

**On Law and Justice.** PAUL A. FREUND. Belknap Press of Harvard University Press, Cambridge, 1968. Pp. vi, 259. \$4.95.

*Vince Blasi*†

The jacket to Paul Freund's new book features a picture of the author in a suitably contemplative pose, together with the publisher's boast that he is generally regarded as the nation's leading authority on constitutional law. I rather doubt that Professor Freund gave his approval to such a statement—not because I think that he is a humble man (I don't know him personally), but because the one theme that permeates the book is his distaste for definitive conclusions of any sort. The generation that now reigns supreme in the legal academy seems to reserve its highest rewards for those members who can best articulate the paradoxes and dilemmas that inevitably plague attempts to organize and implement aspirations. It is because Professor Freund is the valet-dictorian of that school that I find his book at once impressive and frustrating.

#### I. SUMMATION

*On Law and Justice* is a collection of fourteen speeches and articles presented by Professor Freund over the past twenty years, each of which has appeared elsewhere in print. It is divided into three sections broadly denominated, "The Court and the Constitution," "The Pursuit of Justice," and "Appreciations: A Gallery of Judges." The first section is made up entirely of lectures about the Supreme Court and the constitutional system. As is to be expected from the fact that they were originally prepared to satisfy the demands of patrons attending fashionable lectures and not the needs of constitutional scholars, the speeches take the form of general observations rather than detailed studies of specific problem areas. The second section is by far the best. In two of the essays, "Rationality in Judicial Decisions" and "Social Justice and the Law," Professor Freund finds himself as the spokesman for the legal profession in a high-powered symposium on a concept of general importance.<sup>1</sup> The profession is well represented in both instances, as Professor Freund's contributions demonstrate how the legal mind with its capacity for categorization and definition can contribute much to the analysis of nonlegal problems. If only legal reasoning worked as well within its more familiar sphere of resolving social

---

† J.D. 1967, University of Chicago; Assistant Professor of Law, University of Texas.

<sup>1</sup> RATIONAL DECISION (C.J. Friedrich ed. 1964); SOCIAL JUSTICE (R. Brandt ed. 1962).

disputes through judicial relief! The final biographical section, which takes up more than half of the book, is uneven. Two of the essays, those on Chief Justice Stone and Judge Magruder, use the biographical occasion only as a take-off for doctrinal discussions. Unless the reader happens to be interested in conflicts of laws, choice of federal or state law, actions under the civil rights acts, or habeas corpus, they can be skipped without fear of missing any perceptive insights about the two men. The Brandeis essay is, as expected, brilliant, and the Frankfurter piece is, as expected, too deferential. Scattered throughout the book are perceptions which collectively go far toward undermining the Frankfurter constitutional philosophy,<sup>2</sup> but the reader is predictably denied the ecstasy of seeing these leitmotifs drawn together by a Harvard man into one glorious *Gotterdammerung* to be reported by the Harvard University Press! Professor Freund's critique of Justice Black, the most recent work in the book, is original but tantalizingly undeveloped. Judge Learned Hand and Mr. Justice Jackson are also treated, the latter in a Marc Antony fashion that is all the more devastating because seemingly unintentional.

The serious student of constitutional law might find this book a little too occasional for his tastes. But there are within these discursive pages several important observations which should not be missed. For example, Professor Freund suggests that defamed public officials, destined for defeat under the *New York Times* rule, could be partially compensated by means of a special verdict procedure which would at least give them a face-saving jury declaration to the effect that the remark was defamatory and that compensation was denied only because of the overriding public policy embodied by the privilege.<sup>3</sup> In response to those who would attack the Court by means of a facile generalization about the erosion of states' rights,<sup>4</sup> Freund presents a

---

<sup>2</sup> *E.g.*, p. 57. "[T]here falls to the Court a vital role in the preservation of an open society, whose government is to remain both responsive and responsible. . . . In this context it is not hard to appreciate the central importance [preferred position?] of decisions on freedom of press and assembly, on voting rights, and on reapportionment." And see pp. 77-78: "The most troublesome role of reason in coping with bias is an endeavor to offset an illegitimate one with self-awareness and deliberate counter-bias. How delusive or self-defeating may this effort be? May it indeed produce a counter-distortion rather than neutrality? And may the self-analysis be too superficial, disguising a deeper unconscious desire to arrive at the counter-bias? . . . My present question is whether preoccupation with bias, adding oneself to the problem to be decided, may involve a significant risk of distorting oneself, the problem, and the decision." And again pp. 159-60: "[Mr. Justice Frankfurter] relies heavily, may it not be too heavily, on the teachings of history. . . . [W]hen history is called on to furnish a guide to the priority of values, I wonder whether it is being given a burden heavier than it can bear alone."

