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## JUDGE IRVING A. LEVINE — A SEEKER OF JUSTICE AND A DISCIPLE OF LEGAL REALISM

ALFRED L. SCANLAN\*

The unexpected and untimely death of Judge Irving A. Levine of the Court of Appeals of Maryland on October 2, 1978 was a severe loss to the bench and the bar and to the administration of justice. This writing will not repeat the many deserved eulogies spoken and written by others who knew Judge Levine well. Suffice to say that all would have to agree with the words of Chief Judge Murphy that Judge Levine "demonstrated qualities that earned for him the universal admiration and respect of his colleagues and a very, very special place in the hearts of lawyers and judges throughout Maryland, and indeed well beyond our borders."<sup>1</sup>

Instead, the purpose of this article will be to examine some representative opinions of Judge Levine in an effort to better understand both the core and the contours of his judicial philosophy. The article suffers from the limitations imposed by the few opinions examined and the restricted areas of the law to which reference is made. Specifically, the writer will discuss briefly some opinions of Judge Levine in the fields of administrative law, first amendment law, criminal law, consumer law and, if the reader will pardon the expression, the law of the little man, and lawyers', or technical, law. These selective categories, of course, are not all-inclusive, but I hope they may assist in painting some picture of Judge Levine's memorable work as an appellate judge.

His approach to administrative law was traditional and straightforward. On one hand, he was willing to afford wide scope to the expertise and the decisions of administrative agencies when they were operating within their assigned zones of authority and competence. As he said in *Potomac Edison Co. v. Public Service Commission* in upholding an electric utility rate set by the commission: "decisions of the Commission are prima facie correct, and its judgment is accorded the respect due an informed body that is aided by a competent and experienced staff."<sup>2</sup>

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1. 26 NEWSLETTER OF THE BAR ASSOCIATION OF MONTGOMERY COUNTY, MARYLAND, Bull. No. 5 at 11 (Nov. 1978).

2. 279 Md. 573, 582, 369 A.2d 1035, 1041 (1977).

On the other hand, Judge Levine was a stickler for fair administrative procedure. Illustrative is his opinion in *Bethesda Management Services, Inc. v. Department of Licensing and Regulation*.<sup>3</sup> In that case, the Commissioner of Labor and Industry had revoked the license of employment agencies on the ground of fraud after reading the record of the hearing conducted by a hearing officer, but without serving proposed findings of fact and conclusions of law and giving the employment agencies the opportunity to file exceptions and to present argument. Judge Levine reversed the commissioner's decision, holding that while the commissioner may have been free to decide without attending the hearing, he was required to serve a copy of the proposed decision, findings, and conclusions of the hearing officer upon the appellants, and to permit them to present argument to him before rendering his decision.<sup>4</sup>

Although Judge Levine yielded second place to no one in his devotion to the broad principles of the first amendment, he recognized that these principles were not without limitation. One such limitation was applied by Judge Levine, speaking for the court, in *International Brotherhood of Electrical Workers Local 1805 v. Mayo*.<sup>5</sup> In that case, he ruled against a defendant union newspaper in a libel action in which the plaintiff had met the *New York Times* test of knowing falsity or reckless disregard of truth, concluding as a consequence that the first amendment offered no obstacle to the recovery of presumed and punitive damages without proof of injury to the plaintiff's reputation. Again, in *Sigma Delta Chi v. Speaker, Maryland House of Delegates*,<sup>6</sup> Judge Levine demonstrated that the sweeping prohibitions of the first amendment, as made applicable to the states through the fourteenth amendment, do not grant an unrestrained right of the press to gather information. Thus, Judge Levine upheld legislative rules of the Maryland Senate and House of Delegates that barred recording instruments and electronic devices in the Senate and House Chambers without the respective permission of the President and Speaker.

Turning to the criminal law, it is apparent that Judge Levine set great store in preserving ancient constitutional principles established for the protection of all citizens, including criminal defendants, and, at the same time, relied on the blandishments of common sense in interpreting those principles in a modern setting. For

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3. 276 Md. 619, 350 A.2d 390 (1976).

4. *Id.* at 628-29, 350 A.2d at 395.

5. 281 Md. 475, 379 A.2d 1223 (1977).

