander, or fraudulent oral misrepresentation of goods offered for sale, or perjury on the witness stand. . . ." or (in Holmes' famous phrase) shouting "fire" falsely in a dark and crowded theater. It follows then, that in close cases the essence of the judicial function is to balance conflicting interests in the context of the circumstances in which they clash. This is what the Court purports to do, and what Professor Black agrees it must do. His point (bluntly put) is that the Court should insist (pretend?) that free speech is an absolute —while it does the inevitable balancing by manipulating the definition of "free speech." Professor Black admits that "in a *purely logical* sense" it really makes no difference which approach is used. In either case "free speech" gets balanced off against more mundane interests. We must look, then, for an extra-logical—perhaps irrational—justification for the unorthodox position. Its value is said to be psychological: "what is really on the scale is attitude." A judge who talks in terms of absolutes (even though with tongue in cheek) reveals a more reliable attitude, it seems, than one who makes no bones about what he is doing, who balances openly and not under the guise of defining.

Of course, Professor Black has no sympathy for subterfuge and he knows

that in this world compromise cannot be avoided. Yet his argument has little point unless it contemplates that by talking absolutes a court will delude itself—if only a little bit—into thinking and acting in absolute terms. And what of the layman who hears high talk of unqualified rights—which, as it turns out, are somewhat less than unqualified?

Verbalisms are important—largely because they are so misleading. That is why Justice Holmes admonished us to think things, not words, and why in his long fight for human freedom he carefully avoided absolutes. That also is why Brandeis fought so heroically to shift the focus of judicial attention from word-play to the facts of life. The old Court that goaded Holmes and Brandeis into dissent wasn't cruel; it was blinded by absolutes. Preoccupied with the definition and meaning of its preconceptions, it failed to see the human meaning of such things as child labor, sweat-shops, and "yellow-dog" contracts. The whole purpose of the Brandeis Brief was to cure this blindness by blocking the very thing that Professor Black now advocates: judicial opinions founded on platonic absolutes and closet exercises in the art of definition.

If the balancing of concrete human claims is at, or near, the heart of the judicial process, let it be done directly and openly for all to see—not at second hand, behind a verbal barrier. For the great merit of the frankly factual (as distinct from the verbal) emphasis is that it tends to keep us close to reality and away from the never-never land of our private hopes and fears. What Walter Lippman said in another context is relevant here: "When men act on the principle of intelligence, they go out to find the facts and make their own wisdom. When they ignore it, they go inside themselves and find only what is there. They elaborate their prejudice instead of increasing their knowledge."

We are told that: "Attitude is what is at stake between Justice Black and his adversaries." Since that Judge's reverential treatment of the Bill of Rights is shown to be "correct," it would seem to follow that the Court's attitude is hostile, or at least "wrong." What, then, is that attitude? Of course, Justice Black's "adversaries" on the bench respect the principle of free speech. But they know that the Bill of Rights was not designed, and has never been held, to protect every word that might come out of a man's mouth. The great difficulty is that the Constitution does not tell us which words in what contexts are protected and which are not. Accordingly, the thing that we have called "balancing" inevitably involves an element of *choice, i.e., an element of lawmaking*. To cry "fire" falsely when one is alone on a desert island is one thing; to do so in a crowded theater is another. Somewhere between these obvious extremes lies the line between protected and unprotected speech. Since the Constitution does not locate that boundary for us, some mortal agency must. Unfortunately we have none that is immune from the possibility of human error. Under our system, unlike the British, the judiciary has the final word (short of constitutional amendment). But this is a bit galling to some who believe deeply that democracy cannot exist for a people that is not free to

choose for itself when choice must be made. After all, voters have relatively direct and immediate control over Congress, but only the remotest power to correct judicial error. It is not that Justice Black's "adversaries" like free speech less, but that they like democracy—*in all its aspects*—more. Accordingly, when the two responsible, *i.e.*, elected, branches (Congress and the President) agree upon a line in the area of doubt or choice, the Court hesitates to interfere. (The Constitution, remember, does not provide an unmistakable boundary.) This is to say, the Court is reluctant to intrude upon the democratic processes unless it is convinced beyond reasonable doubt that the legislative balance has no rational foundation. To put it differently: the Court starts with a presumption that the people, speaking through their elected representatives, are "right"; Justice Black presumes that they are "wrong." Each side, of course, will consider arguments in rebuttal of its presumption.

In short, both Justice Black and his "adversaries" believe deeply in free speech—probably more deeply than any comparable group of their predecessors. They differ mainly in their attitude toward the judicial role in a democracy. It comes, perhaps, to this: How can democracy work, if its fundamentals (free speech, for example) are not preserved? Yet, how can democracy prosper, how deep is our respect for it, if we do not trust it with fundamentals? We practice intolerance and expect the Court to preserve the Bill of Rights. Should judges try to save us from ourselves even in the area where the Constitution leaves room for doubt and choice; or should they leave us free to gain the strength that grows with the burden of responsibility—the wisdom that comes with self-inflicted wounds? That is the oldest, most basic, and most tantalizing problem in American constitutional law. We have no solution, unless it be this: we almost always manage to have both attitudes represented on the bench.

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Lincoln's Manager: David Davis. BY WILLARD L. KING. Cambridge: Harvard University Press, 1960. Pp. xiii, 383. $6.75.

Willard King, a member of the Chicago Bar, has now completed his task of writing a biography of each of the two Justices of the United States Supreme Court appointed from Illinois since its statehood in 1818. In 1950, he published a biography of Chief Justice Fuller, the second of Illinois' two judges.[1] Now after ten years of painstaking research, Mr. King's second biographical effort has been published. Mr. King thus belongs in that first rank of legal scholars who have sought to rescue the Supreme Court "from the limbo of impersonality," about which Mr. Justice Frankfurter complained almost twenty-five years ago.

[1] KING, MELVILLE WESTON FULLER (1950).