<sup>3</sup> P. 30.

<sup>4</sup> Compare Kurland, *Foreward: "Equal in Origin and Equal in Title to the Legislative*

more balanced picture: "The states are permitted to tax and regulate in ways that were foreclosed or dubious a generation or two ago. Taxation of interstate enterprise, of federal salaries, regulation not only for health, safety, and morals but for aesthetic purposes as well, jurisdiction over out-of-state business, are extensions of public power that liberate the lawmaking process in the states as well as in the nation."<sup>5</sup> And for those of us who admire Mr. Justice Black and are willing to forgive his recent transgressions<sup>6</sup> as the inescapable consequence of a constitutional philosophy that on balance has served us well, Professor Freund's analysis offers the unsettling prospect that the Black defection may be more than a simple matter of doctrinal determinism: "The governing canon of constitutional interpretation for Justice Black may be said to be natural meaning in contrast to natural law."<sup>7</sup> "In his own hands his formulation has had the immense power of simplicity; one cannot help wondering whether it can be commended to others with confidence that its simplicity will not be merely formal or mechanical, and with assurance that it will yield similarly perceptive, sure-minded judgments. It is all no doubt a question of congenial ways of thinking. Some minds, whether legal or scientific, are more comfortable with formal simplicities, resolving underlying complexities intuitively. Such minds are often the minds of the masters. Others need to be fortified by a more explicit and detailed framework of analysis."<sup>8</sup>

For students of jurisprudence and the legal process, there is also much in these essays to ponder. Our current fetish over fair procedure is explained against the background of the legal system's failure to address itself to the many "substantive" injustices of our age: "This is not to say that the great substantive issues of justice are less pressing or complex. On the contrary, it is just as those issues grow more difficult and divisive that the procedural injustices about which there can be readier consensus tend to become grounds of decision."<sup>9</sup> In working with precedents, Freund seems to say, it is "which" and not "how" that really matters. While it may be fun to stretch and narrow holdings, the most important decisions are (1) which of the competing lines of

---

*and Executive Branches of the Government," The Supreme Court, 1963 Term, 78 HARV. L. REV. 143, 163 (1964): "Indeed, the amazing fact about the Court's infringement on state authority is that, having taken away so much, it continues to find more to take away."*

<sup>5</sup> P. 56.

<sup>6</sup> *E.g.*, *Katz v. United States*, 36 U.S.L.W. 4080 (1967); *Walker v. Birmingham*, 388 U.S. 307 (1967); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Adderley v. Florida*, 385 U.S. 39 (1966); *Brown v. Louisiana*, 383 U.S. 131 (1966).

<sup>7</sup> P. 215.

<sup>8</sup> P. 221.

<sup>9</sup> Pp. 96-97.

precedent will be used as the framework<sup>10</sup> and (2) which precedents will be re-examined to see if their principles are still valid.<sup>11</sup> On the subject of equality, Professor Freund provides a welcome relief from the usual shallow analysis in terms of moral imperatives or senseless leveling. For him, "the question of equality resolves itself into the appropriate group-categorization of the complainants. . . ."<sup>12</sup> It is a terribly difficult process, as his discussion of the diverse problems of equal broadcast time, union political contributions, and expropriation by underdeveloped countries demonstrates. Finally, insofar as it is possible to ascribe a unifying theme to anyone's jurisprudence, Professor Freund's has unique relevance for the social problems that have beset the United States in the present decade. His touchstone is "the satisfaction of reasonable expectations."<sup>13</sup> He describes "the ultimate task of the law" as "the resolution of the ambiguities and antinomies of human aspiration."<sup>14</sup> A corollary to this theme is what he terms "the feedback principle": the increasing recognition of a right (*e.g.*, voting) gives rise to an obligation to increase the resources devoted to supporting the right (*e.g.*, education).<sup>15</sup> At a time when expectations—dare we call them "unreasonable"?—are rising as never before only to receive a "nay" from the judicial process, it is refreshing to find someone with jurisprudential credentials hinting, at least, that there is no philosophical imperative for this lack of response.

