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Selected Writings of Benjamin Nathan Cardozo (Book Review)

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SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO. Edited by Margaret E. Hall. New York: Fallon Law Book Company, 1947. Pp. xxiv, 456. \$5.00.

In a hitherto unpublished essay by Benjamin Nathan Cardozo printed with the permission of Columbia University, the learned judge, in the opening paragraph of his article on the thought of Matthew Arnold, presents a thesis which would seem to apply as well to his own work. "It will be found true," he states, "of the works of every master mind that there is in them some recurring note, some theme, some refrain, that stamps that author's personality upon them, and forms a principle of unity throughout them all. The works of any man must always partake, in large degree, of the spirit of the man himself; and the more pronounced and earnest his views may be, the more the truths he has discerned burden him and press for utterance, the more constantly will they dominate his writings, and the more clearly will his writings reflect the workings of his spirit."¹

Cardozo's decisions reflect his liberal eclecticism and predisposition for compromise. But his willingness to compromise is no simple process of adhering to a middle-of-the-road philosophy; rather it is a highly intellectual conception of the nature of the judicial process. As Cardozo states, "The judicial process is one of compromise, a compromise between paradoxes, between certainty and uncertainty, between the literalism that is the exaltation of the written word and the nihilism that is destructive of regularity and order."²

The foregoing is the theme of his book *The Paradoxes of Legal Science* but in various other forms it is found throughout all the works presented in this compilation of his writings.

In *The Nature of the Judicial Process* Cardozo analyzed his subject in the following manner: "My analysis of the judicial process comes then to this and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs. But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new

¹ P. 61.

² P. 25.

courses, of marking a new point of departure from which others who come after him will set out upon their journey."³

The balancing of interest or forces is at the basis of the judicial process, but these forces are continually undergoing change and hence the law must follow their development if it is to remain adequate to its task, *i.e.*, the dispensation of justice. We find this theme again presented in *The Growth of the Law* which was based on a series of lectures given at the Law School of Yale University in December of 1923 and were considered to be supplementary to those earlier lectures published by the Yale University Press under the title of *The Nature of the Judicial Process*. In *The Growth of the Law*, which concerns itself primarily with the philosophy of the law, Cardozo makes a thorough study of the function of the needs of law and analyzes the various schools of thought both home and abroad.

Cardozo familiarized himself with the most advanced social studies of his day in adherence to his principle that to meet his responsibility for making the law serve human needs the judge cannot rely on legal authorities alone but must know the actual facts of life about him, the psychological and economic factors that determine its manifestations, and must thus keep abreast of the best available knowledge which those engaged in various social studies or investigations can supply. His analysis of individual and group inter-relationships⁴ in *The Paradoxes of Legal Science* with his analogy of the individual person as "the atom in the social structure" and his study of the combination of these atoms into the clan, the church, the club, and ultimately the state through various attractions and repulsions, not only displays a knowledge of the physical sciences but also his grasp of sociology.⁵ He is at home with the thought of men like Harry Elmer Barnes, Harold Laski, Bertrand Russell and John Dewey when he dwells on the subject of the state and society. He is equally at home with the thought of Charles A. Beard and James Harvey Robinson when he wishes to point a lesson through the study of history.

Selected Writings of Benjamin Nathan Cardozo provides ample opportunity to catalogue his virtues as a judge and human being. His humility can be discerned in his address to the New York County Lawyers Association⁶ where he was frank to admit that he was a "good deal puzzled to understand why at this particular stage in the journey of my life there should be a dinner in my honor."⁷ His high ethical beliefs were enunciated in his commencement address at the exercises of the Jewish Institute of Religion on May 24th, 1931, when although he wondered whether his message could be of worth to his listeners he nevertheless exhorted them to spread the teachings of religion with more than lip service and to remain loyal to the beliefs to which they had consecrated themselves. His sympathy, understanding and subtle sense of humor are perhaps best evidenced in his address to the first graduating class

³ Pp. 153-154.

⁴ Pp. 305-313.

⁵ Pp. 305-306.

⁶ P. 99.

⁷ *Ibid.*

of St. John's University School of Law in 1928 when he compares the law to a flirt who like other beauties "can speak with a double meaning, and is not above playing a sly trick on those whose sighs and service are offered at her feet."⁸ He warned the newly graduated audience that "Our Lady of the Common Law . . . is no longer an easy one to please. She has become insatiate in her demands. Not law alone, but almost every branch of human knowledge, has been brought within her ken, and so within the range of sacrifice exacted of her votaries. . . ."⁹

Cardozo's stature grows with the passing years and this volume though replete with the wisdom of the ages will prove upon careful reading to be also as fresh and timely as tomorrow's newspaper. The validity of the liberal ideal, his life illustrates and his philosophy of law illumines. Publication of his collected writings nearly a decade after his untimely death is appropriate recognition of his tremendous contribution to the literature and philosophy of American Law.

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BACKGROUND OF ADMINISTRATIVE LAW. By Milton M. Carrow. Newark: Associated Lawyers Publishing Company, 1948. Pp. ix, 214, index.

When your reviewer first heard that an up to date treatise had been written on the subject of administrative law, in the hope that the book would to some extent satisfy the long felt need of the student of administrative law, and of the general practitioner, he immediately proceeded to obtain a copy. The new book was entitled, *Background of Administrative Law*. The title seemed to create an uncertainty as to its contents. It was believed, that in all probabilities, the author was primarily concerned with the historical background of the subject. A reading of the book revealed that the author did not limit himself to an historical background, or to a treatment of the growth and development of administrative law, but rather, treated some of the main headings of the entire field of administrative law.

In the Preface, the author states the objective to be as follows:¹

"This book is intended to present a synthesis of the fundamental principles underlying the vast body of cases, statutes, rules and orders which constitute the field of administrative law. There is no dearth of discussions on isolated aspects of these principles but there has been little effort to treat them in a unified manner. It is the aim of the present work to achieve this objective in some measure." The author further states that, ". . . an effort is made to describe the growth of the administrative process, to define the subject of

⁸ P. 87.

⁹ P. 88.

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¹ P. v.