

C A U T I O N
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UNTIL AFTER DELIVERY
(12 noon, December 19, 1938)

In Memory of

BENJAMIN N. CARDOZO

Address by

HONORABLE HOMER CUMMINGS
ATTORNEY GENERAL OF THE UNITED STATES

Delivered Before

THE SUPREME COURT OF THE UNITED STATES

on

Monday, December 19, 1938
at 12:00 o'clock noon.

May it please the Court:

The members of the Bar of this Court on November 26, 1938, met in this room to express their sorrow at the death of Mr. Justice Cardozo. At that meeting moving tributes were paid to his memory; and the following resolutions were adopted:

"The members of the Bar of the Supreme Court of the United States, meeting in the Court Building Saturday, November 26, 1938, on the call of the Solicitor General, speak for the bar of the Nation in expressing their sorrow at the untimely death of Mr. Justice Cardozo. No formal memorial can give an adequate sense of his mental powers or his spiritual qualities. Only the barest outline of his career and an indication of its significance can be attempted.

"Benjamin Nathan Cardozo was born in New York City May 24, 1870, and died at the house of his intimate friend, Judge Irving Lehman, in Portchester, New York, July 9, 1938. He was the younger son of Albert and Rebecca Nathan Cardozo, both of whom were descended from Sephardic Jews who had been connected with the Spanish and Portuguese

Synagogue in New York from before the Revolution. He graduated from Columbia College at the age of nineteen and received his master's degree the following year while attending the Columbia Law School. He did not stay for a degree in law, and was admitted to the Bar in 1891. For twenty-two years he pursued what was essentially the calling of a barrister, unknown to the general public but quickly gaining the esteem of the Bar and the Bench of New York. His devotion to the law as a learned profession he proved in his daily practice and by his illuminating book on the Jurisdiction of the Court of Appeals of the State of New York published in 1903.

"In 1913 he was elected a Justice of the Supreme Court. A month later, on the request of the Court of Appeals, Governor Glynn designated him to serve temporarily as an Associate Judge of that Court. In January, 1917, he was appointed a regular member by Governor Whitman, and in the autumn was elected for a term of fourteen years on the joint nomination of both major parties. In 1927 he was elected without opposition Chief Judge.

"As he was a lawyers' lawyer, so he was a judges' judge. For eighteen years by his learning and the felicity of his style he added distinction to the New York Court of Appeals, and his dominant influence helped to make that court the second tribunal in the land. During this period his philosophic temper expressed itself more systematically than legal opinions permit in four volumes, slender in size but full of imaginative insight, upon the relations of law to life. These are: The Nature of the Judicial Process, The Growth of the Law, The Paradoxes of Legal Science, and Law and Literature.

"The New York Court of Appeals, with its wide range of predominantly common law litigation, was a natural field for Judge Cardozo. No judge in our time was more deeply versed in the history of the common law or more resourceful in applying the living principles by which it has unfolded; and his mastery of the common law was matched by his love of it. It was, therefore, a severe wrench for him to be taken from Albany to Washington. Probably no man ever took a seat on the Supreme Bench so reluctantly. But when

Mr. Justice Holmes resigned in 1932 President Hoover's nomination of Chief Judge Cardozo was universally acclaimed. In selecting him the President reflected the informed sentiment of the country that of all lawyers and judges Cardozo was most worthy to succeed Holmes.

"It was a grievous loss to the Court and the Nation that fate should have granted him less than six full terms on the Supreme Bench. That in so short a time he was able to make such an enduring impress on the constitutional history of the United States is a measure of his greatness. To say that Mr. Justice Cardozo has joined the Court's roll of great men is only to anticipate the assured verdict of history. His juridical immortality is due not to the great causes that came before the Court during his time, but to his own genius. With astonishing rapidity he made the adjustment from preoccupation with the comparatively restricted problems of private litigation to the most exacting demands of judicial statesmanship. Massive learning, wide culture, critical detachment, intellectual courage, and exquisite disinterestedness combined to reinforce imagination and native humility, and gave him in rare measure the qualities which are the special requisites for the work of the Court in whose keeping lies the destiny of the Nation.

"Accordingly it is resolved that we express our profound sorrow at the death of Mr. Justice Cardozo, and our gratitude for the contributions of his life and work, the significance of which will endure so long as the record of a consecrated spirit has power to move the lives of men, and the Law shall be the ruling authority of our Nation.

