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## THE NATURE OF THE JUDICIAL PROCESS: THE ENDURING SIGNIFICANCE OF A LEGAL CLASSIC

Joel K. Goldstein\*

A classic, Mark Twain said, is a book everyone wants to have read but no one wants to read. Alternatively, Twain described a classic as a work people praise but don't read. Twain, of course, was mocking social behavior, not the relatively few works that rank as classics or the rare authors who produce them.

In the literature of the law, few books become classics. The period over which most law books are read is depressingly brief, to writers of such works at least. The life of the law may be experience, not logic, as Oliver Wendell Holmes, Jr. instructed,<sup>1</sup> but one consequence of writing about such a dynamic subject is that even profound thinkers find their work forgotten as new opinions subordinate earlier precedents, doctrine changes, institutional behavior evolves, new circumstances introduce novel problems and considerations, and a younger generation rebukes or forgets the writings of earlier times.

Benjamin N. Cardozo's *The Nature of the Judicial Process*<sup>2</sup> is an exception. It is a legal classic.<sup>3</sup> Those who attended Cardozo's four

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<sup>1</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

<sup>2</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

<sup>3</sup> See, e.g., Ruggero J. Aldisert, *The Nature of the Judicial Process: Revisited*, 49 U. CIN. L. REV. 1, 2 (1989) (referring to Cardozo's "classic essay"); Judith S. Kaye, *Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 88 CORN. L. REV. 1004, 1008 (1987) (referring to Cardozo's book as "classic"); Cf. Shirley S. Abramson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965, 968 (1993) (Wisconsin Supreme Court justice referring to book as "timeless"); Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1, 16 (1990) (New York Court of Appeals Chief Justice referring to Cardozo's book as a "seemingly timeless work"); Paul Brickner, *How Judges Think*, 59 CASE W. RES. L. REV. 793, 794 (2009) (referring to Cardozo's "enduring study" and "slender classic"); see also cf. Grant Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022, 1032 (1975) (describing *The*

Storrs lectures at Yale Law School in 1921 or read the resulting book published later that year recognized as very special what they heard or read. Two years after its publication, Cardozo's successor on the Supreme Court, Felix Frankfurter, put quotation marks around the lower-case words "the nature of the judicial process,"<sup>4</sup> implicitly suggesting that the six words of Cardozo's title already required such treatment even when not specifically referring to the book. Frankfurter described the book as "a little classic" in 1958,<sup>5</sup> a judgment Professor Arthur Corbin had conferred, but without the adjective, in 1939.<sup>6</sup>

To be sure, Cardozo's book has had its occasional detractors. Justice Harry Blackman first read the book "carefully" in 1975 and found the lectures "somewhat disappointing."<sup>7</sup> Very late in life, Judge Henry Friendly told Judge Richard A. Posner that he found Cardozo's book dated and Posner himself thought it "pretty useless" as "a handbook of the judicial craft"<sup>8</sup> and reported that it was "considered in sophisticated legal circles old hat."<sup>9</sup> Shortly after replacing Cardozo on the Supreme Court in 1939, Frankfurter found the book not helpful in deciding actual cases.<sup>10</sup> A year after publishing *The Death of Contract*, the great Grant Gilmore declared the demise of *The Nature of the Judicial Process* in his 1975 Storrs Lecture. "[N]obody reads" Cardozo's book anymore, Gilmore said, which he said has "almost no intellectual content."<sup>11</sup>

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*Nature of the Judicial Process*, along with Holmes' *The Common Law*, as "the two most celebrated books in the history of American jurisprudence" though "nobody reads them and everybody praises them").

<sup>4</sup> Felix Frankfurter, *Twenty Years of Mr. Justice Holmes' Constitutional Opinions*, 36 HARV. L. REV. 909, 909-10 (1923).

<sup>5</sup> Frankfurter often referred to Cardozo's book in diminutive terms. See, e.g., Felix Frankfurter, *The American Judge*, 37 HARV. L. REV. 782, 782 (1924) (book review) (referring to Cardozo's "exhilarating little volume"), perhaps in response to or consistent with Cardozo's own reference to "my little book" in a letter of February 4, 1922 to Frankfurter, quoted in ANDREW L. KAUFMAN, *CARDOZO*, 153, 623 n.36 (1998).

<sup>6</sup> Arthur L. Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 48 YALE L.J. 426, 434 n.15 (1939).

<sup>7</sup> Harry A. Blackman, *Notes on a Somewhat Disappointing Book*, 15 GREEN BAG 2D 204 (2012).

<sup>8</sup> RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 19 n.38 (1990).

<sup>9</sup> *Id.* at 21.

<sup>10</sup> Paul A. Freund, *Foreword: Homage to Mr. Justice Cardozo*, 1 CARDOZO L. REV. 1, 3-4 (1979).

<sup>11</sup> Gilmore, *supra* note 3, at 1032; see also GRANT GILMORE, *THE AGE OF AMERICAN LAW* 76 (1977).

Professor Gilmore's comment recalls the verdict of another great American thinker, Yogi Berra, about Ruggeri's, a prominent Italian restaurant in St. Louis which opened in 1904. "Nobody goes there anymore. It's too crowded,"<sup>12</sup> Yogi supposedly said in the late 1940s. Ruggeri's closed in 1982, but *The Nature of the Judicial Process* has endured. Cardozo's classic has been purchased as well as praised. In 1990, Judge Posner concluded that the frequency with which the book is still cited confirms its status as a classic.<sup>13</sup> The prominent legal historian, Morton Horwitz, wrote near the end of the 20<sup>th</sup> century that Cardozo's book "remained perhaps the most widely read American work on legal thought for over a half century."<sup>14</sup> In 2013, Cardozo's biographer, Professor Andrew Kaufman, reported that the work "continues to be reprinted and sold in substantial numbers over ninety years" after publication.<sup>15</sup>

Nearly a century after it appeared, Cardozo's classic, *The Nature of the Judicial Process*, should be read, as well as praised, by law students and their teachers, and by others who aspire to understand the American judicial process. Indeed, it should be part of the common literature that law schools assign their students. In part, its claim to continued study is historical, based on its impact on twentieth century legal thought and for the insights it provides about its iconic author, one of America's greatest and most influential judges. Yet it also presents a compelling account of common law judging and the common law process that, somewhat remarkably, continues to describe law and judging in our time as well as in Cardozo's. Cardozo's book provides lasting insights into the challenging task assigned judges in the American system. Cardozo explained how judges could help make a legal system remain connected to changing times and values, even while applying a proliferation of rules from decisions rendered in the past, and often the long-distant past. And he explained how judges could respond when legal disputes presented situations that existing rules don't clearly cover. Cardozo did not provide a neat, formulaic response, but his depiction took root and survived because it was candid, credible and pragmatic, and because it balanced the virtues of continuity and change. And, perhaps not surprisingly, part of what has

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<sup>12</sup> YOGI BERRA, *THE YOGI BOOK* 16 (1998).

