

CARDOZO AND THE JUDICIAL PROCESS TODAY

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In his lecture to the New York State Bar Association January 22, 1932, Judge Cardozo made this autobiographical remark:

In years gone by I have afflicted my brethren of the bench and bar with disquisitions on judicial method, on the philosophy of case law, revelations (or shall I say confessions?) of the springs of the judicial process. A decade has gone by since I began these indiscretions. I have thought you might forgive me if I offered you a cumulative supplement that would bring the process down to date.¹

It would be a large order for anyone else to bring the process down to date. It may be enough to attempt to assess the contemporary status of some of the legal theory and judicial rulings which were his own important contributions to the process.

I.

The first of Cardozo's self-styled "indiscretions" was the series of lectures delivered at the Yale Law School in 1921, entitled *The Nature of the Judicial Process*. The story is told of a visitor who found his way to a cottage in New Jersey where Judge Cardozo was summering, and inquired how he was spending his time. It is said that Cardozo shyly replied, like a man who had at last been tracked to his lair and his nefarious purposes exposed, that he was writing a book. This book, as well as others that have followed in its train,² have ever since been the joy of bench and bar throughout the United States and abroad. It is to the glory of Yale that the first two of these series of lectures were delivered there, and that *Law and Literature* was also published by the Yale University Press.

The Nature of the Judicial Process is an analysis of the factors which actuate judges in making up their minds in the decision of cases. It is the product of Cardozo's observation and introspection. With his sense of the continuity of knowledge, his broad and universal culture, and his aversion to anything trite or tawdry, Cardozo's analysis of the motivation of judicial decision was couched as often as possible in the elevated language of legal philosophers and other thinkers and writers. It is rich with thoughts of other men, but is still largely original and is essentially the result of his own experience and self analysis. No point of view seems to have escaped him, nor to have irritated him or warped his conclusions. He was accustomed to reconcile,

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1. CARDOZO, *SELECTED WRITINGS* 7 (Hall ed. 1947).

2. CARDOZO, *THE GROWTH OF THE LAW* (1924); CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928); CARDOZO, *LAW AND LITERATURE* (1931).

where possible, divergent ideas and emotional drives, to view them with equanimity, and to hold them in balance and in right perspective. That resulted in fewer dissents when he was Chief Judge than during the regime of any other man who ever presided over the New York Court of Appeals. The members of a divided court are not always so far apart as they may think at the time, and Cardozo had both the instinct to sense this during the formative period of decisions and the skill and grace to harmonize discordant positions before they became too deeply entrenched to be changed. After reading *The Nature of the Judicial Process* many times, first in the year of publication, this perceptiveness, detachment and poise seem to me to be its greatest quality. Cardozo seldom overspoke himself, as many a brilliant theorist has done, nor did he lack decisiveness on account of being alert to every phase of the issues. No one familiar with his opinions is likely to consider that the native hue of resolution was sicklied o'er with the pale cast of thought.

Developments in the law since *The Nature of the Judicial Process* was published consist less in modifications of Cardozo's generalities than in changes in their application to specific cases, or their application to cases of first impression. Precedent is still followed in the absence of overriding factors. Historical and traditional interpretations are generally adhered to unless more recent considerations dictate otherwise. Custom becomes law if adapted to that purpose in the absence of statute to the contrary. New types of controversy are resolved according to the mores of the day. Social questions receive social treatment. No one is likely to quarrel with these principles at this date. They are and always have been essentially part of the method of the common law. Changes and development have come in their application to specific facts.

The growth of the law since 1921, when these lectures were delivered, has been marked chiefly by a change in emphasis or direction respecting sociological jurisprudence and its development in fields not previously occupied by law, the tremendous expansion of administrative law and agencies, and a huge volume of legislation and court decisions. The statute books are flooded with legislation enacted in fifty states, to say nothing of the Congress of the United States, and these statutes are augmented by rules and rulings in astronomical numbers by administrative agencies in every jurisdiction and at every level of government. One is reminded of this by the letter from the Editorial Board of the *Yale Law Journal*, outlining the scope of the present symposium:

We seem to sense a certain tendency toward solidification and mechanization of the law—the proliferation of codes and codifiers, of digests and abstracts. One of our professors has suggested that these and perhaps other changes in our legal system have been generated by the breakdown of our case law system under the increasing volume of reported cases and the accompanying diversity of precedents. These and other trends suggest that a reappraisal of the judicial process might be of special value at the present time.

