CARDOZO'S PHILOSOPHY OF LAW

Part II *

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HIS CONCEPTION OF THE JUDICIAL FUNCTION

Cardozo's theories of law and of the judicial process are built around his conception of the judicial function. The separation of powers into executive, legislative and judicial determines basically the scope of his juristic theory. He did not discuss, as far as I know, the problems of justice and social adjustment through legislation. Even in his admirable plea for a ministry of justice [97] he was concerned only with the correction of anachronisms or the filling of gaps in the common law of judicial precedent. Such problems of social legislation as workmen's compensation, social security, unemployment relief and agricultural relief were not discussed in his extra-judicial writings, and even on the bench he had occasion to consider them only in the context of judicial review (constitutionality) which he conceived narrowly. He did not aspire to be a philosopher of the social order. He was a philosopher of law within the limits of the judicial function.[98]

Fortunately this was not as severe a limitation as it might have been, for his conception of the judicial function was broader and more radical than that of most of his predecessors, though more conservative than that of some of his contemporaries. He recognizes that courts do make law, in a sense; to say that they merely give effect to law has a lofty sound, but it is only a half truth.[99] Yet courts make law more often by gradual evolution than by revolution; [100] in this way the courts have for centuries developed the common law.[101] The court "legislates"

* The first installment of this article, containing footnotes 1 to 96, appeared in the November issue of the REVIEW. (1939) 88 U. OF PA. L. REV. 71. The following abbreviations are used in the footnotes of this article: "The Nature" for CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); "The Growth" for CARDOZO, THE GROWTH OF THE LAW (1924); "The Paradoxes" for CARDOZO, THE PARADOXES OF LEGAL SCIENCE (1928); "55 Reports" for 55 REPORTS OF NEW YORK STATE BAR ASSOCIATION (1932).

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97. Cardozo, *A Ministry of Justice* (1921) 35 HARV. L. REV. 113, reprinted in CARDOZO, LAW AND LITERATURE (1931) 41, and excerpted in HALL, READINGS IN JURISPRUDENCE (1938) 1132-1138.

98. THE NATURE at 113.

99. THE NATURE at 169, commenting on Marshall's dictum that the judicial department "has no will in any case . . . ." Osborne v. Bank of United States, 9 Wheat. 738, 866 (U. S. 1824).

100. *Id.* at 26-28.

101. *Id.* at 116-126.

subject to limitations both in scope and in method. The judge's "power of innovation" is insignificant when compared with "the bulk and pressure of the rules that hedge him on every side"; [102] in only a small percentage (about ten per cent) of the cases before an appellate court is the judge creative.[103] Here Cardozo is interpreting his judicial experience, and his testimony should not lightly be dismissed on the theory that legal rules are mere rationalizations after the decision has been reached. His insistence that a legal rule does have a kind of reality in advance of its embodiment in a given decision is essential to his conception of the judicial function. He feels, as a judge, the weight and pressure of the whole body of legal rules. To the limits set by rule and precedent he adds, as a restraint on judicial innovation, the customs of courts and the silent indefinable practices of generations of judges.[104] The judge comes to know the limits of the judicial function by the practice of the art of judging.[105]

There are other limitations on judicial law-making. Traditionally, the law of the judicial decision is not merely prospective, but is also retrospective, in operation. It will determine the legal consequences of acts done and transactions made before the decision and its rules were enunciated, and may thus frustrate the plans and expectations of those who have acted in reliance upon the discarded legal rule. In this respect judicial law-making differs from legislation, in respect to which non-retroactivity is presumed even in cases where it is not required by constitutional law. The court in overruling a precedent, in discussing a rule, has to consider the consequences which the step will have upon things previously done. The judicial function is limited by a teleological norm.

Cardozo was sensitive to the retrospective effects of judge-made law. An illustration is his defense of *Crowley v. Lewis*,[106] where he concurred in the refusal to abrogate the old rule that an undisclosed principal is not bound by a sealed instrument executed by his agent. He refers to the practice, in New York, whereby a man took title in the name of a "dummy", who executed in his own name a bond and mortgage of the premises. The mortgagee did not get the personal security of the true owner; the sealed instrument was a device for limiting liability. To abolish the old rule would give such mortgagees better security than they expected to get, and would impose on landowners liabilities which they never expected to assume. By legislation the archaic

102. *Id.* at 136-137.
103. *Id.* at 165; THE GROWTH at 60.
104. THE NATURE at 103.
105. *Id.* at 114.
106. 239 N. Y. 264, 146 N. E. 374 (1925); and comment in THE PARADOXES at 70-71. He gives another example in 55 REPORTS 295.

rule could be swept away for future transactions only. This is the kind of law-making for which he advocated a Ministry of Justice,[107] to discover such anachronisms and to correct them by well-drawn legislation.

But the norm of retrospective consequences is to be applied with discrimination. Not every set of people affected by a rule of law is as law-conscious as are mortgagors and mortgagees. Overruling should be confined to precedents which have not determined conduct,[108] and outside the field of real property [109] there are not many such rules.[110] A judicial innovation that a manufacturer is liable in tort to the ultimate purchaser of a motor vehicle is not likely to upset expectations, since neither manufacturer nor purchaser may be supposed to have relied upon the old (and now generally discredited) doctrine of "privity".[111] The court must draw upon the experiences of its members in determining what overrulings will work havoc with expectations still dependent upon the discarded doctrine.

