

# THE LIBRARY

BY H. L. MENCKEN

## *Mr. Justice Holmes*

THE DISSENTING OPINIONS OF MR. JUSTICE HOLMES, arranged by Alfred Lief, with a foreword by George W. Kirchwey. \$4.50. 9½ x 5½; 314 pp. New York: *The Vanguard Press*.

MR. JUSTICE HOLMES's dissenting opinions have got so much attention in late years, especially from hopeful Liberals, that it is somewhat surprising to discover that Mr. Lief is able to muster but fifty-five of them, and even more surprising to hear from Dr. Kirchwey that in only one case has the learned justice stood quite alone, and that the cases "in which he has given expression to the judgment of the court, or in which he has concurred in its judgment, far out-number, in the ratio of eight or ten to one, those in which he felt it necessary to record his dissent."

There is even more surprising stuff in the opinions themselves. In three Espionage Act cases, including the Debs case, one finds a clear statement of the doctrine that, in war time, the rights guaranteed by the First Amendment cease to have any substance, and may be set aside summarily by any jury that has been sufficiently inflamed by a district attorney seeking higher office. In *Fox vs. the State of Washington* we learn that any conduct "which shall tend to encourage or advocate disrespect for the law" may be made a crime, and that the protest of a man who believes that he has been jailed unjustly, and threatens to boycott his persecutors, may be treated as such a crime. In *Moyer vs. Peabody* it appears that the Governor of a State, "without sufficient reason but in good faith," may call out the militia, declare martial law, and jail anyone he happens to suspect or dislike, without laying himself open "to an action after he is out of office on the ground that he had not reasonable ground

for his belief." And in *Weaver vs. Palmer Bros. Co.* there is the plain inference that, in order to punish a theoretical man, A, who is suspected of wrong-doing, a State Legislature may lay heavy and intolerable burdens upon a real man, B, who has admittedly done no wrong at all.

I find it hard to reconcile such notions with any plausible concept of Liberalism. They may be good law, but it is impossible to see how they can conceivably promote liberty. My suspicion is that the hopeful Liberals, frantically eager to find at least one judge who was not violently and implacably against them, seized upon certain of Mr. Justice Holmes's opinions without examining the rest, and read into them an attitude which is actually as foreign to his ways of thinking as it is to those of Mr. Chief Justice Hughes. Finding him, now and then, defending eloquently a new and uplifting law which his colleagues proposed to strike off the books, they concluded that he was a sworn advocate of the rights of man. But all the while, if I do not misread his plain words, he was actually no more than an advocate of the rights of law-makers. There, indeed, is the clue to his whole jurisprudence. He believes that the law-making bodies should be free to experiment almost *ad libitum*, that the courts should not call a halt upon them until they clearly pass the uttermost bounds of reason, that everything should be sacrificed to their autonomy, including, apparently, even the rights of man. If this is Liberalism, then all I can say is that Liberalism is not what it was when I was young.

In those remote days, sucking wisdom from the primeval springs, I was taught that the very aim of the Constitution was to keep law-makers from running amok,

and that it was the highest duty of the Supreme Court, following *Marbury vs. Madison*, to safeguard it against their forays. It was not sufficient, so my instructors maintained, for Congress or a State Legislature to give assurances that its intentions were noble; noble or not, it had to keep squarely within the limits of the Bill of Rights, and the moment it went beyond them its most virtuous acts were null and void. But Mr. Justice Holmes apparently thinks otherwise. He holds, it would seem, that violating the Bill of Rights is a rare and difficult business, possible only by summoning up deliberate malice, and that it is the chief business of the Supreme Court to keep the Constitution loose and elastic, that getting through it may not be too onerous. Bear this doctrine in mind, and you will have an adequate explanation, on the one hand, of those forward-looking opinions which console the Liberals—for example, in *Lochner vs. New York* (the bakery case), in the child labor cases, and in the Virginia case involving the compulsory sterilization of imbeciles—and on the other hand, of the reactionary opinions which they so politely overlook—for example, in the Debs case, in *Bartels vs. Iowa* (a war-time case, involving the prohibition of foreign-language teaching), in the Mann Act case (in which Dr. Holmes concurred with the majority of the court), and in the long line of Volstead Act cases.

Like any other man, of course, a judge sometimes permits himself the luxury of inconsistency. Mr. Justice Holmes, it seems to me, did so in the wiretapping case and again in the Abrams case, in which his dissenting opinion was clearly at variance with the prevailing opinion in the Debs case, written by him. But I think it is quite fair to say that his fundamental attitude is precisely as I have stated it. Over and over again, in these opinions, he advocates giving the legislature full headroom, and over and over again he protests against using the Fourteenth Amendment to upset novel and oppressive laws, aimed

frankly at minorities. If what he says in some of those opinions were accepted literally there would be scarcely any brake at all upon lawmaking, and the Bill of Rights would have no more significance than the Code of Manu.

