Rediscovering *The Nature of the Judicial Process*: A Comment on Professors Abraham’s and White’s *Doctrinal Forks in the Road*

John C. P. Goldberg*

**INTRODUCTION**

Sometime between 1918 and 1920, Dean Thomas Swan, with the approval of his faculty, invited Benjamin Cardozo to give the prestigious Storrs lectures at Yale Law School.1 The invitation was notable. After only a few years on the bench, Cardozo clearly had made a mark, in part thanks to his 1916 opinion for the New York Court of Appeals in the *MacPherson* case.2 Cardozo seems to have initially demurred but then, when asked if he could share his thoughts on how he went about the job of judging, agreed.3

Cardozo lectured on four successive days in February 1921. According to Arthur Corbin’s well-known account, the first lecture was met with a standing ovation that subsided only when Cardozo left the room.4 The remaining lectures then were moved to a room twice as large that was filled to capacity, with Corbin reporting that attendees were “spell-bound.”5 Though perhaps embellished, this recounting is plausible. Cardozo was a powerful speaker.6 And, as I will suggest below, he delivered a message that audience members might had reason to find engaging.

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5. *Id.* at 198.

6. Kaufman, *supra* note 1, at viii (describing a recording he discovered of Cardozo giving an address). To my ear, Cardozo on this recording sounds a bit like Franklin Roosevelt.
Although Cardozo joked that he would be “impeached” if the lectures were to see the light of day, they were published in the year they were delivered under the title *The Nature of the Judicial Process*. The book soon gained the status of a classic. For decades, it routinely appeared on lists of books entering law students ought to read. It also became a touchstone for later works in jurisprudence.

As befits a classic, *The Nature of the Judicial Process* has its detractors. Here is Grant Gilmore’s assessment, in his own Storrs lectures:

I think it fair to say that the two most celebrated books in the history of American Jurisprudence are Holmes on *The Common Law* and Cardozo on *The Nature of the Judicial Process*. The two books, however, have nothing in common beyond the facts that nobody reads them and everybody praises them . . . Cardozo’s book, as a matter of strict fact, had almost no intellectual content whatsoever.

According to Gilmore, Cardozo’s lectures, despite their vapidity, were well-received because of their candid acknowledgement, in the supposed heyday of mechanical jurisprudence, that judges make law—“a legal version of hard-core pornography.” Gilmore probably was pleased to offer this characterization knowing that it would have mortified the prim and proper Cardozo.

Say what you will: the success of the lectures carried over to the print version. Andrew Kaufman tells us that 156,637 copies of *The Nature of the Judicial Process* were sold between 1960 and 1994. That’s 4,600 copies per year for 34 years. ‘Pornography’ sells.

I. SOPORIFIC OR SPELLBINDING?

Professors Abraham’s and White’s article has two parts. The first is strongly critical. They concur with Gilmore that Cardozo’s lectures are vacuous. Worse, what made for titillation a century ago (at least according to Gilmore) is for them a snooze. Having written off the lectures as a total dud, Abraham and White in the second part of their article offer Cardozo some redemption. Seizing on occasional references in *The Nature of the Judicial Process* to the idea of judges developing the law down one or another “path,” they credit him with recognizing that appellate judging in

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10. *Id*. at 1033.
12. Abraham & White, *supra* note 1, at 76.
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common-law cases often comes down to choosing between two available lines of doctrine. They then review three pairs of his opinions in tort cases, and argue that each demonstrates how he effectively navigated the forks in the road that his court faced. As a Cardozo fan, I am inclined to disagree with both parts of their analysis. In a nutshell, I find the first too harsh and the second too tepid. I’ll say something about each in turn.

Abraham and White find in the lectures nothing more than “a series of abstractions whose meaning collapses under close scrutiny.” Worse, Cardozo’s presentation—particularly his elaboration of four distinct methods of adjudication—is “tedious, excessively abstract, filled with distracting allusions to the work of others, and contain[s] very little substantive bite.”

