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CARDOZO THE CRAFTSMAN

WALTON H. HAMILTON*

I

The last opinion of Benjamin Nathan Cardozo has taken its place in the Reports. His contribution to the endless fabric through which the law is shaped to the needs of the land is done. There is nothing that he can add or subtract from a miscellany of utterance scattered across the pages of many legal volumes. The record is complete and closed; yet it is impossible to assess the exact quality of his work or with certainty to assign his place in the great tradition. For in his decisions a jurist offers only one of the elements out of which a judgment upon him is to be distilled. The great web of the law gives character to his accomplishment; and, as the future sets its pattern, provides the perspective against which his craft is defined. The jurist performs; and the law and posterity give worth to his contribution. He can only do—and abide the event.

For, as Cardozo realized, the jurist is not a solitary artist. He plies his craft as a common task. In a sense such a community of effort touches all creative effort; it marks the work of the playwright, the novelist, the musician and the painter. As old plays were little by little fitted to the temper of late Elizabethan times, the dramas of Shakespeare emerged; a London audience and an exuberant England were as much their creators as the dramatist who shaped his lines to their reception. In names like Defoe, Fielding, Scott, George Eliot, Thackeray, Galsworthy, and Walpole, the English novel retains its continuity. It is the allegory of John Bunyan done into a mundane story; the characters, however human, remain saints and sinners, and the Puritan tradition remains to point the

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1 The opinions of Cardozo, as Judge and as Chief Judge of the New York Court of Appeals, are to be found in 210 to 258 N.Y.; as Justice of the United States Supreme Court, in 285 to 302 U.S.
moral. In music the stamp of the age underlines the mark of the composer. Mozart is the quintessence of the later eighteenth century in all its charm, courtly form and elegance. Beethoven was sensitive to the forces of humanism and democracy released by the French Revolution. He was fed up on the existing order, wanted to say "God-damn," and in his most passionate moments needed a piano or an orchestra to help him say it. Wagner converted the cause of good against evil into a militant nationalism and hymned aspirations which are epic and Teutonic and tainted with vain glory. He created musical dramas which have outlasted an empire and a republic to serve a totalitarian state. Rimsky-Korsakoff was a professor of music in the Royal Conservatory at a time when Russia's ambitions turned to the east; and the Scheherazade Suite glows with the colors of Oriental aspirations. The artist always exhibits a unique quality, marked by talent and often rising to genius; but time smothers contemporaries beneath oblivion and distorts into a sharp perspective the blurred lines of individual performance. In every art the creator stands in his tradition and plies his trade in consort with his fellows.

Above all others the jurist pursues a common calling. Like painter and sculptor the impulses which touch off his creative work come from without his own shop. From the outside, too, are derived the stuff of idea and value, of circumstance and occasion from which he fashions his opinions. A master of music gives his creative touch to a handful of folk tunes—and a great symphony emerges. But, unlike musician or dramatist, the stimulus comes to the jurist by compulsion rather than suggestion. A situa-

2 Vice is too attractive to resist fictional depiction. Fortunately the novelist had the moral at hand to take the taboo off. Note, e.g., the parade of crime and sin in The Newgate Calendar, sanctified by the "bad end" to which all villainy came.

3 An unforgettable story gives character to Beethoven's music. It is recorded that on one occasion he was walking along a street with Goethe. A trumpet sound announced the approach of a mighty one of earth. Goethe, like the populace, drew up to the curb and remained uncovered until His Highness had passed. Beethoven, with strident step and hat on, pursued his way through the crowd. The next day, he tells us, he wrote to Goethe and told him "exactly what he thought of him." Perhaps the coldness of Goethe to Beethoven's music has, if not cause, at least incidental occasion.

4 Remove its communal background and a work of art loses its meaning. In America Rimsky-Korsakoff's famous Song of India is usually entrusted to the soprano. In accord with her homespun tradition she brings to it the nostalgia of Home Sweet Home and extracts from it the last drop of imported saccharine. But, as sung by the Kedroff Quartet, who follow the score in Sadko, it is the song of the merchant bragging about the wealth of his country—the eyes of Russia are upon the East.

5 Again the Scheherazade Suite exhibits the process. The Thamar Overture of Balakirev is an earlier and cruder version of the same Russian cry for the Orient. Almost all the ideas, so colorfully developed by Rimsky-Korsakoff, are there. Many musicians prefer the earlier, severer and less gaudy version.
tion in life touches off a conflict, is converted into a cause of action, and demands his attention. As best he may he must find his way through a conflict of considerations to an answer that will do. The jurist takes a nucleus of facts, adds a bit of common sense—and deftly chisels a rule of law.

In such a venture he works at once with liberty and amid constraints. Here is a tangle out of life, a question about human conduct, a resort to the courts, a reference to the norms of legality. The "facts" emerge from a narrative, involve the mores of a group, and ramify into the design of a changing culture. The "rule" lies somewhere within a mighty corpus which comprehends "the common law," the tomes of the statutes, the boundless wilderness of the reports. Amid such a group of variables there is endless choice—in selecting the "real" issue, in winnowing out the "relevant" facts, in finding the "applicable" rules. In matters of strategy, such as striking the key for decision, putting the question, invoking the compulsions, and marshaling the argument the jurist has scope for wide discretion. In the detail of tactics—the creation of atmosphere, the choice of acceptable words, the parade of intangibles, the subtle touch upon the sources of persuasion—he can give play to varied skills. In cases of consequence questions remain open until the issue is resolved; in "the opinion of the court" the mark of the craft of the spokesman is indelible. It is only where social conditions have been static or benches have remained adamant, that the formula for decision has become a stereotype. It has taken the hardened disciple of the law, with its beat in endless reiteration, to make of judgment even an orderly procedure.

