



NOTES ON A SOMEWHAT DISAPPOINTING BOOK

Harry A. Blackmun

Reviewing
BENJAMIN N. CARDOZO,
THE NATURE OF THE JUDICIAL PROCESS
(Yale University Press 1921)

THIS BOOK CONSISTS OF the addresses delivered by the Justice in the William L. Storrs lecture series at Yale Law School in 1921. This is the first time I have read them carefully. Frankly, I find them somewhat disappointing. In any event, the following are a few notes.

The great generalities of the Constitution have a content and a significance that vary from age to age.

All agree that there may be dissent when an opinion is filed. Some would seem to hold that there must be none a moment thereafter. Plenary inspiration has then descended upon the work of the majority. Page 29.

Logical consistency does not cease to be a good because it is not the supreme good. (The Justice is here speaking of what he calls the rule of analogy or the method of philosophy.)

Harry Blackmun was a judge on the U.S. Court of Appeals for the Eighth Circuit from 1959 to 1970 and on the U.S. Supreme Court from 1970 to 1994. The original of this review is in Box 1374 of the Papers of Harry A. Blackmun, Manuscript Division, Library of Congress.

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The method of philosophy comes into competition, however, with other tendencies. One of these is the historical method or that of evolution. There are fields where there can be no progress without history. The law of real property supplies the readiest example. History built up the system and the law that went with it. Page 54. Their development in order to be truly logical must be mindful of their origins. There are vogues and fashions in jurisprudence as in literature and art and dress. Page 58. Constitutions are more likely to enunciate general principles which must be worked out and applied thereafter to particular conditions. In every department of the law, the social value of a rule has become a test of growing power and importance. Page 73. In our judicial history liberty was conceived of at first as something static and absolute. The Declaration of Independence had enshrined it. Page 77.

Statutes are designed to meet the fugitive exigencies of the hour. A constitution does not state rules for the passing hour but principles for an expanding future. Page 83. New times and new manners may call for new standards and new rules. Page 88.

The Justice then turns to the method of sociology. The juristic philosophy of the common law at bottom is the philosophy of pragmatism. Law is an historical growth, for it is an expression of customary morality which develops silently and unconsciously from one age to another. The patterns of utility and morals will be found by the judge in the life of the community. Page 105.

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. Page 112.

The judge must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Page 113. Here is the point of contact between the legislator's work and his. Each is working within the limits of his competence. The law which is the resulting product is not found but made. Today the use of fictions has declined. Page 117. A judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals. Page 133. There is judicial legislation, and

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the judge legislates at its peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honor. No brave and honest judge shirks the duty or fears the peril. Page 135. The judge, even when he is free, is still not wholly so. He is not to innovate at pleasure. He is not to yield [to] spasmodic sentiment and to vague and unregulated benevolence. Page 141.

On the New York Court of Appeals, the majority of the cases could not be decided in any way but one. In another considerable percentage, the rule of law is certain and the application alone is doubtful. Often these cases provoke differences of opinion among judges. But jurisprudence, as such, remains untouched regardless of the outcome. Finally, there remains a percentage, not large, and yet not so small as to be negligible, where a decision one way or the other will count for the future and will advance or retard the development of the law. These are the cases where the creative elements in the judicial process find its opportunity and power. Page 165. The judicial process in its highest reach is not discovery but creation. Page 166. Chief Justice Marshall said in *Osborne v. Bank of the United States*, 9 Wheat. 738, 866, that judicial power is never exercised for the power of giving effect to the will of the judge but always for the purpose of giving effect to the will of the legislature. This sounds fine, but it is no more than partly true. Marshall's own career illustrates this. He gave the Constitution the impress of his own mind. The form of our constitutional law is what it is because he molded it while it was still plastic and malleable in the fire of his own intense convictions. Pages 169-170.

We worry over much about the enduring consequences of our errors. They may work a little confusion for a time, but in the end they will be modified or corrected or ignored. The future takes care of such things. Page 179.

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