<sup>13</sup> POSNER, *supra* note 8, at 21.

<sup>14</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870-1960 THE CRISIS OF LEGAL ORTHODOXY* 189 (1992).

<sup>15</sup> Andrew L. Kaufman, *Cardozo at 100*, 13 J. APP. PRAC. & PROCESS 183, 184 (2013).

made the book a classic was Cardozo's ability to deploy virtues of the common law methodology to explain appellate decision-making.

This Essay begins by describing in Section I the events leading to the creation of *The Nature of the Judicial Process*. Section II briefly outlines Cardozo's argument in the book. Section III describes the reaction to Cardozo's book, and section IV seeks to explain its continuing relevance.

## I. THE BACKGROUND TO *THE NATURE OF THE JUDICIAL PROCESS*

*The Nature of the Judicial Process* grew out of Cardozo's 1921 Storrs Lectures at Yale Law School when Cardozo was in the eighth of his 18 years on the New York Court of Appeals, the state's highest court. He had been elected to the New York Supreme Court in late 1913 and took office in January, 1914, at age 43. A few weeks later, Governor Martin Glynn designated Cardozo to serve temporarily on the New York Court of Appeals, the state's highest court. Cardozo was elected in 1917 for a 14-year term.

The invitation to deliver the Storrs Lectures came in winter, 1920. Arthur Corbin had written about Cardozo's opinion in *DeCicco v. Schweizer*,<sup>16</sup> and Corbin's scholarly article<sup>17</sup> had generated a correspondence between jurist and academic.<sup>18</sup> The Yale Law faculty "enthusiastically" authorized Dean (later Judge) Thomas W. Swan to invite Cardozo.<sup>19</sup> Charles E. Clark, a young faculty member at Yale Law School at the time who became a prominent federal judge, later recalled the faculty's sense that Cardozo was "not merely a good judge, but even more a student and scholar in the law worthy of our highest platform honor."<sup>20</sup> Cardozo initially declined the invitation to give the Storrs Lectures, stating "I have no message to deliver."<sup>21</sup> A visit of Cardozo with the Yale Law faculty was arranged, at which Cardozo

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<sup>16</sup> 117 N.E. 807 (N.Y. 1917).

<sup>17</sup> Arthur L. Corbin, *Does a Pre-Existing Duty Defeat Consideration? — Recent Noteworthy Decisions*, 27 YALE L.J. 362, 362 (1918).

<sup>18</sup> Arthur L. Corbin, *The Judicial Process Revisited: Introduction*, 71 YALE L.J. 195, 196 (1961).

<sup>19</sup> *Id.* at 197.

<sup>20</sup> Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946).

<sup>21</sup> Corbin, *supra* note 18, at 197; *see also* Corbin, *supra* note 6, at 434 n.15 (reporting that Cardozo accepted the invitation to deliver the Storrs Lecture "hesitatingly").

repeated the declination for the same reason. Yet at least one person present persisted. “Judge Cardozo, could you not explain to our students the process by which you arrive at the decision of a case, with the sources to which you go for assistance?” Cardozo promptly assented that “I believe I *could* do that.”<sup>22</sup>

And he did. After a year of preparation, Cardozo performed his assignment. On successive days from February 15-18, 1921, he explained how he decided cases in four, hour-long lectures.<sup>23</sup> Cardozo had already authored some of his greatest hits. In addition to *DeCicco v. Schweizer*,<sup>24</sup> *MacPherson v. Buick Motor Co.*,<sup>25</sup> and *Wood v. Lucy Lady Duff-Gordon*<sup>26</sup> were already in the books when the invitation was extended, and *Jacobs and Youngs, Inc. v. Kent*<sup>27</sup> was hot off the press when Cardozo spoke in New Haven, having been issued the prior month.

The Yale Law faculty had anticipated that Cardozo would rank with its prior Storrs lecturers, but surely none anticipated that his lectures would remain the standard nearly a century later.<sup>28</sup> Clark, then a young faculty member, later recalled that none of us “was prepared to be so wooed and won as we were by the gentle, shy, and engaging personality who charmed his listeners to the point of achieving the supreme distinction of requiring a larger hall for his huge audience.”<sup>29</sup> That feat departed from normal practice which had dictated that the lectures drew successively smaller audiences.<sup>30</sup> Corbin recalled that Cardozo’s first lecture was met with a “burst of applause that would not cease.”<sup>31</sup> Attendance for the second lecture increased to such an extent that the lecture was moved to a hall that accommodated 500, twice the seating capacity of the original venue. Even so, the larger hall was filled.<sup>32</sup> Corbin reported that the audience was “spell-bound” for the four lectures. Cardozo “had inspired our ambition in the law

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<sup>22</sup> Corbin, *supra* note 18, at 197.

<sup>23</sup> KAUFMAN, *supra* note 5, at 204.

<sup>24</sup> 117 N.E. 807 (N.Y. 1917).

<sup>25</sup> 111 N.E. 1050 (N.Y. 1916).

<sup>26</sup> 118 N.E. 214 (N.Y. 1917).

<sup>27</sup> 129 N.E. 889 (N.Y. 1921).

<sup>28</sup> See Gilmore, *supra* note 3, at 1022 n.b. (Editors’ Introduction describing Cardozo’s lectures as “the most famous”). See also Clark, *supra* note 20, at 267 (describing Cardozo’s Storrs Lectures as “an historic occasion”).

<sup>29</sup> Clark, *supra* note 20, at 267.

<sup>30</sup> Clark, *supra* note 20, at 267.

<sup>31</sup> Corbin, *supra* note 18, at 197.

<sup>32</sup> Corbin, *supra* note 18, at 197-98.

and had warmed the cockles of our hearts. Never again have I had a like experience,” remarked the man who became one of the leading Contracts scholars in American history.<sup>33</sup> After the final lecture, the faculty insisted that the manuscript be published. Cardozo protested that “If it were published, I would be impeached.”<sup>34</sup> He relented, of course, Yale University Press published the 180-page book later that year, and the rest, as they say, is history. Cardozo became iconic, not impeached.

