

# Introduction: *The Nature of the Judicial Process* at 100\*

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This special issue of the *Yale Journal of Law and the Humanities* contains papers presented at a March 2022 conference at Yale Law School marking the centenary of the publication of Benjamin Cardozo’s *The Nature of the Judicial Process*. (The pandemic foiled our efforts to time these events more precisely.) One of us (Barzun) came up with the idea, and the two of us, together with Daniel Markovits, Benjamin Zipursky, and Konstanze von Schütz, planned the event and this volume. We can think of no more apt publisher for the conference papers than the *Yale Journal of Law and Humanities*. As a person of letters and science with both pre-modern and modern sensibilities, as someone both of and not of this world, and as a jurist who was unsentimental yet devoted to the cause of human dignity and welfare, Cardozo approached the law first and foremost as a humanist.<sup>1</sup> The papers here collected—which range from the historical to the philosophical to the literary—are offered in the same spirit.

One may ask whether the hundredth anniversary of the publication of Cardozo’s book is an occasion worth marking. Judge Richard Posner observed in his contribution to the centennial issue of the *Harvard Law Review* that because “a journal has no natural lifespan, the fact that it is 100 years old should interest only people who have a superstitious veneration for round numbers.”<sup>2</sup> A book’s publication date may have an even weaker claim for recognition since it does not even give birth to an institution with a “lifespan” at all, natural or otherwise.

Nor does Cardozo’s book obviously cry out for special treatment. Delivered as a set of four lectures in 1921, *The Nature of the Judicial of the Process* is a somewhat meandering set of reflections on judicial decisionmaking, filled with long sentences and even longer quotations from

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\* Participants in the conference included those mentioned in this introduction, as well as Richard Brooks, Abbe Gluck, Robert Post, Rebecca Roiphe, and Scott Shapiro.

1. See ANDREW L. KAUFMAN, CARDOZO (1998); John C. P. Goldberg, *Book Review: The Life of the Law*, 51 STAN. L. REV. 1419 (1998) (discussing how Cardozo combined profound detachment from the world with a deep understanding of it and attempted to fashion and apply law in a way that was both rule-bound yet responsive to social norms).

2. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

a range of jurists, some of them now obscure.<sup>3</sup> Its arguments are circuitous, and they might seem to terminate in the most banal imaginable conclusion: judging cannot be mechanical because there are hard cases that require balancing various and conflicting legal, moral, and social considerations. Even if one supposes this was news back in 1921, one might fairly conclude that, one hundred years later, there is nothing much to see here.

On the other hand, law is a discipline built upon old texts. It treats certain sources as authoritative or canonical, and *The Nature of the Judicial Process* is undoubtedly part of the American legal canon. Supreme Court justices have cited it nearly sixty times since its publication (nineteen times in this century alone), including in such landmark cases as *Rochin v. California*,<sup>4</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>5</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>6</sup> and *District of Columbia v. Heller*.<sup>7</sup> In a 34-year stretch in the late twentieth century, the book sold over 150,000 copies, and new editions continue to appear—including one in 2021.<sup>8</sup> Although its central theme is now well-worn territory, Cardozo's distinctive take on the "judicial process" has somehow endured.

But *ought* it to have endured? Does it *really* have something valuable to tell us about law or adjudication today? If so, *what*? These were the questions underlying our conference, which was held at Yale because that is where, one hundred years ago, Cardozo delivered the Storrs Lectures that became the book. Unfortunately, there was no life-in-being at Cardozo's lecture who could attend our conference. But we came close: When the *Yale Law Journal* hosted a symposium to honor the 40th anniversary of *The Nature of the Judicial Process*, Arthur Corbin, then 94 years old, was able to participate and give a firsthand account of Cardozo's lectures.<sup>9</sup> In attendance at that 1961 symposium was a precocious young law professor named Guido Calabresi. Now-Judge Calabresi, approaching his ninetieth birthday, was an active participant in our symposium sixty-one years later.

