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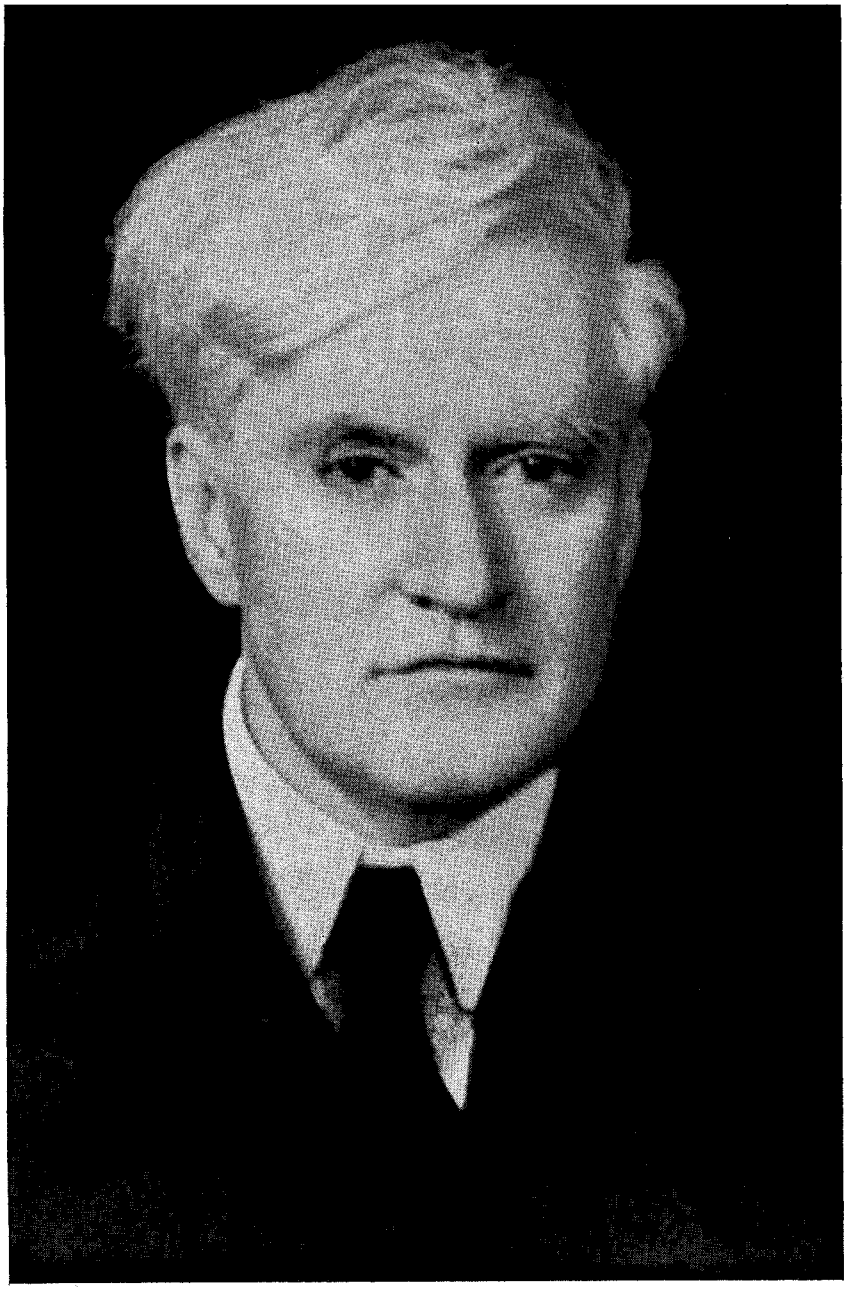

BENJAMIN NATHAN CARDOZO

# Benjamin Nathan Cardozo

*Jurist, Philosopher, Humanitarian*

ROBERT LEE TULLIS*

Benjamin Nathan Cardozo was born in the city of New York on May 24, 1870. He died on July 9, 1938. The story of his early intellectual life is told in the words of his close friend and former associate, Judge Irving Lehman:

