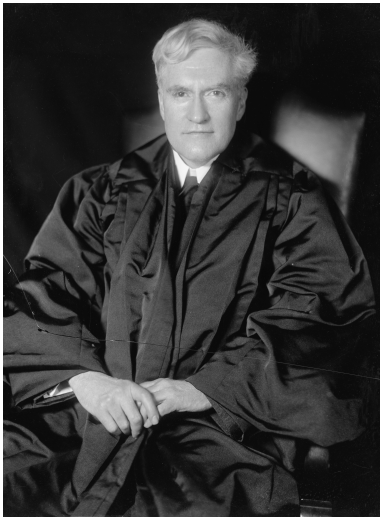
CHAPTER ONE

A JOURNAL OF LAW BOOKS



Benjamin N. Cardozo

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CHAPTER ONE

Robert C. Berring, Editor

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THE GREAT LAW BOOKS

AN INTRODUCTION TO *CHAPTER ONE*

Robert C. Berring[†]

Chapter One is a series devoted to resuscitating interest in the best legal thinking from the past century. The great legal thinkers of the 20th Century are beginning to slip away from us, reduced to residing in the quotations above doorways. The law school graduate of today will recognize some of the names because of bits and pieces of their judicial opinions entombed in casebooks or because entire law schools have been named to honor them, but who reads the thought-provoking works that made them famous? While some of the books that were influential in their own time do not wear well, others remain vital and engaging. Some, like *The Nature of the Judicial Process,* remain both eminently readable and, almost a century after publication, on the cutting edge of controversy. When I assigned this book in a seminar at Berkeley Law School the students found it engaging and risky. As one student put it, "Cardozo would not make it through one day of Senate Judiciary Committee Hearings today." The collision of the modern metaphor of the judge as umpire simply enforcing the rules and Cardozo's portrait of the judge as a human engine of justice brings out the most contemporary of issues in sharp relief.

Our hope is that by presenting you with the first chapter of a great book, we can stimulate you to read the whole thing. It is an intentional tease. To sweeten the pot we include along with the first chapter, a *Foreword* by Professor Andrew Kaufman, author of *Cardozo*, Harvard University Press (2002) – the authoritative biography of the Justice, written especially for a new printing of the

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book in July 2010. This printing – part of the Legal Legends Series edited by Professor Alan Childress for Quid Pro Quo Press – makes quality paperback reprints of legal classics available. Though we conceived the *Chapter One* project without knowing of Professor Childress's project, we hear the same Siren's call. You can buy the book or read it digitally, but we hope that you will be inspired to read past the first chapter.

For further context on *The Nature of the Judicial Process*, and for fun, we include a handful of contemporary reviews. These are drawn from a time when law reviews were serious about the enterprise of book reviews, and when intellectual giants were willing to write short, pithy book reviews. For your delectation we offer Judge Learned Hand's assessment from the *Harvard Law Review*, Professor Max Radin's observations for the *California Law Review*, and those of then-Professor (later Supreme Court Associate Justice and then Chief Justice) Harlan Fiske Stone in the *Columbia Law Review*. Professor Kaufman's *Foreword* traces the book through its history. Citations to it continue to appear. As Professor Kim Wardlaw notes in *Umpires, Empathy and Activism: Lessons from Judge Cardozo*, the book has been cited over 2,000 times by law reviews.[1] It is worth a read. ❶

[1] 85 Notre Dame Law Review 1629 (2010).

FOREWORD

TO *THE NATURE OF THE JUDICIAL PROCESS*

Andrew L. Kaufman[†]

Why a new edition of *The Nature of the Judicial Process*? Presumably because in the world of law, Benjamin Cardozo still rocks, and his opinions and writings still send worthwhile messages as we near the 100th anniversary of his election to the bench. All law students and many academics continue to wrestle with a number of his common law opinions. Just this year Professor Lawrence Cunningham devoted many pages to comparing Cardozo's method of approach to decision-making to the more modern, economic-oriented approach of Judge Richard Posner and found Cardozo's method more helpful.[1] Cardozo's approach to constitutional law also continues to have many adherents on the bench and off; and, in a legal world filled with both strongly-held doubts and certainties, his nuanced, and I might say, ambiguous approach to the art of judging continues to beguile. *The Nature of the Judicial Process* was his major effort to address the subject of judicial decision-making out of the confines and constraints of a judicial opinion.

A new edition of *The Nature of Judicial Process* invites a new generation of readers to become familiar with a man who became one of the giants of twentieth century lawmaking by political accident after a most unpromising start. Benjamin Cardozo was born in 1870 into a political family. His father was a judge of the New York Supreme Court, New York's major trial court. His ancestors, the Cardozos

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[†] *Charles Stebbins Fairchild Professor of Law at Harvard Law School.* *Page numbers in footnotes 5, 6, and 7 of this article refer to the 2010 Quid Pro Quo Press edition edited by Alan Childress.*

[1] Cunningham, *Traditional Versus Economic Analysis: Evidence from Cardozo and Posner Torts Opinions*, 62 Fla. L. Rev. 667 (2010).

and the Nathans, were prominent New York Sephardic Jews, who had fled Spain and Portugal during the Inquisition and had arrived in New York prior to the American Revolution via Holland and England. Their synagogue, Shearith Israel, was already over 125 years old when the Revolutionary War was won, and their rabbi, Gershom Seixas, was the first Jewish trustee of the college that was to become Columbia University. Benjamin Cardozo would be the second. His uncle, for whom he was named, was a Vice-President of the New York Stock Exchange. In Benjamin's generation, one first cousin, Emma Lazarus, was the author of the poem that graces the base of the Statue of Liberty; another first cousin, Maud Nathan, was a well-known suffragette, social reformer, and president for thirty years of the Consumer's League of New York; and yet a third first cousin, Annie Nathan Meyer, was a playwright and the founder of Barnard College.

Albert Cardozo, Benjamin's father, earned a different kind of distinction. His judicial career was the result of political connections with two rival and notorious New York City Democratic politicians, Fernando Wood and Boss Tweed. Widespread accusations of wrongdoing against a number of New York judges in one of the periodic public outcries against Tammany Hall domination of politics led to legislative hearings to consider charges of corruption against three justices of the New York Supreme Court (the state's trial court). Albert Cardozo was one of them, and he resigned his position just before the legislature would surely have voted to impeach and convict him, as they did his two colleagues. The evidence of political favoritism and personal corruption was compelling. Benjamin Cardozo was two years old at the time. The family fortunes, literally and figuratively, declined, and the family moved out of its splendid brownstone home just off Fifth Avenue to lesser quarters several times before Albert, aided by his political connections, was able to revive the family situation.

Benjamin grew up with a twin sister and four older siblings under the cloud of the family disgrace. He was particularly close to his older sister Nellie, who helped raise him, and with whom he lived in the family homes for his whole life, taking care of her in a very

long illness at the end of her life. He was home schooled, and the tutor who prepared him for his entrance examinations to Columbia was Horatio Alger, the popular author of rags to riches novels, whose early career as a Unitarian minister was marred by accusations of what today we would call sexual abuse.

Cardozo entered Columbia at the age of 15, where he was the youngest in the class. He lived at home with his sisters and an older brother, who was practicing law in their father's firm. Their father died during his first year at college. Benjamin did not participate much in the social life of the school. He worked hard, did very well, won several prizes, and went straight from college into Columbia Law School. The instruction there consisted mostly of lectures about the rules and doctrines of law without much analysis. The Socratic method of questioning students and analyzing doctrine critically that was associated with the Harvard Law School of Christopher Langdell arrived during Cardozo's second year. He did not much take to it. Columbia had recently added a third year of study, but Cardozo, along with two-thirds of the class, left at the end of his second year. He was not yet 21.

Cardozo was admitted to the bar as soon as he reached 21, joined his brother in their father's politically-oriented firm, and began practicing law. Almost immediately, he began to make a name for himself, arguing several cases in the New York Court of Appeals in the first years of his practice. The records from his years at the bar show a very active trial and appellate practice. As time went on and he demonstrated his ability, more and more lawyers referred their important or difficult matters to him. His practice was largely oriented toward commercial and family matters. His clients came from the Jewish community, and he often litigated their cases against lawyers from major firms.

