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## BENJAMIN CARDOZO AND THE DEATH OF THE COMMON LAW

*John C. P. Goldberg*\*

### INTRODUCTION

Although a member of the Supreme Court at the time, Benjamin Cardozo did not participate in *Erie Railroad Co. v. Tompkins*.<sup>1</sup> He was dying. It is a mere fortuity that Cardozo's death coincided with the death of the general common law.<sup>2</sup> Yet it has since proved to be something more—or so this essay will argue. It is in part because our highest court took itself out of the business of making law in contract, property, tort, and certain other subject areas that Cardozo's beloved common law has fallen on hard times, and that even state-court judges have increasingly lost their feel for how to reason about it. Today, there is no member of a state judiciary who rivals Cardozo in stature. Mainly this is a testament to his extraordinary gifts. But it also reflects the waning of the common law in the United States, and a concomitant loss of the sense of what it means to be a great common-law judge.

### I

Oral argument before the Supreme Court in *Erie* took place on January 31, 1938.<sup>3</sup> Justice Stanley Reed, newly confirmed, was welcomed to the junior justice's seat at one end of the bench. The seat

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\*Eli Goldston Professor of Law, Harvard Law School. Thanks for helpful comments to Samuel Bray, Don Herzog, Andrew Kaufman, Mark Tushnet, and Ben Zipursky. Remaining errors are mine.

<sup>1</sup> 304 U.S. 64 (1938).

<sup>2</sup> *Swift v. Tyson*, 41 U.S. 1 (1842) (recognizing the authority of the federal courts in diversity-jurisdiction cases to identify and apply general common law).

<sup>3</sup> *Erie R. Co.*, 304 U.S. at 64.

next to his was empty.<sup>4</sup> It belonged to Justice Cardozo. Cardozo had recently suffered a heart attack and stroke from which he would not recover.<sup>5</sup> At about the time the Court issued its *Erie* decision, he was being returned by train to his home state.<sup>6</sup> Put up at a friend's home just north of his New York City birthplace, he died weeks later.<sup>7</sup>

We will never be sure what Cardozo would have done in *Erie* had he participated. But it seems probable that he would have joined the majority for whom Brandeis wrote, and not just because he was among the Court's "liberals."<sup>8</sup>

To be sure, Cardozo had his issues with Brandeis. Both regarded themselves as following in the footsteps of Holmes, but each emphasized different aspects of the great man's legacy. Whereas Cardozo drew from *The Common Law* an appreciation of the historically rooted complexity and richness of judge-made law,<sup>9</sup> Brandeis saw himself as *The Path of the Law*'s new man: the "man of statistics and master of economics."<sup>10</sup> As we learn from Professor Kaufman's endlessly informative biography, Cardozo regarded Brandeis as too much a wonk and too ideological.<sup>11</sup> Cardozo also would have chafed at Brandeis's overblown claim that *Swift* was to be condemned for relying on the false jurisprudence of the brooding omnipresence, whereas *Erie*'s holding was authentic to the true jurisprudence of Austinian legal positivism.<sup>12</sup>

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<sup>4</sup> Irving Younger, *Observation: What Happened in Erie*, 56 TEX. L. REV. 1011, 1027 (1978).

<sup>5</sup> ANDREW L. KAUFMAN, CARDOZO 566-67 (1998). This is an apt occasion on which to acknowledge my great good fortune in having benefited for the last decade from the generosity, wisdom, and support of my esteemed colleague Andy Kaufman, master of all things Cardozoan.

<sup>6</sup> *Id.* at 567.

<sup>7</sup> *Id.* His body was buried in a Queens cemetery located about an hour's drive west of Touro Law Center. A half-hour further west stands the Long Island Railroad's East New York station, the site of *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

<sup>8</sup> KAUFMAN, *supra* note 5, at 499-506 (noting that Cardozo interpreted the federal Constitution to leave legislatures with broad leeway in the domain of economic regulation).

<sup>9</sup> OLIVER W. HOLMES, JR., *THE COMMON LAW* (1881).

