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Book Reviews

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BOOK REVIEWS

ON UNDERSTANDING THE SUPREME COURT. By Paul A. Freund.[1] Boston: Little, Brown & Company, 1949. Pp. 130. $3.00

This little book can be read with pleasure and with profit; and I hope it will be read by a host of people. It comprises in three chapters the text of the Rosenthal Foundation lectures delivered by Professor Paul Freund at the Law School of Northwestern University, together with the subsequently added Introduction and Notes.

That there is need for understanding the Supreme Court, I suppose most everybody would agree. That Professor Freund is exceptionally qualified to lead one towards that goal, I can enthusiastically affirm. He speaks with first-hand knowledge. He has seen the Court in operation from the chambers of a Justice (as clerk to Justice Brandeis), from the table of counsel and advocate (as assistant on the staff of the Solicitor General), and from the relatively detached post of teacher (as a member of the Faculty of Law at Harvard). He makes no pretension of furnishing all the answers: he is content to indicate that judgments about the Court are more difficult to reach than might be supposed, and to suggest inquiries relevant in reaching judgments of one's own. While he is not concerned solely with the work of the Court in constitutional cases, what he has to say, especially in the third chapter, is so much to the point in that area of the law that I shall comment mainly on it.

In this chapter, happily styled " 'Judge and Company' in Constitutional Law," Professor Freund breaks away from the more or less traditional style of writing about the substantive content of the Court's opinions and the ways of the Justices. Instead, he enlarges upon and emphasizes the role played by lawyers (as part of the "Company") in the determination of constitutional issues. He makes it clear that one of the best first steps towards understanding what the Supreme Court has done in any given case is to find out what the lawyers themselves did beforehand. After all, it is the lawyers who raise the questions and bring them, via the lower courts (also included in the "Company") to the Supreme Court; and in a large sense the task of that Court from then on is to dispose of what they proposed.

The lawyer's part is discussed and illustrated by Professor Freund in three aspects: "The *what,* the *how,* and the *when* of constitutional litigation." On the *what,* he shows the large responsibility of counsel in supplying the materials upon which the courts may draw in making their decisions. The long since famous Brandeis brief in the Oregon case on hours for women is put down as "probably the most notable contribution to the lawyer's technique

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in constitutional cases." But he does not leave it there: he points up a number of problems which the brief raises—*e.g.*, whether economic data should not be developed at trial and embodied in the record, rather than presented in a brief. On the *how*, he sees the role of counsel as even more striking; indeed, the determination is largely in counsel's hands whether the case shall be an all-out contest on the constitutional front or only an engagement limited to a small sector. The Tennessee Valley Authority litigation supplies, almost as if made to order, an illustration of the clash of the broad and narrow views of constitutional warfare; and the holding company litigation is described as a still more vivid instance of jockeying for position. Shading off from the *how* into the *when*, Professor Freund considers the "critical importance" of the timing of constitutional lawsuits. Here he finds large questions of policy arising that concern the Court, the Government and the public. Not the least of these is the policy of the Court itself in determining when and in what circumstances it will exercise its function of passing upon constitutional questions.

Professor Freund concludes his discussion by noting two shifts which are taking place in respect of the forum for the consideration of constitutional issues and which bear significantly on the lawyer's work of the future. The first is that, given the Supreme Court's recent reluctance to declare state laws unconstitutional under the due process clause unless basic civil liberties are involved, constitutional litigation over state laws tends to be concentrated more and more in state courts under state constitutional provisions. State constitutional law may thus become of "dominant" importance, demanding more attention than is commonly given to it. The second is that, with the increasing diversion of constitutional issues of federal legislation from the courts to the legislative stage, the constitutional lawyer's function is being discharged more and more before Congressional committees. Federal constitutional law may thus in part become "one phase of legislative drafting," with increased emphasis on the constructive side of the lawyer's job.

