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# Benjamin N. Cardozo

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BENJAMIN N. CARDOZO

EMERSON in his essays called "Representative Men" speaks of the uses of great men. He says that the study of some individuals leads us to an elemental region where the individual is lost; that his spirit diffuses itself in his work; and that by a study of his life we can touch and know his summits. With this in mind, I wish to speak of the late Justice Cardozo.

Perhaps all of you know something of Benjamin Cardozo's life. He was born in New York in 1870. All of his ancestors were Sephardim Jews, those cultured members of the Jewish race who were persecuted in Spain and Portugal in the 13th and 14th centuries and finally banished from those countries. After migrating to Holland and England, a number of them came to America long before the Revolution.

Many of Cardozo's forebears in this country played prominent roles in its early history. Several of them served in Washington's army and others in the American forces in the War of 1812. The immediate Cardozo clan was prominent in the law. Benjamin Cardozo's grandfather was nominated a Justice of the Supreme Court of New York, but died before he took office. His father was one of the most brilliant judges that ever sat on that court.

Cardozo's father, though a very learned judge, had an unfortunate experience which was to play an important part

in his son's life. The father was a judge in New York during the time when the infamous Tweed gang was rampant in that city. At Boss Tweed's request, Cardozo's father, as judge, appointed a certain receiver for the Erie Railroad after Tweed's ally, Jay Gould, had manipulated it into bankruptcy. This led to an investigation by the New York Bar Association in which it was revealed that Judge Cardozo had appointed Boss Tweed's nephew as a receiver in more than three hundred cases and Tweed's son as a receiver in over one hundred other instances. As a result of the investigation, Cardozo's father resigned from the bench. It was a severe blow to the proud and honored Cardozo family. Ben, the future Supreme Court Judge, was only three years old at the time. The episode had a profound effect on him as he grew older. A burning desire to restore the name of Cardozo to an honored place in the law developed within him. As we know, that ambition for success in the law was achieved.

Cardozo graduated from Columbia University at nineteen and then attended Columbia University Law School for two years. He was a brilliant student. He was admitted to the Bar of New York in 1891. For twenty-two years he practiced law in New York City. His practice was essentially that of a barrister; that is, handling cases for other lawyers. Although unknown to the public generally, he attained the high respect of the Bench and Bar of New York. During that time he wrote and published a book on the practice in the New York appellate courts.

In 1913 he was elected to the Supreme Court of New York. Shortly thereafter he received a temporary appointment to the Court of Appeals, and in 1917 became a permanent member of that Court. There he remained until elevated to the Supreme Court of the United States in 1932.

The New York Court of Appeals was one of the most distinguished courts in the land. Cardozo exerted a dominant

influence in making it such. Just as he had been known as a lawyer's lawyer, he came to be known as a judge's judge. His opinions were models for their lucidity, craftsmanship and literary style. More than that, they made an immediate impress on the common law problems which came before the Court of Appeals.

During this time he published four little volumes dealing with the law. Two of them, "The Nature of the Judicial Process" and "The Growth of the Law," were lectures which he had delivered to the Yale Law School in 1922 and 1924. I shall refer later to these books, but I should like to say now that I can think of no way a law student or young lawyer can better supplement his "must" work than by reading these gems of legal philosophy and thought.

In 1932 Justice Holmes resigned. Almost unanimously the Bench and Bar of the country suggested that Cardozo be appointed to fill the vacancy. It was in the nature of a national call. Probably no man ever ascended the Supreme Court more reluctantly than Cardozo. He loved his work on the New York Court of Appeals, and he had a genuine affection for his colleagues on the bench. He hated to leave; however, he accepted the appointment and went to Washington.

Justice Cardozo was on the Supreme Court bench less than six full terms. He died in 1938. Although he was a member of the highest court of the land only a short time, he had the same profound effect in the domain of public law that he previously had asserted in the common law field.

In appraising Cardozo's influence on the law, perhaps the first thing to be noted is his legal craftsmanship. He was a master of the common law. He knew its sources and history. He did what Holmes said was the first essential: simply going to the bottom of the subject.