<sup>10</sup> Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

<sup>11</sup> KAUFMAN, *supra* note 5, at 473, 477-78, 497.

<sup>12</sup> I base this speculation in part on Cardozo's opinion for the Court in *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). Sunburst sued for a partial refund of charges paid to Great Northern, claiming the charges were based on a rate that had been improperly set by a Montana commission. The Montana Supreme Court upheld Sunburst's challenge, but also held that the proper rate would apply only to future transactions. Sunburst argued to the U.S. Supreme Court that the state court's prospective application of its ruling was a violation of its due process rights. Writing for a unanimous Court, Cardozo rejected this

Still, it was not Cardozo's habit to write separately.<sup>13</sup> There is also evidence that he was not a fan of *Swift*'s notion that federal courts were entitled to fashion general common law. Indeed, Irving Younger tells us that it was Cardozo who, in the summer of 1937, granted *Erie*'s request for a stay after the judgment for *Tompkins* had been affirmed on appeal. That he did so may suggest that he wanted the Court to have an opportunity to revisit *Swift*.<sup>14</sup>

In support of this hypothesis, Younger also noted a decision in which Cardozo, writing for the Court, announced that it would refrain from adopting a rule of general common law on the question of whether an insurance policy had lapsed because of a missed premium payment attributable to the insured's incapacitation.<sup>15</sup> Rather than allowing the case to "be complicated by a consideration of [the Court's] power to pursue some other course," he opted for "a benign and prudent comity," according to which the law of the state in which the contract was formed would control.<sup>16</sup>

More fundamentally, Cardozo was in his heart of hearts a state-court judge. Even after his elevation to the United States Supreme Court, he maintained a New York state of mind.<sup>17</sup> Here it is worth recalling that, in the judicial opinion that put him on the map (written while he was still sitting on the Court of Appeals by designation), Cardozo had no compunction swatting aside a directly on-point general common law ruling that had been issued a year earlier by the Second Circuit. Writing for a 5-1 court in *MacPherson v. Buick*,<sup>18</sup> he declared the old privity rule dead, holding instead that, under New York law, automobile manufacturers owe it to users of their cars to

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argument, observing that the U.S. Constitution is "silent" on questions of "juristic philosophy," and that state courts are at liberty to adopt different understandings of the nature of law and the judicial process. *Id.* at 364-66.

<sup>13</sup> KAUFMAN, *supra* note 5, at 166.

<sup>14</sup> Younger, *supra* note 4, at 1023-24.

<sup>15</sup> *Id.* (discussing *Mutual Life Insurance Co. v. Johnson*, 293 U.S. 335 (1934)).

<sup>16</sup> *Id.* (quoting *Johnson*, 293 U.S. at 339). *Johnson* was a unanimous decision and followed, among others, another unanimous decision rendered the previous term in which the Court stated in dictum that it was prepared to refrain from exercising its power to fashion general law in the face of conflicting state court decisions. *Trainor Co. v. Aetna Casualty & Surety Co.*, 290 U.S. 47, 54-55 (1933). Given that the Justices who later dissented in *Erie* signed off on both *Johnson* and *Trainor*, it is difficult to draw inferences about Cardozo's precise views on *Swift* merely from his having authored *Johnson*.

<sup>17</sup> KAUFMAN, *supra* note 5, at 472.

<sup>18</sup> 111 N.E. 1050 (N.Y. 1916). Chief Judge Bartlett dissented; Judge Pound did not vote. *Id.* at 1057.

take care that their cars not cause injury.<sup>19</sup> Yet in *Cadillac Motor Car Co. v. Johnson*,<sup>20</sup> the Second Circuit—relying heavily on New York precedents—had ruled oppositely on precisely this question. Indeed, the federal court had gone so far as to pronounce itself unpersuaded by the contrary interpretation of those precedents that had been provided by New York’s intermediate appellate court when deciding the initial appeal of the *MacPherson* case.<sup>21</sup> One suspects that Cardozo took some satisfaction in demonstrating to the Second Circuit that his Appellate Division brethren had got the common law right (thank you very much) and that *Johnson* had gotten it wrong.<sup>22</sup>

