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Cardozo and Personal Rights

ARTICLES

CARDOZO AND PERSONAL RIGHTS

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The appointment of Justices White and Goldberg to the Supreme Court tempts speculations about tomorrow's content of personal rights.[1] Either of the new Justices could make the less conservative minority the new majority. If this becomes a reality, new vitality and meaning may be assigned to some personal rights, notably due process.[2]

The underlying issues that confront the Supreme Court are not new. They have existed since the adoption of the Constitution. How these issues have been dealt with has depended upon the Court's philosophy of law. In a search for a mature philosophy, the contributions of Benjamin N. Cardozo, one of America's greatest judges, may provide clarity and direction. With a peerless style he drew upon and synthesized the best—from the thought of Holmes, Pound, James, and Dewey. His legal philosophy was fully revealed in extra-judicial writings before his appointment to the Supreme Court.[3] Some questions of continuing importance which he examined are: What is the meaning of liberty as a legal concept? What is the judicial method in personal rights cases? How are the values underlying personal rights determined? What are the factors in choosing between competing values?

Liberty and Law

Cardozo posed the questions: "Is a legal concept a finality, or only a pragmatic tool? Shall we think of liberty as a constant, or, better, as a variable that may shift from age to age?"[4] Cardozo rejected the first alternatives in the questions and embraced the latter. The answers were of great importance in

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1. Personal rights, in the sense I use the term, include all of the substantive and procedural rights through which the Constitution guarantees our personal security. They are in contrast with the economic rights of freedom of contract and property.

2. See Gideon v. Wainright, 372 U.S. 335 (1963), decided after the preparation of this article.

3. His major writings are The Nature of the Judicial Process (1921) [hereinafter cited as Nature], The Growth of the Law (1924) [hereinafter cited as Growth], and The Paradoxes of Legal Science (1928) [hereinafter cited as Paradoxes].

4. Cardozo, *Mr. Justice Holmes,* 44 Harv. L. Rev. 682, 685 (1931).

his time and have equal significance today. The method of judicial analysis and often the decision hinge upon the judge's conception of law.

Law to Cardozo is not simply what courts do in reference to operative facts,[5] nor is it deductively derived from a priori absolutes.[6] He stated:

> A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged is, then, for the purpose of our study, a principle or rule of law. In speaking of principles and rules of conduct, I include those norms or standards of behavior which, if not strictly rules or principles, since they have not been formally declared in statute or decision, are none the less the types or patterns to which statute or decision may be expected to conform.[7]

The principles that will probably be recognized by courts can only be expressed in generalities.[8] They are to be extracted from the precedents and are more likely to be found in what judges say rather than do.[9] Cardozo suggested the following were principles of law: the binding force of a will disposing of the estate of a testator in conformity with law, the prohibiting of civil courts from adding to the pains and penalties of crimes, and the barring of man from profiting through his own inequity or taking advantage of his own wrong.[10]

The view that laws are generalizations tends to increase the number of situations which are embodied by a law; thus the judge's freedom of choice in making decisions becomes narrower.[11] The gaps in the law lessen; certainty and stability increase. However, a generality must be sufficiently specific that it can operate as a guide. It is much easier to determine whether a specific rule applies to a particular fact situation than a broad principle. The principle can become so general that it ceases to be a directive device for controlling

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5. Patterson, *Cardozo's Philosophy of Law*, 88 U. PA. L. REV. 71, 82-84 (1939); Cardozo, *Jurisprudence*, 55 REPORTS OF NEW YORK STATE BAR ASS'N 263, 276 (1932). In the bar association address he suggested that the neo-realists (American legal realists) were striving to squeeze law out of existence. Compare Llewellyn, *Some Realism about Realism*, 44 HARV. L. REV. 1222 (1931).

6. GROWTH 49, 54; NATURE 132. Cardozo rejected Locke's "natural rights" doctrine as well as scholastic natural law.

7. GROWTH 52. For other definitions see Cardozo, *supra* note 5, at 276; GROWTH 33-34, 44. For an illuminating analysis of Cardozo's conception of law see Patterson, *supra* note 5.