6. 270 Md. 1, 310 A.2d 156 (1973).

example, in *State v. Wilson*<sup>7</sup> he wrote the opinion for the court, which held that the taking down of serial numbers on various articles, such as television sets, stereo equipment, speakers, radios, and cameras, during execution of a search warrant that was limited to narcotics and narcotic paraphernalia in order to determine whether those items were stolen goods, constituted an unreasonable search and seizure. Judge Levine resisted extension of the "plain view" doctrine to the situation before the court, as the circumstances demonstrated that it was not immediately apparent to the police that they had evidence before them. He interpreted this last-stated element to constitute "a requirement that police have probable cause to believe the evidence is incriminating before they seize it."<sup>8</sup>

Similarly, in his dissent in *Mobley v. State*,<sup>9</sup> Judge Levine disagreed with the majority's conclusion that the "exigent circumstances" doctrine permitted the police to conduct a warrantless search of an automobile in which the defendants had been riding following the removal of the automobile to the police station. Judge Levine acknowledged the basis for the "automobile exception" from restrictions otherwise imposed by the fourth amendment as made applicable to the states through the fourteenth amendment, pointing out that the exception "has been consistently 'justified on the basis that an automobile is so readily movable as to make impracticable the obtaining of a search warrant.'"<sup>10</sup> Nevertheless, he observed, once the occupants of the car were safely in custody and were prevented from gaining access to it, any exigency had ceased and the police should have obtained a warrant before searching the car.

In both *Mobley* and *Wilson* Judge Levine adhered to the language and spirit of the fourth amendment and refused to expand intrusions permitted under certain judicially enunciated exceptions to the otherwise applicable prohibitions of the amendment. Nevertheless, in both instances his refusals to expand the exceptions rested on a realistic understanding of the particular facts of the cases before the court and were not born of a zealous desire to push the commands of the fourth amendment to the nth power.

Another example of Judge Levine's reluctance to expand constitutional doctrines to thresholds not supported by the facts may be found in *Bowers v. State*,<sup>11</sup> in which he upheld a statute that

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7. 279 Md. 189, 367 A.2d 1223 (1977).

8. *Id.* at 195, 367 A.2d at 1227.

9. 270 Md. 76, 90, 310 A.2d 803, 811 (1973).

10. *Id.* (Levine, J., dissenting) (quoting majority, *id.* at 80, 310 A.2d at 806).

11. 283 Md. 115, 389 A.2d 341 (1978).

defined the felony of child abuse as physical injury sustained as a result of cruel or inhuman treatment. Over objections that the statute was unconstitutionally vague, he concluded that a criminal statute is not void merely because it permits the exercise of some discretion on the part of law enforcement and judicial officers; only when a statute is so broad as to be susceptible to irrational and selective patterns of enforcement will it be held unconstitutional.<sup>12</sup> Conceding that the vagueness of the statute may have a "chilling effect" on fundamental liberties, he found that the Maryland child abuse law nevertheless survived constitutional scrutiny. In so doing, he noted that the language of the statute appeared to be "nothing but a codification of the common law principles concerning the limits of permissible parental chastisement."<sup>13</sup> Continuing, he observed that "[s]ince the contours of the common law privilege [of parental discipline] have been subject for centuries to definition and refinement through careful and constant judicial decision-making,"<sup>14</sup> the language of the statute had acquired a relatively widely accepted connotation in the law and that use of such language in the child abuse statute did not, therefore, render the law constitutionally infirm.

It was perhaps in the new and still evolving area of the law — loosely described as consumer law — that Judge Levine most clearly exhibited, as Judge Davidson, then of the Court of Special Appeals, put it in her eulogy, "his ability to understand the changing world around him and the demands that an evolving complex society places on the individual."<sup>15</sup> Several examples illustrate this point.

In *Maryland Board of Pharmacy v. Sav-A-Lot, Inc.*,<sup>16</sup> Judge Levine spoke for the court in declaring unconstitutional a state statute that banned the advertising of prescription drug prices. In his opinion, Judge Levine referred to testimony concerning the impact of the law on senior citizens, many of whom were on maintenance drugs, but were prevented from shopping for the lowest available drug prices by the statutory proscription against advertising. He noted that this was "a matter of great concern for the elderly, the sick, and the economically disadvantaged, for it is such persons who are less mobile and, therefore less able to survey drug

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12. *Id.* at 122, 389 A.2d at 346.