The practice of law was very different then from what it has become. The bar was relatively small, and most major firms had just a few partners. A good lawyer could make his (and they were virtually all "his") way quickly, and Benjamin Cardozo established himself as a good lawyer very early in his career. Modern-style brief writing was not yet well established. Many, perhaps most, briefs consisted

of conclusory arguments coupled with citation of, and quotation from, relevant cases. Cardozo immediately adopted the modern, more useful style that began with a statement of the facts and the questions to be decided and then went on to argument based on critical analysis of doctrine and policy supporting the desired result. When the policy arguments were not strong, Cardozo argued from the facts, and he could make technical arguments with the best. In short, he used the best ammunition to support his case that he could find, and he argued persuasively, and with style. No wonder other lawyers sought him out. His career seemed destined to carry on in that fashion although, with time, the matters he handled involved larger sums of money and his practice became more varied. He never, however, became a Brandeis-type lawyer taking on large social issues of great public importance.

Then chance intervened. 1913 was the occasion for a periodic convulsion in the New York political world. A diverse group of reformers, anti-Tammany Democrats, and Republicans united to produce a joint Fusion ticket in the local elections to try to wrest control of the local government from Tammany Hall. Putting together a ticket for the various executive and judicial positions required considerable negotiation among the different groups. A subcommittee on judges was looking for a Jew to balance the ticket. Cardozo's name was eventually suggested to the subcommittee chair, Charles Burlingham, well-known as a "judgemaker" and later thought by many to be the dean of the New York bar. Burlingham made the case for Cardozo to the Fusion group, and although the Fusion ticket was generally successful, Cardozo, running against an incumbent, barely squeaked through with the aid of some Bronx County dissident Tammany Democrats.

As he took the bench in 1914, he had been a practicing lawyer for 23 years. I have earlier summarized the first 43 years of his life in the following paragraph:

> Twenty-three years of practice had a major impact in preparing Cardozo for his judicial career. His college and law school education furnished a substantial amount of intellectual capital and the habits of reading and study that lasted his

> whole life. His work matured him socially, and his colleagues soon discovered not only his ability but the strength of his character and personality. Having lived a sheltered personal life, he used his work as his window on the world. A good litigator gets to understand people, both their strengths and their weaknesses. His work gave him firsthand experience with the human condition, with human frailty, trickery, and deceit. A good litigator also learns a good deal about the subject matter of his cases. Cardozo read widely and was more familiar with new ideas than most practicing lawyers, but he came to the bench with a view of the judge's role as a resolver of disputes, not as a dispenser of legal theory. Even though his experience as a judge would enlarge his view of the judicial role, Cardozo never lost his lawyer's touch.[2]

Cardozo tried cases as a Supreme Court Justice for just one month before he was appointed by the Governor to fill one of the temporary Court of Appeals positions that existed to help that court clean up its backlog. Three years later he was appointed and then elected to a regular term on the Court of Appeals, the state's highest court. Cardozo's first few years on the Court of Appeals were a time of legal ferment. The realist movement roiled the academic world, and its critique influenced judicial decision-making. Some of Cardozo's early opinions were instant hits. *Wood v. Lucy, Lady Duff Gordon*,[3] involving interpretation of a contract with an eye to the nature of business relationships, and *MacPherson v. Buick Motor Co.*[4] found their way very quickly into law school curriculums. The latter especially was heralded as an example of adapting ancient common law doctrine to the needs of modern industrial society for its holding that an auto company was liable to a purchaser, through a dealer, of one of its cars for injuries resulting from an accident caused by a defective wheel even though the company had no direct contractual relationship with the purchaser.

In just a few years on the bench Cardozo made a name for him-

[2] Kaufman, *Cardozo*, at 112-113.
[3] 222 N.Y. 88 (1917).
[4] 217 N.Y. 382 (1916).

self. By 1921 his growing reputation was recognized in three distinct ways. He was selected to the Board of Overseers of Harvard University. He was invited to lend his support to a project of the Association of American Law Schools to organize what would become the American Law Institute, most known for regularly publishing "Restatements" of bodies of law such as contracts and torts. Finally, he delivered the Storrs Lectures at the Yale Law School. Those lectures have been read by hundreds of thousands in the succeeding years under the title of *The Nature of the Judicial Process*.

Dean Swan had issued the invitation the previous year and Cardozo had first declined on the ground that he had nothing to say. But the offer was renewed and Cardozo responded positively to the suggestion of a faculty member that he describe for his audience the process by which he decided a case. He spent many months working on the lectures and delivered them over four nights in February 1921. They were a spectacular success. The usual process is for audiences to diminish over the course of a lengthy lecture series. Not so with Cardozo's Storrs Lectures. Once word got around after the first lecture, the audience increased dramatically, and the series had to be moved from a room seating 250 to a hall seating 500. The latter room was completely filled for the remaining three lectures.

Although Cardozo read his lectures, he was a captivating speaker. The one known recording of his voice reveals the style of a nineteenth-century orator. Arthur Corbin, a leading realist member of the Yale faculty, reported that the substance of the remarks and the style of the speaker made an extraordinary impression. "Never again have I had such an experience. Both what he said and his manner of saying it held us spell-bound on four successive days." Cardozo was then persuaded to let them be published. Cardozo was the first judge in modern times to try his hand at describing what judging was all about. Indeed, *The Nature of the Judicial Process* helped create what has become a cottage industry as interest in the subject of judicial decision-making has grown not only in the academy but perhaps more importantly among the general public. First, Cardozo himself, in subsequent efforts in the 1920s entitled *The Growth of the Law* and then *The Paradoxes of Legal Science*, and then other judges and judicial

philosophers, have written in increasingly theoretical fashion about the subject. However, ninety years later Cardozo's initial effort is still being read, with profit.

When Cardozo delivered his lectures, the diverse academic movement known as "legal realism" was in full flower. A theme of that movement was its attack on what it portrayed as a formalist, mechanistic approach to judging. The previous half century had been characterized for its emphasis on judge-made law as having its own internal consistency, with doctrines derived from first principles independent of the politics of the day. Judges, it was said, "found" and did not "make" law, and they deduced the governing rules in a particular case from the decided precedents. The extent to which that portion of the realists' attack on their predecessor was based on inaccurate caricature is still a matter of some debate, but there is little doubt that one of Cardozo's purposes in delivering *The Nature of the Judicial Process* was to acknowledge the importance of sources beyond precedent for judicial decision-making as well as the inevitable element of "law-making" discretion that appellate court judges exercise in close cases.

Some of the major ideas in *The Nature of the Judicial Process* relied on the earlier work of Holmes' *The Common Law* (1881), John Chipman Gray's *The Nature and Sources of the Law* (1909), and the writings of Roscoe Pound. Cardozo described four major sources of material for judicial decision-making – logic, history, custom, and public policy. He devoted a lecture to each of these. It seems apparent that history and custom are more specialized doctrines that will be powerful factors in deciding a matter only in those relatively few cases when there is enough evidence of either from which to dispose of the case. He regarded logic, the use of deductive analysis from principles already established, as having a certain presumption in its favor and as governing absent strong arguments from history, custom, or public policy. While logic as he defined it was backward looking, his incorporation of the notion of deciding by analogy also had a forward looking aspect.

Cardozo was not content with such subtlety. The bulk of his lectures consisted of analysis of the effect of public policy considera-

tions – a normative approach based on contemporary values – on judicial decision-making. He both endorsed the importance of using law to achieve social justice and warned against the dangers that could accompany the abandonment of established principles, certainty, and order. Judges were agents of change, but not too much and not too often. The trick was to know when to innovate and when to refrain.

Cardozo was no revolutionary. His vision of the judicial role was a version of what English and American judges had done for centuries, reaffirmed and adapted for modern use. He believed that the major role in guiding social change in a democracy belonged to the legislature and the executive. Thus, he innovated most when the step to be taken was modest and when the innovation did not violate what he saw as the prerogatives of other institutions of government – and ideally when the legislative or executive branch had already pointed the way. While Cardozo often adapted law to new social conditions, he also often declined to make such adaptations. Fairness was important to him, but he did not believe that judges could always do what they thought was fair or just. Cardozo believed that he had to respect precedent, history, and the powers of other branches of government. Judging involved taking all these factors into account, methodically and as impartially as he could.

