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Mr. Justice Cardozo

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MR. JUSTICE CARDOZO

Thomas P. Hardman*

It has been said that the most important thing about a man is his philosophy.¹ And, generally speaking, that is true even as to the man in the street; it is particularly true as to the man on the bench though few whom we have elevated to the latter position have had the candor or courage to say so. It is refreshing therefore, as well as encouraging, to find that the newest member of the Supreme Court not only comes to the bench with a well-rounded legal philosophy and a profound knowledge of the judicial process but with a candor unique in American legal thought and a felicity of expression that almost outruns the inimitable literary style of Mr. Justice Holmes. Mr. Justice Cardozo succeeds Mr. Justice Holmes in more senses than one.

To those who challenge the thesis of this comment on the ground that philosophy is something too theoretical, something raised too high above the ground, to be of practical interest to the lawyer or judge, Mr. Justice Cardozo has himself answered, em-

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¹ See James, Pragmatism (1907) 4: "The philosophy which is so important in each of us is not a technical matter; it is our more or less dumb sense of what life honestly and deeply means. It is only partly got from books; it is our individual way of just seeing and feeling the total push and pressure of the cosmos."

James (p. 3) quotes, with approval, the following language from the preface to Chesterton, Heretics: "There are some people—and I am one of them—who think that the most practical and important thing about a man is still his view of the universe. We think that for a landlady considering a lodger it is important to know his income, but still more important to know his philosophy. We think that for a general about to fight an enemy it is important to know the enemy's numbers, but still more important to know the enemy's philosophy."
phatically, that (in every doubtful lawsuit at least), though the philosophy applied may be veiled, ill co-ordinated and fragmentary, it is nevertheless "a philosophy" which "is in truth the final arbiter. It accepts one set of arguments, modifies another, rejects a third, standing ever in reserve as a court of ultimate appeal . . . . Neither lawyer nor judge, pressing forward along one line or retreating along another, is conscious at all times that it is philosophy which is impelling him to the front or driving him to the rear. None the less, the goal is there." [3]

It is not possible, of course, to spell out in full the legal philosophy of Mr. Justice Cardozo. And yet Cardozo, more than any other judge in modern times at least, has candidly given us a realistic picture of the more or less inarticulate forces which constitute his philosophy of life. In a telling paragraph of his lectures on the nature of the judicial process he gives us some notion of what he considers the most important thing in the judicial equipment, namely, that underlying philosophy of life which, as William James says, [4] every one has, "even those of us to whom the names and the notions of philosophy are unknown or anathema". [5] As to this Cardozo says: [6]

"There is in each of us a stream of tendency, whether you choose to call it philosophy or not," 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 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. In this mental background every problem finds its setting."

What then is "this mental background" in which the legal problems about to face Mr. Justice Cardozo will find their settings? In other words what, in addition to and in conjunction with precedents and legislation, are the forces which consciously or unconsciously will cause Mr. Justice Cardozo (and his brethren for that matter) to decide a given case this way or that?

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[3] Ibid.
[5] See James, op. cit. supra n. 1, at 3.
[7] Ibid.
[8] "Cf. N. M. Butler, 'Philosophy', pp. 18, 43." This reference is by Mr. Justice Cardozo.
Of course, many judges, lawyers and law teachers seem unwilling to admit that such "extra-legal" forces have any proper place in the judicial technique. To them the judicial process is apparently a sort of judicial slot-machine into which the courts put "the facts of the case", using a steam-roller sometimes when the "factual" realities do not fit readily into the chosen legal concept or other legal "slot", using force, if necessary, in order to pull out the "legal" result.

But to Mr. Justice Cardozo the judicial process is quite a different kind of thing. "What is it that I do when I decide a case?" asks the learned justice. "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 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."

Until Mr. Justice Cardozo propounded and answered these questions in a brilliant book published in 1921, the nature of the judicial process was largely a matter of non-judicial speculation. Of course, a court's opinion (when there is one) generally reveals part of the process, but there is always an unstated, and in part almost unstatable, residuum. And not the least of the services which Mr. Justice Cardozo has rendered to the science of law is his epoch-marking exposé of the realities in the judicial process. Others, of course, including Mr. Justice Holmes, were already waging war, realistically, against the socially undesirable results that were reached, now and again, by failure to consider the "extra-legal" facts and forces that throbbed and clamored for legal recognition. But it remained for Mr. Justice Cardozo, with his greater candor, to paint, in bold colors, the best realistic picture of the judicial technique.

