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Two Cheers for the Supreme Court

Paul A. Freund

Editor's Note: The following is a speech delivered by Prof. Paul A. Freund of Harvard University Law School to the society of SCRIBES in Dallas, Texas, August, 1969. The occasion was the presentation of the 1969 SCRIBES award for the best book written for laymen as well as lawyers, to Prof. Freund for his book *On Law and Justice* (Harvard University Press, 1968). While its is not usually the policy of the *Cleveland State Law Review* to publish speeches, the Editors feel that this commentary, by so eminent an authority as Prof. Freund, is of such interest that it should certainly receive the widest possible circulation.

Two Cheers For the Supreme Court

*Paul A. Freund**

MR. WOLKIN, MR. OLECK, LADIES AND GENTLEMEN:

There are two ways of responding to this kind of an introduction. There is the Yale way and the Harvard way. The Yale method was exemplified by Robert Hutchins when he was Dean of the Yale Law School and was the victim of a similar occasion. When the introducer had concluded, Hutchins rose and said "Never have I heard praise more lavishly bestowed, more eloquently expressed, or more richly deserved!" The Harvard way was President Eliot's response when he said, "Flattery is not particularly harmful, so long as you don't inhale."

It occurs to me that since the prize is for a book on law aimed largely at laymen, the committee really ought to be composed of wives of SCRIBES members. For all I know it was in fact they who picked the book; certainly it was they for whom the book was written, and I am doubly proud that it is a book which in your judgment, at least, does have something to say to the non-professional.

To set your minds at rest let me say at once that I do accept this award and I do so with a very full heart. There is no kind of recognition that is more meaningful and more touching than that which comes from a group of one's peers. It is a little like a cordon bleu being awarded to a cook by a society of chefs. You people are connoisseurs of legal writing, and therefore this award has a meaning and significance beyond the ordinary.

In Justice Holmes' words on a similar occasion, "Despite all I know to the disadvantage of the subject, it makes me very proud."

I am reminded too of the story of Dr. Samuel Johnson, who was summoned by King George III to an audience with the King. He was

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with the King about a half hour and when he emerged he joined his wife, who asked very excitedly, What did you talk about, and Dr. Johnson replied, "Why, the King said that he greatly admired my writings." And Mrs. Johnson said, "Well, didn't you protest a bit at that?" To which Dr. Johnson retorted, "Why no, my dear, who am I to bandy words with my sovereign?" So I will leave it at that.

I hope you are not expecting tonight a major policy address or disquisition on the Supreme Court of the United States. There is something in this book on that subject, though it risks becoming outdated as the months go by.

I suppose the attitude in this book toward the Court over the past fifteen or twenty years might be described as "two cheers for the Court." I do think that some of the criticism directed at the Court is quite misconceived. I don't now speak of the mindless kind of abuse leveled at the Court, but more thoughtful criticism. Even that I think is often misconceived in several respects.

For one thing, it is sometimes charged that this Court has abruptly changed the course of constitutional development. It has been an innovating court to be sure, but it has seemed to me that if there was a watershed in the evolution of constitutional doctrine in the area of the Bill of Rights, the watershed emerged rather early in the 1930's in the Chief Justiceship of Charles Evans Hughes. You may remember that as late as the 1920's it had not been established that the 14th Amendment applied to criminal trials in a state court; nor had it been established that the 14th Amendment absorbed the guarantee of freedom of the press. It was only in the early 1930's that this quantum leap of doctrine took place. It was only in the 1930's that a coerced confession, a really garden variety of coerced confession in the state courts, was held to be a matter for review by the Supreme Court of the United States. It seems to me that that was the great bridge to the modern law of the Bill of Rights, and that further development was historically inevitable because in this field the Supreme Court is bound within limits to follow the moral climate of the period.

I know when my friend Judge Wyzanski, then a government lawyer, won an important case in the Supreme Court and received a note of congratulations from Judge Learned Hand, Wyzanski replied saying, "Thanks for your congratulations, but really the case was won by Mr. Zeitgeist, not by Mr. Wyzanski." And I think that remains true, though of course, when the Solicitor General (Dean Griswold) wins a case, he wins despite Mr. Zeitgeist, and all credit to him. But when he loses a case, it was won by Mr. Zeitgeist.

