FOREWORD

TO *THE NATURE OF THE JUDICIAL PROCESS*

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Why a new edition of *The Nature of the Judicial Process*? Presumably because in the world of law, Benjamin Cardozo still rocks, and his opinions and writings still send worthwhile messages as we near the 100th anniversary of his election to the bench. All law students and many academics continue to wrestle with a number of his common law opinions. Just this year Professor Lawrence Cunningham devoted many pages to comparing Cardozo's method of approach to decision-making to the more modern, economic-oriented approach of Judge Richard Posner and found Cardozo's method more helpful.[1] Cardozo's approach to constitutional law also continues to have many adherents on the bench and off; and, in a legal world filled with both strongly-held doubts and certainties, his nuanced, and I might say, ambiguous approach to the art of judging continues to beguile. *The Nature of the Judicial Process* was his major effort to address the subject of judicial decision-making out of the confines and constraints of a judicial opinion.

A new edition of *The Nature of Judicial Process* invites a new generation of readers to become familiar with a man who became one of the giants of twentieth century lawmaking by political accident after a most unpromising start. Benjamin Cardozo was born in 1870 into a political family. His father was a judge of the New York Supreme Court, New York's major trial court. His ancestors, the Cardozos

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[1] Cunningham, *Traditional Versus Economic Analysis: Evidence from Cardozo and Posner Torts Opinions*, 62 Fla. L. Rev. 667 (2010).

and the Nathans, were prominent New York Sephardic Jews, who had fled Spain and Portugal during the Inquisition and had arrived in New York prior to the American Revolution via Holland and England. Their synagogue, Shearith Israel, was already over 125 years old when the Revolutionary War was won, and their rabbi, Gershom Seixas, was the first Jewish trustee of the college that was to become Columbia University. Benjamin Cardozo would be the second. His uncle, for whom he was named, was a Vice-President of the New York Stock Exchange. In Benjamin's generation, one first cousin, Emma Lazarus, was the author of the poem that graces the base of the Statue of Liberty; another first cousin, Maud Nathan, was a well-known suffragette, social reformer, and president for thirty years of the Consumer's League of New York; and yet a third first cousin, Annie Nathan Meyer, was a playwright and the founder of Barnard College.

Albert Cardozo, Benjamin's father, earned a different kind of distinction. His judicial career was the result of political connections with two rival and notorious New York City Democratic politicians, Fernando Wood and Boss Tweed. Widespread accusations of wrongdoing against a number of New York judges in one of the periodic public outcries against Tammany Hall domination of politics led to legislative hearings to consider charges of corruption against three justices of the New York Supreme Court (the state's trial court). Albert Cardozo was one of them, and he resigned his position just before the legislature would surely have voted to impeach and convict him, as they did his two colleagues. The evidence of political favoritism and personal corruption was compelling. Benjamin Cardozo was two years old at the time. The family fortunes, literally and figuratively, declined, and the family moved out of its splendid brownstone home just off Fifth Avenue to lesser quarters several times before Albert, aided by his political connections, was able to revive the family situation.

Benjamin grew up with a twin sister and four older siblings under the cloud of the family disgrace. He was particularly close to his older sister Nellie, who helped raise him, and with whom he lived in the family homes for his whole life, taking care of her in a very

long illness at the end of her life. He was home schooled, and the tutor who prepared him for his entrance examinations to Columbia was Horatio Alger, the popular author of rags to riches novels, whose early career as a Unitarian minister was marred by accusations of what today we would call sexual abuse.

Cardozo entered Columbia at the age of 15, where he was the youngest in the class. He lived at home with his sisters and an older brother, who was practicing law in their father's firm. Their father died during his first year at college. Benjamin did not participate much in the social life of the school. He worked hard, did very well, won several prizes, and went straight from college into Columbia Law School. The instruction there consisted mostly of lectures about the rules and doctrines of law without much analysis. The Socratic method of questioning students and analyzing doctrine critically that was associated with the Harvard Law School of Christopher Langdell arrived during Cardozo's second year. He did not much take to it. Columbia had recently added a third year of study, but Cardozo, along with two-thirds of the class, left at the end of his second year. He was not yet 21.