## II. A SUMMARY OF CARDOZO’S ARGUMENT IN *THE NATURE OF THE JUDICIAL PROCESS*

Consistent with the invitation as refined and accepted, Cardozo’s lectures and eventual book attempted to describe how he decided cases. Judge Jerome Frank later criticized Cardozo for ignoring the important work of trial courts,<sup>35</sup> but that attack, though largely accurate, seems entirely unfair. Cardozo’s title, *The Nature of the Judicial Process*, certainly misrepresented his topic since the assignment given and accepted was far more modest. Cardozo, an appellate judge, made that clear at the outset of his book, beginning in its eighth sentence:

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?<sup>36</sup>

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<sup>33</sup> Corbin, *supra* note 18, at 198.

<sup>34</sup> Corbin, *supra* note 18, at 198.

<sup>35</sup> Jerome Frank, *Cardozo and the Upper Court Myth*, 13 LAW & CONTEMP. PROBS. 369, 373 (1948) (“Cardozo completely by-passed the operations of the trial courts, as if to say either that they had little significance or that their unique decisional activities and distinctive functions had no place in that process.”).

<sup>36</sup> CARDOZO, *supra* note 2, at 10.

Cardozo's recurring use of the personal pronoun was suggestive. Consistent with the invitation he had ultimately accepted, Cardozo was describing how, he, an appellate judge, decided cases.

Cardozo's purpose was primarily descriptive, not prescriptive.<sup>37</sup> He recognized judge-made law as a reality<sup>38</sup> and one which involved some governing principle,<sup>39</sup> although not always the same principle for all jurists or even a uniform principle for any one judge in every case.<sup>40</sup> The principle was sometimes consciously chosen and sometimes subconsciously driven,<sup>41</sup> yet inherently personal.<sup>42</sup>

Cardozo thought that generally, some constitutional, statutory or common law rule provided a clear and consensus resolution for judges regarding most legal questions.<sup>43</sup> But on occasion, the law left gaps,<sup>44</sup> particularly in instances where intention was obscure or where legislators had not foreseen a later application,<sup>45</sup> a condition especially likely in constitutional law.<sup>46</sup> When the law left gaps, judges had to determine the appropriate legal rules and principles and how to apply them.<sup>47</sup> In such situations, Cardozo explained that judges did not find and apply existing law. They made law,<sup>48</sup> they created it, but they did so only "interstitially,"<sup>49</sup> as Holmes had written four years earlier in dissent,<sup>50</sup> "between gaps"<sup>51</sup> and subject to restraints Cardozo spelled out.<sup>52</sup>

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<sup>37</sup> CARDOZO, *supra* note 2, at 10.

<sup>38</sup> CARDOZO, *supra* note 2, at 10.

<sup>39</sup> CARDOZO, *supra* note 2, at 11.

<sup>40</sup> CARDOZO, *supra* note 2, at 11.

<sup>41</sup> CARDOZO, *supra* note 2, at 11-12.

<sup>42</sup> CARDOZO, *supra* note 2, at 13.

<sup>43</sup> CARDOZO, *supra* note 2, at 14, 18, 129, 137.

<sup>44</sup> CARDOZO, *supra* note 2, at 14, 69-71.

<sup>45</sup> CARDOZO, *supra* note 2, at 14-15.

<sup>46</sup> CARDOZO, *supra* note 2, at 17.

<sup>47</sup> CARDOZO, *supra* note 2, at 15-16, 17, 28, 129.

<sup>48</sup> CARDOZO, *supra* note 2, at 21, 115, 166.

<sup>49</sup> CARDOZO, *supra* note 2, at 69.

<sup>50</sup> *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common law judge could not say, 'I think the doctrine of consideration a bit of historical nonsense, and shall not enforce it in my court.'").

<sup>51</sup> CARDOZO, *supra* note 2, at 113.

<sup>52</sup> CARDOZO, *supra* note 2, at 141.

Cardozo suggested four methods judges used: 1) logical progression, or the method of philosophy; 2) historical development or the method of evolution; 3) community customs, or the method of tradition; and 4) justice, morals and social welfare, or the method of sociology.<sup>53</sup> The method of philosophy had “a certain presumption in its favor”<sup>54</sup> based on considerations of consistency, fairness, and impartiality and to preserve faith that the legal system is legitimate, not arbitrary.<sup>55</sup> Departures from logic required justification.<sup>56</sup> Yet logic sometimes pointed in different directions and required judges to choose between or accommodate competing legal principles or look to some other criteria for guidance.<sup>57</sup> Cardozo presented the four methods as distinct approaches,<sup>58</sup> but suggested that sometimes they operated together as when history illuminated logic when understanding the rationale animating a rule requires knowledge of its origins.<sup>59</sup>

Cardozo recognized the importance of history and custom in shaping the law. Yet even though these methods linked law to the past, they did not “confine[] the law of the future to uninspired repetition of the law of the present and the past.”<sup>60</sup> On the contrary, Cardozo thought history could illuminate the past and the present, and in so doing could guide the future path of the law.<sup>61</sup>

The most significant method was not, however, logic or history or custom but “the power of social justice,” the method of sociology,<sup>62</sup> what Cardozo sometimes described as “utility, and the accepted standards of right conduct.”<sup>63</sup> “The final cause of law is the welfare of society,” wrote Cardozo, and “[t]he rule that misses its aim cannot permanently justify its existence.”<sup>64</sup> Cardozo did not suggest that judges could routinely ignore existing rules in pursuit of their own

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<sup>53</sup> CARDOZO, *supra* note 2, at 30-31, 112.

<sup>54</sup> CARDOZO, *supra* note 2, at 31.

<sup>55</sup> CARDOZO, *supra* note 2, at 32-36.

<sup>56</sup> CARDOZO, *supra* note 2, at 33, 35.

<sup>57</sup> CARDOZO, *supra* note 2, at 40-43.

<sup>58</sup> *Cf.* Corbin, *supra* note 18, at 199 (stating that Cardozo’s discussion of four methods may lead the “unwary” to compartmentalize them rather than see them as part of Cardozo’s integrated method).

<sup>59</sup> CARDOZO, *supra* note 2, at 51-52, 55, 65.

<sup>60</sup> CARDOZO, *supra* note 2, at 53.

<sup>61</sup> CARDOZO, *supra* note 2, at 53.

<sup>62</sup> CARDOZO, *supra* note 2, at 65-66.

<sup>63</sup> CARDOZO, *supra* note 2, at 112.

