JUSTICE CARDOZO: SOCIOLOGICAL JURISPRUDENCE
IN THEORY AND PRACTICE

by

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STATEMENT BY AUTHOR

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INTRODUCTION

Benjamin Nathan Cardozo was born in New York City in 1870. A precocious youth, he showed an early interest in books and ideas. By 1889, at the age of nineteen, Cardozo had received his A.B. degree from Columbia University, graduating with highest honors in Greek and political economy. As an undergraduate he had also been chosen a member of Phi Beta Kappa scholarship society.

Cardozo spent another year at Columbia and earned a master's degree. He went on two more years to the study of law. In 1891 he was admitted to the New York State Bar and entered private law practice.

In his general practice Cardozo became known as an able and scrupulous lawyer. He had a deep knowledge of legal principles and precedents. His arguments before the appellate courts brought him to the attention of bench and bar. In 1913 Cardozo was elected a Justice of the Supreme Court of New York County, running on an Independent-Democratic ticket. He had served one month when a vacancy occurred on the Court of Appeals, the highest state court.

Governor Glynn asked the judges of the Court of Appeals their choice of a temporary appointee to fill the vacancy. Unanimously they chose Cardozo, and repeated their request when the hesitant Governor noted Cardozo's inexperience as an appellate judge. Glynn gave Cardozo the temporary appointment as an Associate Justice.
In 1917, Governor Whitman appointed Cardozo a permanent Justice in the Court of Appeals when a vacancy again occurred. In the autumn of the same year, Cardozo was endorsed by both major political parties and was elected to another full term as permanent Justice.

By 1926 Cardozo's prestige was such that his brethren of both parties elevated him to the position of Chief Judge of the most important state court in the nation. In form as well as in fact, the Court of Appeals was now "Cardozo's Court." The force of his personality and the persuasiveness of his arguments had, for a long time, guided the Court's direction.

When Justice Holmes resigned from the United States Supreme Court in 1932, a worthy successor was sought to fill the position. Because of the persistent efforts of those on the bench familiar with the quality of Cardozo's work, President Hoover reluctantly nominated him as Holmes' replacement.

Thus Cardozo was elevated to the highest Court of the land to fill the position left by one of history's great judges—the one Justice whose work Cardozo admired over that of any other. Cardozo proved to be a fitting replacement for the Olympian. He carried forward the pragmatic tradition of Holmes and in his own manner proved an effective spokesman for the Holmsian position on "judicial self-restraint."

Cardozo's untimely death in 1938 spelled a loss to American jurisprudence. A nation by now familiar with Cardozo's work and cognizant of his stature "mourned his loss and paid him tribute, not only in admiration
for his character, but in affection for his great spirit."

His mastery of the English language makes Cardozo's writings and opinions artful and persuasive conveyers of his ideas. He always had the proper phrase or the appropriate analogy at hand with which to communicate a thought. One admirer of Cardozo has said: "The graciousness that Emerson breathed into American literature, Cardozo breathed into American law."^2

Cardozo's accomplishments in the field of law are noteworthy. He was an articulate exponent of the sociological jurisprudence of Dean Pound and others. In his lectures on the judicial process^3 he did his share in exploding the fiction that judicial decisions are the inevitable outcome of a mechanical process, perfect and unvarying in its workings.

Others before Cardozo had emphasized the public law aspects of sociological jurisprudence and juristic pragmatism. It was Cardozo's unique contribution to sociological jurisprudence that he related its methods to private law, especially in the area of torts. Cardozo revealed that in all areas of judicial law-making, the process is essentially the same.

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However, the scope of this study will not include Cardozo's concern with private law matters. The inquiry is confined to his very impressive contributions in the field of public law—that area of law involving the relationship between the individual and his government.

The object of my investigation will be to determine the extent to which Cardozo's judicial opinions reflect the doctrines he expounds in his writings on the judicial process. The problem is one of consistency. Does Cardozo, as a judge, follow the postulates of the judicial theory he outlines in his writings?

The thesis is divided into four chapters. The first is devoted to a survey of the tradition of sociological jurisprudence—its development, basic doctrines, and characteristic emphases. The second chapter deals with the main themes of thought in Cardozo's writings concerning sociological jurisprudence. The third chapter considers Cardozo's judicial activity in public law cases, as reflected in his opinions and dissents. The concluding chapter compares Cardozo the judge with Cardozo the theorist to ascertain in what degree the one is consistent with the other.
In the first three decades of the twentieth century, a group of American scholars and judges blazed new trails in American legal thought. This group, including Holmes, Frank, Pound, Brandeis, and Cardozo, rejected traditional, formalistic tendencies in the study of jurisprudence and insisted that the legal rule is not "found" by the judge—rather, it is created by him. The legal rule, they insisted, does not exist a priori in some eternal realm of essences, only to be discovered and applied to the controversy at hand by unimaginative judges performing a mechanistic function. Law is not dictated by the mind of God or reflected in the immutable laws of nature or history or economics or sociology but is created in response to a social need. Law is created by judges, who, like other human beings, are victims of preference and even prejudice.

This movement, labeled "sociological jurisprudence" by one of its leading spokesmen, Roscoe Pound, considered problems of law from the standpoint of the social process and deserted the traditional logic of certainties for the pragmatic logic of effects and probabilities. From one wing of this movement—that typified by Roscoe Pound—Benjamin Cardozo draws special inspiration and guidance. For a better understanding of Cardozo's thought, we will first survey the various emphases and a tradition which he inherits and further develops.
Jhering and Ehrlich

Sociological jurisprudence did not spring full-grown onto the American scene. It had European antecedents which anticipated later developments in the United States. Many names could be cited as important in the European context, but those of Rudolph von Jhering and Eugen Ehrlich deserve special mention. Jhering, born in 1818 and living at a time when Hegelian idealism was at its peak of influence, rejected the approach of the historical school. Jhering did not accept the idea that law is the product of unconscious, silently operating historical forces in which individual effort is insignificant.¹ In the preface to his Law as a Means to an End, Jhering tells us that "the fundamental idea of the present work consists in the thought that purpose is the creator of the entire law; that there is no legal rule which does not owe its origin to a purpose, i.e., to a practical motive."²

To Eugen Ehrlich, living in the latter half of the nineteenth century, the significance of law, as with Jhering, depends a great deal upon those persons responsible for its application:

The administration of justice has always contained a personal element. In all ages, social, political, and cultural movements have necessarily exerted an influence on it; but whether any individual jurist yields more or less to such influences, whether he is more inclined to follow tradition or is rather disposed to


introduce changes and innovations, depends, of course, less on any theory of legal method than on his own personal temperament. 3

Toward the end of the nineteenth century, there was a general movement in American jurisprudence, which tended to study law as a man-created institution and to measure its significance in terms of effects. This development borrowed much from ideas on the continent. However, a greater impetus to this change in attitude was derived from the American philosophical method of pragmatism.

Praagmatism and Instrumentalism

Praagmatism owes its inception as a philosophical doctrine in the 1870's to Charles Saunders Pierce. Pierce later dubbed his method "pragmaticism," a word "ugly enough to be safe from kidnappers . . . ." 4 However, the name "pragmatism" became used in popular expression, in spite of Pierce's attempts to distinguish his doctrine from that of others.

The pragmatic method was subsequently applied to problems of valuation by William James and to social controversies by John Dewey, who preferred to call it "instrumentalism," suggesting, as he believed, that philosophy and its concepts have value only as instruments for resolving social tensions or conflicts.

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The pragmatic maxim of Pierce was, in essence, that our concept of an idea lies in knowing the effects of its application or verification. Restated by James, the pragmatic maxim reads: "The truth of an idea is not a stagnant property inherent in it. Truth happens to an idea. It becomes true, is made true by events. Its verity is in fact an event, a process; the process namely of its verification. Its validity is the process of its validation." Thus, the meaning of a maxim, a belief, or a practice lies in the consequences of its being adopted. A method rather than a system, pragmatism looks to the functions, operations, and effects of an idea or principle and upon this basis determines its value or "truth", as James would prefer to say. Absolute validity is felt to be illusory and removed from human affairs. We gain the truth that we can for today from today's experience. James said:

A pragmatist turns his back resolutely and once for all upon a lot of inveterate habits dear to professional philosophers. He turns away from abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards action and towards power.

John Dewey's "instrumentalism" maintained that the function of philosophy is to facilitate the application of ideas as instruments to the progress of society. "Law, religion, government, art, science," he

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says;"... receive meaning not from what they are but from what they accomplish. They are neither the first things in life nor the last; they are only its ways and means." In Dewey's method, human intelligence would be freed to experiment with ideas in the solving of social problems. Hypotheses would be tested by the consequences of their adoption. Human intelligence, he feels, should not be fettered by theories of prior truth, which allow the mind only to report things as they are and to conform to them.

Holmes

Oliver Wendell Holmes, Jr., who served on the United States Supreme Court during the first three decades of the twentieth century, adopted the method of the pragmatists and applied it to problems of the law. Never really a reformer in his social and economic philosophy, Holmes was hailed by political progressives for his use of the pragmatic method in revealing the secrets of a judicial function which, at the time, was acting in a very unprogressive manner.

Judicial logic, Holmes maintained, is not a matter of discovering a pre-existing rule and applying it to the case in hand. It is not this simple, he felt, because logical certainty is usually false certainty. "Behind the logical form," Holmes said, "lies a judgment as to the relative worth and importance of competing grounds, often an inarticulate


and unconscious judgment, it is true, yet the very root and nerve of the proceeding. You can always give any conclusion a logical form. 10

Holmes went on to interpret law, not as an absolute, fixed system, but as a probability. In practical everyday usage, one wants "to know what the courts are likely to do in fact . . . The prophecies of what the courts will do in fact," Holmes said, "are what I mean by law." 11

"The law is a prophecy of what the courts will do," but Holmes did not mean to imply by this that the courts have license to do whatever strikes their fancy. He was an outspoken critic of "judicial activism" and candidly opposed the judicial practice of reading personal economic and political theories into the meaning of the Constitution. In Lochner v. New York, Holmes informed the majority that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." 12 Holmes did recognize, however, that, because of statutory or constitutional ambiguity or silence concerning the meaning of the law in a specific situation, there arise "interstices" in the law which must be dealt with by judicial legislation. 13 The courts are free within these limits.

11 Ibid.
13 See Southern Pacific Co. v. Jensen, 244 U.S. 205, 221.
The Realists

The realist or "neo-realist" wing of the sociological school has taken certain of Holmes' revelations concerning judicial decision-making and given them a new emphasis. The realists are mainly concerned with law and the judicial process as they exist. They put little emphasis on what law should do.

Holmes pointed out that unconscious factors to a great degree determine the outcome of a judicial decision. Emphasizing subjective factors as an influence on what judges actually do in deciding a case, as opposed to what they say they do in written opinions, one realist, Jerome Frank, studies psychological influences on the decisions of judges. He concludes that legal principles are nothing more than the end-result of a search for a "father authority." Another realist, Charles Grove Haines, takes the position that constitutional law has resulted from "human forces in which the personality of judges, their education, associations, and individual views are of prime importance."  