Cardozo was aware of this danger, as appears from his address on the American Law Institute published in *Law and Literature*. Regardless of

whether the Restatements of the Institute supply the answer to the problem (there are those who consider them to be of greater value than the subsequent more adventurous and possibly less successful attempts to codify the law), it hardly follows that the role of the judge is being superseded by legislation. There may be change in emphasis. The rule of *stare decisis* in practice may be somewhat weaker than when Cardozo wrote, or when he so conscientiously sought to maintain it in the absence of overriding factors. Yet precedent is still followed in all jurisdictions (I doubt whether it can be wholly escaped even in civil law countries), nor could it be otherwise unless the personal lives of people, their liberties, businesses and properties generally were to be thrown into confusion. The multitude of specific legislation, sometimes passed without sight of consequences in order to satisfy constituents asserting that there ought to be a law on some subject to bring their neighbors to heel, as well as the sea of administrative rulings, are likely to break down order and regularity in the administration of justice quite as much as the number of court decisions. Only the other day, for example, the Commissioner of Internal Revenue announced that when a ruling favorable to a taxpayer is made in tax law, other taxpayers in similar circumstances ought not to rely upon a similar ruling being made in their cases. The Commissioner is quoted as having said:

When we are reconsidering our ruling position we do not believe there is any valid support to a taxpayer's claim that he is entitled to a favorable ruling—on the grounds that he relied to his detriment on a ruling issued by the service to another taxpayer.³

The Commissioner may have been right in making this announcement. It was a forthright warning to taxpayers of the predicament which confronts an administrative bureau obliged to deal with complex law under changing conditions. Yet the Commissioner would be the first to admit, I am sure, that however necessary such uncertainties may be, or however much they may be beyond his control, they do not make for uniformity or stability in the administration of justice.

The constant interplay of change and stability in the law is the theme of most of Cardozo's extra-judicial writing. He was anything but a case lawyer. He believed that lawsuits should be decided according to principles, derived from experience and understanding of every branch of life, of which the existing case law is only a part. We have become so accustomed to this idea that it is necessary to remember that when Cardozo went on the bench, except for Holmes, Roscoe Pound and a few other eminent lawyers and jurists, the conception was prevalent that the common law had become static, except as it might be changed by legislation, and that the function of the judge was simply to decide new cases according to former precedents. It was even questioned whether in deciding cases judges should read beyond the law books, or apply knowledge of life which they might possess that was not circumscribed by the

3. N.Y. Times, Aug. 21, 1961, p. 31, col. 2.

legal reports and textbooks. Only recently in modern times have judges had the temerity to cite sociologists, economists, historians and other writers having knowledge essential to the intelligent decision of the law applicable to the case at bar. Because Cardozo spoke out openly in favor of the utilization by judges of all available knowledge in every field (life and law being a seamless web) and, like the great common law judges of old, because he did not consider that courts were forever bound by prior decisions merely for the reason that they had been decided, eulogists of the neo-realist variety are accustomed to praise him for being in favor of changing the old order as a matter of course. Nothing could be farther from the truth. Any image of Cardozo as an innovator for innovation's sake is wide of the mark. He was not a neo-realist. The respect which he held for the rule of *stare decisis* is sharply presented by his 1932 address to the New York State Bar Association in which he characterized as "unreal and almost farcial when applied to apartment life today" the contention that gas ranges in apartment houses remain personal property without annexation to the freehold. He and the court (with one dissent) voted in favor of this "unreal and almost farcial" position, for the reason that it had been so held sixteen years before in another case on similar facts. In explanation of this ruling, Judge Cardozo stated in his Bar Association address:

[A] majority of the court believed that in view of the probable reliance by innocent parties upon a decision which the same majority would have refused to make if the question had been a new one, there was nothing to do except to adhere to what its predecessors had done, and let *stare decisis* control the judgment.⁴

This was followed by the interesting suggestion which has not been adopted, although it has often been discussed, the courts should be authorized to decide such cases in accordance with existing precedents but to announce that thereafter the rule would be otherwise.⁵ But Cardozo was as certain that old rules should be changed for good cause as he was that they should be followed in the absence of reason for a change. This is not the place to recite all of the changes in obsolete rules that were made under his skillful leadership of the New York Court of Appeals. A study of those decisions would carry this paper out of bounds. It suffices to say that of that kind over which he presided changes were the work of a master, conscious of responsibility in altering old rules of conduct, aware of the conflicting considerations weighing in favor of the change

4. HALL, *op. cit. supra* note 1, at 35-36. Compare *Madfes v. Beverly Dev. Corp.*, 251 N.Y. 12, 166 N.E. 787 (1929), with *Central Union Gas Co. v. Browning*, 210 N.Y. 10, 103 N.E. 822 (1913). Cf. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112 (1921) ("One of the most fundamental social interests is that law shall be uniform and impartial").