<sup>64</sup> CARDOZO, *supra* note 2, at 66.

vision of wisdom. Rather, he meant that when judges were called upon to apply rules to new situations “they must let the welfare of society fix the path, its direction and its distance.”<sup>65</sup> Cardozo did not believe judges had license generally to impose their own conceptions of morality.<sup>66</sup> Instead, they must apply an objective test and apply the views they might reasonably expect a reasonable person to view as correct.<sup>67</sup> They must adhere to the mores of the day, the temper of the times, the morality of “right-minded” contemporaries.<sup>68</sup> Ultimately, judge-made law must be measured by its consequences.<sup>69</sup> A judge-made rule which experience showed clashed with the sense of justice or did not serve social welfare should be abandoned or fixed,<sup>70</sup> especially when it did not shape the litigants’ conduct.<sup>71</sup> Cardozo thought precedent should normally command adherence but not when experience demonstrated that it was at odds with social welfare.<sup>72</sup>

Cardozo saw nothing novel in his depiction of the judicial process.<sup>73</sup> It had so operated for centuries.<sup>74</sup> But whereas fictions had traditionally been deployed to conceal this truth,<sup>75</sup> transparency had more recently replaced concealment as the preferred approach.<sup>76</sup> Cardozo thought candor a virtue in describing the judicial process.

Cardozo was careful to place his claim regarding judicial law-making within the context of a legal system that made such activity the rare exception, not the rule. Generally, law was clear and litigation did not result.<sup>77</sup> When disputes went to court, legal clarity generally gave judges no discretion and provided no opportunity for judicial law-making. It was only when a dispute exposed a gap in the law that judges made law.<sup>78</sup> Judicial innovation was confined to a narrow space.<sup>79</sup>

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<sup>65</sup> CARDOZO, *supra* note 2, at 67.

<sup>66</sup> CARDOZO, *supra* note 2, at 108.

<sup>67</sup> CARDOZO, *supra* note 2, at 89-90, 106, 142.

<sup>68</sup> CARDOZO, *supra* note 2, at 104, 105, 106, 108.

<sup>69</sup> CARDOZO, *supra* note 2, at 102-103, 112-13.

<sup>70</sup> CARDOZO, *supra* note 2, at 150.

<sup>71</sup> CARDOZO, *supra* note 2, at 151.

<sup>72</sup> CARDOZO, *supra* note 2, at 149, 150.

<sup>73</sup> CARDOZO, *supra* note 2, at 116.

<sup>74</sup> CARDOZO, *supra* note 2, at 116, 137-38.

<sup>75</sup> CARDOZO, *supra* note 2, at 116.

<sup>76</sup> CARDOZO, *supra* note 2, at 117.

<sup>77</sup> CARDOZO, *supra* note 2, at 128.

<sup>78</sup> CARDOZO, *supra* note 2, at 129.

<sup>79</sup> CARDOZO, *supra* note 2, at 136-37, 170.

Cardozo recognized that judge-made law presented perils, including the possibility that judges would act unwisely.<sup>80</sup> But someone had to exercise the “power of interpretation,” and constitutional “custom” had reposed that power with courts,<sup>81</sup> he concluded, channeling Alexander Hamilton in Federalist 78<sup>82</sup> and John Marshall in *Marbury v. Madison*.<sup>83</sup> Cardozo thought judges would discharge that function well if they acted conscientiously and intelligently.<sup>84</sup> The diversity of the bench would also provide a corrective. “The eccentricities of judges balance one another,” he wrote.<sup>85</sup> And judicial error would be corrected over time in later cases.<sup>86</sup> The process of continually examining rules against the test provided by recurring application would reveal which should survive and which should change.<sup>87</sup>

Cardozo recognized the problem of applying judge-made rules retrospectively. The fiction that judges always found existing law pretended the problem away but candor recognized that gimmick as a false resolution. Some retrospective-application of law was inevitable given the law-maker’s inability to anticipate all contingencies.<sup>88</sup> Cardozo concluded that where the law did not provide an applicable rule the best course was to entrust resolution to an impartial judge based upon what fair and reasonable persons who knew community habits and standards of justice would conclude.<sup>89</sup> Generally, the result so generated would mirror what a statute would have provided.<sup>90</sup> Judges must be translators who could accommodate the law to “the spirit of their times.”<sup>91</sup> To the extent a judge succeeds in that task, his

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<sup>80</sup> CARDOZO, *supra* note 2, at 135.

<sup>81</sup> CARDOZO, *supra* note 2, at 135.

<sup>82</sup> THE FEDERALIST NO. 78 (“The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”).

<sup>83</sup> 5 U.S. (1 Cranch) 137, 151 (1803).

<sup>84</sup> CARDOZO, *supra* note 2, at 136.

<sup>85</sup> CARDOZO, *supra* note 2, at 177.

<sup>86</sup> CARDOZO, *supra* note 2, at 178.

<sup>87</sup> CARDOZO, *supra* note 2, at 179.

<sup>88</sup> CARDOZO, *supra* note 2, at 143.

<sup>89</sup> CARDOZO, *supra* note 2, at 142.

<sup>90</sup> CARDOZO, *supra* note 2, at 143.

<sup>91</sup> CARDOZO, *supra* note 2, at 174.

work will endure; if he does not, his work will not produce lasting rules<sup>92</sup> but will yield to his successors' improved resolutions.

### III. THE REACTION TO CARDOZO'S BOOK

Reviewers of *The Nature of the Judicial Process* responded with effusive praise that mirrored the reactions of those who heard the lectures.<sup>93</sup> They praised its substance,<sup>94</sup> style<sup>95</sup> and method.<sup>96</sup> Some welcomed the book as a pioneering effort of a jurist to explain how judges did their work. Writing in 1921, Harlan Fiske Stone, the Dean of Columbia Law School, called it “the first book which has sought in simple and understandable language to answer the question, what is the intellectual process by which the judge decides a case?”<sup>97</sup> Cardozo's contribution, Judge Rousseau Burch of the Kansas Supreme Court suggested, was not simply to educate the public but to contribute to transparency about government.<sup>98</sup> Reviewers thought the book should be read by judges, lawyers and a lay audience.<sup>99</sup>

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<sup>92</sup> CARDOZO, *supra* note 2, at 178.

<sup>93</sup> See, e.g., W. F. Dodd, *Book Review*, 16 AM. POL. SCI. REV. 710, 710 (1922) (“Seldom in a similar space will a student of legal institutions find so much of interest as in these lectures of Judge Cardozo. With a wealth of knowledge and a felicity of practical illustration. . . .”); *id.* at 711 (“It is impossible in a brief review to do more than call attention to the excellence of this little book. Those who do not read it will miss a stimulating contribution to the discussion of our legal institutions.”); Thomas Reed Powell, *The Behavior of Judges*, THE NATION, March 22, 1922, at 347-48 (calling book a wonderful resource “[f]or those who fear not wisdom.”).