Some extreme nominalists in the left-wing of the movement, building upon Holmes' statement of law as "prophecies," will not admit the existence of legal rules. Joseph Bingham, Jr., in his attack upon the

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16Haines, p. 96.
"generalization of law," feels that legal rules cannot hope to have continuity or consistency as it is impossible for two persons to hold the same idea . . . . The two might have a similar mental state, but it could not be said that they had the same idea. Certainly it could not be said that it had any existence of its own.\textsuperscript{17} Given Bingham's nominalism, the legal rule becomes a "puff of air" which disappears as soon as it is uttered, and law can only be a particular decision by a particular judge at a particular moment in time.

Others within the sociological school, while rejecting absolutes in law, are not willing to give up the possibility (and necessity) of a rule of law. They acknowledge the necessity for studying what the judicial process does do. However, they are more concerned with using this knowledge of the workings of law and judges in a formulation of what the judicial process should do. Among these members appear the names of Dean Roscoe Pound, Louis Brandeis, and the subject of this study, Benjamin Cardozo.

\textbf{Pound}

From his strategic position as Dean of the Harvard Law School, Roscoe Pound began, as early as 1911, to expound the new jurisprudence. Incorporating some of the insights of European thinkers like Ehrlich\textsuperscript{18} and Jhering with the method of pragmatism as presented by James, Dewey,

\footnote{\textsuperscript{17}Cahill, pp. 102,103}

\footnote{\textsuperscript{18}In his \textit{Jurisprudence}, (St. Paul: West Pub. Co., 1959) vol. I, p. 334, Pound says, "Eugen Ehrlich . . . calls for special notice. In spite of certain defects often pointed out, his \textit{Grundelung der Soziologie des Rechts} is one of the outstanding books of this generation."}
and Holmes, Pound studied the law both as a reflection of and as a factor acting upon various competing interests within our society. Pound, like the realists, is intent upon pointing out what he conceives to be the true nature of the judicial process; and he thinks an explanation of how law and judges function is necessary to a mature jurisprudence. However, he does not condone the "scientism" of the realists.\(^\text{19}\) nor accept a definition of law as statements of what courts rule in particular. Pound allows legal rules both an existence and a utility.

In company with the realists, on the other hand, Pound rejects traditional views that "law cannot be made; that it may only be found, and that the process of finding it is a matter purely of observation and logic, involving no creative element";\(^\text{20}\) or, in the words of Blackstone, that upon the "law of nature and the law of revelation depend all human laws."\(^\text{21}\) Bentham's claim that all law can be reduced to a code is unnecessarily optimistic; and Austin's strict "separation of powers,"\(^\text{22}\) which would relegate the judge to the position of an administrator, is the same kind of nonsense. Neither does Pound accept the view of historicism which conceives of law as directed by the "internal silently-

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\(^{21}\)W. Friedman, Legal Theory (London: Stevens and Sons Ltd., 1953) p. 54, from Blackstone, Commentaries II, pp. 41-43.

\(^{22}\)Cahill, p. 76 n. quotes Pound, The Formative Era in American Law (Boston: Peter Smith, 1938) p. 111, showing Pound's rejection of analytical concepts.
operating powers of history. Law is no more and no less than a creation of man in an effort to deal with his social problems. Given this premise, the judge must realize the true nature of his function and be aware of the effects of his action. The judge should not think of the law as an inflexible, closed order, nor his action in applying legal rules merely submissive. He should, says Pound, become a "social engineer," who, aware of the societal basis of law and informed of its effects in the social order, can legislate within Holmes' "interstitial" limits in accordance with societal needs.

The theory of "social engineering" pragmatically conceives of law as an emerging instrument in a growing society. Pound's position is that law is the product of a social demand and that the value of any legal rule is to be measured by how well it satisfies that demand.

"What we are seeking to do and must do in a civilized society," Pound says, "is to adjust relations and order conduct in a world in which the goods of existence, the scope of free activity, and the objects on which to exert free activity are limited, and the demands upon those goods and those objects are infinite." The very purpose of the law, after the method of the pragmatists, is adjustment. Given these premises, the law student should know "not only what courts decide, but quite as much the

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circumstances and conditions, social and economic, to which these principles are to be applied . . . 25

Brandeis

If ever a student of the law was deserving of Pound's admiration, it was the ex-corporation attorney, Louis D. Brandeis, who, in the Oregon Cases26 established his reputation as a liberal lawyer with the introduction of a revolutionary briefing technique. The "Brandeis Brief" did not rely on the pedantry of legal logic and the authority of precedent to uphold social legislation charged with unconstitutionality. Instead, the brief presented social statistics showing that the effect of the law was to deal effectively with the social conditions to which it was directed.

"'Nobody can form a judgment . . . worth having,' he had declared in 1915, 'without a fairly detailed and intimate knowledge of the facts.'"27 Brandeis practiced what he preached. In Muller v. Oregon, in which a statute regulating the hours of women working in factories was challenged, Brandeis confronted the Court with ten pages of legal argument and 102 pages of sociological, physiological, psychological, and economic data.


supporting the statute. In 1917 an Oregon minimum hour law for all workers in industry came before the Supreme Court and was sustained. This time Brandeis' brief for the statute included three pages of legal argument and 390 pages of sociological data. The Muller and Stettler decisions set the stage for upholding another Oregon law guaranteeing a ten-hour day, with overtime provisions for men in industry.

The "Brandeis Brief" had a great impact on the legal profession. Case after case was presented in this way. When Mr. Brandeis was appointed to the Supreme Court, Professor Frankfurter took over the task. Not all the cases were won, but no competent attorney would now think of arguing this type of case without following the pattern of the "Brandeis Brief." What the "Brandeis Brief" did was to convince the Court by degrees that the validity of social and economic legislation could not be intelligently settled unless one knew the conditions with which it dealt.

The Heritage of Cardozo

We have surveyed various representative expressions of a judicial theory popularly known as "sociological jurisprudence." We can readily see that within the movement we find many variations on a central theme—the function of law and courts as social phenomena. Holmes' pragmatism, Frank's psychology, Bingham's nominalism, Pound's teleology, and Brandeis' briefing techniques emphasize different aspects of sociological jurisprudence. Each variation, in its own way, makes a contribution to the

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32 Cushman, p. 2.
stream of legal thought to which Cardozo is heir. Let us examine Car-
dozo's own expression of sociological jurisprudence, a school of legal
tinking which "became, after the great struggle of 1937, the all but
official doctrine of the court." 33

33Bernard Schwartz, The Supreme Court (New York: Ronald Press,
CHAPTER II

CARDOZO AS THEORIST

Law, Society, and Judicial Creativity

Cardozo, as well as others in the sociological school, rejects the notion that law is an eternal verity, unchanging and immutable in its nature and absolutely certain in its application. In one of his retrospective moments, Cardozo states that a quest for certainty is vain. He says of himself:

I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable.1

To what does Cardozo attribute the uncertainty of law? Law is uncertain because it is inextricably related to the needs, values, and beliefs of society. Law reflects the mores of the times. This does not mean, as the historical school would have it, that law is an unconscious growth determined by the Volksgeist—some mystical agreement of the people, beyond the creative power of individuals. Cardozo's historicism is

is a conceptual tool of explanation, not an irresistible force.\textsuperscript{2} History has influenced the law only in the sense that life, or, more pertinently, the experience of life, has influenced it. For law is a social institution. It is an outgrowth of the constantly evolving society which it, in turn, governs.

Rule by law is an attempt to impose stability, uniformity, and predictability upon the relationship of groups in society. Law arises from the desire to escape nihilism and seeks the assurance of a standard of action that will be acceptable to one's fellow man. Yet, as social relationships change, law must also change. The law must bring about a new "equilibrium of social interests, moral and economic";\textsuperscript{3} it must effect a new adjustment between competing groups. The metamorphosis is constant.

"There are attractions and repulsions between one individual and another, between individuals and groups, and finally between groups themselves. Energies must be released and energies must be curbed. The reconciliation of these opposites is one of the outstanding problems of the law; it is the problem of liberty and government."\textsuperscript{4}

Because law is the product of a society in flux, it is apparent that it cannot be a certain body of knowledge. On the other hand, we can readily see that a concept of law as absolute fluidity would frustrate law's very purpose—that of ordering social relationships. Cardozo

\textsuperscript{2}See Nature, pp. 53, 54, in M.E. Hall, p. 128, where Cardozo quotes Maitland.


\textsuperscript{4}Paradoxes, p. 87, M.E. Hall, p. 306.
recognizes this problem and, in pragmatic fashion, attempts a definition of law which mediates between the extremes of certainty and fluidity. Cardozo's theory of law abandons absolute conceptions, while avoiding the realists' conclusion that law is to be equated with the behavior of the judge. Cardozo feels that realism, or neo-realism, as he prefers to call it, carries a once-healthy scepticism too far. Having purged law of its fixed qualities, the realists have gone on to define law out of existence. Cardozo says:

Now personally I prefer to give the label law to a much larger assembly of social facts than would have that label affixed to them by many of the neo-realists. I find lying around loose, and ready to be embodied into a judgment according to some process of selection to be practiced by a judge, a vast conglomeration of principles and rules and customs and usages and moralities. If these are so established as to justify a prediction with reasonable certainty that they will have the backing of the courts in the event that their authority is challenged, I say they are law . . . . My main objection to narrowing the definition is that in so doing we come near to squeezing law out of existence.

In defining law as a probability, Cardozo gives to legal rules a status which mediates between two distinct competing values inherent in them: one, that law give predictability to human affairs; the other, that law be flexible enough to adjust to new societal relationships as they arise. The definition allows legal rules a permanence devoid of ossification and a stability short of immutability. In short, it allows both predictability and change.


7See Paradoxes, p. 6, in M.E. Hall, p. 254; Paradoxes, p. 10, in M.E. Hall, p. 257.
Cardozo's view of law allows it the flexibility necessary for it to adjust to social change. Yet, while this adjustment is a constant process, it is often slow and disordered in its workings. Cardozo believes that there is need for some agency, the function of which is to consciously guide the growth of legal rules in conformity with social needs. The vital readaptation of the legal corpus to contemporary social conditions becomes the function of courts and judges.

In 1921, Cardozo stated that in a small but important percentage of the cases that come before his court "a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law." In these cases, the judge performs his creative function of adapting legal rules to the swiftly changing relationships they regulate. As we will see below, judicial creativity is not to work in cataclysmic fashion. Cardozo pictures the function as a slow, but constant, remoulding process. But the function must go on, if law and society are to have a correspondence that will afford justice.

Court, Legislature and Constitution

Given Cardozo's claim that judges do and must legislate, we are made aware that (excluding theories of natural law or historicism, where the law of men is merely the reflection of a greater reality) there are several kinds of law within the legal system. There is the law of judges,  

\[1\text{Nature, p. 165, in M.E. Hall, p. 177.}\]
or what has been historically known as the common law; the law of the legislature, or statute; and the higher law of the constitution. Traditional American legal theory would maintain that legislatures, the people's representatives, enact laws which are constitutionally within their competence; that judges apply the law of legislature and constitution to specific controversies; that, in applying that law, judges should seek only to determine the intent of the legislature or drafters of the constitution; that only when statute or constitution is silent should the courts apply the common law; and that, in applying the common law, the practice should be adherence to precedent. How much of this approach does Cardozo accept? What are the limits on the courts' power to pronounce law? What is the status of the court vis-a-vis legislature and constitution within the governmental system?

