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Konefsky: The Legacy of Holmes and Brandeis

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RECENT BOOKS

THE LEGACY OF HOLMES AND BRANDEIS. By *Samuel J. Konefsky*. New York: Macmillan. 1956. Pp. ix, 316. \$6.

"[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court. . ." So prescribes the Constitution for the President. For few presidents with multiple opportunities—perhaps for only one—can there be strong support for a claim of a high average of excellence in the performance of this constitutional duty. In many more than a majority of instances, presidential appointments to the Supreme Court have brought distinction of place to men who did not match that distinction with distinction of performance in the subtle and difficult responsibilities of their office. This, of course, judges presidential performances after the event, but from many appointees it seems clear that a dispassionate and qualified observer would not at the time have expected exceptional performance. Perhaps the chorus of politely restrained approval which usually greets those appointments not evoking active opposition manifests, at least among the informed, more of hope than of expectation.

Justice Frankfurter has recently had occasion to tell us,¹ in specific terms, what an appropriate appointee to the Court need not be or have—and in more general terms what he should. In the course of doing so, he found that a consensus of informed judgment would establish a roster of distinction which would number sixteen, or possibly nineteen, men from among the seventy-five who have been members of the Court, omitting consideration of fifteen (now sixteen) contemporary and relatively recent members. It is possible to question both the size and the composition of this roster, but it seems fairly clear that membership has not been awarded with reluctant hand or niggardly spirit. More lively debate, or more positive opinion, might be anticipated were we to attempt to decide whether the ratio of distinction would be maintained, or even increased, had the discreet omission been omitted.

Even on a roster of judicial distinction much diminished by more stringent standards of admission, most lawyers, and certainly most students of the law, would expect to find the names of Justices Holmes and Brandeis. Each brought to the Supreme Court high professional competence, earlier manifested in rather divergent fashions. Each was the possessor of a keen and wide-ranging intelligence—ranging, as it happened, in different directions. Each performed his judicial task in characteristic manner by the full utilization of these attributes. But each had as well the ability, neces-

¹ Frankfurter, "The Supreme Court in the Mirror of Justices," 105 UNIV. PA. L. REV. 781 (1957).

sary to some extent for any judge deemed distinguished on a nation-shaping court, to view with critical detachment against a horizon enlarged in time and space, not only the cases before him but also the institution of which he was a part, its and his function and performance, and the nation which it shares in shaping—perhaps to constrict, perhaps to develop. In short, each was able to an uncommon degree “to see things as they are,” if we may borrow Arnold’s compressed phrase, an ability the very desire for which, as Arnold remarked, “implies a balance and regulation of mind which is not often attained without fruitful effort.”

Finding sharp and continued disagreements among later Justices who were thought to share in what had become known as the Holmes-Brandeis tradition, Mr. Konefsky has set himself the task of looking into that tradition, if such there was, of examining and appraising separately the attitudes and judicial performances of the two Justices who so often, in their sixteen years together on the Supreme Court, agreed with each other in disagreeing with all or most of their brethren. The result of Mr. Konefsky’s investigation is to establish, certainly to his own satisfaction, that the title deeds of the two Justices’ claims to distinction are by no means uniform in their merit, and that the so-called tradition which had been thought an alloy made more enduring by the blending of complementing elements was in fact an unstable mixture of disparate materials. The varying appraisals of these components are indicated by two sentences from the closing pages (p. 306) of the study. Of Brandeis: “The fusion of richly informed judgment and high social purpose is his legacy to the judicial process.” Of Holmes: “Awareness of human fallibility is no justification, however, for moral indifference on the part of those holding high public office.”