A similar problem of retrospective operation arises when a court of last resort declares unconstitutional a statute in reliance upon which acts have been done. Cardozo seems unduly complacent about the consequences of such decisions. "Most courts", he says, "in a spirit of realism have held that the operation of the statute has been suspended in the interval." [112] No doubt in many cases the result which he approved has been attained, by direct or indirect means. Yet courts have not infrequently denied recognition to such expectations, in applying the doctrine of mistake of law or illegality,[113] or on the theory that courts, in overruling precedents, merely discover what the law was all along.[114] Cardozo returned to the problem of retroactive decisions on two subsequent occasions. On the eve of his appointment to the Supreme Court he recognized, as within the scope of the judicial function, the procedure by which a court applies the doctrine of its previous precedents to the case before it and at the same time announces that it will apply a different rule to acts or transactions occurring after the pronouncement.[115] As a Justice of that court he shortly afterward wrote the opinion of the

107. See note 97 *supra*.
108. THE NATURE at 151.
109. THE GROWTH at 121.
110. "My impression is that the instances of honest reliance and genuine disappointment are rarer than they are commonly supposed to be by those who exalt the virtues of stability and certainty." 55 REPORTS at 295.
111. THE NATURE at 146, discussing MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916).
112. THE NATURE at 147, and authorities cited in note 4.
113. Troy, Adm'r v. Bland, 58 Ala. 197 (1877) (legal tender cases); Doll v. Earle, 59 N. Y. 638 (1874); Flower v. Lance, 59 N. Y. 603 (1875); *cf.* Lund v. Bruflat, 159 Wash. 89, 292 Pac. 112 (1930).
114. *See* Fleming v. Fleming, 264 U. S. 29, 31 (1924), *aff'g* 194 Iowa 71, 184 N. W. 296 (1921). A decision declaring a statute unconstitutional has similar effects. *See* FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE (1935).
115. 55 REPORTS at 296-298.

court which upheld the use of this procedure by a state supreme court, as not violative of constitutional guaranties.[116] He conceived of the judicial function as capable of expansion.

Another limitation on the judicial function which Cardozo touched upon,[117] and of which he was aware, is that a court cannot make detailed rules for the implementation and administration of general principles. However much dissatisfied a court might be with the doctrine that the employer's liability is based upon fault, it could not, within the scope of the judicial function, substitute a workmen's compensation law with its fixed schedule of compensations. Judicial doctrine must be "reasonable"; it is not "reasonable" to declare that an employee shall receive exactly one-half of his wages during a prescribed period, except in the sense that it is reasonable to make the law exact in order to make it workable. Such exactitude is within the province of the legislature, not the judiciary.

What, then, of judicial freedom of decision? Cardozo was preoccupied with this question in most of his juristic writings. He felt that the judge does and properly may fall back upon his intuitions of rightness and wrongness; yet the sentiment of justice, he says, is not a substitute for law but only one of the "tests and touchstones" to be used in construing or extending law.[118] He finds that Saleilles exaggerates the element of free volition when he lays down as a principle of all juridical construction that one wills the conclusion first and one finds the principle afterward.[119] Yet within the small percentage of cases which involve the creative element,[120] he agrees with Theodore Roosevelt's statement, in his message to Congress in 1908, that "the decisions of courts upon economic and social questions depend upon their economic and social philosophy." [121] Perhaps Cardozo underestimated the creative element in judicial decision, perhaps the cases in which the judge's sentiment of justice, or his social philosophy, is a signficant factor, are relatively more numerous than he has stated. Or perhaps he meant by creative only those decisions overruling precedents or asserting novel doctrine, which he is fond of using by way of illustration. Even for the "ordinary" variety of appellate decision, it seems, he recognizes that the judge has considerable freedom of selection, in that guise which Dean Pound has called "finding the law".[122] In his Bar

116. Great Northern Ry. v. Sunburst Oil and Refining Co., 287 U. S. 358 (1932).
117. THE NATURE at 114, quoting CHARMONT, LA RENAISSANCE DU DROIT NATUREL (2d ed. 1927) 181.
118. *Id.* at 140.
119. *Id.* at 170.
120. *Id.* at 165.
121. *Id.* at 171.
122. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) c. III.

Association address of 1932, Cardozo, obviously replying to a criticism that he had still a naive yearning for the absolute,[123] again emphasized the perils and snares that lurk in universals, and the variety of notions referred to by the word "law":

> "Now, personally I prefer to give the label law to a much larger assembly of social facts than would have that label affixed to them by many of the neorealists. I find lying around loose, and ready to be embodied into a judgment according to some process of selection to be practiced by a judge, a vast conglomeration of principles and customs and usages and moralities. If these are so established as to justify a prediction with reasonable certainty that they will have the backing of the courts in the event that their authority is challenged, I say they are law . . . though I am not disposed to quarrel with others who would call them something else." [124]

His Four Methods of the Judicial Process

Cardozo's chief sustained or comprehensive analysis of the judicial process is to be found in the four methods of the judicial process which formed the framework of his first volume,[125] were redefined and amplified in his second,[126] and were ignored in his subsequent writings. In examining this piece of constructive theory critically we must bear in mind that his juristic writings were a by-product of a busy life, that in philosophy and sociology he was largely self-educated, and that, as has frequently been noted, he chose the inspiring generality rather than the arid and exact generality. Certainly his terminology at this point is inconsistent and inexact. Beneath the confusion of form one can scarcely discern a classification of values. The four methods are not four norms of decision. They are descriptive of the material process of judging, as practiced by Cardozo and perhaps by his judicial colleagues; only incidentally do they convey the notion that they state the proper or best procedure. They tell us, for instance, how the judge would answer if a tyro were to ask him: "Judge Cardozo, how do you go about deciding cases?" To which the Judge might reply: "In some kinds of cases, one way; and in other kinds, other ways." And then would follow the account of the four methods. They are generalized descriptions of the procedures of an art rather than of the interrelated principles of a

123. Frank, Law and the Modern Mind (1930) 237-238. In fairness to Mr. Frank, it must be said that the present writer, examining the book above cited, found the references to Cardozo almost uniformly laudatory. He is spoken of as a "brilliant critic" (*id.* at 6n), a great judge (*id.* at 134), an enlightened judge (*id.* at 153), and a judge who recognizes that absolute certainty is unattainable (*id.* at 6, 352).

124. 55 Reports at 276.

