

## THE JUDICIAL PROCESS REVISITED: INTRODUCTION

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BENJAMIN N. CARDOZO, Chief Judge of the New York Court of Appeals, Justice of the United States Supreme Court, author of the four lectures entitled *The Nature of the Judicial Process* that were delivered at Yale, was a man of such beauty of countenance, such personal charm, and such keenness of mind, that to write of him now creates again the poignant joy that he brought to his friends and listeners at Yale more than forty years ago. His smile could melt one's heart to tears, his modesty and quickness of understanding roused instant confidence, and the beauty of his language, written and spoken, made it the perfect expression of his thought.

One Cardozo on a judicial bench was enough to give assurance that it would be the dispenser of justice that satisfies the imagination and fulfills the hope. In the judicial conferences after the final argument, without the slightest assumption of superiority or universal wisdom, he added an element so persuasive that he was seldom on the dissenting side. Decisions were not always unanimous, for judges could not always see with Cardozo's luminous eyes; they might be wedded to the rule of thumb, the worded doctrine of a book, the doctrine carefully written down from an old professor's lecture, the conviction that the taught rule is eternal and must not be weakened into variation and uncertainty. The mind and spirit of Cardozo were free; and yet he had ample respect for stated rules and doctrines. He had no illusion of all-wisdom; and he paid just tribute to the opinions of the judges with whom he sat.

In 1921, at the invitation of the Association of American Law Schools, Cardozo came to Chicago to address its annual meeting in support of the proposal then before it to organize what became in the following year the American Law Institute. In a charming address, leavened with wit and permeated with good humor, fit to associate with his many more professional lectures, filling just four pages in the Annual Report for 1921, he disclaimed any special wisdom, saying,

I have no message to deliver, no counsel to offer, nothing except my own sympathy and interest in the project, a conviction that there is something

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to be done and a willingness within the narrow limits of my capacity to cooperate in the task of doing it.<sup>1</sup>

With keen accuracy, he proceeded to state the function of the judge and its limitations and to suggest the possible part to be played by an Academy or Institute. Above all, he said, a function of the Institute would be that of cooperation.

We are to substitute for the attitude of mind, the temper, that spends itself in hostility and distrust, the attitude and temper of mutual helpfulness, of willing cooperation, a fusion of diverse types and capacities and attainments. Of course, in such a process there are losses as well as gains. Sometimes one has to scrap the things that one would like to keep. One's pet hobbies are sometimes derided, and one's dearest formulas rejected. One who sits in an Appellate Court, with the necessity of convincing or placating six minds or more, becomes finally more or less inured to these scenes of carnage and mutilation. But in exchange one gains other things that mitigate the sacrifice.<sup>2</sup>

At the end he received what the Report describes as "tumultuous applause."

This address to the collection of law professors in 1921 occurred soon after the publication of his lectures on *The Nature of the Judicial Process*, and more than a year after he personally delivered those lectures at Yale. More than any living man, except Judge Thomas W. Swan, the writer of this contribution had an active part in the preliminaries to the delivery of those lectures. I had been attracted by Cardozo's opinions as a member of the New York Court of Appeals, and I had published a detailed critique of his opinion in *DeCicco v. Schweizer*,<sup>3</sup> a critique that expressed enthusiastic admiration and yet had some differences in analysis. That led to some correspondence at the time and to our sending to him a complimentary subscription to the *Yale Law Journal*, a gift that brought back an appreciative letter to the editors of the *Journal*.

In 1918, our faculty had the perennial problem of inducing a competent and attractive man to deliver the Storrs Lectures. Some of Cardozo's predecessors in that course had been both competent and attractive; but not all of them had a style or a delivery that would hold an audience of students. Thus, in 1903, Sir Frederick Pollock delivered here his lectures poetically entitled "Our Lady of the Common Law," lectures that are attractive in both substance and form. All the faculty and all the students attended his first lecture. It was my first year as an instructor; and the name of Sir Frederick excited my imagination and aroused great expectations. I listened carefully but I could understand next to nothing. Sir Frederick peered with near-sighted

1. Address of Judge Cardozo, in HANDBOOK OF THE ASS'N OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE NINETEENTH ANNUAL MEETING 117 (1921).

2. *Id.* at 120.

3. 221 N.Y. 431, 117 N.E. 807 (1917). See Corbin, *Does a Pre-Existing Duty Defeat Consideration?—Recent Noteworthy Decisions*, 27 YALE L.J. 362 (1918).

eyes close to the manuscript and spoke indistinctly through his beard, with an accent and pronunciation that has been described as "cockney." Five years later, I reported this fact to a distant cousin in London who was then registered in the Inner Temple and who later became the Vice-Chancellor of Brazenose College and a writer on International Law. This young man's fashion of speech was so like my own that I marveled at this in the light of my experience with Sir Frederick. With a young law student's promptness and assurance, he replied: "Oh, Sir Frederick could never make a living practicing law here in London." At his subsequent lectures, he had practically no audience except the members of the faculty who had invited him. Sir Frederick appeared to be not in the least disturbed by this.