8. Compare Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475 (1933).

9. Cardozo, *supra* note 5, at 275.

10. These were three conflicting principles of law in a case where the legatee murdered the testator. NATURE 41.

11. The "narrow rule" approach of the American legal realists gives the judge greater freedom in making decisions. See Llewellyn, *supra* note 5, at 462.

decisions in particular cases. The broadest generalities are noncontrolling without further content added by interpretation.[12]

This inability of broad generalities to direct a decision in a particular case, Cardozo found, has its greatest importance in the principles expressed in the Constitution.

> A constitution states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard, and descends into details and particulars, it loses its flexibility, the scope of interpretation contracts, the meaning hardens. While it is true to its function, it maintains its power of adaptation, its suppleness, its play.[13]

About due process he stated:

> Here is a concept of the greatest generality. Yet it is put before the courts en bloc. Liberty is not defined. Its limits are not mapped and charted. How shall they be known? Does liberty mean the same thing for successive generations? May restraints that were arbitrary yesterday be useful and rational and therefore lawful tomorrow? I have no doubt that the answer to these questions must be yes.[14]

Not only must content be added, but the principles must not become so stratified as to lose their flexibility. "We must learn the lesson that the freedoms comprehended within the concept 'liberty' are not the same at different places or at different epochs."[15] Personal rights have already been the subject of much judicial interpretation. For example, a body of precedents exists which clarifies and particularizes freedom of speech. Should the Court detach the underlying principles and be controlled by them in deciding future cases? Cardozo did not give a clear answer to this question. He spoke in terms of discovering broad, rationalizing principles,[16] but was silent as to the more narrow rules the Court creates. It can be safely surmised that he would have said that court-constructed principles which particularize the broad principles expressed in the Constitution should receive much less deference by the Court than should be given principles and rules of law in other fields.

THE METHOD OF SOCIOLOGY

Cardozo's conception of the Constitution cannot be fully understood without some examination of his philosophy of the judicial process. When a case comes before a judge, he should first compare it with the precedents. If the

12. See NATURE 18, 71.
13. *Id.* at 83.
14. *Id.* at 76-77.
15. PARADOXES 119.
16. *Id.* at 96-102.

precedents are plain and not too shocking, the search will probably end.[17] If the precedents are not conclusive he then extracts the underlying principle from the precedents.[18] In constitutional cases the underlying principle may be drawn from the Constitution. The directive force of the principle may be exerted along the line of logical progression, historical development, custom, or sociology, depending on the judge's preference.[19] The judge seldom employs one method to the exclusion of the others. The methods often blend together. For example, the values of certainty and predictability, which are achieved through the method of logical progression, are also values to be considered when applying the method of sociology.

In constitutional law, as in situations which involve unique or unsettled law, Cardozo believed that the method of sociology should be emphasized.[20] The method of sociology evaluates principles in terms of social welfare.

> 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.[21]

Cardozo expressly relied upon the philosophy of pragmatism in his enunciation of this method.[22] Rules must eventually justify themselves on the basis of their consequences.[23] Ultimately the goal of law is social welfare.[24] His method of sociology relates constitutional issues to modern society. He called upon the judge to look beyond the cases and principles dealing with facts from another age. The judge must become a student of life. The values and needs of society must guide the decision.

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17. NATURE 19-20.
18. *Id.* at 28.
19. *Id.* at 30-31. For excellent disussions of the four methods see LEVY, CARDOZO AND FRONTIERS OF LEGAL THINKING 46-63 (1938); Patterson, *Cardozo's Philosophy of Law*, 88 U. PA. L. REV. 156, 160-65 (1939). Rather than describe the four methods, this article will be limited to the method emphasized in constitutional cases. The method of logical progression is most used outside constitutional law. Cardozo estimated that nine tenths of the cases that came before him could have been decided only one way. See GROWTH 60.
20. PARADOXES 132. He considered the gaps in the law wider in constitutional law than in other fields. NATURE 16-17. Thus it is the field where judge-made law and "free decision" reign. Whether gaps in the law exist is the subject of continuing jurisprudential controversy. Kelsen claims not. See EBENSTEIN, PURE THEORY OF LAW 196-97 (1945).
21. NATURE 71-72.
22. GROWTH 46-47; NATURE 102.
23. NATURE 98-103.
24. GROWTH 130-31.

