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Book Review: Selected Writings of Benjamin Nathan Cardozo

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REVIEWS


Here under a single cover are the extra-judicial writings of our great philosopher-judge. For the most part this book is made up of well-known materials, including the famous lectures on the judicial process and the witty and gracious talks on law, literature, opinion writing, the new jurisprudence, the "game of the law and its prizes," and the "comradeship of the bar." But there are some new materials of interest: lecture notes from Professor Nicholas Murray Butler's psychology class; a student essay on The Moral Element in Matthew Arnold, suggesting one shaping source for the Justice's beautiful and lucid prose; and a Columbia Commencement Oration on The Altruist in Politics. The last, delivered in 1889, was a vigorous condemnation "alike of communism and of socialism that they thwart the instinct of expansion" or of individual energy and human personality for the "blind, mechanical power of the State" and suggests some intriguing comparisons between these early views and the Justice's later constitutional opinions. Chief Judge Lehman, a close personal friend, contributes a warm and appreciative memorial. And Professor Patterson, fittingly the first Cardozo Professor of Jurisprudence at Columbia, has a foreword which is an admirable short introduction to Cardozo's juristic philosophy.¹

As a collection of selected writings this volume leaves little to be desired. Set out in clear and attractive type, with a satisfactory index and an admirable bibliography of writings both by and about the Justice—the latter in number and caliber strikingly attesting his philosophical and judicial eminence—this is a book to serve as an evening companion, as well as a permanent authority of legal reference. I must confess to a slight nostalgia for the delightful little books containing the original essays. Those seemed so distinctively in keeping with their gentle and modest author, but, nevertheless, bore testimony to their notable material success in the notations of a thirteenth printing for The Nature of the Judicial Process and an eighth for The Growth of the Law. Also—and I realize how purely personal is this objection—I miss the footnotes at the foot of the page and dislike to have to flush them from their hiding places in the interstices between chapters. Of course, I appreciate the shamefaced approach to footnoting shared generally by nonlegal editors and publishers. But here, as always, Cardozo was restrained and modest; and, as the original editions show, his concise citations were not such as to deface the printed page. Yet these are wholly in-

¹ More fully developed in his longer monograph, Cardozo's Philosophy of Law, 88 U. of Pa. L. Rev. 71, 156 (1939).
significant complaints; the book deserves and will surely have a wide distribution.

In re-reading the essays on the judicial process, I am impressed with the freshness and vitality of his approach and how modern it actually is. Notwithstanding law's stock in trade of hoary antiquities in the shape of both precedents and texts, much of judicial writing, particularly of judicial philosophy, is quite ephemeral. A judge's philosophy often does not survive the particular events which gave it birth and shaped its form. We may well recall the cynic's view that longevity is the one essential attribute for judicial greatness. But with occasional exceptions the very temporary quality of judicial thinking has its uses. The dead hand of the law is heavy enough as it is; our recurring constitutional crises have borne witness to that fact. One of the surprising facts of contemporary jurisprudence is the amazing recrudescence of interest in Holmes, not only as hero—where his fame has long been secure—but as villain, the representative of law as only crude force, the seducer of the law schools, which, in turn, betrayed the Court. 

How the old Roman's eyes would have sparkled at that aspect of posthumous fame! But while Cardozo cannot aspire to quite that kind of lasting regard, his own claim to permanent recognition is well buttressed.

It is true that Cardozo, in his brief career on the highest court, consciously followed the Holmes tradition in helping to free welfare legislation from the shackles of constitutionalism. Here his function was to be a follower. His own original contributions were elsewhere, first, as a great common-law judge, and, second, as a unique expositor of the ways of judges. He came to the work of the Court of Appeals in New York by designation of the Governor in 1914 after only a month's service in the trial court. This quick recognition of his outstanding qualities was soon justified through the high quality of his appellate work. A decision at once scholarly and pathbreaking in 1917 on pre-existing duty as consideration for a contract won an approving review from Professor Corbin, who recommended his appointment as Storrs Lecturer at Yale. As Professor Corbin has written, this invitation he "hesitatingly accepted," but the lectures as orally delivered in 1921 "were a triumph," and as subsequently printed "have become a classic." 


