BOOK REVIEWS

On Understanding the Supreme Court. By Paul A. Freund. Boston: Little, Brown & Co., 1950. Pp. xvi, 128. $3.50.

It took a political, economic and jurisprudential upheaval, revolutionary in its ultimate effect if not in its immediate method, to confirm for American constitutional law, the observation of Justice Holmes that the "life of the law has not been logic: it has been experience." Sociological jurisprudence has carried the field before it; its devotees populate the judiciary, the bar, and the rostrum. Most all of them agree that the "felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[1] The syllogism is dead: Long live sociological constitutional law!

Yet, as the cheering subsides and we revert to the business of studying, appraising, and prophesying the course of American constitutional law, the task may be no easier under the rule of the sociologist than it was under that of the logician. Both have their complexities. It is to furnish an understanding of the range and scope of these problems as they beset the United States Supreme Court that Professor Freund has presented us with the published edition of three stimulating lectures which he delivered under the auspices of the Julius Rosenthal Foundation of the Northwestern University School of Law, in April 1949.

Few are the eccentrics who cling to the Blackstonian myth that "judges do not create, but merely find the law." The myth is exposed, but the true facts, as is so often the case, are tougher to understand than the fairy tale which they displaced. How does the Court make law? Why? In what frame of reference? When? It is to this type of inquiry that Professor Freund's book is addressed. No pretense is made of detailed study of the Court's philosophy, personnel, or method. The three essays contained therein have been selected for the prime purpose of introducing to us the difficult problem of the One and the Many in our judicial system, i.e. one Supreme Court and many states, many courts, and many organs of government, with this one Supreme Court "speaking with many, often discontentingly many, voices."

The first essay, entitled "Concord and Discord," is perhaps the best from the point of view of executing the purpose of the book. The main theme of this

[1] Holmes, The Common Law 1 (1881). For a recent interesting discussion of the American jurisprudential transition from mechanistic to sociological, see Commager, The American Mind 359–90 (1950).

essay is the attitude of the Court toward that somewhat loosely delimited field called "civil liberties." To that fundamental theme we have a Court which pays homage far beyond that ever given, even by Courts who numbered Holmes, Brandeis, Hughes, and Cardozo in their ranks. However, Professor Freund carefully and objectively unfolds the cross-currents of discord that mar the harmony of the main theme. Truly the light of liberalism sends its shafts in many directions. While all the present members of the Court could be put down as men who value human rights or personal liberty above the right of property, with reference to the permissible impact of the regulatory powers of the state,[2] the problem is not that simple. The choice in a particular case is never presented in such an "either—or" frame of reference. The choice is rarely between black and white but more usually hidden in a vast spectrum of values and policy decisions. Civil liberties are to be preserved, yes, but their preservation in a particular case may necessitate examination of the nature of our federalism, the due accommodation of state legislative policies, the observation of procedural regularity, and other judicial tasks equally complex to resolve.

Thus, we see a Court which wrestles with the problem of reconciling the aggressive liberties of speech, publication, and practice of religion with the passive liberties—the rights of privacy and private belief. On the whole, the Court has been more accommodating to the aggressive liberties, with the Jehovah's Witnesses cases,[3] *Terminiello v. Chicago*,[4] and *Saia v. New York*[5] illustrating the degree thereof. On the other hand, the right of privacy in the sense of protection from unreasonable search and seizure has been supported only in wavering fashion by the Court. It is interesting to note how one of the most vigorous supporters of free speech, Justice Black, is only lukewarm in his defense of personal immunity against search and seizure, while Justice Frankfurter evens up the score in a vice-versa switch.[6] Clearly the Court protects civil liberties, but which one in any given case is something else again.

The second theme of discord developed by Professor Freund is the dis-

[2] While their number has shrunk, their voices are yet heard. See, e.g., Barrett, review of Frank, Courts on Trial, 19 Fordham L. Rev. 117, 118 (1950). However, adult realization that the Supreme Court perforce must affect policy and make law in the positive law sense does not conflict with the Thomistic theory of natural law, viz., that there are immutable principles of justice binding everywhere on all men. It is when the Thomistic philosophical natural law theory is perverted to serve materialistic laissez faire ends that an apparent clash arises between defenders of the present Supreme Court and the proponents of Herbert Spencer revisited.