125. The Nature at 10 (a foreshadowing), 30-31, and *passim.*

126. The Growth at 62, 73, etc.

science, or even of an art. They bespeak the introspective gropings of an artist searching his soul. The four methods are set forth as follows:

> "The directive force of a principle may be exerted along the line of logical progression; this I call the rule of analogy or the method of philosophy; along the line of historical development; this I call the method of evolution; along the line of the customs of the community; this I call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I call the method of sociology." [127]

These methods, we must remember, are to come into play only after the judge has extracted from the precedents the underlying principle, the *ratio decidendi.* His task is not yet done. He must determine the path along which the principle is to develop.[128] We are not told that these are methods merely for the novel or unprovided case, for the first method would be that for the vast majority of appellate court cases. Indeed, it is hard to see how one could "extract" the underlying principle from the precedents without employing the method of logic or analogy, even if one could for the time being exclude the other three "methods". At all events, the four methods are methods for the judicial process (of appellate courts) in all cases. They are methods primarily aimed at establishing the right rules, rather than at deciding particular cases.

The inexactness of terminology in the quoted passage is apparent. The line of logical progression does, indeed, include analogy; but reasoning by analogy is only one way of using logic, and that among the most slippery. It is surprising to find "logical progression" identified with the "rule of analogy", and astonishing to find the whole called "the method of philosophy"—as if philosophy were concerned only with logic. Cardozo sometimes refers to "philosophy" as if it were a narrow and barren discipline; at other times he seems to exalt it as the noblest of human strivings.[129] Turning to the second "method", we find the assumption that "historical development" is equivalent to "evolution", which may certainly be doubted if evolution is taken to mean progress, ameliorative evolution, as is indicated by other passages of

127. THE NATURE at 30-31.
128. *Id.* at 30.
129. In addition to the passage above quoted (see note 127 *supra*): "Philosophy" does not include history, custom or social utility (THE NATURE at 43) and it must be checked and tested by "justice" (*id.* at 34). He remarks that he does not use philosophy in a formal sense (*id.* at 49). Yet, "philosophy of law" deals with the genesis, evolution and end of law, though there is another kind of philosophy *within* the law, the scope of which is not clear. THE GROWTH at 126; see also *id.* at 23, on theory of values; *id.* at 24, on evolution of law; *id.* at 26, 101, on the end of law. In THE PARADOXES he delves more deeply into philosophic problems. He learned more and more about philosophy as he continued to study it and write about it. The three volumes might be called, without deprecation, "The Education of Benjamin Cardozo".

Cardozo's work. Moreover, the overlapping between "evolution" (second method) and "customs" or "tradition" (third method) will occur to any one who has read his Blackstone or even his Bentham.[130] The third method (tradition) overlaps the fourth, for morals denote custom, and the *mores* are attitudes toward conduct regarded as customary or not customary. Even more striking is the thought that "justice" is reserved for the fourth method, the one which, though of paramount authority, is least often used.[131] The implication is not that the first three methods are methods of injustice; but rather that they are the methods to be used when established authoritative materials provide the legal doctrine.

The confusion in thought does not match the confusion in labeling; Cardozo's exposition and illustration give the four methods greater clarity than they have in the summary above quoted. Thus his lengthy account of the first method (which we shall call the method of logic) indicates that it produces adherence to precedent, stability, uniformity, impartiality. It is the method most commonly applied.[132] It preserves the symmetry of the legal structure.[133] The method of logic is the method of certainty. Yet the analogical extension of precedents sometimes leads to consequences at variance with justice. An example that he gives is the doctrine of equitable conversion, with its consequence that the risk of loss is placed on the vendee of real property before he had gained either possession or title.[134] Moreover, the method of logic does not always lead to certainty, for sometimes it supplies contradictory conclusions, in which case justice dictates the choice,[135] and sometimes there is flexibility, the possibility of curtailing the scope of a precedent within the limit of its logic, or of extending it by analogy beyond this limit.[136] His looseness in the use of the term "logic" is partly atoned for by a later passage.[137] His discussion of this method seems to assume that it is possible to make an unequivocal interpreta-

130. BENTHAM, A COMMENT ON THE COMMENTARIES (1928) § XIII.
131. THE NATURE at 40-41, 98.
132. *Id.* at 34.
133. *Id.* at 33.
134. *Id.* at 38-39. It remained for Cardozo's brain-child, The Law Revision Commission of New York, to hearken to his criticism and to bring about a change of the N. Y. REAL PROPERTY LAW (1909) c. 52, by N. Y. LAWS (1936) c. 731, known as the Uniform Vendor and Purchaser Risk Act.
135. THE NATURE at 40-41.
136. *Id.* at 49.
137. THE GROWTH at 62. He explains: "No doubt there is ground for criticism when logic is represented as a method in opposition to the others. In reality, it is a tool that cannot be ignored by any of them. [Citing M. R. COHEN, INTRODUCTION TO TOURTOULON'S PHILOSOPHY IN THE DEVELOPMENT OF LAW (1922) 29, 30.] The thing that counts chiefly is the nature of the premises. We may take as our premise some pre-established conception or principle or precedent, and work it up by an effort of pure reason to its ultimate development, the limit of its logic." He apparently does not recognize that the meaning of the premise, the denotations and definitions of its terms, are no less basic or decisive than the premise itself.

tion of, or induction from, precedents—to extract *the* rule from the cases. Probably the first method meant to him that when a rule established by precedents is clearly applicable and not too shocking in result when applied to the case in hand, the court will apply it. This is a rough working rule for counselors as well as judges.

The method of history is more easily grasped. The judge is to understand that some conceptions and doctrines of the law are historical growths, and that he must accept them with resignation if not with faith. A prime example is the law of real property. "No law-giver meditating a code of laws conceived the system of feudal tenures." [138] The method of history explains to the judge that archaic elements in the law are not necessarily outmoded; they may still have utility as means of effectuating social adjustment. Title insurance companies could less readily guarantee titles to land if judges were free to modify the rules of conveyancing by their sentiments of justice. On the other hand, Cardozo did not include in the method of history that kind of search for the historical origins of legal rules by which Professor Wigmore has punctured some of the inflated doctrines of the law of evidence.