"Be it further resolved that the Attorney General be asked to present these resolutions to the Court and to request that they be entered in its permanent records."

It is my privilege to present these resolutions and to ask that they be entered in the permanent records of this Court.

In discussing the judicial work of Mr. Justice Cardozo, I speak, however haltingly, for the bar of the Nation; I feel that in a measure I speak also for the Nation itself. A great judge leaves his mark not only on the law which he serves but also on the life of the people. Not until future generations of scholars have traced the course of the law in its constant search for justice will the full scope of his great service be revealed. But we can today with all certainty say that he opened ways along which a free people may confidently tread.

For eighteen years Judge Cardozo sat on the Court of Appeals of New York State. It was an eminent court when he came to

it; when he left it was the greatest common law court in the land. Throughout this long period, as its members have been quick to say, the Court drew heavily upon the inexhaustible learning, the clarity of analysis and the boldness of thought of their gentle brother. The peculiar influence of Cardozo, however, spread far beyond the conference room. To lawyers and to courts his opinions were more than a record of the judgment. They spoke with the majestic authority of an analysis which reached to the bed rock of the learning of the past and yet was attuned to the needs of the living. And always the opinions spoke in tones of rare beauty. They might deal with things prosaic, but the language, lambent and rich, was that of a poet.

Opinions in the New York court are assigned by rotation, yet during the years of his service there an exceptionally large number of its great opinions were those of Judge Cardozo. There were few branches of the law that did not become enriched by his touch. Significantly, his most notable contributions to the common law are found in fields which had long before settled into fixed forms. No other judge of his time was so deft in weaving the precedents of centuries into a new shape, to govern a new society. This is the heart of the common law process, but only a master can fashion a new

rule and yet preserve the essential truths of the older decisions.

To Judge Cardozo the law was meant to serve and not to rule the institutions which it sheltered. No one saw more clearly than he, that the imperfect rules of today may stir equities that become the law of tomorrow. In the law of torts, one need only mention on the one side MacPherson v. The Buick Company,¹ where the law as to negligent manufacture was at last brought abreast of modern methods of distribution, and, on the other side, the Palsgraf case,² where the notion of "negligence in the air" received its classic castigation. The impact of Judge Cardozo on contract law is typified by the Duff-Gordon case,³ where a contract was enforced because the obligations although not express were fairly to be implied. "The law", he said, "has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal." Minor and unintentional defaults in a complicated construction contract, Judge Cardozo hold in another case,⁴ are not to be subjected to a syllogistic rule whose premises are found in the far simpler contracts of another age. There must be no sacrifice of justice, the opinion

1 MacPherson v. The Buick Motor Co., 217 N. Y. 382.

2 Palsgraf v. Long Island Railroad, 248 N. Y. 339.

3 Wood v. Duff-Gordon, 222 N. Y. 88.

4 Jacob & Youngs v. Kent, 230 N. Y. 239, 242.

reads, whatever may be the doubts of "those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result."

Throughout these opinions one traces their animating current, the one passion of this gentle and retiring man, that the courts should never fail to use the law to promote justice. While few judges have been so ready to adapt the law to the changing organization of the business world, he steadfastly refused to sanction any relaxation in the morals of the market place. It is likely that most real estate operators would not consider that their duty to their joint-venturers extended so far as to share the opportunity to start anew at the conclusion of the venture. But, in the case of Meinhard,⁵ Chief Judge Cardozo refused to sanction even so slight a deviation from "an honor the most sensitive." As he writes, the ease of the philosopher changes into the inner fire of the prophet. "Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions * * *. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

⁵ Meinhard v. Salmon, 249 N. Y. 458, 464.

In 1932 Chief Judge Cardozo was at the head of the foremost common law court of the land. His court was but rarely forced to plunge into the elusive statesmanship of constitutional law; it was a court of legal craftsmen. He was warmed by the deep friendship of his colleagues. Neither he nor any student of the common law could have wanted more than that he fill out his days in such a fruitful serenity.

But in that year Justice Holmes resigned. For thirty years he had enriched the work of this great Court and, by the same token, the legal thought of the nation. To succeed Justice Holmes there could be but one man. President Hoover spoke for the whole people when he offered the nomination to Chief Judge Cardozo. With reluctance, and through a selfless obedience to the higher duty, Judge Cardozo accepted the call and took his seat on this Court on March 14, 1932.

