

# Conflict, Consistency and the Role of Conventional Morality in Judicial Decision-Making

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*Cardozo defends a pragmatic approach to judicial decision-making. Judges should apply and develop legal rules with an eye toward their social function. “Public policy” at this stage of decision-making theoretically could be rooted in a social scientific exercise or some other direct attempt to come up with the optimal rule.*

*Cardozo instead directs judges to conventional morality. Conventional morality is an unlikely solution given the specter of inconsistency that it raises. But in the disagreement and conflict about conventional morality that seem to render it unstable lie the resources for self-correction over time. Judicial decision-making is inevitably inconsistent to some degree, no matter how judges try to fill in gaps after traditional decision-making criteria run out. Alternatives like custom, culture and attempts to decipher the “best rule” directly, do not link law with public discourse. Looking to conventional morality allows that judicial decisions, if not aligned, form a progressive arc over time.*

As a self-avowed pragmatist, it is fitting that Benjamin Cardozo does not identify one overriding consideration in judicial decision-making but points to several relevant principles and approaches. Philosophy, custom and history operate together. This approach usually entails reasoning out the logical implications of legal precedent, which often incorporates external standards. Even combined, however, this initial method only takes a judge so far. To resolve remaining gaps, Cardozo says, judges should direct legal rules toward the social function they serve. But this is an even more open-ended inquiry than the three-pronged approach that precedes it.

Cardozo’s account is pluralist in that he does not identify one value that drives legal decision-making, nor does he assign total priority to one source of normative authority over others. As a result, he does not offer a legal

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methodology that will deliver determinate results in adjudication. Nevertheless, Cardozo, does not just identify various sources of legal authority and stop there. He offers a compelling account of how common law handles indeterminacy without rendering law intolerably unpredictable, inconsistent, and undemocratic.

Conventional morality, which Cardozo variously refers to as mores and customary morality, is the key to resolving residual indeterminacy. While custom enters the law by way of legal standards that expressly incorporate conventional practices, conventional morality develops the law by resolving open questions about how the law should be applied or developed in ways that precedent does not answer. It guides the judge in identifying a rule's social function and ascertaining which extrapolation of it will serve that function.

It must have been tempting for Cardozo to downplay conventional morality. Custom is the easier way to acknowledge the "special" relationship between common law and the society it governs. Identifying custom is in principle an empirical investigation. Parties can submit evidence of it. If Cardozo had limited his discussion of convention to custom, he could have avoided the uncomfortable fact that conventional morality is contested and unstable. While the same can be said of custom to a lesser degree, even when conventional morality has been properly identified—unlike custom—it can be wrong. That is, while a custom can be suboptimal, it does not on its face purport to correspond to something separate from itself. By contrast, conventional beliefs about morality can be wrong about moral principles. This potential misalignment would seem to render conventional morality an untethered target, and to make attempts to identify its principles inevitably erratic.

Having opened himself to the charge that his recommended "method" requires interpretation of open-ended cultural currents which might in any event lead judges astray from actual justice, Cardozo could have instead gone the way of Friedrich Karl von Savigny and anointed something like "the spirit of America" as legal arbiter around here—at least when all else fails. But Cardozo rejects the idea that there is one dominant culture that judges could incorporate. And rather than treating the potential error in conventional morality as a liability, he regards the mysterious imperviousness of "cultural spirit" to critique as a strike against the latter.

Given that Cardozo was critical of relying on social phenomena that are not subject to normative critique, he might have invoked what may be the most obvious alternative to conventional morality, i.e., morality itself—the truth of the matter. After all, Cardozo does not have much confidence that judges will read conventional morality the same way, let alone correctly, and he does not deny that there might be a right answer to the underlying question of right. Conventional morality is an uncomfortable reference even

as he describes it. Judges must rely largely on their own intuitions of what people tend to think. Inevitably, their assessment will be clouded by their particular experiences and social background.

Nevertheless, Cardozo argues, it is preferable to the alternative of judges simply pursuing what they themselves believe to be right and good. The same arbitrariness and inescapability of human experience that limits a judge's ability to gage conventional morality makes it even more dangerous for her to attempt to access the right and the good directly through objective reason. But Cardozo goes further than defending conventional morality as a least-worst option. He seems confident or at least optimistic that history is a progressive march forward. Conventional morality will get better, and judges attempting to reflect it in law will make better rules over time too. Counterintuitively, the very susceptibility to popular disagreement that makes conventional morality a potential source of inconsistency allows it to funnel into the law the currents of intellectual and social progress.