Mr. Konefsky’s pained estimate of Justice Holmes’ shortcomings is not based upon those bravura passages—perhaps bravado, perhaps seriously intended, perhaps partly both—from Holmes’ speeches which have evoked other hostile comment in recent years. Rather, his method is to sample what are deemed relevant actions and attitudes of both Holmes and Brandeis before their advent upon the Supreme Court, and thereafter to consider several limited, though still important, areas of their judicial activities while on the Court. The scope of the areas considered is adequately indicated by the ultimate conclusions that while Brandeis was a man of economics and one who cared deeply about the results of social arrangements, Holmes’ economics was outdated or obsolete, and he lacked humanitarian passion; while Holmes had some part in developing constitutional protection for speech, nevertheless Brandeis “took the theory much more seriously than did Holmes.” (p. 202) All this and more demonstrates, if demonstration were needed, that Holmes was not a Liberal, as Mr. Konefsky uses that word. It appears to follow therefore—no doubt is suggested about the inevitability of the conclusion—that he could not be a judge of the first rank, perhaps not even a worthy one. In fact, it seems to be clearly suggested, though not quite explicitly stated, that the great reputation as a

Supreme Court Justice with which Justice Holmes retired, was derivative and synthetic. This is indicated by the fact that when the Justice reached seventy-five, after almost fourteen years on the Court, and just before the appointment of Brandeis, several law reviews dedicated issues or otherwise paid tribute to him. It is the content of these tributes which Mr. Konefsky finds revealing. In the *Harvard Law Review*,² for example, the tributes touch on Holmes the historian, Holmes the common law lawyer and judge, Holmes the philosopher, but only one deals specifically with his work on the Supreme Court.³ On the other hand, when Holmes retired sixteen years later, he was thought of principally as a Supreme Court Justice, and Sir Frederick Pollock had to appeal to his countrymen not to forget his service to the common law. If Mr. Konefsky does not quite conclude, he is clearly not unwilling to have his readers believe, that Holmes owed to the presence of Brandeis his latter-day development as a public law judge, such as Mr. Konefsky concedes it may have been.

That Brandeis contributed to the development of Holmes, as Holmes did to Brandeis, and as others of their associates inevitably did to both, it would be foolish to question. But to find denigrating significance in the attempt of a law review editor to achieve comprehensive coverage, particularly at a time when public law occupied much less a focal position in the law reviews generally than it does today, appears to indicate a mind eager to reach its conclusion. It may be enlightening to note that when the *Harvard Law Review* came to pay tribute to Justice Holmes on his ninetieth birthday in 1931,⁴ the composition of its dedicatory issue is not radically different from that of 1916. To find significant difference in the tributes paid to Holmes in 1916 and in the 1930's, if it existed, may be a more accurate indicator of the change in public or professional interest and appreciation than it is a measure of the development of the judge. Aside from the free speech cases, which began to come to the Court in significant number and context only later, it would be as safe a generalization as any to say that the lines of Holmes' contributions to the development of constitutional and other public law were clearly ascertainable by 1916.

In his review and appraisal of the work of the Supreme Court and its members, Mr. Konefsky's writing has certain unfortunate characteristics. Spacious and question-begging adjectives are often substitutes for analysis, as are frequent quotations of the conclusions of other commentators, quotations which range without apparent differentiation from the fatuous through the sentimental to the perceptive and acute. But what some might

² 29 HARV. L. REV. 601 et seq. (1916).

³ That one did not suggest a limited stature for Holmes as Justice of the Supreme Court. Frankfurter, "The Constitutional Opinions of Justice Holmes," 29 HARV. L. REV. 683 (1916).

⁴ 44 HARV. L. REV. 677 et seq. (1931).

think its principal weakness is that Mr. Konefsky's study is written in terms which suggest a serialized account of recurrent clashes between the Goods and the Bads. His conclusion, as indicated above, is that while Justice Brandeis enjoyed a merited pre-eminence among the Goods, Justice Holmes fell in with that side quite fortuitously, and never earned the place which popular opinion mistakenly awarded him on its Team. In the course of reaching these conclusions, there are several curious anomalies. Holmes' dissent, which supported resale price maintenance, in the *Dr. Miles Medical Company* case is one of the items cited as "evidence that he was not only illiberal but a downright reactionary." (p. 59) It is not mentioned that Brandeis, the man of economics, the "social scientist with a conscience," was, before his appointment to the Court, warm in his support of resale price maintenance, spoke in favor of it before businessmen, and advocated before a congressional committee legislation which would have sanctioned it.