As they acknowledge, this characterization generates a puzzle. How could four sessions of empty drivel have earned from the audience rapt attention and standing ovations? Oddly, this question is never answered. It seems they believe either that Corbin rewrote history in Cardozo’s favor or that, back in 1921, Yale faculty and students inexplicably were prone to be enthralled by vacuous, impenetrable musings on jurisprudence. As neither of these explanations seems particularly compelling, it is worth pondering further what actually could explain their positive reception. In doing so, one must of course account for the sensibilities of the era. Times—and attention spans—have changed. And one must keep in mind the “as-compared-to-what” question.

On the latter, two points of triangulation present themselves. The first are the Storrs lectures delivered in 1903 by Sir Frederick Pollock, which Corbin back in 1961 juxtaposed with Cardozo’s. According to Corbin, the great English jurist managed instantly to snuff out what had been considerable advance interest in his lectures, in part by speaking with his head buried in his text. That Pollock also seemed not to care a whit what sort of

13. Id. at 85-98.
15. Abraham & White, supra note 1, at 98.
16. Id. at 83.
17. Id. at 76 (given that the lectures are neither coherent nor accessible, “the challenge is to recover what in the lectures made them seem so energizing, even inspiring”).
18. Abraham and White seem pretty clearly to maintain that the value of the “forking” model of adjudication they discuss in the second part of the paper, insofar as it can be found in the lectures, would not have been apparent to Cardozo’s audience. Id. at 85.
19. Corbin, supra note 4, at 196-97. Corbin reported that he “could understand next to nothing” of
impression he was making on his audience apparently helped ensure that his audience would mostly disappear after the first lecture.\textsuperscript{20}

The second point of comparison—mine, not Corbin’s—is Holmes’s *The Path of the Law*,\textsuperscript{21} and not merely because it, too, was an address delivered to law students suffering through a New England winter.\textsuperscript{22} Holmes was a hero to Cardozo, and Cardozo knew Holmes’s work.\textsuperscript{23} It is thus likely not an accident that Abraham and White find constant references to law’s *path* in Cardozo’s lectures.

Holmes’s and Cardozo’s lectures share common features, both negative and positive. If Cardozo can be criticized for use of ponderous, aphoristic language, so too can Holmes.\textsuperscript{24} And it is probably true that both meant to surprise their audiences. Yet Cardozo’s remarks were not, as Gilmore suggested, the least bit naughty, whereas Holmes’s *Path of the Law* persona—one he was fond of trotting out—was that of the grizzled warrior discomfiting his well-mannered audience with plainly stated, harsh truths about how the world really works. Cardozo offered an entirely different presentation of professional self. And it is this aspect of *The Nature of the Judicial Process* that Abraham and White seem to miss.

As noted above, Cardozo was convinced to lecture by being invited ‘simply’ to describe how he goes about his job. And he clearly took the terms of this invitation to heart. His report begins with a somewhat embarrassing admission: judges (himself included) can’t explain to an intelligent layperson how they do their jobs.\textsuperscript{25} Indeed, attempts to do so quickly devolve into a familiar cop-out: the judge will say to his questioner what Pollock said. *Id.* at 196. This was clearly meant as a comment on Pollock’s delivery, and included a seemingly snobby dig at Pollock’s “‘cockney’” accent. *Id.* at 197. It may also have been offered as criticism of the content of the lectures, but this is less clear. A related point of comparison between Pollock and Cardozo is worth noting. *The Nature of the Judicial Process* has had a long shelf life. Pollock’s work not so much. Robert Stevens, *Professor Sir Frederick Pollock (1845-1937): Jurist as Mayfly*, in GOUDKAMP & NOLAN, supra note 1, at 75 (“Nobody reads Pollock anymore. Nor should they.”).

20. Corbin, supra note 4, at 197.


24. See, e.g., Holmes, supra note 21, at 459 (“I do not say that there is not a wider point of view from which the distinction between law and morals becomes of secondary or no importance, as all mathematical distinctions vanish in the presence of the infinite.”).