Where does the judge look for the law which he applies to specific controversies? Cardozo answers,

There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators.⁹

Cardozo would not have judges disregard the law of the legislature or constitution in reaching their determinations. He is respectfully aware of a line dividing the powers of the legislature from those of the courts. "One department of the government may not force upon

another its own standards of propriety ...", he says, and adds, quoting himself, "It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as courts." He calls upon the bar to avoid subjectivity in their declarations and tells the judge that "he may not substitute his own reading for one established by the legislature, acting within constitutional limitations, through the pronouncements of a statute." Again, he says, "When legislature has spoken, and declared one interest superior to another, the judge must subordinate his personal or subjective estimate of value to the estimate thus declared. He may not nullify or pervert a statute because convinced that an erroneous axiology is reflected in its terms."

When the law of the legislature is challenged before the courts as invalid under some rule of the constitution, Cardozo, along with Holmes, is again aware of judicial propriety and indicates a willingness to allow the statute the benefit of the doubt. In judging the constitutionality of legislation, the courts should feel free to look into the working of the statute as a means of informing their decision. However, Cardozo says,

The very need for such inquiry is warning that in default of full disclosure of the facts, there should be submission, rather than

11 Ibid.
12 Paradoxes, p. 55, in M.E. Hall, p. 284.
13 Growth, pp. 94, 95 in M.E. Hall, p. 227.
has sometimes been accorded, to the judgment of lawmakers. The presumption of validity should be more than a pious formula, to be sanctimoniously repeated at the opening of an opinion and forgotten at the end.  

Cardozo indicates his unwillingness to substitute judge-made law for constitutional or statutory law. But he has not said that such declarations should not be supplemented through judicial decision. Cardozo conceives of the function of the common law in a broad sense. We may not infer from his statements indicating a distaste for judicial usurpation of legislative and constitutional authority that the common law is to be used only when a rule to fit the case at hand must be provided in the complete absence of statutory or constitutional pronouncement. The creative application of judge-made law extends into areas other than those where statute and constitution are mute. How does Cardozo defend this position in the face of possible criticism that he is misusing the judicial function, an error which he ostensibly tries to avoid?

Cardozo's call for the creative function of judges working through the common law rests, I believe, on two closely related assumptions: the first, that the meaning of law changes with new combinations of social relationships; the second, that most constitutional and statutory rules are enunciated in general terms (a practice which Cardozo favors) or are ambiguous in their meaning. Thus, while the judge "may not nullify or pervert a statute because convinced that an erroneous axiology is reflected

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1 Paradoxes, p. 125, in M.E. Hall, p. 329. However, Cardozo is quite aware that the last word lies with the courts, and he is quite willing to have them exert their authority when legislation is clearly personal or arbitrary. See Paradoxes, pp. 98, 99, in M.E. Hall, p. 312.
in its terms," he must often supplement the given rule. He must give it meaning and direction through interpretation.

Why does Cardozo feel that courts are better fitted than legislatures to extend, supplement, and readjust the law in line with the needs of society? The answers are found in his belief that the process of adjustment is to be accomplished slowly by agencies in constant touch with the problems of law in its everyday workings; that the rule in the statute books has little meaning apart from its application; and, finally, that the process of adjustment and extension demands a degree of flexibility deficient in the statutory declaration.

Justice is not to be taken by storm. She is to be wooed by slow advances. Substitute statute for decision, and you shift the center of authority, but add no quota of inspired wisdom. If legislation is to take the place of the creative action of the courts, a legislative committee must stand back of us at every session, a sort of supercourt itself. No guarantee is given us that a choice thus made will be wiser than our own, yet its form will give it a rigidity that will make retreat or compromise impossible. We shall be exchanging a process of trial and error at the hands of judges who make it the business of their lives for a process of trial and error at the hands of a legislative committee who will give it such spare moments as they can find amid multifarious demands.  

Cardozo thinks that it is in the best interests of justice that law be stated by constitution and legislature in clear but general terms, giving a statement of value but leaving it to courts to interpret the rule in the light of specific social needs. In 1921, Cardozo argues convincingly for a fact-finding agency to inform court and legislature of each other's needs. "Legislation is needed," Cardozo says,

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16Growth, pp. 133, 134, in M.E. Hall, p. 245.
not to repress the forces through which judge-made law develops, but to stimulate and free them. Often a dozen lines or less will be enough for our deliverance. The rule that is to emancipate is not to imprison in particulars. It is to speak the language of general principles, which, once declared, will be developed and expanded... The judicial process is to be set in motion again, but with a new point of departure, a new impetus and direction. In breaking one set of shackles, we are not to substitute another. We are to set the judges free.\textsuperscript{17}

In summary, we can say of Cardozo that he is conscious of the need for judicial propriety regarding the limits of the judges' power to create law, but he is also deeply conscious of the value of common law as a tool for developing and extending law along those lines of growth that will afford social justice. His respect for the authority of statute and constitution is undoubted; but this should not be construed to mean that he views the judicial function narrowly. His willingness to presume the validity of legislation is not indicative of a feeling that statutes are sacrosanct; it is simply his realization that constitutional meanings vary from age to age, not only for courts, but for legislatures as well. Statute and constitution are important parts, but only parts, of the law which governs society. To expand them to the proportions of a legislative code would be both undesirable and infeasible; first, because of the social injustice of an inflexible command directed to changing circumstances; and second, because this would be futile, for interpretation cannot be circumvented.\textsuperscript{18} It should be emphasized that Cardozo does not conceive of his theory of the judicial process as radical

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\textsuperscript{17}\textit{A Ministry of Justice}," \textit{Harvard Law Review}, XXXV (1921-22) p. 113, in M.E. Hall, p. 361.
\end{flushright}

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\textsuperscript{18}See \textit{Nature}, pp. 14, 16, in M.E. Hall, pp. 110, 111.
\end{flushright}
in nature. The judicial function, insofar as it is legislative in nature, is evolutionary, not revolutionary. "Justice is to be wooed by slow advances," he has said. To the legislature is to be reserved any sudden and far-reaching shift in policy.

The Judge and the Social Welfare

In his considerations of the legal process, Cardozo is principally concerned with the courts' creative function within the area of the common law. In this area, he believes, common law judges have always legislated, consciously or unconsciously, by some process of custom, or precedent, or innovation. The common law rule has always been tested by experience and, if found to be unsatisfactory, has been discarded. The common law "does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars."  

The common law, according to Cardozo, is thought of as an instrument of justice, which will provide a rule where one is lacking and supplement a statute or the constitution within those interstitial limits where interpretation demands innovation. Judges are to evaluate common law rules by their utility. Yet, if pragmatism is "a new name for some

\[19\] Growth, p. 133, in M.E. Hall, p. 245.


old ways of thinking," as James has said, 22 there has been insufficient realization by members of the bench and bar of their duty to calculate the social advantage of legal rules. As Holmes has pointed out, "The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate and often unconscious." 23 It is not the least of Cardozo's contributions that he advocates, in his judicial philosophy, the conscious guidance of the law by the judiciary along lines of growth that will conform to society's needs.

The past has been dominated, Cardozo feels, by an overemphasis on precedent as a guide to judicial decision. Stare decisis, it was assumed, would rid the law of its capricious qualities and result in a better, because more uniform, justice. Ironically enough, Cardozo points out, a too-faithful adherence to precedent has had quite the opposite effect. It has produced an over-emphasis on particulars, obscuring the universal elements in the common law. 24 The result is a choice of precedents so great that the bewildered judge cannot hope to understand the implications of the many alternatives. "An avalanche of decisions by tribunals great and small is producing a situation where a citation of precedent is tending to count for less, and appeal to an informing principle is tending to count for more:" 25 Thus, Cardozo favors the work of


25Ibid.
the American Law Institute, which attempts to restate the law in a fashion that will allow courts to see through the vagaries of precedent to the broad rules of the common law, thereby freeing the law for renewed growth.

However, if the law is not to develop willy-nilly, without direction, it needs more than a restatement from time to time. It needs ends to which it may conform in its development; it needs an objective by which its utility may be measured. There is need of a statement of what the law ought to accomplish in its workings. The end which Cardozo formulates he calls "social welfare" or "social justice." What meaning does he give his term?

Social welfare is a broad term. I use it to cover many concepts more or less allied. It may mean what is commonly spoken of as public policy, the good of the collective body. In such cases, its demands are often those of mere expediency or prudence. It may mean on the other hand the social gain that is wrought by adherence to the standards of right conduct, which find expression in the mores of the community. In such cases, its demands are those of religion or of ethics or of the social sense of justice, whether formulated in creed or system, or immanent in the common mind.

The term "social welfare," with all its lack of precision, indicates a concern with the felt needs of society, as it is viewed at any given time. In the present expectations of the social body is to be found the key to which the law should conform in its workings. "The problem,"

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in the words of Dewey, 'is one of continuous, vital readaptation.'

The end of the law is to regulate human activities in conformity with the needs and desires of the social body. However, the judge still needs techniques of judging. Cardozo has outlined four such methods:

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 historical development; this I will call the method of evolution; 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.

The method of logic or analogy will help keep a consistency in the law, without which it would be capricious and, in many cases, therefore, unjust. Cardozo says,

I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly be some consideration of history or custom or policy or justice. Lacking such a reason I must be logical, just as I must be impartial, and upon like grounds.

The misuse of logic arises when its method and its ends are thought of and used in some absolute sense. Logical consistency cannot be treated as an end-in-itself.

Another guide to judicial decision is the method of history, wherein "the directive force of the precedent may be found in the events that made it what it is, or in some principle which enables it to say of it.

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31Nature, p. 33, in M.E. Hall, p. 118
what it ought to be."³³ By studying the historical use of a rule, the judge can discern to what original purpose it responded and upon that determination decide whether the rule remains valid today.³⁴

If analogy and history do not give direction to the judge, he may find that the method of custom or traditional usage of the rule will give him aid. "General standards of right and duty are established. Custom must determine whether there has been adherence or departure."³⁵

Standing behind all these methods (which often overlap in their application) and determining the extent to which they will be used is the "method of sociology," for, in the final analysis, the law must always respond to the needs of the society which it serves.

Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all . . . . I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.³⁶

The judge impresses upon the law a direction which is not purely automatic. He is seeking an elusive "social justice" which demands that the law conform to the needs of the society which it governs. In the pursuit of this goal, it follows that knowledge of the law with which he works, as well as information concerning the social situations to which

the law is to be applied, are of vital importance to the successful judge.