It is notable that there is no dissent any longer on the Supreme Court over these fundamental issues of whether the states are bound by the guarantees of freedom of assembly, freedom of press, freedom of

speech, separation of church and state, or by the guarantees of criminal procedure. The differences now are over the application of these doctrines, and while the differences are often very sharp, I think we lose perspective if we magnify them to the exclusion of the very significant agreement which has been reached—an agreement which would have been thought remarkable forty years ago.

So I don't think, in the first place, that this Court can be said to have made an abrupt change in the application of the Bill of Rights. Nor has it done so in the special field of race relations. For fifteen years before the Court decided the school desegregation cases the Negro complainants had regularly won their Supreme Court cases involving education and transportation. It is true that the Court had not found it necessary to overrule the old separate but equal doctrine, but they had surely eroded it, and anyone reading opinions perceptively ought not to have been startled at the final overruling of *Plessey v. Ferguson.*[1] The development antedated the present Court. There were brave men before Agamemnon, and it helps a little to remember some recent history.

In the second place, it seems to me unfair to accuse this Court of the kind of judicial vetoes that liberals denounced in the 1920's. It is unfair, for example, to say that the avant-garde on this Court are simply McReynolds of the left doing the same things for the sake of their hearts' desire that McReynolds and Butler and Sutherland did a generation ago. That analysis overlooks a very significant difference. In those days the Court was overturning substantive legislative judgment on matters like price control and minimum wage laws, rent control, certificates of public convenience and necessity. Today, by and large, the judicial vetoes are in the area of process and procedure. I refer not to procedure in the narrow sense, although that is included, but in a large sense which would embrace, for example, access to the polls, access to the organs of public opinion, freedom of assembly, freedom of speech, freedom of the press.

On the face of it reapportionment, for example, and the doctrine of the *New York Times case*[2] giving wide latitude to publications in the field of libel where public figures are involved, seem unrelated, and yet philosophically they are connected because they both refer to the maintenance of a free and uncluttered and untrammeled political process, whether it be through the suffrage or through the molding of public opinion. This it seems to me is a much clearer province for the court than that, say, of minimum wage or price regulations, for the reason that if we are going to give respect to the substantive product of the legislative branch, it does behoove us or behoove some organ to make sure that the legislative and political processes are kept open and uncorrupted.

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[1] 163 U.S. 537, 41 L.Ed. 256, 16 S.Ct. 1138 (1896); overruled in Brown v. Board of Education, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954).

[2] New York Times v. Sullivan, 376 U.S. 255, 11 L.Ed. 2d 686, 84 S.Ct. 710 (1964).

This is basic. If they are kept open, then there is all the more reason to give a presumption of constitutionality to the legislative product. The Court's role in seeing that the processes are kept open is thus a more legitimate and compelling role than that of oversight of legislative judgment in other fields.

Having said that, and having given my "two cheers," I would have to add that not any more than any member of the Supreme Court itself do I agree with all of its decisions or even with the pace, and sometimes as it seems to me the single-mindedness, of its direction. It is like the little boy who said that he knew how to spell banana but didn't know when to stop. Or to quote a more respectable authority, Lord Acton said, "When you perceive a truth, look for the balancing truth."

I give "two cheers" for the reapportionment decision because I think it broke a built-in bias that only the court could break; but I am afraid I can't go along with the rather mechanical arithmetic equality which the Court is now insisting on and which seems to me a kind of delusive exactness, dealing rigidly with census figures which are ten years old anyway, dealing with districts in a way that invites gerrymandering, and ruling out any other kind of consideration like economic interests or political balance which seem to me quite relevant in judging the fairness of representation, or to put it technically, equal protection of the laws. True, trees do not vote and cows do not vote, as the Court told us. That is a profound insight, but cattlemen vote and foresters vote and fishermen vote and Republicans vote and Democrats vote, and it is unrealistic to pretend that voters cannot be characterized in those ways when the objective is equitable representation.