25. As was Holmes. Seipp, supra note 22, at 536. Imagine Holmes’s delight at being able to tell a gathering of law students, in the presence of their professors, to ignore all the moralistic claptrap coming from the front of the classroom. The law, he wanted them to know, might speak in the decorous language of morality, but really it is just a cadre of officials ready to wield state power to enforce the rules that express the values of the dominant group.

26. BENJAMIN N. CARDozo, THE NATURE OF THE JUDICIAL PROCESS 9 (1921). In recounting Cardozo’s lectures, I will follow his use of masculine pronouns in referring to judges.
there’s just no way for him to make what he does comprehensible to the uninitiated. 27 Speaking both in the third- and first-person, Cardozo next imagines a judge, haunted by his failure to explain himself to others, trying to give himself an adequate description of what he does. But here too—where the cop-out cuts no ice—there are few answers, in part because the judge is well aware of the role that semi- and subconscious forces inevitably play in his thought process.28

In keeping with this inauspicious start, Cardozo sets low expectations, apologizing to his audience in advance for how little he has to offer. All he can provide is “an attempt to uncover the nature of the process by one who is himself an active agent, day by day, in keeping the process alive.”29 After a brief mention of constitutional law and statutory interpretation, Cardozo brings the figure of the common law judge to the fore. Here, he mockingly invokes Blackstone’s description of the judge as the “living oracle of the law,” explaining that he intends to “[look] at Sir Oracle in action, viewing his work in the dry light of realism.”30

Seen in the light of day—shorn of fancy titles and costumes, and of any suggestion that they possess oracular powers—judges are just people doing a job. But what is the job? Cardozo’s answer is again self-deprecatory. Common-law judges proceed—he proceeds—by a kind of educated guesswork.31 They form hypotheses about the rules and standards embedded in previous decisions from the relevant court(s).32 While this task might seem straightforward, there are acute difficulties both in formulation and testing. As to formulation, it is not always clear what actually has been decided (Cardozo tells his audience that he sometimes has trouble figuring out what is holding and what is dictum—in his own opinions!)33 As to testing, the validity of any statement about what a set of cases stands for is ultimately answerable to notions of justice and welfare that are themselves moving targets. (The thought here is that reconstructions of precedents that generate a rule or standard that appears to be deeply unjust or counterproductive will be doubted, if not rejected.)34

As he outlined his deflationary depiction of judicial expertise, Cardozo regularly brought audience members into his professional life, and indeed into his head. Whereas Holmes in his Path of the Law address had preached from on high. Cardozo’s lectures have a dialogic dimension. At times he

27. Id.
28. Id. at 10-11.
29. Id. at 13.
30. Id. at 19. As we approach the end of Lecture I, “Sir Oracle” has been reduced to “the anxious judge” who is in need of “rescue” as he despairs over how to decide the case before him. Id. at 43.
31. Id. at 23.
32. Id.
33. Id. at 29.
34. Id. at 24-25
invites his audience into his thinking by imagining how they are reacting to his talk. For example, after mentioning the gap-filling role played by judges tasked with applying ambiguous statutes, he says: “You may call this process legislation, if you will.”

Thus, in both substance and manner, Cardozo’s consistent aim was to close the gap between the judge and those who might be subject to his power, or his lectures. What Cardozo wanted his audience to see, first and foremost, is that the judge—the robed figure who sits above everyone else in the courtroom—works in ways that are not dramatically discontinuous with the ways of ordinary people engaged in ordinary activities. The judicial process carries with it plenty of mysteries. Yet it is not for that exotic. In everyday life, occasions for judgment-calls abound, and often come with a great deal of anxiety and uncertainty. Few of us would suppose that these situations consistently lend themselves to resolution through axiomatic thinking. Equally few would deny that these occasions can be handled poorly or well, even if no one has a complete account of what it means to exercise good judgment. The same, Cardozo tells us, is true of common-law adjudication.