A common complaint, offered by judges, is that Cardozo's prescription does not help a judge to decide a particular case. Of course not. Indeed, in a way, a subtheme of Cardozo's lectures is that judicial decision-making involves a nuanced approach among different considerations, any one of which may be dominant with respect to a particular issue or in the context of particular facts. He was essentially an accommodationist, but the totality of the messages was ambiguous. That ambiguity, I think, has contributed to his enduring reputation. How one applies Cardozo to different situations depends on what strand of thought is emphasized in different contexts. Even judges who subscribe fully to his messages will put the elements of decision-making together in different ways in particular cases, each side citing different Cardozo words for support. As you will see from reading his lectures, Cardozo carried forth his pre-

scription into the field of constitutional law as well, expressing the view that public policy considerations had their strongest justification in that field. Indeed, he outlined a controversial view, which he expounded as a Justice of the United States Supreme Court, that "the content of constitutional immunities is not constant, but varies from age to age."[5]

The Nature of the Judicial Process was not a work of philosophy. Although Cardozo was well read in works of philosophy and often quoted or cited philosophers to support a particular insight, he was not interested in attempting to set out a comprehensive theory of judging that was grounded in philosophy. His purpose was to explain the art of judging from his perspective as a judge and former practicing lawyer. In a sense, the guts of *The Nature of the Judicial Process* can be found buried in three printed pages.[6] All the rest is elaboration and, at the end of the Lectures, he issued a word of caution about everything he said. While he refused to quarrel with the notion that a judge reflects "the spirit of the age," he was skeptical about what that was. "The spirit of the age," he wrote, "as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or occupation or fellowship have given us a place."[7]

The years following the delivery and publication of *The Nature of the Judicial Process* saw the transformation of Benjamin Cardozo from a well-known judge to a judge with a national reputation. The academy lionized him even before he became chief judge of the New York Court of Appeals, and the court itself was seen as the outstanding state court in the country. It had several notable judges, Cuthbert Pound, William Andrews, and Irving Lehman, to name just three of Cardozo's colleagues, but it was Cardozo's opinions that caught the academic public's eye and were incorporated into casebooks throughout the country. This was a time when virtually all judges, and not their law clerks, wrote judicial opinions. Cardozo wrote in a distinctive style, with many one-liners that

[5] Pp. 82-83.
[6] Pp. 112-114.
[7] Pp. 174-175.

sharpened his meaning. Occasionally flowery and ornate, at its best the style was crisp and persuasive, and it constitutes a large part of the explanation for his continuing popularity in the legal academy. He had the knack of making a great case out of what would have been humdrum in the hands of most judges.

Cardozo was induced to give two more Lecture series after *The Nature of the Judicial Process.* The first, *The Growth of the Law* (1924), was little more than a rehash of *The Nature of the Judicial Process.* The second, *The Paradoxes of Legal Science* (1928), was Cardozo's effort to place *The Nature of the Judicial Process* into more of a philosophical mode, but in essence it was *The Nature of the Judicial Process* once more. Cardozo also tried his hand at writing on such subjects as *Law and Literature and Other Essays and Addresses* (1931) and *What Medicine Can Do for Law* (1930), but the only other substantial piece of nonjudicial writing he did while a Court of Appeals judge was a long lecture entitled "Jurisprudence" that he delivered just before he joined the United States Supreme Court in 1932. There again he sought to deal with the phenomenon of legal realism, with which his approach had much in common, by playing down some of its more exuberant statements about the uncertainty and indeterminacy of legal principles as enthusiastic hyperbole.

All he achieved was to anger some of realism's leading exponents, notably Jerome Frank, a New Deal lawyer with academic pretensions who later became a judge of the U.S. Court of Appeals for the Second Circuit. Frank theretofore had been a strong admirer of Cardozo. Stung by Cardozo's talk, Frank wrote him a thirty-one page critique, with a thirty-page appendix, explaining his views, which he believed had been mischaracterized and misunderstood by Cardozo. Cardozo did not respond substantively, pleading the press of business associated with his appointment, and deprecating his own effort. Sixteen years later, after Cardozo had died, Frank published his criticisms of Cardozo's "Jurisprudence" lecture in a law review article that even criticized the title of *The Nature of the Judicial Process* for its emphasis on appellate opinions, as opposed to trials and fact-finding, which Frank took to be of greater significance to

the law as it actually affected people's lives.[8] Indeed, after Cardozo died, Frank, who was much influenced by Freudian psychology, published an anonymous critique with a psychological analysis of Cardozo.[9] Frank portrayed a man who cloaked the disgrace of his father's career in the garb of an eighteenth century English gentleman writing in an alien style. Clearly, the years had not dulled Frank's anger at Cardozo's criticism of his boldest claims about the indeterminacy of the law.

Appointment to the United States Supreme Court ended Cardozo's extrajudicial writing. Unlike many current Supreme Court Justices who regularly expound their judicial philosophies in off-the-bench settings, Cardozo immediately felt constrained by the press of business, by the need to conserve his energy, and perhaps also by a sense that the Court at that time was already embroiled in sufficient controversy concerning the legality of New Deal legislation. But Cardozo had one further contribution to make to larger issues of judicial decision-making, and he chose, what was for him an unusual forum, a judicial opinion. The subject was what we would today call originalism, the binding effect of the Framers' intent in constitutional interpretation. As we have already noticed, Cardozo had indicated a view in *The Nature of the Judicial Process*. But it is one thing to express a view off the bench, quite another to do so in an opinion. That was something Cardozo rarely did. His job as judge was to decide cases, not to issue pronouncements on current issues of jurisprudence. But he did so early in his career on the Supreme Court in the context of a hotly-contested, major piece of litigation.

The Minnesota Mortgage Moratorium Case (*Home Bldg. & Loan Insurance Co. v. Blaisdell*,[10] involved the power of a state to delay foreclosure of a defaulted mortgage by permitting the mortgagor to substitute rent based on reasonable value for the mortgage payments that were due. The debt owed would have to be paid off in full eventually. A closely-divided Supreme Court upheld the state stat-

[8] *Cardozo and the Upper-Court Myth*, 13 Law and Contemp. Probs. 369 (1948).
[9] Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion*, 29 Va. L. Rev. 625 (1943).
[10] 290 U.S. 398 (1934).

ute against an argument that it impaired an "obligation" of contract in violation of Article I, section 10 of the Constitution, known as the Contract Clause. Chief Justice Hughes circulated a draft majority opinion distinguishing between statutes that interfered with the creditor's right and those that interfered merely with the remedy. That was insufficient for Cardozo, who circulated an opinion that dealt with the basics of constitutional interpretation. His opinion spelled out the approach he first set forth in *The Nature of the Judicial Process*. Interpretation of a constitutional provision, even one as narrow and focused as the Contract Clause, was not limited by what the Framers understood at the time of the adoption of the provisions. Echoing John Marshall, Cardozo expounded at some length his view that the Constitution had been designed to meet the needs of an expanding future and its meaning could change as society changed.

But Cardozo's opinion went unpublished. When Hughes saw it, he incorporated some of its substance, briefly, in his own opinion and the ever-collegial Cardozo withdrew his concurrence. His draft opinion, however, was a stirring defense of an expansive approach to constitutional interpretation that still resonates in modern constitutional discourse and constitutes a nice conclusion to the exposition he first set forth in *The Nature of the Judicial Process*. (Substantial excerpts from the draft opinion are published in Kaufman, *Benjamin Cardozo and the Supreme Court*.[11])

It was his final contribution to the subject of judicial decision-making. His career on the Supreme Court was all too short. He suffered a heart attack in late 1937, followed by a stroke shortly thereafter, and he died the following summer at age 68. But, as you will see in reading the following Lectures, he left behind, in *The Nature of the Judicial Process*, a series of insights and messages that still provide substance for anyone interested in the subject of how judges decide cases. ❶

[11] 20 Card. L. Rev. 1259 (1999).