5. See, *e.g.*, *Great Northern Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932); *Aero Spark Plug Co. v. B.G. Corp.*, 130 F.2d 290, 292-99 (2d Cir. 1942) (concurring opinion of Frank, J.); Von Mehren, *The Judicial Process*, 5 AM. J. COMP. L. 197, 226-27 (1956) and articles cited therein.

or retaining the status quo. In most instances he sensed the long-range public opinion of the time, the sober, second thought of the people, as Chief Justice Hughes once characterized it, and few of these creative decisions have since been overruled. A pragmatist at heart, he knew that in course of time some of his cases would be overruled, saying:

I should like to come back a generation or so from now, just to get a peek at the state of the law, make my bow, and retire. I suppose I should find big changes. Many of the opinions that I have written would probably by that time have been overruled, or charitably distinguished. The chief effort of my successors would be, very likely, to find some respectful and respectable way of avoiding or forgetting them. These things might distress me a little, but I have small doubt they would be right. . . . Very possibly I should wish to know the names of those who were doing the work of the day, who were carrying the standard forward, who were keeping alive the great tradition.⁶

Inasmuch as these books and addresses of his are mainly a highly polished gloss upon the decisions of the New York State Court of Appeals rendered while he was an illustrious member from 1914 to 1932, it may be interesting to consider the subsequent history of some of the rulings in cases where he wrote the opinion or participated in the decision, especially where the decision has since been overruled. We might take the peek for him since he is not here.

II.

Some of the most striking developments since Cardozo's day have occurred in the areas of the law imposing liability for negligent acts, liability for criminal acts, and absolute liability. In the field of ordinary tort law the first case which might be mentioned is *Schloendorff v. New York Hospital*.⁷ Decided in 1914, it held that a hospital was only a clearing house for doctors and nurses, and not liable for their negligent medical or surgical decisions even if they were on its payroll. The New York Hospital was exonerated from liability for having supplied the facilities of its surgical ward for the performance of an operation unauthorized by the patient. If Judge Cardozo had returned forty-three years later, he would have seen the *Schloendorff* rule changed in *Bing v. Thunig*⁸—in an opinion by his worthy successor Judge Fuld “keeping alive the great tradition” in the true Cardozo vein. The opinion in *Bing*, forthright as it is, speaks of changes in the administration of hospitals during four decades which have rendered the earlier holding inappropriate to present facts, however well it may have fitted the circumstances of its day. Although pointing out the almost unanimous views of the courts in the country in later decisions contrary to *Schloendorff*, Judge Fuld's opinion was not so blunt as Cardozo's own in *Klein v. Maravelas*, where he said for the court:

6. CARDOZO, LAW AND LITERATURE 168 (1931).

7. 211 N.Y. 125, 105 N.E. 92 (1914).

8. 2 N.Y.2d 656, 143 N.E.2d 3 (1957).

We think it is our duty to hold that the decision in *Wright v. Hart* is wrong. The unanimous or all but unanimous voice of the judges of the land, in federal and state courts alike, has upheld the constitutionality of these laws [i.e., the Bulk Sales Act].⁹

Cardozo said that such statutes were thought in *Wright v. Hart*¹⁰ to "represent the fitful prejudices of the hour" whereas the "fact is they have come to stay We can see this now even though it may have been obscured before. Our past position ought not to stand in opposition to the uniform convictions of the entire judiciary of the land."¹¹

That is not exactly what was said in *Bing v. Thumig* about Judge Cardozo's opinion in *Schloendorff v. New York Hospital*. It was not just wrong, but times had changed, as the opinion noted:

The conception that the hospital does not undertake to treat the patient, does not undertake to act for its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. . . . Certainly, the person who avails himself of "hospital facilities" expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility.¹²

Hence it was held that hospitals should shoulder the responsibilities borne by others and not continue to be exempt from the rule of *respondeat superior*.

In *Woods v. Lancet*¹³ tort liability was sustained in an action by an infant for personal injury to the infant while in his mother's womb, overruling *Drobner v. Peters*,¹⁴ in which Judge Cardozo had dissented. The *Woods* case is in line with the tendency of broadening the field of recovery in tort actions which has gone on apace in recent years. In the earlier case, despite its fine-spun reasoning, the court may have been impressed by the difficulties of proof and the ease of fabrication in actions of that kind. But, according to the etiquette of that period, instead of coming to the point the decision went off on the esoteric idea that until birth the infant was not in being. Cardozo demonstrated elsewhere that he was not in favor of letting down the bars indiscriminately in negligence cases.¹⁵ The fact of his dissent in *Drobner* indicates how carefully he discriminated by voting to grant a recovery where an actual injury has resulted from a negligent act.

9. 219 N.Y. 383, 385, 114 N.E. 809, 810 (1916).

10. 182 N.Y. 330, 75 N.E. 404 (1905).

11. 219 N.Y. at 385, 114 N.E. at 810 (1916).

12. 2 N.Y.2d at 666, 143 N.E.2d at 8.

13. 303 N.Y. 349, 102 N.E.2d 691 (1951).

14. 232 N.Y. 220, 133 N.E. 567 (1921).

15. See, e.g., *Perry v. Rochester Line Co.*, 219 N.Y. 60, 113 N.E. 529 (1916); *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928); *Wolozynowski v. New York Central R.R.*, 254 N.Y. 206, 172 N.E. 471 (1930); *Schloendorff v. New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914).