Arguably, given this agenda, Cardozo’s organization of his lectures around the four “methods” of adjudication have done him a disservice. In modern times, talk of “method” conjures a notion of scientific or technical rigor. And it is possible that Cardozo at times thought of the methods in these terms. But readers might have been spared some puzzlement and exasperation if the methods are understood less methodically: as merely identifying clusters of considerations that a judge will tend to bring to bear on a question of law. Again, it helps to remember that Cardozo was trying his hand at a kind of phenomenology. He was keen to help his audience experience what it’s like to decide cases.

Shorn of their labels, each of the methods is recognizable to anyone who has spent time fretting over a decision. How does one decide what to do? One will want to determine if prior decisions call for a particular decision in the present case (the method of philosophy). And one will want to know how it came to be that one is facing a decision framed on the terms this decision is framed (the method of history). One also will want to consult customary ways of handing the matter at hand (the method of tradition). Lastly, one surely wants to know if a contemplated decision will conform to prevailing notions of what is right and good (the method of sociology).

In the end, much of what made (and makes) Cardozo’s lectures engaging

35. Id. at 16 (emphasis added).
36. Id. at 30-31.
37. HANS-GEORG GADAMER, TRUTH AND METHOD (1960).
38. Perhaps Cardozo drew inspiration from Mill’s 1843 System of Logic, which identified five named methods of experimental inquiry. JOHN STUART MILL, A SYSTEM OF LOGIC, RATROCINATIVE AND INDUCTIVE (1843).
is their successful conveyance of the reassuring message of the pragmatist.\textsuperscript{39} Again, Cardozo’s main goal was to make judges and adjudication less mysterious. But he did not do so by applying Holmesian cynical acid to expose the supposed ‘real’ determinant of judicial decisions. Nor did he go to the opposite extreme of insisting that there are no useful standards against which to measure the soundness of a decision. Judging, as he described it, involves the exercise of a special kind of judgment grounded in law, yet it is still a recognizably human activity. In these ways Cardozo set out to normalize the courts, in part by normalizing himself. I have no trouble seeing how a message and a performance such as this, delivered by a dynamic lecturer, would thoroughly engage faculty and students, particularly if they were used to either dry recitations in the manner of Pollock or high-and-mighty orations in the manner of Holmes.

So Grant Gilmore’s assessment of Cardozo’s lectures in one sense couldn’t have been more wrong. Cardozo was not looking to scandalize his audience or share state secrets with them. Quite the opposite, he sought to undermine their inclination to mystify the figure of the judge by inviting them to recognize that it was only mystifications that prevented them from seeing the perfectly real, perfectly ordinary phenomenon of adjudication for what it is. Here too—as in the other ways noted by Professor Zipursky in his conference paper—Cardozo’s work presages that of H.L.A. Hart.\textsuperscript{40} The Nature of the Judicial Process sought to spare us from what Hart would later diagnose as American jurists’ neurotic tendency to oscillate wildly between accounts of adjudication that depict it as a “Nightmare” or a “Noble Dream.”\textsuperscript{41} It is hardly surprising that a judge with Cardozo’s humility, self-awareness, and sophistication would be a compelling speaker, not to mention a master of his craft and an author of so many astute and enduring judicial opinions.

\textbf{II. FORKS}

While Abraham and White have no patience for The Nature of the Judicial Process, they are very complimentary of several of Cardozo’s classic torts opinions. This leaves them in the somewhat awkward position of insisting that he utterly failed in his lectures to explain what made his own good decisions so good. Such a disconnect is certainly possible: someone’s being great at something doesn’t inoculate them from being unable to explain wherein their greatness resides. Still, Cardozo—who took the trouble on several occasions to articulate what he and other judges do


\textsuperscript{40} Zipursky, supra note 8, at 25.

when they decide cases—seems less likely than most virtuosos to have suffered from this affliction.