But a decent restraint attends the jurist's freedom. In judgment, in ratio decedendi, and even in obiter dicta, he must respect the wisdom which the centuries have brought. He accepts here, qualifies there, distinguishes yonder, and fabricates an opinion whose lines run out into the general fabric of the law. Even when, in the unusual case, he fashions anew, his judgment is formed with scrupulous regard to what courts have said. His break with authority must be justified—in the failure of an old rule to work, in the fact that people no longer think that way, in a newness of conditions which makes an innovation necessary. The bench imposes a further restraint; the jurist's urge to hand down his own justice has a curb in the presence of his brethren. He must, if he is to speak for the court, admit his colleagues to his authorship. An addition here to win

6 Among judges Cardozo was among the keenest in his appreciation of the relation of diction to decision. Logic may convince but it is the word that persuades. In the dubious case the thin line between the reasonableness or unreasonableness of an action may turn upon the word used to describe it. See Cardozo, Literature and the Law, pp. 1-40 (1931).
Brother X, an omission there to hold Brother Y, a suiting of the argument to the general tolerance of the group are essentials to his right to speak. Even his rhetoric must be subdued to the ears of his brethren. If he would utter all that is upon his mind, he is driven to the isolation of the concurring opinion or to the luxury of dissent. Nor can he limit his consideration to the values of the hour. A case may be of little consequence yet pregnant with consequences. His task may involve no more than a few stitches, yet he must have regard to the direction he imposes upon the threads. In his scattered bits of craftsmanship the jurist must keep faith with the pattern of the cloth.

The craft of Cardozo must be appraised as an aspect of the enveloping law. His concern is with crime, with contract and tort, with the wiles of procedure and the strange ways of equitable relief, with the police power and the law of the Constitution, with the curious legal folkways of the people of New York and of the United States of America. Here and there he is at grips with an issue in public policy that lies along the frontier of public control. More often some problem of an industrialism on the march can be resolved only by reference to the host of holdings which impinge upon judgment. The great mass of his work is concerned with small incidents, issues of detail, petty accommodations, seeming trivia which the historian or the philosopher would pass up as unworthy of his mettle. Yet hardly an opinion of his is confined to the space within which it is cabined. In reference, citation and precedent it gathers lines of doctrine, draws them to its passing focus, and imposes upon them its fragment of design. In the reports hundreds of such judgments bear the name of Cardozo, each in its reach a-something-more-than-itself in microcosm. The part is merged in the whole, the opinion comprehends the decisions from

7 A confession of Mr. Justice Holmes, still I believe unpublished, makes the point: "I write an opinion. It states the facts, it comes to grips with the issues, the argument marches, it reaches a right result. And occasionally I flatter myself that it is not without literary quality. Then I circulate it among my brethren. The Chief Justice puts in his thumb and pulls out a plum. Mr. Justice Pitney puts in his thumb and pulls out a plum. And even my good brother Brandeis is likely to reach for my juiciest plum. And, when they are done, it is nothing but stinking dung." The writer was, however, told by one of his colleagues that Mr. Justice Holmes had not spent his boyhood in New England to no purpose, that he adroitly prepared the sacrifices to the bargaining process, and that the opinions as they emerged from the scrutiny of his brethren were about as he wanted them to be. But if the opinions, as set down in the Reports, are "stinking dung," who has a soul that he would not trade in as part payment for the originals?

8 It is of significance that the word "microcosm" was popular with Cardozo. His fondness for it indicates alike the importance he attached to seemingly trivial matters and his capacity to see the large in the small. A schoolman can give his attention only to cosmic things; the great artist discovers humanity in the ordinary doings of the common man.
which it stems, the lines of argument reach out toward future judgments. Occasion and holding have a significance that extends beyond their confines; in its very abundance the incident provides the raw material through which the law renews its youth. Remove these living utterances from the reports, put them between covers, and they become museum pieces, idle bits of delicate craftsmanship, frozen suggestions of causes once instant with pulsing life. The natural habitat of Cardozo's opinions is the law reports.

II

The appearance of Cardozo upon the judicial scene was too unobtrusive to be dated. As a man of books with an interest in affairs he slipped quietly out of college into the practice of law. There the curious mind, the balanced judgment, the eye for implication, the social conscience, the impulse to probe deeply were more than the trade of advocate could satisfy. The urges and capacities within could find full scope only upon the bench. In 1914 he was "designated" to sit upon the New York Court of Appeals. In 1917, by election of the people, he became a regular member of that tribunal and ten years later he was chosen Chief Judge. It was a "good court"—among the best in the country—to which he was appointed and presently it was "Cardozo's court." For his leadership was recognized by colleagues, by the profession and by the public long before he became "the Chief."

Leaders are not of a kind; and the manner of the man made him the kind of a leader he was. He had nothing of the authority, the majestic stride, the thunderous voice from Sinai of a Marshall as he dominated colleagues and drove his argument to its inescapable conclusion. Instead, in respect to his gifts and his judgments, he was among the humblest of men. What he knew seemed to him of trifling account against the background of the great unknown. He was far more concerned to find out than to maintain a position and had no pride in opinion—save the artist's inner joy in a bit of work neatly done. He was almost an ideal leader

9 A handful of plays, of stories, or of sonatas may reveal a Chekov, a Somerset Maugham, or a Johannes Brahms; we must invoke the law which envelops to give meaning and value to the multitude of legal miniatures which are Cardozo.

10 Attempts to lift the opinions of jurists from their legal habitat and to unify them into sequences of essays have been none too successful. In The Dissenting Opinions of Mr. Justice Holmes and The Social and Economic Views of Mr. Justice Brandeis, edited by Mr. Alfred Lief, one gets something of the manner of man, the way of mind, the quality of argument, the adroit use of citation, statistic and concept. But the arena is gone, the other combatant has to be taken for granted, and action is no longer permeated by the atmosphere of the law in the making.

for a venture into legal understanding. The quiet charm, the quaint touch of dress, the play of mind, the high button shoes, the eager reach of mind, the humorous flash of eye, the sincere consideration of others, the bare hint of other-worldliness marked the unusual man.