In this essay, I will offer two examples of how Cardozo's account of the role of conventional morality plays out, in contract and tort, respectively. In each case, precedent and custom leave room for further decision. In contract, formalists and legal economists might direct us to rely on language and efficient defaults to deliver the value of private ordering. In tort, legal economists will point to cost-benefit analysis. Cardozo points to a humbler alternative, and one that in fact accords with what we see judges do: they take into account what people think is fair. The mystery of fairness turns out to be no less intractable than the mystery of efficiency, and its discourse allows for more open contestation. Conflict over time can revise our understanding of fairness in contract and tort. That is how the law can get better, even in the hands of judges.

## I. CONVENTIONAL MORALITY

The judicial process does not start with judges attempting to read the oracle of conventional morality. Cardozo refers to the first sources of law as "philosophy and history," but he seems to have in mind what we would now call logical application of precedent. When these do not "fix the direction of a principle, custom may step in."<sup>1</sup> Custom does not operate to fill in gaps but to supply content to open-ended standards.<sup>2</sup>

While this "ordinary" application of legal rules is sufficient to deliver an answer in most cases, sometimes the logic of a rule and the precedent applying it diverge, or the peculiar facts of a case reveal some other inconsistency hitherto neglected. In some cases, facts simply present a new question to which the "directive force of logic" does not deliver an answer

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1. Benjamin Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 58 (1921).

2. *Id.* at 60.

based on precedent as supplemented by custom.<sup>3</sup> Here Cardozo endorses a sociological turn: judges “must let the welfare of society fix the path” of a legal rule.<sup>4</sup> He invites them to directly consider public policy, or “the good of the collective body.”<sup>5</sup> Formally developing a rule without attending to its direction is counterproductive. “There can be no wisdom in the choice of a path if we do not know where it will lead. The teleological conception of his function must be ever in the judge’s mind.”<sup>6</sup>

Cardozo’s language of the social sciences might point us in a now familiar direction. Perhaps when judges run out of established law, legal norms should be drawn in line with the most efficient rule—perhaps judges should aim to promote welfare in the sense that economists use the concept. Cardozo does not take us in that direction. Instead, he rather quickly concludes that public policy is also an indeterminate ideal. Judges must have something more than “the social welfare” in mind when they aim to pursue it. Cardozo points to mores, or what I will refer to as conventional morality, as the source of principles that illuminate what legal rule will serve the public interest. “It is the customary morality of right-minded men and women which [the judge] is to enforce by his decree.”<sup>7</sup> The public interest is not an objective standard that can be wielded on its own, any more than precedent can be applied without an eye to public policy. For judges to pursue public policy, they need to be guided by conventional understandings of what is right. For a judge, conventional morality comes from a source that already has authority by way of custom: “A slight extension of custom identifies it with customary morality, the prevailing standard of right conduct, the mores of the time.”<sup>8</sup>

Filling in gaps by reference to public policy, as illuminated by conventional morality, raises a host of challenges from a rule of law perspective. Cardozo expressly or implicitly addresses several of them: Is not conventional morality unpredictable? Does it not introduce inconsistency across judges? Do judges even have the authority to interpret conventional morality and imbue it with legal status? Cardozo acknowledges that judges will not all read conventional morality the same way, which will create some modicum of both unpredictability and inconsistency. “[T]he [impersonal, objective] ideal is beyond the reach of the human faculties to attain.”<sup>9</sup> Nevertheless, judges are constrained by a duty “to objectify in law . . . the aspirations and convictions and philosophies of the men and women of my time” and judges are selected in

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3. *Id.* at 40.

4. *Id.* at 67.

5. *Id.* at 72.

6. *Id.* at 102.

7. *Id.* at 106.

8. *Id.* at 63.

9. *Id.* at 169.

part for their alignment or sympathy with the mores by which they should be guided.<sup>10</sup> The judge “is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or goodness.”<sup>11</sup> Judges’ fidelity to conventional morality as an arbiter of the unusual cases in which judge are called upon to fill out legal gaps by reference to ambiguous social ends keeps the law from descending into subjective unpredictability. Finally, deciding gaps in the law by reference to common norms avoids the injustice of applying rules *ex post* without notice because the norms were already out there and, ideally, understood to have indirect legal significance.<sup>12</sup>

Whatever the disadvantages of relying on conventional morality to guide the identification of social policy when filling legal gaps, Cardozo appears confident that there is no better method available.<sup>13</sup> The alternative to attempting to read the same ambiguous text of conventional morality is unleashing each judge to author her own. Judges could attempt directly to decide what is right and good but there is no reason to think they can do this better than anyone else. At least, when they are attempting to decipher how people in the community generally address a question, their idiosyncratic takes are constrained by a common reference point.