## II. LAUDATION

Perhaps more important than the ideas contained in the book is the flavor which is conveyed of Paul Freund's approach to his role as student of the constitutional process. One aspect that stands out is his comfortable use of nonlegal materials. The book is sprinkled with references to ethical philosophers, psychologists, historians, even scientists—references which appear because of their contribution to the argument at hand rather than to the pedantic frolics of the author.<sup>16</sup> A related quality is his ability to mobilize concepts from all areas of the law in making his constitutional arguments. For example, in calling for compensatory preferential treatment of Negroes in some situations, he draws upon the labor law doctrine whereby in order to over-

---

<sup>10</sup> P. 66.

<sup>11</sup> P. 68.

<sup>12</sup> P. 91.

<sup>13</sup> P. 84.

<sup>14</sup> P. 107.

<sup>15</sup> P. 97.

<sup>16</sup> Compare Kurland, Book Review, 32 U. CHI. L. REV. 386, 388 (1965).

come the lingering effect of company domination in a union, the union may not only be cleansed of such domination but completely disestablished.<sup>17</sup> Another manifestation of Professor Freund's escape from the myopia that plagues so many of his colleagues in the profession is his refusal to genuflect excessively before the altar of "craftsmanship," that sophisticated form of intellectual featherbedding practiced by those who find it inconsistent with professional dignity to admit that the march of time has made their legal skills obsolete.<sup>18</sup> As he so aptly puts it:

"Discourse," articulation, the embodiment of a decision in a reasoned opinion or the amenability of a decision there and then to such an embodiment—how essential is this to rational creativity? Much current criticism of judicial decisions as unprincipled or unarticulated tends to overlook the useful part played in the past by decisions which were fraught with creative ambiguity, which moved in a certain direction but left open the turns that might be taken. One need not subscribe to all of Michael Oakeshott's critique of rational intervention and his enshrining of communal ways to appreciate the force of his observation: "Those who look with suspicion on an achievement because it was not part of the design will, in the end, find themselves having to be suspicious of all the greatest human achievements."<sup>19</sup>

A further quality that pervades the book is Freund's refreshingly constructive approach to his task. He treats the Court as an ally, not a foe. When he spots a weakness in a justice's opinion, he resists the temptation to translate it into a personal inadequacy.<sup>20</sup> Instead, he moves swiftly to plug the gap, to supply the missing rationale.<sup>21</sup> Also in keeping with this constructive approach is his willingness to tackle the difficult issues of his day. He does not rail against civil disobedience because it amounts to violation of the law. He recognizes it as an important and sincere tactic and wrestles with the vexing question of how the law should respond to it.<sup>22</sup> Similarly, he does not dismiss

---

<sup>17</sup> P. 46.

<sup>18</sup> Compare Kurland, *supra* note 4, at 144-45, 169-75.

<sup>19</sup> P. 73.

<sup>20</sup> Compare Kurland, *supra* note 4, at 150-52, 159-61, 167. But see Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . ."*, 1962 SUP. CT. REV. 1, 32, 33. The author feels obligated at this point to express his appreciation to his recent mentor, Professor Philip B. Kurland, for a most challenging and provocative education in the science of constitutional law.

<sup>21</sup> See, e.g., p. 44 (discussing *Katzenbach v. McClung*, 379 U.S. 294 (1964)).