Cardozo was, as his office demanded, "learned in the law." He knew it as a technique, as the craft of a workman, as a challenge to judgment, as a scheme of values which an instrument of justice must obey—and not as an august corpus or a collection of rigid formulas. He was, as a master of the lore, able to match syllogisms and citations with the best of his brethren. But he was much too aware of the tricks which concept and symbol, label and verbalism play upon the nodding judge to be taken in by them. He understood that color of word is as important as choice of category; that the telling phrase carries as far as the march of logic; that the start of the opinion depends upon the way the question is put; that the end of the argument lies in its beginning. Nor did he often forget that back of the legal issue lay a human muddle fresh from life, which the court must resolve as best it could. He had the rare gift of probing through voluminous records, grounding his judgment upon reality, giving to novelty the verisimilitude of that which is established, and fitting current necessity with the trappings of the ancient law. His strength lay in his "judicial mind," his capacity for staying judgment until the case was in, his skill at analysis, his command of common sense, his capacity to turn his understanding into a verbal currency that passed easily from mind to mind. It was not in his nature to drive; he required no office to give effect to what he never thought of as his authority. His appeal lay in his powers of persuasion and the rare quality of his leadership. He led—and his court followed.

As he found his stride, he discovered that law—far from being a standard of certainty—is an instrument of justice. Its devices and procedures make up a kit of tools with which the skilled craftsman plies his trade. In his utterance there is none of the nonsense about the judge who lays the facts alongside the law or "measures the statute against the Constitution," and as an automaton sets down the result. Instead reason calls a rule of law into being and its meaning cannot be pent up within the words in which it is cast. Its purpose rather than its verbal form must be its ultimate reference. A rule which has strayed from its intent becomes subject to judicial doubt.

In a familiar field of the law, he recites without a trace of novelty what the most conservative lawyer would accept. Yet a freshness of rhetoric and an appeal to reason bring current life to an ancient distinction. "The
schism in the law of defamation" is not "the product of mere accident." Many things "said with impunity through the medium of speech" change their character "when speech is caught upon the wing and transmuted into print." For "the spoken word dissolves, but the written one abides and perpetuates the scandal." In a case concerned with the conduct of a bank official, his "appeal is to the mores rather than the statute." To him "dishonesty is not a term of art." Its meaning emanates from "no standard of perfection, but an infirmity of purpose so opprobrious or furtive as to be fairly characterized" as such "in the common speech of man." A duty rests upon a purveyor to come across with the supply of molasses which by contract he is obligated to furnish; he is not to be excused "if output is reduced because times turn out to be bad and labor costs high." For "business could not be transacted with security or smoothness if a presumption so unreasonable were at the root of its engagements."

If reason makes the rule, reason appoints the limits to its application. A sheaf of precedents is not an array of imperatives compelling judgment. It is the history of experience with the rule—as set down in the laboratory records of human conflict called the law reports. The essence of its varied wisdom must be distilled by the jurist and applied to the case in hand. Danger lurks in the legal command divorced from its origin in occasion. "The half truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another"; "constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten." The jurist must be alert lest a holding be extended into territory where it can claim no rightful dominion. Thus a rule—the specific reference is to incorporation—"is not a doctrinaire demand for an unattainable perfection; it has its limits in the considerations of practical expediency that brought it into being." Or again, "few formulas are so absolute as not to bend before the blast of extraordinary circumstances." In short, "there are signposts for the traveler," but "equity

18 Id., at 167.
is not crippled by an inexorable formula." The judge is not to abdicate his office to a rigid verbalism which pretends to be the law.

In general Cardozo is content to take his freedom within the constraints of ordinary usage. His forbearance may even extend to a ruling as stupid as it is venerable. But at times even such a patience is fretted by some archaic device with which the jurist must try to reach a satisfactory result. An import borne along with the common law from England is "the rule of the four seas." It makes use of a simple presumption to overcome the hazards of probability and fix the legal status of a child. If during the period of pregnancy the husband is resident somewhere within the wide area marked out by the four seas, the law assumes for him access to the mother and decrees legitimacy for the child. Far be it from Cardozo that an issue "be bastardized as the outcome of a choice between nicely balanced probabilities." But such a presumption must not "consecrate as truth the extravagantly improbable," which "for ends juridical" may be one "with the indubitably false." The presumption falls because "sense and reason are outraged by a holding that it abides." After all, even in the law, "there are barriers in human nature at which presumptions shock and wither"; and abandoned must be "the nonsense of the rule of four seas." So, too, Cardozo and his court leave many another piece of museum legalism—abandoned and un lamented.

A defter stroke, however, is evident in holding the balance between rules. The statute compels of course; "but the statute must be read in conformity with common-law analogies" A writ of habeas corpus to secure custody of a child must not await the outcome of a suit to annul a marriage. The child must not be left in a "corrupting custody while father and mother debate their private grievances." For "the law does not wait upon the niceties of procedure," nor does it "dally and dawdle" with the safety of the ward at stake. Instead "it leaps to the rescue with the aid of its historic writ." An act of justice is not to be defeated by a technical shortcoming. A judgment must be made good even if


People v. Lytton, 257 N.Y. 310, 178 N.E. 290 (1931).

It was quite a tangle that broke on the issue of legitimacy. It may be that the case could have been handled in no other way. It is by no means certain that the justice done was in accord with common sense. Both courts below came to another result and throughout his opinion the attention of Cardozo is far more intent upon "the rule of the four seas" than upon instant act of justice. The curious reader may pursue the subject further in Matter of Findlay, 253 N.Y. 1, 170 N.E. 471 (1930). The quotations here are at p. 8.