The discussions that took place over the two days were lively and wide-ranging, and they confirmed our hunch that Cardozo's text still has something to offer. This said, any fears of a comfortable and complacent pro-Cardozo consensus were quickly put to rest. Early on, Kenneth Abraham and G. Edward White sounded a skeptical note, expressing bafflement at how Cardozo's audience could have found his lectures

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3. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

4. 342 U.S. 165 (1952).

5. 505 U.S. 833 (1992).

6. 509 U.S. 579 (1993).

7. 554 U.S. 570 (2007).

8. KAUFMAN, *supra* note 1, at 204 (providing sales figures); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (Andrew L. Kaufman ed., 2021).

9. Arthur L. Corbin, *The Judicial Process Revisited: Introduction*, 71 *YALE L. J.* 195, 197–98 (1961).

spellbinding (as Corbin claimed it had).<sup>10</sup> In their view, Cardozo provided little more than a rambling pastiche of enigmatic statements: hardly the stuff of successful lectures or texts.<sup>11</sup> Professors Abraham and White nevertheless manage to extract a nugget of value from the lectures in their suggestion that courts face doctrinal “forks in the road” that require judges to adopt either an expansive or narrow rendering of a line of cases. Abraham and White support this claim by drawing on some of Cardozo’s best-known decisions applying and developing the law of torts, which, in their view, capture the phenomenon far better than does anything in Cardozo’s lectures.

John Goldberg offers a response to Professors Abraham and White’s skepticism. He argues that the lecturers were and are more illuminating—and their connection to his judicial opinions deeper—than they claim.<sup>12</sup> Cardozo, Goldberg claims, was showing his legally trained audience that what judges were doing was less technical, and more like ordinary practical reasoning, than they might have supposed. His account of the judicial process is down-to-earth yet not for that cynical or skeptical. Judges must often look beyond settled law to decide cases, but when they do so they rely on the sorts of considerations we would hope they would—asking what has been done before in similar situations, why the issues at hand are framed the way they are, and which decisions better accord with prevailing notions of the right and the good. Professor Goldberg then aims to show how Cardozo invokes precisely those sorts of considerations in some of his most famous judicial opinions.

A common assumption underlying the disagreement between Professors Abraham and White and Professor Goldberg is that Cardozo was aiming to give an account of what judges do under conditions of significant uncertainty. The theme of legal uncertainty was explored even more explicitly by two other conference participants. In his contribution, Shyamkrishna Balganesh draws attention to an apparent tension between *The Nature of the Judicial Process* and a later publication—*The Growth of the Law*—which Cardozo himself regarded as an elaboration rather than a departure.<sup>13</sup> In his Storrs Lectures, Cardozo seemed almost to revel in legal uncertainty, seeing it as an inherent feature of the common-law process and as something to embrace rather than hide or critique. But in his later work, Cardozo presents legal uncertainty as a problem in need of fixing—

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10. *Id.* at 196.

11. Kenneth Abraham & G. Edward White, *Doctrinal Forks in the Road: The Hidden Message of The Nature of the Judicial Process*, 34 YALE J.L. & HUMANS. 24 (2023).

12. John C. P. Goldberg, *Rediscovering The Nature of the Judicial Process: A Comment on Professors Abraham’s and White’s Doctrinal Forks in the Road*, 34 YALE J.L. & HUMANS. 99 (2023). For his part, Judge Calabresi suggested a somewhat different, “more provincial” explanation for the audience’s enthusiastic response to Cardozo’s lectures: Cardozo was telling them that the “Yale approach” to law and legal reasoning was exactly the right one.

13. Shyamkrishna Balganesh, *Cardozo and Uncertainty in the Common Law*, 34 YALE J.L. & HUMANS. 113 (2023).

specifically, fixing through the work of the American Law Institute, of which he was a founding member. Professor Balganesh suggests that this tension reflects a deeper one between Cardozo's two public personas. He was seen—and saw himself—as both a judicial statesman and a practical reformer. Though often aligned, these two personas came into conflict when considering the question of what to do about, and how to think about, legal uncertainty.

