



1989

The Experimental Logic of Benjamin Nathan Cardozo

Marcia J. Speziale
Harvard University

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Judges Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Speziale, Marcia J. (1989) "The Experimental Logic of Benjamin Nathan Cardozo," *Kentucky Law Journal*: Vol. 77 : Iss. 4 , Article 4.
Available at: <https://uknowledge.uky.edu/klj/vol77/iss4/4>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

The Experimental Logic of Benjamin Nathan Cardozo*

BY MARCIA J SPEZIALE**

INTRODUCTION

Benjamin Nathan Cardozo was an early-twentieth-century jurist who, in his person, decisions, and writings, typified the American philosopher-judge. His extrajudicial works contain discussions of the cases he decided while sitting on the New York Court of Appeals—a renowned, forward-looking court, especially during the twenty years that Cardozo was a member. This essay elucidates the philosophy portrayed in Cardozo’s writings and recorded opinions. Particular emphasis will be given to his philosophy of how law develops and the concomitant role of the judge in the growth of the law

Cardozo’s logic was “experimental” because he was measurably influenced by John Dewey in his philosophy.¹ In *Logical Method and Law*,² Dewey propounded an experimental logic of modifiable hypotheses, which had, after Darwin, replaced a rigid logic of fixed and immutable forms.³

Benjamin Cardozo often quoted Dewey in his books and out-of-court addresses.⁴ Dewey’s influence is evident in Cardo-

* This essay was generated in Professor Donald Fleming’s Intellectual History Seminar at Harvard University in the Fall of 1986. I thank Professor Fleming and the members of the seminar for their input to the work in progress. I especially want to thank Gene S. Gordon, M.D. and George W. Kramer, Esq. for support above and beyond the call of duty. Mistakes that are left are my own.

** Ph.D. candidate, Harvard University; B.A., Trinity College, 1974; J.D., University of Connecticut School of Law, 1977; J.S.M., Stanford Law School, 1979; M.A., Harvard University, 1988.

¹ See *infra* notes 56 & 77-80 and accompanying text.

² Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1925).

³ J. Dewey, *The Influence of Darwinism on Philosophy*, in *THE INFLUENCE OF DARWIN ON PHILOSOPHY AND OTHER ESSAYS IN CONTEMPORARY THOUGHT* 1 (1910).

⁴ See *infra* notes 77-80 and accompanying text.

zo's written judicial opinions as well.⁵ After a brief biographical sketch and a section placing Cardozo in historical context, this essay will discuss Dewey's philosophy, followed by a consideration of specific Cardozo decisions.

I. CARDOZO—THE MAN

Benjamin Nathan Cardozo was born in New York City in May, 1870.⁶ He graduated from Columbia College at the age of nineteen. While there, he was known to be frail and reserved and not given to sports or socializing. He loved literature and philosophy, and was very interested in contemporary political movements and activities.⁷

After studying for two years at Columbia Law School, Cardozo began the practice of law.⁸ He has been memorialized as follows: "He was unfitted for any struggle where scrupulous integrity and fine sense of what is right might be a handicap; but judges felt the persuasive force of his legal arguments, and lawyers and laymen sought his counsel and assistance in the solution of intricate legal problems."⁹

In 1913, Cardozo was elected a Justice of the Supreme Court of New York. Soon thereafter, the New York Governor designated him to serve temporarily as an Associate Justice of the Court of Appeals. Early in 1917, the governor appointed him a regular member of that court, and, later the same year, he was elected for a term of fourteen years, having obtained the nomination of both major parties. He became Chief Judge of the New York Court of Appeals in 1926, also by joint nomination. In 1932, President Hoover appointed him to the United States Supreme Court to fill the vacancy left by Oliver Wendell Holmes, Jr.¹⁰ Justice Cardozo died in July, 1938. The nation "mourned his loss and paid him tribute, not only in admiration for his

⁵ See *infra* notes 60-63 & 70-76 and accompanying text.

⁶ Lehman, *A Memorial*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* xi (M. Hall ed. 1947) [hereinafter *SELECTED WRITINGS*].

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at xii.

work and his character, but in affection for his great spirit."¹¹

II. CARDOZO IN HISTORICAL CONTEXT

In the late nineteenth century, legal theory was characterized by rigid conformity to precedent and deductive logic. The predominant way of looking at law was that legal logic was syllogistic, and rules and precedents would lead the judge to a decision by deduction. The task of the judge was to discover analytically the right rule or precedent with which to decide a case.¹²

The beginning of the end of this formalistic approach to law was signalled by the 1881 publication of *The Common Law*, by Oliver Wendell Holmes, Jr.¹³ Holmes propounded the theory that laws were nothing more than predictions that certain conduct would or would not bring a person up against the authorities.¹⁴ Judges made law, they did not discover it, for it was not "a brooding omnipresence in the sky"¹⁵ In *The Path of the Law*, written in 1897, Holmes denounced syllogistic logic as the language of the law and went on to say

You can give any conclusion a logical form. You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.¹⁶

Thus, at the turn of the twentieth century, the conception of what law was and how it developed was being revolutionized.

¹¹ *Id.*

¹² See, e.g., E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 74-75 (1973).

¹³ O. HOLMES, *THE COMMON LAW* (1881).

¹⁴ Holmes, *The Path of the Law*, 10 HARV L. REV. 457 (1897) ("[A] legal duty so called is nothing, but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court").

¹⁵ *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

¹⁶ Holmes, *supra* note 73, at 466.

The function of the judge was also being redefined as the twentieth century dawned. Judges were seen as lawmakers who should be responsive to social conditions. They were not absolved, however, from paying due deference to tradition and uniformity of decision. The pull toward consistency in the law formed one side of a tension; the push of progressive reform constituted the other. The result was a unique role for the twentieth-century judge.¹⁷ This was the setting in which Benjamin Nathan Cardozo assumed his judgeship.

Cardozo was influenced by Holmes, often mentioning him in his writings.¹⁸ Indeed, his focus on the judge as maker-of-law was consistent with Holmes' philosophy. Cardozo, however, developed a more complete philosophy of the judge's role than did Holmes. Whereas Holmes pondered the question, "What is the law?", Cardozo asked himself, "What does (should) the judge do?" Cardozo was self-conscious, reflective, and personal in writing about the judicial process, while Holmes was more traditionally "philosophical" in writing about law. In this, Cardozo was influenced by the Legal Realism of his day.

