

# BOOK REVIEW

## *THE NATURE OF THE JUDICIAL PROCESS*

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It is a singular fact that with the rapidly swelling volume of literature which may aptly be described by the title, "How and what we think about law," no one should hitherto have specifically directed his attention toward an analysis of the judicial process. There have been books innumerable about the nature and sources of law, about legal method, about systematic jurisprudence, all of them erudite and profound and some of them useful. But this is the first book which has sought in simple and understandable language to answer the question, what is the intellectual process by which the judge decides a case?

Its four chapters deal with: I. The Method of Philosophy; II. The Methods of History, Tradition and Sociology; III. The Method of Sociology and the Judge as a Legislator; IV. Adherence to Precedent, the Subconscious Element in the Judicial Process. Together these chapters make up an unusual book, unusual in that within brief compass there is presented a survey of the subject which exhibits both originality of treatment and a grasp of the philosophic thought on the subject which the reader will seek for in vain in many more pretentious volumes dealing with the philosophy of law and legal method. He will be delighted to discover, moreover, in the two or three sittings required for the reading of this book, that the author has not found simplicity and clarity of statement incompatible with sound scholarship and profundity of thought.

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<sup>†</sup> This review originally appeared at 22 *Colum. L. Rev.* 382 (1922). At that time, Stone was Dean of the Columbia Law School. Page numbers appended to the quotations in this article refer to the original 1921 edition of *The Nature of the Judicial Process*.

The judicial process in the vast number of cases which find their way to appellate courts is well understood. It consists in the sifting and analysis of facts and the application to them of accepted rules or doctrines of law. This is the function the performance of which absorbs for the most part the work-a-day life of the judge, a fact that should be emphasized in an attempt to analyze that process with any due sense of proportion. This the author clearly recognizes. He says:

“In what I have said, I have thrown, perhaps too much, into the background and the shadow, the cases where the controversy turns not upon the rule of law, but upon its application to the facts. Those cases, after all, make up the bulk of the business of the courts. They are important for the litigants concerned in them. They call for intelligence and patience and reasonable discernment on the part of the judges who must decide them. But they leave jurisprudence where it stood before. As applied to such cases, the judicial process, as was said at the outset of these lectures, is a process of search and comparison, and little else. We have to distinguish between the precedents which are merely static, and those which are dynamic. Because the former outnumber the latter many times, a sketch of the judicial process which concerns itself almost exclusively with the creative or dynamic element, is likely to give a false impression, an over-colored picture, of uncertainty in the law and of free discretion in the judge. Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one” (pp.163-4).

Precedent is dynamic when it limits or overrules precedent which is static, that is, the precedent which expresses an established rule, or when it fills in the gaps of the law in those cases where judges, as Mr. Justice Holmes puts it, “legislate interstitially.” It is the dynamic precedent, therefore, which is the constructive force in law, bearing within itself the germ of the growth and adaptability of law the *mores* of the times. The skill with which the judicial process is applied in creating it will determine whether law is to move toward or away from the ideal of social utility. But it is nevertheless in the rendering of the dynamic judgment that the judicial process is

not so clearly discerned. Hence it is the dynamic precedent with which this little book is mainly concerned.

Judge Cardozo does not share in the opinion finding expression in current discussion, that the rule of adherence to precedent ought to be abandoned altogether. He believes that adherence to precedent should be the rule and not the exception, but he also believes

“. . . that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. We have had to do this sometimes in the field of constitutional law. Perhaps we should do so oftener in fields of private law where considerations of social utility are not so aggressive and insistent. There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance, or development with the process of the years” (p.150).

In filling the gaps in the law the judge must make use of three methods in varying combinations. The first of these is the method of philosophy which exerts a directing force along the lines of logical progression. It is the “logic” to which Holmes referred when he said that “the life of the law is not logic but experience.” There is a certain presumption, the author believes, in favor of the philosophic method.

“Given a mass of particulars, a congeries of judgments on related topics, the principle that unifies and rationalizes them has a tendency, and a legitimate one, to project and extend itself to new cases within the limits of its capacity to unify and rationalize” (p.31).

