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Mr. Justice Cardozo

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I NEVER knew Cardozo intimately. I read most of his opinions and all of his books; and I heard him lecture. My personal association with him, however, was limited. When he came to Washington, D. C., he lived in rather lonely isolation. I visited with him occasionally in his apartment where we talked about trivial, as well as philosophical, things. He was a gentle—almost self-effacing—man. Yet he had a mind with as keen a cutting edge as any I ever knew.

He was an indefatigable worker; and law was to him a demanding mistress. In those days the Court heard arguments five days a week and had its Conferences on Saturday. Hughes, with an eye to the advanced age of some of the Brethren, worked hard to finish the Conference by 4:30 p.m. And before Hughes left the building that evening he would make the assignment of cases to the justices for opinion writing. By six o'clock the assignment lists would be on their way to the justices' homes by messengers—all except Cardozo's. Hughes told me that he sent the list to Cardozo on Mondays. "Otherwise," said Hughes with a twinkle in his eyes, "Cardozo would spend Sunday working on an opinion, rather than resting or conversing with friends."

Cardozo, like other judges, is a man who may be long remembered or soon forgotten. This is too early a date to know for certain. The future uses those distillations from the past which fill its needs. And the needs of next century are wholly speculative. Even the needs of another year cannot be known. For needs depend on the mood of people, on the causes that catch their imagination, on their spiritual as well as their physical cravings.

I remember a discussion with Brandeis about the durability of the work of judges. Miller, appointed by Lincoln in 1862, served on the Court for twenty-eight years. He was an extraordinarily superior lawyer and towered high above many of his colleagues. Brandeis—an admirer of Miller—often talked with me about the

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man and could not understand how it was that Miller by the 1920's and 1930's had been mostly forgotten.

A few noble phrases from the Magna Carta come winging down the corridors to inspire people whose problems are vastly different from those who lived under King John. Magna Carta became a symbol of man's struggle against tyranny and it has been translated anew to every generation to do service to changing problems and conditions. Ideas that may have been only germs of thought at the time they were uttered survive that age and serve new and different needs. The Bible, the Koran, the Bhagavad Gita are the prime examples of ancient manuscripts surviving each period and becoming contemporary documents for every age.

Cardozo was a stylist and his neatly turned phrases may well become part of our folklore. Cardozo was a craftsman supreme. Only those who cherish the art will fully appreciate his skill. The law, the lawyers, and the judges cling stubbornly to obsolete doctrine. The reason why a rule may once have had validity is forgotten. The rule is put to uses beyond the imagination of the feudalistic judge who fashioned it. Cardozo was the artist who reshaped relics from the past, put new raiments on them, and, when reconditioned, made them do service in today's practical affairs. No one has described the craftsmanship of Cardozo better than the late Walton H. Hamilton in an article in the *University of Chicago Law Review*.[1] Cardozo dealt with a law that lived—a law that responded to modern conditions. He made useful tools out of ancient stuff—useful in the sense that they were adaptable to the needs of an industrial society.

Those who teach often speak of the knack Cardozo had of "tidying up" the law. He constantly broke new ground. Yet he did not leave the impression that he was doing an *ad hoc* job. His task was in part to do justice in the individual case. Yet he knew that rules cannot be turned and shaped merely to meet this exigency or that. A judge who follows that course makes law capricious—good for this day only. Cardozo worked in the great common law tradition and made each case the occasion to take new bearings, to alter the direction necessary for justice in the run of cases, and to leave guides as to the thrust and limitations of the rule as refashioned. Cardozo therefore was the delight of the teacher of law.

[1] Hamilton, "Cardozo the Craftsman," 6 UNIV. CHI. L. REV. 1 (1938).

Apart from Holmes and Stone, I suppose Cardozo had roots deeper in the common law than any judge on the Supreme Court in modern times. But the Court has few problems in common law dimensions. Those that catch the public eye are the epoch-making constitutional decisions. But the main grist for the mill is the construction of statutes in an ever-widening field of federal legislation. Legislative rules become encrusted with administrative rulings; and the judge must fill the interstices. There is administrative *expertise,* so-called, to appraise; and the legislative policy to divine. Common law principles play very limited roles in resolving those issues.

Cardozo's opinions commence with 285 U. S. and end with 302 U. S. These were the volumes produced in six years; and that period is hardly adequate for any man to make the full round of the federal field. Stone used to say that twelve years were needed, no matter what the appointee's background may have been. There is no prior experience that adequately prepares one for service on the Supreme Court. No state court, no lower federal court has the range and variety of problems that reach the Court which is at the apex of our dual judicial system. No law practice can possibly put one on speaking terms with the specialized problems coming from the numerous agencies of government nor with the large questions that involve constitutional rights. Stone's estimate of a dozen years is a fair one. Cardozo with all his eminence lacked the time to become fully exposed to the multitudinous problems that arise in the federal domain and that implicate federal-state relations. Yet he served in the great tradition while on the Supreme Court.