Judges will not read conventional morality the same way because though “[w]e may try to see things as objectively as we please,” “we can never see them with any eyes except our own.”<sup>14</sup> But that complaint against attention to conventional morality is a still more fatal blow against authorizing judges to attempt to read morality as a transcendent truth. Once one admits that objective reason cannot achieve predictability and consistency by way of any heuristic device, we must conclude that “the juristic philosophy of the common law is at bottom the philosophy of pragmatism. Its truth is relative, not absolute.”<sup>15</sup>

Having rejected attempts by judges to ascertain the “best” rule through individual and direct meditation on the question, Cardozo could have fallen back on an enlarged role for custom. On its face, custom appears to enjoy a significant interpretive advantage: it is easier to observe what people do than what they think. Moreover, judges do not need to go it alone in deciphering custom. The parties can submit expert, regulatory and other evidence of how parties in a given industry normally operate. Presumably, regular practices will reflect in part what people think is fair. But the ordinary process of litigation lends itself more readily to deciphering custom than conventional morality.<sup>16</sup>

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10. *Id.* at 173-74.

11. *Id.* at 141.

12. *Id.* at 142.

13. *Id.* at 174.

14. *Id.* at 13.

15. *Id.* at 102.

16. See Lis Bernstein, *The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A*

Cardozo was right not to stop with custom. Notwithstanding the eminently pragmatic advantages of custom, conventional morality has at least two advantages over custom. First, conventional morality takes into account the views of society at large and not just those within a particular industry or those who engage in a social practice. Because it is more removed from the details of a practice, it can be informed by the mores of those who do not participate in the practice directly.

Second, while Cardozo envisions judges reading conventional morality, he also anticipates a kind of feedback effect, in which the law influences its development. Its influence is not and should not be overwhelming, and the degree of influence should depend on the legal norm's persuasiveness and its resonance with existing strands of belief in a pluralistic society. By contrast, when a judge anoints a custom as legally mandatory, or offering legal protection, it directs the evolution of custom with a heavy hand. If the judge gets it wrong, there is limited opportunity (or at least high cost) for custom to turn in a different, better direction.<sup>17</sup> While the ambition of interpreting conventional morality at first seems grander, a judge's infusion of her own understanding of conventional morality is more easily countered and the course of the law corrected over time. Because the judge has no power to alter popular moral beliefs directly, referencing them may present the stakes of a moral question more clearly and favor one answer to it, but it does not alter the substance of conventional morality indelibly. Instead, any one judge exerts only a slight push on conventional morality by virtue of her reading of it. The aggregate effect of the law on morality is a long dance over many cases and many judges, and morality itself will evolve through popular contestation even while judges contest its principles and their significance to legal rules.

If custom is too blunt an instrument with which to connect legal norms with their right purpose over time, Cardozo had still another familiar route available to him: Savigny's concept of culture. Like custom, the idea of culture has the advantage that it cannot be strictly speaking "wrong." That is, while both customs and culture can be "bad", a judge that incorporates them is not attempting to offer the best legal rule any more than she is when she interprets precedent, which can also be faulty. By contrast, conventional morality clearly aims to track something else, i.e., actual morality. Conventional morality seems to lose its normative force to the extent it fails to track the truth of the matter on moral questions. Our reasons for deferring to culture do not similarly depend on culture being good. Savigny regarded law as expressive of culture, in the manner of language and other local

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*Preliminary Study*, 66 U. CHI. L. REV. 710 (1999).

17. In contract, parties can contract around the custom-based default through express terms, but this raises ex ante transaction costs. And there is reason to think courts are not very skilled at identifying custom.

customs.<sup>18</sup> While the idea seemed to include local moral beliefs, Savigny was not interested in local belief as attempts to get morality right but as cultural expressions. Because law should grow naturally out of the contingent history of a “people”, it should not be the same everywhere; something would be wrong if it were. In fact, Savigny’s immediate aim was to resist homogenization of German law through codification.