THE NATURE OF THE JUDICIAL PROCESS

LECTURE I.
INTRODUCTION. THE METHOD OF PHILOSOPHY

Benjamin N. Cardozo[†]

The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth. Let some intelligent layman ask him to explain: he will not go very far before taking refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the craft. Such an excuse may cover with a semblance of respectability an otherwise ignominious retreat. It will hardly serve to still the pricks of curiosity and conscience. In moments of introspection, when there {10} is no longer a necessity of putting off with a show of wisdom the uninitiated interlocutor, the troublesome problem will recur, and press for a solution. What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common

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[†] *When The Nature of the Judicial Process was first published in 1921, he was an Associate Judge on the New York Court of Appeals. Numbers in {brackets} indicate pagination in the 2010 Quid Pro Quo Press edition edited by Alan Childress.*

standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. There, before us, {11} is the brew. Not a judge on the bench but has had a hand in the making. The elements have not come together by chance. *Some* principle, however unavowed and inarticulate and subconscious, has regulated the infusion. It may not have been the same principle for all judges at any time, nor the same principle for any judge at all times. But a choice there has been, not a submission to the decree of Fate; and the considerations and motives determining the choice, even if often obscure, do not utterly resist analysis. In such attempt at analysis as I shall make, there will be need to distinguish between the conscious and the subconscious. I do not mean that even those considerations and motives which I shall class under the first head are always in consciousness distinctly, so that they will be recognized and named at sight. Not infrequently they hover near the surface. They may, however, with comparative readiness be isolated and tagged, and when thus labeled, are quickly acknowledged as guiding principles of conduct. More subtle are the forces so far beneath the {12} surface that they cannot reasonably be classified as other than subconscious. It is often through these subconscious forces that judges are kept consistent with themselves, and inconsistent with one another. We are reminded by William James in a telling page of his lectures on Pragmatism that every one of us has in truth an underlying philosophy of life, even those of us to whom the names and the notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not,[1] which gives coherence and direction to thought and action. 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

[1] {*Lecture I, originally page 12, note 1*} Cf. N. M. Butler, "Philosophy," pp. 18, 43.

an outlook on life, a conception of social needs, a sense in James's phrase of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice shall fall. {13} In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought – a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter.

I have little hope that I shall be able to state the formula which will rationalize this process for myself, much less for others. We must apply to the study of judge-made law that method of quantitative analysis which Mr. Wallas has applied with such fine results to the study of politics.[2] A richer scholarship than mine is requisite to do the work aright. But until that scholarship is found and enlists itself in the task, there may be a passing interest in an attempt to uncover the nature of the process by one who is himself an active agent, day by day, in keeping the process alive. That must be my apology for these introspective searchings of the spirit. {14}

Before we can determine the proportions of a blend, we must know the ingredients to be blended. Our first inquiry should therefore be: Where does the judge find the law which he embodies in his judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators. It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which,

[2] "Human Nature in Politics," p. 138.

however obscure and latent, had none the less a real and ascertainable pre-existence in {15} the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a statute. "The fact is," says Gray in his lectures on the "Nature and Sources of the Law,"[3] "that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present."[4] So Brütt:[5] "One weighty task of the system of the application of law consists then in this, to make more profound the discovery of the latent meaning of positive law. Much more important, however, is the second task which the system serves, namely {16} the filling of the gaps which are found in every positive law in greater or less measure." You may call this process legislation, if you will. In any event, no system of *jus scriptum* has been able to escape the need of it. Today a great school of continental jurists is pleading for a still wider freedom of adaptation and construction. The statute, they say, is often fragmentary and ill-considered and unjust. The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision – "libre recherche scientifique." That is the view of Gény and Ehrlich and Gmelin and others.[6] Courts are to "search for light among the social elements of every kind that are the living force behind the facts they deal with."[7] The power thus put in their hands is great, and subject, like all power, to abuse; but we are not to flinch from granting it. In the long run "there is no guaranty of

[3] Sec. 370, p. 165.
[4] Cf. Pound, "Courts and Legislation," 9 Modern Legal Philosophy Series, p. 226.
[5] "Die Kunst der Rechtsanwendung," p. 72.
[6] "Science of Legal Method," 9 Modern Legal Philosophy Series, pp. 4, 45, 65, 72, 124, 130, 159.
[7] Gény, "Methode d'Interprétation et Sources en droit privé positif," vol. II, p. 180, sec. 176, ed. 1919; transl. 9 Modern Legal Philosophy Series, p. 45.

{17} justice," says Ehrlich,[8] "except the personality of the judge."[9] The same problems of method, the same contrasts between the letter and the spirit, are living problems in our own land and law. Above all in the field of constitutional law, the method of free decision has become, I think, the dominant one today. The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them. Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of lawmakers whose collective will has been declared. It supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law. Codes and other statutes may {18} threaten the judicial function with repression and disuse and atrophy. The function flourishes and persists by virtue of the human need to which it steadfastly responds. Justinian's prohibition of any commentary on the product of his codifiers is remembered only for its futility.[10]

I will dwell no further for the moment upon the significance of constitution and statute as sources of the law. The work of a judge in interpreting and developing them has indeed its problems and its difficulties, but they are problems and difficulties not different in kind or measure from those besetting him in other fields. I think they can be better studied when those fields have been explored. Sometimes the rule of constitution or of statute is clear, and then the difficulties vanish. Even when they are present, they lack at times some of that element of mystery which accompanies creative energy. We reach the land of mystery when constitution and statute are silent, and the judge must look to {19} the common law for the rule that fits the case. He is the "living oracle of the law" in Blackstone's vivid phrase. Looking at Sir Oracle in action, viewing his work in the dry light of realism, how does he set about his task?

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[8] P. 65, *supra*; "Freie Rechtsfindung und freie Rechtswissenschaft," 9 Modern Legal Philosophy Series.

[9] Cf. Gnaeus Flavius (Kantorowicz), "Der Kampf um Rechtswissenschaft," p. 48: "Von der Kultur des Richters hängt im letzten Grunde aller Fortschritt der Rechtsentwicklung ab."

[10] Gray, "Nature and Sources of the Law," sec. 395; Muirhead, "Roman Law," pp. 399, 400.

The first thing he does is to compare the case before him with the precedents, whether stored in his mind or hidden in the books. I do not mean that precedents are ultimate sources of the law, supplying the sole equipment that is needed for the legal armory, the sole tools, to borrow Maitland's phrase,[11] "in the legal smithy." Back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn.[12] None the less, in a system so highly developed as our {20} own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. *Stare decisis* is at least the everyday working rule of our law. I shall have something to say later about the propriety of relaxing the rule in exceptional conditions. But unless those conditions are present, the work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute. It is a process of search, comparison, and little more. Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If {21} that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it

[11] Introduction to Gierke's "Political Theories of the Middle Age," p. viii.
[12] Saleilles, "De la Personnalité Juridique," p. 45; Ehrlich, "Grundlegung der Soziologie des Rechts," pp. 34, 35; Pound, "Proceedings of American Bar Assn. 1919," p. 455.

for others. The classic statement is Bacon's: "For many times, the things deduced to judgment may be meum and tuum, when the reason and consequence thereof may trench to point of estate."[13] The sentence of today will make the right and wrong of tomorrow. If the judge is to pronounce it wisely, some principles of selection there must be to guide him among all the potential judgments that compete for recognition.

In the life of the mind as in life elsewhere, there is a tendency toward the reproduction of kind. Every judgment has a generative power. It begets in its own image. Every precedent, in {22} the words of Redlich, has a "directive force for future cases of the same or similar nature."[14] Until the sentence was pronounced, it was as yet in equilibrium. Its form and content were uncertain. Any one of many principles might lay hold of it and shape it. Once declared, it is a new stock of descent. It is charged with vital power. It is the source from which new principles or norms may spring to shape sentences thereafter. If we seek the psychological basis of this tendency, we shall find it, I suppose, in habit.[15] Whatever its psychological basis, it is one of the living forces of our law. Not all the progeny of principles begotten of a judgment survive, however, to maturity. Those that cannot prove their worth and strength by the test of experience, are sacrificed mercilessly and thrown into the void. The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them {23} deductively. Its method is inductive, and it draws its generalizations from particulars. The process has been admirably stated by Munroe Smith: "In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories

[13] "Essay on Judicature."
[14] Redlich, "The Case Method in American Law Schools," Bulletin No. 8, Carnegie Foundation, p. 37.
[15] McDougall, "Social Psychology," p. 354; J. C. Gray, "Judicial Precedents," 9 Harvard L. R. 27.

of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined."[16] {24}

The way in which this process of retesting and reformulating works, may be followed in an example. Fifty years ago, I think it would have been stated as a general principle that A. may conduct his business as he pleases, even though the purpose is to cause loss to B., unless the act involves the creation of a nuisance.[17] Spite fences were the stock illustration, and the exemption from liability in such circumstances was supposed to illustrate not the exception, but the rule.[18] Such a rule may have been an adequate working principle to regulate the relations between individuals or classes in a simple or homogeneous community. With the growing complexity of social relations, its inadequacy was revealed. As particular controversies multiplied and the attempt was made to test them by the {25} old principle, it was found that there was something wrong in the results, and this led to a reformulation of the principle itself. Today, most judges are inclined to say that what was once thought to be the exception is the rule, and what was the rule is the exception. A. may never do anything in his business for the purpose of injuring another without reasonable and just excuse.[19] There has been a new generalization which, applied to new particulars, yields results more in harmony with past particulars, and, what is still more important, more consistent with the social welfare. This work of modification

[16] Munroe Smith, "Jurisprudence," Columbia University Press, 1909, p. 21; cf. Pound, "Courts and Legislation," 7 Am. Pol. Science Rev. 361; 9 Modern Legal Philosophy Series, p. 214; Pollock, "Essays in Jurisprudence and Ethics," p. 246.