In limiting these comments to chapter 3, I do not mean to minimize the other two. Chapter 1, "Concord and Discord," tells a good part of the story of judicial "lawmaking," particularly as to the play of policy considerations in the hierarchy of values set up by the Court under due process—*e.g.*, in cases affecting freedom of the mind on the one hand, and cases touching property interests on the other. The process of constitutional decision is seen as having become "more self-conscious, more avowedly an expression of political philosophy, than ever before." Chapter 2, "Portrait of a Liberal Judge: Mr. Justice Brandeis," is truly that, and excellently done.

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COURTS ON TRIAL. By Jerome N. Frank.[1] Princeton: Princeton University Press, 1949. Pp. vii, 441. $5.00.

As when you read a fine novel, you know that the big feeling you get from this book is more important that its individual ideas, organization and syntax. You know, but maybe you don't think a book about law has any business making you feel.

But you just can't ignore the big feeling you get when you finish "Courts on Trial." It's too strong! You feel that the quest for uniformity and predictability of decision that has become the quest for law is shamefully wrong. You wonder what is so right about a uniform string of unfair decisions or an accurate prediction of a wrong decision? And what is more wrong than the oft-heard sop: "The accused is innocent under standards of justice, but guilty under the law." And you know that each case is an individual state of facts different from all others and that what we should really look for is justice in individual cases. You do not worry about the indefinability of the word "justice"; for you know that justice is one of those things which we nearly always recognize but can never put into words—as the colors the artist paints or the sounds a musician makes. But then you realize that justice in an individual case is a gamble when the court does not have before it all the facts and that rarely can a court ever have before it all the facts.

Which gets us down to the explicit theme of Judge Frank's book: That courthouse fact-finding has more in common with dice-throwing than science and always will have; and that this affinity forever dooms law itself to a status closer to dice-throwing than to science.

Responsible for the truism that courthouse fact-finding can never be a science is this: What is found as a fact has always been through two subjective reactions. First, the reaction of the witness to the occurrence and, second, the reaction of the trier of fact to the personality of the witness. Even the reaction of an honest witness to an occurrence usually differs substantially from what actually occurred. For example, defective sight or hearing, low attention level, bad memory or subconscious prejudice may warp the witness' reaction to the occurrence beyond any resemblance to the occurrence itself. Then the trier of fact must react to the witness' version of the occurrence. The witness' accent, way of looking out of his eyes, sniffle or any one of thousands of other personality quirks may so charm or revolt the fact-triers that they believe or disbelieve the witness on the basis of a personality quirk which may or may not have real bearing on credibility. These obstructions to the actual facts will always be there, thinks Judge Frank, so long as two or more witnesses continue to mount the stand and give conflicting versions of the same facts.

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The outcome of a particular case, therefore, cannot now and never can be accurately predicted. And without predictability, of course, no legal science is possible. But today's explorers for a legal science, says Judge Frank, make another fallacious assumption in addition to assuming that some day legal decisions can be made one hundred percent predictable. And that is that legal decisions can be made more predictable by systems based only on appellate court law.

To prove his point, Judge Frank sets out abstracts of the various systems such as "legal realism," which law professors have so far devised to increase predictability. (These masterful little synopses of the philosophy of the "legal realists," the "anthropological cult." the "natural law cult," are a short-cut to an education in legal philosophy and themselves are worth the price of the book.) He, then, points out wherein each one has utterly and completely failed to achieve its objective.

The explorers for a legal science would come closer to their objective, thinks Judge Frank, were they to devote their energies to the fact-finding process. Although fact-finding can never be one-hundred percent accurate, says Judge Frank, it can be vastly more accurate than it is today.