Cardozo rejects Savigny’s approach precisely because culture, at least on Savigny’s account, cannot get it wrong (though Savigny is not neutral as to higher and lower elements of culture). Culture, on Savigny’s understanding, evolves over time “organically” but not as the result of contestation. Cardozo writes of “Savigny’s conception of law as something realized without struggle or aim or purpose, a process of silent growth, the fruition in life and manners of a people’s history and genius.”<sup>19</sup> While a “judge in shaping the rules of law must heed the mores of his day,” mores do not “automatically shape rules which, full grown and ready-made, are handed to the judge.”<sup>20</sup> While Savigny would have jurists attempt scientifically to extract the principles of a unified culture, Cardozo sees judges as participants in a discourse, or better, a fight over what is good and right and valuable—how we should live together. Again, judges need to calibrate their role in this struggle carefully. They should be neither overbearing nor too timid. Social conflict about moral principles is a healthy argument rather than a friendly chat; people fundamentally disagree about important things.

At any given moment in the never-ending argument, there is, characteristic of any given community, a prevailing sense of the best thinking on a question so far. Judges will ferret out the “best thinking” by way of their own views; they cannot help it.<sup>21</sup> But this is all a very different picture than the one Savigny paints of technical experts capturing in law the singular spirit of the people at large.

If the conflict over prevailing mores is an argument across society, Cardozo suggests a kind of agreeable but asymmetrical side conversation between the law and conventional morality in which each is responsive to the other; but it is really law that seeks accord. Law evolves, as it does in Savigny’s account, but it does so by the hand of judges consciously seeking to align it with the most promising strands of discourse within society itself, as each judge sees it. The ability of law to evolve is technically enabled by the malleability of precedent.<sup>22</sup> But it is the diversity of judges that ensures the contestation within society is mirrored in the law. Each judge can only access conventional morality through the accidents of “birth or education

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18. Freidrich von Savigny, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* 24 (A. Hayward trans. 1831, 1975).

19. Cardozo, *supra* note 1, at 104.

20. *Id.* at 104.

21. *Id.* at 105-06.

22. *Id.* at 150-52.

or occupation or fellowship” but their “subconscious loyalties” can “balance one another.”<sup>23</sup> Cardozo optimistically concludes that, while the output from this conflictual process of lawmaking over time will not be “the expression of perfect reason,” it should get better over time: “[T]he sands of error crumble.”<sup>24</sup>

## II. CONVENTIONAL MORALITY IN PRIVATE LAW

Two examples of how conventional morality is used in private law suggest that Cardozo was right. He was right descriptively about how judges decide the gaps left by precedent and custom. And he was right to endorse their reliance on conventional morality to fill those gaps. In both of the two contexts explored below, the relevant legal standard incorporates some concept of “reasonableness.” Reasonableness could be filled in “optimally” by way of social scientific criteria, or it could be an entirely empirical question about what people do or think. Courts have not pursued either of those approaches in a straightforward way. Instead, the concept retains its intuitive moral charge, and its legal meaning turns on conventional morality.

The first example is contract interpretation and the continued but strangely subversive concept of substantive reasonableness. Scholars give short shrift to substantive reasonableness for all the reasons we observed sceptics might have for challenging the use of conventional morality as Cardozo commended it. They often favor reliance on text to interpret express terms or efficiency analysis to supply default terms. But neither language nor economics is practically determinate. At the same time, their indeterminacy is not open to democratic contestation that can drive progress and legitimacy over time. The notion of substantive reasonableness has been almost unavoidable and plays an important role in making contract reasonable in a full sense.

Our other example is the standard of care applied to conduct in the context of a potential tort. Here is perhaps the most intuitive example of where we look to custom: what do people usually do? But custom is not binding. Nor do judges engage in cost-benefit analysis in the way that Learned Hand invited and legal economists today would invite them to do. Cost benefit analysis depends on normative choices too, but it cloaks them in technical language that cuts off the language of the law from broader conversations in society about what we owe each other. Thankfully, judges continue to refer to imprecise moral concepts in setting standards of care.

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23. *Id.* at 175, 177.

24. *Id.* at 177.



### A. Contract Interpretation

The meaning of a written agreement turns on its most reasonable meaning.<sup>25</sup> If the writing is unambiguous, then it is not susceptible to more than one of the two meanings that have been offered; only one is reasonable.<sup>26</sup> If the writing is ambiguous, then the court will give it the more reasonable meaning as between the two meanings suggested by the parties.<sup>27</sup>

Legal economists and formalists both tend to advocate for textualism in the interpretation of contracts.<sup>28</sup> They argue that most parties (at least sophisticated parties) do not want courts to undertake unpredictable inquiries into what the parties really wanted out of their agreement.<sup>29</sup> Parties certainly do not want courts to embark on an open-ended query into the most fair terms to be applied to their exchange.<sup>30</sup> Parties are supposed to look out for themselves and it is the task of the court to enforce the bargain they made rather than perfect or even extrapolate from that bargain.