At the heart of his judicial decisions, they say—and hence the true jurisprudential message of Cardozo’s larger corpus—is a clear recognition that important cases present courts with “forks” in the road, and that judges must make and defend good choices about which paths to choose. For example, *MacPherson* presented a choice between reading precedents narrowly (by identifying a limited list of inherently dangerous products not subject to the no-duty-without-privity rule) or broadly (by setting as a general rule that a manufacturer is liable for bodily harm to any persons foreseeably injured by its carelessly made product).42 This, they say, is an illuminating framing, and they further credit Cardozo for ably defending his choice to go broad.43 *Moch v. Rensselaer* is said to have presented the same fork, albeit with *MacPherson* having in the meantime been decided, thus providing greater precedential support for holding the defendant liable for damage to private property resulting foreseeably from its negligent failure to provide water to a municipality for fire-fighting.44 Yet in *Moch*, Cardozo chose the other fork, denying liability on the basis of the ‘narrower’ reading of the cases. In particular, he declined to treat *MacPherson* and other decisions as having abolished the distinction between negligent misfeasance and negligent nonfeasance. This too was a good choice, Abraham and White say, because, as Cardozo explained, expanding *MacPherson*’s rule to cases of nonfeasance threatened to generate crushing liability burdens.45

Do Abraham and White succeed in rehabilitating Cardozo by crediting him with a knack for spotting forks in the road and articulating sound reasons for choosing one path over another? I am skeptical. For one thing, it hardly seems to redound to Cardozo’s credit that he was aware that certain cases that made their way to New York’s high court presented a choice about how to develop the law. A lot of the work in that regard was presumably done by the lawyers and the lower courts. Likewise, to praise Cardozo for coming up with plausible justifications for his decisions might be sufficient to establish that he was good judge, but not that he was a great one.46

More broadly, the notions of forks and paths at work here are drawn quite loosely. At times, the fork in question seems to be conceptual (e.g., in *Wagner* and *Palsgraf*), whether to frame the analysis of the question

42. Abraham & White, supra note 1, at 92.
43. Id.
44. Id. at 93 (discussing *H.R. Moch, Inc. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928)).
45. Id. at 93-94.
46. Cf. Goldberg, *The Life of the Law*, supra note 14, at 1146-49 (noting that descriptions of Cardozo as a judge who was good at balancing conflicting considerations seem unable to explain his greatness).
presented by the plaintiff’s suit in terms of duty or proximate cause). At other times, it is cast instrumentally. And we are told relatively little about what makes Cardozo’s choices in the face of these forks compelling and thus left unenlightened as to why the valuable lesson to be teased out of The Nature of the Judicial Process is that judges must recognize forks and must choose paths wisely.

Space does not permit an extended treatment of these questions, but it will perhaps be helpful to say a few words about Abraham and White’s last pairing: Glanzer and Ultramares.47 In Glanzer, the plaintiff contracted to purchase 905 bags of beans from a seller. Under the terms of the contract, the price was set on per-bound basis, with the weight to be determined by a public weigher. When the beans arrived at the dock from which the buyer was to collect them, the seller contacted the defendant weigher, explained that the shipment had been sold to the plaintiff (identified by name) and that the plaintiff was ready to accept delivery. It further instructed the defendant to issue a certificate, to be provided both to buyer and seller, as to the weight of the shipment. The weigher did so, but it overstated the weight of the bags, causing the plaintiff to overpay the seller.48 Cardozo’s opinion reasoned that the buyer could recover in negligence from the weigher for the overpayment even though the seller, not the buyer, had paid the weigher, and hence the contractual obligation to provide an accurate weighing was, strictly speaking, owed by the weigher only to the seller, not the buyer.