And here Judge Frank begins to lash present-day fact-finding institutions. The jury system takes the worst whipping. Judge Frank says that juries don't usually understand the law and, if so, as often as not, ignore it for their own reasons. I take it from other parts of Judge Frank's book that this wouldn't be so bad if the jurors conscientiously attempted to give justice. But Judge Frank doesn't think they do. He thinks jurors flip coins for decisions, will change their minds about a decision just to go home, etc. And worst of all, according to Judge Frank, jurors can hide a bad decision behind the general verdict in which all they have to say is "We find for plaintiff in amount of so many dollars." No one can tell whether or not the jurors actually found true a version of the facts which would justify a decision for the plaintiff under the judge's charge on the law. I suspect this secrecy is the crux of Judge Frank's quarrel with the jury system. For there are oldtime salesmen in Sing-Sing who will tell you that they learned the hard way when Judge Frank was Chairman of the Securities Exchange Commission that Judge Frank has a passion for full disclosure. Certainly, this passion for full disclosure must be the mainspring of Judge Frank's criticism of juries because he admits that judges and jurors reach decisions in the same manner. Judge Frank subscribes to the Gestalt psychology theory that any decision results from a general impression created by the whole conglomeration of facts and law presented; not from the precise measurement of the facts against the law. The difference between the juror and judge is that the juror just announces his Gestalt, while the judge has his Gestalt, then must look through the record and justify his decision with facts that have

been presented to the court but which he does not necessarily have to believe. The necessity to find those facts, thinks Judge Frank, keeps judges from reaching some of the more outrageous decisions reached by juries. This statement, however, seems open to challenge. For Judge Frank admits that a judge, to justify his Gestalt often finds facts he does not believe; and Judge Frank admits that the jury's decision, to stand, must also rest on facts presented. On Judge Frank's reasoning, then, wherein is the jury's decisional process more outrageous than a judge's. Morally, at least, the jury is better off since it does not have to lie while in a sense the judge does. Personally, I think that Judge Frank is too hard on both juries and trial court judges.

Judge Frank also lays into the advocate system and its "fight" or "let-the-most-skillful-man-prevail" theory. Judge Frank suggests that the system favors wealthier clients, that it terrifies witnesses into forgetting the truth and that it has other bad features. I won't comment on these criticisms, because I'm prejudiced. Without the advocate system, I don't see how I could engage in the private practice of law. And I love the private practice of law. Also socked pretty hard by Judge Frank are the exclusionary rules of evidence. According to Judge Frank, we only have them because juries are stupid; and the rules keep out of a trial whole classes of evidence which are not in themselves reliable but are when joined with other evidence. The book includes a chapter or two on legal education and concludes that the law schools waste too much time with the case system.

For all these defects Judge Frank finds in our present day fact-finding institutions, he suggests rough outlines of proposed curative measures.

Among other things, he believes that juries should be made to give special or fact verdicts in which the judge would ask specific questions about the facts which would require specific answers from the jury. The judge would then apply the law to the facts as found by the jury. He also recommends that an agency be set up to provide funds to those litigants who need money to collect evidence; that the exclusionary rules be liberalized, and many other tentative proposals designed to improve fact-finding and legal education. One's experience would have to be broader than mine effectively to evaluate these proposals.

All of these proposals—indeed, the whole book—are written down in an easy, readable style. Unlike the ordinary lawyer, Judge Frank does not force to push facts into artificial categories and make consistent what is not consistent. This gives his writing an imaginative sweep and sprightliness that is refreshing. But it does get in the way of his theme.

The two worst faults of Judge Frank's style are self-citation and exaggeration to make a point. But the book does apologize for the self-citation. And, reasoning from Judge Frank's opinion of juries, his apology for the exaggeration would probably be that he is writing for laymen and that

laymen might not understand a naked point. Still another flaw of Judge Frank's style is a penchant to set up straw men and then huff and puff at them at length. But I suppose Judge Frank would probably think this, too, necessary for the lawyer talking to the laymen.

All in all, the book is a fascinating product of a mind as brilliant and as versatilely learned as any mind in America today.

HUGO L. BLACK, JR.*

HUGO L. BLACK: A STUDY IN THE JUDICIAL PROCESS. By Charlotte Williams.[1] Baltimore: The Johns Hopkins Press, 1950. Pp. vii, 208. $3.50.

This is a penetrating study of the career of Hugo L. Black, Roosevelt's first appointee to the Supreme Court, and an attempt, in his judicial record, to trace the retreat of the court from its traditional role of opposition to the expansion of governmental power.