VALUES

For Cardozo the ends of law center upon values. In his value system three forces, certainty, justice and utility, are in constant interaction. Certainty is less important in constitutional cases than in other areas.[25] There the need for the continuing flexibility of the broad principles expressed in the Constitution outweighs the desirability of certainty.

Cardozo insisted that values are relative to the existing society. Law should use a pragmatic approach to find its criteria of value.[26] "The book of life changes, and the values revealed to us today may be different from those that will be revealed to us tomorrow."[27] Does this mean that justice can only be measured in terms of the societal setting? If so, is every moral system equally justified? Cardozo would answer no to both questions; ethical relativism did not carry him to moral cynicism. For example, his conclusions about freedom of thought found scientific verification in history. He noted that the measure of an enlightened society is the degree of freedom of discussion.[28] History and critical thinkers reveal those basic necessary values which lie at the core of living in cooperation.

Cardozo's quest for justice was primarily the search for the moral norms to which the law should conform.[29] "I hold it for my part to be so much of morality as juristic thought discovers to be wisely and efficiently enforcible by the aid of jural sanctions.[30] His justice struck a happy medium, "higher than the lowest level of moral principle and practice, and lower than the highest."[31] The other key force in constitutional law cases, utility, comprised several notions affecting the common good, including expediency, convenience, prudence, and economy.[32]

In determining the content of justice or utility Cardozo insisted upon an objective scale of values rather than the judge's personal preferences.[33]

> We read the quality of legal justice in the disclosures of the social mind. We read in the same book the values of all the social interests, moral, economic, educational, scientific, or aesthetic. A new science,

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25. Certainty is attained by adherence to the method of logical progression. See note 19 *supra*. Cardozo's desire for greater certainty is well illustrated in his lecture on the need for restatements of law. See GROWTH 1-29.

26. PARADOXES 36.

27. *Id.* at 59.

28. *Id.* at 106.

29. *Id.* at 31. For a more complete analysis of Cardozo's conception of justice see LEVY, *op. cit. supra* note 19, at 68-82; Patterson, *supra* note 19, at 167-69.

30. PARADOXES 35.

31. *Id.* at 37.

32. *Id.* at 54; NATURE 72. Aesthetic value receives mention but little discussion. See PARADOXES 57.

33. PARADOXES 55; GROWTH 95; NATURE 105-111.

> the science of values or axiology is teaching students of social problems to read the book aright.[34]

The utility of a legal rule can be subjected to scientific verification.[35] The justice of the rule is not so easily gauged. "[L]aw will follow, or strive to follow, the principle and practice of the men and women of the community whom the social mind would rank as intelligent and virtuous."[36] The social mind is the organ out of which public opinion emerges.[37]

His conception of a social mind is vague. When personal rights issues must be resolved, where should one look for an intelligent and virtuous standard? No clear answers were offered. He certainly rejected the notion that the transitory attitudes of the public provided guides. He insisted upon "critically thought out social judgments."[38] His desired goal of the objective evaluation of legal rules is fraught with difficulties. Cardozo recognized this and suggested that when objective standards are inconclusive the judge should look inward to his own.[39]

In his evaluation of individual liberty Cardozo was more specific in setting forth the values involved. He used the term individual liberty to include both personal and economic rights. The histories of the United States and other civilized societies verified that the liberty to know underlied all liberty. "We are free only if we know, and so in proportion to our knowledge. There is no freedom without knowledge—or none that is not illusory."[40] The freedom to know then is a value of the highest order. It is the dominant principle of democracy. It also underlies the value of utility since the advancement of science would be greatly impeded without experimentation and thought freely communicated.[41]

He considered the values of the other liberties, both personal and economic, on a less elevated scale.[42] After discussing freedom of knowledge his mood changed. "The guaranty of liberty in the constitutional law of the na-

34. PARADOXES 52. Here and subsequently Cardozo used the term "legal justice" to signify a broader range of values than morality. See PARADOXES 54. This seems to be an inconsistent use of terminology. See LEVY, *op. cit. supra* note 19, at 77-79.

35. GROWTH 85-86, 123.

36. PARADOXES 37.

37. *Id.* at 50.

38. *Ibid.* See NATURE 175-176.

39. *Id.* at 55-56; GROWTH 95.

40. *Id.* at 104. See Cardozo, *supra* note 4, at 655; PARADOXES 102-16.