[3] Consult Scanlan, The Passing of Mr. Justice Murphy—The Conscience of a Court, 25 Notre Dame Lawyer 7, 14–18 (1949).

[4] 337 U.S. 1 (1949). [5] 334 U.S. 558 (1948).

[6] This reviewer has his own beliefs as to why this occurs. Justice Black, former police court judge and the grand inquisitor of the Black Senate investigating committee, has an understandable sympathy, born of practical experience, with the difficulties of official attempts to procure the information necessary to govern, judge, or arrest. Justice Frankfurter, the active academician of Sacco and Vanzetti memory, does not, but on the contrary undoubtedly carries a psychological, as well as a philosophical, bias toward any laxity of procedural safeguards in the field of criminal law.

harmony which exists among the members of the Court concerning the correct application of the famous "clear and present danger" test inherited from Justice Holmes as the constitutional formula for determining where the right of free speech ends and permissible legislative restriction of it begins. Like all legal formulas and rules, the "clear and present danger" formula means different things to different men. And so it is with the present Supreme Court. As Professor Freund points out, it is no surprise that those judges who are partial to the "aggressive liberties" are also quite willing to apply the "clear and present danger" rule in areas where its application is not too readily apparent, such as in determining the permissible scope of the judicial contempt power, or the allowable area of political activity on the part of government employees. Contrariwise, the judicial defenders of the "passive" virtues, protest against the use here of the "clear and present danger" test, and remind us that axiomatic application of Holmes' felicitous phrase is no substitute for the intelligent value judgments that must be made from case to case. As the case of the convicted Communists approaches the Supreme Court, Professor Freund's inquiries here serve to set the scene for the profound judgment that must soon be made, i.e., the judicial demarcation of where provocative, deceitful, but free speech ends, and seditious conspiracy begins—no easy line-marking job, but one that can be better performed if judicial over-simplication is avoided by both the determined protectors of free speech and the equally determined defenders of orthodoxy and the Republic.

A final disharmonious note pervades the Court's outward allegiance to civil liberty. That is found in the conflicting attitudes taken toward the relationship of the Fourteenth Amendment and the Bill of Rights. Does the ideal of federalism and the Supreme Court's deference toward state legislative policies and criminal procedure explain the present personalized "natural law" approach of a majority of the Court? Does the Fourteenth Amendment embrace only the "fundamental principles of justice" as each individual judge sees them, or is Justice Black closer to a rule which promotes certainty along with fairness when he argues that the original congressional intention behind the Fourteenth Amendment was the incorporation of the Bill of Rights? Professor Freund brings these interrogatories to the reader in an illuminating manner, although the reviewer wishes he had made reference to still another view of the matter. The late Justice Murphy and the late Justice Rutledge advanced a third view, namely, the Fourteenth Amendment incorporates the Bill of Rights, but it doesn't stop there; we have learned a few things since 1791.[7] In closing his dis-

[7] Interestingly enough, each of the three theories rests on a natural law basis—the majority's theory, avowedly so. And since the Bill of Rights has its philosophical base in natural law theory, Justice Black's view to that extent has natural law to thank. Also, the advanced position of Justice Murphy and Justice Rutledge rests on natural law foundations, brought up to date by taking into consideration the constitutional experiences of 160 years. Those who claim that the present Supreme Court has abandoned "natural law" theories are either very much in error, or, as is more likely the case, they are referring to the economic "natural law" of Darwin, Spencer and Sumner.

cussion of this phase of his book Professor Freund reminds us that the heat and acrimony engendered by the disagreements of the Court in the field of civil liberties are not to be taken as evidence of a Great Divide. The ideal is a unanimous one, its application is the source of the friction. But friction is the advocate's meat and Professor Freund has given us some nice chunks to masticate.