<sup>94</sup> C.M. Hough, *Book Review*, 7 CORN. L. Q. 287, 288 (1922) (stating that “the book will enlighten in substance. . . .”).

<sup>95</sup> *Id.* at 288 (stating the book will “charm in style”).

<sup>96</sup> Rousseau A. Burch, *Book Review*, 31 YALE L. J. 677, 677 (1922) (“[T]here is nothing new in this book but its method. Elements of the judicial process have been discussed before; but this account, although brief, is vivid and complete; although daring, is not sensational or exaggerated; although informed by genius and erudition, is lucid enough to be comprehended by law-school students; and the account is rendered with a combination of spirit and restraint, and with that ‘animated moderation,’ which makes it as brilliant as it is convincing.”).

<sup>97</sup> Harlan Fiske Stone, *Book Review*, 22 COLUM. L. REV. 382, 382 (1922); see also Nathan Isaacs, *Book Review*, 20 MICH. L. REV. 688, 688 (1922) (“Curiously enough, the literature in which judges themselves speak of the processes by which they reach their conclusions is very meager. Of introspective analysis by eminent judges there is practically none. . . . Judge Cardozo's contribution, then, though his subject is as old as the law itself, seems to be a pioneer work.”); Learned Hand, *Book Review*, 35 HARV. L. REV. 479, 480 (1922); Burch, *supra* note 95 (calling book a “true” account of judicial process).

<sup>98</sup> Burch, *supra* note 96, at 677 (“[T]he high priest has not merely come out on the porch of the temple to speak to the people, he has taken them inside, and drawn back the veil. This is as it should be.”).

<sup>99</sup> Hough, *supra* note 94, at 290 (stating that “[l]awyers, and especially judges, ought to press this volume onto the reading laity. . . .”); J. Willis Martin, *Book Review*, 70 U. PA. L.

Some, like Judge Learned Hand, credited Cardozo with correcting the fiction that judges simply apply pre-existing law.<sup>100</sup> Cardozo also won praise for identifying the various sources judges used in deciding.<sup>101</sup> Thomas Reed Powell thought it a reflection of Cardozo's wisdom that he identified "the ingredients to be blended" rather than a general rule of decision.<sup>102</sup> Writing in the *American Political Science Review* in 1922, W. F. Dodd praised Cardozo for "draw[ing] aside the veil of judicial sanctity, and show[ing] that judges have their views determined by all the influences which control their judgment as men and as lawyers."<sup>103</sup>

Stone thought the book cautioned judges and lawyers of the limits of logic and history in reaching "dynamic judgment[s]" and should lead

lawyers and students of law to place an appropriate emphasis on the study of sociological data and on the effort to understand the relation of law to them, because by that process we may lay the foundation for a better understanding of what social utility is and where in a given case the path of social utility lies.<sup>104</sup>

But Stone also saw "Cardozo's restrained and discriminating analysis" as a rejoinder of sorts to those who offered sociological jurisprudence as a "panacea."<sup>105</sup>

The book enhanced Cardozo's stature and fame.<sup>106</sup> Cardozo became a sought-after lecturer. Five years after its publication, an English scholar, Harold J. Laski, quoted it early in a discussion of

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REV. 345, 348 (1922) (recommending book for lawyers, law students and laymen); Burch, *supra* note 96, at 680 (recommending book for judges, lawyers, and all interested in public affairs).

<sup>100</sup> Hand, *supra* note 97, at 479.

<sup>101</sup> Hand, *supra* note 97, at 479 (writing that Cardozo's "essay tells us of the different factors which may properly enter into a judge's consideration"); Powell, *supra* note 93, at 347 (praising Cardozo for identifying "springs of wisdom" from which judges drew).

<sup>102</sup> Powell, *supra* note 93, at 348.

<sup>103</sup> Dodd, *supra* note 93, at 710; *see also* Isaacs, *supra* note 97, at 689 (calling recognition of "subconscious element" in judging Cardozo's "most important contribution"); Powell, *supra* note 93, at 347 (crediting Cardozo with recognizing "subconscious" element in judging).

<sup>104</sup> Stone, *supra* note 97, at 384.

<sup>105</sup> Stone, *supra* note 97, at 384.

<sup>106</sup> Kaufman, *supra* note 15, at 186; RICHARD POLENBERG, *THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS* 86 (1997); *see also* The Underwriter, 3 F.2d 483, 485 (E.D.N.Y. 1925) (referring to Judge Cardozo's "thoughtful book").

judicial review in England.<sup>107</sup> And Cardozo's prominence contributed to the esteem in which the court on which he sat was held. Judge Irving Lehman, Cardozo's colleague on the New York Court of Appeals and friend, attributed the stature of that court prior to 1924 to the fact that "students of the law" had read "with glowing enthusiasm" Cardozo's Storrs lectures and his great opinions.<sup>108</sup> In 1936, Justice Harlan Fiske Stone singled out for special praise "that remarkable little volume of Mr. Justice Cardozo, *The Nature of the Judicial Process*" as a source of a "new and fruitful conception of law and the lawmaking process."<sup>109</sup>

Cardozo's death in 1938 prompted discussion of his career during which, not surprisingly, *The Nature of the Judicial Process* received some attention. Three leading law reviews published a joint tribute in which Justice Harlan Fiske Stone referred to Cardozo's "brilliant essay" in "which he pointed the way to the attainment" of molding law "to fulfill the needs of a changing social order."<sup>110</sup> Cardozo's essay was "by far the most illuminating discussion of the aims and method of sociological jurisprudence that has appeared. Its philosophy and literary merits would have won for him enduring fame, apart from his significance as a judge."<sup>111</sup> Frankfurter thought Cardozo's book was "suffused with intimations of what later came from his pen as a Justice, as well as glosses upon what is so shyly expressed in opinions."<sup>112</sup>

In the years following his death, Cardozo's successors on the Court drew from his book from time to time to support their opinions at a time when citation of extra-judicial sources was even more unusual than it is today. Justice Robert Jackson supported the fear expressed in his dissent in *Korematsu v. United States*<sup>113</sup> that the Court's decision had "validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then

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<sup>107</sup> Harold J. Laski, *Judicial Review of Social Policy in England*, 39 HARV. L. REV. 832, 832 (1926).

<sup>108</sup> Irving Lehman, *Judge Cardozo in the Court of Appeals*, 39 COLUM. L. REV. 12, 16 (1939).

<sup>109</sup> Harlan Fiske Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 20 (1936).