In Ultramares, the defendant accountant was hired by Fred Stern & Co. (“Stern”) to prepare and certify a balance sheet. When the defendant took on this job, it knew that Stern would submit the balance sheet to banks and other entities to reassure them it was safe to extend credit to the company. Indeed, the defendant ultimately provided 32 numbered copies of it for that purpose, with it representing that Stern’s assets exceeded its liabilities. Unfortunately, this was not true. Stern was insolvent: its managers had provided the defendant’s employee with records of fictitious sales. When the truth emerged, Stern was declared bankrupt.

Plaintiff, a business that had extended mostly unsecured credit to Stern in part in reliance on the defendant’s certificate, sued the defendant for fraud and negligence. The negligence claim alleged that, had the defendant used due care, the defendant would have discovered that Stern had provided it with falsified records and thus not certified Stern’s solvency, in which case no credit would have been extended. In support of this claim, the plaintiff argued that various prior decisions, including Glanzer, had established a general rule in New York negligence law according to which “words . . . negligently published with the expectation that the reader or listener will

transmit them to another . . . will lay a basis for liability [to the other] though privity be lacking.”49 Rejecting this unqualified statement of the rule of liability, Cardozo distinguished Glanzer and held that the absence of privity between defendant and plaintiff, or something close to it, was fatal to the plaintiff’s claim.

Many have puzzled over whether Ultramares and Glanzer are consistent. Abraham and White maintain that they are, because the potential liability in Glanzer was limited to a single buyer, whereas in Ultramares there was potential for negligence liability to multiple creditors, though they also seem to concede that Cardozo failed (along with many others) to identify a principled line for determining exactly when the threat of liability in the aggregate gets too large.50 This strikes me as a correct but seriously underspecified description of what makes these decisions exemplars of common-law judging.

One of the virtues of my colleague Andrew Kaufman’s Cardozo biography is that it reminds us that the great judge had more than two decades of practice experience before he ascended to the bench, and that his practice mainly involved representing clients in business disputes.51 I would suggest that his handling of Glanzer and Ultramares reflect the nuanced understandings of a lawyer with that sort of experience, along with a comparably subtle understanding of doctrine and judicial method.

Several features of Glanzer supported a finding of a duty of care owed by the weigher to the buyer notwithstanding the lack of privity between them. The sale had already gone through, although delivery and payment had yet to occur. (Cardozo’s opinion states that, when the seller requested the defendant to do the weighing, it informed the weigher that the beans “had been sold” to the plaintiff.)52 The seller, in other words, hired the weigher to perfect a transaction that both parties were legally obligated to complete and legally entitled to demand. Moreover, the relevant interests of the parties to the sales contract were aligned: both were relying on the weigher to provide an accurate weight. In this sense, the seller was paying the weigher to perform a service equally for it and for the buyer.

In effect, then, the weigher in Glanzer was delivering a service to a joint entity, namely, seller-and-buyer under a finalized but not fully performed contract. The plausibility of this description is supported by the following thought-experiment. If at the time of the weighing, another seller of beans had, by unlawful means, convinced the buyer to walk away from the deal, the seller might well have had a claim for tortious interference with contract against the imagined intermeddling seller. And vice versa if another buyer

50. Abraham & White, supra note 1, at 96-97.
51. KAUFMAN, supra note 11, at 54-60.
52. Glanzer, 135 N.E. at 275.
had unlawfully convinced the seller to walk away. In this setting, for these purposes, the real party in interest were both parties to the contract. This ‘fusion’ of seller and buyer did not necessarily entail that the weigher’s contractual obligation was owed to the buyer (although Cardozo in dictum suggests perhaps it did). But it was more than enough to explain why the weigher owed a tort duty to take due care not to cause economic loss to the buyer (or the seller).

For reasons that will become clear in a moment, it probably was also important that the weigher’s job was literally mechanical. Weighing the beans correctly did not require an elaborate investigation or a delicate exercise of judgment. This matters to the analysis of the buyer’s negligence claim because it suggests there would be little reason to worry that the recognition of a legal duty owed by the weigher to the seller would be unduly onerous in leaving this and other weighers with making a sensitive judgment-call while having to please two affected parties with divergent interests and expectations.