41. PARADOXES 105-06. For an excellent discussion about how our scientific endeavors have felt the impact of restrictions imposed through security programs on our scientific endeavors, see GELLHORN, SECURITY, SECRECY, AND THE ADVANCEMENT OF SCIENCE (1950).

42. Justice Frankfurter implied that Cardozo placed all civil liberties on a higher scale than economic liberties. See Frankfurter, *Cardozo and Public Law*, 39 COLUM. L. REV. 88, 109 (1939).

tion and its constituent commonwealths is a guaranty that claims and immunities conceived of at any given stage of civilization as primary and basic shall be preserved against destruction or encroachment by the agencies of government."[43] Aside from freedom of knowledge, he found due process restricted in coverage, limited for the most part to instances where judicial abuse could be shown.[44]

Witness his now famous opinion in *Palko v. Connecticut*.[45] The *Palko* case set the pattern for one of the major debates in the Court today—to what extent does the fourteenth amendment incorporate the Bill of Rights. In *Palko* the state obtained a conviction of second degree murder, and a life sentence was imposed. In accordance with a statute the state appealed and obtained a reversal. In the new trial the accused was convicted of first degree murder and sentenced to death. The accused appealed on the grounds that the double jeopardy was in violation of the fourteenth amendment. Cardozo pointed out that no general rule existed which extended the protection of the Bill of Rights to cover state action. After noting that such safeguards as trial by jury and protection against self incrimination were not essential to justice, he stated:

> [W]e pass to the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption. . . . If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. . . .
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> This is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our policy will not endure it? Does it violate these "fundamental principles of liberty and justice which lie at the base of all civil and political institutions? . . ." The answer surely must be "no."[46]

Cardozo's decision in *Palko* gave strong impetus to the school favoring limited application of the Bill of Rights to the states. How does one determine whether a specific protection or freedom qualifies as one of the "fundamental principles of liberty and justice which lie at the base of all civil and political institutions?" The high value given to freedom of thought came from history and critical thinkers. Cardozo seems to suggest a different test for other liberties. Quoting Norman Wilde he states:

43. PARADOXES 123.
44. See *ibid.*
45. 302 U.S. 319 (1937).
46. *Id.* at 326-28.

> At every stage in the development of a people are found certain standards of living that fix the terms upon which men are willing to endure a given order. As long as society meets these terms they are willing to go peaceably about their business, but if these terms are not met and their fundamental habits of living and acting are interfered with, they rebel and demand their rights. What these fundamental rights are is not determined by human nature in the abstract, but by the custom and expectations of a given age and people.[47]

When will rights become so abused that people rebel and demand greater protection? Can one say that a restriction of free speech of a minority will precipitate a revolt by the people? Procedural rights protect substantive rights. The substantive rights may well be meaningless without sufficient procedural safeguards. This is dramatically illustrated today by relatively unrestrained legislative inquiries.[48] With the continuing development of a cultural and sensitive society, due process should mean something more than the minimum necessary to keep the citizenry content. So long as the standards do not seriously interfere with crime detection, due process should require criminal procedure to strive for greater protection against injustice. Fortunately, there is evidence the Court may tend in this direction. Would Cardozo be in favor of such a trend? One can only conjecture as Justice Douglas has recently:

> The concept of due process which Cardozo approved in the *Palko* case has been carried so far as to permit both the state and the federal governments to prosecute for the same, identical acts. It has permitted one state to chop up activities into many small units, making separate crimes of each, though in essence but one unitary act is involved. Whether Cardozo could have swallowed these strong doses is, of course, not known. He had a mind that was always open to new light, to new ideas. He knew for example that the present definition of insanity has little relation to the truths of mental life and was eager for the legislature to release the judiciary from the duty of applying it. Perhaps he would in time have released himself from the narrow concept of due process which the *Palko* case reflects. Perhaps in time Cardozo would have been influenced by the powerful reasons enumerated in *Adamson v. California*, and in other recent dissenting opinions for inclusion of the Bill of Rights in the concept of due process."[49]

Factors in Decision Making

The determination of the values in a case involving personal rights, while having vital influence, does not necessarily reveal the proper decision. The values in any particular case usually conflict. Should a court weigh the con-

47. Paradoxes 122.

48. See Taylor, Grand Inquest (1955); Chafee, *Investigations of Radicalism and Laws Against Subversion*, in Civil Liberties Under Attack 46 (1951).