Curson v. Federal Reserve Bank, 254 N.Y. 218, 238, 172 N.E. 475, 482 (1930).

there is currently at hand no procedure to give it effect. "All there will be need to do will be to stay the enforcement" until the plaintiff shall "have become qualified to collect in accordance with the foreign law."^24

But the urge that calls all the jurist's skill into play comes from principles in combat. In the "spring-board case" the clash extended from rules, through ideologies, to a schism in social philosophies—and Cardozo responded with a characteristic opinion. A boy, intent upon enjoying a swim in the Hudson, was about to dive from a springboard projected from the property of a railway company. At that moment, as he was poised over the public waters, a live wire on the company's right of way fell and electrocuted him. It was argued, in terms of the ancient law, that the plank was a projection of property, that the youth was a trespasser, that the deceased was without right and the corporation without duty. In an adroit reply Cardozo ranged from the sheer gymnastics of dialectic to the compulsions of social policy. He finds it irrelevant that the plank was "an extension of the soil," that the boy had "abandoned the highway," that a bather had fallen into the status of a trespasser. "Rights and duties in systems of living law are not built upon quicksands." He stood the plank upon its end, considered "the circumambient spaces of water and of air"; and rejected "a jurisprudence of conceptions" which with a "relentless disregard of consequences" pushes a maxim to "a dryly logical extreme." He summoned realism, made the use of the plank "a mere by-play" and gave to the youth protection in his "exercise of public rights upon public waters." It is all very much of a legal to-do, a display of craft which commands the admiration of his brethren, a parade of argument which no rebutting legalism can halt. The net result is that there are rights other than those of the landlord; that real property is no longer an absolute at whose shrine the conveniences of the landless are as nothing. Against rights beaten into the law by fox-hunting squires, to whom poaching is the greatest of all crimes, Cardozo helps to make articulate the aspirations of a less privileged group. His intricate and nimble dialectic gives voice to a revolution in caste, in values and in ideas.^25

In fact the strain which a rising industrialism imposes upon the ancient law creates the most insistent demand for his services. The reports bristle with cases in which rules of the long ago must be accommodated to the current necessities of the people. A notion of "privity" was a veritable bulwark of justice when communities were small and relations largely personal. But current business runs strongly against it; and Cardozo clearly


saw that “the assault upon the citadel of privity is proceeding in these days apace.” Again and again he considers the doctrine; and, although loath to disturb overmuch an established notion he lends his hand to the assault. In this domain a ground-breaking opinion of his has become a classic. An injury to the owner of an automobile was due to a defect in a wheel which had escaped inspection. The law, according to the authorities, is privity of contract. As a result appears a curious paradox. Privity gives to the dealer a right to sue but he had suffered no injury; the owner of the motor-car can boast an injury but is without privity. With hardly a bow to novelty, Cardozo harnesses established principle to a new necessity; the elements of a fresh holding are all within reach and his craft deftly draws them into place. At the coming of individualism absolute liability did not completely fade from the law; one kept on one’s premises a cobra, a lion, a pool of water, or T.N.T. at his peril. As extraordinary circumstances were encountered, the courts gave the doctrine a limited run in the ambit of business where privity was supposed to reign. At the point of origin one must not falsely label a poison, allow a defect in a balance wheel, make “a dangerous trap of a scaffold,” hire out a horse known to be vicious, or allow “a potency of danger” to be fabricated into a coffee urn. Cardozo sounds the issue in tort and shortcircuits immediate holdings. He calls the automobile a “dangerous instrument”; hurls against privity the notion of the good “at large” or “in circulation”; distills personal blame from precedents which stem from the older doctrine, turns unconditional liability to the support of the rule of no liability without fault—and the trick is done. Save from casual references, such as to “the days of travel by stage coach,” it all moves upon the legal level; yet the result is calculated “to serve the needs of life in a developing civilization.” The net result is clean cut. The law of privity did well in the good old days when articles were fashioned by the maker to the buyer’s order. But when goods came to be produced for the market the personal touch was lost; and, with the appearance of the middleman, privity failed in its office. Conditions had gone astray—the new rule allowed the law to accord its ancient protection.

26 Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).
28 The concept of “a dangerous instrument” is very popular with Cardozo. Note, e.g., “one cannot place an engine of destruction in a position where a heedless touch by someone else will awaken its destructive power.” De Haen v. Rockwood Sprinkler Co., 258 N.Y. 350, 353, 179 N.E. 764, 765 (1932).
29 In short the scope of one established holding, Thomas v. Winchester, 6 N.Y. 396 (1852), is enlarged as a means of blocking the way of another established holding, Winterbottom v. Wright, 10 M. & W. 107 (1842).
It was in this fashion that he wrought. By such displays of craftsmanship he won the admiration of his brethren, who constantly marveled "at some new and unexpected facet" of his "genius." As a sincere judge, confronted with an endless array of enigmas from a modern culture, he groped; and as he groped he grew. His is not always the sure touch; one finds opinions of technical excellence that seem lost because lasting values are not yet at hand to give direction to argument. He accepts without question the contagious magic by which a single package from across the border imparts its interstate character to the local train. Thus he insulates all its activities against the state government. He preaches, like any practitioner whose reliance is the Corpus Juris, that "the law should hold fast to fundamental conceptions of contract and of duty and follow them with loyalty to logical conclusions." Yet he could, in words that carry a threat to many an established formulation, insist that the quest "for the normal and the typical" is futile; that "every effect is natural when there is complete knowledge of the cause"; and that "in the complexities of modern life, one does not know where the ordinary ends and the extraordinary begins." He is conscious that "we are not gifted with the power to discover truth with mathematical certitude"; laments the fact that courts are "at the mercy of the diligence and skill" of counsel, and confesses that they are helpless "to speak the word of truth if the facts are not uncovered for them." He is conscious always that his own decisions, born of limited understanding, are at best contributions to a developing law.