_Ultramares_ provided a very different situation. As Cardozo’s opinion explained, _Glanzer_ had involved a “nexus” between seller and buyer of particular “intimacy”—a “bond so close as to approach that of privity.” Nothing like this relationship existed between accountant and buyer in _Ultramares_. Instead, the plaintiff was arguing that the accountant owed a duty of care to “the indeterminate class of persons who, presently or in the future, might deal with the Stern company in reliance on the audit.” A duty of that breadth, Cardozo observed, would generate a potential for massive liability. Here it is crucial to appreciate that Cardozo was not making a straightforward floodgates (“too much liability”) argument. Rather, he pointed to the prospect of large and ongoing liability as a reason to question whether it was plausible to think of an accountant as owing a duty to exercise care in auditing to anyone who foreseeably might rely on its audit:

[i]f liability for negligence exists [on the terms proposed by plaintiff], a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business so conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.

Why is it so troubling to envision accountants owing a legal duty of care to the entire cast of characters that might foreseeably rely on their audits?

53. _Id._ at 277 (suggesting that _Glanzer_ might also recover as a third-party beneficiary of the contract between the seller and the defendant).
55. _Id._ at 446.
56. _Id._ at 444 (emphasis added).
In part the answer turns on the nature of auditing. As noted above, the weigher’s duty in *Glanzer* was to perform properly a mechanical operation, then accurately communicate the results. When performing its audit function, an accountant is dependent on information provided by the audited company, and indeed is being asked to be vigilant in uncovering both company mistakes and outright deception. In some cases, including *Ultramares* itself, client deceptions will be inartful and thus easily detected. But in the run of cases they may be difficult to detect. (Business owners who devote themselves to tricking creditors and investors presumably will tend to be equally devoted to tricking independent accounting firms.) Any obligation borne by an accountant under the law of negligence will thus expose the accountant to a kind of risk to which the weigher was never exposed. This provides a reason to be wary about recognizing a broad duty based on mere foreseeability of harm to members of a large class of persons who might rely on an audit.

Another worry is that a duty owed to a broad class of foreseeable investors stands to generate conflicts of interest for the accountant. As Benjamin Zipursky has observed, Cardozo worried that a duty owed to a broad class of actors who foreseeably might rely on the accuracy of an accountant’s audit will, de facto, be more demanding than the duty to the client. Here is the key language from *Ultramares*:

> [l]iability for negligence if adjudged in this case will extend to many callings other than an auditor’s. Lawyers who certify their opinion as to the validity of municipal or corporate bonds, with the knowledge that the opinion will be brought to the notice of the public, will become liable to the investors, if they have overlooked a statute or a decision, to the same extent as if the controversy were one between client and advisor... Negligence, moreover, will have one standard when viewed in relation to the employer, and another and at times a stricter standard when viewed in relation to the public. Explanations that might seem plausible, omissions that might be reasonable, if the duty is confined to the employer, conducting a business that presumably at least is not a fraud upon his creditors, might wear another aspect if an

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57. *Id.* (noting that the plaintiff’s theory of liability would require accountants to take steps to detect “a theft or forgery beneath the cover of deceptive entries”).

58. *Id.* at 443-44 (noting evidence suggesting that Stern’s falsifications could easily have been detected).

59. Of course whether a given accountant exercised due care on a given occasion is a question of breach that is ordinarily for the jury. This said, it is surely relevant to judicial determinations of duty rules whether the recognition of a proposed duty, in the run of cases, will subject a class of defendants to jury determinations of liability in situations in which the exercise of care is likely to be ineffectual in preventing harm.

independent duty to be suspicious even of one’s principal is owing to investors.\textsuperscript{61}

The problem under the broader rule is not just that the accountant has to ‘insure’ against more liability but that it will find itself serving two masters. There was no conflict of this sort in \textit{Glanzer}.