His first opinion for the Court appears in the 286th volume and his last opinion in the 302nd volume of the reports.⁶ The span is tragically short. But in these brief years Justice Cardozo has notably enriched the history of jurisprudence. To this Court he brought his deep learning in the law and to the solution of its vexing problems he lent a tolerance and a generous understanding which have rarely been equalled.

⁶ In these six years, Mr. Justice Cardozo wrote 128 majority opinions, 2 concurring opinions and 24 dissenting opinions; in addition, he collaborated in 7 concurring opinions and 10 dissents.

He made the transition from New York to this Court with an ease which seemed effortless. The large questions of constitutional law, the unexplored vistas of administrative law, and the complexities of federal taxation, were each beyond the ordinary range of litigation in the Court of Appeals. Yet, from the very beginning, his touch was as sure and his vision as far-ranging as it had been in the familiar rooms at Albany.

To the specialized fields which provide much of the work of this Court, Mr. Justice Cardozo brought rare skill with the technical tools of the lawyer and an insistent belief that the law failed when it offered reward to chicanery or greed. A complicated question of tax limitation⁷ was solved by "the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong." He differed with the majority of this Court in the Securities and Exchange Commission case,⁸ perhaps less because of his analysis of the statute than for fear that it would "become the sport of clever knaves." If the registration procedure is not to "invite the cunning and unscrupulous to gamble with detection," he continued, "when wrongs such as those have been committed or attempted, they must be dragged to light and pilloried."

⁷ Stearns Co. v. United States, 291 U. S. 54, 61-62.

⁸ Jones v. Securities and Exchange Commission, 298 U. S. 1, 32.

But it is in the larger reaches of public law that the broad vision of Mr. Justice Cardozo found full scope. The commentators may dispute as to whether the judge who decides these questions must be more the statesman or the lawyer. But none has doubted that Mr. Justice Cardozo was rarely gifted with both qualities.

The novel problems presented by administrative law received from him a sympathetic and discerning treatment. He never forgot that administrative agencies were born of a need for developing a technique which differed from judicial litigation. He has written, for the Court, that "the structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. * * * It is not the province of a court to absorb this function to itself."⁹ He saw, too, that these agencies act in a field where substantial accuracy is immeasurably preferable to the complete frustration which would result were an absolute precision sought. The Interstate Commerce Commission, faced with the task of valuing railroads, he said, may recognize that "in any work so vast and intricate, what is to be looked for is not absolute accuracy, but an accuracy that will mark an advance upon previous uncertainty."¹⁰ For him the respect to be paid the findings of the administrative tribunal was an

⁹ Miss. Valley Barge Co. v. United States, 292 U. S. 282, 286.

¹⁰ I. C. C. v. New York, N. H. & H. R. Co., 287 U. S. 178, 205.

imperative rule of decision, not to be satisfied by a verbal recognition. He has placed a decision of the Court on the ground that the lower court, "although professing adherence to this mandate, honored it, we think, with lip service only."¹¹

The same quality appears when he considers the validity of state legislation. There could be no tolerance for state regulation which, as he said in the Seelig case,¹² by setting "a barrier to traffic between one state and another", "would neutralize the economic consequences of free trade among the states." But, so long as the state action contained no threat to national solidarity, it could not properly, Mr. Justice Cardozo felt, be nullified by this Court unless the Constitution spoke to the contrary with unmistakable clarity. [When this Court held invalid a state sales tax, graduated according to volume, in the Stewart Dry Goods case,¹³ Mr. Justice Cardozo entered eloquent protest. The legislation, he said, was "a pursuit of legitimate ends by methods honestly conceived and rationally chosen.] More will not be asked by those who have learned from experience and history that government is at best a makeshift, that the attainment of one good may involve the sacrifice of others, and that compromise will be inevitable until the coming of Utopia."

¹¹ Fed. Trade Com'n v. Algoma Co., 291 U. S. 67, 73.

¹² Baldwin v. G. A. F. Seelig, 294 U. S. 511, 521, 526

¹³ Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, 577.