49. Douglas, *Mr. Justice Cardozo*, 58 Mich. L. Rev. 549, 553-54 (1960).

flicting values and try to find a compromise? Other questions arise. The legislature in passing a law also makes a judgment between conflicting values. Should the court consider its judgment superior to the legislature? In the search for compromise, are there rationalizing principles present which can guide the court to the proper decision?

Balance of Interest

"The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law."[50] Thus launched, Cardozo set forth an eloquent and analytical plea for the necessity of what is now known as the balance-of-interests approach. The judge's task is to find the compromise between conflicting values. Cardozo did not suggest ready-made formulas to guide this difficult function. The judge must acquire the knowledge "from experience and study and reflection; in brief, from life itself."[51] The compromise "must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired."[52] Much also depends on how greatly the interests are affected.[53] The conclusions are provisional hypotheses, based upon the probable.[54]

The balance-of-interests approach represents a wholly pragmatic method of viewing the problem of constitutional interpretation. Other interests may outweigh the protected rights. *People v. Defore*,[55] one of Cardozo's New York Supreme Court decisions provides interesting insights into his use of the approach and some problems that may arise. After the appellant's arrest, an officer seized evidence contrary to a New York civil rights statute. The trial court admitted the evidence and appellant was convicted. He appealed on the grounds that the statute and the fourteenth amendment implicitly prohibited the admissibility of evidence obtained by unreasonable search and seizure. Although a prior New York case had allowed admissibility, since then the Supreme Court had decided *Weeks v. United States*[56] prohibiting admissibility in federal courts when the evidence was unlawfully obtained by federal agents.

Cardozo balanced the scales and decided in favor of admissibility, stating the interests as follows:

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50. PARADOXES 4.
51. NATURE 113. See GROWTH 85-86.
52. NATURE 112.
53. See GROWTH at 88.
54. *Id.* at 68-70.
55. 242 N.Y. 13, 150 N.E. 585 (1926) (admissibility of illegally obtained evidence). For Cardozo's views on what constitutes unreasonable search and seizure see People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923). Another personal rights case where Cardozo balanced the interests is Clark v. United States, 289 U.S. 1, 16 (1933).
56. 232 U.S. 383 (1914).

> The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office.[57]

He found many potential adverse effects in the federal requirement.

> We are confirmed in this conclusion when we reflect how far-reaching in its effect upon society the new consequences would be. The pettiest peace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious. A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free. . . . Like instances can be multiplied.[58]

As to the fourteenth amendment he concluded:

> The Fourteenth Amendment would not be violated, though the privilege against self-incrimination were abolished altogether. The like must be true of the immunity against search and seizure without warrant in so far as that immunity has relation to the use of evidence thereafter.[59]

The opinion reveals problems which go to the crux of the balance-of-interest approach. First, how can the judge determine what interests or values are involved? We have seen the considerations which play a role in determining values. Second, in the alignment of these values for weighing, it is possible to articulate them in such a way as to force a particular conclusion. For example, this can be done by weighing a societal interest against an individual interest.[60] In legal problems usually several societal interests can be found supporting a particular result. In the *Defore* case the social interest that office holders would not flout the law was cited in support of the exclusionary rule. This social interest would not be greatly affected by allowing the evidence. Another social interest, not explicitly placed on the scales, the protection of society from police abuse and illegality, would be greatly affected. Such freedoms as privacy and speech hinge upon the protection of society from uninhibited governmental prying. Protection for the individual is an impotent expression of the more important societal protection in the *Defore*

57. 242 N.Y. at 24-25, 150 N.E. at 589.

58. People v. Defore, *supra* note 55, at 24-25, 150 N.E. at 589. Cardozo's fears have finally been rejected. *Defore* was used as authority when the Court held that the exclusionary rule is not required by the due process provision. See Wolf v. Colorado, 338 U.S. 25 (1949). The Court recently decided this position is untenable. Mapp v. Ohio, 367 U.S. 643 (1961). See generally Van Voorhis, *Cardozo and the Judicial Process Today*, 71 YALE L.J. 202, 208-90 (1961).

