Literary Influence on Legal Philosophy: A Comment on Professor Meyler’s
*Cardozo's Literary Precedents*

Leslie Kendrick

What shapes judicial temperament? What hones judicial style? Seeing as judges are grown in neither a hothouse nor a test tube, presumably they attain their temperament and style much the same way as the rest of us—which is how, exactly? Do we soak up influences like sponges? Or do we spring forth like Athena, our outlook and predilections mostly formed, and find in outside influences that which we want to see? I am not qualified to answer these questions, about either judges or people in general, yet they are the questions that Bernadette Meyler’s lovely piece on *Cardozo's Literary Precedents* prompts for me. I will suggest here that Meyler’s piece identifies and rejects some bad answers to these questions and also hints at some more intriguing possibilities.

I.

Meyler deftly and convincingly traces correspondences between what Cardozo saw in the works of George Eliot, as articulated in an undergraduate essay, and what he later said about judging—and indeed did as a judge. For example, the works of Eliot inspired Cardozo to assert that “every mastermind” exhibits “some recurring note, some theme, some refrain” that pervades their work,¹ and he later said, in *The Nature of the Judicial Process*, that all people, including judges, have “a stream of tendency . . . which gives coherence and direction to thought and action.”² Similarly, Cardozo admired Eliot’s way of bringing the reader into the thought processes of characters working through the expectations of society and their own desires on their way toward making significant moral

¹ The author would like to thank the editors of the Yale Journal of Law & the Humanities and the participants in the Cardozo conference that yielded this symposium. Thanks especially to Bernadette Meyler for the essay to which this piece responds. All errors are mine.


---

246
decisions (often doing so by making rationalizations about the expectations of society or their obligations toward others).\textsuperscript{3} Meyler suggests that Cardozo viewed judging as involving a similar type of thought process (for instance, when Cardozo wrote, “A judge is to give effect in general not to his own scale of values, but to the scale of values revealed to him in his readings of the social mind. . . . [H]e must put himself as best he can within the heart and mind of others, and frame his estimate of values by the truth as thus revealed.”).\textsuperscript{4} Meyler further argues that in his opinions, too, Cardozo toggles between the individual perspective of parties and the standpoint of tort law’s reasonable person.\textsuperscript{5} In these and other ways, Meyler shows similarities between Cardozo’s gloss on Eliot and his own work, both his writings about the judicial process and his own judicial opinions.

Given these similarities, it would be easy to say that Cardozo was influenced by Eliot—that her preoccupations and her style had an effect on Cardozo’s preoccupations and style. Some might even welcome such a claim, whether because it might shed light on the judicial temperament and style of a well-known figure, or because it might support, or justify, the existence of the field known as law and literature. We have so many examples of law figuring in literary works; here is a rarer instance of literature influencing law. And yet, this claim of influence would not necessarily be a good thing. It would, in my view, actually be a bad thing, one that does credit to neither literature nor law.

To be clear, Meyler does not make a direct causal claim. She states, “Eliot’s work certainly did not dictate Cardozo’s conceptions of duty and responsibility,” and, “Did what [Cardozo] discerned in Eliot dictate his later legal style or understanding of duty? No.”\textsuperscript{6} This is much to Meyler’s credit and of a piece with her general approach to law and literature. Nevertheless, one might question why Meyler and I are in easy agreement on this point, or why anyone might be ambivalent, or worse, about a causal connection between the literature Cardozo consumed and the judge he became. There are at least three reasons.

First, the empiricists among us will remind us that correlation does not equal causation. The fact that there are correspondences between Cardozo’s interpretation of Eliot and his own judicial philosophy does not mean that Eliot influenced his judicial philosophy. It is possible that some exogenous factor explains both. For example, perhaps Cardozo had a preexisting set of interests that led him both to read Eliot in a particular way and to exhibit a similar approach in his own writings. Whether these tendencies were hard-

\begin{itemize}
\item 3. Meyler, \textit{supra} note 1, at 214-17.
\item 4. \textsc{Benjamin Cardozo}, \textit{The Paradoxes of Legal Science} 55 (1928); Meyler, \textit{supra} note 1, at 218.
\item 5. Meyler, \textit{supra} note 1, at 220.
\item 6. Meyler, \textit{supra} note 1, at 211.
\end{itemize}
wired or a product of influences he encountered earlier in his life, it is possible that by the time he wrote a college paper on Eliot, his own habits of mind were sufficiently set that he saw in Eliot what he chose to see. In this case, both his paper on Eliot and his judicial approach are different manifestations of the same temperamental and stylistic characteristics.

Second, it seems to me that lawyers and legal scholars should not be sanguine about the possibility that Cardozo picked up his judicial philosophy in a novel he read in college, even a novel as great as one of Eliot’s. There are two possibilities: either Cardozo deliberately lifted aspects of his judicial philosophy from a work of fiction, or he subconsciously did so. Neither possibility is reassuring. Both evoke realist theories of how judges judge—i.e., because of factors completely outside the legal rules and legal process. It’s a small step from judging based on a novel to judging based on what one had for breakfast.