Cardozo was admitted to the bar as soon as he reached 21, joined his brother in their father's politically-oriented firm, and began practicing law. Almost immediately, he began to make a name for himself, arguing several cases in the New York Court of Appeals in the first years of his practice. The records from his years at the bar show a very active trial and appellate practice. As time went on and he demonstrated his ability, more and more lawyers referred their important or difficult matters to him. His practice was largely oriented toward commercial and family matters. His clients came from the Jewish community, and he often litigated their cases against lawyers from major firms.

The practice of law was very different then from what it has become. The bar was relatively small, and most major firms had just a few partners. A good lawyer could make his (and they were virtually all "his") way quickly, and Benjamin Cardozo established himself as a good lawyer very early in his career. Modern-style brief writing was not yet well established. Many, perhaps most, briefs consisted

of conclusory arguments coupled with citation of, and quotation from, relevant cases. Cardozo immediately adopted the modern, more useful style that began with a statement of the facts and the questions to be decided and then went on to argument based on critical analysis of doctrine and policy supporting the desired result. When the policy arguments were not strong, Cardozo argued from the facts, and he could make technical arguments with the best. In short, he used the best ammunition to support his case that he could find, and he argued persuasively, and with style. No wonder other lawyers sought him out. His career seemed destined to carry on in that fashion although, with time, the matters he handled involved larger sums of money and his practice became more varied. He never, however, became a Brandeis-type lawyer taking on large social issues of great public importance.

Then chance intervened. 1913 was the occasion for a periodic convulsion in the New York political world. A diverse group of reformers, anti-Tammany Democrats, and Republicans united to produce a joint Fusion ticket in the local elections to try to wrest control of the local government from Tammany Hall. Putting together a ticket for the various executive and judicial positions required considerable negotiation among the different groups. A subcommittee on judges was looking for a Jew to balance the ticket. Cardozo's name was eventually suggested to the subcommittee chair, Charles Burlingham, well-known as a "judgemaker" and later thought by many to be the dean of the New York bar. Burlingham made the case for Cardozo to the Fusion group, and although the Fusion ticket was generally successful, Cardozo, running against an incumbent, barely squeaked through with the aid of some Bronx County dissident Tammany Democrats.

As he took the bench in 1914, he had been a practicing lawyer for 23 years. I have earlier summarized the first 43 years of his life in the following paragraph:

> Twenty-three years of practice had a major impact in preparing Cardozo for his judicial career. His college and law school education furnished a substantial amount of intellectual capital and the habits of reading and study that lasted his

> whole life. His work matured him socially, and his colleagues soon discovered not only his ability but the strength of his character and personality. Having lived a sheltered personal life, he used his work as his window on the world. A good litigator gets to understand people, both their strengths and their weaknesses. His work gave him firsthand experience with the human condition, with human frailty, trickery, and deceit. A good litigator also learns a good deal about the subject matter of his cases. Cardozo read widely and was more familiar with new ideas than most practicing lawyers, but he came to the bench with a view of the judge's role as a resolver of disputes, not as a dispenser of legal theory. Even though his experience as a judge would enlarge his view of the judicial role, Cardozo never lost his lawyer's touch.[2]

Cardozo tried cases as a Supreme Court Justice for just one month before he was appointed by the Governor to fill one of the temporary Court of Appeals positions that existed to help that court clean up its backlog. Three years later he was appointed and then elected to a regular term on the Court of Appeals, the state's highest court. Cardozo's first few years on the Court of Appeals were a time of legal ferment. The realist movement roiled the academic world, and its critique influenced judicial decision-making. Some of Cardozo's early opinions were instant hits. *Wood v. Lucy, Lady Duff Gordon*,[3] involving interpretation of a contract with an eye to the nature of business relationships, and *MacPherson v. Buick Motor Co.*[4] found their way very quickly into law school curriculums. The latter especially was heralded as an example of adapting ancient common law doctrine to the needs of modern industrial society for its holding that an auto company was liable to a purchaser, through a dealer, of one of its cars for injuries resulting from an accident caused by a defective wheel even though the company had no direct contractual relationship with the purchaser.