In the field of criminal procedure, I believe the Court's direction is right, is historically inevitable, and is in tune with the moral climate of the day. Again, possibly because of the style of some of the opinions, decisions have had an absolutist flavor that was either not intended or if intended, deeply unfortunate. I am not sure that the guidelines in the *Miranda case*[3] are ideal; I think that they are better than none at all—better than what we did have, but I am not sure that the proffer of counsel is clearly the most effective safeguard of voluntariness in answering questions, where a suspect may be suspicious of court-appointed counsel or may not really understand the warning. I am not sure it is necessarily better than rules that would put a time limit on questioning and that would require video taping of the process or confirmation before a Magistrate. In other words, I am not sure that the time for experimentation in this area is passed. The opinion in *Miranda*[4] did indicate that other effective means would be acceptable, but those passages were buried under what seemed to be rather doctrinaire guidelines. I think

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[3] Miranda v. Arizona, 384 U.S. 436, 11 L.Ed. 2d 694, 86 S.Ct. 1602 (1966).

[4] *Ibid.*

the whole opinion would have been more palatable if that aspect, namely, that we lay these down in default of something else that legislatures or local courts may devise, had been more prominent, and to me the opinion would have been more consistent with the general guarantee of voluntariness, without specification of means, in the 5th amendment.

I had not wanted to talk at length about the Court, but since the book contained some commentary on the subject, I thought perhaps I should summarize it for those who are intimidated by the book itself.

What I really would like to say is that to my mind we ought to welcome the day when the Supreme Court will not be first-page news. I think the country would be in a perilous state if the Supreme Court had to be regarded as the conscience of the country. Nine men who have had legal training are not by background or temperament or mission necessarily best qualified to be the conscience of the country any more than nine physicians or nine journalists or nine clergymen. I like to think of John Maynard Keynes' remark about economists, that we would really be civilized when economists have no greater function in society than dentists; that is to say, they do a little patch work here and there, but they are not responsible for the basic health of the society. I feel the same way about the Supreme Court, and I don't doubt that all the members of the Court feel the same way, that they would be happier if they were not front-page news and were not called on to be responsible for the health of society, if other agencies took up the task and left the Court only a little patch work, a little corrective dentistry to do here and there. Every encouragement ought to be given to those agencies.

So I would like to get away from that emphasis on the Supreme Court. I don't think that in any event the most significant features of our legal system are reflected in the Supreme Court; they are reflected in the police courts, in police stations, in law offices, in legal aid offices and so on.

What can the profession contribute, particularly those who have a compulsion to write. It was correct, I think, for the previous speaker to say that those of us who write do so out of a kind of compulsion. It may be a neurotic compulsion; we have to write, and so I feel that I am talking here to fellow neurotics.

There is a good deal of opportunity to write for the popular press about the law. It is true that national reporting of judicial news has greatly improved in the last ten years or so. Anthony Lewis, to whom reference has been made by another, was a Nieman Fellow at Harvard in journalism and spent his year at the Harvard Law School, where I came to know him, and so anything he writes on this subject now must be read as the expression of a grateful patient. While he was at the Harvard Law School, I happened to run into James Reston, who was his chief at the time on the New York Times. I said to Reston that I thought

it was long overdue that a paper like the Times sent a man to a law school to prepare himself to do Supreme Court journalism. I said, you wouldn't think of putting a man on to your scientific beat if he didn't have a scientific background, a man doing musical criticism if he had no background in music. And Reston said, "Oh, you have missed the most important of all; if we had a sportswriter who didn't know that an infield fly with the bases loaded was an automatic out, we would have ten thousand letters the next day." Well, there was a journalist who started out as a sports reporter and was proud of it.

Since then there have been a number of very able journalists who have had exposure to law schools, but nevertheless there is a great deal of room for development on the local level in the reporting of local legal news, where it seems to me the local bar, and in particular local law schools, might take a hand. I know there are problems concerning members of the bar writing articles about recent decisions, but I don't think the problems are insuperable; and more attention ought to be paid to that kind of appeal to the layman by way of interpreting the work of courts and of legislatures.

Now my final suggestion is along the same line, that is to say, how can lawyers and legal writers be more useful to society. My suggestion has to do with a very fundamental issue, perhaps the most fundamental facing us aside from overpopulation and nuclear war, and that is education in the early grades.

