

positive law. On these islands we find the beginnings of a council of state, and there are other examples of the rise of institutions for the enforcement of law.

For centuries men have speculated on how law grows, and the place law should have in society. Numerous theories have developed out of this speculation but no theory can be adequately constructed today without taking into account the materials offered by sociology and anthropology. For those who would construct a theory, the book under review is a worthy companion of Malinowski's "Crime and Custom in Savage Society," and Sumner's "Folkways."

E. S. KAUFMAN.

MR. JUSTICE CARDOZO. Joseph P Pollard. York Press, N. Y.
1935.

A powerful mind, comparing the oft-times technical and unjust results of cold logic with the broader sociological view point, tempering the effects of antique precedent with a modern perceptive, looking behind the maxims and axioms of a so-called legal science to bring more realism into the law—that is one's impression of the intellect of Judge Benjamin Cardozo as presented by Joseph P Pollard in his book, *Mr Justice Cardozo*.

The far-flung ramifications and ever-increasing complexity of our present economic life place a gigantic burden upon those men whose task it is to settle our legal controversies in a manner that seems socially just; for it is many times difficult to render such decisions without breaking down precedent or at least straining the interpretation of a body of law which our legislatures are too busy to modernize. Thus it is that we enthusiastically welcome a word picture of a living master, who dares with bold strokes to alter the legal pattern to fit our present social and economic necessities.

For over twenty years Justice Cardozo has been on the bench, eighteen of these being spent in the New York Court of Appeals from which he was elevated in 1932 to the Supreme Court of the United States. Many cases in all fields of the law have come before him. Mr. Pollard has classified the multitudinous decisions of Justice Cardozo in both the New York Court of Appeals and the United States Supreme Court so that in each field we may study his efforts compositely. In this way we see how a great judge looks upon a particular branch of the law; and we see how he manipulates his knowledge, ever aiming toward a good result despite technical and historical obstacles.

Most interesting is the method in which Justice Cardozo is shown to have handled cases in the field of domestic relations. Here fixed rules and rock-bound precedent may easily cause injustice, for stability in the law can not fully take into account the personal element which enters into any one narrow set of facts. Here a judge frequently has the choice of following precedent or of daring to break it down in favor of what he considers to be a higher justice. He can not allow sentiment to enter into his decision, and yet it is often hard for him to decide whether his feelings are impelled by sentiment or by his legal sense of justice as between the parties. Consequently the easier course would be to follow precedent or fixed rules. Of Justice Cardozo Mr. Pollard aptly says: "Sentimentalism played no part in his solution of these problems, but his disciplined mind was tempered with the warmth and feeling of an understanding heart."

Mr. Pollard traces the efforts of Justice Cardozo through the fields of personal injury, labor, crime, business, government, international affairs and other types of cases which come before our high courts. Especially in those controversies involving the Constitution, Justice Cardozo is revealed as a liberal-minded man looking more to the spirit of the law than to the letter. A constitution should be considered as a flexible instrument with a broad interpretation put on some rules while others are construed narrowly as the exigency of the time and situation demands.

In workmen's compensation cases we see Justice Cardozo attempting, whenever possible, to protect the workman by granting him his award. In one case a worker left his station to obtain tobacco from a fellow workman, slipped on a greasy floor and so injured his hand that amputation was necessary. Justice Cardozo ruled that such a workman may reasonably be expected to ask his fellows for tobacco and that so doing does not disentitle him to compensation for it is not outside the course of his employment.¹

Mr. Pollard's general tone would indicate that Justice Cardozo is worthy of praise for the stand which he took on the New Deal legislation. In part Mr. Pollard says: "Cardozo knows that the mighty power of a Supreme Court Judge is wielded best when wielded to promote rather than to destroy the social experiments performed in the legislative laboratories of state and nation." This statement was made prior to the unanimous decision in the *Schechter* case.² There it was

¹ *Wickham v. Glenside Woolen Mills*, 252 N.Y. 11, 168 N.E. 446 (1929).

² *U. S. v. Schechter Poultry Corp.*, 79 L.Ed. 888, 55 Sup. Ct. 837, 97 A.L.R. 947 (1935). See also *Loussville Bank v. Radford*, 79 L.Ed. 920, 55 Sup. Ct. 854, 97 A.L.R. 1106 (1935).

decided that "extraordinary conditions do not create or enlarge constitutional power and can not justify governmental action outside the sphere of constitutional authority." The failure of Justice Cardozo to dissent in the Schechter case tends to show that even though he had always been considered a liberal-minded jurist, and, to the extent to which his leanings have been revealed by decisions prior to the Schechter case, in favor of legislative social experiments; still he is as yet unwilling to broaden his concepts of constitutionality to embrace the statutes complained of in the Schechter case. Whether his liberalism stops at this point or merely marks time until he feels that changed situations and viewpoints demand a broader conception are things which we have no means of knowing in advance.

The book requires but one finishing touch to be complete. It is only natural that, after watching Justice Cardozo the craftsman sitting upon his bench and operating his legal machinery, one wonders how this eminent jurist acts in his role as an ordinary citizen. A few sentences in a foreword by Dean Roscoe Pound relate something of the great man's early legal life but fall short completely of satisfying one's desire to know more about his private life.

DONALD J. HOLLINGSWORTH.

CRIMINAL LAW IN ACTION. John Barker Waite. Houlston House, Sears Pub. Co., N.Y. 1934.

"Criminal Law in Action" is a metaphor. It connotes official activity of policemen, prosecuting attorneys, defense counsel, jurors, judges, and all other officials by whom the mandates of the law are translated into action and through whose activities alone, the law has any observable effect. Law does not act; it can not act. It is nothing more than "a statement of acts which human beings are expected to perform or to refrain from performing." If one of the mandates of the law is broken, law itself does not punish the violators, it merely declares what other persons shall do in order to punish the violators. "Able men can make deficient law effective, but the most perfect law will be inoperative and futile if its administrators are incompetent and inefficient." For that reason most of "Criminal Law in Action" deals with agents of the law, rather than with the law's provisions.

The author wants it specifically understood that the purpose of this book is exposition and not advocacy. In other words he does not wish to advocate any changes or reforms but desires simply to explain the failures of the criminal law in action as he himself, through many years of study, and actual contact, has come to know and appreciate them.