In the 1920's and 1930's, many American law professors were joined together by a common attitude in a movement termed "Legal Realism." Denouncing abstractions, they aspired to analyze what was really going on in the courts. Since law constantly changed, they did not believe that certainty or uniformity was possible in any field of human knowledge. These Realists believed that "Is" and "Ought" should be temporarily separated for purposes of analysis.¹⁹ They called for empirical studies of the way the law operated in society, drawing on the methods of the newly-emerging social sciences.²⁰

Benjamin Cardozo called them "neorealists" out of deference to those before them "who strove to see the truth in the workings of the judicial process, to see it steadily and whole,

¹⁷ See G. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (1980).

¹⁸ See, e.g., Cardozo, *Mr. Justice Holmes*, in *SELECTED WRITINGS*, *supra* note 6, at 77.

¹⁹ Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 *HARV. L. REV.* 1222, 1236-37 (1931).

²⁰ See, e.g., E. PURCELL, *supra* note 12, at 74-94; Pound, *The Call for a Realist Jurisprudence*, 44 *HARV. L. REV.* 697 (1931); Llewellyn, *supra* note 19.

and to report what they had seen with sincerity and candor."²¹ Proponents of this view included Savigny, Jhering, Holmes, and Pound.²² Although Cardozo had preached a similar message,²³ he distinguished himself from the Realist movement:

What is wrong in neorealism is a tendency manifest at times to exaggerate the indeterminacy, and entropy, the margin of error, to treat the random or chance element as a good in itself and a good exceeding in value the elements of certainty and order and rational coherence—exceeding them in value, not merely at times and in places, but always and everywhere. In emphasizing the danger of extracting principles and formulas from an aggregation of specific cases and adhering to them blindly, we must be on our guard lest we be carried over to the other extreme and left with nothing more coherent than a mass of nebulous particulars.²⁴

In the tradition of Holmes and in the context of the Legal Realists, Cardozo tread his own middle course through the field of early-twentieth-century legal theory.

III. DEWEY—THE MAN

John Dewey was born in 1859 in Burlington, Vermont. He attended the University of Vermont as an undergraduate, where he studied physiology and philosophy. After two years of teaching high school in Pennsylvania, he enrolled at Johns Hopkins University as a graduate student in philosophy. Attaining a Ph.D. in two years, he went on to teach at the University of Michigan, the University of Chicago, and Columbia University. Dewey "retained Hegel's hatred of abstract, static, formal logic"²⁵ and was also influenced by Darwin. Aside from his pragmatic axiology, Dewey is remembered for his philosophy of education. He was also an advocate of early progressive reforms, having befriended Jane Addams. He died in 1952.

²¹ Cardozo, *Jurisprudence*, N.Y. ST. B.A. RPT. 263, 268 (1932).

²² *Id.*

²³ *Id.* at 270.

²⁴ *Id.* at 290.

²⁵ E. CONKIN, *PURITANS AND PRAGMATISTS: EIGHT EMINENT AMERICAN THINKERS* 348 (1968).

IV DEWEY—HIS IDEAS

In *The Quest for Certainty*, John Dewey wrote that a person's distrust of himself leads to the search for true knowledge and transcendence.²⁶ The quest is for "a peace which is assured, an object which is unqualified by risk and the shadow of fear which action casts."²⁷ Only "pure knowing," said Dewey, fulfills the quest for complete certainty.²⁸ A person's "highest and most divine bliss" is a communion with unchangeable truth.²⁹

The realm of the practical, however, brings us to the region of change; where chance is inevitable. Perfect certainty, wrote Dewey, "cannot be found by practical doing or making; these take effect in an uncertain future, and involve peril, the risk of misadventure, frustration and failure."³⁰ No mode of action can ultimately satisfy this quest for absolute certainty.³¹

Thus Dewey rejected dogmatic rules and embraced inquiry.³² Dogmatism ignores the fact that truth comes only as the result of experiment.³³ In *The Influence of Darwin on Philosophy*, Dewey argued that *The Origin of Species* had transformed the logic of knowledge and hence the treatment of morals, politics, and religion.³⁴ Darwin had disrupted the "sacred ark of absolute permanency" and had treated forms—once regarded as fixed and perfect—as originating and passing away.³⁵ According to

²⁶ J. DEWEY, *THE QUEST FOR CERTAINTY: A STUDY OF THE RELATION OF KNOWLEDGE AND ACTION* 7 (1929).

²⁷ *Id.* at 8; see also B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience.

Id. at 166-67.

²⁸ J. DEWEY, *supra* note 26, at 8.

²⁹ *Id.* at 16.

³⁰ *Id.* at 21.

³¹ *Id.* at 33.

³² *Id.* at 39-46.

³³ J. DEWEY, *HUMAN NATURE AND CONDUCT: AN INTRODUCTION TO SOCIAL PSYCHOLOGY* 237 (1950).

³⁴ J. Dewey, *supra* note 3.

³⁵ *Id.* at 1-2.

Dewey, the genuine issue was not “whether certain values, associated with traditions and institutions, have Being already . . . , but what concrete judgments we are to form about ends and means in the regulation of practical behavior.”³⁶

Dewey did not focus on results, but on methods of action.³⁷ The Darwinian orientation was that knowledge was to be obtained “through deliberate institution of a definite and specified course of change.”³⁸ The method of physical inquiry, reversing “[t]he conceptions that had reigned the philosophy of nature and knowledge for two thousand years,”³⁹ introduced change to order so that correlative changes could be observed.

Dewey explained that experimental inquiry had three outstanding characteristics:⁴⁰ 1) all experimentation involves overt doing; 2) experiment is not random, but directed by ideas; and 3) the outcome is “the construction of a new empirical situation in which objects are differently related to one another”⁴¹ Thus, the aim of science became “discovery of constant relations among changes in place of definition of objects immutable beyond the possibility of alteration.”⁴² Principles, then, are hypotheses for experimentation and testing.⁴³

John Dewey realized what faces one who seeks absolute certainty:

With the surrender of unchangeable substances having properties fixed in isolation and unaffected by interactions, must go the notion that certainty is attained by attachment to fixed objects with fixed characters. For not only are no such objects found to exist, but the very nature of experimental method, namely, definition by operations that are interactions, implies that such things are not capable of being known. Henceforth the quest for certainty becomes the search for methods of control; that is, regulation of conditions of change with respect to their consequences.⁴⁴

³⁶ J. DEWEY, *supra* note 26, at 46.