In just a few years on the bench Cardozo made a name for him-

[2] Kaufman, *Cardozo*, at 112-113.
[3] 222 N.Y. 88 (1917).
[4] 217 N.Y. 382 (1916).

self. By 1921 his growing reputation was recognized in three distinct ways. He was selected to the Board of Overseers of Harvard University. He was invited to lend his support to a project of the Association of American Law Schools to organize what would become the American Law Institute, most known for regularly publishing "Restatements" of bodies of law such as contracts and torts. Finally, he delivered the Storrs Lectures at the Yale Law School. Those lectures have been read by hundreds of thousands in the succeeding years under the title of *The Nature of the Judicial Process*.

Dean Swan had issued the invitation the previous year and Cardozo had first declined on the ground that he had nothing to say. But the offer was renewed and Cardozo responded positively to the suggestion of a faculty member that he describe for his audience the process by which he decided a case. He spent many months working on the lectures and delivered them over four nights in February 1921. They were a spectacular success. The usual process is for audiences to diminish over the course of a lengthy lecture series. Not so with Cardozo's Storrs Lectures. Once word got around after the first lecture, the audience increased dramatically, and the series had to be moved from a room seating 250 to a hall seating 500. The latter room was completely filled for the remaining three lectures.

Although Cardozo read his lectures, he was a captivating speaker. The one known recording of his voice reveals the style of a nineteenth-century orator. Arthur Corbin, a leading realist member of the Yale faculty, reported that the substance of the remarks and the style of the speaker made an extraordinary impression. "Never again have I had such an experience. Both what he said and his manner of saying it held us spell-bound on four successive days." Cardozo was then persuaded to let them be published. Cardozo was the first judge in modern times to try his hand at describing what judging was all about. Indeed, *The Nature of the Judicial Process* helped create what has become a cottage industry as interest in the subject of judicial decision-making has grown not only in the academy but perhaps more importantly among the general public. First, Cardozo himself, in subsequent efforts in the 1920s entitled *The Growth of the Law* and then *The Paradoxes of Legal Science*, and then other judges and judicial

philosophers, have written in increasingly theoretical fashion about the subject. However, ninety years later Cardozo's initial effort is still being read, with profit.

When Cardozo delivered his lectures, the diverse academic movement known as "legal realism" was in full flower. A theme of that movement was its attack on what it portrayed as a formalist, mechanistic approach to judging. The previous half century had been characterized for its emphasis on judge-made law as having its own internal consistency, with doctrines derived from first principles independent of the politics of the day. Judges, it was said, "found" and did not "make" law, and they deduced the governing rules in a particular case from the decided precedents. The extent to which that portion of the realists' attack on their predecessor was based on inaccurate caricature is still a matter of some debate, but there is little doubt that one of Cardozo's purposes in delivering *The Nature of the Judicial Process* was to acknowledge the importance of sources beyond precedent for judicial decision-making as well as the inevitable element of "law-making" discretion that appellate court judges exercise in close cases.

Some of the major ideas in *The Nature of the Judicial Process* relied on the earlier work of Holmes' *The Common Law* (1881), John Chipman Gray's *The Nature and Sources of the Law* (1909), and the writings of Roscoe Pound. Cardozo described four major sources of material for judicial decision-making – logic, history, custom, and public policy. He devoted a lecture to each of these. It seems apparent that history and custom are more specialized doctrines that will be powerful factors in deciding a matter only in those relatively few cases when there is enough evidence of either from which to dispose of the case. He regarded logic, the use of deductive analysis from principles already established, as having a certain presumption in its favor and as governing absent strong arguments from history, custom, or public policy. While logic as he defined it was backward looking, his incorporation of the notion of deciding by analogy also had a forward looking aspect.

Cardozo was not content with such subtlety. The bulk of his lectures consisted of analysis of the effect of public policy considera-

tions – a normative approach based on contemporary values – on judicial decision-making. He both endorsed the importance of using law to achieve social justice and warned against the dangers that could accompany the abandonment of established principles, certainty, and order. Judges were agents of change, but not too much and not too often. The trick was to know when to innovate and when to refrain.