But the method of philosophy finds itself sometimes supported by and sometimes in competition with the method of history and tradition, which on occasion gives origin to the legal doctrine which

philosophy develops, and on occasion restricts its philosophical development within the limits of hits history. And finally there is the method which turns the directive force of principle along the lines of justice, morality, and moral and social welfare; in short, the method of sociology.

“It is the arbiter between other methods, determining in the last analysis the choice of each, weighing their competing claims, setting bounds to their pretensions, balancing and moderating and harmonizing them all” (p.98).

It is the admirable discussion of the interplay and of the action and reaction of history, logic and the judge’s view of right and social need – the essential elements in the judicial process, which take place in the making of the relatively rare dynamic or “interstitial” precedent – which makes this book such stimulating reading and such an effective provocative of reflective thinking. One could wish that the author had expanded his concise and lucid statement of fundamentals with a wealth of illustration showing where again and again in the history of the law doctrines with an historical origin and sometimes with a philosophical basis have been finally rejected on sociological grounds or how a doctrine of historical origin and without any purely logical justification has been retained because of its social utility. And alas, how many are the instances where rules socially inconvenient and burdensome have been perpetuated and expanded because of a defective philosophy or too great a reverence for history; but this book contains well-chosen examples illustrating all of these phases of legal development and sufficient in number to prove the author’s thesis.

Let us quote him in summarizing the procedure by which the sociological method is to moderate the demands of philosophy and of history.

“My analysis of the juridical process comes then to this, and a little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value

of the social interests that will be thereby promoted or impaired. One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore, in the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs. But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey” (p.112).

It would be exceedingly difficult to state in more admirable fashion the part which the judge’s notions of social utility may properly play in the judicial process, and we find ourselves in cordial agreement with it. But can we dignify this procedure by terming it in any proper sense a “method”? Has sociological jurisprudence any formulae or any principles which can be taught or expounded so as to make it a methodical guide either to the student of law or to the judge? Judge Cardozo deals with this aspect of the matter with characteristic frankness.

“If you ask how he is to know when one interest outweighs the other, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; . . .

“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. If this seems a weak and inconclusive summary, I am not sure that the fault is mine. I know he is a wise pharmacist who from a recipe so general can compound a fitting remedy” (pp. 113, 161, 162).

In short the method of sociology is the method which the wise and competent judge uses in rendering the dynamic decision which makes the law a living force. Hardwick, Mansfield and Marshall employed it long before the phrase “sociological jurisprudence” was thought of. The weak and incompetent judge cannot use it and indeed in his hands it is a dangerous instrument, for the only guide for its use is judicial wisdom.

A vast deal has been written in recent years about sociological jurisprudence until it has become the fashion to refer to it glibly as though it were a cure for all the ills that our legal system is heir to. One who reads attentively Judge Cardozo’s restrained and discriminating analysis will gain no illusion that the method affords any positive formula or guide which can ever make it a panacea. At most its value is negative. It warns the judge and the student of law that logic and history cannot and ought not to have full sway when the dynamic judgment is to be rendered. It points out that in the choice of the particular legal device determining the result – social utility – the *mores* of the times objectively determined may properly turn the scale in favor of one and against the other, and it should lead us as lawyers and students of law to place an appropriate emphasis on the study of sociological data and on the effort to understand the relation of law to them, because by that process we may lay the foundation for a better understanding of what social utility is and where in a given case the path of social utility lies. But sociological jurisprudence will never tell us how to ascertain in any way, except by the exercise of a wise judgment, where the course of social utility lies or what are the *mores* of our times. The capacity to do that and to give them their appropriate place in judicial decision finds expression in the wisdom which characterizes the decision of the great judge and distinguishes him from his inferior brethren.

To those who have not passed beyond the Blackstonian concept

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of a law which has always existed and which needs only to be discovered by the diligent judge, this book may seem to exhibit radical tendencies. To others it will seem no more radical than science itself which seeks always by the gathering of data and their accurate interpretation to penetrate a little nearer to the ultimate truth. In this sense the book is truly scientific in spirit and method, presenting its subject with the balance, restraint and clarity which have marked the author's distinguished service as a judge. ❶