³⁷ *Id.* at 36.

³⁸ *Id.* at 84.

³⁹ J. Dewey, *supra* note 3, at 1.

⁴⁰ J. DEWEY, *supra* note 26, at 86.

⁴¹ *Id.*

⁴² *Id.* at 102.

⁴³ J. DEWEY, *supra* note 33, at 239.

⁴⁴ J. DEWEY, *supra* note 26, at 128.

Born the year that *The Origin of Species* was published, Dewey was a Darwinian philosophically

V LEGAL LOGIC

In *Logical Method and Law*, John Dewey outlined a logic that was "empirical and concrete."⁴⁵ Dewey explained, "If we trust to an experimental logic, we find that general principles emerge as statements of generic ways in which it has been found helpful to treat concrete cases."⁴⁶ The meaning and worth of a general statement is "subject to inquiry and revision in view of what happens, what the consequences are, when it is used as a method of treatment."⁴⁷

No lawyer, said Dewey, ever thought out a client's case in terms of the syllogism. Rather, lawyers begin with an intended conclusion (favorable to the client) and analyze the facts so as to construct the most favorable picture. While doing this, they research recorded cases that are arguably similar, looking for rules to substantiate their interpretation of the facts. As research continues, lawyers shift emphasis and perspective on the facts; and as additional facts are encountered, lawyers modify their selection of the rules of law upon which they rely.⁴⁸

Logical systematization is indispensable to the lawyer, but not ultimate. It is a means, not an end. General principles inform and clarify the inquiry preceding concrete decisions. "It is most important that rules of law should form as coherent generalized logical systems as possible,"⁴⁹ reducing numerous cases to a few general principles that fit together as a whole. However, while consistent generalizations may help a particular student, it "is clearly in last resort subservient to the economical and effective reaching of decisions in particular cases."⁵⁰

In response to Justice Holmes' generalization that "the whole outline of the law is the resultant of a conflict at every point

⁴⁵ Dewey, *supra* note 2, at 19.

⁴⁶ *Id.* at 22.

⁴⁷ *Id.* at 22-23.

⁴⁸ *Id.* at 23.

⁴⁹ *Id.* at 19.

⁵⁰ *Id.*

between logic and good sense,"⁵¹ Dewey argued that Holmes' decried logic was "formal consistency, consistency of concepts with one another irrespective of the consequences of their application to concrete matters-of-fact."⁵² When Holmes said the life of the law had not been logic, he equated logic with the syllogism.⁵³ Dewey's logic was quite different. Rather than being a logic of rigid demonstration, Dewey chose a logic of search and discovery. Dewey's experimental logic used "methods of reaching intelligent decisions in concrete situations, or methods employed in adjusting disputed issues in behalf of the public and enduring interest."⁵⁴

General legal rules and principles were working hypotheses for Dewey, and they needed to be constantly tested by application to concrete situations. The implications for the logic of judicial decisions were revolutionary.

They indicate either that logic must be abandoned or that it must be a logic *relative to consequences rather than to antecedents*, a logic of prediction of probabilities rather than one of deduction of certainties. For the purposes of a logic of inquiry into probable consequences, general principles can only be tools justified by the work they do. They are means of intellectual survey, analysis, and insight into the factors of the situation to be dealt with. Like other tools they must be modified when they are applied to new conditions and new results have to be achieved.⁵⁵

It is difficult to know whether Benjamin Cardozo ever read *Logical Method and Law*, but he did cite *The Quest for Certainty* and *Human Nature and Conduct* in his extrajudicial writings, often quoting John Dewey.⁵⁶ Let us turn now to specific opinions written by Judge Cardozo, keeping an eye upon his philosophy and Dewey's influence.

⁵¹ *Id.* at 20.

⁵² *Id.*

⁵³ Holmes, Book Review, 14 AM. L. REV. 233, 233-34 (1880).

⁵⁴ Dewey, *supra* note 2, at 21.

⁵⁵ *Id.* at 26.

⁵⁶ Cardozo, *supra* note 22, at 283; see also B. CARDOZO, *THE GROWTH OF THE LAW* 65-67, 130 (1924).

VI. CASES

A. *Jacob & Youngs, Inc. v Kent*⁵⁷

Jacob & Youngs, Inc. built a country residence (valued at \$77,000) for Kent, who refused to pay the balance owed of \$3,483.46 because he was not happy with the house. Their contract specified, with regard to plumbing, that "all wrought iron pipe must be well galvanized, lap welded pipe of the grade known as 'standard pipe' of Reading manufacture."⁵⁸ Nine months after occupying the house, Kent noticed that some of the pipe was not Reading, but the product of other factories. Insisting upon exact performance, he wanted Reading pipes substituted. The problem was that most of the plumbing was encased in the walls, which would have to be demolished at great expense. Jacob & Youngs would not tear the house down, and instead asked for a certificate that the final payment was due.

In writing the opinion of the New York Court of Appeals, Judge Cardozo pointed out that in this case the substitution of Cohoes for Reading pipe was neither fraudulent nor willful. The only distinction between Reading and Cohoes pipe was the name. Even Kent's architect failed to pick up the error when inspecting the pipe after its arrival. The trial judge had not allowed any evidence regarding the comparative quality of the two kinds of pipe and directed a verdict for Kent. The Appellate Division reversed the judgment and granted a new trial, whereupon Kent appealed to Cardozo's court.⁵⁹

Writing that this case involved the distinction between both promises and conditions, and independent and dependent promises, Judge Cardozo commented upon the haziness of the lines between these concepts: "Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by classification where the lines of division are so wavering and blurred."⁶⁰ The desire for consistency and certainty prompts

⁵⁷ 129 N.E. 889 (N.Y. 1921).

⁵⁸ *Id.* at 890.

