

To sum up: a well-produced "overview" (to use a horrid word common in academic circles today), but of limited usefulness to the practitioner or serious student.

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CARDOZO AND FRONTIERS OF LEGAL THINKING. By Beryl H. Levy. The Press of Case Western Reserve University. 1969. Pp. xi and 365. \$9.95.

Benjamin Nathan Cardozo was an outstanding example of the finest traditions of the American judiciary. In a manner reminiscent of Oliver Wendell Holmes, his predecessor on the Supreme Court, he brought a strongly philosophical outlook to his work as a practising judge. It is perhaps even more notable that Cardozo maintained such an outlook when the major portion of his career was spent in the Court of Appeals of New York State rather than in the more philosophically congenial atmosphere of the Supreme Court.

Dr. Levy's study, which was first published in 1938, has as its focus Cardozo's concern with the process of judicial decision making and particularly his methods of dealing with the nonroutine, or penumbral, case. The format of the work is interesting. It is divided into three sections, consisting of a critical analysis of Cardozo's attitudes towards the judicial decision, followed by an illustrative sample of his opinions and an afterword, which seeks to put his views into some kind of historical perspective. The first two sections of the book are reprinted from the first edition and only the third section, of about fifty pages, contains any new material.

The analysis of Cardozo's views on the judicial decision can best be described as a fascinating period piece. It was written at the peak of the Realist movement and it gains strength from a vivid sense of contemporaneity. Throughout this section, Cardozo is treated as a living person and the problems with which the Realists were so fruitfully concerned are presented as live issues. This section of the book to some extent revives the genuine intellectual excitement aroused by Realism in the full flush of its success and avoids the current tendency to regard the movement as an old-fashioned and rather naïve curiosity of the Thirties.

As a consequence of this generally beneficial scheme, however, one receives the impression that the author is claiming too much for the realism of Cardozo. It was almost a characteristic of the Realist movement to attempt to find support for its iconoclastic tendencies in figures of such legal and philosophical eminence as Holmes¹ and Cardozo. Dr. Levy bears no exception to this trait. Cardozo is viewed as "an eminent pioneer of the Realist movement,"² though of course the author admits that he was far from being one of its radical supporters. But within the

¹ For an analysis of Holmes' position as a Realist, see A. L. Goodhart in *Jennings, Modern Theories of Law*, at 1-20.

² *Id.*, at 19.

limits imposed by his judicial office, he is portrayed as having gone further than anyone in emancipating himself from the traditional view of law as a certain, rule-oriented discipline.

The author does mention the ways in which Cardozo differs from many of the Realists, particularly in his support for the deciding of routine cases by reference to fixed and settled legal rules. Nevertheless it is still necessary to differ from Dr. Levy on grounds of emphasis, for his concentration upon Cardozo's views on decision-making in the penumbral case leaves the reader with a rather distorted view of his conception of the judicial process as a whole. It is conceded that Cardozo's discussion of the methods by which the judge decides the penumbral case is frank and aimed basically at producing a socially functional rule. But the admission that decisions of the penumbra are not dictated by legal rules does not of itself support the claim that Cardozo was a Realist pioneer. Such a claim is surely dependent upon an assessment of the entire judicial process and it is here that Cardozo's views are more restricted than almost any Realist. He emphasized constantly that his support for policy-oriented decision making was restricted to the very small number of cases in which he considered some freedom of judicial choice existed. It was after all Cardozo who wrote:³

Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided as any way but one. The law and its application are plain.

It is noteworthy, as Jerome Frank so often has reminded us, that Cardozo here was discussing only appellate courts, where presumably there is at least some uncertainty in the application of the law to support the appeal in the first place. If courts of first instance were included in this assessment, it is likely that an even narrower view of the penumbral area might emerge. At a later stage, Cardozo estimated that this "majority" of cases in which there was no room for judicial legislation amounted to nine-tenths of the cases that come before a court,⁴ and elsewhere, he made it plain that he considered this situation most desirable.⁵ It is difficult to reconcile these statements with Dr. Levy's presentation of Cardozo as a pioneer in a movement away from the traditional conceptions of law. It might perhaps be more satisfactory to regard him as a sympathetic, but detached, observer of Realism, an observer who was influenced by many of its lessons in practice but one who held a rather different view of the judicial process.⁶ In fact, Cardozo's views are not entirely out of line with those of the modern analytical positivists, who see the judicial process as a core of reasonably fixed and settled rules surrounded by a penumbra of uncertainty, in which judicial legislation is both necessary and desirable.

This appraisal of Cardozo's position on the jurisprudential spectrum would seem to be supported by the excellent selection of his opinions which Dr. Levy has made. They are written primarily in the traditional judicial manner, though with a considerable sensitivity and concern for justice. But it is difficult to see in the impressive, almost patrician,

³ B. Cardozo, *The Nature of the Judicial Process*, at 164.

⁴ B. Cardozo, *The Growth of the Law*, at 60.

⁵ B. Cardozo, *supra*, n. 3, at 149.

⁶ For an excellent discussion of the relation of Cardozo to the Realist movement, see W. Rumble, *American Legal Realism* (1968), at 83-88.

construction of his opinions anything approaching the Realist demands for a fundamentally new approach to the making of decisions.

The final part of Dr. Levy's book is mainly concerned with some modern philosophical analyses of the judicial process with a special concentration upon its creative aspects. He presents a critical summary of a number of recent developments in this area of interest which was of particular concern to Cardozo, and he succeeds in stimulating interest in a vital field jurisprudence. In this context, modern positivism receives some attention in a highly critical review of Richard Wasserstrom's book "The Judicial Decision."⁷ It seems regrettable however that "the current reversion to the age-old interest in rules"⁸ is so readily dismissed for fruitful analysis. It is even more surprising to see the total rejection of a rule-oriented approach to law without so much as a footnote reference to Professor Hart's contributions. In addition, the omission of any reference to the value-oriented jurisprudence of McDougal and Lasswell in this section seems unfortunate. Not only do McDougal and Lasswell offer an exciting development of Legal Realism, but they also address themselves to the problem which Dr. Levy sees as vital—the "engagement with the democratic ideals of which our legal system in the last analysis is an instrumentality."⁹

In summary, it may be said that the main criticism offered of Dr. Levy's book is one of emphasis. Within the restricted context of the non-routine case, this study of Cardozo is stimulating and does pose challenging questions. It is suggested however that such a narrow focus tends to distort Cardozo's conception of the judicial decision-making process as a whole.

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⁷ R. Wasserstrom, *The Judicial Decision* (1961).

⁸ *Id.*, at 337.

⁹ *Id.*, at 359.

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THE WORLD BEYOND THE CHARTER. By C. W. Jenks. London: George Allen & Unwin Ltd. 1969. Pp. 199.

"The volume makes no claim to be a work of careful research or elaborate scholarship. It represents the reflections of one who has lived through, rather than the findings of one who has studied, the developments which it describes."¹ This humble preface is not quite accurate. The author is one who has studied the developments which it describes. As appears on the frontispiece, his list of works on international organization ranks among the longest—*The Common Law of Mankind* (1958), *Law in the World Community* (1967), a series on the Law of International Institutions (*The Prospects of International Adjudication* (1964), *International Immunities* (1961), *The Proper Law of International Organizations* (1962), *The Headquarters of International Institutions* (1945), *Human Rights and International Labor Standards* (1960), *The International Protection of Trade Union Freedom* (1957), *Space Law* (1965). Nor does the book really stand as a series of reflections. The

¹ Preface, at 17.