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Book Reviews

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Mr. Justice Black: The Man and His Opinions. By John P. Frank. New York: Alfred A. Knopf. 1949. Pp. xix, 357. $4.00.

In the words of the author: "The biographical sketch and the collection of opinions presented here are intended to acquaint those readers who do not closely follow the Supreme Court of the United States with the part played by President Roosevelt's first appointee to that Court." The opinions have been selected on the basis of "variety" and "general interest." This sets the tone for the review. Mr. Frank has not purported to produce a comprehensive study of either Mr. Justice Black or his opinions; therefore the reviewer will not evaluate the book by using the standard of comprehensiveness. There is, it should be pointed out, a variance (which the reviewer seeks to explain) between the author's modest endeavors and the introductory remarks by America's eminent historian, the late Charles A. Beard, who urges all citizens to read the book and infers that all law students should do the same. We may overlook the publisher's puffing remarks that this book contains "an analysis of his [Mr. Justice Black's] most significant and controversial Opinions." "Variety" and "general interest" do not equate with "significant" and "controversial." This detail is mentioned out of fairness both to the author and to the reader—the former because the book may be mis-evaluated unless its purpose is restricted, and the latter because he should know what to expect. The study of this book has given me a variety of thoughts about Mr. Justice Black, the Court, problems in legal biographic technique, and the responsibilities which we as lawyers have for the general reader who lacks intimate familiarity with our doings.

The book consists of a biography which covers 139 pages and a selection of thirty-four opinions from among the over three hundred which have been written by the Justice. The biographic materials are clearly presented, and one does receive a fleeting glimpse of the Justice as his life races through the pages. It is the sort of biography which one would write if he did not have available the source materials for an intimate study. It is a rough summary, but interesting to those who know none of the details about a great personality. It is improbable that the materials are sufficient to permit the correlation of the opinions with the man. Perhaps the association of farming family, legal representative of labor, foe of utilities and monopoly, and advocacy of New Deal measures might be sufficient for rough correlation with some opinions.

About the opinions the author states: "Most paragraphs of technical analysis either of jurisdiction or of previous decisions, and almost all footnotes and citations, have been omitted. The theory in cutting has been to avoid, as far as possible, much that an intelligent non-lawyer would find uninteresting." The opinions are divided into two groups: "Control of the Economy" and "Civil Rights." Under the first group there is one opinion on the "Extent of Federal Power"; there are six opinions concerning the "Extent of State Power," and ten opinions under the general heading of "Problems of Regulation." Under the second group, there is one opinion on "Basic Theory" (*Adamson v. California*),[1] seven under the heading of "Speech, Press and Religion"; seven on "Fair Trial," one on "Marriage and Divorce," and one on "Aliens." Prefatory to each opinion there is a brief statement of the facts, if they are not stated in the opinion, and a few remarks on the voting of the Justices. In some of the prefatory remarks the author has briefly laid the setting of the problem to be discussd, although there is nothing like the critical analysis and evaluation which appears in Max Lerner's *The Mind and Faith of Justice Holmes.* Likewise, there is no serious attempt to contrast, distinguish, or weigh the Justice's opinions with those of his brethren, or with previous developments on the Court.

It is believed that Professor Beard's introduction has significance for legal education. My impression is that it presents the question: Is legal education doing its job in providing materials about judges in order that we may study their lives and opinions as one landscape. It is the spirit, and not the literal meaning of the introduction, which has relevance. Professor Beard said:

> "If fifty years ago students of constitutional law could have had at their command volumes on the life and work of all the justices who appeared in the law books, such as Mr. Frank now provides for Justice Black, they might have been spared many grave misunderstandings in their practice and pleadings and, indeed, the Court might not have wounded itself so often by ill-considered and arbitrary actions. This is not to say that Mr. Frank tells or pretends to tell what lawyers call the 'whole truth.' He undertakes no such adventure in omniscience."

Previous to this remark, Beard recalled that as a student of constitutional law he had felt a great unfilled need to know about the men behind the decisions, their lives, their interests, the documents and details and other materials which some are so wont to describe as impractical and non-legal. How far have we come since this need was felt fifty years ago? We have a few collections about the Justices like Fairman's *Mr. Justice Miller and the Supreme Court,* Swisher's *Roger*

[1] 332 U. S. 46 (1947).

B. Taney, a larger collection on Brandeis and Holmes, and assorted materials scattered through the periodicals. My feeling is that legal scholarship has barely begun to solve the deeper problems of viewing together the judges and their law. It is believed that this problem may have been in Professor Beard's mind; it is in the minds of many.[2]

A solution of this problem would not solve the problems of legal education, although it should help solve one of them. Obviously, Mr. Frank has not sought to do this job. He stated that he hoped to do a comprehensive study on Justice Black "many years hence." Possibly such studies could be made today on Justice Black, on the other Justices, and on the justices of the peace and the small claims justices. It is an intriguing thought to contemplate lucid materials on the motives, the feelings, the urges and the drives of the judges as human beings, and to seek to tie these to their law. It is believed that we shall know much more about what the law is when we learn more about the judges. Perhaps, the methodology is not available for doing such a study, but the genius (and resources) which discovered the ways of the atom could surely solve this problem of technique in the social sciences. It seems wasteful to wait until a man's years are over and then to explore how he felt and believed. This approaches biographic archaeology. A few choice artifacts are the basis for deducing his psychologic responses. The present legal biographic sterility might be replaced, and knowledge which only the cosmic forces now possess would be available for the advancement of our insights of the law in society.