⁵⁹ *Id.*

⁶⁰ *Id.* at 891.

judges to honor the stricter standard of precedent. But when courts balance those considerations against equity and fairness, the latter considerations win out, especially in the state of New York, where the "liberal view" prevailed. "Where the line is to be drawn between the important and the trivial cannot be settled by a formula."⁶¹

Cardozo was quick to point out that a builder has no general license to use materials which are "just as good."⁶² The question was one of degree, where the jury and the judge had to look at both the significance of the discrepancy and the cost of redoing the work. He therefore ruled that the decision in favor of Jacob & Youngs should be upheld, explaining that "the rule that gives a remedy in cases of substantial performance with compensation for defects of trivial or inappreciable importance, has been developed by the courts as an instrument of justice."⁶³

Writing later, Cardozo said that courts in these cases have trouble squaring their justice with their logic. The rule of substantial performance which emerged from *Jacob & Youngs v Kent* was inspired by a "mere sentiment of justice."⁶⁴ That having become a rule, judges have surrounded it "with the halo of conformity to precedent."⁶⁵

Justice reacted upon logic, sentiment upon reason, by guiding the choice to be made between one logic and another. Reason in its turn reacted upon sentiment by purging it of what is arbitrary, by checking it when it might otherwise have been extravagant, by relating it to method and order and coherence and tradition.⁶⁶

Cardozo thus employed experimental logic à la Dewey: the choice was of methods.

⁶¹ *Id.*

⁶² *Id.* (citing language in *Easthampton Lumber & Coal Co., Ltd. v. Worthington*, 79 N.E. 323, 325 (N.Y. 1906)).

⁶³ *Id.* at 892.

⁶⁴ B. CARDOZO, *supra* note 27, at 44.

⁶⁵ *Id.* at 45.

⁶⁶ *Id.*

B. *Hynes v New York Central R.R. Co.*⁶⁷

On July 8, 1916, sixteen year old Harvey Hynes swam with two friends across the Harlem River, a navigable stream, from the Manhattan side to the Bronx side. The New York Central Railroad Company had a right of way on the Bronx side for trains operated by high tension wires strung on poles and crossarms. Extending from the Railroad's bulkhead above the river was a plank used for diving. One end of the plank was lodged under a rock on the Railroad's land, and nails had been driven at the point of contact with the bulkhead. Seven and one-half feet of the board projected beyond the line of the Railroad's property and above the public waterway⁶⁸

As Hynes stood poised, preparing to dive, a crossarm with electric wires fell from a pole and struck him, casting him to his death in the waters below. His mother sued the Railroad for damages. The lower courts ruled that Hynes was a trespasser on the Railroad's land. Judge Cardozo, however, noted that "the board itself was a trespass, an encroachment on the public ways."⁶⁹ He said that Hynes would have met the same fate had he been below the plank and not above it. The conclusion that Hynes was a trespasser and was therefore not entitled to damages had, in the lower courts, been "defended with much subtlety of reasoning, with much insistence upon its inevitableness as a merely logical deduction."⁷⁰ A majority of Cardozo's court, however, was unable to accept it as a conclusion of law⁷¹

According to Judge Cardozo, bathers in the Harlem River on the day of the disaster were enjoying a public highway and were entitled to reasonable protection from the Railroad's wires. "They did not cease to be bathers entitled to the same protection while they were diving from encroaching objects or engaging in the sports that are common among swimmers."⁷² Presuming that the Railroad would deny liability if the same plank had been only a few inches above the water, as opposed to a few feet,

⁶⁷ 131 N.E. 898 (N.Y. 1921).

⁶⁸ *Id.* at 898-99.

⁶⁹ *Id.* at 899.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

Judge Cardozo, in the opinion of the New York Court of Appeals, declared: "Duties are thus supposed to arise and to be extinguished in alternate zones or strata."⁷³ The court concluded that Hynes was in the enjoyment of public waters and under cover of their protection even when preparing to dive.

Cardozo opined that the Hynes case was a striking instance of the dangers of "a jurisprudence of conceptions"⁷⁴—"the extension of a maxim or a definition with relentless disregard of consequences to a 'dryly logical extreme.'"⁷⁵ Where, as here, structures and ways are superimposed on each other, "there is little help in pursuing general maxims to ultimate conclusions. They must be reformulated and readapted to meet exceptional conditions."⁷⁶ Considerations of analogy, convenience, policy, and justice supported an award of damages to Hynes' mother.

In *The Growth of the Law*, Benjamin Cardozo wrote that no process of merely logical deduction would have determined whether the plank was part of the Railroad's land or not.

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 the law, the function of legal liability; and this question of ends and functions is a question of philosophy.⁷⁷

This is similar to John Dewey saying that the syllogism is not and should not be the logic of law. Sounding much like Dewey, Judge Cardozo went on to say that "all methods are not idols," but "tools."⁷⁸ Cardozo explained "We must test one of them by the others, supplementing and re-enforcing where there is weakness, so that what is strong and best in each will be at our

⁷³ *Id.*

⁷⁴ *Id.* at 900 (citing language in Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 610 (1908)).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ B. CARDOZO, *supra* note 56, at 100-01.

⁷⁸ *Id.* at 103.

service in the hour of need.”⁷⁹ This “natural selection of methods” is specifically set forth by Dewey in *Logical Method and Law*⁸⁰

Cardozo expanded upon the “jurisprudence of conceptions”⁸¹ that he referred to in *Hynes*: “A fruitful parent of injustice is the tyranny of concepts. They are tyrants rather than servants when treated as real existences and developed with merciless disregard of consequences to the limit of their logic.”⁸² Rather, we should treat concepts as hypotheses subject to modification depending upon their outcome.

C. *In re Rouss*⁸³

To some extent, wrote Cardozo, ends and functions are coterminous.

Our philosophy will tell us the proper function of law in telling us the ends that law should endeavor to attain; but closely related to such a study is the inquiry whether law, as it has developed in this subject or in that, does in truth fulfill its function—is functioning well or ill.⁸⁴

This is followed by a quotation from *In re Rouss*.⁸⁵

Jacob Rouss had been the attorney for a member of the New York City police force accused of collecting bribes from Sipp, the keeper of a disorderly house. Rouss and Sipp’s attorney arranged for Sipp to be paid to stay out of the state. Five police inspectors were later indicted for conspiring to obstruct justice by suppressing Sipp’s testimony. At their trial, Rouss was a prosecution witness. After his testimony, which was essentially a confession of guilt, Rouss was threatened with disbarment for professional misconduct.