The weak spot in his reasoning, if I may presume to suggest such a thing, is his tacit assumption that the voice of the legislature is the voice of the people. He is, I take it, a democrat, and thus holds naturally that the people ought to have every right to make experiments and to change their minds. But there is, in fact, no reason for confusing the people and the legislature: the two, in these later years, are quite distinct. The legislature, like the executive, has ceased to be even the creature of the people: it is the creature of pressure groups, and most of them, it must be manifest, are of dubious wisdom and even more dubious honesty. Laws are no longer made by a rational process of public discussion; they are made by a process of blackmail and intimidation, and they are executed in the same manner. The typical lawmaker of today is a man wholly devoid of principle—a mere counter in a grotesque and knavish game. Is he in favor of Prohibition? Then it is no more than a sign that the Anti-Saloon League has found out how to scare him. Is he for a high tariff on this or that? Then it is simply because the Grundys of his bailiwick have told him plainly what they want, and what penalties will follow if they don't get it. If the right pressure could be applied to him he would be cheerfully in favor of chiropractic, astrology or cannibalism.

It is the aim of the Bill of Rights, if it has any remaining aim at all, to curb such prehensile gentry. Its function is to set a limitation upon their power to harry and oppress us to their own private profit. The Fathers, in framing it, did not have minorities in mind; what they sought to hobble was the majority. But that is a detail. The important thing is that the Bill of Rights sets forth, in the plainest of plain language, the limits beyond which even legislatures

may not go. The Supreme Court, in *Marbury vs. Madison*, decided that it was bound to execute that intent, and for a hundred years that doctrine remained the cornerstone of American constitutional law. Now the court takes the opposite line, and public opinion seems to support it. Certainly Dr. Holmes has not gone as far in that direction as some of his brother judges, but if the opinions in this book represent him fairly he has gone far enough. He is a jurist of great industry, immense learning and the highest integrity, but in the light of the present book, to call him a Liberal is to make the word meaningless.

### *An American Idealist*

THE TRUE STORY OF BERNARR MACFADDEN, by Fulton Oursler. \$2.50. 8 x 5¼; 281 pp. New York: *The Lewis Copeland Company*.  
 BERNARR MACFADDEN: *A Study in Success*, by Clement Wood. \$3. 9¼ x 6; 316 pp. New York: *The Lewis Copeland Company*.  
 CHATS WITH THE MACFADDEN FAMILY, by Grace Perkins. \$2.50. 8 x 5¾; 228 pp. New York: *The Lewis Copeland Company*.

THE authors of these brochures do not spare the goose-grease: poor Macfadden chokes and gurgles in it on every one of their 825 pages. I can recall no more passionate anointing of a living man, even in the literature of campaign biography. He appears as a hero without a wart, spiritual or temporal, sworn only to save us all from the Medical Trust and make us strong enough to lift a piano with our bare hands, with maybe a couple of gals and a bartender sitting on top of it. His devotion to that great cause is depicted as a sort of wild and transcendental frenzy, like that of the St. Peter Celestine who kept four Lents every year, and during each of them ate only black bread, a small loaf every three days. One marvels that a man so virulently consecrated to good works should keep his shirt in New York, where even Bishop Manning has to be on constant watch. But then one remembers *True Stories* and the *Graphic*, and at once one recalls that there have been saints who have also been excellent business men. Macfadden is apparently one of them. If

it could not be done otherwise, he would gladly starve to save us, but since it is not necessary he prudently husbands the inflowing *mazuma*, and is now a very well-heeled fellow, spoken to politely by Otto Kahn, received in audience by Jimmy Walker, and the owner in fee simple of a palace over in Jersey that will make a swell roadhouse when he dies.

Despite the gusts and hurricanes of vase-line, mayonnaise, whale oil and curve grease, Macfadden emerges from the three volumes as a very engaging fellow—expansive, unconventional, amiable and innocent. There are hints here and there that, in his rôle of rich publisher, he has borrowed, like the pathetic Frank A. Munsey, some of the longshoreman manners of the younger James Gordon Bennett, but if so they seem to sit upon him lightly. His chief intellectual possession, one gathers, is a vast and cocksure ignorance. He seems to be taken in by all of the transparent quacks who advertise in his magazines, and he postures as an authority upon the crimes of modern medicine without knowing anything more about the human body than any other gymnast. His central doctrine is to the effect that bodily vigor is the foundation of all virtue. John L. Sullivan could floor an ox at a blow; Franz Schubert was floored by a few miserable bacilli; *ergo*, John was a better man than Franz. The duty of all of us is to be strong—not simply strong enough to get down the national ration of gin, but strong enough to bite off the head of a golf-club, to crack a Prohibition agent's head with the naked fist, to play leap-frog at eighty.

In the fine arts his tastes are simple. The first literary friend he ever made appears to have been John R. Coryell, the creator of both Nick Carter and Bertha M. Clay, and from Coryell, in his early *Physical Culture* days, he got the inspiration that was later to flower in *True Stories* and the *Graphic*. His disdain of fancy writing is as vast as his disdain of hollow chests and smallpox vaccine. The common belief in New York is that the records of hopes and