3. This bit of history appears in Corbin, Mr. Justice Cardozo and the Law of Contracts, one of the notable essays in the joint tribute of three universities in January, 1939, 39 Col. L. Rev. 56, 64, 52 Harv. L. Rev. 408, 416, 48 Yale L. J. 426, 434. The case was De Cicco v. Schweizer, 221 N. Y. 431, 117 N. E. 807 (1917), reviewed in Corbin, Does A Pre-existing Duty Defeat Consideration?—Recent Noteworthy Decisions, 27 Yale L. J. 362 (1918). For the contemporary reaction to the lectures, see also my Cardozo Lecture, State Law in the Federal Courts: The Brooding Omniscence of Eric v. Tompkins, 55 Yale L. J. 267 (1946).
quarter of a century The Nature of the Judicial Process still remains as the best analysis we have of the judge at work.

It is hard for us now to realize just how "daring" 4 was the task Cardozo so successfully undertook, for the custom of confessions by judges had not then become general. Previously there had been no attempt by an American judge to develop a detailed and consistent philosophy of the process of judicial adjudication. Cardozo's statement came before the days of the judicial "hunch," indeed of "gastronomical jurisprudence" or what he himself has called "the cardiac promptings of the moment, the visceral reactions of one judge or another." 5 But both in what he says as to the freedom of judicial action and as to the restraints which circumscribe a judge, his views are an unusual combination of balance and restraint, with originality and freedom of judicial action. His later lectures, those on The Growth of the Law, at Yale, and on The Paradoxes of Legal Science, at Columbia, supplement his first development of the subject, but hardly match the simple but frank exposition of the judicial way of life to be found in the earlier lectures.

This is not the place for, nor, in view of what has already been written, is there need of, another revaluation of the lectures. But I desire to refer to one matter Cardozo always emphasized, which has particular pertinence and interest in the light of contemporary views. What I have chosen to stress are not his contributions to freedom of judicial decision, but the limitations on that freedom which he continuously asserted. My choice is itself a tribute to the rapidity with which the climate of juristic thought changes. When the original lectures were given, interest centered in the last of his four methods of judicial decision, that of sociology, or, as he stated it, with the directive force of the process exerted along "the lines of justice, morals and social welfare, the mores of the day." 6 That was the exciting new development of those days. Justice Cardozo himself manfully carried this approach from the cloisters of the classroom into the sanctuary of judicial decision itself. Indeed his third lecture was boldly entitled The Judge As A Legislator, while his fourth even quoted the profanations of Theodore Roosevelt that "the chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority." 7 But time moves on; and now I am at pains to point out not the exuberance of, but rather the restraints incorporated into, his analysis.

It will be recalled that his other methods were those of philosophy, i.e., analogy; of evolution, i.e., historical development; and of tradition, i.e., the customs of the community. These were not sharply delimited. As Professor Patterson has so well pointed out, their lines tended to blur and intermingle. Then, too, the descriptive titles are not altogether helpful; thus one might

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4. The adjective is Judge Burch's in his review in 31 Yale L. J. 677 (1922).
5. In his address on Jurisprudence before the New York State Bar Association in 1932, p. 15 of this edition.
not immediately recognize the analysis of precedents as the method of "philosophy." Nor were the four methods real co-ordinates, resorted to in equal parts or in strict alternation by the judge. Moreover, although the purpose is to describe how the judge himself approaches the task of decision, the analysis is often that of the philosopher describing what has taken place in the juristic mind. It is obvious, however, that he intended to keep his analysis fluid and tentative; and his last lecture properly stresses the "subconscious element" in the process. I agree with Professor Patterson that "one can quarrel with Cardozo's terminology and one can be baffled by his diffuseness in detail but one can see in the large what he was trying to get at." 8