He was with the dissenters when the Agricultural Adjustment Act was held unconstitutional in *United States v. Butler.*[2] He was with the dissenters when the Court struck down a New York minimum wage law for women.[3] He was alert to protest the Baron Parke technique of using rules of procedure as stumbling blocks or traps, especially where life or liberty was at stake. *Herndon v. Georgia,*[4] shows him eloquent in his plea that the rights of man not be lost on the flypaper of procedure.

The dissenting combination of Holmes, Brandeis and Stone was replaced by Brandeis, Stone and Cardozo. There was novelty for

[2] 297 U.S. 1 (1936).
[3] Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).
[4] 295 U.S. 441 at 446 (1935).

him in this role as dissenter. For Cardozo at Albany,[5] like Marshall in Washington, D. C., had held his judicial group together, seldom dissenting. But his first opinion written on the Supreme Court was a dissent.[6] And, during the 1934 Term and the 1935 Term when the so-called New Deal legislation was being levelled by decisions of the Court, Cardozo's voice was often heard in protest. This is not the occasion to review that period of history. One thing can be said with assurance; and Walton Hamilton, in the article already referred to, said it exquisitely: "It is to Cardozo that credit is due for preserving the spark of sanity in a period of judicial panic. It is to his everlasting credit that during the darkest of days he met intolerance with tolerance."[7] And when the tide turned and constitutional doctrine, kept alive by dissent, was rediscovered and used to support the main pillars of this legislative program, Cardozo was on hand to cast his vote with the new majority. He indeed wrote for that majority in *Steward Machine Co. v. Davis*,[8] upholding the constitutionality of the Social Security Act.

One who follows his work on the Court will not always agree with him. Cardozo was strangely silent when the "white primary" was approved in *Grovey v. Townsend*[9]—a decision that was overruled nine years later by *Smith v. Allwright*.[10] His treatment of a rate case[11] leaves the impression that he gave accountants' entries far more prestige than they should enjoy. He was author of the Court's opinion in *Palko v. Connecticut*[12] which made a narrow, limited application of the Bill of Rights to the states. There a state had obtained a conviction for murder; and a life sentence was imposed. The state appealed and obtained a reversal. A new trial was had and this time Palko was sentenced to death. He claimed error, alleging that his second trial was double jeopardy.[13] The Fifth Amendment prohibits double jeopardy; and the question was whether that prohibition is applicable to the states by reason of the due process clause of the Fourteenth Amendment. The Court had long held that only some, not all, provisions of the Bill of

5 For an estimate by his colleagues on the court of appeals, see 258 N.Y. at p. v (1932).
6 Coombes v. Getz, 285 U.S. 434 at 448 (1932).
7 Hamilton, "Cardozo the Craftsman," 6 UNIV. CHI. L. REV. 1 at 18-19 (1938).
8 301 U.S. 548 (1937).
9 295 U.S. 45 (1935).
10 321 U.S. 649 (1944).
11 West Ohio Gas Co. v. Public Utilities Commission of Ohio, 294 U.S. 63 (1935).
12 302 U.S. 319 (1937).
13 For the federal view, see Green v. United States, 355 U.S. 184 (1957).

Rights were made applicable to the states by the Fourteenth Amendment. Cardozo accepted that construction and said that only those guarantees in the Bill of Rights that are "implicit in the concept of ordered liberty"[14] were carried over to the states by the due process clause of the Fourteenth Amendment. Double jeopardy is not so included, ruled Cardozo, at least where the state is not trying to wear an accused out by a series of trials.[15] And so Palko's second conviction was sustained.

This problem of the application of the Bill of Rights to the states is a recurring one. There has never been a majority of the Court to say all of those guarantees are included. Usually the Court has not been unanimous. Dissenters have almost always been on hand to claim that the Bill of Rights fixes the contours of due process as that term is used in the Fourteenth Amendment. The first Harlan so contended in 1884.[16] Mr. Justice Butler—not often identified with the libertarian school—dissented in the *Palko* case. And the split among the justices on this point has continued.

The concept of due process which Cardozo approved in the *Palko* case has been carried so far as to permit both the state and the federal governments to prosecute for the same, identical acts.[17] It has permitted one state to chop up activities into many small units, making separate crimes of each, though in essence but one unitary act is involved.[18] Whether Cardozo could have swallowed these strong doses is, of course, not known. He had a mind that was always open to new light, to new ideas. He knew for example that "the present definition of insanity has little relation to the truths of mental life"[19] and was eager for the legislature to release the judiciary from the duty of applying it. Perhaps he would in time have released himself from the narrow concept of due process which the *Palko* case reflects. Perhaps in time Cardozo would have been influenced by the powerful reasons enumerated in *Adamson v. California,*[20] and in other recent dissenting opinions for inclusion of the Bill of Rights in the concept of due process.