"Nothing can take the place of rigorous and accurate and profound study of the law as already developed by the wisdom of the past. This is the raw material which we are to mould. Without it, no philosophy will amount to much, any more than a theory of aesthetics will help the sculptor who would mould the statue without the clay." 37

And Cardozo makes it clear that profound study of the law in the record books is not enough, if the judge is to use the law effectively. He tells a graduating class in law, "You will need to know much more than law, or rather till you know many other things not often ranked as law, you will find that law itself is in reality unknown." 38 In applying the law to the end of the social welfare, it is by Brandeis' example that judges should mold their methods. 39 The social welfare cannot be known until the law's functioning is known. The function of the law will not be understood "without the recorded observations, the collected facts and figures, the patient and systematic studies, of scientists and social workers." 40

37 Growth, p. 60, in M.E. Hall, p. 212.


39 Samuel J. Korefsky has said of Brandeis that "He was one of the few in his profession who understood finance as well as law . . . ." See Korefsky, The Legacy of Holmes and Brandeis (New York: The Macmillan Co., 1957) p. 67.

The Relativity of Legal Meanings

We have seen that Cardozo's legal thought is predicated upon the realization that, because of changes in social relationships, law varies in its meaning from age to age. Thus, legal concepts take on a relativity suggestive of Darwinian evolution and reflective of its child, pragmatism. Cardozo's relativism is the admission that, while a "reality that is absolute and unconditioned may exist, . . . man must know it, if at all, through the conditioned and the relative."41 Like Justice Holmes, whom he so deeply admired, Cardozo was not content to let a label or a catchword stand in the way of perceptive analysis. Legal rules and precepts, he believed, vary in their authority and meaning with variations in the circumstances wherein they are applied. "We are tending more and more toward an appreciation of the truth," he said,

that, after all, there are few rules; there are chiefly standards and degrees. It is a question of degree whether I have been negligent. It is a question of degree whether in the use of my own land, I have created a nuisance which may be abated by my neighbor. It is a question of degree whether the law which takes my property and limits my conduct, impairs my liberty unduly.42

We speak of "liberty" and "freedom" and "equality" and "the sanctity of property." Are these rights absolute and unchanging to all generations? For Cardozo's answer, let us turn to his analysis of these terms.

We are familiar with the controversy involving government regulation of private property between the years following the Civil War and

41Growth, p. 46, in M.E. Hall, p. 205.
42Nature, p. 161, in M.E. Hall, pp. 175, 176.
Roosevelt's "Court-packing" battle in the 1930's. Cardozo served on the bench and wrote his extra-judicial commentaries on the judicial process during much of this period. He was keenly aware of the vigorous debate over the meaning of the word "liberty" in the Fifth and Fourteenth Amendments to the United States Constitution. His experience as a judge had taught him that the "due process" clauses of these amendments were used to protect both the "substantive" rights of property and "procedural" rights.

Cardozo claimed that the word "liberty" was at first thought of as absolute and immutable. However, changing social conditions were responsible for a new concept of liberty such as was revealed by Holmes in his Lochner dissent. This new, flexible concept recognized the validity of governmental regulations, except as a fair and rational individual might "admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." Cardozo pointed out that the freedoms contained within the concept "liberty" have new meaning for new generations. "Power might be exercised with brutal indifference to the many when society was organized on a basis of special privilege for the few. Democracy has brought in its wake a new outlook . . . and . . . a new law." Restraints that would have been considered arbitrary in times past may be useful and

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45 Paradoxes, p. 19, in M.E. Hall, p. 262.
rational today. If liberty is exercised with impunity by the strong and unscrupulous, the result may often be a contraction of liberty for the weak and helpless. Because an "excess of liberty contradicts itself," government can actually expand the liberty of the many at the expense of the irresponsible few. Government, through restraint, can guarantee to all parties the equality on which true social liberty depends. This is the case in bargaining between employers and employees for wages and hours and other conditions of employment. "Restrictions, viewed narrowly, may seem to foster inequality. The same restrictions, when viewed broadly, may be seen to be necessary in the long run in order to establish the equality of position between the parties in which liberty of contract begins."47

Thus, in cases involving government control over the property or economic activities of individuals, we might expect Cardozo not to favor absence of restraint as an end-in-itself. Conversely, he would approve of governmental action that fosters the equality on which true liberty depends.

Individual property, like personal liberty, is protected by the Constitution against governmental control. While Cardozo viewed the protection of private property as a recognition of what is self-regarding in the mind of man, he realized that human nature is not selfishness alone. "Judges and lawmakers," he says, "have seen that private property,

46Paradoxes, p. 95, in M.E. Hall, p. 310.

if it is to be moulded in response to human needs, must be the expression of an egoism that is shorn of brutality."\(^{48}\)

Property rights in a more complex industrialized society may be required to take on a new status, and a more modern interpretation recognizes this.

Property, like liberty, though immune under the Constitution from destruction, is not immune from regulation essential for the common good. What that regulation may be, every generation must work out for itself . . . . Men are saying today that property, like every other social institution, has a special function to fulfill. Legislation which destroys the institution is one thing. Legislation which holds it true to its function is quite another.\(^ {49}\)

The judicial problem, as regards the rights of property ownership, is to "learn . . . to distinguish . . . between what is essential in the concept of ownership and so invariable under the constitution, and what is accidental . . . and severable at the call of social needs."\(^ {50}\)

Let us turn from a consideration of problems relating to economic liberty and the rights of property to another area where the problem involves governmental restraint versus individual freedom. Let us turn to Cardozo's discussion of personal liberty, or, more specifically, those freedoms of expression guaranteed in the First Amendment and more recently interpreted to be included within the meaning of the Fourteenth Amendment.\(^ {51}\)

\(^{48}\)Paradoxes, p. 129, in M.E. Hall, p. 331.

\(^{49}\)Nature, p. 87, in M.E. Hall, p. 141.

\(^{50}\)Paradoxes, pp. 131, 132, in M.E. Hall, p. 332.

Cardozo's view of the freedom of the intellect is that it is inexorably related to the successful growth of the personality. The development of the personality, in turn, is predicated upon the opportunity for making intelligent or informed choices. Cardozo says,

"Personal liberty is a poor and shrunken thing, incapable of satisfying our aspirations or our wants, if it does not exact as its minimal requirement that there shall be the maintenance of opportunity for the growth of personality. (Cf. Hobhouse, Social Evolution and Political Theory, p. 199) . . . . There is no freedom without choice, and there is no choice without knowledge, — or none that is not illusory . . . . At the root of all liberty is the liberty to know."

Cardozo goes on to quote Hobhouse in an expression of his own attitude, which indicates a willingness to accept positive government action that will free the individual in the free development of personality.

"The value of liberty . . . is to build up the life of the mind while the value of state control lies in securing the external conditions, including the mutual restraint, whereby the life of the mind is rendered secure . . . . The further development of the state lies in such an extension of public control as makes for the fuller development of the life of the mind."

Positive government activity that secures the free development of the personality and the intellect is considered valid by Cardozo. Government activity that restricts it is not viewed so flexibly. In considering the freedom of expression, the freedom to develop the life of the mind through a free flow of ideas which will inform the choice and make it a truly free choice, Cardozo comes, as close as we will ever find him, to a position that is absolute. In an essay about Justice Holmes, he says:

52Paradoxes, pp. 103, 104, in M.E. Hall, p. 317.

Only in one field is compromise to be excluded, or kept within the narrowest limits. There shall be no compromise of the freedom to think one's thoughts and speak them, except at those extreme borders where thought merges into action. There is to be no compromise here, for thought freely communicated is the indispensable condition of intelligent experimentation, the one test of its validity... Here are goods to be conserved, however great the seeming sacrifice. We may not squander the thought that will be the inheritance of the ages.54

Cardozo qualifies his position somewhat when he explains that the liberty guaranteed to us by the Constitution is not the liberty to act. Rather, it is the liberty to think and speak. Thought and speech in some situations may be considered as action which may be restrained by government.55 However, he says, "If the reading of the balance is doubtful, the presumption in favor of liberty should serve to tilt the beam."56

Cardozo's discussions of liberty and governmental restraint should serve to give us an indication of his attitude concerning not only the relative nature of legal meanings in time and place but of the content he attributed to some of these meanings in his own epoch. In his generation, he believes, governmental control is not in itself an evil. Instead of being a tyranny to be avoided, it can and should (paradoxical though it may seem) expand liberty through restrictive measures. It is to open the avenues of freedom by guaranteeing equality, by allowing the free development of the personality, by holding property responsible to the society which protects the rights of ownership. In only one area is


55See Paradoxes, pp. 112, 113, in M.E. Hall, p. 322.

56Paradoxes, p. 115, in M.E. Hall, p. 323.
governmental restriction of freedom to be kept at an absolute minimum. This is the area, essential to the very function of democracy and pragmatic experimentation, where thought and expression do not merge into action.
CHAPTER III

CARDOZO AS A JUDGE

The Role of Government in the Economic Sphere

Between the 1880's and 1937, a great battle raged in American jurisprudence. The main point of contention was the role of government in the economic sphere. More specifically, the controversy involved such related matters as the extent of governmental control to be allowed over private property; whether government could regulate the relationship between various economic interests; and the extent to which government itself could carry on economic activity.

Those who prospered under the status quo were understandably opposed to governmental interference in economic matters. Their position was reinforced by the teachings of laissez-faire economics, which held that the natural functions of the economic order could not be safely tampered with, lest their harmonious workings be thrown into disorder.

In sociology, progressive legislation was confronted with another argument against change. Spencerian social Darwinism implied that governmental interference with "natural" social relationships would only hinder that progress of society which accompanies the elimination of the weak and the preservation of the strong.

Some believed that God, Himself, had set these natural laws of economic and social development into motion. To tamper with their harmonious workings was therefore felt to be both futile and evil.
These theories of economics and sociology were very compatible with the natural law legal theory inherited by Americans through the English common law. "Natural law" was assumed to have been embodied in the Constitution by the Founding Fathers. From this, it followed that the judicial function was a mechanistic process, wherein the immutable legal rule revealed in the Constitution was to be applied, without discretion, to the case at hand.

The American judiciary—especially the United States Supreme Court—stood as a protector of property against the encroachments of progressive legislation. Hundreds of pieces of social legislation were struck down on the basis that they deprived someone of "property" or "liberty of contract" without "due process of law." Any attempted governmental activity in the economic sphere was met with judicial suspicion and narrow constitutionalism.

In some of the critical years of this controversy, Cardozo served as a Judge on the New York Court of Appeals and the United States Supreme Court. His theory of the proper role of governmental activity was quite different from that of the American judiciary generally. His pragmatic, sociological views were out of harmony with those who felt that positive government action was futile and dangerous because it interfered with some natural order governing human relationships. Yet, his constancy in these matters is impressive. Cardozo's judicial craftsmanship never gives way to mechanistic conceptions, a priori truths, or narrow constitutionalism.
Labor's Right to Organize

In dealing with the legal rights of workingmen, Cardozo's pragmatic judicial philosophy is faced with the task of interpreting constitutional meanings for a nation undergoing a process of rapid industrialization. Since the Civil War, the growth of industry had been rapid. With this growth, the problems of those who manned the instruments of production increased also.