Hence over and over we find Cardozo stressing the recurring and humdrum nature of much of the judge's activities. Only rarely does a truly great case come along to justify real exercise of the judicial wings. In a later lecture he goes so far as to say that "nine-tenths, perhaps more, of the cases that come before a court are predetermined . . . their fate pre-established by inevitable laws that follow them from birth to death." 9 This figure is deemed too high by Professor Patterson. But I think the fault is in a bit of hyperbole in statement and that he was still intending to emphasize the process of judgment, not the potential result to the individual litigant. In his first lectures he stated his thought more completely. Here he said that of the cases in his (appellate) court, "a majority, I think, could not, with semblance of reason, be decided in any way but one . . . In another and considerable percentage, the rule of law is certain, and the application [through a maze of facts] alone doubtful." While these may often "provoke difference of opinion among judges," "jurisprudence remains untouched, however, regardless of the outcome." Only in a comparatively small number of cases does the creative element in the judicial process find its "opportunity and power," "where a decision one way or the other will count for the future" or "advance or retard, sometimes much, sometimes little, the development of the law." 10

I am quite sure that this in general is a fair picture of the work of appellate courts and that, if anything, the Justice understates the number of truly original cases. Of course, a judge by study and thought and by careful choice of expression may lift a case out of the merely dull and casual run; but even if he makes it a thing of professional joy or beauty, it is still a lawyer's guide, rather than an original expression of community mores. Perhaps it is better so. Otherwise in some of our courts decision would have to be long postponed while the judges tried to reconcile their views of public policy! It was a quite special constitutional problem which brought forth the Brandeis brief; whether or not it may again become necessary, its use is not as a divining rod for the ordinary case. As for the trial court, the proportion of the

8. Patterson, supra note 1, at 165.
humdrum is substantially greater. There of course the problem of ascertaining the facts and reconciling them with the assumed principles is more immediately pressing—and perhaps often more exciting. But it does not admit of more, or even of as much, of the creative element to which Cardozo had reference.

This leads me to the first of Cardozo's methods and what he has to say about it. He puts first the rule of analogy, but says that in doing so he does not rate it as the most important, that, on the contrary, it is often sacrificed to others, but comes first because it has 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." 11 This puts it exactly. True, the revulsion from the undue worship of precedents in the past was quite sound and desirable. Indeed even now a judge too often tends to conceal his real decision by making an abstraction of a mere rule of procedure or otherwise assuming the existence of some completely binding authority. Such evasions of individual judicial responsibility in adjudication may well be condemned and criticized whenever they appear. 12 But as a method of adjudication, we still start off, if indeed we do not end, with a lawyerlike analysis and reconciliation of the authorities.

Now, after all these years, this may seem like quite an anticlimax. Perhaps it is; but to avoid being misunderstood, I shall restate just what I have in mind. I definitely am not saying that these precedents must be examined because they will lead mechanically or even "inevitably" to a decision for one party or another. As we have seen, Cardozo did not mean that; in his survey there was a considerable group of cases where the judges might dispute as to the actual result. I say only that these other precedents give us in the main the stuff from which our decisions are wrought. True, there are a considerable number of cases where analysis—if not manipulation—of the facts takes the leading role in the process; while in others statutory interpretation, involving modern techniques of balancing bits of legislative history, holds sway. But even here the thinking of other judges, stimulated by other lawyers, or by law professors or other text writers in their critical case reviews, is likely to have a prominent part.

I hope it is clear that I do not urge that this should be the over-all situation. As a matter of fact, during many years of teaching, I looked for and thought I observed signs of a broadening of the stuff of decisions. And I think a lack of means, time, and even of interest has prevented developments which might have been, or may still be, of great potential value. 13 I am

11. Note 6 supra.
13. Thus note that most promising attempt at cultivation of the area common to jurisprudence and psychology, Robinson, Law and the Lawyers (1935) passim, and par-
merely trying to describe the process as I find it. In my judicial experience, two reactions are more vivid than the rest. One is the willingness of so many counsel to go before the courts, even appellate courts, with so little preparation and so great trust in the judges to do what we have been led by precept to regard as the prime task of the lawyers. And the other is how, for all of us on the bench, whatever our prior background—professorial or professional alike—a case, however drab, takes on life in the light of what other courts have thought about the same or similar problems. However it may be in the juridical millenium, at the present time the study of precedents, far from making justice mechanical, gives it what breadth, depth, and sophistication of approach it now has. As proof I suggest a comparison of a case where a judge talks only in terms of his own more or less vague concepts of justice in the abstract, and one where the result is reached only after a careful survey of the prevalent thinking, legal and nonlegal, so far as he can find it, upon the matters in issue.