As year followed year he found firmer terrain. He was driven to a search for social values as an escape from the confusion with which rule and citation, principle and precedent beat upon him. It is usually legal utterance which in his opinions marches in complex formation to a single therefore. Yet one feels that it is some consideration of policy—to Cardozo himself not quite articulate—which determines the direction of march. He remains throughout rather the lawyer whose arguments are directed to public ends than the social philosopher who makes the technology of law his instrument. If he had made explicit the sources of his

30 Address by his colleagues to Chief Judge Benjamin N. Cardozo, on his retirement from the New York Court of Appeals, 258 N.Y. vi (1932).
32 Imperator Realty Co. v. Tull, 228 N.Y. 447, 127 N.E. 263 (1920).
own preferences, his influence upon the bench and his authority within his profession might have been less compelling.

For eighteen years Cardozo carried on at Albany. The courts of a metropolitan and industrial state touch men at every point. The judge who amid the hubbub of change would hold the law true to its office must be a jack-of-all-trades. The tangle of family relations, the confusion over inheritance, the equities in corporate property, a law of contract as broad as all business, the qualities making for merchantability, the bothers of recently emancipated women, the safeguarding of the worker in a society madly gone mechanistic, the problems which the growth of the city brings, the relation of the state to its hierarchy of agencies, the taming of an unruly economic order to the needs of a people—all these and a hundred more appeared upon Cardozo’s crowded docket. There is hardly an aspect of the law, from the definition of insanity to the rights of the trade union, which at his hands did not feel the impact of a larger humanism. Under his leadership the New York Court of Appeals became the best court in the land. What it decided today was likely to become the law of many another commonwealth tomorrow.

III

As a state judge Cardozo became a national figure. His name, his attitude, his books came to be known to attorneys, to judges, and to the laity. A large public, unmindful that his was already a national office, insisted that his proper place was at Washington. Liberals and lawyers, labor unions and business executives—hardly one in faith, in doctrine, or in definition of American institutions—united their voices in a demand for his judicial services. So in 1932 he became a member of the United States Supreme Court. He appeared—as the choice of the Judiciary Committee of the Senate and with some reluctance on the part of the Chief Executive—as the inevitable successor to Oliver Wendell Holmes, Jr.

Until that event his life had been all of a piece. The transition from Albany to Washington was an abrupt break. He had not sought the post, but he gracially accepted an office which came as a token of appreciation from the people. A number of discerning persons regretted the move for they considered his old work fully as important as the new. The elevation removed him from the environment to which he was accustomed, disturbed the Albany-New York axis about which he had organized his activities, upset a pattern of life many years in the making, and made more difficult contacts with old friends. The atmosphere of the new Court

36 His pattern of life, with his circle of friends, was of supreme importance to Cardozo. The bond was there even with one who could claim no intimate acquaintance. One hesitated,
was colder, its personal differences sharper, its sensitiveness to the office of the law more blunt, its spirit of cooperation less manifest than the one to which he had been accustomed. The spirit of the Court—many members of which were insulated against the thought, the knowledge, the impulses, the aspirations of the age—was still that of a Mr. Justice Field more than a generation ago gathered to his fathers. But it was not the spirit of the virile Field of another age but a Field now grown decadent through lack of contact with actuality. The older liberty-and-property, with an accent which an America on-the-make had placed on the last word, had become a blind regard for vested privilege. For thirty years Holmes had kept alive the ancient notion of "the common good." Brandeis was blazing trails for public welfare which constitutional law was invited to follow. Stone was bringing to decision the skepticism of the law teacher and the passion of the honest man for the truth. Save for the last two the court was less able—as lawyers, as men of the world, as philosophers—than his old bench, and some of the members were stubborn beyond all reason. Moreover, power still lay with the Harding appointees and such moves as liberalism was allowed to take followed the timid paths of Hughes and of Roberts. The era which had closed with the retirement of Holmes was great in little more than the-law-as-it-might-be enunciated in dissent.

To Cardozo the hurly-burly could not mean what it meant to the others. The excitement of the docket, the round of argument and conference and decision, the importance of sitting in judgment on mighty matters could not have for him the stirring charm it offered the novice. Holmes could take it; he had been an Olympian to whom the judgments of the most powerful court on earth were merely casual incidents in the annals of man. Brandeis had found a mission; he was a militant champion of democracy, anxious to spread his opinions upon the record and certain of the ultimate outcome. Stone had found an exciting workshop; he was a scientist, intent upon finding out, and concerned to explore rather than to reform. He was able to impose a discipline upon his personal preferences and willing to allow the causes themselves to dictate his conclusions. But unlike them Cardozo could not meet such a situation as a pioneer adventure. Matters on which the Court divided were often water which had already passed under his bridge. He wanted to carry on from where he had left off at Albany. Yet he was asked to turn back the clock; to refight against unreasonable opposition old battles; to keep alive doc-

without a concrete excuse, to break in on his busy-ness; yet he would gently complain, by the word of a mutual friend, that you had not been in to see him.
trines which he regarded as ghosts. He was by character and experience one who worked with the group. In his old court, free as was the expression of opinion, there had been no cleavage down the bench which persisted with the years. A separate utterance now and then by one who could not go along only served to throw into sharp relief the common accord. In his sixties high office and circumstance imposed upon Cardozo the novel role of dissenter.