<sup>22</sup> Pp. 47-49. While he concedes that the only long range solution to the rising incidence of civil disobedience is substantive reform, he suggests that the law's short run

bias as a departure from judicial objectivity. Rather, he recognizes its existence and demonstrates that some biases are not only legitimate but desirable.<sup>23</sup>

I am also impressed by Professor Freund's ability to employ legal reasoning without losing sight of its shortcomings. He reminds us that a logical system is only as good as its premises and that only the compulsion of economy should prevent us from retesting our postulates at each experiment.<sup>24</sup> He comments upon "the human addiction to fictions, to thinking 'as if' one thing were another, an addiction particularly strong, no doubt too strong, in the law."<sup>25</sup> Critics who attack the activism of the Warren Court "as if" it were the same as the activism of the early New Deal Court might well take heed.<sup>26</sup> Another pitfall of legal reasoning against which Freund cautions us is phrase escalation. The Constitution does not use the term "state action"; it was created by the majority in the *Civil Rights Cases*. Had they chosen "state responsibility" instead, as Freund would,<sup>27</sup> one can't help but wonder whether the present furor over interpretation of the fourteenth amendment would be so intense. Similarly, Freund observes that much of the present resistance to benign quotas stems from the constitutional concept of "color blindness," an escalation from "equal protection."<sup>28</sup>

Finally, in reviewing Paul Freund's virtues, a word must be said about his eloquence and his wit. Let him speak for himself:

. . . that elaborate demonstration of the obvious by methods

---

accommodation should come from the discretionary elements in the system such as the prosecutor's power to drop charges or the executive's power to pardon. I do not have as much confidence in the willingness of those who wield such discretion to acknowledge the legitimacy of the tactic. See text preceding note 39 *infra*.

<sup>23</sup> Pp. 76-77.

<sup>24</sup> P. 67.

<sup>25</sup> P. 114.

<sup>26</sup> See Kurland, Book Review, 35 U. CHI. L. REV. 386 (1968): "And the Court, freed from the threat of interference by legislature or executive, has returned to its old ways, abiding by McReynolds' description of its function, although on behalf of a different clientele than that which was served by the 'Four Horsemen.'" Freund addresses this tenuous analogy specifically at one point: "Comparison with the lamented and ill-fated judicial vetoes of a prior generation is not wholly apt. Those vetoes of economic measures such as price control and minimum wage laws proceeded on doctrinaire grounds excluding those subjects from legislative control, whereas the judicial negatives in current controversy relate to defects in legislative standards or severity—problems, for example, of controlling inflammatory street speakers or regulating sound trucks or door-to-door solicitation where the subject is not declared immune from public control but rather subject to it in certain forms but not in others." P. 167. To these thoughts I would add the point that the McReynolds Court jeopardized its existence only when it began invalidating acts of Congress as a regular practice. The Warren Court has directed its fire primarily at the states.

<sup>27</sup> P. 9.

<sup>28</sup> P. 33.

that are obscure which is the hallmark of so much current social science. . . .<sup>29</sup>

The great constitutional issues which come before the Court reflect not so much a clash of right and wrong as a conflict between right and right. . . .<sup>30</sup>

Creativity involves a tension between vitality and technique. . . .<sup>31</sup>

It is of course dangerous that judges should be philosophers—almost as dangerous as if they were not.<sup>32</sup>

### III. FRUSTRATION

It should now be apparent that I fully concur with the judgment that Paul Freund is, indeed, the outstanding authority in the field of American constitutional law. That is why I am especially troubled by the significant disparity between his basic outlook and mine. My doubts can be summed up in three themes that emerge from the book: (1) Freund's tendency to treat the judicial process as a self contained whole rather than as a component part of an entire system of government; (2) his feeling that the traditional forms will provide an adequate medium for the accelerated growth of the law that will be necessary if it is to keep pace with the overall acceleration of the society; and (3) his lack of commitment, perhaps reflecting a quiet confidence that "the system" will work things out smoothly without frenetic goal-orientation, perhaps reflecting an attitude concerning the necessity for detachment on the part of the scholar.

"History teaches," said Mr. Justice Frankfurter deferring to the wisdom of Congress in *Dennis v. United States*,<sup>33</sup> "that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." To me the remark reveals a curious choice of ultimate values. I would much prefer to see the judiciary jeopardized than just government jeopardized. And while it may be that Frankfurter, too, was worried only about a valuable means and not an end in itself, there is a tendency among constitutional scholars to become so entranced by the elegance of the judicial system that they never bother to inquire as to what impact that beautiful system is having on the society as a whole. Regrettably, Freund at times shows signs of this attitude. He cautions us to constantly re-examine our premises, and often he presents his

---

<sup>29</sup> P. 40.

<sup>30</sup> P. 36.