> "At the age of nineteen, he graduated from Columbia College with high honors. A youth of frail physique and of reserved manner and spirit, he had little part in the sports or social life of the college; yet, during his whole life, the men who were in college with him gave him their admiring affection. A student of literature and philosophy, a lover of the classics, he showed even in those early days that his deepest interest was in contemporary thought and, especially, in contemporary political and governmental activities. It is significant that for the subject of his commencement oration he chose 'The Altruist in Politics' and for the subject of his bachelor's thesis he chose 'Communism.' "[1]

Cardozo's rise to judicial eminence was totally uncolored by partisan politics, a glowing tribute to the profundity of his legal scholarship. Again we are indebted to Judge Lehman for the following brief account:

> "In 1913, though he was an independent Democrat who had never been active in politics and was known only to the members of his own profession, he was nominated by a Fusion group and elected a justice of the Supreme Court of New York. In the campaign he had received the enthusiastic support of the leaders of the bar and, as soon as he was elected, some of them urged Governor Glynn to designate him to serve temporarily as an Associate Judge of the Court of Appeals. In spite of Cardozo's lack of judicial experience, the designation was made and it was received by the bench and bar with general approval. . . .

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1. Lehman, Memorial to Justice Cardozo (1938) 24 A.B.A.J. 728.

" . . . In January, 1917, Cardozo was appointed a regular member of the court by Governor Whitman and, in the following November he was elected to that position for a term of fourteen years, upon the nomination of both major parties. In 1926, upon similar nomination, he was elected Chief Judge of the court. In 1932 he was appointed by President Hoover Justice of the Supreme Court of the United States."[2]

The gist of Cardozo's philosophy is found in three slender volumes. We may find the formulation of his creed in the first of these, a publication entitled *The Nature of the Judicial Process* which comprises a course of lectures delivered in 1921 before the Law School of Yale University. It is almost at the close of the last lecture that his confession of faith reaches its climax in a passage of extraordinary beauty:

"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. I found 'with the voyagers in Browning's "Paracelsus" that the real heaven was always beyond.' 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. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born."[3]

Cardozo thus acknowledges that judges are subject to human limitations. He does not doubt "the grandeur of the conception which lifts them into the realm of pure reason" but contends that "they do not stand aloof on these chill and distant heights." And so he rejects, on the one hand, the view of Montesquieu who feels that judges are only the mouths that pronounce the law; and, on the other hand, he finds too extreme the sentiment of

2. Ibid.
3. Cardozo, The Nature of the Judicial Process (1921) 166-7.

Saleilles who says of judges that "one wills at the beginning the result; one finds the principle afterwards; such is the genesis of all juridical construction."

The other two books which set forth Cardozo's philosophy are *The Growth of the Law,* which is a publication of a second course of lectures delivered at Yale University in 1923, and *The Paradoxes of Legal Science* which appeared in 1928.

Many of the profoundly disquieting problems affecting the men of today are examined in these volumes. And so great is Cardozo's skill that merely to discuss such problems is to illuminate them. For example, the causes of uncertainty in the law are among the most harassing of all legal problems. Cardozo's analysis of one aspect of the difficulty must strike those who have almost lost their way in groping for light among digests and encyclopedias as particularly significant.

> "The fecundity of our case law would make Malthus stand aghast. Adherence to precedent was once a steadying force, the guarantee, as it seemed, of stability and certainty. We would not sacrifice any of the brood, and now the spawning progeny, forgetful of our mercy, are rending those who spared them. Increase of numbers has not made for increase of respect. The output of a multitude of minds must be expected to contain its proportion of vagaries. So vast a brood includes the defective and the helpless. An avalanche of decisions by tribunals great and small is producing a situation where citation of precedent is tending to count for less, and appeal to an informing principle is tending to count for more. . . . The perplexity of the judge becomes the scholar's opportunity."[4]

We shall not further multiply quotations from his extrajudicial utterances, but shall pass to what is shown concretely in the course of his activities on the bench. Moreover, we shall not concern ourselves with Cardozo's career on the New York Court of Appeals. That fruitful episode in his life has already been the subject of much attention by his biographers.[5]

It is noteworthy that in the first case in which Cardozo took part in a decision of the United States Supreme Court, he dissented. It is even more noteworthy that despite his short stay on this bench he lived to see that dissent become the law. The first case, *Burnet v. Coronado Oil and Gas Company*[6] had held

4. Cardozo, The Growth of the Law (1924) 4-5, 6.
5. E.g., Levy, Cardozo and Frontiers of Legal Thinking (1938).
6. 285 U.S. 393, 52 S.Ct. 443, 76 L.Ed. 815 (1932).

that the proceeds of oil leases executed by the State of Oklahoma on school lands was not subject to federal income tax in the hands of the lessees, since the lease was an instrumentality of the State in its exercise of a strictly governmental function. After a lapse of but six years, this case was overruled[7] on the basis of the dissent in the *Coronado* case. Cardozo thus early opposed a strained construction of inhibitions upon the exercise of governmental taxing powers.