59. People v. Defore, *supra* note 55, at 28, 150 N.E. at 590.

60. See Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943).

case. If the balance-of-interest approach is to be a constructive guide in deciding constitutional issues rather than a means of subverting the guaranteed freedoms, all values must be fully articulated and given careful reflection.

Further problems arise when courts attempt to compromise competing societal interests. Again the *Defore* case serves as an excellent illustration. To what extent will the effectiveness of the unreasonable search and seizure prohibition be increased by an exclusionary policy? To what extent will the public be harmed by criminals escaping their just deserts? And more important—does science offer answers to these questions? The effectiveness of the pragmatic, balance-of-interest approach depends largely upon the capacity of science to provide scientific estimates and verifications of alternative consequences.

The basic disagreement in the Supreme Court today over the balance-of-interest approach relates to the first amendment.[61] Justice Black, firmly opposed by Justice Harlan, has taken the position that first amendment protection has been undermined by the unsatisfactory application of the approach. The problem with using it in this area is that science has offered no method to determine the relative worth of the basic freedoms as compared with such social interests as the protection from internal subversion.[62] Professor Patterson recently said:

> Or, to go back to the constitutional issue, by what experiment could one measure the consequences of restricting freedom of speech and of political association by regulating the Communist Party, as compared with the consequences of inefficient safeguards against internal subversion by a foreign hostile power? Here neither set of consequences is expected to become operative within any short range of time. Suppression of political freedom would be gradual, and so would internal subversion. If either alternative were allowed to run its full course, one would find out too late that one could not go back and try the other. The process would be irreversible.[63]

To some extent these observations hold true with respect to legal rules affecting procedural rights. When a rule is initially proposed its consequences can only be conjectured. However, if the rule is adopted and subsequently becomes a serious interference with law enforcement, the process is not entirely irreversible since often the rule can be modified or abandoned without serious harm to society. Any substantial hindrance of effective police activity is usually met with strong resistance from such quarters as the attorney general or district attorney. Unfortunately, such agencies are not interested in pre-

61. See Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960); *e.g.*, Barenblatt v. United States, 360 U.S. 109 (1959); Scales v. United States, 367 U.S. 203 (1961).

62. PATTERSON, LAW IN A SCIENTIFIC AGE 26-28 (1962).

63. *Id.* at 40-41.

serving procedural rights. The public as well seems much more concerned about police ineffectiveness than potential police abuse. These reasons justify more experimentation with procedural safeguards.

The balance-of-interest approach is the core of sociological jurisprudence. Cardozo articulated and used the approach during an era when an absolutist notion of economic rights led courts to greatly impede needed economic reforms. The final acceptance of the approach radically changed the philosophy underlying the judicial function, particularly in reviewing economic regulation. However, as we have seen, distinct difficulties are inherent in the balance-of-interest approach when it is used in personal rights cases. Without awareness and careful consideration of these problems the balance-of-interest approach can be misused to make deep inroads into our heritage of freedom.

Legislative Deference

Who is properly the final arbiter? The legislature arrives at a decision when it enacts legislation. It can be assumed the legislature considered the values it deemed important and made an evaluative determination. Should courts re-examine that determination, and if so, to what extent? In viewing economic regulation and due process Cardozo felt that legislative determinations should stand "unless they are so plainly arbitrary and oppressive that right-minded men and women could not reasonably regard them otherwise . . . ."[64] The value of the external power restraining the legislature was its tendency "to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible to those who must run the race and keep the faith."[65] He had a deep respect for the legislative judgment, perhaps deeper than his respect for that of the judiciary.[66]

For different personal rights he seemed to suggest different standards for deference to the legislature. Discussing statutes which suppressed speech,[67] he stated, "If the reading of the balance is doubtful, the presumption in favor of liberty should serve to tilt the beam."[68] In viewing what he considered less valuable liberties his mood changed. "Legislature as well as court is an interpreter and a guardian of constitutional immunities."[69] "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."[70]

64. NATURE 91.
65. *Id.* at 93.
66. See Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921).
67. He was referring to the cases of New York v. Gitlow, 286 U.S. 652 (1925) and Abrams v. United States, 250 U.S. 616 (1919). He had dissented in the *Gitlow* case in the state court. Gitlow v. New York, 234 N.Y. 132, 136 N.E. 317 (1924).
68. PARADOXES 115.
69. *Id.* at 121.
70. *Id.* at 125.

