UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 40 | Number 3 Article 14

4-1-1962

Book Reviews

North Carolina Law Review

BOOK REVIEWS

Justices Black and Frankfurter: Conflict in the Court. By Wallace Mendelson. Chicago: University of Chicago Press, 1961. Pp. xi, 151. $4.00.

This is an interesting book about two complex, stubborn Justices who have made their marks on the American scene. The author compares, contrasts, and analyzes; and the result is insight not only into the minds and philosophies of the two, but also into the problems and role of the Supreme Court over the past three decades. Professor Mendelson finds that both of the Justices are "liberals" but that they differ greatly in two respects: (1) their approach to legal problems; and (2) their conception of the role of the Supreme Court. He also finds that one has greater faith in man's ability to find his own way toward justice and the good life, and that the other has greater faith in the prospects for achieving justice and truth.

Justice Frankfurter is categorized under the heading of "humilitarian." He believes in the possible as the objective, and that such words as relative and balancing are vital ones for the Court. He believes that authority and faith (placed in state courts, for example) encourage responsibility; that law is not perfect and cannot be made perfect. He seeks to restrain judicial legislation and to avoid concentration of power in the courts. Other humilitarians, according to the author, were Taney, Waite, Holmes, Brandeis, Learned Hand, Stone and Cardozo. Of Frankfurter he writes:

> Deeply libertarian in private thought and action, he sees what partisans do not see: that if effective transcendental arguments may be made for the social priority of personal liberty, no less powerful considerations in the abstract would sustain the primacy of economic interests.[1]

From a personal bedrock of democratic idealism, then, Frankfurter as a judge comprehends the importance of balance between interests (including property interests) and the importance of judicial restraint. He views the over-all and the future.

[1] MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 126-27 (1961).

> [S]ince the Supreme Court cannot review more than a drop in the flood of American litigation . . . that drop must be selected, not on the basis of Justice to any litigant, but in the interest of balance among the various elements in the governmental structure.[2]

And the Justice does not believe that the Court should impose its own standard on the community.

With Frankfurter in a grouping which contains a fair share of the popular heroes of the Court, one is anxious to see the company in which the author places Justice Black. He is classified as an "activist"—one whose concern is justice and who does not readily permit technicalities to frustrate the ultimate. The Court is strong, righting wrongs wherever found; its function, where necessary and within attainable bounds, is to impose justice on the community. Judicial legislation is the heart of the judicial process, and a judge's ideals guide his creative impulses. Other activists include Marshall, Field, Peckham, Fuller and Sutherland.

Placing Black and Sutherland in the same category is heresy, of course, and is enough to give defenders of each a stroke. But Professor Mendelson is not dealing here with attitudes toward property or civil liberties; rather he is concerned with approaches, methods and goals. The activist desires a strong court and believes that the court's basic assignment is, where necessary and practicable, to impose justice (or the ideals of the Justices) upon the government and the community. "What is justice?" the author asks. "Not so long ago, activists among the 'nine old men' found it in a modified . . . 'laissez faire' called rugged individualism. Modern activists see it as a humane and virile libertarianism."[3] Sutherland gave a preferred place to certain economic interests and rights while Black grants preference to the underdog.

This, in brief, is the book's presentation of Justices Black and Frankfurter. Whatever the author's personal views may be, Justice Frankfurter gets the better of the matter, for the volume makes it pretty plain that the activists approach is risky; that it eases toward a government by men—ethical and kindly today; perhaps tyrannical or aristocratic tomorrow. This thesis, of course, is worthy of consideration, and we should evaluate it carefully, for there are broad

[2] *Id.* at 124.
[3] *Id.* at 117.

implications. One may ask, however, whether it totters due to over-simplification. Black *is* a friend of the underdog, but is this too easy an explanation? He is interested in social justice and freedom (so is Frankfurter), but he is also interested in property rights of the people; thus, there are important economic aspects in Black's decisions.