While the main emphasis of the book is placed upon the period since Black ascended to the bench, the author treats her subject's career in its entirety, from his birth in one of the poorer Alabama counties through his years as police judge of Birmingham, prosecuting attorney of Jefferson County, successful lawyer at the Birmingham bar, and United States Senator. In this connection it is proper to say that, contrary to popular opinion, he attained considerable eminence as an attorney in Birmingham after World War I.

In her discussion of Black's origins and the years in which he embarked on his career, she is able to throw considerable light upon the forces that made him what he is—the protagonist of the underdog, the champion of the little man, and the spokesman for civil, political, and religious liberties.

In 1926 Black was elected to fill the seat in the Senate made vacant by the retirement of Oscar Underwood. Entering upon his duties in 1927, he, with his brilliant forensic and dialectic abilities, became a gadfly to the Republican majority. With the breaking of the great depression he advocated the thirty-hour week as a cure for technological unemployment, thus solidifying his support by organized labor, and with the coming of the Roosevelt administration he devoted himself assidously to the cause of social security.

In 1933 he prosecuted his fight upon the United States Shipping Board, at the same time introducing a resolution authorizing an investigation of the government's methods of awarding mail-carrying contracts. As a result of the latter investigation, Postmaster Walter F. Brown of the preceding administration was more seriously compromised than any high federal official

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had been since the Teapot Dome affair. In the summer of 1935 Senator Black introduced a resolution calling for an investigation of the lobbying activities of the utility companies. The methods of the Senate committee, which he headed, were criticized, but it was soon apparent that it had unearthed a rich store of carefully concealed fact. It is significant that in 1937 he was one of the strongest supporters of Roosevelt's plan to enlarge the Supreme Court.

In October, 1937, Black's appointment to the highest court in the land was confirmed. It must be said that in allowing his friends to state to the Senate without contradiction that he had never been a member of the Ku Klux Klan, and in never admitting the fact until after confirmation, he was something less than frank and gave reasonable grounds for doubts touching his personal integrity. It is a happy circumstance that these justifiable fears have not been realized. Upon taking his seat he immediately struck out alone, sometimes in directions that not even the most liberal of the old justices had hitherto suggested. Miss Williams gives detailed and illuminating analyses of the more important cases in which he wrote the majority opinion for the Court and of many of his dissents.

Competent critics were not long in realizing that Black's legal learning, his ability, and his capacity for growth, were consistently above what had been expected. One is impressed with the sincerity of his concern with social improvement and human betterment, and by his rooted faith that these ends can best be accomplished by an active government. He has been, indeed, the "little man's" advocate upon the Court, and this attitude, as Miss Williams points out, is not confined "to the poor nor to the oppressed by the operation of major social and political forces, but stretches far enough to include all who for any reason are hard put to maintain their rights in an unequal conflict." In this category fall the enemies of society, caught and held helpless in the machinery of avenging justice. Black is ever alert to see that in their trial and conviction the latter are afforded the constitutional safeguards of a fair trial and protection from personal abuse.

In cases involving the question of religious freedom, Miss Williams shows that Justice Black had usually been in favor of the complaining litigant in cases in which the state is charged with restricting religious practices, but in those involving the question of government subsidy to some particular sect —notably in *Everson v. Board of Education*[2]—his course has not been so consistent.

Almost from the time that it began to take shape, the Roosevelt Court was distinguished by an unprecedented number of non-unanimous opinions, though it may be maintained with considerable justice that there was unanimity in seeking a particular end while disputing the means of reaching it.

2. 330 U.S. 1, 67 Sup. Ct. 504, 91 L. Ed. 711, 168 A.L.R. 1392 (1947).