Whenever an appellate court is faced with extending the boundaries of tort liability, it is confronted by the justice of the enlargement of the field of duty in modern civilization where almost everybody is dependent on almost everybody else. At the same time some judges extend the boundaries of liability with reluctance in view of the present tendency of courts to grant recoveries in most of the cases that fall within the orbit of possible liability. Cardozo was instrumental in enlarging the field of liability where common sense and practicality indicated that a duty was owed to the injured person,¹⁶ but, as has been indicated, he was equally firm in denying recoveries where he thought that the plaintiff had failed to prove facts sufficient to constitute a cause of action or that for some other reason the law did not cover the situation.¹⁷

One of the more interesting recent upsets of a precedent where Cardozo wrote for the New York Court of Appeals relates to *People v. Defore*.¹⁸ It was there held that evidence could be admitted in the New York State courts against a person charged with crime, even though it had been obtained as a result of illegal search and seizure. Although in theory the police officers who engaged in the illegal search and seizure are subject to prosecution, they are almost never prosecuted for such offenses; and it has long been argued that *People v. Defore* nullifies, in effect, the illegal search and seizure provisions of the Constitution within New York State. On the other hand, in metropolitan areas where organized crime is rife, valuable evidence obtained in this manner has resulted in the conviction of many a dangerous criminal and the stamping out of criminal organizations where, without it, the result might have been different. The whole subject of wire tapping is intimately involved, although more affected by statute.¹⁹ There has been fear on the part of law enforcement officers that material changes in the *Defore* rule would impair the enforcement of the criminal law. Be this as it may, the rule as stated in Cardozo's opinion in the *Defore* case has recently been altered, this time not by the New York Court of Appeals, but by the United States Supreme Court in the case of *Mapp v. Ohio*,²⁰ overruling *Wolf v. Colorado*.²¹ The majority opinion by Justice Clark has this to say about *People v. Defore*:

Likewise time has set its face against what *Wolf* called the "weighty testimony" of *People v. Defore* . . . There Justice (then Judge) Cardozo, rejecting the adoption of the *Weeks* exclusionary rule in New York had said that "[t]he Federal rule is either too strict or too lax" . . . However

16. See, e.g., *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *Wagner v. International Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921); *Hynes v. New York Central R.R.*, 231 N.Y. 229, 131 N.E. 898 (1921); *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922). *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921).

17. Compare *Ultramares Corp. v. Touche Niven & Co.*, 255 N.Y. 170, 174 N.E. 441 (1931), with *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922).

18. 242 N.Y. 13, 150 N.E. 585 (1926).

19. Cf. *Pugach v. Dollinger*, 365 U.S. 458 (1961).

20. 367 U.S. 643 (1961).

21. 338 U.S. 25 (1949).

the force of that reasoning has been largely vitiated by later decisions of this Court. . . . There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." . . . In some cases this will undoubtedly be the result. But, as was said in *Elkins*, "there is another consideration—the imperative of judicial integrity". . . . The criminal goes free, if he must, but it is the law that sets him free. . . . The ignoble short cut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest.²²

Defore was overruled with something less than the charity and respect which Cardozo had anticipated.²³

Among the famous criminal cases in which Judge Cardozo participated is *People v. Schmidt*.²⁴ It concerned the subject of criminal insanity. Although the judgment of conviction was affirmed, the opinion by Judge Cardozo represented a major effort to mitigate the severity of the *McNaghten* rules embodied in sections 34 and 1120 of the New York Penal Law. We know from Cardozo's 1928 address before the New York Academy of Medicine entitled "What Medicine Can Do for Law"²⁵ that Judge Cardozo was personally opposed to the criminal insanity rule, which takes no account of the disorganization of the emotions but only of the intellect, and results in disregarding the emphasis which modern psychiatry places on emotional disintegration. This rule eliminates most of the persons who would be characterized as psychiatrically insane. In that lecture Cardozo said:

Physicians time and again rail at the courts for applying a test of mental responsibility so narrow and inadequate. There is no good at railing at us. You should rail at the legislature. The judges have no option in the matter. They are bound, hand and foot, by the shackles of a statute. Everyone concedes that the present definition of insanity has little relation to the truths of mental life.²⁶

Legislation has been introduced to alter the legal definition of insanity, but such attempts have failed of fruition for lack of a satisfactory substitute. In the *Schmidt* opinion Cardozo sought to ameliorate the *McNaghten* rule by interpretation so as to render it more nearly in accord with the truths of mental life without changing the statute. Schmidt admitted on cross-examination that his claim to insanity was a hoax. The conviction was necessarily affirmed, as has been stated, but Cardozo's analysis of the rule, even though dictum, had an effect for a time on the application of the law of criminal insanity, as can be perceived from *People v. Sherwood*.²⁷ The reversal of the conviction in the

22. 367 U.S. at 653, 659, 660 (1961).

23. See text accompanying note 6 *supra*.

24. 216 N.Y. 324, 110 N.E. 945 (1915).