[17] Cooley, "Torts," 1st ed., p. 93; Pollock, "Torts," 10th ed., p. 21.

[18] Phelps v. Nowlen, 72 N. Y. 39; Rideout v. Knox, 148 Mass. 368.

[19] Lamb v. Cheney, 227 N. Y. 418; Aikens v. Wisconsin, 195 U. S. 194, 204; Pollock, "Torts," *supra*.

is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier.

We are not likely to underrate the force that has been exerted if we look back upon its work. "There is not a creed which is not shaken, not an accredited dogma which is not shown to be {26} questionable, not a received tradition which does not threaten to dissolve."[20] Those are the words of a critic of life and letters writing forty years ago, and watching the growing scepticism of his day. I am tempted to apply his words to the history of the law. Hardly a rule of today but may be matched by its opposite of yesterday. Absolute liability for one's acts is today the exception; there must commonly be some tinge of fault, whether willful or negligent. Time was, however, when absolute liability was the rule.[21] Occasional reversions to the earlier type may be found in recent legislation.[22] Mutual promises give rise to an obligation, and their breach to a right of action for damages. Time was when the {27} obligation and the remedy were unknown unless the promise was under seal.[23] Rights of action may be assigned, and the buyer prosecute them to judgment though he bought for purposes of suit. Time was when the assignment was impossible, and the maintenance of the suit a crime. It is no basis today for an action of deceit to show, without more, that there has been the breach of an executory promise; yet the breach of an executory promise came to have a remedy in our law because it was held to be a deceit.[24] These changes or most of them have been wrought by judges. The men who wrought them used the same tools as the judges of today. The changes, as they were made

[20] Arnold, "Essays in Criticism," second series, p. 1.

[21] Holdsworth, "History of English Law," 2, p. 41; Wigmore, "Responsibility for Tortious Acts," 7 Harvard L. R. 315, 383, 441; 3 Anglo-Am. Legal Essays 474; Smith, "Liability for Damage to Land," 33 Harvard L. R. 551; Ames, "Law and Morals," 22 Harvard L. R. 97, 99; Isaacs, "Fault and Liability," 31 Harvard L. R. 954.

[22] Cf. Duguit, "Les Transformations générales du droit privé depuis le Code Napoléon," Continental Legal Hist. Series, vol. XI, pp. 125, 126, secs. 40, 42.

[23] Holdsworth, *supra*, 2, p. 72; Ames, "History of Parol Contracts prior to Assumpsit," 3 Anglo-Am. Legal Essays 304.

[24] Holdsworth, *supra*, 3, pp. 330, 336; Ames, "History of Assumpsit," 3 Anglo-Am. Legal Essays 275, 276.

in this case or that, may not have seemed momentous in the making. The result, however, when the process was prolonged throughout the years, has been not merely to supplement or modify; it has been to revolutionize {28} and transform. For every tendency, one seems to see a counter-tendency; for every rule its antinomy. Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless "becoming." We are back with Heraclitus. That, I mean, is the average or aggregate impression which the picture leaves upon the mind. Doubtless in the last three centuries, some lines, once wavering, have become rigid. We leave more to legislatures today, and less perhaps to judges.[25] Yet even now there is change from decade to decade. The glacier still moves.

In this perpetual flux, the problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die.

The first branch of the problem is the one to which we are accustomed to address ourselves {29} more consciously than to the other. Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully. The instance cannot lead to a generalization till we know it as it is. That in itself is no easy task. For the thing adjudged comes to us oftentimes swathed in obscuring dicta, which must be stripped off and cast aside. Judges differ greatly in their reverence for the illustrations and comments and side-remarks of their predecessors, to make no mention of their own. All agree that there may be dissent when the opinion is filed. Some would seem to hold that there must be none a moment thereafter. Plenary inspiration has then descended upon the work of the majority. No one, of course, avows such a belief, and yet sometimes there is an approach to it in conduct. I own that it is a good deal of a mystery to me how judges, of all persons in the world, should put their faith in dicta. A brief experience on the bench was enough to reveal to me all sorts of cracks and crevices and loopholes in my own opin-

[25] F. C. Montague in "A Sketch of Legal History," Maitland and Montague, p. 161.

ions when picked up a few months after delivery, {30} and reread with due contrition. The persuasion that one's own infallibility is a myth leads by easy stages and with somewhat greater satisfaction to a refusal to ascribe infallibility to others. But dicta are not always ticketed as such, and one does not recognize them always at a glance. There is the constant need, as every law student knows, to separate the accidental and the non-essential from the essential and inherent. Let us assume, however, that this task has been achieved, and that the precedent is known as it really is. Let us assume too that the principle, latent within it, has been skillfully extracted and accurately stated. Only half or less than half of the work has yet been done. The problem remains to fix the bounds and the tendencies of development and growth, to set the directive force in motion along the right path at the parting of the ways.

The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; {31} this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I will call the method of sociology.

I have put first among the principles of selection to guide our choice of paths, the rule of analogy or the method of philosophy. In putting it first, I do not mean to rate it as most important. On the contrary, it is often sacrificed to others. I have put it first because it has, I think, a certain presumption in its favor. 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. It has the primacy that comes from natural and orderly and logical succession. Homage is due to it over every competing principle that is unable by appeal to history or tradition or policy or justice to make out a {32} better right. All sorts of deflecting forces may appear to contest its sway and absorb its power. At least, it is the heir presumptive. A pretender to the title will have to fight his way.

Great judges have sometimes spoken as if the principle of philosophy, i.e., of logical development, meant little or nothing in our law. Probably none of them in conduct was ever true to such a faith. Lord Halsbury said in Quinn v. Leathem, 1901, A. C. 495, 506: "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."[26] All this may be true, but we must not press the truth too far. Logical consistency does not cease to be a good because it is not the supreme good. Holmes has told us {33} in a sentence which is now classic that "the life of the law has not been logic; it has been experience."[27] But Holmes did not tell us that logic is to be ignored when experience is silent. I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly be some consideration of history or custom or policy or justice. Lacking such a reason, I must be logical, just as I must be impartial, and upon like grounds. It will not do to decide the same question one way between one set of litigants and the opposite way between another. "If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an {34} infringement, material and moral, of my rights."[28] Everyone feels the force of this sentiment when two cases are the same. Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts. A sentiment like

[26] Cf. Bailhache, J., in Belfast Ropewalk Co. v. Bushell, 1918, 1 K. B. 210, 213: "Unfortunately or fortunately, I am not sure which, our law is not a science."
[27] "The Common Law," p. 1.
[28] W. G. Miller, "The Data of Jurisprudence," p. 335; cf. Gray, "Nature and Sources of the Law," sec. 420; Salmond, "Jurisprudence," p. 170.

in kind, though different in degree, is at the root of the tendency of precedent to extend itself along the lines of logical development.[29] No doubt the sentiment is powerfully reinforced by what is often nothing but an intellectual passion for *elegantia juris*, for symmetry of form and substance.[30] That is an ideal which can never fail to exert some measure of attraction upon the professional experts who make up the lawyer class. To the Roman lawyers, it meant much, more than it has meant to English lawyers or to ours, certainly more {35} than it has meant to clients. "The client," says Miller in his "Data of Jurisprudence,"[31] "cares little for a 'beautiful' case! He wishes it settled somehow on the most favorable terms he can obtain." Even that is not always true. But as a system of case law develops, the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped. The accidental and the transitory will yield the essential and the permanent. The judge who moulds the law by the method of philosophy may be satisfying an intellectual craving for symmetry of form and substance. But he is doing something more. He is keeping the law true in its response to a deep-seated and imperious sentiment. Only experts perhaps may be able to gauge the quality of his work and appraise its significance. But their judgment, the judgment of the lawyer class, will spread to others, and tinge the common consciousness and the common faith. In default of other tests, the method of philosophy must remain the organon of the courts if {36} chance and favor are to be excluded, and the affairs of men are to be governed with the serene and impartial uniformity which is of the essence of the idea of law.