A term of six years is short as tenure goes. Only Moody and the elder Lamar have within so short a period made a bid for eminence. Cardozo's opportunity was scant; he welcomed only one new colleague to the inner circle; until within half a year of the end he remained the junior justice. Yet he could hardly have turned his years to fuller account; he handled far more than his share of the ordinary work of litigation, and because of his eminence his assignments were rather better than a novice might expect. In minor matters he was free to speak, almost without restraint, for his court; and, in a sample of opinion selected almost at random, is evident the touch which gives identity to the distinctive craft. The president of a bankrupt corporation seeks to evade an order for a summary return of properties appropriated on the ground that "the general description" is not "an inventory of items." Cardozo retorts that "words are symbols" whose "significance varies with the knowledge and experience of the mind receiving them." "How many identifying tokens we are to exact the reason and common sense of the situation must tell us." He is called upon gracefully to reverse an opinion of Holmes that the duty of a motorist at a grade crossing is to dismount and make observations. He makes his bow to his predecessor's dictum, takes the sting out of the text with a gloss, and sets it down that "to get out of a vehicle and reconnoitre" is "very likely to be futile and sometimes even dangerous." By the time the driver "regains his seat and sets his car in motion the hidden

37 It was not the retracing of specific steps that troubled Cardozo, for the new problems were different in their sweep. Probably he regretted leaving the role of trail-blazer for an all but baffling attempt to bring about at Washington a judicial attitude resembling that to which his labors has brought the Court at Albany. Before his old court time and again had appeared causes whose concern was workmen's compensation, labor standards, trade union activities, the regulation of securities, civil liberties, unfair competition, the conduct of administrative tribunals and the police power in general. In such matters Cardozo himself often spoke for his court. The instances are far too numerous to justify a catalogue here. The interested reader can readily explore the matter for himself in the New York reports.

38 It is ominous that, although he tried to avoid it, his first opinion as a member of the United States Supreme Court had to be a dissent. See Coombes v. Getz, 285 U.S. 434 (1932).


train may be upon him.” A bit of practical experience with an automobile has ripened into a rule of law. A suit for infringement, and a prayer for an accounting is pending when the federal income tax first goes into effect. In 1924, some thirteen years later, a decree awards the profits of the infringer to the lawful owner of the patent. Although the bulk of the sum accrues before 1913, the United States levies its tax upon the full amount and the tax-payer sues to recover. Cardozo can discover no “property” which has “an ascertainable value” as of March 1, 1913. The amount—accruing when litigation has run its course—is not “capital”; it is income for “within the meaning of the Sixteenth Amendment” income “is the fruit that is born of capital, not the potency of fruition.”

A challenge of an act of Georgia providing for the regulation of private motor carriers is refused. The Court will not consider the constitutionality of the statute until the meaning and validity of its clauses have been passed upon by the highest court of the state. In the absence of “its construction and application of a local law,” we “are deprived of an important aid to the nice performance of our duties,” and to us “the need for forbearance is commanding.” After all “this court is a court of review and limits the exercise of its jurisdiction in accordance with its function.” As the months passed Cardozo came to be almost a regular spokesman upon matters of process and jurisdiction. A case—involving a national bank, the demand for a money judgment, and the circumstances of the depression—is in the offing. The issue is of little inherent consequence, yet the decision is made to reach to the fundamentals of the institution of litigation. “To define broadly and in the abstract” a case arising under the Constitution or laws of the United States demands “something of that common sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation.” One could “carry the search for causes backward, almost without end”; but bounds must be set to the pursuit and “a selective process picks the substantial causes out of the web and lays the other ones aside.”

All law is public law; but at Washington Cardozo had more formal concern with policy than at Albany. He sometimes spoke for the Court when advances were made in minor salients; in matters of significance

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he was more likely to be heard in dissent. But the years have their way even with solemn pronouncements upon the Constitution; and at this moment of hurried transition no one can certainly say that his personal opinion is less the law than that set down as "of the court." Here political theory, the realities of industry, and the values of public policy all have their due; and the social implications of his technology have ripened into a philosophy to direct it. He speaks for the court in the regulation of railways, the valuation of utilities, the imposition of fiduciary obligations upon those who handle other people's money, the fortification of the sources of revenue against the tax-dodger, the relation of the administrative commission to the courts.

Among a multitude of causes civil liberty seems of most concern to him. In according to the rights of man the protection of the Fourteenth Amendment, he helps to write a new chapter in the history of due process. When another speaks for the Court—as when a denial of justice entitles "the Scottsboro boys" to a new trial—he goes along. When it is held that no privilege of a citizen is being invaded by compulsory military training in a land grant college, he concurs. "A different doctrine would carry us to lengths that have never yet been dreamed of." But he finds it expedient to add a word to make it clear that "religious liberty" is by the Fourteenth Amendment protected against invasion by the states. And when the Court refuses to allow a hearing to a negro convicted of sedition under a Georgia statute drawn from moth balls, he is sharp in dissent. The question is, "will men judging in calmness" say that "the defendant's conduct" was "an attempt to stir up revolution through the power of his persuasion"? And if so, "will the Constitution of the United States uphold a reading of the statute that will lead to that response?" To these questions, upon which life or death depends the defendant

45 It is often forgotten that the initial attempt to blow the breath of life into the Fourteenth Amendment was on behalf of the rights of man. See the briefs of ex-Justice John A. Campbell in the Slaughter House Cases, 16 Wall. (U.S.) 36 (1873). The briefs are on record in the Library of Congress.


47 Hamilton v. University of California, 293 U.S. 245, 265-268 (1935). An incident on the side-lines of the decision throws a light upon a facet of Cardozo's character. At a small dinner, at which Mr. Cardozo was present, the conversation turned to liberty, and there was much talk about how the very concrete liberties of the later middle ages had, under the stress of political circumstance, been hammered into an abstract imponderable called "liberty." As Mr. Cardozo was going, he remarked, "Watch my next opinion." It was there. In arguing that the privilege in question was not within the heritage of religious liberty delivered by the First Amendment to the Fourteenth, Cardozo disposed of the issue: "In controversies of this order courts do not concern themselves with matters of legislative policy unrelated to privileges or liberties secured by the organic law." Ibid. 266.
"should receive an answer."\textsuperscript{48} Nothing is Cardozo more conscious of what he does. In the name of "the organic law," he is fitting out the Fourteenth Amendment with the sanctions of the First.