In all three of the Chain Store cases[8] in which Cardozo took part, he voted to sustain the taxing power of the state. The latest case, the *Great Atlantic and Pacific Tea Co. v. Grosjean,* involved a Louisiana statute. It held that in adjusting the rate of tax for a chain store within the state, the legislature may determine the size of the chain by counting the total number of its units wherever located.

The famous case of *Schechter Poultry Corp. v. United States*[9] is conspicuous among the so-called New Deal cases, both for its intrinsic importance and for the reason that the opinion of the court was unanimous. Justice Cardozo, in his concurring opinion, discussed separately the two principal questions: the delegation of legislative power, and the scope of federal regulatory power over commerce. So great was the power delegated to the President that Cardozo said:

> ". . . If that conception shall prevail, 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. This is delegation running riot. No such plentitude of power is susceptible of transfer . . ."[10]

As to the power of Congress to regulate wages and hours of labor in intrastate business, he used this emphatic language: "If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system."[11]

In the celebrated Social Security cases, *Charles C. Steward*

7. Helvering v. Mountain Producers Corp., 303 U.S. 376, 58 S.Ct. 623, 82 L.Ed. 607 (1938).

8. Liggett v. Lee, 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed. 929 (1933); Fox v. Standard Oil Co., 294 U.S. 87, 55 S.Ct. 333, 79 L.Ed. 780 (1935); Great Atlantic and Pacific Tea Co. v. Grosjean, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193 (1937).

9. 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935).

10. Id. at 553.

11. Id. at 554.

*Machine Co. v. Davis*[12] and *Helvering v. Davis*[13] Cardozo was the organ of the court. The first case dealt with the tax for unemployment insurance, the second with the tax for old age insurance. There was no question of delegation of power to the President. That the taxes imposed under the Act are constitutional and that Congress has power to provide for an expenditure of public money for the relief of unemployment, and for old age benefits, is laid down in Justice Cardozo's opinions. An excerpt from what he says in *Helvering v. Davis* will serve better than a paraphrase:

> " . . . 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.
>
> " . . . Unemployment spreads from state to state, the hinterland now settled that in pioneer days gave an avenue of escape. Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation. If this can have been doubtful until now, our ruling today in the case of the *Steward Machine Co., supra,* has set the doubt at rest. But the ill is all one, or at least not greatly different, whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poorhouse as well as from the haunting fear that such a lot awaits them when journey's end is near."[14]

In the National Labor Relations Board cases[15] Justice Cardozo concurred with the majority in upholding the constitutional power of Congress to regulate in interstate commerce the relations of employers and employees with respect to collective bargaining by the employees.

The case of the *Associated Press v. National Labor Relations*

12. 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937).
13. 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307 (1937).
14. Id. at 641.
15. The *Labor Board* cases, which were disposed of at the same time in five separate opinions, are the following: National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893; National Labor Relations Board v. Fruehauf Trailer Co., 301 U.S. 49, 57 S.Ct. 642, 81 L.Ed. 893; National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 57 S.Ct. 645, 81 L.Ed. 893; Associated Press v. National Labor Relations Board), 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953; Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, 301 U.S. 142, 57 S.Ct. 648, 81 L.Ed. 965 (1937).

*Board*,[16] involved not only the power of Congress to regulate interstate commerce, but also the question of freedom of the press. Here it was contended that a news editor was discharged because of his activities in connection with The American Newspaper Guild, a labor organization. The majority of the Court took the view that freedom of the press was not denied, and Cardozo joined in this opinion.