Although none of us had ever seen Judge Cardozo, we enthusiastically approved the invitation extended to him by Dean Swan. From New York, we received an immediate reply. Cardozo wrote that he was surprised that we thought him competent to deliver such a course, and that he felt quite unable to accept, because (he wrote) "I have no message to deliver." But he appreciated so greatly our thought of him that he wanted to call upon us and make our acquaintance in New Haven. A day was set; and Cardozo met us in the office of the Dean. The very sight of him told us that he was our man. After introductions, we sat in a semi-circle about the Dean's desk. Cardozo repeated what he had already written, especially his appreciation. But he could not possibly accept, because "I have no message to deliver." At that point, the suggestion was made as follows: "Judge Cardozo, could you not explain to our students the process by which you arrive at the decision of a case, with the sources to which you go for assistance?" With a bird-like movement of the head, and a mere moment of hesitation, he replied: "I believe I *could* do that." We had acquired our lecturer.

During the succeeding twelve months, in the midst of his judicial labors, he prepared his lectures entitled *The Nature of the Judicial Process*. He was scheduled to deliver them on four successive days at 5 P.M. The first lecture was given in a lecture hall accommodating some 250 listeners. As in the case of Sir Frederick Pollock, every student and every faculty man was in the room. Standing on the platform at the lectern, his mobile countenance, his dark eyes, his white hair, and his brilliant smile, all well lighted before us, he read the lecture, winding it up at 6 o'clock. He bowed and sat down. The entire audience rose to their feet, with a burst of applause that would not cease. Cardozo rose and bowed, with a smile at once pleased and deprecatory, and again sat down. Not a man moved from his tracks; and the applause increased. In a sort of confusion Cardozo saw that he must be the first to move. He came down the steps and left, with the faculty, through a side door, with the applause still in his ears.

The next day, each student must have brought a friend. The hall was jammed, with many more pushing to get in; and we transferred the lecture to the near-by Lampson Lyceum, with some 500 seats. For the remaining

lectures that hall was filled to capacity; and each day at 6 P.M. the ritual of the first day was exactly repeated—the rising of the audience, the continuous applause, the smile of pleasure, the appreciative bow, and the leaving with the faculty while all others stood and cheered. Both what he had said and his manner of saying it had held us spell-bound on four successive days. He had inspired our ambition in the law and had warmed the cockles of our hearts. Never again have I had a like experience. To him also it must have brought a glow of emotion that would long be repeated within, just as it is now repeated for me when writing of it after forty years.

Grouped about him, at the end of his fourth lecture, we said we must have his manuscript for publication by the Yale Press. In his smiling but deprecatory way, he said that he did not “dare to have it published.” Half seriously, he added: “If it were published, I would be impeached.” There were smiles of understanding, but not an ounce of seriousness; and of course he surrendered the manuscript to us. Within twelve months after the publication of the neat little booklet, the Yale Press sold 3,000 copies in New York alone, with the other results that you know. Thereafter, with greater confidence, he delivered other lectures at Yale, Columbia, and elsewhere.

As Vice-President of the American Law Institute, Cardozo participated in many conferences on the Restatement. Some of his hopes may have been realized in that process; but in others he must have been greatly disappointed. Whatever were the “diverse types, capacities, and attainments” of the Reporters and their Advisers, there was not enough competence in the nation for the reduction of such a mass of material into the form of accurate, well organized, clearly expressed, and up-to-date generalizations. The name “Restatement,” chosen for the product, indicates that many may have had the false notion that the common law consisted of a number of permanent, absolute rules and principles, and that the function of the Institute was to eliminate ambiguity and error and to restore them to their pristine clarity and perfection. There are spots in which the Reporter seems to have believed that the effects that “equity” had had upon the “common law” were not within his province. Anyone taking active part in the process who held such a view must have been progressively disillusioned. Those not taking part who held such a view must have been disappointed. Those who are now engaged, thirty years after, in drafting a Revision are well aware that the Restatement did not arrive at permanent perfection, much less start with it, although they are using it of necessity as the base from which to take the next step toward the future.

This writer can bear witness to one instance of Cardozo’s active cooperation. I drafted Section 357, constructing a rule that even a plaintiff who was himself in major default may have a right to some degree of restitution. It certainly was not a Restatement of any generally recognized rule. I sent a copy of this proposed section to Cardozo. He replied expressing his disapproval. In self defense, I prepared an article for publication, stating the facts of many cases with the actual decision made therein. That manuscript I sent to Cardozo.

The result was that we reached agreement. He personally drafted Subsection (2) of that Section, exactly as it now appears, while he gave assent to my Subsections (1) and (3).