Few men have, with such whole-hearted humility, practiced that tolerance for human experimentation which many feel must be the hall-mark of a great constitutional jurist. But none knew better than Mr. Justice Cardozo that, when the question was one of personal liberty rather than the economic judgment of the legislature, vigilance rather than obeisance must be the order of decision. Of freedom of thought and speech, he wrote in one of his last opinions for the Court,¹⁴ "one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." He has elsewhere said:¹⁵ "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 to speak them, except at those extreme borders where thought merges into action." And then follow these majestic words: "We may not squander the thought that will be the inheritance of the ages."

Perhaps the most nearly ultimate field upon which a Justice of this Court must venture is that of measuring the acts of the Congress against the requirements of the Constitution. Mr. Justice Cardozo sat during six of the most momentous years in the history of this Court. Throughout these years the familiar rules which

¹⁴ Palko v. Connecticut, 302 U. S. 319, 327.

¹⁵ Mr. Justice Holmes, 44 Harv. Law Rev. 682, 688.

forbid the Court from passing judgment on the wisdom of the Congress were to him not aphorisms but burning truths. [He found, in his own words,¹⁶ "a salutary rule of caution" in that "wise and ancient doctrine that a court will not adjudge the invalidity of a statute except for manifest necessity. Every reasonable doubt must have been explored and extinguished before moving to that grave conclusion."]

Mr. Justice Cardozo viewed the Constitution as directed to the great end of preserving a democratic government for a free people. This is defeated if the courts view the Constitution as dictating choice, as he has stated it, in "a situation where thoughtful and honest men might see their duty differently."¹⁷ His consistent deference to the judgment of the legislature came not merely from the humility of his nature. It arose also from his profound conviction that, as he put it,¹⁸ "one kind of liberty may cancel and destroy another," and that ["many an appeal to freedom is the masquerade of privilege or inequality seeking to entrench itself behind the catchword of a principle."] Thus, where an industry was so glutted by ruthless overproduction that its survival was threatened, Mr. Justice Cardozo saw nothing in the Constitution which forbade the Congress to act, for, as he said in the Carter case,¹⁹ "The liberty protected by the Fifth Amendment does not include the right to persist in * * * anarchic riot."

¹⁶ Dissenting in United States v. Constantine, 296 U.S. 287, 299

¹⁷ Mayflower Farms, Inc. v. Ten Eyck, 297 U. S. 266, 276.

¹⁸ Mr. Justice Holmes, 44 Harv. Law Rev. 682, 687-688.

¹⁹ Dissenting in Carter v. Carter Coal Co., 298 U. S. 238, 331.

Mr. Justice Cardozo found no constitutional barrier to prevent the enactment of legislation which was compelled by the urgent needs of an ever changing society. "The Constitution of the United States", he wrote in his dissent in the Panama Refining case,²⁰ "is not a code of civil practice." The commerce power, he has said, "is as broad as the need that evokes it."²¹ The basic constitutional doctrine of separation of powers was for him not "a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee today the developments of tomorrow in their nearly infinite variety."²²

Thus far I have spoken of our friend as a lawyer and a judge. This imperfect tribute leaves untouched the far reaches of his mind and character. I have not trusted myself to speak of these things. They are so intimate and so beautiful that they quite transcend the limits of our common speech. It is better, I think, to rest upon the words of Justice Holmes who, in tenderness and affection, said that Judge Cardozo was "a great and beautiful spirit."²³

It was eminently fitting that Mr. Justice Cordozo should have been chosen to deliver the opinion of the Court in the Social Security cases. The governmental process must have seemed noblest to him when

²⁰ Panama Refining Co. v. Ryan, 293 U. S. 388, 447.

²¹ Dissenting in Carter v. Carter Coal Co., 298 U.S. 238, 328.

²² Panama Refining Co. v. Ryan, 293 U.S. 388, 440.

²³ Letter to Dr. John C. H. Wu, printed in Holmes, Book Notices, Uncollected Papers, Letters (Shriver), p. 202.

it was directed to the relief of the aged, the infirm and the destitute. His words seem to have sprung from the heart of one who felt with intensity that government succeeded only as it served the needs of its people: "Nor is the concept of general welfare static. 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. * * * The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near."²⁴

Mr. Justice Cardozo has reached the end of his journey. It has been a journey of loving service to the law and to those who live under the law. I venture to predict that, so long as our common law and our Constitution persist, men will pay tribute to the memory of this shy and gentle scholar, whose heart was so pure and whose mind was so bold.

²⁴ Helvering v. Davis, 301 U. S. 619, 641.