While courts embrace the idea that their job is to figure out what the parties' intended, they also assume that parties intended to behave reasonably—in the more full sense of complying with fairness norms.<sup>31</sup> The expectation of fairness is not inconsistent with but behind the express terms of the contract.<sup>32</sup> Thus, courts understand the job of identifying the most

25. *GMAC v. Everett Chevrolet, Inc.*, 179 Wash. App. 126, 134–35, 317 P.3d 1074, 1078 (2014) (“the objective manifestation theory of contracts, imput[es] an intention corresponding to the reasonable meaning of the words used.”).

26. *Skyland Devs., Inc. v. Sky Harbor Assocs.*, 586 S.W.2d 564, 568 (Tex. Civ. App. 1979) (“[I]f a contract remains reasonably susceptible to more than one meaning after the established rules of interpretation have been applied, it is ambiguous. On the other hand, if only one reasonable meaning clearly emerges, it is not ambiguous.”).

27. *N.A.P.P. Realty Tr. v. CC Enterprises*, 147 N.H. 137, 140, 784 A.2d 1166, 1169 (2001) (“a court determines the parties’ intent by assigning the meaning a reasonable person would give to an ambiguous term”).

28. Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1583 (2005).

29. See Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 499 (2004); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 569 (2003).

30. See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1140 (2001) (“pursuing notions of fairness . . . will make all parties worse off”).

31. See, e.g., *Glenn Distribs. Corp. v. Carlisle Plastics, Inc.*, 297 F.3d 294, 301 n.4 (3d Cir. 2002) (“Courts must be mindful to adopt an interpretation of ambiguous language which under all circumstances ascribes the most reasonable, probable, and natural conduct of the parties, bearing in mind the objects manifestly to be accomplished.”) (internal citations omitted); *Tessmar v. Grosner*, 128 A.2d 467, 471 (N.J. 1957) (“Even where the intention is doubtful or obscure, the most fair and reasonable construction, imputing the least hardship on either of the contracting parties should be adopted so that neither will have an unfair or unreasonable advantage over the other.”).

32. See Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1228 (1999) (“certain expectations of fair and reasonable conduct are so fundamental that the parties rarely mention them in negotiation”); Aditi Bagchi, *Interpreting Contracts in A Regulatory State*, 54 U.S.F. L. REV. 35 (2019) (arguing background normative assumptions should be interpretive reference); Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1722 (1997) (“Courts are guided to prefer an interpretation that gives the entirety of the contract a reasonable, lawful, and effective meaning.”).

reasonable meaning to entail identifying the most reasonable meaning in light of the substantive exchange that the parties undertook.<sup>33</sup> A judge's conclusions about substantive reasonableness do not override the parties' intentions but rather fill in those intentions, because parties are assumed to have acted reasonably to begin with.

This use of the concept of reasonableness illustrates nicely the gist of Cardozo's method. As he directs, courts do not begin by asking the free-ranging question of what fairness required with respect to a particular exchange. If the text is unambiguous, they enforce the unambiguous meaning. But where traditional methods of deciphering contract meaning "run out," judicial methods branch out. They are prepared to incorporate more than they would under the parsimonious approach that formalists recommend.

Nor do judges, upon arriving at the end of the "traditional" inquiry, turn to "public policy" as envisioned by legal economists. Theoretically, upon finding an ambiguous terms, judges could supply default rules informed by an efficiency analysis of the exchange. But courts do not do this in any direct way. We do not see them, for example, using economic analysis to identify the superior risk bearer when the agreement fails to allocate risk; they have no systematic way to apply the test.<sup>34</sup> To the extent efficiency is incorporated, it turns on speculation that the parties themselves would have expected the default to be one term rather than another. But the latter question inevitably turns on more than efficiency because judges know that parties are not optimizing bargains theoretically but acting within the context of business practices, informed by ordinary expectations. The way judges reason out what the parties must have meant blends a common-sense analysis that is friendly to efficiency analysis with a fairness analysis that is ultimately steeped in conventional morality about how parties to exchange are expected to deal with one another.

