BOOK REVIEWS

Mr. Justice Holmes and the Supreme Court. By FELIX FRANKFURTER. Cambridge: Harvard University Press. Second Edition, 1961. Pp. 112. $3.00.

Justice Holmes, Natural Law, and the Supreme Court. By FRANCIS BIDDLE. New York: The Macmillan Co. 1961. Pp. 77. $2.50.

In April, 1938, Professor Felix Frankfurter delivered three public lectures which were published later in that year, and are now republished, under the title, *Mr. Justice Holmes and the Supreme Court*. The lectures dealt not, as the title might have suggested, with the whole body of Justice Holmes' work as a member of the Supreme Court, but specifically with the opinions, attitudes and beliefs of Justice Holmes in constitutional cases—with Holmes as a constitutional judge, if that phrase may be used to designate a judge's involvement in a class of litigation rather than the source and dignity of his office. As a constitutional judge, the figure of Justice Holmes had probably, around 1938, achieved its greatest stature. In 1932, when the Justice retired, it was indeed a major figure not only of its time but of the history of the Court, but the fact remained that on what Professor Frankfurter called the "antecedent issue" "underlying all the myriad forms" of constitutional litigation—the issue of the role of the judge in constitutional cases—Justice Holmes had long and consistently been in a minority. By 1938, the balance appeared to have shifted, and the figure of Holmes appeared magnified by a victory no less significant because delayed and posthumous. Professor Frankfurter could therefore cap praise with a note of triumphant fulfillment: "the enduring contribution of Mr. Justice Holmes to American history is his constitutional philosophy."[1] The republication of the lectures comes at a time when it is increasingly questioned whether what has endured is the triumph, or only the statement of a minority position.

Within a year of the delivery and publication of his lectures, Professor Frankfurter became Justice Frankfurter, the successor, once removed, of the Justice he so greatly admired. If somewhat more obliquely, the essayist writes of himself as well as of his subject, and as of 1939 the understanding reader of *Mr. Justice Holmes and the Supreme Court* must have recognized that he had before him not only an eloquent description of a judicial career which had ended, but also, if he had the insight to perceive them, the initial guidelines of a judicial career which was just beginning. The republication of the lectures more than twenty years later therefore not only re-introduces the mind and figure of Justice Holmes into the continuing and current discussion of the constitutional function of the Supreme Court; it also inevitably sends us back

[1] P. 58.

to ask how clearly the guidelines of the judicial career beginning in 1939 were perceptible, or how constant they have remained.

Of course, one could not expect that Justice Frankfurter would simply be another Justice Holmes. Even Justice Holmes, given agelessness and a renewed term on the Court, would not have been that. Time changes both Court and country and gives both different setting and different complexion to the matters before the Court. In 1938 Professor Frankfurter could write, "whether the prohibition against 'unreasonable searches and seizures' has been violated, allow[s] comparatively meager play for individual judgment as to policy," and of this and other constitutional questions could add, "they are neither frequent nor fighting issues before the Court."[2] How Justice Holmes would have met the issue under the circumstances when it did become "frequent [and] fighting" we can not know. We can only know that it would not have been the Holmes of 1932 on the Court of 1932.

But quite apart from external change, we misread the portrait if we expect it to portray the artist rather than to afford us insight and understanding concerning him. "In law, also, men make a difference,"[3] and the differences between men of law are not to be ignored. Certainly between Justice Holmes and Professor Frankfurter the differences were as manifest and as manifold as the regard and admiration were warm and deep. Style is not an accident but an insight into mind and attitude. The style of Holmes was sparse and tight-knit, the style of Frankfurter polysyllabic and given to expansive elaboration. Mr. Justice Holmes came to the Court having "been singularly outside the current of public affairs or of interest in them. He was essentially the philosopher who turned to law. . . . That he did not read newspapers revealed neither affectation nor a sense of superiority . . . ."[4] The extent and intensity of Professor Frankfurter's participation in public affairs is indicated, though probably not exhausted, in his pre-judicial memoirs,[5] and his voracious appetite for the printed word hardly discriminates against newspapers, domestic or foreign. Mr. Justice Holmes appeared aloof, and merely to accept the system of which he was a part, though the fire that was manifest in the conclusion of his *Abrams*[6] dissent, suggested that the flame was not always blue and cold and that there was more of commitment than was often revealed. But whether there was commitment to the system or not, there was certainly not commitment to much that it produced. On the other hand, there could have been few students who sat in Professor Frankfurter's classes so unperceptive as not to recognize his profound respect for the legislative process in a representative assembly, a respect which certainly approached the belief that in adjusting the clashes of interest in a diverse society it, and perhaps it alone among the instruments of government, could transcend the limitations of the

[2] P. 42.