While Cardozo was still on the Supreme Court there were indications that less deference would be given the legislature in cases involving personal rights rather than economic rights.[71] Professor Freund has indicated that the Court now is in substantial agreement that this double standard should exist where the right of "free inquiry" is involved.[72] A reluctance remains on the part of the majority of the Court to extend this to the other personal rights.

The Court's view of legislative deference is vitally important in all constitutional cases involving legislative restrictions on personal rights. While considering a proposed bill the legislature usually makes several decisions. First, it determines what are the important facts. Then it determines what values should be considered and reaches a final evaluative decision. The legislative process takes the same path the judicial process will follow. In viewing the proper role of the courts, legislative determinations of facts should be distinguished from legislative evaluations of competing values. The legislature has the necessary machinery to discover the relevant societal facts and scientific opinion. Courts do not. If the legislature finds certain consequences will probably result, courts should be reluctant to upset the findings. In reviewing economic legislation courts are distinctly at a disadvantage because of the high degree of expertise often required.[73] Forceful reasons require less hesitancy in reviewing legislative facts leading to restrictions on personal rights.[74] The degree of expertise is not as great. The fact finding is often conducted in a nonobjective, emotionally charged atmosphere, as the subversive activities investigations illustrate. Further, data considered is more likely to be presented by groups which favor restrictions on personal rights.[75]

Reasons why legislative fact determinations should be given weight do not apply to the evaluative judgments which must be made between competing values. Here courts should not minimize their protective role. Legislation, in reality, depends more on pressure from special interests than on the thoughtful weighing of social interests. This pressure may be exerted through organized groups, such as lobbies or administrative agencies; or it may arise from the

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71. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938). Cardozo did not participate in the case.

72. FREUND, UNDERSTANDING THE SUPREME COURT 10-12 (1951).

73. This does not mean that courts do not or should not review legislative facts in the economic field. Professor Freund has pointed out that in cases involving state interferences with interstate commerce, legislative facts are decidedly reviewed. See Freund, *Review of Facts in Constitutional Cases*, in CAHN, SUPREME COURT AND SUPREME LAW 47, 50 (1954).

74. A reason previously discussed is the general inadequacy of science to provide verifiable information in personal rights situations.

75. The Attorney General, Federal Bureau of Investigation, and House Un-American Activities Committee seem able to provide an unending supply of "statistics."

legislator's personal desire for re-election. Particularly is the latter true when the "hot" issue of loyalty is considered.[76]

The judge is largely insulated from outside pressures. In addition, he has received special training in grasping the underlying issues in value conflicts. Legal education and the practice of law are oriented toward finding adjustments when competing interests clash. Thoughtful social scientists are not ready to turn over decisions affecting personal rights to the empirical abilities of the legislature. David Reisman recently observed "that judicial obstinacy may serve in the field of civil liberties to hold open the door of the future in a way that it has not always done in protecting property rights against regulation."[77] About deference to legislative judgments he commented:

> Mr. Justice Stone's point, as I understand it, was that the courts should apply to governmental interferences with civil liberties severer standards—that is, lesser degrees of deference to the so-called legislative judgment—than in due process cases not involving freedom of similar importance for the health and tone of free discussion; he felt that there is something irreversible about an interference with civil liberties. I think that, were he alive today, he would find much evidence (and too few justices) to support his judgment.[78]

He concluded that he was "not entirely happy with developments in our society that would rob the judge and lawyer of their protective insulation against preoccupation with public relations: we still need men who are more for what the books should say than for what people will say."[79]

If the responsibility for interpreting the Constitution had not been granted the judiciary, the legislature could have assumed the task. For better or worse, this was not the choice made. A study of the congressional debate on the Taft-Hartley Act,[80] the Smith Act,[81] and the McCarren Act[82] dispels any thoughts that members of Congress seriously consider it the guardian of personal liberties.[83] If the Court does not protect these liberties, no protection exists.

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76. Certainly it is hard to justify why the controversial HUAC continues virtually unopposed by members of the House. Only six representatives voted against the HUAC appropriation in 1961. This year it has received a record appropriation of $360,000.