The third method, the method of custom or tradition, is more limited in use. Cardozo refers primarily to mercantile custom, which, he says, seldom creates new law today, though it is important in the application of such old rules as those of negotiable instruments.[139] He means by this, apparently, that courts do not accept proof of mercantile customs as a basis for making a new law merchant. He recognizes that the everyday practices of humanity influence court and jury in applying standards of care; there is a "constant assumption" throughout the law that "the natural and spontaneous evolutions of habit fix the limits of right and wrong",[140] which brings the method of tradition and the method of sociology together. The importance that Cardozo attaches to custom or tradition in the judicial process seems inadequate. Changes in the customs or habits of the community give new content to legal institutions; the "living law", to use Ehrlich's expression, becomes different and legal doctrines take on new meanings. The judicial process, as Cardozo elsewhere recognized, is not concerned exclusively with legal rules; yet here he seems to have been preoccupied with formal changes in rules. On the other hand, while his treatment of the relations between law and custom is fragmentary, he avoids that inflated Blackstonian conception of custom, which ascribes the origin of the common law to immemorial custom and then proceeds to subsume the professional or technical customs of courts and lawyers under the gen-

138. THE NATURE at 54.
139. *Id.* at 61.
140. *Id.* at 63.

eral heading of "custom". Cardozo was concerned with live customs, and with customs of the community as a whole. The method of custom was a method of change and adaptation, not a method of glorifying old or primitive national customs, as with Savigny. The historical school of jurisprudence did not make a convert of Cardozo.

His fourth method of the judicial process, that which he calls the method of justice or sociology, is a subdivision of a different order from the other three. It is the residuary legatee of the testament conferring judicial powers. The first three methods are routine methods of legal justice; the fourth is the last resort, to be used when the techniques of legal justice produce conflicts or disclose gaps. Cardozo did not believe, did not want to be understood by the bench and bar as saying that he believed, that because appellate judges have freedom of decision in some cases, they have it in all. The great majority of their decisions and their pronouncements are predetermined by one or more of the first three methods. This predetermination is not coerced by inexorable material causation, nor it is coerced by the judge's fear of committing an impeachable offense. The decisions are predetermined as by the canons of an art. They are predetermined in the sense that they *ought* to be determined by the first three methods. Adherence to logic and consistency may have greater social value than trying out a new legal doctrine created by the judge's sense of justice; in this case, as Cardozo recognizes, the first and fourth methods concur.[141]

The fourth method, that of sociology, is thus not coordinate with the other three. In a sense it is subordinate or inferior to them, because of the probability that the logical ascertainment of established rules will give the court a guide which will be adequate to the needs of justice. Yet if the application of these rules leads to shocking consequences, the method of sociology or social welfare may be used to escape from this conclusion. The method of sociology is thus an appeal to "equity" in the Aristotelian sense. It is also the arbiter when other methods conflict. It calls upon legal doctrines to justify their existence as means adapted to an end.[142] The method of sociology is teleological, and its end is social welfare.[143] He recognizes the vagueness of this end, especially when posed as a test of the constitutionality of statutes, but he prefers vagueness to that rigidity which stereotypes legislation and breeds distrust of the courts.[144] The method of sociology is best exemplified in the field of constitutional law, where

141. *Id.* at 65.
142. *Id.* at 98.
143. *Id.* at 71, 98, 102.
144. *Id.* at 91.

it mediates between the traditional claims of liberty or property and the conflicting demands for social legislation.[145] Here social facts may enlighten the court as to the need for and the consequences of particular legislation; he mentions the influence which fuller information had upon the change in the position of the New York Court of Appeals with respect to the constitutionality of legislation forbidding night work for women.[146] He later had occasion to use social data for a similar purpose, as in the opinion upholding the old age benefits of the Social Security Act of 1935, which relied upon the evidence showing the relation between old age and destitution.[147] In this context "method of sociology" is an appropriate description of the process. Likewise, in the legal doctrines relating to restraint of trade and to labor unions, one can see a direct relation between sociology and the judicial process. But when Cardozo comes to discuss further the application of this method in private law,[148] his discussion wanders far away from sociology in its ordinary sense, and makes the method of sociology the method of social values, among which the judge must consider the social values of the judicial process. Here, as in many other places in Cardozo's writings, 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.

His Theories of Values

Cardozo's philosophy of law centers upon the concept of value. In the preceding analysis we have time and again come upon the proposition that his theories of law, of the judicial function and of the judicial process are in the last analysis theories of value. In his earlier works he brought to articulation the implicit problems of value in which the law abounds, and in *The Paradoxes of Legal Science* he faced the conflicting theories of value and their implications for the meaning of justice.[149] His chief contribution to the philosophy of law was that, as a judge of the highest court of the leading commercial state of a business-minded nation, he brought the articulation of values into his juristic writings and judicial opinions. He not only made explicit the problems of value implicit in legal doctrines; he also showed how making them explicit made the judge more conscious and more worthy of his function, and made the judicial process an instrument of legal adaptation and not merely the sterile logomachy of a profes-

145. *Id.* at 76-94.
146. *Id.* at 81, citing People v. Williams, 189 N. Y. 131, 81 N. E. 778 (1907), and People v. Schweinler Press, 214 N. Y. 395, 108 N. E. 639 (1915).
147. Helvering v. Davis, 301 U. S. 619 (1937).
148. The Nature at 98-141.
149. The Paradoxes c. II, pp. 31-66.

sional technique. He showed the bench and bar how the fiction that judicial decisions are mechanically predetermined by rule and precedent could be discarded without leaving the judicial process in a chaos of individual prejudices. The middle way for the judge was to search for implict values and to strive for their articulation in language which would appeal to the moral sense of the community.