<sup>31</sup> P. 72.

<sup>32</sup> P. 165.

<sup>33</sup> 341 U.S. 494, 525 (1951).

own interpretations of the judicial system in the framework of a realistic evaluation of its capabilities and performances. And yet, to my mind, a premise very much in need of re-examination which he never pauses to question is that which tells us that the executive and legislative branches deserve "deference" from the judiciary because they are more "democratic." In a presidential election year in which the most popular figure in each party has no apparent chance of getting the nomination,<sup>34</sup> one is entitled to doubt the democratic credentials of the executive branch. And when a nation-wide call from pollster and sage alike for a massive ghetto rehabilitation program<sup>35</sup> is answered by Congress with a cut in poverty funds, one wonders whether the seniority-oriented legislative process is any more "democratic" than the adversary process. I am not calling for the abolition of the presidency and Congress, tempting as that might be these days. But I do protest the tendency to exalt deference as a constitutional constant. At various periods in history different institutions come closest to embodying "the will of the people." As social aspiration and change speeds up at a geometric rate, as the executive branch becomes increasingly preoccupied with foreign affairs, and as the ossification of Congress becomes more apparent, it is not beyond the range of possibility that the next period of our history will find the nine men with life tenure our most democratic institution.

But, admittedly, all of this is highly speculative. My basic complaint is that Professor Freund does not choose to speculate about it. The closest he comes is an explanation that serves to dash any hopes that the law's reluctant but inevitable marriage with the social sciences may soon result in a division of governmental authority based on a scientific evaluation of performance rather than on Frankfurter's sterile rigidities or my own partisan guesses:

Social scientists, by and large, have concerned themselves very little with the formation and functioning of rules of substantive law. The reasons for this inattention to a rich quarry of experience are probably various. The problems do not lend themselves readily to experimental study save on a relatively trivial level from which it would be risky to extrapolate. Systematic observation would be costly and often inconclusive because of a number of variables. And, not least, opportunities seem too rare for results that carry a promise of being counter-intuitive.<sup>36</sup>

---

<sup>34</sup> See Hughes, "The Great Disfranchisement," *NEWSWEEK*, January 8, 1968, at 15. This review was prepared before President Johnson's dramatic announcement of March 31, 1968.

<sup>35</sup> See "The Negro in America—What Must Be Done," *NEWSWEEK*, Nov. 20, 1967, at 32-42; "Racial Crisis: A Consensus," *NEWSWEEK*, August 21, 1967, at 16-17.

<sup>36</sup> P. 70.

My second disappointment with the Freund approach stems from the false expectations he arouses with the title for his first essay, "New Vistas in Constitutional Law." He appears to share my feeling that the Constitution is about to enter its puberty stage, that there is a great deal of development to be consummated in the immediate future. And yet he seems also to believe that the tired old clauses of the Constitution will prove adequate to the task. Under the rubric of "new vistas" he discusses the familiar interpretative problems centering around the meaning of "due process," "equal protection" and "state action."<sup>37</sup> I had hoped for his thoughts on some of the dormant but potentially explosive clauses of the Constitution. I really don't think that the old workhorses will be able to shoulder the load.

For instance, the first sentence of the fourteenth amendment<sup>38</sup> implies the existence of rights of national citizenship, rights which are not limited as are other fourteenth amendment rights to protection only from state infringement. Is it not possible that "new vistas" might yield the conclusion that every citizen of affluent America has a constitutional right of national citizenship to food, shelter, clothing, decent education, medical care and legal services which is protected against infringement by the Invisible Hand as well as by the State? Or consider that most overlooked clause of the bill of rights, the protection against cruel and unusual punishment. Should the constitutional system continue to be so ostentatiously solicitous of the small percentage of criminal defendants who choose to contest their guilt<sup>39</sup> while it stands by with indifference as the states administer sentencing principles that defy the teachings of modern criminology?<sup>40</sup> Is not the eighth amendment the vehicle for overcoming those impediments to the reform of our prisons which have always proved too much for the other political processes? And on the vexing subject of civil disobedience, isn't the grievance really punishment which does not take into account the spirit in which the law is violated? The cruel and unusual punishment clause may be the answer: it could permit the authorities to label the conduct illegal and to mete out suspended sentences or nominal fines and still prevent conscientious citizen-critics from being treated

---

<sup>37</sup> P. 9.