[3] P. 44.

[4] P. 55.

[5] PHILLIPS (ED.), FELIX FRANKFURTER REMINISCES (1960).

[6] Abrams v. United States, 250 U.S. 616, 630 (1919).

men who participated in it. That this belief persists in all its vigor, even in the face of nagging evidence that in some areas the process suffers from congenital limitations, has only recently been made manifest.[7]

With men of such different temperament and attitude, of such disparate experience in affairs, what were the guidelines to the incipient judicial career that might have been spelled out of the 1938 lectures? It is not, I should think, the benefit of hindsight which enables one to say that they were there, and clearly there, for all to see who would take their minds beyond the substance of contemporary controversies. The Introduction and first lecture set out the dominant guidelines, not of substance but of process, and they have remained firm through the twenty-odd years that followed. "The history of the Supreme Court would record fewer explosive periods if, from the beginning, there had been a more continuous awareness of the role of the Court in the dynamic process of American society."[8] So the lectures opened with the role of the Court as their theme. All that follows is development. "[T]he enduring contribution of Mr. Justice Holmes . . . [was] his constitutional philosophy,"[9] and that philosophy was based upon his constant awareness of, and was developed in his answer to, the "antecedent issue": "What is the role of a judge in making . . . [the] adjustments between society and the individual, between the states and the nation?"[10]

Some men and judges ignore the antecedent question. It is possible, as has been abundantly demonstrated, to be fully aware of it, and to answer it with words that were an observation, but not an answer, of Justice Holmes: "If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition."[11] That was not the answer of Justice Holmes. It has not been the answer of Justice Frankfurter.

The answer of Justice Holmes came many times, in many forms, in varied circumstances. It was almost always, *mutatis mutandis*, in substance the answer he gave to the Fourteenth Amendment challenge in *Tyson & Bro. v. Banton:* "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."[12] That was central to Justice Holmes. It was the answer that Professor Frankfurter thought the role of the Court demanded. It has been the answer that has guided Justice Frankfurter.

[7] See, *e.g.*, Baker v. Carr, 369 U.S. 186, 266 (1962).

[8] P. 39.

[9] P. 58.

[10] P. 56.

[11] Abrams v. United States, 250 U.S. 616, 630 (1919).

[12] 273 U.S. 418, 446 (1927).

In that answer, the stress of significance, if not of statement, is on the second clause, and one might stop to think of all that lies behind the "should"—"Courts *should* be careful not to extend such prohibitions . . . ." If one could explore, it is probable that one would find that the materials from which Justice Holmes distilled that "should" were quite different from those that produced the same ultimate imperative for Professor and Justice Frankfurter, as diverse as their temperaments, attitudes and experience. Though of course it is only superficial exploration, some suggestion of the diversity may be derived from the differences in emphasis, if not necessarily in ultimate content, of accompanying remarks. From Justice Holmes: "We fear to grant power and are unwilling to recognize it when it exists."[13] From Professor Frankfurter: "In view of the complexities of modern society and the restricted scope of any man's experience, tolerance and humility in passing judgment on the worth of the experience and beliefs of others become crucial faculties in the disposition of cases."[14] It is not only the "should," but also the judgments that measure the "careful," that may be derived from diverse materials. If that is so, it is not surprising that the ultimate product should occasionally appear in isotopic forms. Given *Adamson v. California*[15] and *Wolf v. Colorado*,[16] would the element of physical force, even in its particular form, have moved Justice Holmes to the result in *Rochin v. California?*[17]

If any of the guidelines that were observable in the 1938 lectures may be thought to have wavered, there will be those who will say that they are the lines to be seen in the second lecture, Civil Liberties and the Individual. That may in some measure appear to be true, though the point is not beyond argument—argument which would necessarily be such more extensive than the dimensions of these comments permit. But I would suggest, if it is true, that the reason may lie in the fact that the second lecture was not as accurate or as penetrating as the first in its portrayal of Justice Holmes, and never successfully reconciled its analysis with Justice Holmes' and Professor Frankfurter's answer to the antecedent issue. "Just as he would allow experiments in economics which he himself viewed with doubt and distrust, so he would protect speech that offended his taste and wisdom."[18] This avoids the dominant and antecedent question. It does not answer it. And it will not stand with the answer that was given, as Justice Frankfurter presumably has discovered.