In order to bring out some of the salient features of his value-theories, it is necessary to indicate what is meant by a theory of values. The oldest theories of value were embraced in the conception of "ethics", a term which Cardozo generally avoids using. Ethics was the general theory of human conduct, regarded as right or wrong, or regarded as better or worse. One cannot say much about ethics without getting entangled in the toils of a particular ethical theory. The relation of ethics to morals is one of the problems of ethics. It seems fair to say that ethics is the theory of which moral attitudes and practices are the facts; ethics is a critique of morals. "Ethics", however, came to be limited in meaning to some particular theory of ethics, as that ethics is a criterion of the nobler virtues, or that the sole ethical criterion is the purity of the will.[150] Thus ethics became transcendental; the motivation of the will through legal or social pressures was beyond the scope of ethics because it was both coercive and instrumental. There were, of course, rival theories, but they did not suffice to make ethical theory acceptable to the nineteenth century judge or lawyer, except in that limited field known as professional ethics. To overcome the limitations upon the scope of ethics a broader concept of the theory of value was put forth. This broader discipline, called "axiology", takes "value" as a fundamental concept, and embraces within its scope all the values, "moral, economic, educational, scientific or aesthetic"—to use Cardozo's enumeration.[151] Whereas axiological ethics is primarily, if not wholly, concerned with intrinsic values, the ultimate virtues or goods, legal evaluations are chiefly concerned with instrumental values, the means of attaining the ultimate ends. Most of the controversies in a given political society turn not upon the formulation of ultimate ends, but upon the more concrete and limited value problems, the means of attaining them. One can read the same avowal of ends in both political party platforms; the partisans battle over the particular law which is proposed as a means of attaining those ends. Hence the growth of a "science" of values which does not disdain the mundane problem of means was highly significant for

150. This Kantian conception of ethics, which Holmes called "morals", is the object of Holmes' aversion in *The Path of the Law* in COLLECTED LEGAL PAPERS (1920) 167. (Of course this ethical theory is not *exclusively* Kantian.)

151. THE PARADOXES at 52.

legal philosophy, and Cardozo was among the first to bring it to the attention of the legal profession.

The problems of value which it seems worth while to discuss in the present connection are: 1. What relations did Cardozo find between law and criteria of value? 2. What was the relative importance of motives and of consequences in Cardozo's evaluations of conduct?

1. *Relations between law and criteria of value.* The justice with which Cardozo was concerned was not merely that of law as it is; he was seeking "justice to which law in its making should conform".[152] Justice in this sense is "justice considered as a jural norm", which may be "narrower or broader than the specific quality of justice known to ethical theory", since it prescribes that law should embody

> "so much of morality as juristic thought discovers to be wisely and efficiently enforcible by the aid of jural sanctions." [153]

Justice as a jural norm is narrower than the justice of ethical theory in that law, being coercive in character, cannot enforce all the duties of ethical justice; there are limits to effective legal action.[154] Justice through law does not embrace the whole of morality, but in conformity with the jural norm it does embrace a part of morality. Cardozo recognizes the resemblance of his theory to Jellinek's theory that the law is a minimum ethics, an embodiment of those requirements of morals which at a given stage of social development are indispensable; but he adds that there are elements of difference. Cardozo would not restrict law to its minimum function, to the indispensable requirements of society. Law may well anticipate needs and elevate moral standards.

On the other hand, justice through law, he says, is broader than justice as an ethical concept, for the law takes account of charity and compassion.[155] The law gives relief to one who has paid money or contracted under a mistake; it protects the heir against improvident disposal of his prospective inheritance; it imposes on property-owners an imperfect or provisional duty to an intruder who is in distress. The chancellor may deny specific performance of a contract on the ground of hardship. In all these examples, Cardozo says, the law goes beyond the strict requirements of justice in ethical theory. At this point his conception of the latter seems to be no broader than the ancient maxim, *suum cuique tribuere.* In the "good neighbor" theory

152. THE GROWTH at 70, quoted in THE PARADOXES at 31.

153. THE PARADOXES at 35. See also *id.* at 42, 48.

154. Pound, *The Limits of Effective Legal Action* (1917) 3 AM. BAR ASS'N J. 55, 27 INTERNAT'L JOUR. ETHICS 150; 22 REP. PA. BAR ASS'N 221; POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 239.

155. *Id.* at 39-41.

of Stammler [156] he might have found a broader conception of justice; but in rejecting Stammler's a priori rigidity he rejects the suggestions which might have supported his own view that justice under law includes compassion or grace.

The law, Cardozo said, would do better to take its criteria of value by a pragmatic or inductive method rather than from a priori principles.[157] Its data are the customs and morals of the community. There is nothing inconsistent with this in his recognition that moral standards are a product of reflection as well as of custom,[158] for, as he points out,[159] moral standards differ as between the component groups in the same community, and reflection is necessary to choice. The law will not follow the lowest level, nor yet the highest in the community; it "will not hold the crowd to the morality of saints and seers";[160] rather it will

> "strive to follow the principle and practice of the men and women of the community whom the social mind would rank as intelligent and virtuous." [161]

The "social mind" appears like a ghost in an otherwise naturalistic account of morals. Who can recognize the intelligent and the virtuous? Only the intelligent and the virtuous. The attempt to establish a priori or non-authoritative methods of determining moral standards leads to circularity. Yet Cardozo's statement is suggestive. The judge is to look for the data of moral standards beyond his own intuitions, beyond his own circle of acquaintances. A court is often obliged to tolerate a standard of morality lower than its own, as when it tells the buyer to beware of the perils of the market place; yet in other relations, such as those of trustee and beneficiary or principal and surety, the legal duty exacts the keenest sense of honor.[162] The standard which he applied in *Meinhard v. Salmon* [163] to the duties between business partners was not acceptable to three of his colleagues. One may reasonably believe that he avowed emphasis upon a naturalistic or empirical moral base in order to quell the protests of a highly sensitive conscience, a conscience sometimes troubled by the low moral standards of legal rules which he felt obliged to recognize.

The judge has not only to consider ethical justice, moral value; he has also to consider

156. STAMMLER, THE THEORY OF JUSTICE (1925) 161, 163, 243 *et seq.*, 403 *et seq.*; see also DEWEY AND TUFTS, ETHICS (rev. ed. 1932) 276.
157. *Id.* at 36.
158. *See* DEWEY AND TUFTS, ETHICS (rev. ed. 1932) 171.
159. THE PARADOXES at 37.
160. *Ibid.*
161. *Ibid.*
162. THE NATURE at 109.
163. 249 N. Y. 458, 164 N. E. 545 (1928).