25. CARDOZO, LAW AND LITERATURE 106 (1931).

26. IN CARDOZO, LAW AND LITERATURE (1931).

27. 271 N.Y. 427, 3 N.E.2d 581 (1936).

Sherwood case probably marks the farthest distance that the New York Court of Appeals has ever gone in endeavoring to apply the *McNaghten* rule in a manner more consonant with the facts of psychiatry. Since then, however, the court has reverted to the more rigid previous interpretation which means that a different language is spoken on the subject of insanity by lawyers and judges, on the one hand, and by psychiatrists on the other.²⁸ The *Schmidt* case may have had an effect, however, in the adoption of a different rule in some other jurisdictions.²⁹

In the field of Workmen's Compensation Judge Cardozo appreciated immediately the change which had been wrought by the imposition of absolute liability on employers in cases of industrial accidents and occupational diseases, and his opinions show a liberal trend in the enforcement of that act to serve its original purposes.³⁰ As is well known, in New York State many of the decisions in that field while Cardozo was on the Court have long since been superseded by decisions more favorable to claimants. It would be interesting to speculate how Judge Cardozo would have voted on the run of the mill compensation cases in recent years. In *Mark's Dependants v. Gray*,³¹ decided in 1929, he wrote for the Court as Chief Judge in dismissing a Workmen's Compensation claim by the estate of a plumber's helper, who was killed in an automobile accident which occurred on his way to bring his wife home from a personal visit in another locality. Hearing that he was to make this journey, his employer asked him to take his tools and fix some faucets that were out of order at a dwelling house in the village where the wife was visiting. It was not an important enough job to have warranted the cost of making a special trip, and would not have been ordered if the decedent had not stated that he would make the trip in any event. In dismissing the compensation claim, the opinion by Chief Judge Cardozo stated that if the work of the employee creates the necessity for the travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been cancelled upon failure of the private purpose though the business errand was undone, the travel is then personal, and personal the risk. That decision was essentially overruled in *Mahoney v. Michaels, Stern & Co.*,³² where a compensation claim was allowed on similar facts. This case illustrates the trend toward constantly expanding liability in Workmen's Compensation. The Workmen's Compensation Acts seem to be regarded as having changed their

28. See, *e.g.*, *People v. Horton*, 308 N.Y. 1, 123 N.E.2d 609 (1954); *People v. Reade*, 1 N.Y.2d 459, 154 N.Y.S.2d 27 (1957).

29. *Cf. Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

30. See, *e.g.*, *Sweeting v. American Knife Co.*, 226 N.Y. 199, 123 N.E. 82 (1919); *Connelly v. Hunt Furniture Co.*, 240 N.Y. 83, 147 N.E. 366 (1925).

31. 251 N.Y. 90, 167 N.E. 181 (1929).

32. 9 N.Y.2d 931, 217 N.Y.S.2d 97 (1961).

content as the years have passed. One can only surmise whether Judge Cardozo would have followed the interpretations to their present extreme in applying the presumption in favor of the claimant supplied by section 21 of the Workmen's Compensation Law in this State.

It is of some interest that the case of *Masse v. James H. Robinson Co.*³³ and its progeny, holding in practical effect that heart disease is compensable as an industrial accident, stem in reasoning from Chief Judge Cardozo's opinion in *Silverstein v. Metropolitan Life Ins. Co.*³⁴ in 1930. *Silverstein* was not a compensation case, but dealt with the question whether a duodenal ulcer was a bodily infirmity within the language of an exception in an insurance policy. The ulcer became perforated when the insured dropped a milk can on his abdomen, resulting in his death. The predisposition was slight to rupture of the abdominal wall, and it was held not to preclude recovery on the policy. The opinion states: "The disease or the infirmity must be so considerable or significant that it would be characterized as disease or infirmity in the common speech of men."³⁵ But the Court moved on in *Kleinman v. Metropolitan Life Ins. Co.*³⁶ to a point where prior heart disease did not preclude recovery of double indemnity on a life insurance policy even though the pathology existing before the accident was so serious as to be virtually the sole cause of the death. By parallel reasoning, founded on common sense in the *Silverstein* case, the result was reached in Workmen's Compensation that regardless of the extent of the preexisting pathology of the cardiovascular system, or of how imminent a heart attack might otherwise be, heart disease is compensable if any exertion out of the ordinary arising from employment has aggravated the prior trouble. In actual practice, the "unusual" nature of the exertion has been minimized to such a degree that its unusualness is almost beyond recognition. It does not follow that Judge Cardozo would have voted with the Court in the *Masse* case even though the *Silverstein* case seems to have been its "philosophic" progenitor.

III.