Assuming that we do not so drastically alter our traditional biographic approach, it is believed that there is room for improvement—not only in the materials prepared for the law student, but also for the average interested citizen. Since Mr. Frank has stated that he had in mind the non-lawyer citizen, his book has recalled to me our responsibilities toward the interested citizen as well as toward the busy lawyer who lacks the time to keep up with the Supreme Court's activities. But to speak of the citizen: he elects the judges, or selects the men who choose them,

[2] This is not to say that once we know the man we may predict his opinions without reference to the legal system and its social context. Among the benefits which we would receive from thorough studies are the following: (1) We would become more aware of the personal element in opinions and hence incline to exercise greater care in the choices of our law men from the justice of the peace upward; (2) the hidden personal premises could more readily be detected and we would accept them for what they were without seeking to explain or to justify them by some forced logical construction; (3) we would choose our materials for study, as teacher and student and practitioner, with greater care; (4) we would have more materials from which to choose; (5) we would remove ourselves a step further from the lingering Austinian tightness; (6) we would be stimulated to define our objectives and our "interests"; (7) our law men would learn more about themselves and hence view themselves as a functional unit in the evolution of society, and perhaps be stimulated to broaden their perspective through study and contemplation.

and we seem to bother with him primarily from the standpoint of fees. He should, it is believed, be better informed about the legal process. Mr. Frank has given him some very interesting materials to think about, but only the opinions of one Justice have been presented. True, the book is about Mr. Justice Black, but perhaps Justice Black and the Court could be seen in sharper focus if a few words were stated about the ideas of other Justices concerning the same opinion. It is improbable that the lay citizen reader will observe from these opinions by a single Justice how trained legal minds may differ on the same problem, or that he will be stimulated to think about the ways of the law, or that he will see the broad outline of decision-making which affects almost every details of his life. Perhaps, this point may be illustrated by the following two examples:

> 1. Mr. Frank has chosen the case of *United States v. South-Eastern Underwriters' Association*[3] to reveal Justice Black's position concerning the extent of federal power. The precise question in the case is not whether the federal government has the power to regulate insurance, but as Chief Justice Stone stated in his dissenting opinion: ". . . but with the question whether Congress in enacting the Sherman Act . . . has asserted its power over the business of insurance."[4] Moreover, a vital question in issue concerned the weight to be given to what Chief Justice Stone considered to be seventy-five years of precedent that the business of insurance was not interstate commerce, and the weight to be given to the principle that "Long continued practical construction of the Constitution or a statute is of persuasive force in determining its meaning and proper application."[5] Perhaps, something from the dissent by Mr. Justice Jackson might have been included; this reveals his fears of the effects of the majority's decision and includes the following vigorous statement concerning his conception of the function of the Court: "To use my office, at a time like this, and with so little justification in necessity, to dislocate the functions and revenues of the states [footnote that thirty-five states filed amicus curiae briefs protesting the majority's position] and to catapault Congress into immediate and undivided responsibility for supervision of the nation's insurance businesses is more than I can reconcile with my view of the function of this Court in our society."[6]

This would give the readers interesting materials for evaluation, and they

[3] 322 U. S. 533 (1944).
[4] *Id.* at 563.
[5] *Id.* at 578.
[6] *Id.* at 595.

would become a part of the fire, the policies on the loose, and the power of discretion. They might wonder if the hero of the book was correct. This is not a post-mortem brief for the dissent in this case, because my view is with Mr. Justice Black's position. But it seems essential that the reader should receive enough information to see the total situation; the consequences of a lack of full coverage are particularly harmful where the law is concerned.

2. Under the general heading of "Civil Rights," the author has included several cases. The first heading relates to "Basic Theory" and the fascinating case of *Adamson v. California*[7] is employed to illustrate a broad view. It will be recalled that the majority in this case decided that the Bill of Rights was not included within the Fourteenth Amendment, but that Justices Black and Douglas so contended, with Justices Rutledge and Murphy agreeing but without confining the Fourteenth Amendment's meaning specifically to the Bill of Rights. Justice Black had voiced this view while he was in the Senate.[8] Here is a case where the reader could be given a peek into the intricacies of this problem; yet, he receives only the forceful dissent of Justice Black from which he learns that the majority of the Court used a "natural law formula" in reaching its conclusion and that such formula "should be abandoned as an incongruous excrescence on our Constitution." The lay reader perceives that the majority is in favor of some sort of "excrescence," and he may feel that the majority is composed of a group of stern-hearted Justices who do not mind affirming the conviction. However, a glance at the majority's position would show a group of Justices who could say: "It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment. . . ."[9] This demonstrates that the majority believed that its position was supported by considerable precedent. There is a statement that this interpretation ". . . accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship."[10] In a concurring opinion, after reviewing the history of the Fourteenth Amendment from its inception to ". . . the present membership of the Court—a period

[7] 332 U. S. 46 (1947).