> "values of expediency or of convenience or of economic or cultural advancement, a host of values that are not final, but are merely means to others. . . ." [164]

The law has its own values, instrumental and teleological. Thus, courts as a rule adhere to precedent because economy of effort forbids the reopening of every question in every case.[165] Adherence to precedent has other values. It promotes certainty and order, and, even when there has been no reliance on precedents by the litigants before the court, it promotes uniformity and impartiality of decision, which are fundamental social interests.[166] The certainty at which the courts should aim is not formal or artificial consistency nor adherence to ancient rules which satisfy the lawyer's passion for *elegantia juris.* Better than this is the layman's certainty:

> "What is important for him [the layman] is that the law be made to conform to his reasonable expectations, and this it will seldom do if its precepts are in glaring opposition to the *mores* of the times." [167]

This gives a novel turn to the controversial subject of legal certainty, which Cardozo had previously discussed in terms of legal rules. The technical and professional problems of value are not independent of the social criteria of value. The canons of the judicial process, the limits of the judicial function, are to be tested in the long run by their effects upon society. Philosophy tells what ends the law should endeavor to attain; social science, surveying social facts, will tell whether the law does in truth fulfill its function.[168] Cardozo was never beguiled into believing that the facts alone will lead you out of a blind alley. He never overlooked the importance of reflection, of ideas, of philosophy.[169]

2. *What was the relative importance of motives and of consequences in Cardozo's evaluations of conduct?* In the long history of ethical theory, as well as in everyday reflections on the morality of conduct, there is a recurring contrast between two competing criteria of the goodness or badness of conduct: the motives of the actor, and the consequences of the act. We all recognize the difference between the two arguments: "He didn't mean to do anything wrong" and "But

164. THE PARADOXES at 54.
165. THE NATURE at 149.
166. *Id.* at 112.
167. 55 REPORTS at 288.
168. THE GROWTH at 112.
169. Other discussions of the ends of law are to be found in THE NATURE at 98, 102, 103; THE GROWTH at 79, 99, 102. He later dallied with the idea of a hierarchy or preferential scale of values—first moral, then economic, then aesthetic—but dropped it as unworkable and inconsistent with the choices actually made in our present society. THE PARADOXES at 57.

look at the harm he has caused." Each of these criteria has been taken by different philosophers as the sole test of rightness or wrongness of conduct, and their implications for moral and legal theory are diverse. At the one extreme is Kant, who insisted upon the purity of the actor's will as the basic criterion of ethics, and at the other extreme is Bentham, who insisted upon the consequences of the act as the ultimate and basic test of its relative goodness or badness. Kant's theory led him to the conclusion that legal duty conforms to moral duty only to the extent that the duty itself is the motive of conduct; in so far as people are motivated to perform the legal duty by fear of consequences to themselves (sanctions), the legal duty was distinct from the ethical duty.[170] Hence many duties prescribed by law, and many legal rules, are morally or ethically indifferent; the gulf between law and morality is emphasized. In this context judgments on moral questions tend to become intuitive; we perceive at once that an act is right or wrong. Although Kant tried to avoid the uncertainty of this method by setting up as the criterion of purity of the will a categorical imperative ("Act according to a maxim which can be adopted at the same time as a Universal Law"), the motive criterion leads to an intuitive judgment of rightness or wrongness. On the other hand, Bentham, concerned chiefly with criteria of judgment in law (as opposed to individual morality, the problems of choice which confront the actor), refined the criterion of consequences so as to include the *tendency* of an act to produce harmful or beneficial consequences. "Moral good", he said, "is good only by its tendency to produce physical good."[171] This modification of the teleological theory is indispensable, but it weakens one of the chief advantages of the consequence test, its appeal to the facts, the consequences easily observable. One can ascertain what consequences an act did produce much more incontrovertibly than one can ascertain the consequences it tended to produce. (One can infer the consequences to the well-fed baker of Jean's stealing a loaf of bread to satisfy his hunger, but one cannot as readily infer the tendency of Jean's act to destroy the institution of private property.) Moreover, the teleological theory does not entirely dispense with the consideration of motives nor with intuitive judgments. The motives of the actor are significant to the

170. This is an attempted paraphrase of KANT, THE PHILOSOPHY OF LAW (Hastie's trans. 1887) 20-21, excerpted in HALL, READINGS IN JURISPRUDENCE (1938) 127-129.

171. BENTHAM, THE THEORY OF LEGISLATION (Ogden's ed. 1931) 3. For Bentham the measure of consequences was pleasure and pain ("physical good"). I have tried to state his teleological theory without emphasizing this feature, which seems to have been unnecessary to the objects which he sought to attain. *See* DEWEY AND TUFTS, ETHICS (rev. ed. 1932) 263.

extent that they signify a tendency to produce harmful consequences. And the evaluation of consequences, after the facts have been gathered and all the formulas have been studied, leads to a choice or judgment which is intuitive. The chief advantages of Bentham's theory were, it is submitted, that it afforded a criterion which was workable for legal problems created by the conflicting claims of individuals in society, and that it made its criterion of value available for the criticism of all legal rules or doctrines and not merely of those which had a peculiar moral flavor. "Deontology" was the word which Bentham invented for his system of values in law; no legal rule and no judicial decision could be deontologically indifferent.[172]

Cardozo's jurisprudential writings show him to have been an intellectual convert to the teleological or instrumental theory of values. His judicial opinions sometimes indicate that his conversion was not complete. When litigation involves the more elemental vices, such as dishonesty, breach of faith and corruption, he seems to revert to what, we may suppose, was his earlier Puritanical conception of conduct as intrinsically right, or wrong. Two of his judicial opinions may be chosen to illustrate this tendency.