13. *Id.* at 127, 389 A.2d at 348.

14. *Id.*

15. 26 NEWSLETTER OF THE BAR ASSOCIATION OF MONTGOMERY COUNTY, MARYLAND, Bull. No. 5 at 11 (Nov. 1978).

16. 270 Md. 103, 311 A.2d 242 (1973).

stores for comparative prices.”<sup>17</sup> From these evidentiary premises he proceeded to the conclusion that the statute bore no reasonable relation to the wholly permissible regulation of professional services affecting the public health and welfare. Rather, said Judge Levine, the statute “prohibits advertising of consumer goods sold within the scope of the pharmacist’s retail activity.”<sup>18</sup> As such, it offended due process because it bore no real and substantial relationship to the objectives it sought to obtain.

Judge Levine also wrote for the court in *Sard v. Hardy*,<sup>19</sup> which adopted the law of “informed consent” in Maryland, holding that unless a patient is adequately apprised by the physician of the material risk and the therapeutic alternatives incident to the proposed treatment, any consent that the patient gives to the surgical procedure, whether it is oral or written, is necessarily ineffective. Judge Levine stated that in order for the patient’s consent to be effective, it must have been an “informed consent,” that is, “one that is given after the patient has received a fair and reasonable explanation of the contemplated treatment or procedure.”<sup>20</sup> However, Judge Levine did not fling the doors wide open and expose physicians to vexacious and frivolous malpractice suits. His opinion prescribed an objective test for applying the doctrine of informed consent. That test is whether “a reasonable person in the patient’s position would have withheld consent to the surgery or therapy had all material risks been disclosed.”<sup>21</sup> Thus, if disclosure of all material risks would not have changed the decision of a reasonable person in the position of the patient, there will be no recovery because “there is no causal connection between nondisclosure and his damage.”<sup>22</sup>

Another of Judge Levine’s opinions that demonstrated his concern for the average citizen involved in the toils of litigation is *Shilkret v. Annapolis Emergency Hospital Association*.<sup>23</sup> In that case, he rejected both the “strict locality” and the “similar locality” tests in determining the standard of care that must be exercised by physicians in the treatment of their patients. Carefully noting that the circumstances of medical practice which may have justified the

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17. *Id.* at 105, 311 A.2d at 244.

18. *Id.* at 116, 311 A.2d at 249.

19. 281 Md. 432, 379 A.2d 1014 (1977).

20. *Id.* at 439, 379 A.2d at 1019.

21. *Id.* at 450, 379 A.2d at 1025.

22. *Id.*

23. 276 Md. 187, 349 A.2d 245 (1975).

locality rules fifty or one hundred years ago had changed, he concluded that those older rules "cannot be reconciled with the realities of medical practice today [where] '[n]ew techniques and discoveries are available to all doctors within a short period of time through the medical journals, closed circuit television programs, special radio networks for doctors, tape recorded digests of medical literature, and current correspondence courses.'"<sup>24</sup>

Finally, just as he had demonstrated his concern for the aged and the sick, Judge Levine manifested an enlightened solicitude for the average working person. In *Wiley Manufacturing Co. v. Wilson*,<sup>25</sup> he held that when employees were injured while taking a shortcut route along a railroad right-of-way to the company's parking lot approximately 790 feet from the entrance to their place of employment, and the employees had traveled that same route regularly for several years with the implied consent of the employer, the "proximity" rule operated as an exception to the general rule that an injury sustained by employees while going to or returning from their employment is not compensable under Maryland's workmen's compensation statute. Accordingly, he concluded that the employees' injuries arose out of and in the course of their employment and were compensable under the statute. In reaching his decision, Judge Levine pointed out that the Workmen's Compensation Act "is to be so interpreted and construed as to effectuate its general social purpose . . ."<sup>26</sup>

In the general area which, for want of a better term I shall call "lawyers' law," Judge Levine again demonstrated his preference for present facts over past fictions. His decisions were influenced by his conception of the common law which he refused to view as a static body of absolute and unyielding principles.<sup>27</sup> Rather, he said, "the genius of the common law lies in its capacity to respond to the ever-changing needs and conditions of human society."<sup>28</sup> For example, in *Sherman v. Suburban Trust Co.*,<sup>29</sup> he dissented from the majority's refusal to consider the question whether Maryland should abandon the common law distinctions between invitees, licensees, and trespassers for purposes of the law of premises liability. Pointedly, Judge Levine observed:

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24. *Id.* at 194, 349 A.2d at 249 (quoting Note, *An Evaluation of Changes in the Medical Standard of Care*, 23 VAND. L. REV. 729, 732 (1970)).