<sup>110</sup> Harlan Fiske Stone, *Mr. Justice Cardozo*, 39 COLUM. L. REV. 1, 2 (1939).

<sup>111</sup> *Id.*

<sup>112</sup> Felix Frankfurter, *Mr. Justice Cardozo and Public Law*, 39 COLUM. L. REV. 88, 90 (1939).

<sup>113</sup> 323 U.S. 214 (1944).

lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”<sup>114</sup> He wrote that “[a]ll who observe the work of courts are familiar with what Judge Cardozo described as ‘the tendency of a principle to expand itself to the limits of its logic.’”<sup>115</sup> Justice Jackson also cited Cardozo’s comments about judicial law-making in another opinion,<sup>116</sup> and Justice Hugo Black cited the book regarding the judicial quest for certainty.<sup>117</sup> Justice Frankfurter invoked the book for the proposition that the Court must follow clear statutory direction notwithstanding misgivings regarding its wisdom.<sup>118</sup>

When Yale University Press issued a paperback version in 1960 (for \$.95!), an unsigned review in the *University of Pennsylvania Law Review* stated that “it is safe to say that no other American writer on legal philosophy and the judicial process has ever produced a work which has had so immediate and so lasting an effect on the understanding of the legal profession of the workings of the courts and the growth of the law.”<sup>119</sup> At the time, some 24,805 copies of the book had been sold between 1921 and 1960, but that number was dwarfed by the 156,637 copies sold the next 34 years after it became available

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<sup>114</sup> *Id.* at 246.

<sup>115</sup> *Id.* (quoting CARDOZO, *supra* note 2, at 51).

<sup>116</sup> *State Tax Commission of Utah v. Aldrich*, 316 U.S. 174, 201-02 n.23 (1942) (Jackson, J., dissenting) (citing Cardozo as “another candid jurist” who said “I will not hesitate in the silence or inadequacy of formal sources to indicate as the general line of direction for the judge the following: that he ought to shape his judgment of the law in obedience to the same aims which would be those of a legislator who was proposing to himself to regulate the question.”).

<sup>117</sup> *Francis v. Southern Pacific Co.*, 333 U.S. 445, 453-54, n.1 (1948) (Black, J., dissenting) (“I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. . . . As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation, and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death, and the pangs of birth, in which principles that have served their day expire, and new principles are born . . . [s]omewhere between worship of the past and exaltation of the present the path of safety will be found.”) (quoting CARDOZO, *supra* note 2, at 166-67).

<sup>118</sup> *See Spiegel’s Estate v. Commissioner of Internal Revenue*, 335 U.S. 632, 682 (1949) (Frankfurter, J., dissenting).

<sup>119</sup> Book Note, *Paperbound Books of Legal Interest*, 110 U. PA. L. REV. 1174 (1960).

in paperback.<sup>120</sup> Nearly 18,000 additional paperback copies have apparently been sold since 1994.<sup>121</sup>

Cardozo's successors have continued to draw from his book. Justice Blackmun's disappointment with Cardozo's lectures did not preclude him from citing them in support of a living Constitution in his *Bakke* opinion,<sup>122</sup> or on two other occasions.<sup>123</sup> Justice Brennan invoked the book in the majority opinion in *Karcher v. Daggett*<sup>124</sup> for its statement of principles of stare decisis, as did the joint opinion of Justices O'Connor, Kennedy and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>125</sup> and Justice Stevens's dissent in *District of Columbia v. Heller*.<sup>126</sup> In all, 18 justices have authored (or co-authored) about 50 opinions citing Cardozo's book.<sup>127</sup> Justice Stevens cited it in 16 opinions. Lower federal and state courts have cited the book hundreds of times.

#### IV. THE CONTINUING MERIT OF CARDOZO'S CLASSIC

*The Nature of the Judicial Process's* continuing claim to attention traces in part to the enormous impact it had on legal thought, especially during the first part of the 20<sup>th</sup> century. Cardozo's book must be assessed, initially at least, for what it contributed in 1921, not based on how it reads nearly a century later. As Richard Friedman correctly observed, "however trite Cardozo's analysis may appear now, clearly it did not when he offered it."<sup>128</sup> Leading jurists and

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<sup>120</sup> KAUFMAN, *supra* note 5, at 204.

<sup>121</sup> Personal communication from William Frucht, Exec. Editor, Yale University Press, (March 13, 2017) (reporting sales of 174,034 paperback books since 1960).

<sup>122</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265, 407-08 (1978) (Blackmun, J., concurring in the judgment and dissenting in part) ("The great generalities of the constitution have a content and a significance that vary from age to age.") (citing CARDOZO, *supra* note 2, at 17).

<sup>123</sup> See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 n.13 (1993); *O'Connor v. Ortega*, 480 U.S. 709, 733-34 n.3 (1987) (Blackmun, J., dissenting).

<sup>124</sup> 462 U.S. 725, 733-34 (1983).

<sup>125</sup> 505 U.S. 833, 843-44, 854 (1992).

<sup>126</sup> 554 U.S. 570, 639-40 (2008) (Stevens, J., dissenting).

<sup>127</sup> I am grateful to my research assistants, Jordan Buchheit and Katie Finnegan for this information.

<sup>128</sup> Richard D. Friedman, *Cardozo the [Small r] realist*, 98 MICH. L. REV. 1738, 1756 (2000); see also WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980* 22 (2001) (stating that subsequent acceptance of Cardozo's approach has obscured the originality and novel quality of his conception).

scholars quickly blessed it.<sup>129</sup> The Legal Realists built on it, even as Cardozo resisted and rejected some of their claims.<sup>130</sup> In the 1940s, Justices Black, Frankfurter and Jackson began to cite it in Supreme Court opinions.<sup>131</sup>

Cardozo's contribution was, first of all, in making the judicial decision-making process more transparent. Cardozo was the pioneer in providing a jurist's effort to explain how "judges reason." The unprecedented nature of Cardozo's work, as well as what he revealed, drew attention. Writing in 1939 following Cardozo's death, Edwin Patterson observed that Cardozo's "revelations of the judge's mental processes were at the time *refreshingly novel, even startling*."<sup>132</sup>

Cardozo also dispelled the formalist idea that judges simply discovered and applied pre-existing law rather than fashioning it themselves. Four years before Cardozo's lectures, Holmes had memorably written in his dissent in *Southern Pacific v. Jensen*<sup>133</sup> that "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified. . . ."<sup>134</sup> Cardozo elaborated on that insight in *The Nature of the Judicial Process* and his discussion of interstitial judicial law-making, the tools judges used, and the way they used them profoundly influenced the thought of a generation of judges, lawyers and law students.