It was, however, in respect to the New Deal cases that Cardozo did his most distinctive work. He nowhere expresses an approval of measures, for they involved choice of policies and their accommodation to the changing circumstances of the country—that does not pertain to his office. But he is aware of the depression, recognizes the national economy, knows that the secret of the industrial order evades us, is convinced of the necessity of trial and error, and is unwilling to deny to the government the power to govern. The course of the Court presents a graphic cycle of shifting attitude. In 1934 it was willing to allow remedial legislation to take its course;\textsuperscript{49} by the beginning of the next year, still timid in the face of the emergency, it was using procedural devices against federal statutes.\textsuperscript{50} But the defects of an improper delegation of power—a doctrine incontinently hurried into action—could be cured by the legislature. All during the spring of 1935, it was nip and tuck,\textsuperscript{51}—with the judicial frown becoming apparent as the brethren moved from procedure to substance to strike down railway retirement\textsuperscript{52} and the industrial codes.\textsuperscript{53} By the winter the Court was ready to pass the death sentence upon the Agricultural Adjustment Act;\textsuperscript{54} and in the spring of 1936 it laid on with abandon against all social legislation, state and national.\textsuperscript{55} In effect it invited into

\textsuperscript{48} Herndon v. Georgia, 295 U.S. 441, 455 (1935). After further litigation the matter again came before the Court. Herndon v. Lowry, 301 U.S. 242 (1937), and the conviction under the ancient statute was set aside.


\textsuperscript{50} Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

\textsuperscript{51} There is no royal road to an easy critique. To catch the atmosphere, to note the manner of work, and to watch the decisions emerge, the reader must turn the pages of the Reports. Note especially Norman v. Baltimore and Ohio R.R., 294 U.S., 240, 317, 333 (1935); Nashville, Chattanooga and St. Louis Ry. v. Walters, 294 U.S. 405 (1935); Baldwin v. Seelig, 294 U.S. 511 (1935); Standard Dry Goods Co. v. Lewis, 294 U.S. 560 (1935); and Senior v. Braden, 295 U.S. 422 (1935).


\textsuperscript{54} United States v. Butler, 297 U.S. 1 (1936).

\textsuperscript{55} Again there is no substitute for recourse to the Reports. See especially Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251, 266 (1936); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936); Jones v. Securities and Exchange Commission, 298 U.S. 1 (1936); Carter v. Carter Coal Co., 298 U.S. 238 (1936); Ashton v. Cameron County Water Import District, No. 1, 298 U.S. 513 (1936); and Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).
court parties to whom legislation was disagreeable, touched off the late epidemic of "the higher lawlessness," and threatened to paralyze the activities of government. Men must be stirred deeply to indulge in conduct such as this; and the opinions of the Court stemmed from sources far more compelling than any law of the Constitution. In an unreasoning fear of the President's power the thought of Hughes strayed far from its familiar moorings; the ghost of an imaginary fascism appeared for a time to deflect Brandeis from his orbit; and even Stone faltered and went with the majority in the hot-oil case.

But a vacillation unto indignation was not for Cardozo. As a lawyer and a judge, he maintained throughout the even temper of his ways. He kept his vision keen and true and refused to allow constitutional issues to be muddled by seeing things at night. He made no distinction between the right of the state to fix prices, when the issue was up in 1934 and when it was up in 1936. Nor could he discover within the supreme law a sanction which made price-fixing valid in respect to milk and invalid in respect to labor.56 He could not follow the delicate distinction between remedy and prevention which sanctioned a legislative moratorium on the farmer's mortgage and condemned an act of Congress intended to put his feet in the way of solvency. And yet to validate the moratorium the injunction against impairing the obligation of contract had to be explained away and to strike down the AAA an esoteric rabbit had to be juggled out of the taxation clause.57 In the hot-oil case Cardozo saw that the decision was out of step with the growth of government by commission and the march of constitutional doctrine.58 He had "no fear that the nation will drift from its ancient moorings as a result of the narrow delegation of power." In the NRA case he clearly perceived that "the industries of the country are too many and too diverse for Congress to set up definite standards for regulation."59 In respect to coal he insisted that there was nothing sacred about a "free competition" that does not work and that "the liberty protected by the Fifth Amendment does not include the right to persist in this anarchic riot."60

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. By 1937 the cycle had run its course; judges recovered, as if by a miracle, their judicial poise; and, before a single change had been effected in its membership, the Court proceeded to smother its backward-looking decisions beneath more human entries. A body of constitutional doctrine, lately overlooked or relegated to dissent, was rediscovered. A minimum wage, long kept waiting by the act of God and a majority of one, was brought into accord with the higher law. The ground lost to federal power was regained with substantial additions in a series of decisions asserting the authority of the nation in the field of industrial relations and collective bargaining. Cardozo himself spoke for the Court in putting the stamp of the Constitution upon an act of Congress designed to bring "social security" to the American people. The law reports will be searched in vain for an instance in which a court has so speedily and completely vindicated the opinions of a brother spoken in dissent.

One must not endow Cardozo's work with the superhuman touch or take from him the quality of human frailty. He bought his own knowledge with experience. His facile rhetoric hides many an argument that does not click or marches to a wrong conclusion. The specialist in contract, or tort, or property can point to many a blemish upon his work. He could meet the problems of turbulent times with only such an understanding as he possessed. In rate cases his skill falters; items which add up to valuation are passed in review with none too critical an eye. A disposition to accept without question the entries of the companies represents a presumption, indigenous to the criminal law, but strangely alien to the purposive accountancy of big business. As a member of the court he fumbles with the realities of the milk industry. The prevailing scheme

61 In 1935 and 1936 as much constitutional law was lost as was made. In 1937 the lost was retrieved. A beautiful essay can be done in comparing the citations in the opinion of the court and in dissent in Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936) with those in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), or in Carter v. Carter Coal Co., 298 U.S. 238 (1936) with National Labor Relations Board v. Jones and Laughlin Steel Co., 301 U.S. 1 (1937).

62 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).