In *Union Exchange National Bank of New York v. Joseph*[173] the question was whether a man who had paid money to a bank in response to the bank's threat to prosecute the man's brother-in-law for criminal misappropriation of its funds, could recover back the money so paid. The Court of Appeals unanimously held that no recovery could be had. Judge Cardozo, writing the opinion of the court, declared that the payor and the payee were *in pari delicto*. There is sternness in his pronouncement that even the duress practiced by the bank, even the entreaties of his sister whose husband was threatened with disgrace, did not alter the culpability of the payor's participation in a charge of crime. Where other courts have, almost without exception, balanced guilt against guilt and found that the one practicing duress is more guilty than the one who merely yields to improper pressure,[174] Cardozo took the elemental view that there must be no traffic

172. See Bentham's rejection of the distinction between *mala in se* and *mala prohibita:* THE WORKS OF JEREMY BENTHAM (Bowring's ed. 1859) 192-193; A COMMENT ON THE COMMENTARIES (Everett's ed. 1928) 80-81; HALL, READINGS IN JURISPRUDENCE (1938) 173-174.

173. 231 N. Y. 250, 131 N. E. 905 (1921). The reported case does not disclose whether the accused was guilty or innocent.

174. That is, illegality (stifling a prosecution for crime) plus duress, by the one party, is greater culpability than illegality (participation in stifling a prosecution for crime) by the other party. Holmes gave an exposition of this view in Bryant v. Peck & Whipple Co., 154 Mass. 460, 28 N. E. 678 (1891). Cases supporting it are collected in 5 WILLISTON, CONTRACTS (rev. ed. 1937) §§ 1611-1613. No other American court, it is believed, adopts the New York rule on this situation. The prior New York precedents supported the position taken by Cardozo, but they could have been distinguished without much difficulty.

in justice. The following excerpts show the mixture of teleological and intuitional morality which prevails in Cardozo's opinion:

> "The state has an interest . . . in preserving to complainants the freedom of choice, the incentives to sincerity, which are the safeguards and the assurance of the prosecution of the guilty. Innocence will strangely multiply when the accuser is the paid defender. In such matters the law looks beyond the specific instance, where the evil may be small or nothing. It throttles a corrupting tendency. . . .
>
> "We found no inequality [in guilt] sufficient to set the law in motion at the suit of knowing wrongdoers to undo a known wrong. They had chosen to put private welfare above duty to the state. The state would not concern itself with the readjustment of their burdens unless for some better reason than the fact that indifference to duty had followed hard upon temptation. Excuse would seldom fail if temptation could supply it." [175]

Cardozo's principle that the threat of criminal prosecution for embezzlement must not be used to collect a civil claim against the embezzler is generally accepted by American courts, but his method of implementing that principle is not. To allow the threatener to keep that which he obtains by the threat is to encourage rather than discourage the making of such threats. Under the rule of the New York court the employer can use the threat of prosecution with comparative impunity, if he will insist upon being paid not in promises but in cash.[176] Thus further reflection as to the consequences of the rule approved by the court would, it is believed, have revealed its relative inadequacy as an instrument to effectuate the policy which the court intended to effectuate.

Another case in which Cardozo's deep intuitive revulsion to dishonest conduct appears from his opinion is one involving a fire insurance policy on an automobile.[177] Judge Cardozo, writing the opinion of the court which denied the insured recovery for his fire loss, gave a penetrating analysis of the purpose and justification of policy pro-

175. Union Exchange Nat'l Bank of New York v. Joseph, 231 N. Y. 250, 254, 131 N. E. 905, 906 (1921).

176. The promise would, of course, be unenforceable. In such a situation, the law leaves the parties where it finds them; possession is ten points of the law. Of course, compounding a felony is a crime, but the criminal deterrrent seems in this situation less effective than the civil deterrent.

177. Suetterlein v. Northern Ins. Co. of New York, 251 N. Y. 72, 167 N. E. 176 (1929). The plaintiff's claim for a fire loss was contested on the ground that his wife, though not the owner of the car, had procured other fire insurance on the automobile in her name as insured. The policy sued upon provided that no recovery could be had if there were "any other insurance covering such loss, which would attach if this insurance had not been effected." The language and the precedents gave opportunity for allowing the husband to recover. See also Falk v. Hoffman, 233 N. Y. 199, 135 N. E. 243 (1922), where a doubtful question of procedure was decided against "the wrongdoer", Judge Cardozo writing the opinion.

visions, such as the "other-insurance" clause, designed to reduce the moral hazard. His teleological interpretation of moral hazard warranties shines forth in the dreary waste of logomachy which is found in judicial discussions of the subject. Yet his final justification for the decision denying recovery is in terms of the plaintiff's "connivance" in the procurement of insurance by the wife and in making proof of loss under both policies. The test of moral turpitude predominates.

Cardozo's theory of values pervades his philosophy of law. Intellectually, he subscribed in all sincerity to a theory of values predominantly instrumental, and extended it to the determination of legal questions which were not traditionally regarded as ethical in character. In his heart he kept a place for the basic virtues of honesty and good faith. Where these virtues were in question he was swift and sure in decision, yielding to no subtleties of felicital calculus. Through two decades of growing cynicism without the law and growing mechanism within, he upheld the intrinsic value of the simpler virtues and scourged the simpler vices with the language of the poet and the seer. This alone would make him a significant bearer of moral tradition. More significant for the philosophy of law is his insistence that the law in its more technical aspects—its rules, its administration, its judicial process—should justify itself by the test of consequences, by an analysis of its instrumental values. Here, if in any one place, is his contribution to jurisprudence.