Cardozo's classic also merits continued attention for a second historical reason. He was among the most significant jurists of the 20<sup>th</sup>

<sup>129</sup> John C. P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1475-75 (1999).

<sup>130</sup> *Id.* at 1423, 1455-74 (explaining Cardozo's rejection of Legal Realism).

<sup>131</sup> See *supra* notes 113-18 and associated text.

<sup>132</sup> Edwin Patterson, *Cardozo's Philosophy of Law*, 88 U. PA. L. REV. 71, 74 (1939) (emphasis added); see also KAUFMAN, *supra* note 5, at 2 ("Cardozo's enduring importance arises out of his approach to judging. He was the first modern judge to tell us how he decided cases, how he made law, and, by implication, how others should do so."); POSNER, *supra* note 8, at 32 ("*The Nature of the Judicial Process* is the first systematic effort by a judge to explain how judges reason."); Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965, 971 (1993) ("Cardozo's lectures were the first serious effort by a sitting judge to articulate the sources a judge uses and the reasoning process a judge follows, whether consciously or not, in deciding a case."); Charles E. Clark, *Review: Selected Writings of Benjamin Nathan Cardozo*, 57 YALE L. J. 658, 660 (1948) ("It is hard for us now to realize just how 'daring' was the task Cardozo so successfully undertook, for the custom confessions by judges had not then become general. Previously there had been no attempt by an American judge to develop a detailed and consistent philosophy of the process of judicial adjudication.").

<sup>133</sup> 224 U.S. 205 (1917).

<sup>134</sup> *Id.* at 222.

century<sup>135</sup> and authored many foundational and enduring common law and constitutional opinions. Cardozo was responsible, in the words of legal historian William E. Nelson, for “a new understanding of the nature of the judicial process” which “has been absorbed into all subsequent twentieth-century analyses of the art of judging and has become intrinsic to our own thought processes”<sup>136</sup> *The Nature of the Judicial Process* was his first, and most extended, discussion of how he did his work. Accordingly, the book merits study for the biographical and methodological insights it provides regarding the approach to judging of one of America’s greatest and most influential jurists. Not surprisingly, Andrew Kaufman devotes a twenty-three-page chapter of his seminal biography of Cardozo to the book.<sup>137</sup> Similarly, Judge Posner devotes most of a chapter of about half that size to this most important of Cardozo’s non-judicial writings.<sup>138</sup>

Yet the book’s enduring significance is not simply or primarily for its historical instruction. Rather, Cardozo’s account continues to describe common law judging.<sup>139</sup> Notwithstanding societal changes, Kaufman, Cardozo’s principal biographer, observes that “most judges still go about the job of deciding cases within the framework that Cardozo described.”<sup>140</sup> In 1980, Judge Frank Coffin, one of the outstanding federal appellate judges of the latter part of the 20<sup>th</sup> century, called Cardozo’s “magisterial” book the “paradigm of judicial self analysis.”<sup>141</sup> Judge John Noonan of the United States Court of Appeals for the Ninth Circuit wrote in 1998 that Cardozo had provided

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<sup>135</sup> John C. P. Goldberg, *Community and the Common Law Judge: Reconstructing Cardozo’s Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1324 (1990) (“Benjamin Cardozo’s standing as a great judge is secure.”).

<sup>136</sup> NELSON, *supra* note 128, at 22.

<sup>137</sup> See KAUFMAN, *supra* note 5, at 199-222.

<sup>138</sup> See POSNER, *supra* note 8, at 20-32.

<sup>139</sup> KAUFMAN, *supra* note 5, at 199 (stating that Cardozo’s “enduring importance” was in his “approach to judging” as described in *The Nature of the Judicial Process*); see also Friedman, *supra* note 128, at 1751 (stating general agreement with Kaufman on this point); Friedman, *supra* note 128, at 1756 (stating that Cardozo’s “perspective continues to offer a useful guide to judging.”).

<sup>140</sup> KAUFMAN, *supra* note 5, at 200; see also Friedman, *supra* note 128, at 1756-57.

<sup>141</sup> FRANK COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 12 (1980).

“the best account of the judge’s job” in his book.<sup>142</sup> No wonder judges read the book.<sup>143</sup>

To be sure, some jurists like Justices Frankfurter and Blackmun and Judges Posner and Friendly suggested that Cardozo’s book is not very helpful in deciding actual cases.<sup>144</sup> This complaint misses the mark since it ignores his essential message. As Paul A. Freund pointed out, it is unfair to critique Cardozo for not prescribing a ready-made methodology to approach all cases since “no formulae could be adequate and one should not expect to find ready-made, convertible answers.”<sup>145</sup> Cardozo did not view judging as formulaic. Uncertainty was an inherent part of the enterprise.<sup>146</sup> Amidst this uncertainty, Cardozo identified the interpretive aids but thought the manner, sequence and amount of their use would depend on changing context and would need to be managed by each judge. Judging was more art than science and every judge would have to produce their own synthesis.

Yet if judging was an art, Cardozo viewed making sense of law as a scientific enterprise. Cardozo thought judges should decide hard cases in accordance with social justice and social consequence, but believed those directions could be derived scientifically by attention to social mores and the lessons of a process of trial and error.<sup>147</sup>

Cardozo’s book is about the nature of the law judges apply as well as about the nature of their judicial decision-making process. Cardozo’s insight, that judges make law, may now seem trite—that is,

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<sup>142</sup> John T. Noonan, Jr., *Sitting in Judgment*, N. Y. TIMES, June 21, 1998; see also David A. Nelson, *The Nature of the Judicial Process: Revisited*, 22 N. KY. L. REV. 563, 578 (1995) (arguing that Cardozo accurately described judicial process in *The Storrs Lectures*).

<sup>143</sup> Abrahamson, *supra* note 132, at 973 (Wisconsin Supreme Court justice stating she reread the book upon becoming judge); see, e.g., Judith S. Kaye, *Benjamin Nathan Cardozo*, HISTORICAL SOCIETY OF THE NEW YORK COURTS, <http://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/cardozo-benjamin.html> (last visited July 20, 2017) (“To this day Cardozo’s exposition of the nature of the judicial process and the growth of the law remains new and exciting. It’s an excellent read!”); Charles E. Clark and David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L. J. 255, 255 (1961) (stating that a “rereading . . . gives a sense of renewed life, of complete modernity, to their central thesis.”); John Van Voorhis, *Cardozo and the Judicial Process Today*, 71 YALE L. J. 202, 202 (1961) (reports rereading book “many times”); Clark, *supra* note 132, at 660 (stating that “*The Nature of the Judicial Process* still remains as the best analysis we have of the judge at work.”).