Relatedly, Cardozo may have worried that the Supreme Court in *Swift* had assigned itself and the lower federal courts a task for which they are not well-suited. On his understanding, judges charged with developing the common law are meant to articulate rules of law roughly in synch with prevailing norms and practices.<sup>23</sup> Yet, in the *Goodman* case, to take one famous example, the Court, per Justice Holmes, had announced (in dictum) a hard-and-fast general-law rule according to which a vehicle driver with an obstructed view at a railroad crossing would be denied recovery unless he exited his vehicle to look for oncoming trains.<sup>24</sup> Cardozo later criticized this aspect of *Goodman*, emphasizing that it had gone astray by adopting a rule without any experiential basis.<sup>25</sup> The Supreme Court, he seemed to imply, was particularly at risk of being ‘out of touch’ with local mores, and hence poorly positioned to fashion common law.

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<sup>19</sup> *Id.* at 1053-54 (acknowledging *Johnson* as one of a few “decisions to the contrary in other jurisdictions,” but dismissing it on the ground that it included a “vigorous dissent”).

<sup>20</sup> 221 F. 801 (2d Cir. 1915).

<sup>21</sup> *Id.* at 804 (citing *MacPherson v. Buick Motor Co.* 145 N.Y.S. 462 (App. Div. 1914)).

<sup>22</sup> Probably he was even more gratified when the Second Circuit, relying almost entirely on his *MacPherson* opinion, reversed itself in the *Johnson* case, somehow concluding on a second appeal that its initial 1915 no-duty ruling did not establish the law of the case. *See Johnson v. Cadillac Motor Car Co.*, 261 F. 878 (2d Cir. 1919).

<sup>23</sup> *See generally* John C. P. Goldberg, *Note: Community and the Common Law Judge: Reconstructing Cardozo’s Theoretical Writings*, 65 N.Y.U. L. REV. 1324 (1990).

<sup>24</sup> *Baltimore & O.R.R. v. Goodman*, 275 U.S. 66 (1927).

<sup>25</sup> *Pokora v. Wabash Ry.*, 292 U.S. 98, 105 (1934) (emphasizing the “need for caution in framing standards of behavior that amount to rules of law,” especially “when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without.”).

## II

So the odds are that, if he had participated in *Erie*, Cardozo would have signed on to the rejection of *Swift*. Assuming so, he and his admirers perhaps have reason to be grateful that he was denied the opportunity to do so. For otherwise he would have contributed to developments that have left our courts and our law professoriate in a place that he would not much have liked. If death is ever timely, Cardozo's was. It allowed his professional life to go better than it would have otherwise.<sup>26</sup>

My point is not to suggest that *Erie*'s holding was or is indefensible. *Swift* had created serious problems and it was reasonable for the Court to take steps to address them. Still, it is important not to lose sight of the fact that *Erie* has created problems of its own.

For example, insofar as it was meant to block sophisticated corporate actors from repairing to the federal courts to protect their interests against unfriendly state common law, *Erie* has arguably exacerbated a problem that was on its way to being ameliorated by other means.<sup>27</sup> Certainly the phenomenon of repeat-player defendants seeking relief in federal court from unfriendly state law has not disappeared. Rather, it has persisted on different and arguably more problematic terms. Mostly disabled from inviting federal judges to make general common law, defendants instead argue that federal law *simply bars* state courts from doing what they have been doing. And, starting with *New York Times v. Sullivan*,<sup>28</sup> the Supreme Court has shown itself prepared to deem entire swaths of state tort law null and void, often in the name of protecting business interests.<sup>29</sup> Unlike the

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<sup>26</sup> See DON HERZOG, DEFAMING THE DEAD (2017) (arguing cogently for the claim that post-mortem developments can affect whether a person's life goes better or worse).