The needs of workers in industry pressed for legal recognition. What was to be the legal status of organized labor? Was it to be treated as "a conspiracy in restraint of trade?" Could labor unions carry on peaceful activities in the furtherance of their own interests? Were peaceful labor activities to be protected by government? These are some of the questions with which Cardozo was confronted during his years on the bench. What was his judicial position regarding them?

Cases involving labor's right to organize:
the New York Court of Appeals

When the legal controversy arose over the right of workers to organize and carry on peaceful activities for the purpose of gaining better conditions of employment, Cardozo recognized, as he had expressed in his writings, that true freedom depends upon essential equality. Workers, he felt, should not be prevented from furthering their own interests by being forbidden their valid and peaceful activities through collective action.
In a 1917 case, Cardozo concurred in an opinion by Judge Andrews which refused to enjoin a union from sending notices to union members and building contractors, urging them not to use woodwork produced by non-union manufacturers.

Ten years later, Cardozo again joined with Andrews in a holding favorable to collective bargaining. This time, the conflict involved "yellow-dog" contracts—contracts imposed as a condition of employment in which laborers promised not to join labor unions. The Court of Appeals refused to enforce such "contracts" and upheld the right of employees to organize, strike, and picket peaceably. In the State of New York this decision accomplished, under common law, what Congress would be unable to do through legislation until 1937.

Other cases in which Cardozo participated gave additional evidence that he was aware of the conditions of workers in an industrial society and would allow law to respond to their needs. In Interborough Rapid Transit Co. v. Lavin and People v. Nixon, he is in a court majority which sanctions the peaceful activities of union members acting to further

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1 Bossert v. Dhu, 221 N.Y. 342 (1917).
3 See Adair v. United States, 208 U.S. 161 (1908) and compare with Virginia Railway Co. v. System Federation No. 40, 300 U.S. 515 (1937). It should also be noted that ten years before the Rifkin decision, the United States Supreme Court had upheld the use of "yellow-dog" contracts in the West Virginia coal fields. See Hitchman Coal Co. v. Mitchell, 245 U.S. 225 (1917).
4 247 N.Y. 65 (1928).
5 248 N.Y. 182 (1928).
their interests. And, in a 1931 case, when the controversy arose between rival labor unions contending for supremacy in a particular industry, Cardozo’s opinion for the majority recognized the right of labor unions to picket each other, distribute pamphlets, and make statements intended to inform laborers of the relative superiority of their union over another.

Cases involving labor’s right to organize:

the United States Supreme Court

While on the Court of Appeals, Cardozo refused to use the power of the courts to restrain union activity. Later, as a member of the United States Supreme Court, he consistently voted to uphold progressive legislation protecting the collective bargaining rights of employees by placing restrictions on the activities of employers.

In 1935, the Guffey Coal Act was declared void by the Supreme Court. Among other things, the act had regulated labor relations in the vital bituminous coal industry. Cardozo was joined by Brandeis and Stone in dissent against this ruling.

Just one year previous to the Carter decision, Congress, with the passage of the Wagner Act, had given regulatory agencies the power to prevent "unfair labor practices" by employers doing business in interstate commerce. Two years later the act was challenged and upheld. Cardozo

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voted in this and in two similar cases, to allow such Congressional action in the national interest.

Justice Cardozo's position in the *Carter* and *N.L.R.B.* cases recognized that peaceful and orderly (because fair and equal) relations between employers and employees may be of benefit to society as a whole. Thus, we witness an application of his belief that the welfare of society is a final arbiter of legal conflicts.

**Minimum Wage and Hour Legislation**

Closely related to the problem of labor organization was the matter of government action which guaranteed certain conditions of employment to workers in industry.

*Laissez-faire* economic theory had taught that the "natural laws of economics" are supremely valid means for determining the relations between employer and employee. Wages, hours, and other conditions of labor were assumed to be the natural result of precision-like economic laws. This theory of economics was reinforced by conservative social Darwinism, which held that the fittest would and should survive in the social struggle—that only through a preservation of the able and elimination of the weak and incompetent could society progress. The legal counterpart of such beliefs was found in the common law fiction, "liberty of contract."

"Liberty of contract" rested on the plausible assumption that both parties to a labor contract had equal opportunity to protect their

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respective interests, if only government did not interfere with the bargain­ing process. The burden was on the government to show that legisla­tion tampering with such a sacred right was necessary to the health, morals, or safety of the community.

In the 1905 New York Bakeshop Case, a state law limiting the hours of work in bakeries was struck down by the Supreme Court as an arbitrary interference with "liberty of contract" without "due process of law" (which in this and similar cases refers to the "substantive" not "procedural" aspects of welfare legislation). With this stroke began some thirty years of legal harassment by courts of wage and hour legislation, state and national.

Judge Cardozo could never be persuaded that there is any real freedom existent when a single worker is left, unassisted, to bargain for working conditions against a giant corporation. Nor would he put the burden of proof on the legislature to show that legislation controlling the bargain­ing process is unquestionably justifiable.

Cases involving wage and hour legislation:
the New York Court of Appeals.

Two years after the Bakeshop Case, and seven years previous to Cardozo's appointment to the Court of Appeals, that Court, following the Lochner doctrine, had invalidated a law limiting the hours of women factory workers.11

11People v. Williams, 189 N.Y. 131 (1907).
Following Cardozo's advent to the Court of Appeals in 1914, we witness a sudden change in the attitude of its personnel regarding social legislation. We are led to believe, as another writer has strongly implied, that Cardozo's influence was instrumental in the Court's change to a more flexible position.\textsuperscript{12} This position recognized that "freedom" and "due process" are not static meanings; that, in effect, there is no "liberty of contract" when an individual is forced to bargain with a huge corporation for conditions of employment; that, with changing social conditions, the state police power must be allowed to deal effectively with new problems as they arise; and that the ultimate welfare of society lies in letting the legislature pass such measures as are reasonable and not clearly unconstitutional.

The case which marked the abrupt change of attitude by the Court of appeals\textsuperscript{13} involved a minimum wage and hour law similar to the one struck down in \textit{People v. Williams}. The \textit{Schweinler} decision rejected the \textit{Lochner} and \textit{Williams} rationales in upholding a minimum hour law for women workers in industry. Shortly thereafter, Cardozo was again in a majority which validated a six-day week for workers in industry.\textsuperscript{14}

Cardozo's respect for flexible constitutionalism is revealed in a 1927 case. In \textit{Campbell v. City of New York},\textsuperscript{15} a taxpayer had brought suit under the Fourteenth Amendment to enjoin the awarding of public works.


\textsuperscript{13} \textit{People v. Schweinler Press}, 214 N.Y. 395 (1915).

\textsuperscript{14} \textit{People v. Klinck Packing Co.}, 214 N.Y. 121 (1915).

\textsuperscript{15}244 N.Y. 317 (1927).
contracts containing a "prevailing rate of wages" clause, which, it had been held in a similar United States Supreme Court case, was unconstitutional because it was ambiguous and vague in meaning. Cardozo took cognizance of the higher court's ruling but indicated a dissatisfaction with its implication that such contracts cannot be generally stated. In a passage reminiscent of Holmes' Lochner dissent, Cardozo said, "the Fourteenth Amendment does not embody a provision that municipal contracts shall be perspicuous and definite."\(^{17}\)

In a succeeding case involving "liberty of contract" under the Fourteenth Amendment, the meaning of "public works" was expanded to allow the fixing of minimum wages in work done by railroad companies on railroad properties regulated by the state.\(^{18}\) Again, the legislature was allowed to experiment with the solution of public problems, and the Constitution was not allowed to stand in the way of social progress.

Thus, the Court of Appeals, with no little influence from Judge Cardozo, had moved ahead of the nation in its validation of wage and hour statutes.

\(^{16}\)Connally v. General Construction Company, 269 U.S. 385 (1926).

\(^{17}\)Campbell, at 327.

\(^{18}\)Long Island Railroad Co. v. Department of Labor, 256 N.Y. 498 (1931).
Cases involving wage and hour legislation: the United States Supreme Court

The United States Supreme Court was much slower than the Court of Appeals in responding to the need for minimum wage and hour legislation. The Lochner case had solidified the concept "liberty of contract." Subsequently the three Oregon Cases, made some inroads on the Lochner doctrine, principally as a result of the brilliant sociological briefs of future Justices Brandeis and Frankfurter.

However, in 1922, the tendency to allow wage and hour legislation under the police power suffered a setback. Congress had passed a minimum wage law for the District of Columbia. In Adkins v. Children's Hospital, the Court decided that the statute was a denial of "property without due process of law." There was no relationship, the Court said, between the wage level and the health, safety, or morals of women workers.

In 1933, the year after Cardozo became a member of the Supreme Court, another minimum wage law confronted that high tribunal. This time, the New York legislature had attempted to circumvent the Adkins doctrine by providing that wages reflect a fair value of labor received. The legislature's attempt was in vain. The Court reverted to the reasoning of the D.C. case and nullified the statute.


20. 261 U.S. 525 (1923).

Cardozo joined with Stone and Brandeis in a dissent which attacked the majority's faith in laissez-faire doctrine and exposed their substantive reading of social legislation. "In the years that have intervened since the Adkins case," the dissent said, "we have had opportunity to learn that a wage is not always the resultant of free bargaining between employers and employees; that it may be one forced upon employees by their economic necessities and upon employers by the most ruthless of their competitors." The dissent went on to say that "it is not for the courts to resolve doubts whether the remedy of wage regulation is as efficacious as many believe or is better than some other, or is better even than the blind operation of uncontrolled economic forces. The legislature should be free to choose unless government is to be rendered impotent."23

Finally, in West Coast Hotel v. Parrish,24 Justice Roberts crossed over to the liberal side of the Court alignment, making it possible to uphold a Washington minimum wage statute. Cardozo's view was at last the view of the majority.

In dealing with the problems of labor, Cardozo had followed the pragmatic, flexible, sociological views expounded in his other writings on the judicial process. He was ever aware that the meaning of "freedom," "due process," and "equality" varies with the conditions of time and place; that true freedom depends upon substantial equality; that government can

22Morehead, at 635.
23Morehead, at 636.
often expand the liberty of many by limiting that of a few; that, under modern social conditions, legislative regulation of the relationship between employer and employee is not ipso facto arbitrary; and that judges should not interfere unduly with legislative efforts to act for the welfare of society.

Other Problems of Government in the Economic Sphere

In our discussion of government and labor we witnessed one form of government control over economic activity—that of legislation protecting the interests of labor. Other controversies involve government's conduct of business activity and the extent to which government may promote or regulate business interests.

In all its manifestations, government participation in economic matters met with the objections of those who maintained that governmental functions should be viewed narrowly. During the years of Cardozo's judicial career, any governmental economic activity faced the arguments of laissez-faire, social Darwinism, and mechanistic jurisprudence.

In the sections immediately following, we shall deal with some of the cases (other than those specifically relating to labor) wherein governmental functions in the market-place are challenged with unconstitutionality. Again we will see Cardozo's judicial method in action. We will again witness, in practice, his beliefs that constitutional meanings are to be judged by their performance; that constitutions should be interpreted to allow orderly change; that legislative experimentation should be allowed, unless that experimentation clearly transcends constitutional limitations;
and that the job of the judiciary is to keep the law in harmony with social change and the social welfare whenever possible.

