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# CARDOZO'S JUDICIAL DECISION-MAKING WITH SPECIAL REFERENCE TO HIS THIRD LECTURE, "THE JUDGE AS A LEGISLATOR"

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"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness."

-Benjamin N. Cardozo<sup>1</sup>

## I. Introduction

Cardozo is interested in how the outlooks on life affect the way judges make decisions. A judge must always use an objective standard of right and wrong and must rule within his limits, always adhering to precedence in the absence of a detriment to social welfare. Philosophy, history, tradition, and sociology all are forces which inform a judicial decision, although a judicial decision must be based upon the mores of the community at the present time. A judge sometimes acts as a legislator when he fills in the gaps in the laws. A judge must act in good conscience and reason, and maintain law and morals.

Benjamin N. Cardozo, one of the most influential American jurists of the 20th century, is renowned for his contributions to the development of American common law. His series of lectures, later published as *The Nature of the Judicial Process*, offers deep insights into his judicial philosophy. In his third lecture, "The Judge as a Legislator," Cardozo explores the creative role of judges in shaping the law, highlighting the balance between adhering to precedent and adapting the law to meet contemporary needs. Judges also employ *stare decisis* and apply precedent when looking to common law. The common law derives generalizations from particulars and these decisions should be treated as "working hypotheses" and not "final truths." These rules are retested and reformulated gradually over time, so a seemingly unimportant change may indeed be larger in magnitude down the line. The directive force of a principle may be exerted along the method of philosophy (logical progression), the method of

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<sup>1</sup> This quote from Cardozo reflects his belief that while judges have a creative role, they are still bound by the constraints of the law and must act with restraint.

evolution (line of historical development), the method of tradition (line of the customs of the community), and the method of sociology (the lines of justice, morals and social welfare). Either way, it is important to maintain uniformity in the courts and to exclude chance and favor<sup>2</sup>.

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. Leathern*,<sup>3</sup> "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."<sup>4</sup>

## II. The Methods of History, Tradition and Sociology

A principle expanded to the limit of logic may be counteracted by its tendency to confine itself within the limits of history, thus stressing the importance of the method of history. Often times, history makes the path of logic clear. Some conceptions of the law exist in their current form solely because of history and are not to be understood except as "historical growths." History illuminates the past, and in doing so illuminates the present, and in illuminating the present, illuminates the future. Sometimes conceptions of law are unintelligible or arbitrary when they are separated from their past form and meaning.

In order for these to be logical, one must consider their origins. The method of tradition, or customs, means less today than it did before. We look to custom for the tests and standards that determine how established rules are applied, and we don't look to it so much for the creation of new rules. "Life casts the mounds of conduct, which will someday become fixed as law. Law preserves the mounds, which have taken form and shape from life." Sometimes the method of sociology must be used when social needs demand a decision that calls for sacrificing history or custom.

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<sup>2</sup> Adrianna Phillips, Benjamin Nathan Cardozo: The Nature of the Judicial Process, POEC 6379, February 11, 2010

<sup>3</sup> 1901, A. C. 495, 506

<sup>4</sup> 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."

“The final cause of law is the welfare of society,” and a rule must justify its existence. The welfare of society must fix the path, direction, and distance of an existing rule that is to be extended or restricted. The method of sociology fills in the gaps and we apply it when we pursue logic, coherence, and consistency as the greater social values.

Statutes should not be viewed in a vacuum and abstract conceptions, like liberty and equality, should be placed in the context of the contemporary conditions. Statutes are designed to meet the exigencies of the current time, while the constitution should be designed to last into the future. Standards should be objective, and should consider what one thing another man of normal intellect and conscience would deem right<sup>5</sup>.

### III. Overview of Cardozo’s Judicial Philosophy

#### **Legal Maxim: "Lex non a rege est violanda"**

*Translation:* The law must not be violated even by the king.

*Application:* This maxim can be connected to Cardozo’s respect for legal precedent and the importance of upholding the law, even while recognizing the judge's role in interpreting and sometimes extending it.

Cardozo’s judicial philosophy is often described as a blend of legal formalism and realism. He recognized the importance of legal precedents in ensuring consistency and predictability in the law. However, he also acknowledged that judges must sometimes go beyond precedent to adapt the law to changing social and economic conditions.

- **Legal Formalism vs. Realism:** While Cardozo respected the traditional principles of legal formalism; he was also a pragmatist who understood that the law must evolve to remain relevant. This approach allowed him to navigate the tension between following established legal norms and making decisions that reflect contemporary societal values.<sup>6</sup>
- **Role of Precedent:** Cardozo believed that while precedent should guide judicial decision-making, it should not bind judges to outdated interpretations of the law. He

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<sup>5</sup> Ibid

<sup>6</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921).

argued that judges must exercise discretion when applying precedents to new and unforeseen cases, allowing the law to develop organically over time.<sup>7</sup>

#### IV. Analysis of "The Judge as a Legislator"

In his third lecture, Cardozo delves into the idea that judges, through their decisions, effectively legislate from the bench. He argues that judges must interpret statutes and legal principles in a way that serves the broader purposes of justice, even if this means extending or modifying the law.