<sup>27</sup> EDWARD A. PURCELL, LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, at 59-64, 217-30 (1992) (explaining that (1) *Swift*'s notion of a general law enforceable by federal courts was most helpful to corporate defendants in the late nineteenth and early twentieth centuries; (2) by the 1930s, its significance had already begun to shrink; and (3) *Erie* was but one of several developments that rendered the federal courts in the 1940s substantially less friendly to business interests).

<sup>28</sup> 376 U.S. 254 (1964). This is not to suggest that, if the general common law were alive and well in 1964, the Court would have declined to declare unconstitutional state officials' use of civil defamation law as a thinly veiled seditious libel prosecution. In short, *Sullivan* cried out for a constitutional ruling. Whether the Court would have felt the need to develop anything like the elaborate doctrinal edifice that grew out of *Sullivan* is a more interesting question.

<sup>29</sup> See John C. P. Goldberg & Benjamin C. Zipursky, *The Supreme Court's Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433 (2016) (analyzing central cases in the Supreme Court's modern defamation and preemption jurisprudence).

old general-law decisions such as *Goodman*, these decisions are binding on state courts. Thus has *Erie* substantially raised the stakes for a certain kind of state-federal conflict, in the process further tilting, rather than leveling, the litigation playing field. On the question of the constitutionality of the administrative state, Cardozo was of course opposed to the Four Horsemen. Even so, it is difficult to envision him pleased to learn that, today, the duty of vigilance demanded of automakers by *MacPherson*'s interpretation of New York common law can, almost at the drop of a hat, be pared down by federal judges keen to protect the prerogatives of the federal Department of Transportation, and indifferent to the traditional floor-not-ceiling relationship of regulatory law to tort law.<sup>30</sup>

At a broader level, *Erie* has helped to convert the Supreme Court into an almost exclusively public-law court. The Justices now and again address issues of federal common law, and they sometimes attend to federal statutes that raise common-law questions.<sup>31</sup> The vast run of their cases, however, concern questions of constitutional or administrative law, and questions about the regulatory state. And, overwhelmingly (and not coincidentally), they approach these questions from within a post-Legal Realist, instrumentalist framework.

It is not obvious that the change in case diet fomented by *Erie* by itself rendered the Justices—and the federal courts as a whole—less attuned to common law and common law reasoning.<sup>32</sup> But the cumulative effects of that change and related changes seem reasonably clear. Over the course of the Twentieth Century, the U.S. Supreme Court and the lower federal courts became the focal point of our legal system. By the 1960s (and ever since), the 'big' issues—free speech,

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<sup>30</sup> *Geier v American Honda Motor Co.*, 529 U.S. 861, 886 (2000) (deeming the imposition of tort liability on an automobile manufacturer to be an obstacle to the implementation of federal regulations and therefore preempted, notwithstanding the presence of an express savings clause in the statute authorizing the regulations).

<sup>31</sup> Thus have Justice Ginsburg and Chief Justice Roberts had occasion to tangle over the place of proximate cause in determining liability under the Federal Employers Liability Act. *CSX Transportation, Inc. v. McBride*, 564 U.S. 685 (2011).

<sup>32</sup> Although the U.S. Supreme Court does not resolve questions of substantive state law, diversity jurisdiction obviously provides lower federal courts with occasions on which to do so, at least provisionally. Whether, to what extent, and why these courts have lost their 'feel' for common law and common-law reasoning is a question for another occasion. However, given the centrality of the work of the Supreme Court to law professors and hence modern legal education, it seems plausible to suppose that members of the federal bench, on average, bring to bear public-law-heavy legal training and a public-law mindset that corresponds to a certain lack of deftness when it comes to adjudicating questions arising under the law of contract, tort, property, and the like.

civil rights, privacy, federalism—have played out in those courts. Meanwhile, the state courts, though at times still influential,<sup>33</sup> have faded in significance. One way to make this point is to pose a challenge to the reader: If asked to nominate a candidate for the best-crafted state high-court decision on a matter of common law issued since the turn of the millennium, which decision would you choose?