[14] Palko v. Connecticut, 302 U.S. 319 at 325 (1937).

[15] Id. at 328.

[16] Hurtado v. California, 110 U.S. 516 at 538 (1884). And see Twining v. New Jersey, 211 U.S. 79 at 114 (1908).

[17] Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959).

[18] Hoag v. New Jersey, 356 U.S. 464 (1958). Cf. Ciucci v. Illinois, 356 U.S. 571 (1958).

[19] "What Medicine Can Do for Law," address by Judge Cardozo, New York Academy of Medicine, Nov. 1, 1928, reprinted in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 371 at 387, Hall ed. (1947).

[20] 332 U.S. 46 at 68 (1947).

Those who talk of federalism often use the cliché that its problems cannot be resolved in terms of "justice." Yet due process is a concept which evolved in man's search for justice. Think of the advance in the scheme of "justice" (or, if you like, in the scheme of "ordered liberty") which would be made if states were required to see that defendants got the aid of counsel, not only in capital cases,[21] but in every instance where a major crime was charged.[22] The Bill of Rights sets standards much higher than those provided by some of the states. It is not too much to hope that its measure of due process will some day be made nation-wide.

I have said enough to indicate that, great as I think Cardozo was, he worked in troublesome fields where men are far from unanimous and where, in the eyes of some, he occasionally went astray. Yet he lived and worked in the great tradition and would be the first to admit he was not infallible.

He had character and fidelity to high work-standards. Above all he did not fear the mob or see ghosts or become impelled by fear. *In Matter of Doyle,*[23] he wrote for the court of appeals in holding that an immunity statute, to be valid, must be as broad as the constitutional guarantee against self-incrimination. He spoke of the public demand that criminals be caught and punished. Yet he added a word of caution and wrote this historic sentence: "A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price for relieving itself of the bother of awaiting a session of the Legislature and the enactment of a statute in accordance with established forms."[24]

Cardozo was the embodiment of the idea of an independent judiciary. He knew the value of rocks over which great waves could break and expend themselves. He was always unmoved by the tempests and storms. He tried to make justice a vivid concept in his bailiwick whoever the defendant, whatever the issue.

Cardozo's concept of an independent judiciary is a part of the western tradition that is today making powerful impacts on the legal systems of the East. The independent judiciary in India is a tower of strength in these troubled times. It, too, lives above the storms and tries to administer the laws impartially and dispas-

21 Powell v. Alabama, 287 U.S. 45 (1932).
22 Betts v. Brady, 316 U.S. 455 at 474 (1942).
23 257 N.Y. 244, 177 N.E. 489 (1931).
24 Id. at 268.

sionately. Other young nations are beginning to wonder if their greatest anchor against passion and prejudice may not be an independent judiciary. The need at times for a second and more sober thought is great. The new constitution of France provides a tribunal to pass on issues of constitutionality. Turkey has one in modified form. In communist lands it is the party that has always put the gloss of orthodoxy on legislative acts. In Yugoslavia there is a new development. In a few months a law will go into effect providing courts—both at the state and federal level—with power to determine issues of constitutionality.

The role of courts—independent and supreme in their own domain—will be increasing as the new nations of the world emerge. Cardozo's admonition will be timely to them. It also carries an important reminder to all of us here in the United States. These newly-emerging nations have written constitutions for which our own Constitution often serves as a model. The opinions of their courts are filled with citations of our own decisions. What we as judges and lawyers do at home today thus often becomes instantly important in many other nations.

The major problems of the newly-emerging countries are not entirely economic. They start with the need to develop viable societies along democratic lines. This includes the maintenance of a system of checks and balances. It means restraints on the powers of majorities and the protection of minorities. It means an independent judiciary. Some countries are filled with racial and religious hatreds that are so powerful as to endanger any full-fledged democratic development. Minorities experience daily discrimination. The idea of equal justice may have been powerful when the common enemy was a colonial empire that held all the people down. Yet when liberation comes, the majority often dilutes that concept of equal justice and turns the powers of government to its own advantage.

Moreover, young nations have not developed traditions and habits of thought that propel them along democratic lines. Even criticisms of a prime minister may loom as a monstrous offense; and freedom of speech and of press are made to suffer. In these and many other ways the rights of man are again put in jeopardy, once independence is acquired. The American example is, therefore, of continuing importance both at home and abroad.

The maintenance of our strong traditions of civil rights for all our people, irrespective of race or wealth, religion or color, is the

most important task facing the legal profession. When we let the standard fall, we disappoint people everywhere. When excellence and courage in the Cardozo tradition are the measure of our deeds, the hearts of men the world over are lifted.