Cardozo was no revolutionary. His vision of the judicial role was a version of what English and American judges had done for centuries, reaffirmed and adapted for modern use. He believed that the major role in guiding social change in a democracy belonged to the legislature and the executive. Thus, he innovated most when the step to be taken was modest and when the innovation did not violate what he saw as the prerogatives of other institutions of government – and ideally when the legislative or executive branch had already pointed the way. While Cardozo often adapted law to new social conditions, he also often declined to make such adaptations. Fairness was important to him, but he did not believe that judges could always do what they thought was fair or just. Cardozo believed that he had to respect precedent, history, and the powers of other branches of government. Judging involved taking all these factors into account, methodically and as impartially as he could.

A common complaint, offered by judges, is that Cardozo's prescription does not help a judge to decide a particular case. Of course not. Indeed, in a way, a subtheme of Cardozo's lectures is that judicial decision-making involves a nuanced approach among different considerations, any one of which may be dominant with respect to a particular issue or in the context of particular facts. He was essentially an accommodationist, but the totality of the messages was ambiguous. That ambiguity, I think, has contributed to his enduring reputation. How one applies Cardozo to different situations depends on what strand of thought is emphasized in different contexts. Even judges who subscribe fully to his messages will put the elements of decision-making together in different ways in particular cases, each side citing different Cardozo words for support. As you will see from reading his lectures, Cardozo carried forth his pre-

scription into the field of constitutional law as well, expressing the view that public policy considerations had their strongest justification in that field. Indeed, he outlined a controversial view, which he expounded as a Justice of the United States Supreme Court, that "the content of constitutional immunities is not constant, but varies from age to age."[5]

The Nature of the Judicial Process was not a work of philosophy. Although Cardozo was well read in works of philosophy and often quoted or cited philosophers to support a particular insight, he was not interested in attempting to set out a comprehensive theory of judging that was grounded in philosophy. His purpose was to explain the art of judging from his perspective as a judge and former practicing lawyer. In a sense, the guts of *The Nature of the Judicial Process* can be found buried in three printed pages.[6] All the rest is elaboration and, at the end of the Lectures, he issued a word of caution about everything he said. While he refused to quarrel with the notion that a judge reflects "the spirit of the age," he was skeptical about what that was. "The spirit of the age," he wrote, "as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or occupation or fellowship have given us a place."[7]

The years following the delivery and publication of *The Nature of the Judicial Process* saw the transformation of Benjamin Cardozo from a well-known judge to a judge with a national reputation. The academy lionized him even before he became chief judge of the New York Court of Appeals, and the court itself was seen as the outstanding state court in the country. It had several notable judges, Cuthbert Pound, William Andrews, and Irving Lehman, to name just three of Cardozo's colleagues, but it was Cardozo's opinions that caught the academic public's eye and were incorporated into casebooks throughout the country. This was a time when virtually all judges, and not their law clerks, wrote judicial opinions. Cardozo wrote in a distinctive style, with many one-liners that

[5] Pp. 82-83.
[6] Pp. 112-114.
[7] Pp. 174-175.

sharpened his meaning. Occasionally flowery and ornate, at its best the style was crisp and persuasive, and it constitutes a large part of the explanation for his continuing popularity in the legal academy. He had the knack of making a great case out of what would have been humdrum in the hands of most judges.

Cardozo was induced to give two more Lecture series after *The Nature of the Judicial Process.* The first, *The Growth of the Law* (1924), was little more than a rehash of *The Nature of the Judicial Process.* The second, *The Paradoxes of Legal Science* (1928), was Cardozo's effort to place *The Nature of the Judicial Process* into more of a philosophical mode, but in essence it was *The Nature of the Judicial Process* once more. Cardozo also tried his hand at writing on such subjects as *Law and Literature and Other Essays and Addresses* (1931) and *What Medicine Can Do for Law* (1930), but the only other substantial piece of nonjudicial writing he did while a Court of Appeals judge was a long lecture entitled "Jurisprudence" that he delivered just before he joined the United States Supreme Court in 1932. There again he sought to deal with the phenomenon of legal realism, with which his approach had much in common, by playing down some of its more exuberant statements about the uncertainty and indeterminacy of legal principles as enthusiastic hyperbole.