Omri Ben-Shahar and Lior Strahilevitz have recommended an empirical approach to deciding the most reasonable meaning of written terms.<sup>35</sup>

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33. See, e.g., *Columbia Propane, L.P. v. Wis. Gas Co.*, 661 N.W.2d 776, 787 (Wis. 2003) ("In ascertaining the meaning of a contract that is ambiguous, the more reasonable meaning should be given effect on the probability that persons situated as the parties were would be expected to contract in that way as opposed to a way which works an unreasonable result.").

34. See Melvin Eisenberg, *Foundational Principles of Contract Law* 657 (2018) ("Posner and Rosenfield's [impossibility] test would be virtually impossible to apply in practice."); Daniel T. Ostas & Frank P. Darr, *Understanding Commercial Impracticability: Tempering Efficiency with Community Fairness Norms*, 27 RUTGERS L.J. 343, 352 (1996) ("Although the efficient insurer hypothesis may make some sense in terms of abstract logic, it becomes problematic in its pragmatic application."); Christopher J. Bruce, *An Economic Analysis of the Impossibility Doctrine*, 11 J. LEG. STUD. 311, 321 (1982) ("In many cases, however, the court will be unable to determine which of the parties is the superior risk bearer . . . because the court lacks sufficient information."); Alan O. Sykes, *The Doctrine of Commercial Impracticability in a Second-Best World*, 19 J. LEG. STUD. 43, 93 (1990) ("to administer [the efficient] rule, the courts will typically require more information than is reasonably available to them.").

35. *Interpreting Contracts Via Surveys and Experiments*, 92 NEW YORK UNIVERSITY LAW REVIEW

Parties could submit experimental evidence indicating what people think about the language in controversy in a given case. It would be surprising to see this method take off, for reasons that Cardozo implicitly anticipates when he rejects custom. Not only is the method vulnerable to expert manipulation in the manner of attempts to settle custom, but it also does not allow for judges to incorporate their reading of what fairness requires. It is a blunt instrument of just the sort that would offend Cardozo's pragmatic sensibilities. An open-ended inquiry into reasonableness will take into account the judge's estimation of how most people would read a term, but it does not limit the judge's inquiry to this guess. People might be reading terms cynically on the expectation that the more powerful party will take advantage of the other; they may expect legal instruments to be instruments of exploitation—and on Ben-Shahar's approach, their expectations would be self-fulfilling. While a court will not undertake to write a decent contract where it does not find one before it, it will read contracts "generously" to align them with reasonableness in the best sense, not any mechanical sense.

A simple hypothetical illustrates how the process as Cardozo envisioned it plays out in the context of interpretation. Consider a contract that allows that the seller will deliver 100 widgets by the first of each month for two years, and that payment is due by the 15<sup>th</sup> of each month for the duration of the contract. In the event of a global pandemic, should the seller be excused from the contract? Is her obligation to deliver suspended until delivery is feasible or is the contract cancellable altogether? If the seller can continue performance, can the buyer exit on the grounds that she can no longer use the widgets (perhaps because other machine parts are unavailable or because there is no longer demand for her product)? All of these questions could theoretically be answered by asking what the parties intended. That is in fact what the courts would ask, but to suppose that the parties had intentions on point is to indulge a fiction that obscures the choices before the judge.

The judge's decision should be informed, as Cardozo advises, by the social function of that contract for the parties—and the function of such contracts for parties like them. That question cannot be answered by an economic analysis of which party is in a better position to bear the risk of a pandemic. Pretending to base one's judgment on a calculation of that sort would be disingenuous and, again, obscure the collective moral choices we have to make about how losses and risk shall be shared (or not), and how we will respond collectively to adverse events. Judges are taking a stab at answering those questions these days, however daunting. Parties will update their expectations, and sometimes their written agreements, in response. They will not defer to any "objective" judgment about which party should

bear the risk. But even without such deference, there will be learning. Learning will happen through argument—arguments about judicial decisions, arguments about proposed industry template contracts, arguments in arbitration, and arguments made in the course of negotiating new contracts. It will be through conflict rather than expertise that we will evolve in our understanding of how best to handle these simple widget contracts the next time disaster strikes. And the next time the question presents itself, rather than pretending that the relevant decision-making criteria have remained constant throughout, judges can update applicable default rules in contract.