Amalia Amaya notes a different tension in Cardozo's attitude about legal uncertainty. In her paper, she endorses Cardozo's suggestion that ambivalence can stimulate creativity.<sup>14</sup> Modern psychological research lends some support to that idea by documenting how the experience of ambivalence tends to foster creativity among expert decisionmakers. Professor Amaya thus argues that we should seek to cultivate in our judges today the intellectual virtues Cardozo rightly emphasized—open-mindedness, patience, and the courage to explore new possibilities. Like Professor Balganesh, she points out that Cardozo seemed conflicted, though in a different way. Despite his acknowledgement of his own uncertainty, Cardozo expressed great confidence that, in the long run, the judicial process would result in genuine *progress*. Given his belief that it is often unclear how to decide cases in the short run, what permitted him to be so certain that things will improve in the long run?

That question need not be rhetorical. One answer might be that the common-law method of adjudication, which authorizes judges to resolve cases with equally strong legal support on either side by reference to moral principles, is likely to improve the law over time. A few of the contributions consider Cardozo's suggestions along these lines. Most ambitiously, Professor Zipursky argues that Cardozo is best seen as inaugurating a tradition of legal thought he calls "American Natural Law Theory," which also includes such later thinkers as Lon Fuller and Ronald Dworkin.<sup>15</sup> Because this tradition challenges assumptions of legal positivism, legal realism, and earlier iterations of natural-law theory, it sometimes appears conflicted or even incoherent. But Professor Zipursky offers a defense, showing how the tradition has roots in American philosophical pragmatism and suggesting that insights drawn from Cardozo, Fuller and Dworkin can provide the basis for a coherent and powerful jurisprudence.

In his Comment on the paper, Charles Barzun endorses Professor Zipursky's effort to identify a tradition linking those thinkers but suggests that it is older and more diverse than Professor Zipursky's essay suggests.<sup>16</sup>

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14. Amalia Amaya, *Ambivalence, Judicial Craftmanship, and the Development of the Law: Variations on a Theme of Benjamin Cardozo*, 34 YALE J.L. & HUMANS. 190 (2023).

15. Benjamin C. Zipursky, *Benjamin Cardozo and American Natural Law Theory*, 34 YALE J.L. & HUMANS. 24 (2023).

16. Charles L. Barzun, *Taking Experience Seriously: A Comment on Professor Zipursky's Benjamin Cardozo and American Natural Law Theory*, 34 YALE J.L. & HUMANS. 58 (2023).

In his view, the tradition is better described as a common-law tradition—one that goes back to at least James Wilson. At the same time, he attempts to distinguish Wilson, Cardozo, and Fuller, on the one hand, from Dworkin, on the other, on the ground that the earlier thinkers were more willing than Dworkin was to adopt a sociological perspective on legal practice. For that reason, they could better explain than Dworkin could how the common law might advance—or retard—social progress over time.

Aditi Bagchi develops a similar theme in greater depth.<sup>17</sup> She trains her focus on Cardozo’s reliance upon conventional morality as a source of law. Professor Bagchi carefully distinguishes conventional morality from its cousins, “custom” and “culture,” arguing that Cardozo privileged the first over these other two because it was more likely to lead to progress over time, albeit haltingly. On the one hand, deference to conventional morality privileges the status quo; but on the other hand, because conventional morality is always changing and a locus of disagreements, it may offer opportunities for judges like Cardozo to intervene and even help shape its contours through their judgments, creating a feedback loop of sorts. Thus, Professor Bagchi suggests that the indeterminacy or instability of conventional morality is itself the source of its value as a basis for judicial decisionmaking.