The reason I believe is clear, though it is as frequently ignored by those who quote Justice Holmes (in part) as it was by Professor Frankfurter in his second lecture. When Justice Holmes used the words that have now become a slogan, and said, "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present

[13] 273 U.S. at 445.

[14] P. 60.

[15] 332 U.S. 46 (1947).

[16] 338 U.S. 25 (1949).

[17] 342 U.S. 165 (1952).

[18] Pp. 84–85.

danger that they will bring about the substantive evils that Congress has a right to prevent . . ."[19] he was speaking of what, for the sake of brevity, we may call a statement of political opinion as opposed to an attempt to produce action. He was saying that even that could be punished if it created the now familiar "clear and present danger." But there was also in each instance the disjunctive, the carefully stated alternative, permitting punishment of words having even less effect. Those were words spoken or written with the intent, the motive, to produce the action which had been prohibited. It was evidence warranting a finding of that intent, or motive, not evidence of a result or of danger, that warranted the convictions in *Schenck*[20] and *Debs*,[21] and perhaps also on the fragmentary record in *Frohwerk*.[22] In *Abrams*[23] there was constitutionally adequate intent, or motive, but not the motive that the statute required, so, according to the dissent, the "silly leaflet," the "puny anonymities" which produced no danger of substantive harm could not be punished, nor could the "redundant discourse" of *Gitlow v. New York*,[24] where intent was neither charged nor proven.

It is true that Justice Brandeis qualified and tended to merge the disjunctives in his opinion in *Whitney v. California*,[25] and Justice Holmes concurred in that opinion, but if our concern is with the words and ideas of Justice Holmes we can not confine ourselves to the ringing phrases, and omit the constant alternative. It is true, and perhaps most expressive of his view of the function of the judge in this area, that he would insist on rigor, and not easy attribution, in finding the required motive, as his own opinion in *Abrams* indicated, as well as his concurrence with Justice Brandeis' dissents in *Schaefer v. United States*[26] and *Pierce v. United States*.[27] Those two dissents, now little noticed, and the analysis rather than the eloquence of the *Abrams* dissent, might have given more satisfactory answer to the antecedent question of the role of the judge in civil liberties cases than did Professor Frankfurter's second lecture. That role might concern itself more with the question whether an individual defendant could be punished than with an abstract determination of the constitutionality of statutes.

Professor Frankfurter's third lecture was entitled "The Federal System." In it there was perhaps much more of the author than of Justice Holmes, a foreshadowing of the constant concern of Justice Frankfurter with the working intricacies of federalism, an area which can hardly be said to have been completely developed in the mind of Justice Holmes. It is true that after the false start in his dissent in *Northern Securities Co. v. United States*,[28] Justice Holmes found no implicit limitations in the constitutional grants of authority to Con-

[19] Schenck v. United States, 249 U.S. 47, 52 (1919).
[20] *Supra*, note 19.
[21] Debs v. United States, 249 U.S. 211 (1919).
[22] Frohwerk v. United States, 249 U.S. 204 (1919).
[23] Abrams v. United States, 250 U.S. 616 (1919).
[24] 268 U.S. 652 (1925).
[25] 274 U.S. 357, 372 (1927).
[26] 251 U.S. 466, 482 (1920).
[27] 252 U.S. 239, 253 (1920).
[28] 193 U.S. 197, 400 (1904).

gress, and recognized that, "the wisdom of a particular use of the commerce clause by Congress is for the judgment of Congress and not the Court's business. . . ."[29] *Swift & Co. v. United States*[30] set the pattern which was to prevail, the dissent in *Adair v. United States*[31] was a statement of the reasoning which marked the climactic turn in *NLRB v. Jones & Laughlin Steel Corp.*,[32] and the dissent in *Hammer v. Dagenhart*[33] was of course vindicated in *United States v. Darby*.[34] With respect to the scope of federal authority, Professor Frankfurter could sound a note both triumphant and lasting: "From the constitutional opinions of Mr. Justice Holmes there emerges the conception of a nation adequate to its national and international duties, consisting of federated states in their turn possessed of ample power for the diverse uses of a civilized people."[35]