Over-all, the author presents his analysis and thought in a scholarly manner, and both Justices come out of the book very well. To be sure, few minds will be changed, but perhaps some will see, as the volume quotes Lincoln as saying, that two men may honestly differ about a question and both be right. For the uncommitted, the work offers an interesting and perceptive view of two top minds on the Court, two superb fighters. And an occasional zealot just might perceive, in reading the volume, that the other Justice is not in fact altogether stupid.

This suggests a final point, namely, that it may be faulty scholarship to reach firm conclusions as to a judge's personal interest in property and procedure versus people, as derived from a study of his decisions—a precept which constitutes an additional dimension of this volume. I am not at all sure that Holmes was any more against child labor than were other members of the Court; I am not at all convinced that Sutherland was opposed to poor people; I am far from believing that Black exceeds Frankfurter (or vice versa) in his beliefs in freedom or that either of them would be the same if they had sat a generation earlier. The differences in our Justices, assuming intellectual gift, are generally less fundamental and deal with procedure, degree or balance, and with division of power—matters less basic but nevertheless important. Freedom is to be cherished. But balance must play a part. Liberty without bread (or without order) is meaningless. The new countries of the world are demonstrating this, and in some instances they are placing emphasis on economic considerations to the detriment of freedom for the individual. Labor unions in this country stress the group decision, not individual dissents; and their thrust has generally been economic. It is a mistake to say that Black is not aware of all this or that Frankfurter is alone in recognizing it. Their differences, essentially, are as to procedure, degree or balance, and division of power. Autocrats and aristocrats alike are uncomfortable in the presence of either. Judging the two Justices and choosing between them on this basis

is not only more realistic, but is more fruitful for our own lives and thinking.

THOMAS W. CHRISTOPHER
PROFESSOR OF LAW
UNIVERSITY OF NORTH CAROLINA

Modern Scientific Evidence. By James R. Richardson. Cincinnati: The W. H. Anderson Company, 1961. Pp. xvi, 538. $20.00.

The application of the techniques of modern science to the adjudication of human disputes has provoked changes in the administration of justice in the past, but the vision of what may happen in the future as present scientific procedures are perfected and new ones are discovered is thrilling to those interested in legal development. This revolution is not entirely peaceful, however, and some of the problems are most exasperating. Scientists are disturbed because of what they regard as extreme conservatism of the legal profession when presented with better methods of fact-finding. Lawyers and judges are reluctant to give the sharp tools of science the place they deserve in the courtroom if it means abandoning the constitutionally protected jury trial and major revision of the ancient adversary system. There is no question but that this subject calls for investigation, and many writers and publishers have heeded the summons. The subject of this review is a book of this type.

The author has obviously devoted much time and effort to the production of this book. It reflects a huge amount of research in primary and secondary sources. As stated by the author in the preface, the chapters fall into two parts. The first deals with general theoretical problems associated with scientific evidence. The second covers specific types of scientific evidence such as the polygraph, blood grouping tests, intoxication tests, electronic speed detection devices and others. It is also stated that the book has been written "primarily for the practicing attorney in both the civil and criminal law fields."

There seems to be an opinion in some quarters that a practice book or a book for practitioners need not meet the exacting standards observed for other law books. This reviewer does not share that opinion. There are many technical errors in this book that careful proofing and printing should have eliminated. They are not of great

significance in themselves, but they divert attention and are irritating to a profession that is trained to be alert to such mistakes.

The author also has a writing style that does not contribute to facile communication. There are many long, abstruse sentences, some samples appearing below.[1] These are not easy reading, even in context. In addition, some statements do not seem to communicate anything, such as, "it follows that when the law and psychiatry get together on concepts of insanity the sharp distinction between legal and medical insanity will be gone."[2] It is also true that when you put your hand in water, it will be wet. Such observations fill pages but contribute little to understanding.