There is undoubtedly more to say on these topics, including whether Cardozo’s reasoning in \textit{Ultramares}, even if sound, permits an ambit of duty broader than privity but narrower than foreseeability.\textsuperscript{62} For now, it is enough to note that the strength of both opinions resides in several facets of Cardozo’s analysis. First, he gave close attention to the facts of the cases and draws plausible inferences about their distinctive and representative features. Second, he took at face value the legal question posed by negligence doctrine, namely, the question whether the defendant owed it to persons such as the plaintiff to take care not to make a false representation on which they might detrimentally rely. Rather than simply speculating about the point at which liability in the aggregate becomes too great (whatever that might mean), Cardozo attempted to place himself in the shoes of the defendants and to gauge how they would conduct themselves if the duty proposed by the plaintiff in these cases were recognized and heeded. In taking the question of duty seriously—as a question of obligation, not simply an excuse for a court to think about whether it favored or disfavored liability in this class of cases—Cardozo was faithfully employing what in \textit{The Nature of the Judicial Process} he described as the method of history. Anglo-American law has not always recognized the tort of negligence. Indeed, if this same pair of cases had come up c. 1800 under the old writ system, they would have been analyzed using different terms (e.g., by focusing on whether the injury in question was directly caused). But by Cardozo’s time, courts in New York and elsewhere had recognized negligence as a distinct civil wrong, and had defined it as injuring another through a breach of a duty of care owed to the other. Hence the duty question was properly analyzed on the terms on which he analyzed it.\textsuperscript{63}

Third, as discussed above, Cardozo both followed and distinguished relevant precedents as called for by the method of philosophy. In doing so, he considered, based in part on his own legal experience and in part on reported cases, the terms on which these and others related businesses

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\item \textit{Ultramares}, 174 N.E. at 448.
\item This is the position taken by the last two Torts Restatements. \textsc{Restatement (Third) of Torts: Liability for Economic Harm} § 6 (Am. L. Inst. 2020) (duty owed to identifiable persons whom the accountant knew would be relying on the audit); \textsc{Restatement (Second) of Torts} § 552 (Am. L. Inst. 1977) (same).
\item Cf. \textit{Palsgraf v. Long Island R.R. Co.}, 162 N.E. 99, 100-101 (N.Y. 1928) (Cardozo, J.) (noting that older English law was more prepared than contemporary New York law to hold actors strictly liable for harms caused).
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tended to operate. Here we see an application of what he referred to as the method of tradition. And finally, as called for by the method of sociology, his analysis took account of how the resolution of each case would stack up against prevailing notions of fairness and sound public policy.

In the end, there is no basis for drawing Abraham and White’s implausibly sharp dichotomy between Cardozo’s (supposedly) lame lectures and his excellent opinions. The opinions are indeed excellent, and their excellence resides precisely in Cardozo having, in them, effectively brought to bear the considerations he identified in *The Nature of the Judicial Process* as central to the task of common law adjudication. Of course attention to those considerations hardly guarantees a strong judicial opinion (and Cardozo, so far as I am aware, never suggested otherwise). The point instead is that, when they are attended to by an experienced, perceptive, and wise judge, they are apt to produce well-reasoned and sensible judgments. Such is the nature of the judicial process.

**CONCLUSION**

In this brief commentary, I have tried to explain why Cardozo’s famous lectures were well-received, and why they have had a lasting impact in American jurisprudence. I have further aimed to demonstrate that Cardozo’s justifiably well-regarded judicial opinions partake of—rather than stand independent from—the lessons imparted by his lectures. Among American common-law jurists, Cardozo was uniquely able and insightful: he was the best of his generation and few have rivalled him since. While his lectures were written in a mannered style that does not sit well with modern sensibilities, they should not for that be written off. Indeed, contemporary scholars ignore them at their peril.

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64 *See Ultramares*, 174 N.E. at 448 (considering the scope of liability for negligent misrepresentation in cases involving a range of businesses); *Glanger*, 135 N.E. at 276-77 (same).