- **Judicial Creativity:** Cardozo acknowledges that judges cannot avoid making law. When faced with ambiguous statutes or conflicting precedents, judges must use their discretion to craft rulings that serve the interests of justice.<sup>8</sup>
- **Balancing Act:** According to Cardozo, judges must balance their creative role with the need to respect legislative intent and existing legal frameworks. This balance ensures that judicial decision-making remains grounded in the law while allowing for necessary adaptations.<sup>9</sup>

#### V. Case Studies Illustrating Cardozo's Judicial Decision-Making

Cardozo's judicial philosophy is best understood through his decisions in key cases, where his approach to the law as both a guide and a living instrument is evident.

- **Palsgraf v. Long Island Railroad Co.:** In this landmark case, Cardozo's opinion emphasized the limits of liability in tort law, effectively legislating new principles of proximate cause. His ruling balanced the need for a predictable legal standard with a consideration of fairness and justice.<sup>10</sup>
- **MacPherson v. Buick Motor Co.:** Cardozo expanded the concept of product liability in this case, demonstrating his willingness to adapt legal principles to the realities of industrial society. His decision marked a significant shift in the understanding of

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<sup>7</sup> Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown and Company 1960).

<sup>8</sup> Cardozo, *The Nature of the Judicial Process*, at 113-14.

<sup>9</sup> Roscoe Pound, "Cardozo and the Development of American Law," 44 *Harv. L. Rev.* 1 (1930).

<sup>10</sup> *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

manufacturer liability, reflecting his belief that the law must evolve in response to societal changes.<sup>11</sup>

## VI. Critiques and Impact

Cardozo's approach to judicial decision-making has been both praised and criticized. Some legal scholars admire his ability to balance legal tradition with the need for innovation, while others argue that his willingness to "legislate from the bench" undermines the separation of powers.

- **Criticism:** Critics argue that Cardozo's approach gives too much power to judges, allowing them to impose their own values on the law. This, they claim, can lead to unpredictability and a lack of consistency in legal rulings.<sup>12</sup>
- **Impact on American Law:** Despite these criticisms, Cardozo's influence on American jurisprudence is undeniable. His decisions continue to be cited in courtrooms across the country, and his lectures remain a foundational text for understanding the role of judges in the legal system.<sup>13</sup>

## VII. Adherence to Precedent. The Subconscious Element in the Judicial Process. Conclusion.

When a situation arises where precedent and custom fail, "there is nothing to do except to have some impartial arbiter declare what fair and reasonable men, mindful of the habits of life of the community, and of the standards of justice and fair dealing prevalent among them, ought in such circumstances to do, with no rules except those of custom and conscience to regulate their conduct." It is assumed that the decision reached from this method would not differ if the rule had been established before the situation arose. Law does not consider every conceivable situation and adjust itself accordingly—it is not perfect. Also, laws may change and cases may be overruled, but this is a risk that must be taken for those who rely on court decisions. The adherence to precedent is very important. It should not be so rigid that a judge is hesitant to disavow a rule which is detrimental to the social welfare, but it should not be so flexible that a judge may rely upon precedent at his own will. In most cases, the controversy turns upon the law's application to the facts, where the judicial process consists of "search and

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<sup>11</sup> MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>12</sup> Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press 1990).

<sup>13</sup> Richard A. Posner, *The Essential Cardozo* (The University of Chicago Press 1999).

comparison.” However, sometimes there is a small amount of cases where the decision will make a difference in the future of the law. These are the cases to which Cardozo is primarily referring to in this work. The eccentricities of judges and their differing outlooks on life balance out because the good law continues and the errors in law will always erode away<sup>14</sup>.

### **VIII. Conclusion**

Llewellyn, and other legal thinkers, to embrace unquestioningly a faith in legal objectivity. It seems fitting, therefore, to close by quoting Cardozo once again: "As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born." That profound truth apparently must be relearned, even by scholars as well as judges, again and again<sup>15</sup>.

Cardozo's exploration of the role of judges as legislators offers a nuanced understanding of judicial decision-making. His recognition of the creative role of judges in shaping the law, balanced with a respect for precedent, has had a lasting impact on American legal thought. While his approach has its critics, it also highlights the dynamic nature of the law and the essential role of the judiciary in ensuring that legal principles remain relevant in a changing society.

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<sup>14</sup> Adrianna Phillips, Benjamin Nathan Cardozo: The Nature of the Judicial Process, POEC 6379, February 11, 2010

<sup>15</sup> Cardozo, The nature of the judicial process at (166-67),1921.