More serious are errors such as the statement that Alger Hiss was prosecuted "for alleged subversive activities."[3] (Hiss was indicted and convicted of violating 18 U.S.C. § 1621, which is a perjury statute.) Now this is an entirely human mistake because Hiss was prosecuted for perjury allegedly committed before a federal grand jury investigating his testimony in a congressional investigation of subversion.[4] When students make this mistake law teachers

[1] "Thus, it is clear that where a scientific advancement has been made in a specialized field to the degree where, with substantial accuracy, under proper circumstances, certain factual data may be affirmatively established, or certain reasons may be excluded as the producing cause of a resultant condition, and the fact of particular scientific advancement has been accorded legislative sanction as a proper evidential aid to the courts, but does not admit of that degree of infallibility or preciseness as to be a conclusive determination thereof, such evidential aid should be employed with the utmost caution, and only to the extent sanctioned by the legislature which endorsed its use." RICHARDSON, MODERN SCIENTIFIC EVIDENCE 138 (1961).

"It was indicated in the previous section that the protection against self-incrimination is not universally limited to judicial or official hearings, investigations or inquiries where persons are called upon formally to give testimony, since the doctrine of self-incrimination is a logical alternative to the rule against coerced confessions, if the real characteristic of the privilege is protection from being compelled, under any circumstances, to give answers, or furnish documents, which present the likelihood of conviction for crime based on the evidence revealed." *Id.* at 198.

"Certainly, as a fundamental proposition, on the question whether a given signature is in the handwriting of a particular person, comparison with other writings of that person known to be genuine is a rational method of investigation; and that similarities and dissimilarities thus disclosed, by an expert who has the necessary special knowledge, skill, experience or training, are probative and more satisfactory in the instinctive search for truth than opinion formed by the unquestioned method of comparing the signature in issue with an exemplar of the person's handwriting, existing in the mind, and derived from direct acquaintance, however little, with the party's handwriting, is not to be denied." *Id.* at 472.

[2] *Id.* at 264.

[3] *Id.* at 257

[4] United States v. Hiss, 185 F.2d 822 (2d Cir. 1950), *cert. denied,* 340 U.S. 948 (1951).

patiently correct them, but it should not appear in a law book, not even a practice book. Perhaps Alger Hiss might have been convicted of the more serious offenses of treason or subversion, but he was not. If historians find this book in the libraries, posterity may not be so sure. It is clear that the author does not refer to the Hiss case for the purpose of making fine distinctions about his offense,[5] but it is in making this sort of technical distinction that lawyers profess expertise. The readers of "practice books" do not expect to be misinformed, even about collateral matters.

> Another serious error is in a footnote which states,
>
> [A]bout 125 years previously the court had held that the Fourteenth Amendment had not imposed the privilege against self-incrimination upon the states under the privileges and immunities clause, and that they are not required to recognize the privilege as a requirement of a fair trial under the due process clause of the same amendment.[6]

Since the fourteenth amendment will not be one hundred years old until 1968, one wonders when in the future the Supreme Court will hand down this holding so as to make the footnote speak the truth. Seriously, it is not hard to perceive the meaning intended, particularly in view of the cases cited as authority for the statement. It is, nevertheless, surprising to find the statement of law correct and the chronology wrong.

There is much discussion of *Wolf v. Colorado* in chapter 6 in which all of the fine distinctions dealing with the admissibility of evidence illegally obtained are carefully made. It is ironic and no fault of the author's that *Wolf* should be overruled by the Supreme Court of the United States contemporaneously with the publication of this book.[7] Chapter 6 is partly obsolete as a result.

The best chapters in the book are those on psychiatry and the polygraph. The author has utilized his eclectic method well in these chapters; and there is much to be learned from them, especially by those who do not have time to read the reports of the original studies cited by the author. The book has a table of contents, a table of cases, a table of authorities and an index, which should make it more usable. There is also provision for periodic supplements.

[5] There was an attempt to impeach Whittaker Chambers, the principal witness for the Government, by psychiatric testimony.

[6] RICHARDSON, *op. cit. supra* note 1, at 182.

[7] Mapp v. Ohio, 367 U.S. 643 (1961).