The most important part of *The Nature of the Judicial Process* relates to what Cardozo calls the method of sociology. Social reasons are the ones most frequently adduced to justify the overruling of precedent, or historical, traditional, or customary canons of decision. It should be recalled that when Cardozo wrote this book in 1921 sixteen years had yet to elapse before the United States Supreme Court overruled *Adkins v. Children's Hospital*³⁷ in *West Coast Hotel Co. v. Parrish*,³⁸ at last holding constitutional a state statute

33. 301 N.Y. 34, 92 N.E.2d 56 (1950).

34. 254 N.Y. 81, 84, 171 N.E. 914, 915 (1930).

35. *Id.* at 84, 171 N.E. at 915, citing *Eastern Dist. Piece Dye Works v. Travelers Ins. Co.*, 234 N.Y. 441, 453, 138 N.E. 401, 405 (1923).

36. 298 N.Y. 759, 83 N.E.2d 157 (1948).

37. 261 U.S. 525 (1923).

38. 300 U.S. 379 (1937).

authorizing the fixing of reasonable minimum wages for women and minors. The tenor of decisions by the Supreme Court thereafter changed rapidly with respect to all kinds of social legislation, state and federal. That phase of our judicial history is so well known that mention of it is made here only for the sake of perspective regarding Cardozo's book. The background of his thinking is so much more nearly attuned to the post 1936 views of the Supreme Court³⁹ that one forgets the climate of decision in which he was writing. His discussion of sociological jurisprudence, accurate and prophetic enough as far as it goes, seems general in the light of later decisions. He dutifully outlined the holdings of the Supreme Court as of 1928 in *The Paradoxes of Legal Science*, in a passage which is so dated that it deserves to be quoted :

The legislature may not require the payment to women workers of a minimum wage, though the wage does not exceed what is essential for the needs of decent living; it may not prohibit employers from discriminating against employes who are connected with a labor union; it may not abolish the equitable remedy of an injunction in controversies between capital and labor; it may not require the submission of industrial disputes to boards of arbitration; it may not even regulate the weight of loaves of bread, nor forbid the introduction of shoddy into mattresses.⁴⁰

His own views in this field would have run counter to many Supreme Court decisions of that day. If he had attempted to deal in specifics it could only have resulted in criticism of decisions by the highest court in the land which, except by general inference, he was unwilling or unprepared to undertake. Concerning that he said :

I have no purpose at this time to debate the much-debated question whether these cases or some of them might better have been decided differently. As to that the court has spoken with an authority all its own.⁴¹

And further :

I shall leave it to others to apply the pronouncements of social science to the specific cases I have mentioned. It would not detract from the importance of the inquiry though it were found that in some instances, or even in many, the application would yield results at variance with those accepted by the court. I am concerned with a method that may have value in the future.⁴²

The "social" side of Cardozo's comments on jurisprudence relates mainly though not exclusively to limitations on the use of private property and to

39. Cf. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 79 (1921) (reference to dissenting opinion of Holmes, J., in *Lochner v. New York*, 198 U.S. 45 (1905)).

40. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 100 (1928). The decisions referred to are, in succession: *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Truax v. Corrigan*, 257 U.S. 312 (1921); *Wolff Packing Co. v. Industrial Court*, 262 U.S. 522 (1922), 267 U.S. 552 (1925); *Burns Baking Co. v. Bryan*, 264 U.S. 504 (1923); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926).

41. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 100 (1928).

42. *Id.* at 100-01.

the conduct of business so as not to interfere unduly with the rights of others, rather than to the creation of governmental institutions for the paternalistic administration of society. Such items as the regulation of business practices to curtail fraud on customers or competitors, labor laws, unionization of employees, public health rules, libel and free speech, zoning and topics of similar variety are the principal substance of these books. The necessity of curtailing the absolute use of property and property rights in a highly integrated community life is conceived partly as the proper function of case law and at other times as related to the constitutionality of statutes directed to similar objectives. *The Nature of the Judicial Process* is mainly concerned with judge made law, and the method of sociology is chiefly discussed in that context. The method of the common law is, however, so closely related to decisions on the constitutional validity or invalidity of statutes, that there are many occasions when the two functions are parallel. The great debate about judicial activism has something to do with common law as well as constitutional law, or would have if it were extended to the State courts. The controversy there regards the extent to which courts can or should make the law in instances where the legislatures have not acted, or change the decisional law in the absence of legislation. In the constitutional field, if one may not be deprived of life, liberty or property without due process of law, the inquiry is immediately posed what is property, or liberty, and what in a particular situation may be due process of law? These inquiries revert immediately to the realm of common law, that is, judge made law, not as a fixed or completed system, but as giving effect to the wisdom of the judge in the light of contemporary life concerning what are the attributes of property or liberty under the changing circumstances of the day. It is sometimes said that Holmes, Brandeis and Cardozo believed that questions of degree do not enter into determinations of the constitutionality of statutory law; that the legislative body either has or lacks power to act, that the legislative power is plenary in social matters and that if it has acted in a field where it has power, subject to adequate procedural safeguards, there is no judicial restraint upon the legislative product. I doubt whether Cardozo, at least, went that far. He recognized that most distinctions in the law are founded on questions of degree. I hardly think that he meant to render the determination of questions of constitutionality an exception or that he outlawed all substantive requirements of due process, however much opinion may differ as to when or under what circumstances the power to declare statutes unconstitutional may be exercised. The importance of this question of degree is accented in *The Nature of the Judicial Process*:

So also the duty of a judge becomes itself a question of degree, and he is a useful judge or a poor one as he estimates the measure accurately or loosely. He must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales.⁴³

43. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 161-62 (1921).

