

WHEREAS—A JUDGE'S PREMISES. By *Charles E. Wyzanski*. Boston, Toronto: Atlantic Monthly Press, Little Brown & Co., 1965. Pp. xiv, 312. \$6.75.

This volume is a collection of Wyzanski writings over the past thirty years. Charles Wyzanski was an early New Dealer following service as a Clerk of both Augustus and Learned Hand. He became Solicitor of the U. S. Department of Labor only three years out of law school, an experience reflected fondly in this volume in some observations on bright young men in Washington. His great public service includes the District Judgeship in Massachusetts and posts of honor and responsibility with Harvard University, the Ford Foundation and the American Law Institute. These are formal things, and I stop short of completeness to avoid making a catalog or a *Who's Who* entry. I also pull up short because while this parade of posts warrants attention to any book by this author, the work itself stands comfortably on its own merits.

The Judge has read prodigiously, has thought deeply, and writes English better than almost any lawyer who regularly tries to. Brandeis has been a strong influence on his life and Wyzanski appears to have guided himself by a desire to live up to the Brandeis ideal. This is never a stated goal, yet one luminously implicit in the values which highlight the fact that "we [as lawyers] rejoice in our public duties. We reserve our greatest honors not for those among our brethren who earn the largest fees but for those among us who serve the public best."¹

Wyzanski has done his public duty, and honor has followed. He did not fluke into public service by haphazard, or merely for some short-term, legitimate advantage which he might commend in others,² but with a genuine desire to serve the common weal. Even as a youngster in the 30's, Wyzanski's philosophy had developed to and beyond the Boy Scout stage of good deed. This volume reflects the deepening and enrichment of that philosophy over the decades; it should cause any man to contemplate where he has been, and provoke the thoughtful to consider where he is going.

On first opening this safe deposit of Judge Wyzanski's valuables, one's anticipation is like that of a probate lawyer discovering Grandma's hidden possessions after her death. He can only catalog the contents; their synthesis or continuity is lost. But Wyzanski writings are integral, and turn out not to be miscellany at all. The *Atlantic*

1. P. 221, 222.

2. P. 201.

Monthly pieces, the occasional speeches ranging from a Massachusetts Institute of Technology baccalaureate address to graduation remarks at a boys' prep school, intertwine astonishingly. The Judge, in a preface, goodnatureedly chides his publishers for their omissions of other writings he fancies; he should erect a small monument to the clean line they have achieved in fitting together his jigsaw pieces.³

While the essays are parts of a common whole, they were each created to stand separately, and they do. For sheer information, the Brandeis is the collection's best; probably no other short piece gives as keen an insight into that Justice. The piece is no mere footwisher. The Judge recognizes that the Justice's austerity made him Spartan, at times to the point of ignoring the Athenian arts of beauty. Intellectually, he is inclined to reject as shibboleth Brandeis' automatic revolt against bigness. After a lifetime of writing occasional short sketches of judges, I can only say with admiration that I wish I had done one half as good as this.

The keenly perceptive Brandeis sketch and a superbly eloquent essay on Learned Hand are balanced a little by the essay on Augustus Hand—the only distinct failure in the book.⁴ It is a sterile catalog of posts held and cases decided, with none of the excitement of the meaning, purpose and skill of the man's work which characterizes Wyzanski's typical effort. His swift insights are usually remarkable—a concise size-up of Chief Justice Stone is the best bouillion cube giving the flavor of that old Yankee that I have ever seen.⁵

Wyzanski repeatedly denounces pride as a deadily sin.⁶ One senses a man with a good deal to be legitimately proud about, who fights to retain his humility and pretty frequently wins. This is particularly important to a trial judge who must be incisive but not too proud of his opinions. It is illustrated by Wyzanski's willingness to make up his mind after, rather than before, he has heard the argument. The federal judge lives in what Wyzanski describes as a "protected world,"⁷ and the

3. If the monument should be erected, I suggest the sacrifice at its feet of the dog who devised the system of putting the date and occasion of each piece at its end instead of its beginning.

4. Phillips Exeter Academy also looms larger in the mind of the Judge than it will to one who forms his impression from what the Judge has to say about it, p. 266.

5. Stone "deserves to be recalled as a judge of considerable learning, free from partisan taint, solid in his judgment, and wise in discerning the deepest currents of his society. Men instinctively and rightly trusted his good sense and fairness. But he was no more a genius than he was a great chief. He was the true center—not the leader in ideas or in organization." Pp. 92-93.