<sup>38</sup> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV.

<sup>39</sup> See Banfield & Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. CHI. L. REV. 259, 300 (1968) (Table 2).

<sup>40</sup> See, e.g., N. MORRIS, *THE HABITUAL CRIMINAL* (1950); Rubin, *The Indeterminate Sentence—Success or Failure?*, 28 FOCUS 47-52 (1949); Sutherland, *The Sexual Psychopaths*, 40 J. CRIM. L.C. & P.S. 543-54 (1950).

as common criminals.<sup>41</sup> Finally, does the "except as a punishment for crime" appendage on the prohibition of involuntary servitude in the thirteenth amendment give explicit sanction to a constitutional definition of crime? Would a "new vista" tell us that legislatures ought to produce more evidence of anti-social consequences than they have to date on, say, the smoking of marijuana before being permitted to invoke their devastating power to label an activity "criminal"? No doubt Freund's creative skills could produce other fresh approaches. But apparently he feels that the blank slate tactic is not the best method.

My final and most serious parting of the ways with Professor Freund is over his excessive detachment. As is the practice of so many of his colleagues, he seems to worship paradox for its own sake. He delights in pointing out that the retroactive application of criminal procedure precedents may result in less, not more, protection for the accused, because it means that constitutional innovation entails a higher cost.<sup>42</sup> He informs us that our cherished free speech protections are in fact the direct descendants of the economic due process doctrines against which Holmes and Brandeis fought.<sup>43</sup> At a different level he observes: "Two of the great civilizing human traits, it seems to me, are hypocrisy and greed. Hypocrisy is a bridge thrown up between attitude and behavior. Greed is a response to the equalizing power of money."<sup>44</sup>

This would be nothing more than a harmless hobby, and an engaging one at that, were it not for the fact that Freund seems to regard his task as complete once he has fully articulated the paradox or dilemma. He simply refuses to take sides. For example, on the subject of judicial self-restraint he notes that "self-limitation is the first mark of the master"<sup>45</sup> but that a deliberate counter-bias is likely to be delusive and self-defeating.<sup>46</sup> The result is a form of Socratic limbo in which the reader is left to reach his own conclusions. Underlying this vision of his proper role is, I suspect, a profound faith in the legal system's natural tendency in the normal process of evolution to crystal-

---

41 Of course, such a doctrine would require that the concept of civil disobedience be confined so as not to embrace truly disruptive lawbreaking. Freund suggests such a narrowing definition: "When I speak of civil disobedience I use it in a limited and strict sense to mean practices that are nonviolent, measured responses which are highly selective because of their moral quality, and whose practitioners are prepared to pay the penalty of the law by acting openly in an effort to sear the conscience of the community." P. 47.

42 P. 12.

43 Pp. 5-6.

44 P. 41.

45 P. 36.

46 P. 77.

lize goals and endorse certain values, I wonder if that faith is justified. One might fairly ask whether the system is too wedded to gradualism and a haphazard trial-and-error approach to goals and values, whether it isn't time for constitutional planning to replace constitutional laissez-faire, and whether it isn't the responsibility of the legal scholar to undertake a more active role in the delineation and implementation of constitutional goals. In short, I suspect that the acceleration of aspiration and change may require that in the future we take our values and goals from the social sciences, using the legal process as an orderly means of implementing them rather than as a leisurely means of discovering them.

It is, I suppose, this sense of urgency that really explains our differing outlooks. Freund has a quiet confidence in the eternal legal verities. My own youthful, perhaps impetuous, perspective leads me to believe that the constitutional system is engaged in a life and death struggle with revolutionaries for the allegiance of the burgeoning elements of discontent in our society—and not only Negroes. I wonder if among his volumes of Shakespeare,<sup>47</sup> Goethe,<sup>48</sup> Whitehead,<sup>49</sup> and Jerome Bruner,<sup>50</sup> he has a copy of *The Autobiography of Malcolm X*,

---

<sup>47</sup> P. 8.

<sup>48</sup> P. 119.

<sup>49</sup> P. 24.

<sup>50</sup> P. 72.