All he achieved was to anger some of realism's leading exponents, notably Jerome Frank, a New Deal lawyer with academic pretensions who later became a judge of the U.S. Court of Appeals for the Second Circuit. Frank theretofore had been a strong admirer of Cardozo. Stung by Cardozo's talk, Frank wrote him a thirty-one page critique, with a thirty-page appendix, explaining his views, which he believed had been mischaracterized and misunderstood by Cardozo. Cardozo did not respond substantively, pleading the press of business associated with his appointment, and deprecating his own effort. Sixteen years later, after Cardozo had died, Frank published his criticisms of Cardozo's "Jurisprudence" lecture in a law review article that even criticized the title of *The Nature of the Judicial Process* for its emphasis on appellate opinions, as opposed to trials and fact-finding, which Frank took to be of greater significance to

the law as it actually affected people's lives.[8] Indeed, after Cardozo died, Frank, who was much influenced by Freudian psychology, published an anonymous critique with a psychological analysis of Cardozo.[9] Frank portrayed a man who cloaked the disgrace of his father's career in the garb of an eighteenth century English gentleman writing in an alien style. Clearly, the years had not dulled Frank's anger at Cardozo's criticism of his boldest claims about the indeterminacy of the law.

Appointment to the United States Supreme Court ended Cardozo's extrajudicial writing. Unlike many current Supreme Court Justices who regularly expound their judicial philosophies in off-the-bench settings, Cardozo immediately felt constrained by the press of business, by the need to conserve his energy, and perhaps also by a sense that the Court at that time was already embroiled in sufficient controversy concerning the legality of New Deal legislation. But Cardozo had one further contribution to make to larger issues of judicial decision-making, and he chose, what was for him an unusual forum, a judicial opinion. The subject was what we would today call originalism, the binding effect of the Framers' intent in constitutional interpretation. As we have already noticed, Cardozo had indicated a view in *The Nature of the Judicial Process*. But it is one thing to express a view off the bench, quite another to do so in an opinion. That was something Cardozo rarely did. His job as judge was to decide cases, not to issue pronouncements on current issues of jurisprudence. But he did so early in his career on the Supreme Court in the context of a hotly-contested, major piece of litigation.

The Minnesota Mortgage Moratorium Case (*Home Bldg. & Loan Insurance Co. v. Blaisdell*,[10] involved the power of a state to delay foreclosure of a defaulted mortgage by permitting the mortgagor to substitute rent based on reasonable value for the mortgage payments that were due. The debt owed would have to be paid off in full eventually. A closely-divided Supreme Court upheld the state stat-

[8] *Cardozo and the Upper-Court Myth*, 13 Law and Contemp. Probs. 369 (1948).
[9] Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion*, 29 Va. L. Rev. 625 (1943).
[10] 290 U.S. 398 (1934).

ute against an argument that it impaired an "obligation" of contract in violation of Article I, section 10 of the Constitution, known as the Contract Clause. Chief Justice Hughes circulated a draft majority opinion distinguishing between statutes that interfered with the creditor's right and those that interfered merely with the remedy. That was insufficient for Cardozo, who circulated an opinion that dealt with the basics of constitutional interpretation. His opinion spelled out the approach he first set forth in *The Nature of the Judicial Process*. Interpretation of a constitutional provision, even one as narrow and focused as the Contract Clause, was not limited by what the Framers understood at the time of the adoption of the provisions. Echoing John Marshall, Cardozo expounded at some length his view that the Constitution had been designed to meet the needs of an expanding future and its meaning could change as society changed.

But Cardozo's opinion went unpublished. When Hughes saw it, he incorporated some of its substance, briefly, in his own opinion and the ever-collegial Cardozo withdrew his concurrence. His draft opinion, however, was a stirring defense of an expansive approach to constitutional interpretation that still resonates in modern constitutional discourse and constitutes a nice conclusion to the exposition he first set forth in *The Nature of the Judicial Process*. (Substantial excerpts from the draft opinion are published in Kaufman, *Benjamin Cardozo and the Supreme Court*.[11])

It was his final contribution to the subject of judicial decision-making. His career on the Supreme Court was all too short. He suffered a heart attack in late 1937, followed by a stroke shortly thereafter, and he died the following summer at age 68. But, as you will see in reading the following Lectures, he left behind, in *The Nature of the Judicial Process*, a series of insights and messages that still provide substance for anyone interested in the subject of how judges decide cases. ❶

[11] 20 Card. L. Rev. 1259 (1999).