Third, many literary practitioners would also balk at the influence theory. Some people both inside and outside of the humanities constantly try to tell us what literature is for. Often these theories posit some civic benefit to reading literature. But attempts to justify the existence of literature in utilitarian terms risk both missing what is special about literature and over-agrandizing its other virtues. Literature is not a civics course, in either style or substance. Its effects and its thrills are much more complex than the pat just-so stories of political morality that some of its so-called supporters attribute to it. Indeed, some great literature might be bad for you. Consider Robert Browning’s dramatic monologues like “Porphyria’s Lover,” or Lolita. But the point is that literature’s worth is not measured by its civic utility. The one is at best orthogonal to the other.

Thus, there are reasons for both legal and literary practitioners to be skeptical of, if not hostile toward, claims about literature’s influence on law: neither the “law” nor the “literature” side of “law & literature” should feel easy. It is one thing for creative writers to influence other creative writers: the scholarly literature on literary influence is immense, and a great deal of literary influence is conscious on the part the influenced. As Picasso supposedly said, “Great artists steal”—that is to say, artists take intentionally from their predecessors and contemporaries. It is an entirely different thing for a judge to take, intentionally or unintentionally, from a novel when constructing a judicial process.

Another Eliot wrote,

> When a poet’s mind is perfectly equipped for its work, it is constantly

---

7. I have described elsewhere what happened when Richard Rorty, who argued that philosophers must rely on literature to foster civic solidarity in a way that philosophy cannot, spoke before a group of literature scholars at the University of Oxford. See Leslie Kendrick, *The Book Has Two Faces: Trevor Ross’s Writing in Public: Literature and the Liberty of the Press in Eighteenth-Century Britain*, 6 CRITICAL ANALYSIS L. 174 (2019). To cut a long story short, they were unpersuaded.
amalgamating disparate experience; the ordinary man’s experience is chaotic, irregular, fragmentary. The latter falls in love, or reads Spinoza, and these two experiences have nothing to do with each other, or with the noise of the typewriter or the smell of cooking; in the mind of the poet these experiences are always forming new wholes. For a poet, it may be a virtue to fall in love and read Spinoza and have these experiences inform each other. For a judge, it is the stuff of realist critique. Seemingly important in a reply to legal realists is an assertion that judges are more like the “ordinary man” than the poet: that they are capable of keeping both their Spinoza and their failing in love separate from their other activities, or at least from their judging.

II.

It is interesting that T.S. Eliot chose to contrast the poet with the “ordinary man,” given that many of Cardozo’s famous cases revolve around tort and the conduct of the reasonable or ordinary man, and that Meyler’s essay identifies echoes of George Eliot in precisely that judicial context. I have suggested that positing literary influence on judicial philosophy should raise major concerns for both law and literature. But what is the alternative for the “ordinary man,” or the reasonable judge? Meyler’s piece offers some suggestions, from her own interpretations and from Cardozo himself.

Although Meyler disavows any claim that Eliot’s works “dictated” Cardozo’s judicial philosophy or style, she suggests something softer: “Eliot’s work certainly did not dictate Cardozo’s conceptions of duty and responsibility but, like works of philosophy or legal treatises, furnished a powerful substrate through which Cardozo could refine his emerging ideas.” Later, she writes, “I would argue[] Eliot’s novels may have prompted greater reflection about what kinds of narrative techniques could be used for which purposes and provided Cardozo with a valuable resource for thinking through relationships of duty and causation.” These passages, as I read them, posit the possibility that Eliot’s work did exert some influence on Cardozo’s. What Meyler rejects is that Eliot’s work “dictated” Cardozo’s approach. The word “dictate” is interesting, because it suggests no agency on the part of the person being dictated to, as though Eliot’s novels may somehow have hijacked Cardozo’s judicial output. This particular form of influence seems highly unlikely, nor is it the only form of influence to be concerned about. It still seems worrying if Cardozo deliberately lifted his judicial philosophy from a novel, or if he

---

9. Meyler, supra note 1, at 211.
10. Meyler, supra note 1, at 225.
11. Meyler, supra note 1, at 211, 224.
was subconsciously shaped by it in a more casual, less dictatorial way. Meyler seems to posit that this may have been the case.