25. 280 Md. 200, 373 A.2d 613 (1977).

26. *Id.* at 217, 373 A.2d at 622.

27. *State v. Williamson*, 282 Md. 100, 114, 382 A.2d 588, 596 (1978) (concurring opinion).

28. *Id.* at 114-15, 382 A.2d at 596 (Levine, J., concurring).

29. 282 Md. 238, 384 A.2d 76 (1978).

Retention of the archaic doctrine predicating the duty of a landowner solely upon the status of the injured party as a trespasser, licensee or invitee can be no longer justified in terms of either logic or social policy. Although it was once thought that the common law approach was necessary to protect a landowner's right to the free use and enjoyment of his property, . . . the emerging and more enlightened view, in my opinion, is that society's interest in the safety of its members outweighs its interest in the occupier's unrestricted use of his premises.<sup>30</sup>

In *State v. Williamson*,<sup>31</sup> Judge Levine, in a concurring opinion, called for the abolition of the distinction between principals and accessories, arguing that the "common law principles of accomplicity and their procedural counterparts . . . have injected a most undesirable hypertechnicality into the law of accomplice responsibility, which not infrequently operates to thwart justice and reduce judicial efficiency."<sup>32</sup>

On the other hand, Judge Levine's preference for substance over form did not tempt him to tolerate sloppy lawyering. In *Walko Corp. v. Burger Chef Systems, Inc.*,<sup>33</sup> for example, Judge Levine, speaking for the court in response to a question certified to it by the United States Court of Appeals for the District of Columbia Circuit, held that the statute of limitations was not suspended during the pendency of a defective motion for leave to intervene. The motion was ultimately denied in the United States District Court for the District of Columbia, and Judge Levine noted that a ruling that the statute was suspended would permit a plaintiff to "toll the statute of limitations by filing a suit which was later dismissed as being procedurally defective, [and thus] . . . effectively postpone the running of the statute for an indefinite period of time."<sup>34</sup>

### CONCLUSION

This abbreviated survey of some representative opinions authored by Judge Levine permits, the writer believes, several conclusions. Unquestionably, he was a most careful student of the law. He also paid attention to precedents, especially when they corresponded with present reality and served the achievement of justice. He also was willing to let government work — to allow "some

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30. *Id.* at 252, 384 A.2d at 84 (Levine, J., dissenting) (citations omitted).

31. 282 Md. 100, 382 A.2d 588 (1978).

32. *Id.* at 113, 282 A.2d at 595 (Levine, J., concurring).

33. 281 Md. 207, 378 A.2d 1100 (1977).

34. *Id.* at 215, 378 A.2d at 1104.



play at the joints" of the law, as Mr. Justice Holmes once observed. On the other hand, Judge Levine was quick to intervene when the government acted unfairly or departed from fundamental constitutional principles. He was also inclined to watch out for the average citizen — the little person — when the latter was caught up in the toils of the law, especially in litigation against more powerful adversaries such as government, business interests, or doctors.

I think, then, that it is fair to classify Judge Levine as a judicial activist. By that I mean a judge often willing to prefer justice over legal forms and ancient but outmoded rules. On the other hand, his judicial activism was strongly tempered by his respect for the body of the common law and was guided by the pull of the facts of the case before the court. It is certainly appropriate to classify Judge Levine as a seeker of justice and a judicial activist when necessary to achieve that objective. It is equally accurate, however, to regard him as a disciple of legal realism unwilling to carry the quest for perfect justice beyond the boundaries marked out by the facts of a particular case. In equal combination, those two components, I feel, made up the essence of his judicial philosophy. He applied that philosophy well in the service of the people of Maryland during his tenure on the Court of Appeals.<sup>35</sup>

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35. The author, because of the limitations of time and space, has not done justice to Judge Levine's memorable career on the Court of Appeals. He hopes that in the future someone will undertake a more comprehensive and more profound analysis of Judge Levine's many opinions in an attempt to distill further his judicial philosophy as it found its way into the reported cases during his service as an appellate judge.