Also in *The Paradoxes of Legal Science*:

The state under the guise of paternal supervision may attempt covertly and gradually to mould its members to its will. The difference as so often is a difference of degree.⁴⁴

This is further borne out by the lengthy discussion of "the judge as a legislator," in which he dwells upon the similarity of function of judge and legislator.⁴⁵ By this he did not mean that judges were to compete with members of Congress or of the State Legislatures in the performance of their functions, nor, basically, that judges should resort primarily to their own notions of right and wrong than to the prevailing public belief of the day. It does mean, however, that the "interstitial" legislative function of the judge is not to be denied or minimized, either in the formation and development of the common law or in adjudications on constitutional law, where the circumstances call for its exercise. Much as this subject has been discussed since Cardozo, I doubt that what he said has been improved upon very much.

He was firmly convinced of the necessity of upholding civil rights.⁴⁶ It is not within the scope of my portion of this symposium to discuss extensively Cardozo's record as an Associate Justice of the United States Supreme Court; in general, as is well known, he continued the tradition of Holmes and Brandeis as it was expected that he would do when he was appointed. He was the author of the prevailing opinion in *Helvering v. Davis*,⁴⁷ which upheld the broadest power of the Congress to enact laws for the establishment of Federal bodies to administer public money for general welfare under the authorization of the general welfare clause in the Constitution. This pertains, of course, to the paternalistic aspect of sociological jurisprudence as distinguished from the mere limitation of private activity regarded as socially harmful or unjust; not only is private industry and the use of private property as well as liberty to be in subordination to the public interest but, also, under this broad interpretation of the general welfare clause, the welfare state may be established in many of its aspects if the Congress so ordains.

Yet, socially minded as Cardozo was, he was no socialist. Reticent he may have been about overriding the presumption of constitutionality of statutes, but he was clear that

our constitutional law in its development of the idea of liberty may not press development so far as to trench upon an institution constitutionally protected, the institution of private property. Statutes may go down

44. CARDOZO, *op. cit. supra* note 41, at 111.

45. *Id.* at 110-20.

46. *Cf.* the comprehensive article by Mr. Justice Frankfurter epitomizing Cardozo's work on public questions during his years on the Supreme Court, Frankfurter, *Mr. Justice Cardozo and Public Law*, 52 HARV. L. REV. 440 (1939); 48 YALE L.J. 458 (1939), 39 COLUM. L. REV. 458 (1939).

47. 301 U.S. 619 (1937).

because impairing an essential incident of property, though by establishing a wider distribution of equality they might tend to economic liberty.⁴⁸

And again in *The Nature of the Judicial Process*:

Property, like liberty, though immune under the Constitution from destruction, is not immune from regulation essential for the common good. What the regulation shall be, every generation must work out for itself. . . . Men are saying today that property, like every other social institution, has a social function to fulfill. Legislation which destroys the institution is one thing. Legislation which holds it true to its function is quite another.⁴⁹

In many instances in the New York Court of Appeals Cardozo stood for property rights in social situations where he was by no means always on the popular side of the question.⁵⁰

Much of the social jurisprudence established by the United States Supreme Court after its change of policy as symbolized by the overruling of *Adkins v. Children's Hospital*, occurred after Justice Cardozo's final illness and death. We cannot know with certainty how he would have voted, among others, on the recent antitrust cases, the steel seizure case, the intrastate commerce cases affecting interstate commerce, the state tax cases on interstate business involving what Justice Jackson termed the "Balkanization" of the United States, the civil liberties cases, recent cases involving administrative review or many others. Would he have voted to transfer to a national board, proceeding as a paternalistic body, jurisdiction in essentially local labor matters remotely affecting interstate commerce—a jurisdiction previously exercised in state courts at the instance of private parties?⁵¹ It would be interesting to know. One may entertain a fairly clear idea that in most of them he would have voted with the majority. We know that he dissented from the invalidation of the first Agricultural Adjustment Act, that he supported a broad interpretation of the general welfare clause as an affirmative grant of power to the Federal government, that he voted in favor of the national labor relations act, the mortgage moratorium and the invalidation of the gold clause in bonds, that he supported the constitutionality of the price fixing of milk, as well as the New