Even more intriguing is that Meyler identifies musings of Cardozo that bear directly on this question of influence. For example, Meyler notes that in *The Nature of the Judicial Process*, Cardozo writes that all people have “a stream of tendency . . . which gives coherence and direction to thought and action,” and that judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in [Henry] James’s phrase of “the total push and pressure of the cosmos,” which, when reasons are nicely balanced, must determine where choice shall fall.12

Similarly, in *The Growth of the Law*, Cardozo writes:

Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however veiled, is in truth the final arbiter. . . . Often the philosophy is ill coordinated and fragmentary. Its empire is not always suspected even by its subjects. Neither lawyer nor judge, pressing forward along one line or retreating along another, is conscious at all times that it is philosophy which is impelling him to the front or driving him to the rear. None the less, the goad is there.13

These passages together suggest that (1) all judges are driven to some degree by their own philosophy, one that may be incomplete and even unknown to the judge and (2) such philosophies are formed by a variety of non-legal influences. That these non-legal influences could include literature seems entirely possible, given that they seem to include everything else. Cardozo suggests that such philosophies may only come into play in close cases (“when reasons are nicely balanced” or “where the question is, so to speak, at large”), but in such cases, he explicitly asserts that they inform outcomes.

Thus Cardozo seems candidly to admit that judges may develop their judicial philosophy from non-legal forces in their lives, seemingly including literature, and that their outlooks can influence outcomes. Have we returned to the realist critique? Is the ordinary man, or the judge, more like the poet than T.S. Eliot supposed? And should we not be very worried about that?

III.

As I said at the outset, I cannot explain how judicial temperament and

---

12. CARDozo, supra note 2, at 12; Meyler, supra note 1, at 213.
judicial style develop, nor can I explain how they should. All I can say is that Meyler’s essay raises various possibilities for me, some of which seem more supportable than others.

In supportable is the idea that Eliot’s novels “dictated” Cardozo’s judicial philosophy, in the sense of subconsciously ordaining Cardozo’s later outlook. In supportable, also, is the idea that Cardozo deliberately adopted a wholesale judicial approach modeled on a series of books by a nineteenth century British novelist. Thankfully, both these options seem as unlikely as they are unattractive.

Highly questionable, also, is the idea that, while not dictating Cardozo’s path, Eliot’s works exerted a strong subconscious influence. This puts the judge in the same category as the poet reading Spinoza. Just as the poet’s approach to a romantic relationship is somehow shaped by his reading of Spinoza, so the judge’s judging carries a deep impression from his reading of Eliot. This puts the judge close to realist territory, where all sorts of outside influences determine what is happening in the courtroom.

And yet, equally insupportable is the fiction that judges are grown in hothouses or test tubes. Before they become judges, they are lawyers, and before they are lawyers, they are “ordinary people,” and they must be influenced by their experiences, environment, and education at every step of the way. What is most striking about Cardozo’s descriptions of judicial philosophy is their breathtaking frankness. He does not pretend that judges emerge only from careful and reflective engagement with legal texts and traditions. They carry within them a richer, wilder set of influences.

Thus, it may seem, on this point Cardozo is with the realists, and what they have on their side is reality. Judges are not produced in carefully controlled legal environments. Nor would we want them to be.

All of this could easily lead us in any number of directions—jurisprudence, judicial biography, sociology, psychology—where any number of well-informed scholars would be waiting with their analysis, which would no doubt be enriching. But I would like to keep this reply shorter than the essay to which it is responding, and thus I will just say that Meyler’s piece suggests a middle way, between the poet/realist and the test tube/hothouse. That is a process of discernment, in which the influenced reflectively considers the influence and makes a decision about its relevance to the matter at hand.

Meyler gives examples of exactly this process in Eliot’s and Cardozo’s writings—of a character, or judge, considering someone’s individual perspective, the expectations of society, the claims of others, and perhaps even other factors before arriving at a decision. Perhaps Cardozo’s engagement with Eliot might have mirrored that same pattern of reflection—considering what ideas resonated with his existing outlook or experience, what stylistic or aesthetic traits were worthy of note, what
insights Eliot’s depictions provided into humanity, and how all this might or might not be relevant in his understanding of the world around him and, ultimately, his process of moral decisionmaking in that world. Later, when he became a judge, perhaps some of those insights seemed relevant, not because they were part of his personality, but because they seemed legitimately relevant to cases about such things as what duties ordinary people owe to each other. What is most disturbing about imagining judges behaving like T.S. Eliot’s poet is that, for the poet, the conflation of two disparate experiences is unreflective—reading Spinoza and falling in love are just related, automatically and unreservedly. Again, this may be a wonderful trait in a poet. But perhaps it is possible, and desirable, for judicial philosophy to take shape more deliberately, maybe ultimately with no fewer influences, but with more reflection.

Meyler’s essay raises a rich set of questions about the nature of legal, and literary, influence. Ultimately, her analysis suggests a possibility of reflective influence mirrored by the very approach that she traces in both Eliot and Cardozo’s writings. More broadly, her essay prompts serious thinking about the relationship between law and literature. Here, the message seems to be one of caution—and again of the value of reflection and discernment in considering how the two do, and ought to, relate.