Of course, the idea that morality, whether genuine or conventional, properly directs the growth of the law is an old one. A few of the contributors explored its doctrinal roots in the law of equity, observing that many of the examples Cardozo used to illustrate his preferred method of adjudication—including the now-canonical *Riggs v. Palmer*<sup>18</sup>—come from decisions that once would have been understood to fall within the courts’ equitable rather than legal jurisdiction. In his paper, Henry Smith argues that Cardozo represents a middle-of-the-road-not-taken with respect to the role of equity jurisprudence.<sup>19</sup> This view recognizes the need to use equity to supplement and correct the law in certain circumstances but stops short of seeing it as authorizing first-order judicial policymaking of the sort described and endorsed by prominent Legal Realists. Offering a novel take on Cardozo’s claim that the “method of sociology” serves as the “arbiter” of the other methods, Smith argues that Cardozo understood equity as “meta-law”—a genuine gap-filling technique that aims to correct for problems created by the generality of legal rules. Rejecting the thought that his rendition of Cardozo’s understanding of the law-making power of courts renders it unduly cautious, Professor Smith argues that it offers a

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17. Aditi Bagchi, *Conflict, Consistency and the Role of Conventional Morality in Judicial Decision-Making*, 34 YALE J.L. & HUMANS. 9 (2023).

18. 22 N.E. 188 (N.Y. 1889).

19. Henry E. Smith, *Cardozo and the Nature of the Equitable Process*, 34 YALE J.L. & HUMANS. 166 (2023).

compelling way for modern courts to provide law that is both determinate and conduct-guiding yet flexible.

Irit Samet pursues similar themes in her conference paper. In doing so, she challenges directly Judge Posner's effort to characterize Cardozo as a Legal Realist or Posnerian pragmatist, arguing that such an interpretation cannot be squared with Cardozo's willingness to give the formalistic tendencies in the law their due.<sup>20</sup> Instead, she claims, it is more accurate to view him as an equity jurist in the classic style. For centuries, equity courts had recognized the need to soften the law's sharp edges to ensure justice is done, even when that required the judge, as Cardozo put it, to "bend symmetry" in the law, "ignor[ing] history and sacrific[ing] custom in pursuit of other larger ends."<sup>21</sup> According to this view, the judge's task is to ensure that legal liability ultimately tracks moral accountability.<sup>22</sup>

In her Comment on Professor Samet's paper, Konstanze von Schütz concurs in the judgment that equity plays a central role in Cardozo's lectures. But she distinguishes between a judge looking to *conventional* morality to decide a case and a judge relying on a personal sense of *conscience* to do so. Cardozo's understanding of equity jurisprudence, according to Professor von Schütz, stresses the former more than the latter. Like Professor Bagchi, she notes that Cardozo recognized a feedback effect between the two. Judges' decisions not only reflect conventional morality but also shape it. For Professor von Schütz, the upshot is that if Professor Samet is right that Cardozo's vision of equity law has the capacity to advance a "progressive agenda," then it will do so through "carefully crafted reform, not revolution."<sup>23</sup>

Several of the participants in the symposium noted Cardozo's interest in the interaction just mentioned between judges' individual moral views and those of the society in which they live.<sup>24</sup> Bernadette Meyler's contribution offers the most distinctive approach to this question. In preparing for the conference, Professor Meyler unearthed a heretofore unpublished work of Cardozo's that reveals his interest in this issue from an early age. While a Columbia University undergraduate, Cardozo wrote an essay titled "Some Notes on George Eliot." It is reproduced here, as part of this special issue.<sup>25</sup> Professor Meyler points out that Cardozo seemed to be particularly interested in Eliot's use of what literary scholars today call "free indirect

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20. Irit Samet, *Equity, Morality and The Law in The Nature of the Judicial Process*, 34 YALE J. L. & HUMANS. 136 (2023).

21. CARDOZO, *supra* note 3, at 65.

22. Samet, *supra* note 20, at 12.

23. Konstanze von Schütz, *Cardozo's Equitable Method and Judicial Lawmaking's Auxiliary Role: A Comment on Professor Samet's Equity, Morality, and Law in The Nature of the Judicial Process*, 34 YALE J.L. & HUMANS. 158 (2023).