48. CARDOZO, *op. cit. supra* note 40, at 115.

49. CARDOZO, *op. cit. supra* note 39, at 87.

50. See, *c.g.*, *Smith v. Loughman*, 245 N.Y. 486, 157 N.E. 753 (1927); *City Bank Farmers' Trust v. New York Central R.R.*, 253 N.Y. 49, 170 N.E. 489 (1930); *People ex. rel. The Texas Co. v. Gilchrist*, 252 N.Y. 19, 168 N.E. 449 (1929); *People ex. rel. Studebaker Corp. v. Gilchrist*, 244 N.Y. 114, 155 N.E. 68 (1926); *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 155 N.E. 58 (1926); *People ex. rel. Pennsylvania Gas Co. v. Saxe*, 229 N.Y. 446, 128 N.E. 673 (1920); *Municipal Gas Co. of Albany v. Public Service Comm'n*, 225 N.Y. 89, 121 N.E. 772 (1919); *City of Rochester v. Rochester Gas & Elec. Corp.*, 233 N.Y. 39, 134 N.E. 828 (1922); *Cullings v. Goetz*, 256 N.Y. 287, 176 N.E. 397 (1931).

51. *Cf. Exchange Bakery & Restaurant, Inc. v. Rifkin*, 245 N.Y. 260, 157 N.E. 130 (1927).

York emergency rent laws while he was on the New York Court of Appeals, and that he was a strong protagonist of freedom of speech.

IV.

What has all this to do with *The Nature of the Judicial Process*? Simply that this little book is an open-end production when it comes to sociological jurisprudence. The principles enunciated are designed for projection into the future, to be implemented by specific decisions later on, and it is informative to learn as much as we can about how Cardozo filled in the pattern during his subsequent judicial career. Necessarily an important part of the implementation of his general ideas about sociological jurisprudence involves the United States Supreme Court on which he sat from 1932 until 1938. Part of the merit of the book is that it proclaims a philosophy which leaves the way open to much that has subsequently occurred in this important field.

This is the area in which, one may readily surmise, the future polity of the United States chiefly lies. Is there enough of substantive law involved in due process so that it guarantees the continuance of a capitalist nation? Can a country in which private industry is eclipsed or destroyed continue to function as a social democracy? Even though the Constitution does not guarantee Mr. Herbert Spencer's social statics, does it protect the private ownership of productive industry in some form? Do property rights go hand in hand with personal or civil rights, and if property rights are destroyed in favor of a socialized state will personal or civil rights follow in their wake? These are not matters wholly within the province of the judiciary, but they are affected and may be affected profoundly by what the courts do.

It is likely that Judge Cardozo's chief interest was in other fields than these. If there is any criticism of his extra-judicial writings in so far as sociological jurisprudence is concerned, it seems to lie in the circumstance that in his engrossing life of scholarship he had little contact with business, labor unions, practical politics or the type of controversialism which they engender. Wise and cultured as he was, with constructive imagination which enabled him to penetrate into many situations where he had never been personally involved, he may not have had the particular brand of burning curiosity which permeates some men to use every resource to learn what makes society function in all of its departments, what are the driving forces in finance, industry, labor and politics, how much of the prosecution of business or labor in the courts or in the newspapers, radio and television is based on meritorious grounds and how much is mere politics or craving for publicity, tending to destroy and disintegrate rather than to improve and mellow our industrial plant of which the Russians are perhaps more afraid than they are of our public officers. What courts and law do in these fields is important. Laws cannot create industry but they can break it. If an industrial unit must compete with others in its field to avoid prosecution under the anti-trust laws, but is not to be allowed to

compete under the Robinson-Patman Act, and is to be punished under the anti-trust laws if it does compete and thereby obtains too large a proportion of the business, social reasons demand that the law be overhauled unless we are to lose our industrial supremacy which is vital to the nation and to society. Here is plenty of room for controversy, of a kind which, I suspect, did not appeal to one of Cardozo's temperament. If it had appealed to him he would not have been Cardozo, and the world would have been the loser. Nevertheless from the point of view of interesting reading, *The Nature of the Judicial Process* and Cardozo's other books and lectures lose something in not coming to grips with the dominant questions of the day in this realm, and analyzing more specifically the function which courts should or ought not to play in their solution and development. Near the close of his life, Mr. Justice Robert H. Jackson said:

I shall pass over as not germane to my subject the question whether the Constitution itself is adequate for the security problems, the economic problems and the political problems of our day. But I do not think that would be an academic question.⁵²

Cardozo left it to others to sound these depths, and to evolve how on the economic, social and governmental planes (again in Justice Jackson's words)

In a society in which rapid changes tend to upset all equilibrium, the court, without exceeding its own limited powers, must strive to maintain the great system of balances upon which our free government is based.⁵³

Perhaps it is asking too much to suggest that more might have been said regarding the specifics of these things. It is, after all, an oblique tribute to wish that we might have been enlightened further in these respects by the wise and brilliant mind of the beloved judge who was once the private pupil of Horatio Alger. He enlightened and ennobled us in so many ways that it is perhaps invidious to wish for more.

52. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 58 (1955).

53. *Id.* at 61.