This is not the place for a critical review of the substance of *The Nature of the Judicial Process*. No independent mind can accept 100 per cent of the conclusions and reasoning of another man, even of such worshipful masters as Cardozo and Holmes. The best one can do is to smite those who fail to accept them by 95 per cent. It is my conviction that Cardozo's neat subdivision of the judicial process into four named methods may mislead the unwary into supposing that they are separated by division fences into four compartments. They are merely four aspects of one method—the Cardozo Method. Also, I regard as likely to be given undue importance his classification of the cases into (1) those where “the law and its application are alike plain,” (2) those in which the “rule of law is certain and the application alone doubtful,” and (3) the residue in which “a decision one way or the other, will count for the future, will advance or retard, sometimes much sometimes little, the development of the law.”<sup>4</sup>

There are, indeed, great differences in degree; and differences in degree become so great as to be described as differences in kind. But there is many a case in which the judges on a single bench can not agree on the class in which the case before them falls. Where are the cases in which the “rule of law is certain” even before the court has determined its “application”? All “rules of law” are aggregations of words, with fringes of uncertainty and variable content. A word is not a “crystal” but the “skin of living [and variable] thought.”<sup>5</sup> The same is true of any group of words, called a “rule” or “principle.” No word has any meaning except as it has been used by men as the “skin” of their varying thoughts in differing contexts. A “rule of law” has no content divorced from its applications; it is by a series of more or less analogous “applications” (decisions) that it is stated and revised and restated; and every application to new facts adds to (or subtracts from) its content and, soon or late, compels a new “Restatement” and a new “Revision.” This is the evolutionary process by which the growth of law occurs.

It was not merely the cases that obviously fall neatly into his class (3) that caused Cardozo to be “oppressed and disheartened in [his] first days upon the bench.” The “ocean” upon which he “embarked” was “trackless.” But even though “the quest for it [certainty of rule] was futile,” he found methods of judicial operation that gave him comfort and confidence:

As the years have gone by, and I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches [in *all* of its reaches] is not discovery, but creation, and that the doubts and misgivings, the hopes and

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4. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 164-65 (1921).

5. *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (opinion of Holmes, J.).

fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.<sup>6</sup>

Cardozo's Chicago address to the law professors makes it easy to see why they at once enrolled him as one of their judicial heroes, to the envy of some of his judicial brethren. He acknowledged the necessary function of the research scholar in the recognition, the restatement, and the growth of legal principles. He spoke of the existing distrust of mere "theorists" and of "legal theory," a distrust expressed by lawyers and judges, by "men who deal with the law in action, the men in the thick of the fight." He felt free to speak "with candor about this because I do not share the distrust myself." Who is it that does not love "recognition"? The "distrust" that he did not share, however, has ample and enduring justification. The progression of life causes casualties among "legal theories" much more certainly and rapidly than among judicial "decisions"; but these "theories" are those announced as reasons by the judges as well as those advocated by the scholars. "Your decision will probably be right but your reasons are certain to be wrong" was the advice given by Lord Mansfield to a young jurist.

Cardozo's judicial method brought together all the possible sources of judicial and societal wisdom and experience, awarding a high place to the full-time research scholar. The chief defect in the rule of *Erie v. Tompkins* is in the fact that it denies to diversity litigants the advantages of his judicial method and does it on the false ground of Constitutional necessity. In diversity cases, the federal courts are empowered by the people of the several states that have adopted the Constitution to do justice between diversity litigants. They have a right to the same wise and satisfying judicial process as other litigants. It is the *Erie v. Tompkins* decision and not the Constitution that denies to them the benefits of Cardozo's method. The Supreme Court itself can and does abandon the strait-jacket that is pinned on the lower federal courts. It makes federal general law that is "common" to all the states, using all of Cardozo's sources. Inferior courts can do so only by subterfuge and in fear of reversal for doing it.

Cardozo's method does not give first place to research scholars.

I do not say that in any disparagement of the Courts, their learning or ability. I am not making any damaging admissions here in this conclave of our critics. I am standing up on my constitutional rights, and I shall not add to the burdens of my tribe by any unnecessary confessions. . . . In all this I am not attempting to depreciate the value of Judge-made law or to exaggerate its defects. On the contrary, I am convinced that it is the best and most flexible agency for development and growth. Just because I believe that, I am anxious to place at the service of the Judges the resources and the results of modern scholarship and learning.<sup>7</sup>

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6. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166-67 (1921).

7. Address of Judge Cardozo, *op. cit. supra* note 1, at 118.

Only the immature academic mind can fail to realize that the research scholar's chief source of the materials on which his generalizations must be based is the mountainous mass of court decisions and opinions. He must realize also that his generalizations must be tested and altered and restated and abandoned in accordance with their application (or rejection) by the courts to the ever-changing problems of life. This is one main reason why Restatements must be revised and restated; it is why the Revisions of the present decade will show vast differences from the Restatements published 30 years earlier; it is why the Revisions of the present era will require a new Revision within another 30 years. There will be new classifications and more acute analyses as well as new rules and explanations, although the basis of the new Revision will be the still meritorious, though partly erroneous, patently inadequate, outgrown and inoperative, Restatement of the past.