His vast learning and culture made Cardozo a master also of the English language. Although he has better claims to

posterity, the literary quality of his opinions has earned for him a niche in the hall of legal fame. In his masterful essay, "Law and Literature," he confesses to the principle which you will find is an ingredient in all of his opinions. There he quotes Henry James, as follows: "*'Form alone takes, and holds and preserves substance, saves it from the welter of helpless verbiage that we swim in as in a sea of tasteless tepid pudding.'*" Then he goes on to say. "This is my own faith. The argument strongly put is not the same as the argument put feebly any more than the 'Tasteless Tepid Pudding' is the same as the pudding served to us in triumph with all the glory of the lambent flame. The strength that is born of form, and the feebleness that is born of the lack of form, are qualities of the substance. They are the tokens of the thing's identity. They make it what it is." If you wish to know more about the secret of Cardozo's talent for exact and faultless expression, you can find it in this little essay. Nor need you look further for proof of Cardozo's greatness as a literary stylist. It has a charm and exquisiteness that makes for delightful reading.

Beyond his mastery of the common law and of the written word was Cardozo's passion for justice. Call it by other names — his philosophy of law, his judicial approach or his method of judging — it made a profound and lasting impression on legal thought. His was a life-long quest: How does the law grow? How does it bridge the gap between the experiences of yesterday and the needs of today? How can it be a permanent thing, something to rely and act upon, and yet fulfill the changing exigencies of the hour? The answer to these questions was a life-long search for Cardozo.

I barely can touch on his views on these fundamental problems of jurisprudence. For their full import you will have to read the lectures he delivered to the Yale law students. In one of them he quotes Dean Pound as saying, "Law must be stable, and yet it cannot stand still." Then Cardozo continues "Here is the great antinomy confront-

ing us at every turn. Rest and motion, unrelieved and unchecked, are equally destructive. The law, like human kind, if life is to continue, must find some path of compromise. Two distinct tendencies, pulling in different directions must be harnessed together and made to work in unison. All depends on the wisdom with which the joinder is effected.”<sup>1</sup> It is to this idea that Cardozo gave so much of his thought. Law, we know, must be certain; without certainty, there is no law. It must have a uniformity of application. Principles and rules of conduct cannot be changed to fit the whims of the occasion. On the other hand, a certain elasticity is required so that needed growth can take place. The rules of conduct must not be too hard and fast; fluidity is needed to meet the novel set of facts. The molds used to fashion yesterday’s judicial determination may not fit today’s problem, posed for the law to settle. An outstanding example comes to mind. All of you who have studied equity know that equitable remedies came into being because the common law legal procedure had become so crystalized and hardened that it could no longer meet many of the needs which justice demanded. This of course is an outstanding example of the law’s growth. There have been thousands of changes more subtle or perhaps, I should say, less drastic, effected by the judicial process.

A main topic which Cardozo discusses in his lectures is how law is created. Of course we know that statute law is created by the legislature. But how about judge-made law? True, most cases are decided on precedent. Ordinarily, the law found in other cases is sufficient to decide the case at hand. But there are cases when new or different rules must be fashioned. Cardozo asked the question, what are the principles that determine the creation of the rule in such instances? He did not agree with those legal thinkers who argue that the judge in announcing a new principle or rule is only discovering something already existing within the body

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<sup>1</sup> The Growth of the Law, p. 2.

of the law. His view was that the judge at times creates law; that is, he is a legislator, albeit in a very limited sense, and that the body of the law is being constantly molded and remolded by the courts. I quote from one of his lectures: "We have the conception of law as a body of rules and principles and standards which in their extension to new combinations of events are to be sorted, selected, molded and adopted in subordination to an end. A process of trial and error brings judgments into being. A process of trial and error determines their right to reproduce their kind."<sup>2</sup>

For a specific example I refer to a case in which Cardozo wrote one of his most famous opinions, *MacPherson v. Buick Motor Co.*<sup>3</sup> The facts were these: The defendant manufactured automobiles. It sold an automobile to a retail auto dealer who in turn sold it to the plaintiff. The plaintiff was injured because of a defective wheel. Although the defendant as the manufacturer of the automobile had purchased the wheel from another manufacturer, it had been negligent in failing to ascertain the defect. The plaintiff sued the Buick Motor Company for his injuries and recovered. The Court of Appeals of New York affirmed. In his opinion Cardozo demonstrated how the law grows to meet changed conditions.

In 1842 an English court decided a similar case which the American courts followed until *MacPherson v. Buick Motor Co.* was decided. This was the case of *Winterbottom v. Wright*.<sup>4</sup> There a contractor furnished a mail coach to the Postmaster General. The coach collapsed and injured the driver. Although the injured driver, as plaintiff, charged the contractor with negligence in furnishing a defective coach, the English court held that there was no relation between the driver and the contractor; that the only duty owed by the contractor was to the person to whom the coach was

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<sup>2</sup> The Growth of the Law, p. 55.

