

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

realization of democracy addressed to the "consumer"; it is also a formulation of maxims and principles from which the political philosopher and the philosopher of law may learn to reformulate his problems.

The book is organized in strict sequential outline, marked off by catchphrase headings to assist the "consumer" in the choice of courses of action. It falls into three parts. The first examines democratic thinking as the background of our moral involvement; the second explores the processes by which the vicarious responsibilities of the citizen may be judged and exercised; the third turns to moral incentives and the means by which the objectives to which they are directed may be achieved.

The background in democratic thinking is investigated in chosen cases of injustice of government. The moral involvement of the citizen results from three major drives in contemporary democratic thought: "first, the drive to discard an anthropomorphic notion of sovereignty; second, the drive to develop a consumer perspective; and third, the drive to use the past, the traditional, and the Given as material for new progress and creation."¹ The responsibilities of the citizen are divided into collective responsibilities and individual responsibilities. Cahn analyzes collective responsibilities into three processes—prevention, reparation, and protest—suggesting effective modes of operation in each; he elaborates a process of "Self-Search" for individual responsibilities; and he closes the section on responsibilities with an examination of the dilemma of "withdrawal" and "association." Moral incentives are found in equality and quality. Specific instances illustrate the difference between passive equality (the kind of political and legal treatment that preserves a human being's minimum status as a member of society) and active equality (opportunities for personal improvement and advancement, including participation in the benefits arising from discovery, invention, and general progress). In the consideration of quality Cahn turns to the "virtues and talents" which must be found in the citizen if democracy is to succeed. In the present posture of affairs, Cahn finds a supreme need for citizens who display "quality" in *judgment*, in *honor* (or courage), and in *associability*. His analysis of these qualities is an incisive, positive contribution to an understanding of our moral condition.

The "consumer" to whom this book is addressed will find it a concrete and practicable examination of the duties and opportunities of a citizen; the student of jurisprudence may look over his shoulder and find a stimulating reformulation of problems and principles which have long been the subject of speculation and controversy. In the interest of concreteness, Cahn professes to desert "the traditional path to the upper philosophical regions where theorists can rest at ease, disregard the distant swarms in the humid valley, and send forth utterances of absolute and universal validity."² But on his

¹ Pp. 41-42.

² P. 75.

journey through the lowlands, the heights of principles are sharply in view and subject to clear delineation. He seeks precision in analysis, but he applies his precision to dilemmas and predicaments in regions of hazy thought and vague presentiments in which precision does not yield the simple anticipated answers. Finally he pauses from time to time to state maxims and principles in which simple antitheses are abandoned to bring the moral and the legal into relation. He states one such principle which applies to the judicial process:

If not the testimony of the scientists, then what did precipitate the decisions? I suggest that, in order to identify the catalyst, one must first recognize a certain elementary principle about the nature of the judicial process and the requirements of effective advocacy. That is, if you wish a judge to overturn a settled and established rule of law, you must convince both his mind and his emotions, which together in indissociable blend constitute his sense of injustice. You must satisfy his mind not only that the general doctrines of the past are wrong in their specific current application but also that they themselves contain, if properly reinterpreted, the guides that will lead to a rule which is right and just. His mind must see not only that the law has erred but also that the law itself proffers a remedy. Then he can feel free to correct the error without betraying the consistency and continuity of the legal order because he will only be replacing mistaken law with correct law.³

It is a principle which illustrates one of the drives Cahn is fond of detecting in democratic thought, the drive by which the traditional and the Given are used as material for new progress and creation. His treatment of the paradoxes involved in equality and freedom, in association and the rights of association, and in the democratic qualities of judgment, honor, and associability suggest a need for the statement of like principles which will save us from the limitations of customary distinctions between "is" and "ought" and will open up the path from the sense of injustice to the justice which begins and ends at points at which the "ought" and the "is" are experienced together before they are separated in analysis.

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³ P. 129.

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It is interesting to observe that, at the present time when foreign trade and its effect upon our national economy appear to be a continually growing feature of interest in our daily lives, with the President of the United States leading the forces of trade and tariff policy liberalization, a publication should