Cases involving government in the economy while Cardozo served on the New York Court of Appeals

Early in his judicial career, Judge Cardozo penned an opinion which gave modern meaning to "liberty of contract".25 The case came a year after the Schweinler decision26 and involved a New York statute intended to prevent massive shipments of goods by dealers in an effort to destroy their competitors. Cardozo's statement for the majority candidly overruled an earlier decision in a similar case27 and denied that "liberty" within the meaning of the Fourteenth Amendment restrains such social legislation in the public interest. "The needs of successive generations," Cardozo said, "make restrictions imperative today which were vain and capricious in times past."28

A 1919 case brought up another problem regarding government regulation of private property in the social welfare.29 The New York Public Service Commission had regulated the rates of a gas company whose lines ran directly from the Pennsylvania oil fields to Jamestown, New York, where the gas was sold. Technically, the company was engaged in interstate commerce and therefore claimed that it could not be regulated by a

26Supra, p. 43.
28Klein, at 385.
state agency. The federal government had not occupied the field with legislation. If the company's allegation were upheld, it would have been left unregulated and responsible to the public only insofar as it chose to impose responsibility upon itself.

Judge Cardozo saw through to the realities of the situation, led a unanimous court in a decision necessary to the social welfare, and, in doing so, interpreted the Constitution in the light of contemporary societal needs. Since the federal government had not occupied the field, Cardozo reasoned, the state police power could step in. In addition, he pointed out that the regulation of price-fixing in this case is of an essentially local character, not requiring uniform regulation by a national agency. He further stated that gas service was vital to the public and carried with it the duty to provide gas at reasonable rates. Thus the state must regulate in the absence of regulation by a national authority. "The state in the adoption of this law," Cardozo said, "has not imposed a new burden. It has given a new 'sanction' to 'an inherent duty'. . . ."30

In one of his infrequent dissents while on the Court of Appeals, Cardozo indicated that he was not willing to allow private business to escape paying a fair share of the cost of government.31 A private telegraph and electric protective company which offered a centralized burglar-alarm service to businesses in New York City claimed that it was a "public utility" and, as such, should be exempted from city license taxes, even

30Pennsylvania, at 406.

31Holmes Electric Protective Co. v. Williams, 288 N.Y. 407 (1920).
though its lines ran across city property. The majority agreed to allow
the protective company the status of "public utility," under which they
could exercise "eminent domain" powers which would circumvent city taxa-
tion.

Cardozo's dissent did not agree that the company's services di-
rectly benefited the general public. It could not, therefore, be clas-
sified as a "public utility". In this case, Cardozo felt, the public in-
terest resided in the city's power to regulate such private businesses,
not in the promotion of their welfare at the people's expense.

Other cases indicate that Cardozo put into practice his belief
that property has a social function to fulfill and that the rights of
property change with the social situation. Cardozo concurred in a 1921
opinion of Judge Pound which upheld state emergency legislation temporari-
ly fixing the rent which landlords can exact from tenants. This legis-
lation was held to be compatible with both the "contract" and "due proc-
ess" clauses of the Constitution.32

In People v. Perretta,33 Cardozo again concurred in a Pound de-
cision which upheld state licensing of milk dealers to protect producers
from fraud. Again, the legislation was found not to impair "freedom of
contract" or to violate "due process." "When the Legislature has power
to act," the decision said, "it may act without interference from the
courts. The Legislature has, we find, acted on reasonable grounds and
in a reasonable manner."34

32People ex rel Durham Realty Corp. v. LaFetra, 230 N.Y. 429 (1921).
33253 N.Y. 305 (1930).
34Perretta, at 313.
Sometimes a statute under the state police power conflicted with Cardozo's otherwise normal inclination toward humanitarianism in judicial decision. In *People v. Crane*, he held that a New York statute which forbade the employment of aliens on state public works projects did not deprive an Italian worker of "equal protection of the law." Cardozo pointed out that such discrimination may be "ungenerous" and "unwise."

But, he went on to say, this does not make it "unlawful." He said:

>This statute must be obeyed unless it is in conflict with some command of the constitution, either of the state or of the nation. It is not enough that it may seem to us to be impolitic or even oppressive. It is not enough that in its making great and historic traditions of generosity have been ignored. We do not assume to pass judgment upon the wisdom of the legislature. Our duty is done when we ascertain that it has kept within its power.

Cardozo went on to say: "If doubt exists whether there is a conflict between the statute and the constitution, the statute must prevail."

Upon occasion, there was no doubt in Cardozo's mind that the constitution must prevail. Constitutions, he felt, are to be given flexible interpretation; and, in the cases above, Cardozo shaped its meaning to accord with social needs and realities. However, in a 1925 case, Cardozo indicated a willingness to practice the assertion made in his writings, that the judge is not to pervert the constitution nor to use it indiscriminately.

When faced with the task of interpreting the meaning of "acquisition, care, management and use of its streets and property" in a New York

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35 *214 N.Y. 154 (1915)*.

36 *Crane*, at 172.

37 *Crane*, at 173.

Home Rule amendment to the state Constitution, Cardozo did not elect to give the city the right to operate a transportation system. "The colorless words chosen," he said, "were singularly inept if they were intended to express approval of a departure so momentous." Cardozo believed that the Constitution could not reasonably be construed to allow an interpretation other than the one given.

However, the general tenor of Cardozo's judicial craftsmanship was favorable to governmental action in the economic sphere, especially when there was a social evil to be eradicated. In Adler v. Deegan, the constitutionality of a 1929 New York State Multiple Dwelling Act, which attempted to eliminate slum conditions in New York City by forcing landlords to raise the quality of living conditions in their tenement houses, was challenged. A 1925 Home Rule amendment to the state Constitution had provided that only under "emergency" conditions could the state pass legislation regulating the "property, affairs or government of cities." It was therefore argued that the state statute in question applied to a matter under the exclusive control of New York City. However, the Court of Appeals held the act valid because slum clearance within New York City was deemed to be a concern of the entire state.

Cardozo's separate concurring opinion agreed with the decision of the majority. In passages permeated with sociological emphasis, he said:

The Multiple Dwelling Act is aimed at many evils, but most of all it is a measure to eradicate the slum. It seeks to bring about conditions whereby healthy children shall be born, and healthy men and women reared, in the dwellings of the great metropolis. To have

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39 Browning, at 124.

40 251 N.Y. 467 (1929)
such men and women is not a city concern merely. It is a concern of the whole State. Here is to be bred the citizenry with which the State must do its work in the years that are to come.41

Perhaps Cardozo's greatest effort in "social engineering" came in the Utica Airport controversy,42 just one year before the Adler decision. A 1928 statute had authorized the cities of the state to build and maintain airports. Acting under this grant of power, the city of Utica proposed a bond issue to purchase the necessary land. However, a taxpayer brought suit for injunction, pointing out that, according to the state Constitution, no city could incur debt except for a "city purpose." Was the construction and maintenance of an airport a "city purpose"? A narrow construction of the Constitution would say that it was not. Cardozo's majority opinion for the Court of Appeals took a broader view. With an eye to the realities of social change, Cardozo pointed out that aviation was then an established method of transportation and that in the future its use would be even more general. In a poetic phrase he said: "The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness."43

41 Adler, at 484.
42 Hesse v. Rath, 249 N.Y. 436 (1928).
43 Hesse, at 438.
Cases involving government's role in the economic sphere while Cardozo served on the United States Supreme Court

When Cardozo was appointed to the Supreme Court upon the retirement of Justice Holmes in 1932, he continued to follow the judicial philosophy which had guided him on the Court of Appeals.

A case in 1932 brought up, again, the familiar problem of governmental regulation of private economic power in the public welfare. In line with the Sherman Anti-Trust Act of 1890, a District of Columbia Court decree of 1920 had enjoined certain monopolistic practices of leading meat-packing companies. Claiming that marketing conditions had changed in the intervening years, the companies sought to have the decree reversed. Cardozo's opinion revealed keen understanding of the economic realities of the matter and decided that the original motivations for the holding still existed. Thus, the decree should not be overturned. If the companies are restored their original powers, said Cardozo, "the opportunity will be theirs to wage the war of extermination that they waged in years gone by."45

Another case in the same year involved intergovernmental taxation.46 A Stone dissent, in which Cardozo joined, anticipated a more recent doctrine that would allow the federal government to tax state lands leased to private companies, thus holding the company profits responsible to the

45 Swift, at 118.
public welfare.47

Viewed together, two other 1933 cases indicate that Cardozo’s concern for the public welfare would allow diverse government actions in the economy. In I.C.C. v. Oregon-Washington R.R. and Navigation Co.,48 Cardozo concurred in an opinion upholding a regulatory commission order requiring the extension of railroad lines in accordance with public convenience and necessity. In another decision49 three months later, Cardozo felt that the public interest resided in governmental promotion of a railroad. The Court allowed the State of Maryland to extend tax exemptions to interurban railroads weakened by the depression. The cities of Baltimore and Annapolis, desirous of tax revenue from the railroads, claimed that the exemption violated the Constitutional guarantee of “equal protection of the laws.” Cardozo’s opinion for the majority rejected their contentions in pointing out that

time with its tides brings new conditions which must be cared for by new laws. Sometimes the new conditions affect the members of a class. If so, the correcting statute must apply to all alike. Sometimes the new conditions affect one only or a few. If so, the correcting statute may be as narrow as the mischief. The Constitution does not prohibit special laws inflexibly and always. It permits them when there are special evils with which existing general laws are incompetent to cope. The special public purpose will then sustain the special form.50

47 For the reversal of the Burnet doctrine, see Helvering v. Mountain Producers Corporation, 303 U.S. 376 (1938).

48 288 U.S. 14 (1933).


50 Williams, at 46.
Perhaps the severest test of the quality of Cardozo's judicial philosophy came while he served on the United States Supreme Court during the New Deal era. Justice Cardozo's activity at this time brings out in relief the long-fermenting judicial philosophy of a new era in contrast to that of a dying century. Between 1934 and 1937 we witness the powerful but dying motions of narrow legal constructionism on a Supreme Court, frightened anew by executive and legislative forces, endeavoring to preserve the economy of a nation caught in the throes of an unprecedented depression. In the midst of this controversy we find Cardozo, consistently applying the judicial philosophy which had guided him since 1914. This theory of the judicial process insisted again and again that the Constitution be interpreted with modern meaning and that the agencies of government be allowed to meet the exigencies of changing times. Cardozo faithfully, at one time singly, reiterated the ideas of judicial restraint, flexible constitutionalism, and legal pragmatism.

In 1934, two pieces of social legislation passed by state legislatures were upheld on appeal to the Supreme Court by narrow five-to-four majorities. The Blaisdell decision was a justification of state emergency legislation temporarily extending the time for redeeming property from foreclosure and sale. The Nebbia case, likewise, justified state social legislation, this time fixing prices on milk sales to consumers in an effort to protect producers who were being forced to produce at costs exceeding their income.