Miss Williams gives a fascinating account of factions in the Court, with Black leading one group and Frankfurter, supported by Jackson, the other. It was Justice Jackson, as she points out, who finally dragged out into the open the proof that the fire of factionalism existed behind the smoke of rumor. On the occasion of the filling of the vacancy of Chief Justice on the death of Stone in 1946, Jackson, in an unprecedented attack upon Black, pulled back the curtain and exposed the ugly situation with which the Court was beset. This indiscretion probably sprang from Jackson's deep disappointment over Vinson's appointment, and his conviction that his own elevation was blocked by Black's alleged threat to resign if he were appointed. However one may evaluate Jackson's charges, it is to the credit of Black's good sense and self-control tbat he made no reply.

In summing up her conclusions, Miss Williams finds that Justice Black's career warrants the assertion that the origin of his political philosophy lies in his desire to improve the lot of the common man and to protect him from the oppression of powerful forces. Rejecting completely the thesis that that government governs best which governs least, he would employ the instruments of society to effect far reaching social and economic reforms. It is pointed out, however, that when he feels that government is acting in such a way as to deny some individual one of his rights or liberties, he strikes at it vigorously, and he has been particularly zealous in protecting the freedoms of speech, press, and radio. Further, he has small compunction about departing from judicial precedent, and he believes that when a rule is found to be "inconsistent with the sense of justice or with the social welfare," it should be immediately and frankly altered.

As Mr. Roosevelt's first appointee to the Supreme Court, taking his seat under peculiarly trying circumstances, Black's record was immediately subjected to the closest and most critical scrutiny. At first atacked for his previous membership in the Klan, distrusted by racial, religious, and minority groups on the same grounds, and feared by business and financial interests for his support of New Deal legislation in the Senate, Black is now commonly regarded as an unusually fair and capable judge.

Miss Williams has succeeded brilliantly in evoking the atmosphere of the early days of the New Deal. Further, she has written a penetrating and scholarly study which holds a peculiar interest for one who has lived through the period discussed, and observed the development of a new epoch in the history of the Court when previous positions have been frequently and drastically reversed.

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HATCH ACT DECISIONS (POLITICAL ACTIVITY CASES) OF THE UNITED STATES CIVIL SERVICE COMMISSION. By James W. Irwin.[1] Washington: United States Government Printing Office, 1949. Pp. 304. $1.50.

The primary purpose of this book is to make available to attorneys for persons charged with violations of the political activity provisions of the Hatch Act the precedents and information needed in preparing a defense. To accomplish this purpose the editor presents 59 pages of text and excerpts from 51 "representative" decisions of the United States Civil Service Commission, which enforces the statute.

This book is timely in view of the likelihood that increasing numbers of people will be affected by the Hatch Act prohibitions. There may be some doubt, however, as to the extent to which the book fills its objective. The editor states that the selected decisions "reasonably comprehend the principles of law with which the Commission has dealt in the field of prohibited political activity." (p. 8) If the reference is to procedural principles doubtless the editor's claim is justified, but it is doubtful whether all kinds of prohibited political activity that have been considered by the Commission are illustrated in the selected decisions.

This criticism may spring from a conviction that the book should be helpful to those interested in avoiding participating in the prohibited political activity as well as those trying to defend past conduct. After careful study of the book one can hardly be confident in his knowledge of the conduct that constitutes prohibited political activity.

Perhaps it is not fair to wish that the editor had done what he did not undertake to do, but he fails to develop several suggested points. We are told that "when other Commissioners are unavailable, one may render a decision." (p. 65) We are not informed of the basis for this rule, but the implications are startling in view of the possible consequences of "Commission" decisions. Readers would like to know more about the Commission's internal procedure in handling political activity cases. Such information might not be directly relevant to the purpose of the book, but the editor makes reference (pp. 37, 88) to problems in administering the statute.

The editor has made available to attorneys and other interested persons materials not otherwise readily available. The discussion in the text of the Commission's procedure in political activity cases (pp. 28-38) is informative and will dispel fears of attorneys who are unaccustomed to appearing before the Commission. The selected cases provide precedents that in the absence of this book the practicing attorney could collect only with great difficulty.

The objective of the book would be better served had more complete references to cases and other materials been given. Indeed, readers are not

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