Perhaps as curious and as revealing a comment as any is made in Mr. Konefsky's appraisal of the Holmes dissent in *Lochner*, a comment which may speak for itself: "Strictly speaking, therefore, what separated Holmes from the majority in the *Lochner* case was a matter of degree, a difference of view as to whether the New York legislature was justified in curtailing freedom of action in the circumstances disclosed by the case. Moreover, since Holmes saw no need for research to establish the reasonableness of the New York law, his dissent may fairly be described as altogether lacking in constructive criticism. In a fundamental sense, it was no more than a moral preachment, an earnest plea for judicial self-restraint." (p. 42)

Whatever Holmes' judicial limitations, and there were some which Mr. Konefsky does not mention, his approach to personification of Marshall's famous admonition that "we must never forget it is a *constitution* we are expounding" is likely to place him for some time among the forefront of Justices of the American Supreme Court, despite Mr. Konefsky's doubting appraisal.

To those who have a concept of the judicial function differing from that of Mr. Konefsky—and the group may include some lawyers—the more damaging portrait, if it were accepted as accurate, would be that of Justice Brandeis. Mr. Konefsky speaks of him—and in each case approval appears to be indicated—as the "crusader" (p. 110), the "social scientist with a conscience" (p. 163), whose "sympathies . . . were deeply engaged in many of the causes before him; no one can attribute to him such impartiality [as Holmes'] or lack of concern over social policy and its consequences." (p. 140) "It was Brandeis whose opinions conveyed the definite impression that he personally attached the same 'importance' to the 'ends' as did the legislators who were seeking to implement them." (p. 162) "No wonder so many of his opinions give the impression that he was less concerned with his role as a judge and far more with the cause of effective government." (p. 156) "Indeed, a judge for whom the social consequences of

adjudication were as compelling as they were for Brandeis may be assumed not to have worried about logical consistency." (p. 265) All this is consistent with, and supports, the attributed conclusion "that the Justice employed his judicial opinions as a vehicle for broadcasting economic and social ideas which he wished to see advanced. . . . His main concern was with the strategy for effectuating his pet theories, a fact said to explain why so many of his opinions are really ingenious briefs. The 'open-mindedness' of the man was in his 'manner' but did not disturb the 'substance' of his beliefs." (p. 163) There are the somewhat equivocal qualifications that "The fact that Brandeis did not have a completely closed mind on economic matters is confirmed . . ." (p. 177), and that "any suggestion that Brandeis carried his personal predilections to unreasonable lengths would distort the essentially statesmanlike character of his economic philosophy, but especially his conception of the judicial function." (p. 173)

This may be the Brandeis which some, possibly even some judges, see today. If it were an accurate portrait there would be many who would believe that such a judge more than merited Pope's rebuke, "Most critics, fond of some subservient art, Still make the whole depend upon a part: They talk of principles, but notions prize, And all to one lov'd folly sacrifice." But to reduce Brandeis from humanist to humanitarian is "to sink from ethos to pathos," and recalls Babbitt's related remark that "How the humanitarian loses proportionateness is plain; it is by his readiness to sacrifice to sympathy the ninety per cent or so of the virtues that imply self-control." Fortunately, there is abundant evidence both in the United States Reports and from other trustworthy sources,⁵ of a different Brandeis—of a character both on and off the bench well endowed with restraint and proportionateness. Brandeis, as did Holmes, had "perception not only of the pastness of the past, but of its presence." Neither would have been found among the claque for Dr. Colenso.

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⁵ Cf. Freund, "Mr. Justice Brandeis: A Centennial Memoir," 70 HARV. L. REV. 769 (1957).