In both of these decisions, the majority view could well have served as precedent for upholding federal emergency action during the recovery program of President Roosevelt. This, however, was not to happen before a period of wholesale invalidation of social legislation and an eventual struggle with the President.

In early 1935, the Court, in *Panama Refining Co. v. Ryan*52 struck down National Recovery Act legislation designed to regulate oil production by controlling interstate and foreign shipments of oil in excess of state-permitted quotas. The majority view maintained that an executive order restraining such oil shipments was made under an ill-defined, thus inadequate, delegation of Congressional power.

Cardozo agreed that Congress could not part with its policy-making power. However, his lone dissent would have the Court consider not only the narrow and hastily written section of the act upon which the President's action was held unconstitutional, but the statute as a whole. Upon this consideration, Cardozo decided, Congress had offered proper standards for the President in dealing with the illicit oil shipments. He further recognized that a delegation too narrow in scope would leave the President helpless to deal with unforeseen circumstances as they arise. He concluded by reminding his brethren that "the Constitution of the United States is not a code of civil practice."53

Following the oil controversy, the Court narrowly upheld governmental attempts to spur the economy by abrogating the gold clause in

52 *293 U.S. 388 (1935).*
53 *Panama*, at 447.
private bonds (and in government bonds if the bondholder could not give
evidence of hardship in the event that payment was made in regular cur-
currency). However, in a subsequent litigation involving recovery legis-
lation, the Court returned to substance and struck down railroad retire-
ment. In each of these situations, Cardozo voted to uphold the right
of Congress to pass such emergency legislation in the public welfare.

An integral and controversial part of President Roosevelt's re-
covery program involved industrial codes established under the National
Recovery Act. These "codes of fair competition" were drawn up by repre-
sentatives of industry and submitted to the President for his approval.
Their purpose was to hasten economic recovery by eliminating waste in
natural resources, by lowering unemployment, by improving conditions of
employment, and by eliminating destructive competitive practices within
industries.

By 1935, the codes had long since become detrimental to small
business and embarrassing to the President. In May of that year, their
constitutionality was tested by a New Jersey chicken dealer indicted for
selling chickens which did not conform to code standards in the poultry
industry. The Court invalidated the codes, saying that the delegation

(1935).

\[55^{Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330}
(1935).

\[56^{Eric F. Goldman, Rendezvous with Destiny (New York: Vintage Books,}
of Congressional rule-making power had been too broad. Congress, they felt, had not established proper standards for the President to follow in supervising the codes. In addition, it was held that Congressional regulation of commerce, in the case of the codes, had invaded the reserve powers of the states. Regulation, the Court said, was manifest even after articles had reached their destinations in another state.

Cardozo wrote a separate concurring opinion in which Justice Stone joined. We will recall that in the "hot oil" case, Cardozo felt that the purposes of the legislation therein challenged had offered the President a sufficient statement of policy by which to conduct his action. In his Schechter opinion, Cardozo was careful to explain his position in relation to the Panama case. His discussion was principally directed to the delegation of Congressional rule-making power, a delegation which, in the case of the codes, he said, "is delegation running riot . . . ."58 When "anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code . . . ."59, there is, in effect, no guide at all to the President's use of legislative power.

In early 1936, another important piece of recovery legislation, the Agricultural Adjustment Act, came before the Court.60 The act attempted to raise farm prices by means of taxing the processors of farm products and using the revenue thus gained to pay farmers for limiting farm

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58 Schechter, at 553.
59 Ibid.
production. The majority, again with an eye to substance, ruled that the Congressional action could not constitutionally be construed as a proper exercise of the taxing power in the "general welfare." However, Stone's dissent, in which Brandeis and Cardozo joined, would give Congress a freedom to act in this critical situation.

Congress, the dissent maintained, has the power to levy excise taxes on farm products. The Agricultural Adjustment Act was certainly designed to tax and spend for the general welfare of the nation by furthering the welfare of farmers. Stone felt that the Court majority had ruled on the wisdom of the act, not on its constitutionality. In a comment on the majority's narrow legalism and judicial activism, he reminded them that "courts are not the only agency of government that must be assumed to have capacity to govern."

By mid-1936 the Court had leveled the Bituminous Coal Conservation Act of 1935, holding unconstitutional, Congressional attempts, under the commerce power, to regulate prices and employment practices in the vital coal industry. Cardozo, joined by Stone and Brandeis in dissent, pointed out that the conditions regulated did affect interstate commerce and that the concept "liberty" loses its sanctity when it does not square with realities. Cardozo said:

Congress was not condemned to inaction in the face of price wars and wage wars so pregnant with disaster. Commerce had been choked and burdened; its normal flow had been diverted from one state to another; there had been bankruptcy and waste and ruin alike for capital and labor. The liberty protected by the Fifth Amendment does not include the right to persist in this anarchic riot.

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61Butler, at 87.
63Carter, at 331.
Following the President's attempt in 1937 to change the membership of a hostile Court, the members began to take a broader view of Congressional emergency power. The Court was once again ready to allow Congress the power to govern.

A decision upholding a state minimum wage statute anticipated the approval of Congressional restrictions, under its commerce power, on employment practices in businesses engaged in interstate commerce.

Shortly thereafter, Cardozo wrote the majority opinion in two cases upholding the Social Security Act of 1936. In the Steward opinion, Cardozo was able at last to say with assurance that "it is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the general welfare." In a statement indicative of his whole relativistic philosophy, he went on to add: "Needs that were narrow or parochial a century ago may be interwoven in our day with the well being of the nation. What is critical or urgent changes with the times."

At last Cardozo's view had become the view of the majority. Justice Cardozo had not let his flexible doctrines waver in the face of

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64West Coast Hotel v. Parrish, Supra, p. 46.
67Steward, at 586, 587.
68Steward, at 619.
national emergency. He had not abandoned the pragmatic heritage of Holmes and Pound, even when he stood alone in the "hot oil" case. The power of his arguments was felt, and in three short years his constancy had been rewarded.

**Government and Civil Rights**

When dealing with controversies arising in the area of civil rights, Cardozo took a much more inflexible position than he did when dealing with the rights of labor or of property. He was not as prone to presume the validity of governmental restrictions on the "procedural" and "substantive" liberties found in the first eight amendments to the Federal Constitution as he was on the economic liberty often claimed under the Fifth and Fourteenth Amendments. Nor was the Constitution to be interpreted as flexibly when it was applied to a matter of personal freedom (as distinguished from economic liberty).

Cardozo's attitude on personal liberty recognized that the guarantees of the Bill of Rights have fundamental significance in a democratic nation. He was aware that all democratic institutions and practices are predicated upon the preservation and perpetuation of individual freedom.

The pragmatism of Cardozo, like the pragmatism of Dewey, assumed the values of democracy and humanism. It assumed the value of an open society—a society of growth—a society in which individuals have the maximum possible opportunity to develop their talents and pursue their interests. There is a paradox here. It is that a philosophy of growth and experimentation bases its very continuance on an inflexible premise—that personal liberty is not to be constricted unless in some overwhelming and
critical social need. Nevertheless, the premise is unavoidable; and Cardozo clearly recognized its critical importance.

We should not infer that Constitutional guarantees of civil liberty give one license to indulge his every impulse. Nor would Cardozo and other democrats deem that it should. There are obviously some acts that are detrimental to the social body, and these should be restrained. For instance, as Holmes has pointed out, the freedom of speech does not give one the right to falsely yell "Fire!" in a crowded theatre.

The problems of civil liberty arise over which acts may be restrained by government and the legal procedure government is to follow in classifying and prosecuting these acts. Civil rights controversies are complex and manifold, demanding nearly a case-by-case solution of its meanings. It is ever difficult to determine where the rights of the individual cease and those of society begin—and the rights of both must be considered.

In discussing Cardozo's judicial position on civil rights matters, we will concern ourselves with two areas of discussion: "procedural" and "substantive" rights. The former involves the rights of fair legal procedure after an individual is accused of crime; the latter is concerned with certain "essential" freedoms guaranteed to an individual by virtue of his being a citizen in a free society. Put in other terms, the "substantive" problem is concerned with which activities may be controlled and to what extent; the "procedural" problem with how a person is to be legally prosecuted after being accused of violating a law which regulates "substantive" acts.
When considering both "procedural" and substantive rights, Cardozo revealed a deep concern for protecting the personal liberty of individuals in a free society. However, in the latter instance, when dealing with First Amendment freedoms (speech, press, assembly, petition, religion), Cardozo treated these liberties as near-absolute in nature. In dealing with the rights of communication and expression, Cardozo was willing to give them what the Court in the 1940's began to term "preferred status." 69

The Holmesian "reasonableness" test held that courts should presume the validity of legislation charged with unconstitutionality. The "preferred status" doctrine served libertarians on the court with a rationale by which they could presume the validity of legislation affecting economic liberty and still be "activist" regarding legislation restricting First Amendment freedoms. The doctrine says, in effect, that First Amendment liberties are so basic to the perpetuation of ordered democracy that the burden of proof is on the government to show that their restriction is necessary to the preservation of safety and order. Thus, statutory validity is to be presumed unless it restricts those liberties on which the very existence of democracy depends.

Cardozo and Procedural Rights

Cardozo recognized that some actions of individuals must be legally restricted in the interests of society. He was also cognizant of the fact that individuals accused of transgressing these restrictions must have recourse to a fair trial offering them ample opportunity to prove their innocence. 69

69 For a clear statement of this doctrine, see Justice Rutledge's opinion in Thomas v. Collins, 323 U.S. 516 (1945).
In Matter of Doyle, Cardozo's lengthy opinion would not admit the bending of historic privileges against self-incrimination in order that one individual might be brought to justice in a particular instance. He said, in part, that "historic privileges and immunities are not to bend from day to day because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment". (Holmes, J. in Northern Securities Co. v. United States, 193 U.S. 197, 400).

Again, in a controversy involving "third-degree" methods of gaining confessions, Cardozo held that historic guarantees of proper legal procedure are to apply to all alike. In a dissenting opinion he noted that the accused is by habit "a man of bad character and evil associations . . . ." However, the dissent claimed, no matter how depraved the defendant might be, "he is yet entitled, when charged with murder, to a fair trial conducted in accordance with those safeguards and guarantees which by law and tradition are regarded necessary for the protection of the accused." It was also Cardozo's firm belief that an accused person must have the opportunity to face his accusers. Before a probationer could be termed delinquent and sent back to prison by his probation board, Cardozo said, he must "have a chance to say his say before the word of

70257 N.Y. 244 (1931).
71People v. Doran, 246 N.Y. 409 (1927).
72Doran, at 434.
his pursuers is received to his undoing."73 In another case involving this procedural guarantee, Cardozo held that a man implicated in a crime through the cooperation of officials in another state who could not be cross-examined or confronted by the accused in New York courts should have a new trial.74

Neither would Cardozo allow prejudiced juries the opportunity to convict one of crime. The conviction of an individual by a jury deemed to have been swayed by impertinent evidence concerning the accused's character was reversed. "The law," Cardozo said in his opinion, "is not blind to the peril to the innocent if character is accepted as probative of crime."75 In another situation, Cardozo concurred with the majority in ordering a new trial for Negroes convicted of murder by a trial court which systematically and arbitrarily excluded members of the Negro race from jury duty.76

When dealing with unreasonable search and seizure, Cardozo was ready to use the power of the courts in restraining the activities of overenthusiastic police officials.77 However, when the search and seizure of incriminating evidence conformed with social expectations and did not unduly jeopardize individual freedom, the action was allowed.78 "We are

74People v. Reese, 258 N.Y. 89 (1932).
75People v. Zackowitz, 254 N.Y. 192, 198 (1930).
not to strain an immunity," Cardozo said, "to the point at which human nature rebels against honoring it in conduct."79

Powell v. Alabama80 brought up the procedural problem of a defendant's right to counsel in a criminal trial.