I am not denigrating the talent or dedication of the state bench. I am merely describing a situation that American law and American lawyers now face. Starting sometime after World War II, the ‘action’ in American law has been in public law, and at the national level. The most perceptive torts scholars of that time—including the ever-astute William Prosser—saw the writing on the wall. Prosser understood that, if tort law were to continue to be a high-status field within the law, it needed to be re-imagined. Instead of being thought of as (old-fashioned, regressive, formalistic) private law, it had to be seen as law that empowers courts to engage in “social engineering”—i.e., to make law on important policy issues in a manner akin to legislatures and agencies.<sup>34</sup> This was very much an effort to salvage the prestige of a body of state common law (not to mention the prestige of the scholars who attend to it) for the age of federal and public law.

Ironically, the most influential common-law judge of the last 35 years has been an occupant of the federal bench, namely, Richard Posner.<sup>35</sup> Quite self-consciously, Posner has claimed for himself the legacy of Cardozo and Holmes. Their greatness, he says, lay in their early and clear-eyed recognition that legal doctrine is the jargon in which judges dress up instrumentally driven policy analysis. According to Posner, it was this precocious insight, along with their literary gifts, that ensured their enduring significance and, by implication, will ensure his.

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<sup>33</sup> For example, state courts played an important role in the development of the now-recognized federal constitutional right of same-sex couples to marry. *See, e.g.*, *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941 (Mass. 2003) (ruling that the denial of marriage to same-sex couples violates the equal protection guarantee of the Massachusetts Constitution).

<sup>34</sup> WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 3, at 25 (1st ed. 1941).

<sup>35</sup> On the adoption of Posner’s opinions in Contracts and Torts casebooks, *see* Lawrence Cunningham, *Cardozo and Posner on Contracts and Torts*, *CONCURRING OPINIONS*, (July 1, 2008), [https://concurringopinions.com/archives/2008/07/cardozo\\_and\\_pos.html](https://concurringopinions.com/archives/2008/07/cardozo_and_pos.html).



Yet Posner misidentifies the secret to Holmes's and Cardozo's success,<sup>36</sup> not to mention his own.<sup>37</sup> What made Cardozo a great judge was his mastery of the common law: a mastery that consisted of something more than literary talent. Posner's judicial excellence is made of the same stuff. He knows a lot of law, has an excellent feel for which doctrines are implicated by which facts, and sees how the law's distinct parts hang together.<sup>38</sup> His distinctiveness from his predecessors is largely at the level of theoretical packaging. To engage in some justified table turning, one might say that Posner has felt compelled in this, our post-Realist age, to hide his common law light under the bushel of law and economics.<sup>39</sup>

Anyone who examines Cardozo's decisional corpus will be struck by his opinions, with their distinctive sentence structures and memorable epigrams. A closer reading, however, reveals something deeper, namely, his remarkable feel for the subtleties of the common law and their significance. This is a judge who really understood contract, tort, agency, partnership, trusts, restitution, equity, and many other topics for which students, professors and judges today have little feel. This is a judge who saw himself enmeshed in multiple overlapping webs of doctrine, and who saw his job as making sense of them, not by reducing them down to a single idea, but by taking them seriously on their own terms, understanding what they mean and don't mean, and grasping how they relate to one another to form a scheme that aspires to coherence, and is reflective of "the traditions and conscience of our people."<sup>40</sup>

Only a judge who truly understands negligence law, tort law, and tort law's relation to other bodies of law, including criminal law,

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<sup>36</sup> On Posner's misreadings of Holmes and Cardozo, see John C. P. Goldberg, *Book Review: The Life of the Law*, 51 STAN. L. REV. 1419, 1436-41 (1999) [hereinafter, Goldberg, *Life of the Law*]; John C. P. Goldberg, *Style and Skepticism in The Path of the Law*, 63 BROOK. L. REV. 225, 226-40 (1997).

<sup>37</sup> John C. P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas and Robinette*, 88 IND. L.J. 569, 583 (2013).