A more or less detailed consideration of a rather typical decision by Mr. Justice Cardozo will suffice to point what is meant.

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7 Cf. Pound, Mechanical Jurisprudence (1908) 8 Col. L. Rev. 605.
8 Cardozo, op. cit. supra n. 4, at 10. Italics ours.
9 The Nature of the Judicial Process.
In 1921 the New York Court of Appeals had before it a case in which the material facts were these.

A boy was bathing in a river in which, since it was navigable, he had a right to be. While so bathing he climbed upon a springboard which projected from a right of way belonging to the defendant. As the boy stood there, over the water, electric wires, negligently maintained by the defendant, fell upon and injured the boy. The question presented was whether the defendant under the circumstances had breached any legal duty to the boy and was therefore liable in damages. Four judges, including Cardozo, were in favor of liability; three judges dissented. The opinion of the court, written by Cardozo, is one of the best examples in the books of what has recently come to be called the realistic approach. There was no precedent precisely in point and so counsel on each side fell back on analogies.

Being a bather in navigable waters the boy was like one on a public highway and therefore, being over the water, he had the same rights on the board as off, a right not to be injured negligently, was the essence of one analogical argument. But, contended the defendant, the boy, inasmuch as he was on a board which was attached to the defendant’s realty, was a trespasser. And, therefore, since the only legal duty owed to trespassers is a duty not to injure them wantonly or maliciously, there was no liability, as the injury was not caused wantonly or maliciously, only negligently.

Cardozo’s subsequent explanation of his decision is enlightening.

"'Now, the truth is,' he said, '"that, as a mere bit of dialectics, these analogies would bring a judge to an impasse. No process of merely logical deduction could determine the choice between them. Neither analogy is precise, though each is apposite. There had arisen a new situation which could not force itself without mutilation into any of the existing moulds. When we find a situation of this kind, the choice that will approve itself to this judge or to that, will be determined largely by his conception of the end of law, the function of legal liability; and this question of ends and functions is a question of philosophy.'"

This was said extra-judicially, of course, but even in the

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opinion itself Mr. Justice Cardozo painted a realistic picture of
the judicial process with an equally bold brush. He there said:"

"This case is a striking instance of the dangers of 'a
jurisprudence of conceptions' (Pound, Mechanical Juris-
prudence, 8 Columbia Law Review, 605, 608, 610), the ex-
tension of a maxim or a definition with relentless disregard
of consequences to 'a dryly logical extreme'. The approxi-
mate and relative become the definite and absolute. Land-
owners are not bound to regulate their conduct in contem-
plation of the presence of trespassers intruding upon private
structures. Landowners are bound to regulate their conduct
in contemplation of the presence of travelers upon the ad-
jacent public ways. There are times when there is little
trouble in marking off the field of exemption and immunity
from that of liability and duty. Here structures and ways
are so united and commingled, superimposed upon each other,
that the fields are brought together. In such circumstances,
there is little help in pursuing general maxims to ultimate
conclusions . . . . In one sense, and that a highly technical
and artificial one, the diver at the end of the springboard is
an intruder on the adjoining lands. In another sense, and
one that realists will accept more readily, he is still on public
waters in the exercise of public rights."

This quotation is strikingly Cardozian. No dichotomizing,
no nineteenth-century legal pigeon-holing here."

Thus, with Mr. Justice Cardozo, as with Mr. Justice Holmes,
"the life of the law has not been logic"," though with many of
their brethren the contrary is still true, at least so far as one may
judge from the language which they use. On this point Mr.
Justice Cardozo has stated, better than any one else, the place

34The writer does not mean to intimate that Cardozo never indulges, to
any degree, in what may be called dichotomizing. Nor does the writer wish
to be understood as intimating that dichotomizing of sorts is never defensible.
Some divisions in the field of law are of course necessary or at least use-
ful. What is objectionable, however, is an approach that recognizes, as it
were, only legal 'white' and legal 'black', being unable to see that fre-
quently there are intervening, gradually deepening shades of grey. Dichotomiz-
ing, in this restricted sense, is one of the major impediments in the path of
legal progress. And no one has done more than Cardozo to remove this im-
pediment. See particularly his NATURE OF THE JUDICIAL PROCESS, passim. See
35See HOLMES, THE COMMON LAW (1881) 1: "The life of the law has
not been logic: it has been experience. The felt necessities of the time, the
prevailing moral and political theories, intuitions of public policy, avowed or
unconscious, even the prejudices which judges share with their fellow-men,
have had a good deal more to do than the syllogism in determining the rules
by which men should be governed."
which logic properly occupies in the adjudication of cases. He says:  

"My analysis of the judicial process comes then to this, and 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 . . . . 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.