77. Reisman, *Law and Sociology*, in EVAN, LAW AND SOCIOLOGY (1962). Less confidence in the Court's ability to judge the legislative decision was recently displayed by a prominent law professor. See KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 86 (1962).

78. Reisman, *supra* note 77.

79. *Ibid.*

80. Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. 151 (1959).

81. Smith Act of 1940, 66 Stat. 163, 18 U.S.C. § 2385 (Supp. 1962).

82. Immigration and Nationality Act (1952), 8 U.S.C. 1101 (1959).

83. For a revealing study of constitutional discussion about these three statutes see Frank, *Review and Basic Liberties*, in CAHN, SUPREME COURT AND SUPREME LAW 109, 122-29 (1954).

Coordinating Principles

Cardozo found that deep beneath the surface of the legal system were values in paradoxical relationships. "Fundamental opposites clash and are reconciled."[84] The legal concept of liberty contains such a paradox. Liberty in the most literal sense is anarchy, the negation of "ordered liberty."[85] This antithesis must be reconciled. Cardozo searched for principles to guide a compromise.[86] The legal restriction of some liberty is necessary for the survival of social liberty. The mission of laws restricting liberty should be to preserve and enlarge social liberty.[87] If this is the purpose for restricting liberty then the principle is: the constitutionality of an act which restricts liberty should turn on its "tendency to advance or retard the free development of personality in the conditions of time and place prevailing" when the act is passed.[88] Constitutionality is determined by whether the restriction tends to increase general social freedom.

Cardozo talked mostly about economic rights when discussing this coordinating principle. His analysis of freedom of contract displays the significance of the principle. "Equality is the necessary condition of liberty . . . ."[89] Between the employer and employee no equality existed. Trade unionism adjusted this and enlarged social freedom. "The benefit that came thereby to workmen enforced an important lesson of far wider application. This was that in the matter of contract true freedom postulates substantial equality between the parties."[90] Thus a decade prior to the historic decisions upholding the New Deal legislation, Cardozo had provided a philosophical basis for governmental regulation of contracts.

He did not elaborate on this principle in a freedom of thought case.[91] Considering the continuing importance of his analysis in the *Palko* case, such

84. PARADOXES 7.
85. *Id.* at 94.
86. *Id.* at 101; see *id.* at 3.
87. *Id.* at 94-96.
88. *Id.* at 122.
89. *Id.* at 117.
90. *Id.* at 126.
91. There may have been missed opportunities. He joined in a decision upholding a vague statute requiring registration of all groups and members, except those specifically exempted by the statute, which required a secret oath as part of the initiation to membership. People v. Zimmerman, 241 N.Y. 405, 150 N.E. 497 (1926); *cf.* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); National Ass'n for the Advancement of Colored Persons v. Alabama, 357 U.S. 449 (1958). He was silent when the white primary was upheld. See Grovey v. Townsend, 295 U.S. 45 (1935); *cf.* Nixon v. Condon, 286 U.S. 73 (1932). In the personal rights cases, Cardozo most often concurred in invalidating offense legislation. See Herndon v. Lowry, 301 U.S. 242 (1937); De Jonge v. Oregon, 299 U.S. 353 (1937). For a breakdown of Cardozo's position in the cases for which he did not write the opinion see Acheson, *Mr. Justice Cardozo and Problems of Government*, 37 MICH. L. REV. 513, 532-39 (1939).

a decision would probably have had great influence on the Court today.[92] In any event he has left the Court the philosophy of coordinating principles to guide them.

CONCLUSION

Cardozo was a pioneer who insisted that judges should become aware of the impact of philosophy upon their role. He intelligently articulated a vital philosophy about the judicial process. He clarified the problems in personal rights cases and provided an excellent analysis of the meaning of freedom in a free society. Although one may not always agree with his decisions, he provided rationalizing principles which transcended his cases and guide today. The student, the lawyer, and the judge would profit well to study the philosophy of Benjamin N. Cardozo. His insistance upon discovering these principles demonstrated his regard for the judiciary's responsibility for the final judgment—the final reasoned weighing of values.

92. The importance of Cardozo's views in *Palko* was recently noted by Justice Brennan. Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761, 769-72 (1961).