6. *E.g.*, pp. ix, 258, 300.

7. P. 234.

arrogance of security may make him quick on the trigger. Wyzanski illustrates his own willingness to be persuaded by including two essays on the Nuremberg trials, one unreservedly condemnatory, the other partially reconciled.⁸

Occasionally Wyzanski lets his bubbling enthusiasm carry him in conflicting directions. Various, Justice Black is "the greatest influence in twentieth-century American Law";⁹ Justice Brandeis has "rank in influence upon American law second only to John Marshall";¹⁰ while Learned Hand is simply "The greatest of living American jurists";¹¹ and Chief Justice Hughes and Justice Jackson have better than average claims on posterity.¹² Whether or not these various plaudits are consistent is immaterial, for the circle thus drawn is indeed distinguished, and the various eminences assigned reflect the dating of the pieces and the enthusiasm of the moment.

While Wyzanski is flexible on detail, even major detail, he is utterly unshakeable on principle. During the past thirty years, only one great principle of liberty has been subject to almost constant tension, only one may have occasionally failed to command the acceptance of a majority. The turbulence of our Constitutional history since 1935 has never left equal protection for the races, separation of church and state and the right to a fair trial, with all its attachments, without basic, dominant surges of support in American thought. But freedom of speech has at times been in grim jeopardy during the Wyzanski years. There have been periods in the era of loyalty programs, McCarthyism, Congressman Dies and his satellites when an American could not be sure that the ideals of 1789 would survive.

Honors in the battle of resistance on behalf of these ideals go to many sturdy souls. Along with the Blacks, the Douglasses, and the Warrens there is a place for Charles Wyzanski. With a rugged and absolute dedication to free inquiry, he has stood on the line for free speech; his essay on freedom of association, to me the most intellectually original writing in the book, marked an appreciable contribution to contemporary thinking on the right to speak not merely in a vacuum or on a soapbox, but in concert with those of like mind.¹³

8. Pp. 164, 180.

9. P. x.

10. P. 46

11. P. 148.

12. Pp. 92, 93. Hughes belongs "in the select company of John Marshall" while Jackson "in many ways . . . is the outstanding man of the last quarter century of the Court's history."

13. P. 126.

His is a fighting faith, expressed where it might not be expected, as in a remarkable dissent by way of introduction to Learned Hand's lamentable Holmes Lectures.¹⁴ In this preface, the Judge develops his own friendly but firm disagreement with Hand's role in the *Dennis* case.¹⁵ Moreover, Wyzanski is ready not merely to exhort but also to apply his own doctrine in areas where he does have responsibility, as in University administration: "What faculty members do outside their posts, we should leave to outside authority. This is the teaching of Bologna, of Paris, of Oxford, of Cambridge, and I fervently hope of Harvard and Yale."¹⁶

The Wyzanski attitude toward free speech is not an isolated fragment, a by-product of some inculcated loyalty to 18th-century greats. It is part of the total philosophy reflected in this book which moves from the relatively simple good intentions of the 1930's to a unified approach to life and man's place in it. This Wyzanski likes to call "religion," as perhaps it is. He rejects a simple or vulgar pragmatism, a sort of "What's in it for me" approach to truth, accepting instead a richer version of truth emerging from free inquiry.¹⁷ He adopts as his own the view that not the truth, but its pursuit is the object of human existence—"the ultimate ideal, and the hopeless quest."¹⁸

In this spirit, Wyzanski would apply the First Amendment, practice law, counsel the young, learn and apply history, and write philosophy. In the same spirit, he would search out the facts necessary to decide cases in terms of the mixture of positive and natural law which he espouses. Holmes was dominantly a philosopher and Brandeis predominantly a searcher for fact and a teacher. Wyzanski blends the qualities of these two former Massachusetts greats. In these essays he gives us the modern man's composite of ideals and information. He builds constantly for the future, but on a well-grounded basis in the past; he lives his own maxim that "familiarity with the older vessels will make us better prepared for what the future may hold."¹⁹

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14. P. 117.

15. P. 85. Wyzanski regrets Hand's gutting of the Holmes approach to free speech—it "converts what the framers erected as a prohibition into a mere adjuration." *Id.*, at p. 85.

16. P. 273.

17. This is superbly developed in the 1952 Massachusetts Institute of Technology address, p. 255.

18. Pp. 259, 265.

19. P. 299.

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