You will say that there is an intolerable vagueness in all this. If the method of philosophy is to be employed in the absence of a better one, some test of comparative fitness should be furnished. I hope, before I have ended, to sketch, though only in the broadest outline, the fundamental considerations by which the choice of

[29] Cf. Gény, "Méthode d'Interprétation et Sources en droit privé positif," vol. II, p. 119.
[30] W. G. Miller, *supra*, p. 281; Bryce, "Studies in History and Jurisprudence," vol. II, p. 629.
[31] P. 1.

methods should be governed. In the nature of things they can never be catalogued with precision. Much must be left to that deftness in the use of tools which the practice of an art develops. A few hints, a few suggestions, the rest must be trusted to the feeling of the artist. But for the moment, I am satisfied to establish the method of philosophy as one organon among several, leaving the choice of one or the other to be talked of later. Very likely I have labored unduly to establish its title to a place so modest. Above all, in the Law School of Yale University, the {37} title will not be challenged. I say that because in the work of a brilliant teacher of this school, the late Wesley Newcomb Hohfeld, I find impressive recognition of the importance of this method, when kept within due limits, and some of the happiest illustrations of its legitimate employment. His treatise on "Fundamental Conceptions Applied in Judicial Reasoning" is in reality a plea that fundamental conceptions be analyzed more clearly, and their philosophical implications, their logical conclusions, developed more consistently. I do not mean to represent him as holding to the view that logical conclusions must always follow the conceptions developed by analysis. "No one saw more clearly than he that while the analytical matter is an indispensable tool, it is not an all-sufficient one for the lawyer."[32] "He emphasized over and over again" that "analytical work merely paves the way for other branches of jurisprudence, and that without the aid of the latter, satisfactory solutions of {38} legal problems cannot be reached."[33] We must know where logic and philosophy lead even though we may determine to abandon them for other guides. The times will be many when we can do no better than follow where they point.

Example, if not better than precept, may at least prove to be easier. We may get some sense of the class of questions to which a method is adapted when we have studied the class of questions to which it has been applied. Let me give some haphazard illustrations of conclusions adopted by our law through the development of legal conceptions to logical conclusions. A. agrees to sell a chattel to B. Before title passes, the chattel is destroyed. The loss falls on the

[32] Introduction to Hohfeld's Treatise by W. W. Cook.
[33] Professor Cook's Introduction.

seller who has sued at law for the price.[34] A. agrees to sell a house and lot. Before title passes, the house is destroyed. The seller sues in equity for specific performance. The loss falls upon the {39} buyer.[35] That is probably the prevailing view, though its wisdom has been sharply criticized.[36] These variant conclusions are not dictated by variant considerations of policy or justice. They are projections of a principle to its logical outcome, or the outcome supposed to be logical. Equity treats that as done which ought to be done. Contracts for the sale of land, unlike most contracts for the sale of chattels, are within the jurisdiction of equity. The vendee is in equity the owner from the beginning. Therefore, the burdens as well as the benefits of ownership shall be his. Let me take as another illustration of my meaning the cases which define the rights of assignees of choses in action. In the discussion of these cases, you will find much conflict of opinion about fundamental conceptions. Some tell us that the assignee has a legal ownership.[37] Others say that his right is purely equitable.[38] {40} Given, however, the fundamental conception, all agree in deducing its consequences by methods in which the preponderating element is the method of philosophy. We may find kindred illustrations in the law of trusts and contracts and in many other fields. It would be wearisome to accumulate them.

The directive force of logic does not always exert itself, however, along a single and unobstructed path. One principle or precedent, pushed to the limit of its logic, may point to one conclusion; another principle or precedent, followed with like logic, may point with equal certainty to another. In this conflict, we must choose between the two paths, selecting one or other, or perhaps striking out upon a third, which will be the resultant of the two forces in combination, or will represent the mean between extremes. Let me take as an illustration of such conflict the famous case of Riggs v.

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[34] Higgins v. Murray, 73 N. Y. 252, 254; 2 Williston on Contracts, sec. 962; N. Y. Personal Prop. Law, sec. 103a.

[35] Paine v. Meller, 6 Ves. 349, 352; Sewell v. Underhill, 197 N. Y. 168; 2 Williston on Contracts, sec. 931.

[36] 2 Williston on Contracts, sec. 940.

[37] Cook, 29 Harvard L. R. 816, 836.

[38] Williston, 30 Harvard L. R. 97; 31 *ibid.* 822.

Palmer, 115 N. Y. 506. That case decided that a legatee who had murdered his testator would not be permitted by a court of equity to enjoy the benefits of the will. Conflicting {41} principles were there in competition for the mastery. One of them prevailed, and vanquished all the others. There was the principle of the binding force of a will disposing of the estate of a testator in conformity with law. That principle, pushed to the limit of its logic, seemed to uphold the title of the murderer. There was the principle that civil courts may not add to the pains and penalties of crimes. That, pushed to the limit of its logic, seemed again to uphold his title. But over against these was another principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man should profit from his own inequity or take advantage of his own wrong. The logic of this principle prevailed over the logic of the others. I say its logic prevailed. The thing which really interests us, however, is why and how the choice was made between one logic and another. In this instance, the reason is not obscure. One path was followed, another closed, because of the conviction in the judicial mind that the one selected led to justice. Analogies and {42} precedents and the principles behind them were brought together as rivals for precedence; in the end, the principle that was thought to be most fundamental, to represent the larger and deeper social interests, put its competitors to flight. I am not greatly concerned about the particular formula through which justice was attained. Consistency was preserved, logic received its tribute, by holding that the legal title passed, but that it was subjected to a constructive trust.[39] A constructive trust is nothing but "the formula through which the conscience of equity finds expression."[40] Property is acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest. Equity, to express its disapproval of his conduct, converts him into a trustee.[41] Such formulas are merely the remedial devices by which a result

[39] Ellerson v. Westcott, 148 N. Y. 149, 154; Ames, "Lectures on Legal History," pp. 313, 314.
[40] Beatty v. Guggenheim Exploration Co., 225 N. Y. 380, 386.
[41] Beatty v. Guggenheim Exploration Co., *supra*; Ames, *supra*.

conceived of as right and just is {43} made to square with principle and with the symmetry of the legal system. What concerns me now is not the remedial device, but rather the underlying motive, the indwelling, creative energy, which brings such devices into play. The murderer lost the legacy for which the murder was committed because the social interest served by refusing to permit the criminal to profit by his crime is greater than that served by the preservation and enforcement of legal rights of ownership. My illustration, indeed, has brought me ahead of my story. The judicial process is there in microcosm. We go forward with our logic, with our analogies, with our philosophies, till we reach a certain point. At first, we have no trouble with the paths; they follow the same lines. Then they begin to diverge, and we must make a choice between them. History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law, must come to the rescue of the anxious judge, and tell him where to go. {44}

It is easy to accumulate examples of the process – of the constant checking and testing of philosophy by justice, and of justice by philosophy. Take the rule which permits recovery with compensation for defects in cases of substantial, though incomplete performance. We have often applied it for the protection of builders who in trifling details and without evil purpose have departed from their contracts. The courts had some trouble for a time, when they were deciding such cases, to square their justice with their logic. Even now, an uneasy feeling betrays itself in treatise and decision that the two fabrics do not fit. As I had occasion to say in a recent case: "Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result" remain "troubled by a classification where the lines of division are so wavering and blurred."[42] I have no doubt that the inspiration of the rule is a mere sentiment of justice. That sentiment asserting itself, we have proceeded to surround it {45} with the halo of conformity to precedent. Some judges saw the unifying principle in the law of