Rouss argued that he was immune from discipline pursuant to section 584 of the New York Penal Law,⁸⁶ which provided

⁷⁹ *Id.*

⁸⁰ Dewey, *supra* note 2, at 19-20.

⁸¹ See *supra* note 74 and accompanying text.

⁸² B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 61 (1928).

⁸³ 116 N.E. 782 (N.Y. 1917).

⁸⁴ B. CARDOZO, *supra* note 56, at 112.

⁸⁵ 116 N.E. 782.

⁸⁶ *Id.* at 783.

that no person should be prosecuted or subject to penalty or forfeiture on the basis of his own testimony regarding violations of that law. The issue, wrote Judge Cardozo, was whether disbarment was a "penalty or forfeiture" as intended by the statute.⁸⁷

Cardozo found that membership in the bar was a "privilege burdened with conditions,"⁸⁸ one of which was a fair private and professional character. If the condition was broken, the privilege was lost. The examination into character was "merely a test of fitness. To strike the unworthy lawyer from the roll [was] not to add to the pains and penalties of crime."⁸⁹ With a clear focus on how the law was to function, Cardozo exclaimed: "We will not declare, unless driven to it by sheer necessity, that a confessed criminal has been entrenched by the very confession of guilt beyond the power of removal."⁹⁰ Cardozo buttressed his opinion on a finding that a disbarment proceeding was not a criminal case—a case with which forfeitures and penalties were associated.

Cardozo further stated that the immunity of section 584 of the Penal Law was only as broad as the constitutional privilege. Disbarment was not within the exemption. This ruling, he said, was well-supported by precedent and reason. He then wrote the words quoted in *The Growth of the Law*⁹¹ "Consequences cannot alter statutes, but may help to fix their meaning. Statutes must be so construed, if possible, that absurdity and mischief may be avoided."⁹² Like physicians, lawyers had "the right to purify their membership and vindicate their honor. . . The knave and criminal may pose as a minister of justice. Such things cannot have been intended, and will not be allowed."⁹³

Thus, Cardozo stressed ends and functions in what he called the method of sociology. This approach, like Dewey's testing of hypotheses, asked, "How does the precept work? Is it a sensible

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ B. CARDOZO, *supra* note 56, at 112.

⁹² *Rouss*, 116 N.E. at 785.

⁹³ *Id.* at 786.

rule for the governance of mankind?"⁹⁴ This sociological method of deciding cases had rarely been employed prior to Cardozo's tenure on the bench. He was one of its foremost advocates.

D *MacPherson v Buick Motor Co.*⁹⁵

The Buick Motor Company manufactured and sold an automobile to a retail dealer, who sold it to MacPherson. While he was driving the car, it collapsed because one of the wheels was made of defective wood and its spokes broke into pieces. MacPherson was thrown out of the car and injured.

Although the manufacturer had not made the wheel, it could have discovered the defects by inspection. However, the manufacturer did not perform an inspection. The question, as framed by Judge Cardozo, was "whether the defendant owed a duty of care and vigilance to anyone but the immediate purchaser."⁹⁶

In 1916, most American courts still followed the English rule of *Winterbottom v Wright*⁹⁷ that those having no privity of contract could not be awarded damages on the basis of the contract.⁹⁸ In New York, *Thomas v Winchester*⁹⁹ marked an exception to the overarching rule of privity by holding the manufacturer of a falsely labelled poison liable to the person poisoned even though the drug was supplied by a pharmacist. The theory was that the defendant's negligence put human life in "imminent danger"¹⁰⁰

Judge Cardozo traced later cases that extended the rule (exception) of *Thomas v Winchester* and bluntly stated that if there had been such an extension, the New York Court of Appeals was committed to it. These cases, he wrote, constitute "the trend of judicial thought."¹⁰¹

The court, through Cardozo, held that:

⁹⁴ B. CARDOZO, *supra* note 56, at 113.

⁹⁵ 111 N.E. 1050 (N.Y. 1916).

⁹⁶ *Id.* at 1051.

⁹⁷ 152 Eng. Rep. 402 (Ex. 1842).

⁹⁸ *See id.* at 403 ("The party who made the contract alone may sue.").

⁹⁹ 6 N.Y. 381 (1852).

¹⁰⁰ *Winterbottom*, 152 Eng. Rep. at 403.

¹⁰¹ *MacPherson*, 111 N.E. at 1052.

[T]he principle of *Thomas v Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, then it is a thing of danger.¹⁰²

Cardozo's opinion "relaxed the [imminent danger] requirement to include cases where the defendant did not know but should have known the danger."¹⁰³ The peril came when the thing was "negligently made"—not because of the danger in and of the thing itself. Cardozo continued:

Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.¹⁰⁴

There must be knowledge that danger is probable and that, in the usual course of events, the danger will be shared by persons other than the buyer. Applying this standard to the facts of the *MacPherson* case, Judge Cardozo found that the nature of an automobile gave warning of probable danger "if its construction is defective."¹⁰⁵ The car in question was designed to go fifty miles an hour; injury was almost certain unless the wheels were sound and strong.

Revealing his philosophy of law, Cardozo noted that precedents taken from the days of the stage coach did not fit the conditions of travel in 1916. "The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be."¹⁰⁶

MacPherson v Buick Motor Co. and its expansion of manufacturer's liability to persons other than the direct purchaser

¹⁰² *Id.* at 1053.

¹⁰³ See James, *Products Liability*, 34 TEX. L. REV. 61 (1955).

¹⁰⁴ *MacPherson*, 111 N.E. at 1053.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

have been the subject of much scholarly comment.¹⁰⁷ The expansion has been referred to as the “*MacPherson* doctrine,” and by 1957 it was almost universally accepted.¹⁰⁸ William Prosser characterized the import of *MacPherson* as follows: “Cardozo, wielding a mighty axe, burst over the ramparts, and buried the general rule under the exception During the succeeding [sic] years this decision swept the country . . . no American jurisdiction now refuses to accept it. The rule of the *MacPherson* case was extended by degrees.”¹⁰⁹ Karl Llewellyn has called *MacPherson* “a classic example of how a troubling sequence of cases can be handled in argument.”¹¹⁰ Llewellyn noted that using the “Style of Reason,”¹¹¹ Cardozo invoked one of his best patterns. Extracting a principle from past authority, Cardozo “re-formulated it to fit the modern need, to solve the case at hand, and to guide the future,”¹¹² all the while dealing with intervening authorities. For Llewellyn, and indeed for Cardozo, the idea that principles must be recurred to constantly (to correct and readjust precedent) was vital.