[8] See an interesting account of other views held by Justice Black when he was in the United States Senate, Barnett, *Mr. Justice Black and the Supreme Court*, 8 U. OF CHI. L. REV. 20, 21 (1940).

[9] See note 7 *supra* at 50.

[10] *Id.* at 53.

of 70 years . . . ,"[11] Mr. Justice Frankfurter says: "Of all these judges only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments. . . ."[12] If the reader saw these conflicting expressions he might believe that he was in the midst of the battle of the giants; and he would be. He was on the verge of seeing new law made, since this was a 5-4 decision. Many interesting ideas might come to the reader, for example: the impression that Mr. Justice Black favors non-interference with the states, yet here he wishes to curtail the domain of state activity; although, on further thought the reader may conclude that in the long run Justice Black's position will restrain the judiciary's interposition of its own ideas of good and bad and thus remove its threat of curtailing state action. Yet he may now wonder whether so much "precedent" should be overturned or whether the Constitution should not be amended to do what Justice Black wishes; but then he may pause and consider that the Court is not a docile Court and need not wait for amendment or Act of Congress. Indeed, he may wonder if perchance the Court has been wrong all these years since the Fourteenth Amendment was adopted. Likewise, a comment on the "excrescence" phase of natural law would have revealed a whole pandora's box of ideas about the law.[13] After such brief excursions on both sides, it seems that the layman and the busy lawyer would have sharper perspective of the dynamic problems involved. Again no post-mortem brief is being written for the majority in this case. Finally, most would agree that the presence of the judicial habit of dissenting and concurring is an effective means of focusing upon the smaller and larger issues of a constitutional, or any, problem.[14] The presentation of the process in action would make interesting and informative reading, and should appeal to the publishers. The demand for such works on the part of the lay reader, lawyers, law students, and teachers might be greatly increased.

There is much good reading in this volume, but space does not permit further discussion. The famous Klu Klux Klan incident is covered with possibly too much effort to remove the tinge of contamination by association from the vigorous young political battler. A good rationalization of the Klan membership with which many young Southern leaders were

[11] *Id.* at 62. [12] *Id.* at 62.

[13] See generally, HAINES, REVIVAL OF NATURAL LAW CONCEPTS (1930); STONE, THE PROVINCE AND FUNCTION OF LAW 215.

[14] Mr. Justice William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUD. SOC. 104 (1948).

involved is the observation that "They must either ride the whirlwind of the Klan or surrender, and they had no thought of surrendering."[15] The incident concerning Mr. Justice Jackson is discussed with studious objectivity; although, the author's book would have suffered no loss if he had refrained from choosing a statement from a Georgia newspaper which said that Mr. Justice "Jackson is an ass." Perhaps, objectivity would have demanded comparative epithets concerning the Justices. All this reminds me of a statement by D. H. Lawrence in *Apropos to Lady Chatterley's Lovers* (if my memory is correct) which may be twisted to say: "Who isn't?"

Mr. Justice Black is no exception to the rule that judges who come to the Supreme Court after a vigorous life of statesmanship are controversial figures; possibly his appointment was among the more controversial ones which the great American institution of muckraking sought as a target. He is no exception to the rule that ideas which judges possess before coming to the bench will seek, and be given, outlet in their opinions. Indeed, it would be odd if the judges discarded themselves on donning the robe. In the case of Mr. Justice Black those to whom he was antagonistic during his career as practitioner and legislator have not forgotten their rancor, and it was quite normal for them to view with awesome terror one of their "enemies" ascending to the summit of judicial power with all its vast connotations of judicial supremacy. It may not occur to some that the New Deal emphasis upon federal power has firm Marshallian foundation. It is a portion of our traditions that but for the fate of national and world-wide depression and the election of President Roosevelt, those who opposed Mr. Justice Black's appointment would have chosen in his place an idol in their own image, who believed in laissez faire literalism; and the choice would have been rationalized with the rule of the Universe in its application of late nineteenth-century substantive due processism.

Mr. Frank is to be congratulated for doing this brief work on the Justice. It is hoped that others interested in legal biography will take up where he left off. Indeed, those of us who are teaching might inspire a collective student effort to biographize local justices of the peace: MEN AND OPINIONS. It would make delightfully shocking reading for bench, bar, student, teacher, and, of course, for the lay citizen.

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[15] LERNER, IDEAS ARE WEAPONS 254 (1902). Mr. Frank quotes the Montgomery Advertiser as follows: ". . . the engineers of the attack were not disturbed by the knowledge of his former Klan affiliation . . . they hated him because of his record as a United States Senator."