[42] Jacobs & Youngs, Inc. v. Kent, 230 N. Y. 239.

quasi-contracts. Others saw it in the distinction between dependent and independent promises, or between promises and conditions. All found, however, in the end that there *was* a principle in the legal armory which, when taken down from the wall where it was rusting, was capable of furnishing a weapon for the fight and of hewing a path to justice. Justice reacted upon logic, sentiment upon reason, by guiding the choice to be made between one logic and another. Reason in its turn reacted upon sentiment by purging it of what is arbitrary, by checking it when it might otherwise have been extravagant, by relating it to method and order and coherence and tradition.[43]

In this conception of the method of logic or philosophy as one organon among several, I find nothing hostile to the teachings of continental jurists who would dethrone it from its place and {46} power in systems of jurisprudence other than our own. They have combated an evil which has touched the common law only here and there, and lightly. I do not mean that there are not fields where we have stood in need of the same lesson. In some part, however, we have been saved by the inductive process through which our case law has developed from evils and dangers inseparable from the development of law, upon the basis of the *jus scriptum*, by a process of deduction.[44] Yet even continental jurists who emphasize the need of other methods, do not ask us to abstract from legal principles all their fructifying power. The misuse of logic or philosophy begins when its method and its ends are treated as supreme and final. They can never be banished altogether. "Assuredly," says François Gény,[45] "there should be no question of banishing ratiocination and logical methods from the {47} science of positive law." Even general principles may sometimes be followed rigorously in the deduction of their con-sequences. "The abuse," he says, "consists, if I do not mistake, in envisaging ideal conceptions, provisional and purely subjec-

[43] Cf. Hynes v. N. Y. Central R. R. Co. (231 N. Y. 229, 235).

[44] "Notre droit public, comme notre droit privé, est un *jus scriptum*" (Michoud, "La Responsibilité de l'état à raison des fautes de ses agents," Revue du droit public, 1895, p. 273, quoted by Gény, vol. I, p. 40, sec. 19).

[45] *Op. cit.*, vol. I, p. 127, sec. 61.

tive in their nature, as endowed with a permanent objective reality. And this false point of view, which, to my thinking, is a vestige of the absolute realism of the middle ages, ends in confining the entire system of positive law, *a priori*, within a limited number of logical categories, which are predetermined in essence, immovable in basis, governed by inflexible dogmas, and thus incapable of adapting themselves to the ever varied and changing exigencies of life."

In law, as in every other branch of knowledge, the truths given by induction tend to form the premises for new deductions. The lawyers and the judges of successive generations do not repeat for themselves the process of verification, any more than most of us repeat the demonstrations of the truths of astronomy or physics. A stock of juridical conceptions and formulas is {48} developed, and we take them, so to speak, ready-made. Such fundamental conceptions as contract and possession and ownership and testament and many others, are there, ready for use. How they came to be there, I do not need to inquire. I am writing, not a history of the evolution of law, but a sketch of the judicial process applied to law full grown. These fundamental conceptions once attained form the starting point from which are derived new consequences, which, at first tentative and groping, gain by reiteration a new permanence and certainty. In the end, they become accepted themselves as fundamental and axiomatic. So it is with the growth from precedent to precedent. The implications of a decision may in the beginning be equivocal. New cases by commentary and exposition extract the essence. At last there emerges a rule or principle which becomes a datum, a point of departure, from which new lines will be run, from which new courses will be measured. Sometimes the rule or principle is found to have been formulated too narrowly or too broadly, and has to be reframed. {49} Sometimes it is accepted as a postulate of later reasoning, its origins are forgotten, it becomes a new stock of descent, its issue unite with other strains, and persisting permeate the law. You may call the process one of analogy or of logic or of philosophy as you please. Its essence in any event is the derivation of a consequence from a rule or a principle or a precedent which, accepted as a datum, contains implicitly within itself the germ of the

conclusion. In all this, I do not use the word philosophy in any strict or formal sense. The method tapers down from the syllogism at one end to mere analogy at the other. Sometimes the extension of a precedent goes to the limit of its logic. Sometimes it does not go so far. Sometimes by a process of analogy it is carried even farther. That is a tool which no system of jurisprudence has been able to discard.[46] A rule which has worked well in one field, or which, in any event, is there whether its workings have been revealed or not, is carried over into another. Instances of such a process I group {50} under the same heading as those where the nexus of logic is closer and more binding.[47] At bottom and in their underlying motives, they are phases of the same method. They are inspired by the same yearning for consistency, for certainty, for uniformity of plan and structure. They have their roots in the constant striving of the mind for a larger and more inclusive unity, in which differences will be reconciled, and abnormalities will vanish. ❶

[46] Ehrlich, "Die Juristische Logik," pp. 225, 227.
[47] Cf. Gény, *op. cit.*, vol. II, p. 121, sec. 165; also vol. I, p. 304, sec. 107.

BOOK REVIEW

THE NATURE OF THE JUDICIAL PROCESS

Learned Hand[†]

Judge Cardozo has in this book tried his hand at one of those problems which have fascinated the mind of mankind since it began to ponder upon the meaning of law. The position of an English speaking judge, especially, presents an apparent contradiction that has always exercised those who are speculatively inclined. The pretension of such a judge is, or at least it has been, that he declares pre-existing law, of which he is only the mouthpiece; his judgment is the conclusion of a syllogism in which the major is to be found among fixed and ascertainable rules. Conceivably a machine of intricate enough complexity might deliver such a judgment automatically were it only to be fed with the proper findings of fact. Yet the whole structure of the common law is an obvious denial of this theory; it stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work.

We have grown more self-conscious of late and can no longer content ourselves with fictions; and candid men like Judge Cardozo will not stomach those equivocations which keep the promise to the ear and break it to the hope. So, while he is aware enough of the limitations upon a judge's freedom, he is more acutely aware than many of his contemporaries of the extent to which he must choose responsibly. His essay tells us of the different factors which may properly enter into a judge's consideration. He must be faithful to

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[†] *This review originally appeared at 35 Harv. L. Rev. 479 (1922). At that time, Hand was a District Judge on the United States District Court for the Southern District of New York.*

the past, of which he is the inheritor, but not too faithful; he must remember that he lays down a rule of general application, – consistency for him is a jewel; but beyond all he must remember that he is a priest of his time, the interpreterof an inarticulate will, which accepts the past only in part, – no more of it than the present has not yet awakened to repudiate.

No quantitative valuation of these elements is possible; the good judge is an artist, perhaps most like a *chef*. Into the composition of his dishes he adds so much of this or that element as will blend the whole into a compound, delectable or at any rate tolerable to the palates of his guests. The test of his success is the measure in which his craftsman's skill meets with general acceptance. There are no *vade mecums* to this or any other art. It is in the end a question of more or less, and the judicial function lies in the interstices of the social tissues.

That a judge of Judge Cardozo's standing should so frankly own the way in which he works is itself a portent, though in fact he probably disposes of his cases by no saliently different methods from the judges who have preceded him. Indeed he is analyzing, not his own mind alone, but the ways in which all judges decide their cases. But the self-scrutiny which can learn how it works and the candor which will avow it, are rare in such high places. The masters assure us that ours is a time of change in the law, when it is to be recast; one of those periods when the bud is bursting its sheath and the flower unfolding. If they are right – and who are we to question them? – the development will be self-conscious as never before. How Demos will accept it is another matter. Hitherto he has been lulled to rest by unctuous protests of docility from his judges. Will he awaken in a rage when they admit that they are not all "mind," but entertain a "will" as well? Perhaps not; most judges are more pious than Judge Cardozo – and less sincere.

We, who are born in the faith, learned to lisp in our cradles that this is a government of laws, not men. Only yesterday the thunder broke from Olympus and reassured such of us as may have been shaken. From this postulate indeed it followed that the writ of injunction is one of those fundamental rights, any experimentation

with which the Constitution forbids. I must confess that this book does not seem orthodox measured by that standard. There is a scandal in so much subjectivity. Mr. Justice Holmes has somewhere said that the lawyer's problem is one in psychology; he must find the personal equation of his judge, a compelx (it was before the days of Freud) of all those elements which may influence him, his dialectic propensity, his learning, his deference ot the past, his docility to the present, his traditions, his individual habit. It is as if a man were to study the disposition of a pet tiger, another pursuit interesting though perilous, like life. He must reckon with the fundamental biologic tropisms of all sentient creatures; he must know the limitations and capacities of the *Felidae;* he must acquaint himself with the acquired instinctive responses of *Felis tigris;* but chief of all he had better understand the partialities of that particular tiger.