### *B. Standards of Care in Negligence*

When someone claims that she was injured by the negligence of another, she must show that she was injured as a result of the failure of the latter person to exercise ordinary care.<sup>36</sup> “The question is ‘whether a reasonably prudent person at the time and place should recognize and foresee an unreasonable risk or likelihood of harm or danger to others’ by his or her conduct.”<sup>37</sup> “A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.”<sup>38</sup>

Again, the legal rule is open-ended and does not directly establish a conduct rule. Nor is it a simple matter of custom. The question is not whether most people would have done the thing in question but whether a reasonable person would have. We might start with the presumption that everyone is not unreasonable, but we do not need to be committed to the idea that common behavior is always reasonable. Judges can treat typical conduct as good evidence of what reasonable people would do, but they can also determine that, in some contexts, imprudence is pervasive and hold the defendant to a higher standard of conduct.

What standard then? Learned Hand famously offered a formula to decide: when the cost of precaution is lower than the cost of injury multiplied by

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36. See Dilan A. Esper, Gregory C. Keating, *Putting “Duty” in Its Place: A Reply to Professors Goldberg and Zipursky*, 41 LOY. L.A. L. REV. 1225 (2008) (“‘the general rule’—both in California and throughout the United States—is that ‘all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct.’”(citing *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 588 (Cal. 1997)).

37. *Franco v. Fairleigh Dickinson Univ.*, 467 N.J. Super. 8, 25, 248 A.3d 1254, 1263 (App. Div. 2021). See also *Bjorndal v. Weitman*, 344 Or. 470, 478, 184 P.3d 1115, 1120 (2008) (“A person is negligent if the person fails to exercise reasonable care, a standard that “is measured by what a reasonable person of ordinary prudence would, or would not, do in the same or similar circumstances.”).

38. *People v. Kumar*, 39 Cal. App. 5th 557, 566, 252 Cal. Rptr. 3d 246, 252 (2019). See also *Guegel v. Bailey*, 1947 OK 273, 199 Okla. 441, 443, 186 P.2d 827, 829 (“the universally adopted definition of actionable negligence [is] the failure to do that which an ordinarily prudent person, in the exercise of reasonable care, would have done under like or similar circumstances.”).

the probability of injury, the precaution is warranted.<sup>39</sup> Legal economists have developed the Learned Hand formula into sophisticated cost-benefit analysis.<sup>40</sup> Judges do not need to estimate the relevant numbers on their own. Plaintiff's counsel can offer evidence that speaks to the varieties and magnitude of injury that some conduct might cause plaintiff and others similarly situated. Defendant's counsel can offer evidence of the cost of the proposed precaution and the rate of accident.

While courts might take this evidence into account, we need only a short step back to see that tort adjudication never became the quantitative exercise that this approach implies.<sup>41</sup> Instead, judges continue to grapple with everyday notions of reasonableness that are more fluid and moralistic. They consider a long list of factors to decide whether defendant owed plaintiff a duty, including factors such as "the moral blame attached to the defendant's conduct,"<sup>42</sup> "fairness," "ideals of morality and justice," "social ideas about where the plaintiff's loss should fall," "whether there is social consensus that the plaintiff's asserted interest is worthy of protection," and "community mores."<sup>43</sup> These factors are a far cry from the quasi-mathematical approach that legal economists propose.

The efficiency analysis that economists recommend purports to be an objective inquiry into the optimal rule, but it could never meet its own aspirations.<sup>44</sup> There is no way for a judge or anyone else to identify the full range of possible injuries that can result from an action, let alone their respective magnitudes and probabilities. That apparently innocuous question assumes that some kinds of injuries are causally linked to the action, which is a normative question. It also turns on how we value various injuries, which is a further normative question. Any numbers that we attempt to generate to represent our answers to those questions are too arbitrary to give us confidence about the answer the formula generates about the overall liability question. The objective appeal of the formula is illusory; it does not deliver determinacy any more than a fairness inquiry. It is, moreover, inferior inasmuch as it does not openly invite disagreement about

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39. *United States v. Carroll Towing Co.*, 159 F.2d 169 (1947) ("if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P").

40. Richard Posner, *ECONOMIC ANALYSIS OF LAW* 167-71 (7<sup>th</sup> ed. 2007).

41. Mark F. Grady, *The American Negligence Rule*, 53 VAL. U. L. REV. 545, 564 (2019) ("Courts know how to give cost-benefit jury instructions; they simply do not do so in ordinary negligence cases.").

42. W. Jonathan Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1878 (2011) (citing *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968)).