All this is hardly new. I stress it only for the purpose of pointing a moral or two. One might concern the preparation of trials and appeals by counsel; but perhaps a judge should not venture into fields so much the prerogative of the bar. Moreover, some experience leads me to doubt the value of judicial admonition in the premises. But I am bold enough to venture some suggestions involving the law schools and legal education in general.

First is the conclusion that the job of the schools, in the climate of actual professional activity, is being done much better than the present chorus of criticism would indicate. It remains true that the best work in the trial and appellate courts comes from the product of the modern law school. Much is made of the lack of experience of these men, the failure of the schools to attempt more legal clinics, their neglect to bring their students into the courts—in short their lack of attention or even due reverence to the journeymen’s tricks of the trade. Such suggestions, urged as practical, seem to me in the highest degree impractical; as has been well said, we should need to enter our sons at five years of age in a reorganization course to watch a complete proceeding! I believe that any judge would say from experience that a client’s fate is safer with a youngster who has successfully surmounted the severe testing of the good schools than an oldster whose experience has taught him little beyond the obvious. Naturally better than either is the lawyer who combines capacity and training with experience. That combi-
tion, however, tends to be found less and less in the courtroom as our economy has developed. I had the explanation recently when I asked one able former student why he did not appear more frequently in our court. His answer was, "To tell the truth, I can't afford it. My time is too valuable in my office to waste it in going before you fellows." Alas that the richest rewards of our profession are not to be achieved in the courtroom; but wherever they are, even occasionally in public life, there will be found, successful and competent, the man who has gone through this supposedly esoteric training.

But a succeeding thought is that that very success carries its own responsibilities and incentives for increased effort for the schools. It is obvious that if judges and lawyers are ever to get out of their respective ruts, it is the law schools which will provide the inspiration and the motive power. Beyond the fertilizing force of the views of other courts, which I have referred to above, is the stimulus of the legal texts and reviews, now increasingly recognized in the opinions. It is not long before some new view by a law teacher finds lodgment in an opinion; and not unusually a whole current of legal authority is reversed upon the persuasion of a single law review article. Further, the law I am discussing, and which was Cardozo's immediate interest, is judge's law. That in all likelihood will occupy less and less of the law teacher's field. Other processes, legislative, administrative, those of world assemblies and courts, are more and more within his province. Let us have more of soul-searchings by the professors; while their accomplishments are greater than they now appear to believe, their intellectual qualms and strivings will sooner or later enrich the judicial process. So I can do no better than emulate Cardozo in his plaudits for the schools. For he was among the first in his decisions to show a complete awareness of the impact of scholarly thinking upon the problems which came before his court. And his lectures explicitly and implicitly bear tribute to the persuasive and pervasive force of the writing emanating from the law schools. It is small wonder that he became almost at once the darling of the schools, which urged his appointment to the highest court a full decade before the event actually occurred.

Of course no reference, however fleeting, to Cardozo's writings can properly be made without mention of the beauty and force of his prose style. Had he not been able to express himself in "glowing, sententious prose," to use Professor Patterson's apt expression, much of the force of his message would have been lost. I need not attempt to gild the lily, but I will refer to one attribute which I have seen little mentioned, his touches of delicate wit and humor, so unlike a judge. This often appeared in his many expressions of modest self-deprecation. Thus at the close of one address he says, "Like Socrates and other bores, I have earned the draft of hemlock if you choose to pass the cup."  

On another occasion, when he had been chosen for the honor of a dinner and resulting address, he expressed his puzzlement why

at that particular stage of his life's journey he should have been selected and thought of the explanation given by Lord Salisbury, as English premier, for appointing Mr. Alfred Austin poet laureate in succession to Lord Tennyson: "I don't think anybody else applied for the post." Then he went on to disclaim even that modicum of fitness shown by Mr. Austin. At times this could be coupled with a fine sense of irony. What more complete demolition of a majority outburst likening "with denunciatory fervor" an SEC investigation to the Star Chamber of the Stuarts could be found than his classic response, "Historians may find hyperbole in the sanguinary simile."  