<sup>38</sup> Which of course is not to say that all of his opinions are equally masterful. See *id.* at 583-89. Even Cardozo had some off days.

<sup>39</sup> Goldberg, *Life of the Law*, *supra* note 36, at 1439 (noting Posner's embrace of Grant Gilmore's claim that Cardozo "hid his light under a bushel"—i.e., adjudicated by reasoning instrumentally rather than doctrinally, yet dressed up his reasoning in the language of doctrine to conform to conventional lawyerly sensibilities).

<sup>40</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.).

could have written *Palsgraf*.<sup>41</sup> Only a judge who fully grasps the doctrine and spirit of contract law could have written *Allegheny College*.<sup>42</sup> And only a judge versed in law and equity could have offered the eloquent dissent in *People v. Westchester County National Bank of Peekskill*.<sup>43</sup> That's the case in which Judge William Andrews—sometimes praised for being the anti-formalist, justice-seeking champion of the downtrodden Helen Palsgraf—struck down a statute, overwhelmingly approved by referendum, that authorized New York state to issue bonds to finance modest payments to residents who had served in the U.S. military during World War I.<sup>44</sup>

Andrews held that the bond issue violated a state constitutional ban on the use of governmental credit to extend gifts to individuals.<sup>45</sup> Cardozo rejected this characterization, faulting Andrews for too hastily concluding that the payments in question were ineligible to occupy the legal space between a payment in satisfaction of a legal debt, on the one hand, and the mere conferral of a gift out of gratitude, on the other.<sup>46</sup> This 'middle' option—the one Cardozo believed to be applicable to the case—was a payment based on an obligation that sounded in equity. Here is how Cardozo described the situation (I quote at length to remind us of his methods):

Great achievement and great sacrifice have been meagerly rewarded. The perils of battle, the hardships of camp and trench, may be poorly paid at any price; few will assert that they are recompensed at the rate of \$1 a day. Even for those who did not reach the firing line, there were the pangs of separation from home and kindred, the anxieties and the strain of a new and hazardous adventure. Legislature and people,

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<sup>41</sup> For a careful explication of this decision, see Benjamin C. Zipursky, *Palsgraf, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757 (2012).

<sup>42</sup> *Allegheny College v. Nat'l Chautauqua Cty. Bank of Jamestown*, 159 N.E. 173 (N.Y. 1927). For a careful explication of this decision, see Curtis Bridgeman, *Allegheny College Revisited: Cardozo, Consideration, and Formalism in Context*, 39 U.C. DAVIS L. REV. 149 (2005).

<sup>43</sup> 132 N.E. 241 (N.Y. 1921).

<sup>44</sup> *Id.* at 247.

<sup>45</sup> *Id.* at 245 (payments from the state could be deemed in satisfaction of an equitable obligation only where "some direct benefit was received by the state as a state or some direct injury [was] suffered by the claimant under circumstances where in fairness the state *might be asked to respond ...*") (emphasis in original).

<sup>46</sup> *Id.* at 248 (Cardozo, J., dissenting).

beneficiaries of this devotion, have heard the call of a moral duty to mitigate the disparity between suffering and requital. But the catalogue of suffering does not end with pain of mind and body. There was money loss as well, or so at least a Legislature, looking at average conditions, might not unreasonably believe. . . . We take judicial notice of these things. We take judicial notice, too, that since the beginnings of our history a sense of the moral obligation to give aid to the returning soldier has been felt and acted on by government. *U. S. v. Hall*, 98 U. S. 343, 346, 25 L. Ed. 180. The call of these and kindred equities has been heard and answered in the past. Are the equities so feeble, is their summons so plainly an illusion, that we may answer them no more? . . . .