With respect to state legislation which is friction-producing within the federal relationship, "it makes," as Professor Frankfurter pointed out, "all the difference how deeply one cares for assuring a free market throughout the country, or how discerningly one sees the economic interrelationships upon which the attainment of such a market depends."[36] Justice Holmes did state his care,[37] but if Professor or Justice Frankfurter would attribute to him discernment in seeing the economic interrelationships upon which the attainment of a free market depends, it is an attribution in which I am unable to join. Perhaps the answer to the antecedent question makes such discernment irrelevant and unnecessary. It appeared originally that Justice Frankfurter might think so.[38] But there is reason to believe that in dealing with the economic frictions between the states—a tellingly different concept from "defin[ing] the ever-shifting boundaries between state and national power"[39]—the antecedent issue may require an answer other than the one concerned with limitations internal to the state. Justice Frankfurter appears to have recognized that this may be so.[40]

Now printed with Professor Frankfurter's lectures is the biographical notice of Justice Holmes which Justice Frankfurter wrote for the *Dictionary of American Biography* in 1944. As Professor Freund remarks in the Foreword, it is "remarkably sensitive . . . , at once . . . compressed and . . . com-

[29] P. 98.

[30] 196 U.S. 375 (1905).

[31] 208 U.S. 161, 190 (1908).

[32] 301 U.S. 1 (1937).

[33] 247 U.S. 251, 277 (1918).

[34] 312 U.S. 100 (1941).

[35] P. 111.

[36] P. 95.

[37] HOLMES, COLLECTED LEGAL PAPERS 295–96 (1920).

[38] See, *e.g.*, McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 183 (1940) (dissenting opinion); Osborn v. Ozlin, 310 U.S. 53 (1940).

[39] P. 43.

[40] See, *e.g.*, Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 470 (1959) (dissenting opinion); *cf.* Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219 (1957).

prehensive . . . ." It has all the grace and life which Justice Frankfurter can give to a tribute. If the portrait seems somewhat larger than life, that would not question its merit as an essay, and perhaps not even its publication in a dictionary.

Mr. Biddle's three lectures on Justice Holmes, given at the University of Texas at the invitation of the Permanent Committee for The Oliver Wendell Holmes Devise, may have accomplished in appreciable measure their stated purpose of "giv[ing] you a picture of what he was like."[41] But to have given an understanding of the judge, it seems strange to have focused upon somewhat heated theological attacks upon his jurisprudence, and to have attacked those attacks with almost equal ardor. The jurisprudence of Justice Holmes is not beyond criticism, and more effective attacks and defenses have appeared elsewhere.[42]

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[41] P. 4.

[42] See, *e.g.*, Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951) and materials there cited; Hart, *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929 (1951); Howe, *Holmes' Positivism—A Brief Rejoinder*, 64 HARV. L. REV. 937 (1951).

The Predicament of Democratic Man. By EDMOND CAHN. New York: The Macmillan Company, 1961. Pp. 194. $3.95.

The new predicament of democratic man is a moral predicament arising from the new moral condition developed by free and representative governments. Edmond Cahn's analysis of that predicament sets forth the concrete problems faced by the citizen; from that "consumer" perspective he elaborates a specific and practical philosophy of democracy. The predicament takes the form of dilemmas and paradoxes in the application of traditional ideals in new circumstances; in the resolution of those dilemmas Cahn expounds some of the principles and maxims of a philosophy of law.

Cahn uses concreteness to discover the resolution of a predicament and seeks precision to relate the parts of a paradoxical situation. His examination of facts discloses, in turn, moral responsibilities and moral incentives. There are paradoxes in both which are similar to the paradoxes explored in his earlier books: *The Sense of Injustice* was an appropriate name for a reexamination of the nature of justice, and *The Moral Decision* established relations among antitheses which often separate legal and moral decision-making. The moral problem of democratic man is his involvement in the misdeeds of government; the positive aspect of our new condition is the possibility open to him of realizing the elementary demands to which democracy is a response. *The Predicament of Democratic Man* is therefore a plan of action for the