43. See Cardi, *supra* note x, at 1879-84.

44. Shawn J. Bayern, *The Limits of Formal Economics in Tort Law the Puzzle of Negligence*, 75 BROOK. L. REV. 707, 711 (2010) ("the defense of negligence as promoting bilateral precaution fails because it depends on an exceedingly fragile formal model that cannot adapt even to features of the world that, by the model's own terms, it ought to address"); Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula"*, 4 THEORETICAL INQUIRIES IN LAW 145 (2003) (judges do not actually apply the Hand Formula); Michael D. Green, *Negligence = Economic Efficiency: Doubts*, 75 TEX. L. REV. 1605, 1611 (1997) (questioning the role of economics in positive tort law).

its normative predicates. By disguising fundamental moral questions as formulaic inputs, the cost-benefit approach thwarts the discourse that, over time, we can expect to give us better legal rules. To be clear, the problem is not comparing the benefits and costs of a given legal rule, an exercise appropriate to many kinds of legal rules, but rather understanding this methodology to displace matters of conventional morality rather than to channel them.

While judges appear to have largely rejected cost-benefit analysis that would exclude considerations of fairness, they should not be understood to have rejected a public policy approach. Instead, the policies that tort law vindicates just turn on these open-ended moral questions.<sup>45</sup> As Cardozo proposed, conventional morality steps in to fill out the ends of public policy. Whether we are to have a policy about driving that is more or less stringent, or a policy on medical practice that is more or less forgiving of mistakes, or a policy on property maintenance that is more or less vigilant against injuries to people who are invited onto that property—all these policy questions depend on what we think people in various social roles owe each other. If it is difficult to see how a judge can know what people in general think about these questions, it is even more difficult to see how a judge can answer these questions on her own—even with the aid of the parties—or why we would defer to her best guess.

### III. CONCLUSION

Predictability and consistency are hallmarks of the rule of law.<sup>46</sup> It is a little alarming, then, to consider that judges sometimes invoke so unwieldy a concept as “conventional morality” to decide cases. They will not understand it the same way. They will not get it right. And conventional morality could be wrong anyway.

There are alternatives to conventional morality as a reference: custom, culture, and the actual truth of the matter, understood either as the most efficient rule or, simply, the “right” one all things considered. These alternatives each have their distinctive drawbacks (and advantages), but the

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45. Many tort scholars have defended this approach as recognizing the essentially moralistic character of the claim of negligence. John C.P. Goldberg & Benjamin Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1744 (1998) (duty is “the set of obligations that matches, roughly, what citizens believe about the care they owe one another”); David Owen, *Duty Rules*, 54 VAND. L. REV. 767, 777 (2001) (“Duty has an internal moral compass that, on the one hand, defines certain harmful behavior as wrong, but which, on the other, defines other harmful behavior as lawful and beyond the proper reach of law.”); Ernest J. Weinrib, *The Passing of Palsgraf?*, 54 VAND. L. REV. 803, 804 (2001) (“notions of fairness and coherence . . . underlie tort law as a whole”).

46. See *Smith v. Toney*, 862 N.E.2d 656, 660 (Ind. 2007) (“Rules of law are designed to promote consistency and predictability.”); *State v. Gaskins*, 866 N.W.2d 1, 40 (Iowa 2015) (stating rule-of-law values include “consistency and equal treatment, stability, and predictability at any one time and over time”).

feature that renders them each inferior to conventional morality as a gap-filler when conventional legal criteria run out is their apparent stability. None is stable in practice: there can be disagreement about what the prevailing custom is, how to interpret culture around here, and there is no determinate answer to the underlying question of the optimal rule, even when we cast it in mathematical terms. But none of these references anticipates disagreement and movement over time as openly as the concept of conventional morality.

No one is an expert about conventional morality. No one expects it to remain constant. Just about everything about conventional morality is open to contestation. While each judge can make a good faith effort to understand it, it cannot be channeled into the law fully by any one judge. Similarly, it cannot be deciphered or even form, conceptually, outside of discourse. The very idea of conventional morality depends on people talking—arguing, actually—about rights and obligations.

Cardozo puts his faith in disagreement and public discourse. Paradoxically, the measure of a judicial method is not only its ability to generate determinateness in individual cases but also its capacity to harness the power of debate as an engine of progress over time. Debate cannot take place among judges and other elites alone, though those social actors can be expected to disagree among themselves. The relevant discourse is public discourse. Any attempt to put judicial reasoning on a leash so short that judges cannot reach into that discourse not only denies judges the benefit of our collective deliberation but also cuts it off from the energy that propels the common law forward over time.