Cardozo considered *MacPherson* in *The Nature of the Judicial Process* in 1921. He said that the conclusion of the majority of the court (the majority consisted of four of the seven judges) was evidence of a “spirit and a tendency to subordinate precedent to justice.”¹¹³

How to reconcile that tendency, which is growing and in the main a wholesome one, with the need of uniformity and certainty, is one of the great problems confronting the lawyers and judges of our day. We shall have to feel our way here as elsewhere in the law. Somewhere between worship of the past and exaltation of the present the path of safety will be found.¹¹⁴

¹⁰⁷ See *infra* notes 108-12 and accompanying text.

¹⁰⁸ Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 965 (1957).

¹⁰⁹ Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100 (1960).

¹¹⁰ K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 430 (1960).

¹¹¹ *Id.* at 431.

¹¹² *Id.*

¹¹³ B. CARDOZO, *supra* note 27, at 160.

¹¹⁴ *Id.*

Throughout his works, Cardozo spoke of a middle way—between uniformity and individuality, precedent and justice, rest and motion, immutable principles and hypotheses, discovery of fixed principles and creation of modifiable standards. Not an absolute idealist and not a strict empiricist, he continually spoke of walking the razor's edge.

Even though *MacPherson* was an important decision, the judges of the New York Court of Appeals did not totally overthrow all previous law when they decided it. Writing of the case in 1924, Cardozo said that *MacPherson's* conclusion was "drawn from a stock of principles and rules which [were] treated as invested with legal obligation."¹¹⁵ Cardozo continued: "The court will not roam at large, and light upon one conclusion or another as the result of favor or caprice. This stock of rules and principles is what for most purposes we mean by law"¹¹⁶ As one commentator noted: "In the language of Professor John Dewey, whom [Cardozo] frequently cited with admiration, the judicial process involves a series of imagined experimentations, in terms of operations (facts implying legal consequences) which must be 'compossible' with the principles of the legal system."¹¹⁷ *MacPherson* is an example of Cardozo striving to walk the "path of safety"¹¹⁸ of which he so eloquently wrote.

E. *Klein v Marvelas*¹¹⁹ and *Sun Printing & Publishing Association v Remington Paper & Power Co.*¹²⁰

The issue in *Klein v Marvelas* was whether the sales in bulk law¹²¹ was valid under the United States and New York constitutions. A similar law had been declared unconstitutional by the New York Court of Appeals in *Wright v Hart*.¹²² The *Wright* court held that the enactment violated the federal con-

¹¹⁵ B. CARDOZO, *supra* note 56, at 43.

¹¹⁶ *Id.*

¹¹⁷ Patterson, *Cardozo's Philosophy of Law*, 88 U. PA. L. REV. 71, 90 (1939).

¹¹⁸ B. CARDOZO, *supra* note 27, at 160.

¹¹⁹ 114 N.E. 809 (N.Y. 1916).

¹²⁰ 139 N.E. 470 (N.Y. 1923).

¹²¹ N.Y. Pers. Prop. Law, § 44 (1914) (current version at N.Y.U.C.C. Law § 6-101 to -112 (McKinney 1964 & West Supp. 1989)).

¹²² 75 N.E. 404 (N.Y. 1905).

stitution in denying equal protection of the laws to merchants and violated both the federal and state constitutions in imposing arbitrary restrictions on liberty of contract. The court was closely divided, with three judges vigorously dissenting.

The same issue was to be decided anew in *Klein* by the same court. Judge Cardozo, who wrote the opinion, began by stating that since *Wright v Hart*, comparable statutes had been upheld in two cases by the United States Supreme Court.¹²³ Therefore, concluded Cardozo, the current sales in bulk law was not violative of the United States Constitution.

As to the New York constitution, Cardozo frankly wrote: "We think it is our duty to hold that the decision in *Wright v Hart* is wrong."¹²⁴ His reasoning was that the "all but unanimous voice of the judges of the land, in federal and state courts alike, has upheld the constitutionality of these laws."¹²⁵ Cardozo continued: "At the time of *Wright*, such laws were new and strange" and most thought them to be "the fitful prejudices of the hour."¹²⁶ By 1916, however, similar laws were on the books in all states. Cardozo followed this by citation to twenty-six cases in which like statutes were held constitutionally valid.¹²⁷

"In such circumstances we can no longer say, whatever past views may have been, that the prohibitions of this statute are arbitrary and purposeless restrictions upon liberty of contract."¹²⁸ Thus, Judge Cardozo explained why he so jettisoned precedent.

The needs of successive generations may make restrictions imperative today which were vain and capricious to the vision of times past. Back of this legislation, which to a majority of the judges who decided *Wright v Hart* seemed arbitrary and purposeless, there must have been a real need. We can see this now, even though it may have been obscure before. Our

¹²³ *Klein*, 114 N.E. at 810 (*Lemieux v. Young, Trustee*, 211 U.S. 489 (U.S. 1909) (Connecticut bulk sales law constitutional); *Kidd, Date, and Price Co. v. Musselman Grocer Co.*, 217 U.S. 461 (U.S. 1910) (Michigan Sales-in-Bulk Act of 1905 constitutional)).

¹²⁴ *Id.* at 810.

¹²⁵ *Id.*

¹²⁶ *Id.* (citing *Wright v. Hart*, 75 N.E. 404, 408-09 (N.Y. 1905)).