A group of Negro boys charged with raping two white girls were sentenced to death upon conviction. The defendants were citizens of another state, separated from friends and family in a hostile environment. In addition, they were all illiterate and incapable of handling their own defense or even of securing counsel. No positive effort was made to procure counsel for the defendants, with the result that they were not represented until the day of their trial, and then only upon impromptu agreement by a member of the bar who felt a personal sense of responsibility.

The Court ruled that the defendants had, in fact if not in form, been denied right to counsel, and that "due process" within the meaning of the Fourteenth Amendment included an observance of this right. In effect, the opinion incorporated the Sixth Amendment right of counsel into the meaning of the Fourteenth Amendment, thus nationalizing that particular portion of the Bill of Rights. The right to counsel, state-appointed counsel if necessary, was to be observed by states in trials involving capital crime.81

79Chiaqles, at 197.
80287 U.S. 45 (1932).
81For years it was assumed that the Powell decision had made the right of counsel a mandatory element of "due process" under the Fourteenth Amendment. The doctrine was subsequently denied by the Court in Betts v. Brady, 316 U.S. 455 (1942).
Cardozo's position regarding procedural rights is significant in that it willingly extends to the defendant in a criminal proceeding every opportunity to prove his innocence. Cardozo recognized that in a democracy it is to society's best interest that historically validated methods of legal procedure be followed. In short, he felt that a jealous protection of procedural rights is necessary to the "social welfare."

Yet, Cardozo's position in most of these cases is not unique. Many judges with a sense of democratic values would have taken his stand. It is in the area of "substantive" civil liberties that Cardozo makes his greatest contributions.

Cardozo and Substantive Rights

Many problems of "substantive" liberty involve minority group members' rights of equal citizenship. A 1918 case brought up such a controversy.

A New York State Civil Rights Law protected the right of all races to patronize "a place of public accommodation, resort and amusement." But, what is a public place? Anticipating a controversy which rages in our own time, a dissenting opinion by Cardozo would hold that saloons are "public" places and that a Negro could not be excluded arbitrarily on grounds of race.82

The right to vote is another privilege of citizenship often denied Negroes, especially in the one-party South. In Nixon v. Condon,83 Cardozo

82Gibbs v. Arras Bros., 222 N.Y. 332 (1918).
83286 U.S. 73 (1932).
construed the Fourteenth Amendment to restrain the State of Texas from denying to its Negro citizens the right to vote—a right basic to successful expression and political freedom.84

Of all the First Amendment liberties, freedom of expression through speech, press, and assembly is perhaps the one which evokes the deepest respect from the democratic Cardozo. Earlier it was pointed out that this freedom, the very foundation of his democratic pragmatism, brings Cardozo as close as we will ever find him to an absolute position. In decision as well as in theory he holds consistent with an expressed conviction that ideas "are goods to be preserved no matter how great the cost."

What is freedom of the press? Is it the complete absence of governmental restriction? Generally not. But the restriction must not unduly interfere with the printing and distribution of news. Grosjean v. American Press Co.85 found Cardozo participating in a majority holding that a 1934 Louisiana license tax on newspapers was invalid because the tax was, in essence, a penalty.

One of the basic requisites of free expression is the right of individuals to assemble peaceably and exchange ideas. In People ex rel Bryant v. Zimmerman,86 Cardozo went along with a unanimous Court when it

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84 It should be noted, however, that in a subsequent case Cardozo would not stretch the Fourteenth Amendment to forbid discrimination against Negroes by the Texas State Democratic Party in primaries (Grove v. Townsend, 295 U.S. 45 (1935)). It could be argued that he should have anticipated the doctrine of Smith v. Allwright, which forbade such discrimination by a private party that was nevertheless an integral part of the state election machinery.

85 297 U.S. 233 (1936).

86 241 N.Y. 405 (1926).
upheld this fundamental liberty. Again, in *De Jonge v. Oregon*, he con­
curred with the majority in overruling an Oregon Syndicalism Law which
unduly infringed upon the right of peaceable assembly.

Cardozo was joined by Stone and Brandeis in dissent, when the
Supreme Court dismissed the appeal of a Negro citizen of Georgia who had
been sentenced to death under an ancient insurrection statute. When
the case came up again two years later, Cardozo concurred with the ma­
jority as it declared the Georgia action invalid because it suppressed
free speech and assembly not immediately dangerous to the existence of
the government.

In the now famous case of *People v. Gitlow*, Cardozo joined with
Judge Pound's lone dissent. The State of New York had convicted Benjamin
Gitlow under a Criminal Anarchy Statute for publishing a "Left-Wing Mani­
festo" which advocated the overthrow of capitalism by force and violence.
On appeal to Cardozo's Court, the conviction was upheld.

The Pound-Cardozo dissent expressed dissatisfaction with this
holding and pointed out that the "Criminal Anarchy" Statute was not in­
tended to apply to the advocacy of "proletarian dictatorship." "Anarchy,"
the dissent pointed out, is not equatable with the doctrine of "left-wing
socialism."

*87*299 U.S. 353 (1937).


*89*Herndon v. Lowry, 301 U.S. 242 (1937). Cardozo's position in
this case is all the more significant when we read Van Devanter's dissent­
ing opinion. It gives evidence that Herndon did, indeed, advocate violent
and total revolution against a system which, he felt, oppressed the Negro
race.

*90*234 N.Y. 132 (1922).
The dissent concluded on a note which anticipated the "preferred freedoms" position: "Although the defendant may be the worst of men; although Left Wing socialism is a menace to organized government; the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected." While this passage does not clearly state the "preferred freedoms" doctrine, it does imply a "preferred status" for the rights of free expression.

It was after Cardozo became a member of the United States Supreme Court that he made his greatest judicial contribution in the area of free speech. In *Palko v. Connecticut*, Cardozo would not permit the Fifth Amendment prohibition against "double jeopardy" to be absorbed within the meaning of the Fourteenth Amendment concept "liberty". However, he went on to reaffirm the absorption of First Amendment freedoms within that phrase.

Speaking of the freedom of the mind—of the freedom of thought and speech, he said: "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every form of freedom." Again, it would seem that Cardozo indicates a "preferred position" for First Amendment freedoms.

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91 Gitlow, at 158.


93 *Palko*, at 327.

94 *In his Civil Liberties and the Vinson Court* (Chicago; U. of Chicago Press, 1954) p. 33, Hermann Pritchett points out that while the origin of the "preferred position" doctrine on the Supreme Court is usually attributed to Justice Stone's *Carolene Products* footnote, Cardozo's *Palko* opinion was more correctly its earliest expression.
In a passage that sums up his whole attitude regarding freedoms of expression, he went on to add that the inclusion of those freedoms within the meaning of "liberty" in the Fourteenth Amendment "became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than the exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts."\textsuperscript{95}

\textsuperscript{95}Ibid.
CHAPTER IV

CONCLUSION

How consistently does Cardozo as a judge follow the postulates of the sociological jurisprudence he expounds in his theoretical writings on the judicial process? Upon examining both his extra-judicial writings and his judicial decisions and dissents, I think we must conclude that Cardozo's consistency is notable.

The basic theme of Cardozo's writings on the judicial process was that the end of law is the "social welfare" and that this welfare is realized by keeping law in conformity with the prevailing expectations, needs, or mores of the times. Cardozo's judicial career gave dramatic expression to this belief. In his hands, the legal corpus was molded through interpretation to give "social justice" in a rapidly changing society.

In the area of civil rights, social justice resided in the protection of personal liberty. When dealing with the problems of labor, the social welfare demanded legal recognition of workers' needs. Social welfare demanded, also, that property be held responsible to the society which protects its existence. And, during times of economic dislocation, the social welfare was served by allowing government to deal effectively with the resulting social difficulties.

While Cardozo served on the Court of Appeals, he pioneered in giving judicial recognition to long-fermenting, but at that time still unpopular, legal doctrines.
It was Cardozo's Court, largely under his influence, that refused to use judicial power to restrain collective bargaining and enforce "yellow-dog" contracts in those early years when labor was still treated as a "conspiracy." Cardozo led the Court of Appeals in other areas of legal innovation. Minimum wage and hour legislation received recognition at a time when it was deemed unconstitutional by the United States Supreme Court. Other social legislation which restricted property in the interests of social welfare met with the same attitude of tolerance from Cardozo and his brethren. Long before the Supreme Court's change of attitude in the 1930's, Judge Cardozo's Court had adopted a doctrine of flexible constitutionalism and judicial restraint.

In 1932, when Cardozo was elevated to the United States Supreme Court, the forces of judicial pragmatism were still suffering repeated defeat at the hands of a narrow but firmly entrenched majority. Thrown into the unfamiliar role of dissenter, Cardozo did his share to keep the arguments of sociological jurisprudence alive all during the dark days of judicial reaction to the New Deal. On the Supreme Court, as on the Court of Appeals, Justice Cardozo's pragmatic jurisprudence emphasized the social necessity and judicial propriety attendant upon giving government the power to govern.

Cardozo's pragmatic analysis of legal meanings kept them ever in touch with changes in time and circumstance. "Due process," "property," "freedom of contract," "public works," "public place," and "equal protection of the law" are but some of the legal terms, the meaning of which Cardozo was willing to change when new societal conditions demanded re-interpretation.
In only one area, he had explained in his writings, is legislative restriction to be kept at an absolute minimum. This is in the area involving the freedoms of thought and expression—freedoms which lie at the very basis of ordered liberty in a democratic society. As a judge, Cardozo closely approached that position advocated in his other writings. He invariably favored the protection of First Amendment freedoms against legislative infringement. Here, also, Cardozo was in the vanguard of legal development. His early statements concerning freedom of expression anticipated the "preferred freedoms" doctrine of the "Roosevelt Court."

That Judge Cardozo consistently followed the doctrines of the sociological jurisprudence outlined in his other writings is apparent. It is of further significance that Cardozo anticipated doctrinal developments in several areas of constitutional law. His early position on collective bargaining, minimum wage and hour legislation, the regulation of property interests in the social welfare, and on First Amendment freedoms indicates that he was motivated by deep-seated and well-systematized convictions, not by expediency.

Cardozo's position on these problems, while popular with many in American society, was out of harmony with the views of the American judiciary generally. The consistency between Cardozo the judge and Cardozo the theorist is all the more remarkable for the courage and tenacity it then required to stick by the doctrines of sociological jurisprudence in the practical situation of judicial decision-making.
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