His Metaphysical Conceptions

Metaphysics, as the theory of being or existence, is the most abstract and inclusive of disciplines. To some philosophers it is the queen of philosophy and the governess of the sciences,[178] or the inquiry which sets the problems for the special sciences and disciplines.[179] The persistence of metaphysical speculation as to what is reality and what is appearance (and similar problems) is some evidence that it is the product of a profound and persistent human curiosity, the satisfaction of which is a genuine human need.[180] Some metaphysical theories have developed categories of being which have been deemed related to the theories of the status of universals or concepts: nominalism, realism, etc. It has already been indicated that these notions are not necessary to the development of legal theory.[181] Closer to practical

178. Maritain, An Introduction to Philosophy (1933) 111.
179. E. g., Whitehead, Modes of Thought (1938) 67.
180. Of course, a naturalistic argument might be made from the persistent recurrence of insanity, etc.
181. See *supra* Part I, pp. 79-80.

affairs are the theories of the inter-connections of the universe, as exemplified in the theories of causation and freedom of the will, with its supposed corollary of moral responsibility. In the process of reflective inquiry toward practical judgments in law, metaphysical premises seem rarely, if ever, to have been useful, and seem often to have introduced confusion by directing thought toward false clues or illusory subtleties. Thus Cardozo as a judge rejected the subtle argument from universal causation with the comment that it was "headed toward futility".[182] Whether because of the inherent futility of metaphysical inquiries or because they took a wrong turn of the road and went down a blind alley,[183] metaphysics has become a byword for unprofitable subtleties and "metaphysical" has become an opprobrious epithet.[184] Yet the very fact that the language and the distinctions of metaphysics have been introduced into discussions of and in law indicates that the study of law, as a cultural study, should take account of these influences.

Cardozo displayed an occasional interest in metaphysics in his two earlier works, which became more explicit in *The Paradoxes of Legal Science*. Thus, he set forth Aristotle's four categories of causes,[185] without drawing any conclusions from them. He referred to the "metaphysical problem" of substance and identity, as presented in discussions of the law relating to boundary trees, to confusion of goods and to similar problems. Yet he asserts that

> "Law contents herself for the most part with those standards of identity that are accepted by the average mind, untrained in metaphysics." [186]

Throughout his books he expressed again and again the feeling that there was beneath the flux of appearance an enduring reality, a fundamental verity.[187] These Platonic passages, which were poetic rather than philosopical in intent, brought forth unduly severe criticism.[188] On one occasion he suggested a subjectivistic epistemology,

182. Silverstein v. Metropolitan Life Ins. Co., 254 N. Y. 81, 86, 171 N. E. 914, 915 (1930). He refers to this metaphysical problem of causation. THE GROWTH at 129.

183. DEWEY, EXPERIENCE AND NATURE (1929) especially pp. 48-49.

184. E. g., Cardozo asks: "Shall our standard be a metaphysical conception, or an historic datum, or a living need?" THE GROWTH at 75. Elsewhere he speaks of the "conceptions of our law", saying: "Metaphysical principles have seldom been their life." THE NATURE at 56. See also WILLIAM JAMES, THE SENTIMENT OF RATIONALITY in THE WILL TO BELIEVE (1915), reprinted in JAMES, SELECTED PAPERS IN PHILOSOPHY (1917) 125, 147.

185. THE GROWTH at 73. Elsewhere he speaks of the welfare of society as "the final cause of law". THE NATURE at 66.

186. THE GROWTH at 128, and *see id.* at 129.

187. THE NATURE at 66, 172; THE GROWTH at 5, 17, 21-23, 142; THE PARADOXES at 3, 4, 6.

188. See notes 20, 123 *supra.*

asking how can the *ego* transcend its limitations and see anything as it really is? [189] Yet a little farther on he remarks that the distinction between "subjective" and "objective" conscience is shadowy and tends to become one of words so that for practical purposes moral standards may be regarded as objective.[190] Here he is Cardozo the Judge again. His allusion to Hegelian idealism is tempered with the shrewd reflection that "in every court there are likely to be as many estimates of the *'Zeitgeist'* as there are judges on its bench".[191] Metaphysics was still on the periphery of his interest.

In his *Paradoxes of Legal Science* he developed a scheme of contradictories in a way that suggested a metaphysics of law. His series of "paradoxes"—rest and motion, stability and progress, the individual and society, liberty and government—reminds us, as it doubtless did him, of Hegel's dialectic, or of Professor Morris Cohen's principle of polarity.[192] One does not gather from Cardozo's polarities or categories any systematic conception of the ultimate, but one does gather that his conception of the cosmos embraced contingency as well as certainty as an integral part of its nature. In the most persistent of his many moods, he seems to fall back upon the naturalistic humanism of Professor Dewey,[193] to whom he pays more frequent tribute [194] than to any other philosopher. At times he seems to have become needlessly disillusioned because transcendent metaphysical concepts did not afford sure guidance for the practical problems of the judicial process. Toward the close of *The Paradoxes,* he became reconciled to the "maze of contingency and regularity", to the uncertainty that is "the lot of every branch of thought and knowledge when verging on the ultimate".[195] No other American jurist-philosopher has striven as persistently to ascend to the heights of metaphysical conceptions and no other American judge has done more to reveal the contingency and certainty in the judicial process.

189. THE NATURE at 106.

190. *Id.* at 110.

191. THE NATURE at 174.

192. M. R. COHEN, REASON AND NATURE (1931) 165 *et seq.*

193. DEWEY, *op. cit. supra* note 183.

194. THE GROWTH at 67, 91, 130; THE PARADOXES at 17, 36, 50, 51, 91, 109, 128, 135. In Cardozo's first book (THE NATURE), I do not find any references to Professor Dewey, nor, indeed, any references to general philosophers as distinct from legal or political philosophers. He also frequently cited or quoted with approval from other pragmatists, William James and Charles S. Pierce.

195. THE PARADOXES at 135, citing DEWEY, *op. cit. supra* note 183, and DEWEY, RECONSTRUCTION IN PHILOSOPHY. To the end, however, he was reluctant to give up the hope for less precarious methods of determining "the truer estimate of values and the better ordering of life." The jurist, he says, "will hope indeed that with study and reflections there may develop in the end some form of calculus less precarious than any that philosopher or lawyer has yet been able to devise. In the meantime, amid the maze of contingency and regularity, he will content himself as best he can with his little compromises and adjustments, the expedients of the fleeting hour."

In his Pilgrim's Progress through the realm of law, Benjamin Cardozo climbed at last to the mountain top of metaphysics. Here he found himself alone, and enveloped in clouds. He wondered that he could not see more clearly from this height, and so he descended into the plain. Yet the ardor of his ascent, and his fleeting glimpses from the summit, gave him inspiration for his work among the common folk to whom he had returned.