24. This theme is explored in John Goldberg, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1344 (1990).

25. Benjamin N. Cardozo, *Some Notes on George Eliot*, 34 YALE J.L. & HUMANS. 226 (2023).

discourse,” which refers to a form of storytelling in which the narrator “oscillates between that character’s internal perspective and the third-person form.”<sup>26</sup> Professor Meyler suggests that Cardozo’s understanding of the judicial process as something that requires the judge to make moral judgments but also consider those judgments in light of the norms of a society’s morality—can be seen as mimicking in certain ways Eliot’s method of free indirect discourse. She goes on to show how other themes Cardozo took up in his later writings and judicial opinions—from the importance of literary form to the nature of duty and causation—can also be seen in this early essay.

In her Comment on Professor Meyler’s paper, Leslie Kendrick pours some skeptical (if not quite cynical) acid on the suggestion that Eliot directly influenced Cardozo’s thinking.<sup>27</sup> Kendrick notes that there were many such influences, and that it would be a fool’s errand to identify any single one as decisive. Nor should we *hope* that judges would turn to literature to improve their judging. “Literature is not a civics course,” Kendrick insists, “in either style or substance.”<sup>28</sup> The worry, then, is that any juristic effort to use literary sources will end up abusing them.<sup>29</sup>

But more than just *literary* sources are liable to abuse. Professor Kendrick’s challenge could be broadened to question the organizing rationale of the symposium itself. We suggested above that the papers published in this volume serve as evidence that Cardozo’s lectures still have something to offer today. But a skeptic might suggest that the contributions to this volume reveal more about their authors than about *The Nature of the Judicial Process*—that the book continues to serve as a kind of inkblot in which judges and law professors see whatever set of moral, social, or aesthetic values they happen to prize.

Maybe so. But a similar worry is also inherent to the task of being a judge or legal scholar. When there are disputes over how to interpret a contract, a judicial opinion, or the “social mind,” it will always be difficult to assess how much of one’s interpretation is the product of one’s own experience, rather than found in the object itself. That is why our legal system strives to make legal texts clear, explicit, and less susceptible to competing interpretations. It is also why a good deal of common law has been supplanted by statutory and regulatory law since Cardozo’s day. The

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26. Bernadette Meyler, *Cardozo’s Literary Precedents*, 34 *YALE J.L. & HUMANS*. 210, 215 (2023).

27. Leslie Kendrick, *Literary Influence on Legal Philosophy*, 34 *YALE J.L. & HUMANS*. 246 (2023).

28. As Judge Calabresi put it at the Symposium, the difference between law and literature is that the “the poet’s job is to say it well; the judge’s job is to get it right.”

29. At the symposium, Daniel Markovits defended the plausibility and value of genuine literary influence on a person’s ethical outlook. Even if Professor Kendrick is right that we should not look to literature *for the purpose of* moral improvement, it may nevertheless be the case, Professor Markovits suggested, that “if we read better books, we’ll be better people.” Indeed, the pedagogical value of the “humanities” that forms part of the title of this journal has long been premised on such an assumption.

theory—surely contestable, given longstanding debates about statutory interpretation—is that, in the face of disagreement over which rules we should adopt, we can at least agree about which rules to obey.<sup>30</sup>

The fact of interpretive disagreement, however, does not cause the problem; it merely reveals it. Law is, at least in part, a social construction. It is also a human achievement, which means that maintaining its existence and improving its operation are as much social and political tasks as intellectual and moral ones. Perhaps that explains why in his Storrs Lectures, Cardozo felt compelled to balance the conflicting impulses he experienced as a judge—the need for stability against the demand for change, the weight of social mores against the pull of his own conscience—in order to bring into harmony “the truth without us and the truth within.”<sup>31</sup> If so, then reflecting on the lectures Benjamin Cardozo gave one hundred years ago may indeed still tell us something important about the nature of the judicial process.

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30. For a classic statement of this idea – one that itself surely owes a debt to Cardozo – see HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (characterizing as the “central idea of law” the judgment that “decisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed”); see also *id.* at 181 (citing *The Nature of the Judicial Process*).

31. CARDOZO, *supra* note 3, at 174.