His second essay is one on Justice Brandeis. This reviewer believes that it was given in the hope of exposing the over-simplification of labeling a judge as a "liberal" or a "conservative" and hoping by that approach to have furnished an index of his opinions. Brandeis certainly could be referred to as a "liberal" judge; the little minds who almost blocked his nomination would have been willing to concede that, and then some. Yet, as Professor Freund points out, if we stopped there we would certainly be at a loss to explain Brandeis, the stickler for procedural regularity, the high priest of a harmonious federalism, the joyful executioner of *Swift v. Tyson*,[8] and the proud creator of *Erie R. Co. v. Thompkins*.[9] Nor could it serve to explain his complete support of the Court against a president's scheme to expand it when it seemed such an obstacle to the democratic expression of the will of the people. Equally would it be unavailing in understanding his concept of stare decisis in interpreting statutes, a concept that he embraced so completely that it probably propelled him to reverse *Swift v. Tyson* on constitutional grounds, rather than resting with a decision which said merely that the Rules of Decision Act had been erroneously interpreted. The lesson the reader could learn from this second essay is one that should be very appropriate in these days of political name-calling and muck-raking.

The last essay entitled "Judge and Company" is an abortive effort to set forth some of the techniques and approaches which might be useful to the constitutional law advocate. This reviewer has no quarrel with this objective, nor with the essay as far as it goes. However, even granting that the book is purposely limited in the subject matter attempted, it does appear that this essay adds little to the previous two. Moreover, the recent appearance of two other complete works touching on appellate advocacy before the high court[10] perhaps make this last essay seem more trite than otherwise might be the case. There are two points touched upon in the last essay which bear repetition, however. Professor Freund calls attention to the lack of, and the inaccessibility of adequate legislative histories of state legislation. State legislative history materials have too long been in a disorganized and unsatisfactory state. Improvement in this field is more than ever demanded, especially when we consider Professor Freund's concluding observation. With the increasing reluctance of the Supreme Court to declare legislation unconstitutional under the due process clause unless basic civil liberties are involved, the result may be a cor-

[8] 41 U.S. 1, 16 Pet. (U.S.) 1 (1842).

[9] 304 U.S. 64 (1938).

[10] Weiner, Effective Appellate Advocacy (1950); Gressman and Stern, Supreme Court Practice (1950).

responding increase in the substantive due process on the state level. A recent article has recalled our attention to this area.[11] This reviewer realizes that our constitutional history has demonstrated that, strangely enough, Hamiltonianism and John Marshallism have served liberalism well; and that paradoxically, too, Jefferson's "states rights" theory has been perverted to the service of money changers. He hopes, however, that state "substantive due process" will not provide the refuge afforded by the pre-Roosevelt Court for economic laissez faire masquerading in the disarming robes of "natural law" (Darwinian style).

Professor Freund has presented us with a well-written stimulating, and objective work. What it lacks in integration of subject matter, it more than makes up in reader interest and appeal. I dare say neither the partisans of the Right nor the Left will particularly appreciate his effort. The Right will writhe at the cavalier way in which he relegates the gilded age of judicial hyper-protection of "property rights" to the discard heap. The Left will be equally uncomfortable with his picture of a Supreme Court to whom "civil liberty" doesn't always mean "civil license." Those, however, who wish to understand more intelligently the "cult of the robe" (as Judge Jerome Frank has called it), and who prefer to have knowledge of the workings of a judiciary in a democracy rather than merely to give emotional obeisance thereto, will enjoy this book, and perhaps be enlightened. A recent writer has suggested that "the nature of the American government depends upon the opinion and the principles of the men who constitute the Supreme Court. . . . Since they are men, not gods, they are presumably subject to mundane influence, and a study of American government must therefore include a study of the tastes and temptations of judges."[12] This still may come as a shock to some. Whatever the virtue of "shock treatment," Professor Freund's work is an excellent initial dose for those who wish eventually to attain mature understanding of American constitutional law in action.

ALFRED L. SCANLAN*

War and Civilization. By Arnold J. Toynbee, selected by Albert V. Fowler London: Oxford University Press, 1950. Pp. xiv, 165. $2.50.

A Plan for Peace. By Grenville Clark. New York: Harper & Bros., 1950. Pp. xii, 83. $1.00.

In a preface to Mr. Fowler's selections, Professor Toynbee expresses the opinion that war explains the breakdowns of civilizations. To one reader of the volumes of Mr. Toynbee's *Study of History*, from which the selections are made, the observation causes difficulty.

[11] Paulsen, "Natural Rights"—A Constitutional Doctrine in Indiana, 25 Ind. L.J. 123 (1950).

[12] Agar, The Price of Union 194 (1950).

* Legislative Attorney, Office of Counsel, Secretary of Defense.