One more suggestion and I am done. A standard criticism of modern realists is their supposed repudiation of all moral values and their refusal to acknowledge the force of ethical principles and the higher law. We need not stop here to comment upon the interesting dialectical inversion whereby a movement most prominently identified with warmhearted support of welfare legislation, i.e., increased aid and sustenance for the poor and the unfortunate, should be found thus wanting in moral qualities. We may note, however, that at least as to Cardozo, who both "preached" and "practiced" the same doctrine "in a modest way,"  this charge cannot be maintained. For he continuously stressed, in his opinions and in his lectures, the shaping force of the moral values of life.  His addresses contain some of the most felicitous expression of a lofty morality to be found in any professional writing. The first address of this book, entitled Values, or The Choice of Tycho Brahe, tells poetically of a scholar's choice of service and sacrifice in place of fame and position. I need not stress this; all who had the rare privilege of knowing him attested to his high sense of devotion and dedication. His sincerity was patent. An impulse to quote is here strong; I shall limit myself to a single one. This was his reaction to the "fitness and beauty and impressiveness" of the grand jurors' oath going back to the day of the Saxon kings: "Like the tones of a mighty bell, these echoing notes of adjuration bring back our straying thoughts to sanctity and service. I cannot listen to them without a thrill. Here . . . imperishably preserved amid the grime and dust of centuries, the word has been proclaimed, to steady us when we

15. P. 99.
18. Thus see his fourth and fifth lectures—"The Function and the Ends of Law"—in The Growth of the Law, and several of his lectures in The Paradoxes of Legal Science, viz., "The Meaning of Justice—The Science of Values," "The Individual and Society," "Liberty and Government," also discussion by Professor Patterson, supra note 1. For his judicial decisions, see the careful analyses by various writers in the memorial number of the Columbia and Harvard Law Reviews and the Yale Law Journal cited note 3 supra; and see also SHIENAG, MOULDERS OF LEGAL THOUGHT 1-98 (1943); LEVY, CARDozo AND FRONTIERS OF LEGAL THINKING (1938).
19. This, the Commencement Address at the Jewish Institute of Religion (1931), we are told, was requested by hundreds of men in the Armed Forces during World War II.
seem to falter, to strengthen us when we seem to weaken, to tell us that with all the failings and backslidings, with all the fears and all the prejudice, the spirit is still pure.”

CHARLES E. CLARK ♦


The recent growth of centers devoted to research in labor relations should be viewed as a Good Thing: the alluring prospect of an integrated social science glows, like the Grail, ahead.1 Anthropologists, economists, psychologists and sociologists have gathered together to gain knowledge of the interaction of human beings and human institutions within an industrial framework. And their quest is worthy: they examine a segment of society whose daily decisions affect the whole community; they explore an enduring relation which exists no matter in whose hands the ownership of tools.

Their program entails an initial act of faith. Like all who seek a science of society, they must assume that they deal with material composed of a finite number of variables, that the human mind is capable of manipulating an enormous, reticulated set of factors, that adequate machinery for unearthing knowledge of those factors exists, and that the content of each factor remains fairly stable during the awesomely lengthy and tedious accretion of knowledge. These are large assumptions and their adoption cows more than the craven. But refusal to adopt them means giving up the battle—and, indeed, real proof of their invalidity can come only after the assumptions are made and the adventure attempted.2

The search itself raises the further problem of selectivity: faced with the close-knit fabric of going institutions one must decide what to study. Here

20. Address to the graduating class of St. John's University Law School in 1928, Our Lady of the Common Law, 13 St. John's L. Rev. 231 (1939); p. 95 herein.
♦ Circuit Judge, United States Circuit Court of Appeals, Second Circuit.

1. And more than prospective is the immediate practical value derived from forums in which labor and management leaders can gain understanding of the others' viewpoint.
2. The live practical issue is how verifiable social data is to be gathered with a minimum expenditure of time and personnel. To date we seem to have progressed little further than the questionnaire and the interview: the data presented is doubly subjective, being conditioned by its sources as well as by the investigator. And formation of a theory correlating subjective reaction with pure phenomena seems futile, for it cannot be validated until the phenomena can be observed. It is, therefore, in the field of techniques that developments must come. Until then, the social scientist works with feeble tools which may perhaps be barely efficient in terms of time expenditure but which raise doubts as to the assumption of "adequate machinery"; and until then an unverifiable assumption of objective-subjective correlation must be made.