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

Ex facio jus oritur thus becomes one of the bases of Mr. Justice Cardozo's legal philosophy. The law must test the validity of its conclusions by something more than logic and formulas. "Hardly is the ink dry upon our formula", he says, "before the call of an unsuspected equity — the urge of a new group of facts, a new combination of events — bids us blur and blot and qualify and even, it may be, erase". With Cardozo, as with Holmes, the changing economic and social facts are to be considered along with precedents and formulas as forces which singly or in combination influence the judicial process.

But, like Holmes, Cardozo is ever on his guard against the dangers that lurk in philosophical extremes, the extremes, for example, of legal fundamentalism on the one hand and legal radicalism on the other. "We seek to find peace of mind in the word,

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36The Nature of the Judicial Process (1921) 112, 113.
the formula, the ritual. The hope is an illusion.”37 A liberal
without being a radical he aims to keep the judicial process be-
tween Scylla and Charybdis, as it were, between the literalism
that worships the written word and the nihilism that is subversive
of all order.38

Thus Mr. Justice Cardozo takes his place on the Supreme
Court as a liberal and a realist. This is important; for, as the
writer has recently pointed out in the pages of this periodical,39
the personnel of the Supreme Court (not including Cardozo) is
at present composed of four liberals (four realists)40 and four
who believe in the main in quite a different kind of approach to
legal problems, in quite a different kind of philosophy, a phil-
osophy approximating, at times, the “jurisprudence of concep-
tions” to which Cardozo referred in the above-quoted paragraph
from his opinion in the spring-board case, a philosophy which,
when precedents and adverse analogies are logically in the way,
leaves little scope for the conscious consideration of the extra-
legal forces which sometimes sway Cardozo and Holmes, and, in
varying degrees, Hughes and Brandeis and Stone and Roberts.41

But Cardozo, like Mr. Justice Holmes, has not always held
to such a philosophy. “Only late in life”, he tells us did he give
up what he has called his “blind faith” that “the courts would
follow” a precedent “to the limits of its logic. I learned by sad
experience that they failed, now and again, to come out where I
expected. I thought, however, in my simplicity, that they had
missed the road or carelessly misread the signposts; the divaga-
tions never had the aspect of willful adventures into the land of

467, particularly at 465, 466.
38 See, e. g., Cardozo’s opinion in Wood v. Lucy, Lady Duff-Gordon, 222
N. Y. 88, 118 N. E. 214 (1917).
39 See Hardman, Public Utilities I. The Quest for a Concept (1931) 37 W.
Va. L. Q. 250.
40 The writer does not intend to intimate that “a liberal” and “a realist”
are necessarily synonymous. Thus a judge may well be influenced by extra-
legal forces but in order to effect a conservative end. Nor is this an ap-
propriate place in which to elaborate. In the recent pages of this Quarterly,
in the article just referred to, the writer has dealt sufficiently with the
point.
41 No intimation is herein intended that “extra-legal” forces do not at
times sway some other members of the Supreme Court. All judges are con-
sciously or unconsciously influenced to some extent by such considerations,
Nor is any intimation intended that none of the other justices are ever
realists. It is largely a matter of degree. Any classification is more or
less arbitrary. “Most distinctions”, as Mr. Justice Holmes says, are distinc-
tions of degree “and are none the worse for it.” Haddock v. Had-
dock, 201 U. S. 562, 631, 26 S. Ct. 525, 553 (1906).
the unknown. The problem stood before me in a new light when I had to cope with it as judge."

In one of his most recent utterances Mr. Justice Cardozo gives us an appropriate bon mot with which to close. "The judicial process is one of compromise", he says, compromise between many things, between stability and progress, sacrificing precedents if need be, but only if need be, in the process of "translating into law the social and economic forces that throb and clamor for expression." Those who mourned the judicial passing of Holmes can take heart at such an utterance. To repeat, Mr. Justice Cardozo succeeds Mr. Justice Holmes in more senses than one. And if we may judge the future by the past, we may look forward with assurance to the further activities of Mr. Justice Cardozo in translating into law the changing social and economic forces that continue to throb and clamor for recognition and in giving to the legal profession a better set of tools with which to work.

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2 The Growth of the Law (1924) 56, 57.
3 This quotation is taken from a newspaper report of a recent public address by Mr. Justice Cardozo. However, the language, as reported, is so Cardozian as to demand inclusion.