It is interesting to note, however, that when he conceived the freedom of the press to be endangered, Cardozo was quick to respond. Thus in an earlier case, *Grosjean v. American Press Co.*,[17] the State of Louisiana had levied a license tax on newspapers for the privilege of charging for advertising therein, applicable only to newspapers enjoying circulation of more than 20,000 copies per week. It was held that this enactment was invalid as constituting restraint on the freedom of the press guaranteed by the due process clause of the Fourteenth Amendment. Justice Sutherland was the organ of the Court, and Justice Cardozo was a member. Widely divergent as have been the views of these two men on other issues where liberty and government come in conflict, they were agreed in upholding what Cardozo calls liberty of mind and spirit.

In the well-known case of *West Coast Hotel Co. v. Parrish*[18] the Supreme Court upheld a statute establishing minimum wages for women and thus squarely overruled the earlier case of *Adkins v. Children's Hospital*.[19] Justice Cardozo joined in the majority ruling in the *Parrish* case, and this stand was quite in accordance with his fundamental principles. In *The Paradoxes of Legal Science* he had said, "On a plane less exalted than these decisions that deal with the liberty of the spirit are those that limit the power of government in the field of economic liberty. *The legislature may not require the payment to women workers of a minimum wage, though the wage does not exceed what is essential for the needs of decent living.*"[20] He cites the *Adkins* case, and also indicates other limitations on the power of government in the economic sphere.

He disclaims any purpose to debate the question whether these cases or some of them might have been decided differently,

16. 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937).
17. 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936).
18. 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937).
19. 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923).
20. Cardozo, The Paradoxes of Legal Science (1928) 99-100. (Italics supplied.)

and he says that his purpose was "merely to inquire whether liberty may not have a meaning as a concept of social science which will have illumination for problems of this order as they come before the court hereafter."[21] He discusses the question whether the application of the pronouncements of social science might not in some or even in many instances yield results at variance with those accepted by the court. Is it to be wondered at that in 1937 the Cardozo who gave expression to these sentiments should have been found with the majority who voted to overrule the decision in the *Adkins* case?

In the famous A.A.A. case,[22] Justice Stone, dissenting, advocates "the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nation-wide economic maladjustment by conditional gifts of money."[23] Justice Cardozo joined in this dissent. In the Gold Clause cases,[24] Cardozo joined with the majority in holding that the plenary power of Congress over the monetary system of the country could not be hampered by agreements between private parties.[25] At the same time he agreed with Chief Justice Hughes that this rule was not applicable to government obligations although he felt, as did the majority of the Court, that the holder of the government bond had failed to show damage.[26]

A few cases will now be considered that have probably escaped the notice of the general public. *Shapiro v. Wilgus*[27] was decided with Cardozo as the organ of a unanimous court. An embarrassed debtor found that two of his creditors were unwilling to give him time. Under the law of his home state of Pennsylvania, he could not have a receiver appointed for himself, as an individual. He therefore brought about the formation of a Delaware corporation, to which he transferred all his property, receiving in return substantially all the shares of stock, and a covenant by the grantee to assume the payment of the debts. Then, in conjunction with a creditor, he brought suit in the federal court in Pennsylvania

21. Id. at 100.
22. United States v. Butler, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477 (1936).
23. Id. at 88.
24. Norman v. Baltimore & Ohio R.R. Co., United States v. Bankers' Trust Co., 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885 (1935); Nortz v. United States, 294 U.S. 317, 55 S.Ct. 428, 79 L.Ed. 907 (1935); Perry v. United States, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935).
25. Norman v. Baltimore & Ohio R.R. Co., United States v. Bankers' Trust Co., 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885 (1935).
26. Perry v. United States, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935).
27. 287 U.S. 348, 53 S.Ct. 142, 77 L.Ed. 355 (1932).

against the newborn Delaware corporation, invoking diversity of citizenship as the ground of jurisdiction. To the end that, as the debtor averred, the business might be protected from the suits of creditors and made to pay a profit to stockholders, a receivership was prayed for. The corporation answered, admitting all the averments of the bill and joining in the prayer. A decree, entered the same day, appointed receivers, and enjoined attachments and executions not permitted by the court.

This scheme to thwart the creditor was described as "a purpose which has been condemned in Anglo-American law since the Statute of Elizabeth (13 Eliz., ch. 5)."[28] Justice Cardozo's opinion shows that the venerable statute was stronger than the infant corporation.