65 For example see West Ohio Gas Co. v. Public Utilities Committee of Ohio, 294 U.S. 63 (1935). Stone's concurring opinion, ibid., 77 presents a far closer approach to realism.
of arrangements is strongly at variance alike to the free competition which McReynolds wished to preserve and the open market which Roberts wanted the state to help over the hard places. 66 Cardozo's wisdom fell before the enigma of the milk-shed. He declared invalid, as infringing the domain of inter-state commerce, a section of the New York act fixing prices paid to producers outside the state for milk sold within it. 67 Yet the power of the municipality to inspect pays no regard to state lines; and the effect of his decision was to leave the farmer within the commonwealth helpless as to price.

He failed the cause of civil liberty in respect to the vote of the black man. In Texas, where a single party makes of the primary an election, the legislature said that the Negro could not vote in the choice of Democratic candidates. The Court, through Holmes, invalidated the act in the name of the Fourteenth Amendment. 68 Next a statute of the state conferred upon the party the right to fix its own qualifications. The party excluded the negro and the Court, through Cardozo, struck down the arrangement. 69 Finally the state repealed its legislation and the party, quite uninstructed, arranged suffrage to its liking. Then the Court, through Roberts, found the party to be a private club, denied that its act was the act of the state, and put the issue beyond the reach of the higher law. 70 Cardozo was silent; yet, if a compelling argument was not at hand, germs of doctrine might have been set down in a dissent. 71 The result is that the protection accorded the negro's vote by the Fifteenth Amendment is conditional; the state must not formally abridge it but may filch it away by indirection.

A judge who has discovered verity can make no such mistakes; he can flaunt no such shortcomings. In spite of flaw, frailty and failure to rise to the occasion Cardozo is still Cardozo. For to him law is no revelation immune to growth through knowledge and experience.


71 It may be that a compelling constitutional argument could not be contrived. But all great principles spring from germs of doctrine; and, in current legal and political thought, enough was at hand for an arresting dissent. For evidence see "Should Negroes Vote," in 83 New Republic 356 (1935); and "Black Justice," 140 Nation 497 (1935).
Thus for us Cardozo takes his place in the great tradition. If our judgment comes to endure, his work entitles him to rank with Holt and Mansfield, Gibson and Shaw and Cooley, Marshall, Taney and Brandeis. They are alike in making the law the instrument of justice; the craft of each reflects the manner of the man. In all else Cardozo is as unlike them as they are to each other. Marshall was the great theologian, at home with truth, proclaiming an ultimate dogma. Cardozo is the inquisitive scientist, putting himself to no end of bother, and setting down the tentative hypothesis. A Marshall in cathedral tones lays down the eternal verities; a Cardozo can only set down in its finiteness the best of his understanding. Marshall was a belated product of the age of reason; Cardozo, an advance prophet of an era of inquiry.

Even in such a company Cardozo has distinction. From his law the ghost of theology has vanished and the spirit of trial and error has come to the aid of logic. His craft is rarely more than the servant of justice; it is only when it escapes his control that it becomes the master. Fact, value, the-difference-it-will-make are at hand to define legal concept, to take rigidity from formula, and to direct technical argument. An ordinary judge often rises to the heights in a great case; it takes the great jurist to achieve the significant result through a scattering of ordinary cases. Yet even when confronted by petty causes Cardozo does not descend to clerk's law; he is the artist in miniature as well as in masterpiece. Only Holmes is his equal in suiting his words to the very life of his ideas. In the exercise of his calling a great judge may be a man of letters; Cardozo elevates the jurist's craft to a fine art. We owe it to Holmes and to Cardozo that in the law journals, almost alone among learned periodicals, literacy is still respectable.

We cannot, however, assign to Cardozo his exact place in the great tradition. The entries are too fresh for time to give its perspective. In the long run it is not what is, but what is made of it, that counts. In law, as in all human creation, the present turns what is gone to its own account. As age has given way to changing age, each in its turn has managed to make the Bible a contemporary document. The God of Holy Writ has donned the robes of Prince of Peace, Lord of Hosts, Lord and Proprietor of the Universe. And shorn of the last sheet of his anthropomorphic being he has made a twentieth century appearance as the spiritual version of the mechanistic law of cause and effect. A common text alone identifies the Bard of Avon with the Shakespeare we know; between our eyes and the words lie three centuries of social change, the thick
crust of a cloistered pedantry, and the intoned lines of the grand manner. The King James version, as much English as Bible, is father to the Homeric idiom most of us know; Plato speaks to us as Victorians with the accent of Jowett; and Adam Smith proclaims economic verity in the tones of a Liberty Leaguer. Malthus was no Malthusian; Karl Marx wrote in a tongue unknown to current Marxists.

The law can claim no immunity from a common frailty. In its discipline vested words forever take on fresh meaning. Magna Carta was fashioned as a seventeenth century expediency out of a forgotten feudal document. If the Stuart Kings were to be defied, conscience had to be appeased with an ancient sanction. William Blackstone’s Tory commentaries on the law of England became the Bible of the profession to judges in the American democracy. Writings live, not by reason of the worth inherent in them, but because of their accord with interests which later come to prevail. The great mass of polemic is consigned to oblivion; the few that are saved—pamphlets, treatises, precedents—are remade to wear the livery of a later master. The words of the jurist who is gone are lifted from their occasions; meanings not in his mind make their homes in his sentences; rules are shunted from pristine purpose into alien servitudes. The gloss usurps the place of the text. As a judge's utterances ripen into precedent, he is accounted petty or great, not for what he said, but for the values with which tradition has endowed his words.

If an institution is to live, it must continue to renew its youth. The law, steeped in precedent and heavy with ritual, has never found it easy to slough off the obsolete and to make way for novelty. With a look ahead—and without a break with the past—it must be kept an enduring instrument of justice. Cardozo was concerned, within the ambit of his influence, to make articulate the awakening impulses of the age in which he lived. It is enough that to him the law was, not a brooding omnipresence in the skies, but the living law.