<sup>3</sup> 217 N. Y. 382.

<sup>4</sup> 10 M. & W. 109.

furnished, that is, the Postmaster General. The rule was subsequently modified in cases where the courts held the thing manufactured was "imminently dangerous to life," such as firearms and explosives. The courts held that these instances were exceptions to the general rule laid down in *Winterbottom v. Wright*; however, since the *MacPherson* case the exception has become the prevailing rule of law. In his opinion Cardozo traces the history of the principle announced in the English case and then demonstrates that it is outmoded for the needs of modern manufacturing and distributing methods. Thus, the law has changed so that it may function more satisfactorily under present day conditions.

In speaking of this growth of the law, I am not talking of the great postulates of justice. These do not change. What do change are the subsidiary rules and principles which stem from those postulates. These changes come gradually. Case follows case, each pushing a little farther out, until, before we realize it, the established rule has been abandoned and a new rule has taken its place. Cardozo likened the law's growth to a slowly moving glacier and in another instance to an erosion, the gradual pushing out of principles from the mound of known and established law into the unexplored areas. Holmes stated it differently in *Noble State Bank v. Haskell*, when he wrote, "With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides."<sup>5</sup>

What really concerned Cardozo was not that the law grows, but how it grows. What does the judge call upon in reaching a decision that may announce a new principle? How does he create either a new rule or a different shading of an old rule when confronted with a novel problem? What are his tools for these changes and how does he use them?

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<sup>5</sup> 219 U. S. 104.



In his lectures, entitled "The Nature of the Judicial Process," Cardozo expounds his ideas on this subject. He says that the judge may use any of four methods or any of these in combination. In his own words these four methods are, "The directive force of a principle may be exerted along the line of logical progression: this I will call the rule of analogy or the method of philosophy; along the line of the customs of the community: this I will call the method of tradition; along the lines of justice, morals and social welfare, the mores of the day; and this I will call the method of sociology."<sup>6</sup> These not only are methods of advancing the law but, as he points out, they also are limitations on the freedom of the judge in deciding a case. There is some freedom, but only so much as is dictated by the novelty of the facts and as permitted by the methodology outlined by Cardozo. In other words, the judge is limited in his freedom to make changes insofar as existing rules can only be changed through logical or historical development or by recognition of changed custom or, finally, by an acknowledgment that the modified rule will function better under present circumstances. This last method of change Cardozo thought to be the most important. The real test of a rule's right to exist, according to Cardozo, is its workability. Does it function satisfactorily under present conditions, was his final question in fashioning a legal rule; this, because the law is a "means to an end and not an end in itself."

Cardozo was a modest, quiet man of high principles. He had no thought of stating any revolutionary ideas about the law. Indeed, he did not. What he tried to do was to develop a better understanding of how the law functions and how it keeps pace with the changing needs of life itself.

Cardozo loved the law. He was devoted to it. Justice Holmes once said of Cardozo, "He was a great and beautiful spirit." After his death Judge Learned Hand wrote these

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<sup>6</sup> The Nature of the Judicial Process, p. 30.

well chosen words, "He was wise because he was uncontaminated, because he knew no violence, or hatred, or envy, or jealousy, or ill will \* \* \*. In this America of ours where the passion for publicity is a disease, it was a rare good fortune that brought to such eminence a man so reserved, so unassuming, so retiring, so gracious to high and low, and so serene."<sup>7</sup>

I conclude by quoting from one of Cardozo's rare addresses. In 1925 he spoke to the graduating class of the Albany law school. After telling his audience that if they believed that the ordeal of learning the law was over upon graduation, they were doomed to disillusionment, he expressed these significant thoughts: "But if you bear in mind the truth that this is only the commencement, the troubles are only beginning, and if you act upon that faith, behold by some subtle necromancy, the pain that you foresee shall be transmitted into joy. The troubles will emerge as triumphs; the travail and the doubt will yield an unexpected peace; the great truth will have been that the quest is greater than what is sought, the effort finer than the prize, or, rather, that the effort is the prize — the victory cheap and hollow were it not for the rigor of the game \* \* \*. Give what you have, whether what you have be much or little. You will be sharers in a process that is greater than the greatest of its ministers."<sup>8</sup>

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<sup>7</sup> 52 Harvard Law Review, p. 361.

<sup>8</sup> Law and Literature, p. 163.