*Rogers v. Guaranty Trust Co.*[29] was a case decided by a 5 to 3 vote, Justice Roberts taking no part. Stone, Brandeis and Cardozo dissented. Briefly stated, the case went off on a jurisdictional question, the Supreme Court ordering the dismissal of the bill because of lack of jurisdiction in a federal court, but without prejudice to the petitioner's right to proceed in the state court of New Jersey. Justice Stone leads in the dissent. His review of an episode in the management of the American Tobacco Company is luminous and striking. Justice Cardozo's separate dissent contains the following:

> "The doctrine of *forum non conveniens* is an instrument of justice. Courts must be slow to apply it at the instance of directors charged as personal wrongdoers, when justice will be delayed, even though not thwarted altogether, if jurisdiction is refused. At least that must be so when the wrong is clearly proved. The overmastering necessity of rebuking fraud or breach of trust will outweigh competing policies and shift the balance of convenience."[30]

*McCandless, Receiver, v. Furlaud*[31] was decided with Cardozo as the organ of the Court, Roberts, McReynolds, Sutherland and Butler dissenting. The subject of the case is the fraud of promoters of a corporation. The details of the transactions involved and discussed will not be here recited; suffice it to say that the liability of the promoters was affirmed, and Justice Cardozo's

28. Id. at 354.
29. 288 U.S. 123, 53 S.Ct. 295, 77 L.Ed. 652 (1933).
30. Id. at 151.
31. 296 U.S. 140, 56 S.Ct. 41, 80 L.Ed. 121 (1935).

opinion is of the same nature that we might expect, after reading the dissent in *Rogers v. Guaranty Trust Co.*, supra.

*Jones v. Securities and Exchange Commission*[32] was a case in which Justice Sutherland was the organ of the court, and Justices Cardozo, Brandeis and Stone dissented. The right of a registrant to withdraw his registration statement without the consent of the Commission was upheld. A subpoena had been issued to the registrant, and he withdrew his registration statement without responding to the subpoena. The requirements of the subpoena were likened by Justice Sutherland to the proceedings of the Star Chamber. To this Cardozo answered:

> "A Commission which is without coercive powers, which cannot arrest or amerce or imprison though a crime has been uncovered, or even punish for contempt, but can only inquire and report, the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice, is likened with denunciatory fervor to the Star Chamber of the Stuarts. Historians may find hyperbole in the sanguinary simile.
>
> "The Rule now assailed was wisely conceived and lawfully adopted to foil the plans of knaves intent upon obscuring or suppressing the knowledge of their knavery."[33]

What has been written deals with Justice Cardozo by the method of formulating his philosophy of law largely in his own words. The application of that philosophy has been drawn from his opinions, whether of concurrence or of dissent, during his tenure as an associate justice of the Supreme Court of the United States.

He takes his own measure, in *The Paradoxes of Legal Science,* when he compares his labors with those of the designer of a bridge. It is not for the engineer to have misgivings. His business is to know. His work is not a mere experiment. He has wrought a highway to carry men and women from shore to shore, to carry them secure and unafraid, though the floods rage and boil below. And then he continues:

> "So I cry out at times in rebellion, 'why cannot I do as much, or at least something measurably as much, to bridge with my rules of law the torrents of life?' I have given my years to the task, and behind me are untold generations, the

32. 298 U.S. 1, 56 S.Ct. 654, 80 L.Ed. 1015 (1936).
33. Id. at 33.

judges and lawgivers of old, who strove with a passion as burning. Code and commentary, manor-roll and year-book, treatise and law-report, reveal the processes of trial and error by which they struggled to attain the truth, enshrine their blunders and their triumphs for warning and example. All these memorials are mine; yet unwritten is my table of logarithms, the index of the power to which a precedent must be raised to produce the formula of justice. My bridges are experiments. I cannot span the tiniest stream in a region unexplored by judges or lawgivers before me, and go to rest in the secure belief that the span is wisely laid."[34]

But to the perturbed spirit that uttered this cry there might have come quieting voices from school and court and marketplace, bearing the message: "You have left no bridge as a monument, but what you have left gives you the right to say with the Roman poet, '*Non omnis moriar.*' The currents of life should be more tranquil because of your living and your teaching. You have striven as a highway patrolman along the path of the law to set, at every curve that may lead to sophistry and error and injustice, the danger signal, *Caveat viator.*"

34. Cardozo, op. cit. supra note 20, at 1-2.