¹²⁷ *Id.*

¹²⁸ *Id.*

past decision ought not to stand in opposition to the uniform convictions of the entire judiciary of the land. Least of all should it stand when rendered by a closely divided court against the earnest protest of distinguished judges.¹²⁹

He concluded by saying that the 1916 law was distinguishable from the 1904 law and the constitutionality of the 1916 law could be so justified. But the differing details were "in reality trifling" and Cardozo thought it better for the court to be honest and simply reverse *Wright v Hart*.¹³⁰

Speaking of *Klein* in *The Nature of the Judicial Process*, Cardozo said that the rule of adherence to precedent ought not to be abandoned, but relaxed. "I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment."¹³¹ Judges, opined Cardozo, ought not to tie the hands of their successors because mores change or may be misinterpreted.¹³²

In *The Growth of the Law*, Cardozo wrote: "To keep the balance true, let me put before you other cases where certainty was found to be the larger good when mobility was weighed against it."¹³³ He then launched into a discussion of *Sun Printing & Publishing Association v Remington Paper & Power Co.*¹³⁴

Sun Printing agreed to buy, and Remington Paper agreed to sell, 1,000 tons of paper per month between September, 1919 and December, 1920. Specifications of the paper were agreed upon, as was time of payment. Regarding prices and how long they would be effective, the agreement read:

For the balance of the period of this agreement the price of the paper and length of terms for which such price shall apply shall be agreed upon by and between the parties hereto fifteen days prior to the expiration of each period for which the price and length of term thereof have been previously

¹²⁹ *Id.* at 810-811.

¹³⁰ *Id.* at 811.

¹³¹ B. CARDOZO, *supra* note 27, at 150.

¹³² *Id.* at 152.

¹³³ B. CARDOZO, *supra* note 56, at 109.

¹³⁴ 139 N.E. 470 (N.Y. 1923).

agreed upon, said price in no event to be higher than the contract price for newsprint charged by the Canadian Export Paper Company to the large consumers, the seller to receive the benefit of any differentials in freight rates.¹³⁵

This clause became the center of dispute when the buyer and the seller disagreed as to prices and their duration.

Writing the opinion of the New York Court of Appeals, Judge Cardozo pointed out that the parties attempted to protect themselves from the contingency of failing to reach agreement on price, but that they did not guard against the contingency of failing to reach agreement as to time. He concluded that the result was not a contract but an "agreement to agree"¹³⁶ at some future time.

Rejecting the suggestion that the defendant was under a duty to accept reasonable terms according to the nature of the transaction and the practice of the business (in lieu of a term definitely spelled out by the contract), Cardozo refused to "make the contract over."¹³⁷ Judges, he wrote, were "not at liberty to revise while professing to construe."¹³⁸ Judgment, therefore, was for the defendant, Remington Paper

This was a case, according to Cardozo, "where advantage had been taken of the strict letter of a contract to avoid an onerous engagement."¹³⁹ A "sensitive conscience" might have aborted such an attempt, but the New York Court of Appeals "thought this immaterial."¹⁴⁰

The court subordinated the equity of a particular situation to the overmastering need of certainty in the transactions of commercial life. The end to be attained in the development of the law of contract is the supremacy of will outwardly revealed in the spoken or the written word. The loss to business would in the long run be greater than the gain if judges were clothed with power to revise as well as to interpret. [T]he

¹³⁵ *Id.* at 470.

¹³⁶ *Id.* at 471.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ B. CARDOZO, *supra* note 56, at 110.

¹⁴⁰ *Id.*

current axiology still places stability and certainty in the forefront of the virtues.¹⁴¹

Other cases where the interest of certainty predominated could be cited, said Cardozo, "without number."¹⁴²

Klein and *Sun Printing* present a point-counterpoint between relaxation of precedent and upholding uniformity. The tension between them illustrates the "middle way" which Cardozo attempted to stride:

In our worship of certainty, we must distinguish between the sound certainty and the sham, between what is gold and what is tinsel; and then, when certainty is attained, we must remember that it is not the only good; that we can buy it at too high a price; that there is danger in perpetual quiescence as well as in perpetual motion; and that a compromise must be found in a principle of growth.¹⁴³

Just as legal rules and principles were working hypotheses for John Dewey, so was the interest of certainty for Benjamin Cardozo, and it had to be constantly tested by application to concrete situations.

F *Yome v. Gorman*¹⁴⁴

In *The Paradoxes of Legal Science*, Benjamin Cardozo gives a citation to John Dewey after the following: "The jural as well as the moral norm, has in it an infusion of qualities with which justice is at times contrasted, such as charity or compassion."¹⁴⁵ Immediately preceding is a reference to *Yome v. Gorman*.¹⁴⁶

In *Yome*, the issue was whether a widow could disinter the body of her husband, who had received the sacrament of last

¹⁴¹ *Id.* at 110-11.

¹⁴² *Id.* at 111. *See, e.g.,* *Murray v. Cunard S.S.*, 139 N.E. 226, 228 (N.Y. 1923) (court upheld a ticket contract that placed a time limit of 40 days after debarkation for a passenger to provide the steamship company with written notice of personal injury) ("If claims may be presented at any time . . ., the opportunity for investigation will often be lost.").

¹⁴³ B. CARDOZO, *supra* note 56, at 16-17.

¹⁴⁴ 152 N.E. 126 (N.Y. 1926).

¹⁴⁵ B. CARDOZO, *supra* note 82, at 39-40.

¹⁴⁶ 152 N.E. 126.

rites and had been buried in a Roman Catholic cemetery. The rules and regulations of the Bishop of the Diocese of Brooklyn prohibited disinterment if the body were to be buried in a non-Catholic resting ground. Anna Yome, however, contended that her husband had not been that religious; that they had intended the plot to be a temporary place of burial; and that she and her husband had wanted to be buried close to each other. Thus, she was granted a preliminary injunction restraining the Diocese from interfering with his disinterment.

Called upon to determine the validity of the injunction, Judge Cardozo said that the issue could be resolved only by weighing "conflicting inferences of duty and propriety."¹⁴⁷ The wishes of wife and kin, he wrote, are not supreme and final "when the body has been laid to rest, and the aid of equity is invoked to disturb the quiet of the grave."¹⁴⁸ The task was to balance the wishes of the deceased, the motives and feelings of the survivors, and the sentiments and usages of the religious body which conferred the rite of burial. Another consideration was that the dead are not to be disturbed without reason of substance.

Characterizing his approach to the issue, Cardozo said that the Court of Appeals was not declaring a rule, but exemplifying a process. None of the considerations mentioned were to be applied absolutely. All were subject to neutralization by the others. In the final analysis: "Right must then be done as right would be conceived of by men of character and feeling."¹⁴⁹ Cardozo concluded that a case for an injunction had not been made out as a matter of right upon uncontroverted facts. A trial court would have to balance the considerations he had set forth, and any others it felt applicable.