I fancy that if all this be true, the law, which is the greatest common divisor of the sum total of concrete judgments, must in some measure retain a strain of warm humanity about it, which sits a little oddly upon the heights where the Constitution of Massachusetts has placed it. The law is indeed not the creation of this generation, and those who should feel so have no proper place in it. But then this generation was itself scarcely parthenogenetic; and to be human is necessarily to be more than individual. However, after making all allowances, there will be excellent people who cannot help feeling that the voice of this book is in a way the voice of heresy. It will disquiet them even more to know that it emanates from a judge who by the common consent of the bench and bar of his state has no equal within its borders; from one who by the gentleness and purity of his character, the acuteness and suppleness of his mind, by his learning, his moderation, and his sympathetic understanding of his time, has won an unrivaled esteem wherever else he is known. They will be troubled at learning all this; and they will be right to be troubled. When Brutus strikes, we had best fold our togas over our heads and resign our spirits to the darkness. Of course, there is always an escape by concession, by ceasing to climb towards the snowy heights of eternal principles; but they may be unwilling to surrender the truths which have descended to them from the Fa-

thers, tested in the furnaces of experience, burnished by the great hands of the dead, for an opportunism which seeks to cover its usurpation under an affectation of candor. Nor will it much reassure such loyal souls to point to the casual origin of all other institutions, or to let them peep into the unlovely undercurrents which run below the noble surfaces of even the great and 'good. But conversion is open to us all, and perhaps this book will prove to be a primer in introspection which may find a way even into the tents of righteousness. ❶

BOOK REVIEW

THE NATURE OF THE JUDICIAL PROCESS

Max Radin[†]

What is the judicial process? Kantorowicz (Rechtswissenschaft and Soziologie, p.5) tells us that according to popular conception in Germany, it consists, or ought to consist, in dropping an appropriate section of a statute into a hopper, turning the crank and pulling out the correct decision at the bottom. Doubtless the current American belief is very similar, except that we are likely to credit the judge with a perverse ingenuity in so turning the crank that a wrong decision comes out. In this admirable little volume, Mr. Justice Cardozo tells us that turning the crank is far from being a purely mechanical process, that it is a matter of minute and delicate adjustments, that in its conscious form it is an application of philosophy, history and sociology, and that subconsciously powerful forces direct and help determine it.

Judge Cardozo is a member of one of the busiest and most influential tribunals on the face of the earth, the Court of Appeals of New York State. That he can find time to subject his thinking and procedure to so close an analysis is a sign of high encouragement. He is quite abreast of the New Learning – new, that is to say, to lawyers trained in the common-law tradition – a learning that consists in treating the profoundly significant work of modern continental jurists not as a mischievous irrelevancy, but as a source of guidance and light. If he quotes mostly from the valuable series on legal philosophy and continental legal history issued by the American Association of Law Schools, that is apparently for the convenience of

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[†] *This review originally appeared at 10 Cal. L. Rev. 367 (1922). At that time, Radin was a professor of law at Boalt Hall.*

his readers, since he gives ample indication of being conversant with the original sources. All this is important to note, for the quite extraordinary width and depth of his learning have largely contributed in giving his decisions those qualities which have earned for them an almost general commendation. If any man can completely describe the nature of the judicial process, it will be a man like the Storrs lecturer of 1921.

Judge Cardozo somewhat over-dignifies the method which he calls that of philosophy. Properly it is rather the method of the formal syllogism. It is a way of dealing with facts that can never become obsolete. Drawing correct inferences from premises is a discipline that must always be valuable, but is limitations are obvious and over-emphasis of it has done real harm. For a syllogism can tell us nothing that was not already implicit in the major premise. Progress is impossible in a theory that recognizes no other method except by the surreptitious devices of fictions and verbal quibbles. It is a judicial method that too closely for comfort resembles the turning of the handle, and it deserves some of the odium into which it has recently fallen.

The historical, sociological, and psychological methods which the author sets forth are really different in kind. They assist the judge in performing his really judicial task – of selecting his major premise, or they constitute his apology and justification for selecting a bad one. Judge Cardozo overstates, I think, the force that a single precedent has had for common-law judges. The fiction that judges find and do not make the law had at least this advantage, that courts have not hesitated to leap over a fence consisting of but one case which did not commend itself to them. While they have not insisted on the *series longissima rerum similiter indicatarum,* it was always a course of decision, a weight of authority, that forced them to accept a rule they would otherwise have rejected, and the popular fancy of a judge in 1922 confronted with a single unreversed decision of 1422, or even of 1777, and helplessly succumbing to it, is not really borne out by the facts.

Judge Cardozo is inclined to limit the functions of the judge as a legislator to the "gaps in the law" which the "Free-law" school as

well as Zitelman's book, has made famous. Only in the obvious silence of statute or precedent, should the judge follow the injunction of the Swiss Civil Code and legislate, but then he should legislate consciously. However, determining the existence of a gap is itself the difficult task. A law which is the essence of reason has no gaps, and a law which makes no such profession may have none. Under the common-law writs, under the Roman *leglsaction*, there were no gaps. The law concerned itself with facts that could be fitted into rather unyielding frames. There were no gaps, not because there were no cases in which injuries were left without remedy, but because the system did not pretend to do more than classify the injuries it would consent to remedy. And again a system that refuses to admit the existence of *damnum absque iniuria* has no gaps.

When the facts of Riggs v Palmer 115 N.Y. 506 were presented to a New York court, was there a gap in the law? Should a legatee who murdered his testator take under the will? That question will be answered differently in exact accordance with the desire of the judge to assume legislative functions. If a judge decided that a gap existed, he would act as a legislator, that is, he would apply the sociological method; he would decide what public interest demanded and determine accordingly without troubling himself to construct a syllogism. But suppose he did not wish to legislate and did feel bound to construct a syllogism. He would have then to determine what his major premise should be. In this case at least three were open to him, one of which would have led to a result different from the others. Is it not obvious that he would – that he must – choose the premise which will secure what to him is a desirable result, and that the result will be desirable in accordance with his views of society?

That is, he is applying the sociological method quite as much as in the other case. He is doing so, even when he selects of three possible major premises the one he thinks most important without regard to its application in the particular case. For he has no criterion of importance in the abstract, and his only way of deciding that question is to be convinced of the greater or smaller advantage which the inferences from conflicting premises will bring. Howev-

er, if he will not recognize a gap, and selects his premise by its fancied intrinsic importance, he runs the danger of being unduly influenced by the accident of his own legal studies, and this is a greater danger than that of being influenced by the accident of one's own economic and social theories.

The judicial process, then, as presented by Judge Cardozo, may be said to consist in using history and sociology to select the principles of our reasoning and logic in applying it. Where history, that is, precedent, permits a choice, sociology will make it, and here logic will not help us, for it is the conclusion that consciously determines the premise. Logic, however, is of especial application to statutes, for our judges will scarcely have the hardihood of "le bon juge," Magnaud, who declared in his speech to the Chamber of Deputies: "The law cannot have wished an unjust result. Therefore, if an apparently unjust result follows, the words of the law must have a sense different from what they seem to have." Our courts have performed feats in this direction without so open an avowal; but a salutary change is noticeable and we are not likely to see repeated the methods by which statutes are wrested from their declared sense to secure a result opposite to what was intended.

Enough has been said to show that in the author's presentation the judicial process depends on the learning, humanity and philosophy of the judge. That is doubtless not a new doctrine. The book, however, makes clear that in a complicated age, rude integrity and formal logic will not suffice to carry the process to a desirable result. The learning must be great, the humanity finely tempered and broadly established, the philosophy acute. Judge Cardozo is himself an example that such qualities are ceasing to be rare in our judiciary. ❶

BOOK REVIEW

THE NATURE OF THE JUDICIAL PROCESS

Harlan F. Stone[†]

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: 1. 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.

[†] *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 overcolored 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 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 panacaea. 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

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