It seems to me that this educational experience is basic to a great share of our problems, including the problem of law observance. The subject of law is conspicuously absent from the curriculum of the schools until possibly the undergraduate college level, where there may be a little introduction to constitutional law. By then it is really too late to matter very much for the layman. The subject ought to be introduced into the curriculum of the schools at the earliest possible age, not simply in high school, but in grade school, possibly as low as the fifth grade. By law, of course, I don't mean abstruse problems of copyright or international trade, but those ethical-legal problems that are within the range of understanding of youngsters. They may involve such things as property rights, or freedom of expression and censorship in the school newspaper, or search and seizure as part of a program of detecting crimes. Children, particularly in the inner cities, are highly familiar with the search and seizure, the knock at the door, experience.

Now there are two approaches to this subject that have been recently much favored and experimented with. One may be called the Bill of Rights "glory story" approach, where the children are told what a wonderful set of principles we have in our Bill of Rights; that nobody can be forced to testify against his will, that his home is his castle, and so on. This is all very well except that it lacks the dialectic that gives reality

to the subject, and like all such "glory stories" it exposes the children to disillusionment at a later stage. It is like the Santa Claus legend.

The other approach, at the other end of the spectrum, is the "law and order" approach. Teach them they must obey the law. Well, this too lacks that double dimension which makes the subject real and honest. It seems to me that neither of these will really satisfy the need for introducing a youngster at an early age to the legal process. What is needed is, as I have said, a more dialectical approach which will be put in terms which youngsters can understand, and will indicate competing values, competing considerations, competing rights, and how law has to resolve them somehow in an honest to goodness effort.

It seems to me that this kind of exposure cannot help but instill some respect in students for the processes of the law. It will bring the student into the decision-making process vicariously—what would you do, how would you frame a rule. They would be playing roles either legislative, judicial or that of an advocate, and this is, of course, ideal pedagogical material. I am very interested in this and would be more interested if some foundations too became interested and made it possible to do some imaginative work, because the lower the level at which this material is introduced, the more complex becomes the task of presenting the material. You can't give a casebook to a fifth grade student, you have to give him some kind of multimedia material using pictures and perhaps games and role play and film and all the rest.

You may ask why I bring this up here. It is simply because I think that in your own communities opportunities may arise to introduce something of this sort into the schools, whether the high schools or the grade schools. It would admittedly be easier to do in the high schools, pedagogically, and also perhaps from the point of view of school administration. The older students are felt to be more ready for it, and the material presented would entail less of a threat to the authority of the teacher. At any rate, if such an opportunity presents itself, lawyers in the community ought to support and indeed agitate for this sort of a program. Legal materials and decisions represent the greatest quarry of ethical problems and reasoned, articulated ethical solutions that we have. It seems a pity that our educational system finds no room in it for this immensely important aspect of education of the young.

Such an experiment has been tried in a number of places, in Boston and in Cambridge, and some of the comments of the students after the course was over were very touching. The course was given, by the way, by a number of law students at Boston University and at Harvard who were, it need scarcely be said, exceedingly dedicated. A few of the comments were critical; I say this to show that the students were not intimidated in any way. Some of them didn't like particular law students. But the overwhelming sentiment was "why can't everybody take this

kind of course?" A lot of the children were complaining, the comments read, that they didn't have a chance to take this course. One bonus fallout seems to have been to promote communication within a family. A boy wrote that he never was able to find any subject that he could talk to his father about; but when he went home and told his father about some of the questions they were discussing in their social studies course on law, he and his father had long discussions all through the evening.

Surely anything that can bridge the generation gap in the home has merit on that score alone. I am afraid I have become something of a propagandist on this subject, which I hope you won't think wholly inappropriate; but to me in the long run it is more important than whether a particular Supreme Court case went five to four one way or the other way, and so I do hope that some of you may have an opportunity to further this cause, if it makes sense to you, in your own communities. Perhaps this is simply a dream, but at any rate it is a lawyer's dream, and we are all entitled to our dreams.

You know the story of the dreamer, and I will end with it. A young lady was lying in bed having a dream. She dreamed that a wild-eyed, bushy-haired young man broke into her room, dragged her out of bed, down the stairs, pushed her into a waiting car, drove her over city streets and country roads, and finally stopped in a clearing, where he pulled her out of the car. Half frozen with fright she cried, "What are you going to do with me now?" The young man answered her very calmly, "How should I know, lady, it's your dream."