The characterization of the court's approach in *Yome* as a "process" rather than a "rule" is quite Dewey-esque. Darwinian laboratory science—directed experimentation—did not deal in absolutes; it dealt with method, or process. In *Yome*, Cardozo was not deducing a result from standards engraved in stone.

¹⁴⁷ *Id.* at 128.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 129.

Rather, he was outlining a method for decision—a process of weighing and balancing the competing considerations. Here, Cardozo was employing experimental logic.

G. *Epstein v Gluckin*¹⁵⁰

One way in which judges may keep in touch with the mores of the time and the currents of legal thought is by reading legal commentaries. There they may find “the treasures buried in the law reviews.”¹⁵¹ These periodicals published by law schools may in fact “guide the course of judgment.”¹⁵² Cardozo’s willingness to consider these “treasures”¹⁵³ of legal scholarship was demonstrated in the case of *Epstein v. Gluckin*.¹⁵⁴

In *Epstein v Gluckin*, the defendant, Rose Gluckin, made a contract to sell a house and lot in Brooklyn to Weinstein and Joblin for \$12,550, to be paid partly in cash and partly by way of purchase-money bond and mortgage. Weinstein and Joblin assigned their interest under the contract to Epstein, the plaintiff. When the vendor refused to convey, Epstein brought suit for specific performance. The lower court ruled for Epstein, but the Appellate Division reversed, a result, according to Cardozo, which was “a deduction from cases which have conditioned relief in equity upon mutuality of remedy”¹⁵⁵ Cardozo added: “We think the deduction must be rejected as unsound.”¹⁵⁶

In an opinion for the court, Cardozo found that “[t]he assignee of such a contract succeeds by force of the assignment to the position of the original vendee,”¹⁵⁷ with all the attendant rights and duties. Thus, the court held that specific performance was available not only to Weinstein and Joblin, but also to Epstein. Before citing four commentaries and a number of cases, Cardozo wrote:

¹⁵⁰ 135 N.E. 861 (N.Y. 1922).

¹⁵¹ B. CARDOZO, *supra* note 56, at 14.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ 135 N.E. 861.

¹⁵⁵ *Id.* at 861.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

If there ever was a rule that mutuality of remedy existing, not merely at the time of the decree, but at the time of the formation of the contract, is a condition of equitable relief, it has been so qualified by exceptions that, viewed as a precept of general validity, it has ceased to be a rule to-day [sic].¹⁵⁸

Cardozo said that the purpose of the old mutuality of remedy rule was the assurance that neither injustice nor oppression would operate against the plaintiff or the defendant. Although the formula was an attempt to insure equal justice, it had outlived its usefulness. Cardozo concluded: "We may not suffer it to petrify at the cost of its animating principle."¹⁵⁹ Thus, the New York Court of Appeals decided in favor of Epstein.

Writing about *Epstein v. Gluckin* in *The Growth of the Law*, Cardozo expressed the belief that had the university professors not written their commentaries, the rule of mutuality of remedy "would have been extended by a process of purely logical deduction, and things would have gone from bad to worse."¹⁶⁰ *Epstein v. Gluckin* was a reconsideration of the whole issue and a change consistent with equity and justice. "Without the critical labors of Ames and Lewis and Stone and Williston, the heresy, instead of dying out, would probably have persisted, and even spread."¹⁶¹ Indeed, criticism from without "saved the day"¹⁶² So had the openness of Dewey's experimental method.

CONCLUSION

Arthur Corbin wrote of Cardozo:

[H]e molds doctrine without repudiating it. In his judicial process, Cardozo draws from the very wellsprings and fountainheads, and pours forth the living draught in a liquid style that sparkles with his own incomparable charm and personality

All this does not mean that Cardozo is building a new system of law No one knows better than he that even a

¹⁵⁸ *Id.* at 862.

¹⁵⁹ *Id.*

¹⁶⁰ B. CARDOZO, *supra* note 56, at 14.

¹⁶¹ *Id.* at 15-16.

¹⁶² *Id.* at 16.

Cardozo can do no such thing. He is making an existing system work well in new cases as they arise. He is taking the past, indeed well-learned and well-respected, and molding it to serve the ends that it has always served. It is true that he does not leave it unaffected and unchanged in the process. So it has always been with other judges, great and small. Such is indeed the Nature of the Judicial Process.¹⁶³

Benjamin Cardozo was remarkable for his style of clarity and beauty. He also stands out as a philosopher among judges; and as one who very self-consciously applied his philosophy to his judicial work.

Cardozo believed in the survival of the fittest logic—of the best method for deciding a case. Law moves inch by inch, like a glacier, and is in a state of “endless becoming.”¹⁶⁴ Rules of decision are tools, hypotheses subject to future modification, as John Dewey proclaimed. The process is one of trial and error, testing and retesting, ebb and flow. Philosophy of law, wrote Cardozo, teaches us a great commandment: “Thou shalt not make unto thyself any graven image—of maxims or formulas to wit.”¹⁶⁵

Dewey said that fixed objects with fixed characters cannot be known. Cardozo often wrote in his decisions that if he were to deduce a guiding rule from those fixed, the result would have been oppressive or unjust. John Dewey also rejected use of the syllogism in law and instead proposed experimental logic. Cardozo believed that the “juristic philosophy of the common law is at bottom the philosophy of pragmatism. Its truth is relative, not absolute.”¹⁶⁶ However, he warned that “we must not sacrifice the general to the particular, [or] throw to the winds the advantages of consistency and uniformity”¹⁶⁷ in the name of doing justice in the instance. “We must keep within those interstitial limits which precedent and custom and the long and silent

¹⁶³ Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 52 HARV. L. REV. 408, 438-39 (1939).

¹⁶⁴ B. CARDOZO, *supra* note 27, at 27-28.

¹⁶⁵ B. CARDOZO, *supra* note 56, at 107-08 (quoting Pollock, *A Plea for Historical Interpretation*, 39 LAW Q. REV. 163, 169 (1923)).

¹⁶⁶ B. CARDOZO, *supra* note 27, at 102.

¹⁶⁷ *Id.* at 103.

and almost indefinable practice of other judges through the centuries of the common law have set to judge-made innovations."¹⁶⁸ In these ways did Benjamin Nathan Cardozo profess and live by an experimental logic.

¹⁶⁸ *Id.*