We err when we envisage the soldier's relation to the government in the category of contract. Contract in the true sense there is none, but service conscripted by the sovereign, and, even though not conscripted, rewarded at its will. That is why payment of the wage does not always satisfy the conscience that there has been payment of the debt. The Constitution does not silence these mutterings of spiritual disquiet when sacrifice unevenly distributed oppresses those who profit by it with the sense of a burden undischarged. Our ruling in *Matter of Borup*, 182 N. Y. 222, 74 N. E. 838, 108 Am. St. Rep. 796, was founded in that truth. We held that it was in the power of the Legislature by a retroactive statute to assume liability to a landowner injured by a change of grade, though at the time of the change the impairment of value was damage without wrong. Under the law before the statute, the loss was one of the incidents of life in organized society. It was part of the price which the citizen must pay for the benefits of government. We held that the Legislature might readjust the incidence of the burden, might establish a more equitable distribution between the individual and the public, through the voluntary acceptance of liability for a loss which was without a

remedy when suffered. I cannot yield to an appraisal of values that would find the basis of an equity there, and a mere cobweb, an illusion, here. In neither case is there legal liability unless the Legislature assumes one. In each there is an unequal pressure of the burdens and the power of government upon one man and upon others. The readjustment of these burdens along the lines of equality and equity is a legitimate function of the state as long as justice to its citizens remains its chief concern.<sup>47</sup>

This is vintage Cardozo. Consider how much ground is covered in these few sentences. There is an appeal to precedent and tradition. There is a view of the deference owed by a state's courts to its legislature. There is careful attention to the distinct domains of law and equity. And none of this can be dismissed as Cardozo dressing up his 'raw' political preferences in fancy language: thanks to Professor Kaufman's dogged research, we know that Cardozo told Felix Frankfurter that he (Cardozo) personally opposed the bond issue.<sup>48</sup>

Note too that equity, as Cardozo employs it, is not an idea of unconstrained discretion to do justice. Rather, it is equity rooted in and constrained by the methods of tradition and sociology. Andrews' majority opinion treated the envisioned payments as, at best, a unilateral expression of gratitude to the state's veterans. Now pause for a moment and bring yourself to the present. Think of the sentiment that is everyday expressed when civilians encounter a soldier. "Thank you for your *service*," we say. This sort of routine, ritual interaction is the stuff of equity as Cardozo understood it. Of course within this sentiment there *is* an expression of gratitude. But there is more than that. There is an acknowledgment of *sacrifices and losses*, and of *benefits* conferred—of debts that are owed and that may never be repaid. To be sure, a court in the exercise of its equitable powers—even though they include the authority to recognize certain claims that lack a grounding in legal right, and to issue forms of relief beyond those available at law—could not legitimately order a sovereign state to compensate one of its veterans merely because the veteran sought such an order. A legislature, however, has broader powers. New York's regarded the bond issue as the acknowledgment of an equitable

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<sup>47</sup> *Id.* at 249-50 (Cardozo, J., dissenting).

<sup>48</sup> KAUFMAN, *supra* note 5, at 340.

debt, and the payments made under it as a partial fulfillment of an authentic equitable obligation.<sup>49</sup> And it was reasonable to do so. As always, for Cardozo, reasonableness was determined not by high moral theory, but by precedent, by tradition, and by how people in the world actually act, talk, and feel. There is a broadly shared understanding of military service—an understanding that is entirely practical, not ethereal. It is this understanding that defeats the suggestion that the payments in question could only be construed as mere handouts.

### III

Perhaps a virtuoso of Cardozo's caliber finds his way to the bench only once in a generation. My worry is that, thanks in part to *Erie*, the future 'hit' rate will be even lower. The passing of *Swift v. Tyson* was hardly an occasion for wailing and the gnashing of teeth. But the *Erie* doctrine should still be recognized for what it is: a tributary feeding a stream feeding a river that is steadily bearing us away from common law and common-law method.

Then again, legal history is anything but linear. Perhaps, just ahead, a bend in the river awaits us. Perhaps the next Cardozo is right now sitting in one of our classrooms. I look forward to reading her opinions.

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<sup>49</sup> *Westchester County Nat'l Bank of Peekskill*, 132 N.E. at 248 (Cardozo, J., dissenting).