<sup>144</sup> See *supra* notes 7-10 and accompanying text.

<sup>145</sup> Paul A. Freund, *Foreword: Homage to Mr. Justice Cardozo*, 1 CARDOZO L. REV. 1, 4 (1979).

<sup>146</sup> CARDOZO, *supra* note 2, at 166-67.

<sup>147</sup> NELSON, *supra* note 128, at 23-24.

after all what classics do, they make the extraordinary familiar. Yet often forgotten is his related, but important, point that generally the law is clear and gives rise to little controversy.<sup>148</sup> For most people, lawsuits are rare and dreaded experiences which turn on factual, not legal, disputes so the law often provides no gaps for judges to fill.<sup>149</sup> Judicial lawmaking was the exception, not the rule.

That characterization of law in America remains valid even though law school and political discussion obscure this truth by focusing on the high profile, 5-4 decisions, the hard or very hard, cases. One can recognize as consequential the choices different judges make (and accordingly, the choice of different judges) without denying the overwhelming consensus in the legal system. Even at the Supreme Court, where controversial issues are addressed, most justices agree most of the time. Justices Thomas and Ginsburg voted together 65% of the time on cases the Court decided during the October 2016 term and most of the justices agreed with most of their other colleagues more than 75% of the time.<sup>150</sup>

Notwithstanding the recurring promises of some presidential candidates and presidents to appoint judges who will apply the law, not make it, that dichotomy lacks real meaning and is more misleading than instructive. Much law is certain, but Cardozo pointed out that human fallibility prevents a legal system from anticipating every situation or always crafting the right rule initially.<sup>151</sup> When the inevitable gaps occasionally arise, jurists must choose between pretending existing law furnishes the answer or providing one, from following unworkable precedent or changing course. In either case, judicial creativity occurs but only with candor when the reality of judicial law-making is recognized, not concealed.

Cardozo's enduring contribution was, in part, in providing a basis for a judicial process based on transparency and honesty rather

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<sup>148</sup> CARDOZO, *supra* note 2, at 128.

<sup>149</sup> CARDOZO, *supra* note 2, at 128-29.

<sup>150</sup> SCOTUSBLOG, STAT PACK OCTOBER TERM 2016, [http://www.scotusblog.com/wp-content/uploads/2017/06/SB\\_Stat\\_Pack\\_2017.06.28.pdf](http://www.scotusblog.com/wp-content/uploads/2017/06/SB_Stat_Pack_2017.06.28.pdf). A couple of caveats are in order. First, Justice Neil Gorsuch participated in a small number of decisions. His presence for an entire term may introduce more disagreement although should not change the general point being made. More significantly, although the statistics regarding voting by Supreme Court justices shows overwhelming agreement, the fact that 79% of decided cases from lower federal and state courts are reversed whereas only 21% are affirmed shows a degree of disagreement in these cases. *See id.* at 3. Of course, the cases the Court accepts for review are a tiny and unrepresentative set of judicial decisions.

<sup>151</sup> CARDOZO, *supra* note 2, at 143-45.

than one based on the fiction that judges applied, but never made, law. Yet that insight was only part of the continuing legacy of *The Nature of the Judicial Process*. Cardozo also articulated a vision of the role of the judge in a pluralistic and changing society. As John Goldberg has pointed out, Cardozo saw the common law judge as performing an important function in identifying and propagating the norms citizens share by carefully navigating between following existing doctrine and adapting judge-made law to maintain its consistency with changing moral beliefs.<sup>152</sup>

In order to manage this challenge successfully, Cardozo believed judges needed to balance competing perspectives. They could not be indifferent to the past but neither could they feel shackled to it. They must be sensitive to received legal concepts but they could not confine their attention to legal categories while ignoring “the ever-evolving social world around them.”<sup>153</sup> They must be, Cardozo thought, in touch with their times<sup>154</sup> and seek to give voice to “the aspirations and convictions and philosophies” of the people of their time.<sup>155</sup> Judges must understand the prevailing norms of their society so they could craft legal doctrine in a pragmatic manner based on them, not simply apply their own moral views in an imperious manner.<sup>156</sup>

Cardozo believed that in making law judges should be attentive to the consequences of alternative courses; they must be pragmatic.<sup>157</sup> History furnished a laboratory to help inform that assessment. Judicial conclusions should undergo “constant testing and retesting, revision and readjustment.”<sup>158</sup> Rules, having been “duly tested by experience,” should be abandoned if they failed to accord with justice or social welfare.<sup>159</sup> To be sure, some subjectivity was inevitable since every judge experiences the world personally. Yet judges should aspire to

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<sup>152</sup> Goldberg, *Community and the Common Law Judge*, *supra* note 135, at 1327; *see also* John C. P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1458 (1999) (stating that Cardozo structured book around tension between law’s need for “conceptual coherence” and adaptation).

<sup>153</sup> Goldberg, *The Life of the Law*, *supra* note 152, at 1458.

<sup>154</sup> CARDOZO, *supra* note 2, at 174.

<sup>155</sup> CARDOZO, *supra* note 2, at 173.

<sup>156</sup> Goldberg, *The Life of the Law*, *supra* note 152, at 1459-61.

<sup>157</sup> CARDOZO, *supra* note 2, at 102-03.

<sup>158</sup> CARDOZO, *supra* note 2, at 136.

<sup>159</sup> CARDOZO, *supra* note 2, at 150.

be “translators” of their times,<sup>160</sup> and they could not serve this function if they were always looking backwards.

Cardozo provided an enduring description of the common law process yet the method he presented did not simply describe the work of judges regarding the common law subjects. For instance, Cardozo’s approach speaks to contemporary discussions in constitutional law between originalists and those who favor a living, or common law, constitution. In his recent book, *The Living Constitution*,<sup>161</sup> and in other writings,<sup>162</sup> David Strauss, the leading academic proponent of a “living constitution,” draws from Cardozo regarding the common law approach to constitutional interpretation. Strauss explains that when constitutional precedents are not clear, judges often decide based on fairness and social policy. Like Cardozo, Strauss cautions against over (or under)-stating the role of such judgments and draws on Cardozo, “one of the greatest American common law judges,” by quoting a passage from Cardozo’s second lecture confirming that judges consider considerations of social welfare in expanding or restricting the reach of existing rules.<sup>163</sup> Echoing Cardozo, Strauss points out that in “well-functioning legal system[s]” most disputes are not litigated, that clear rules govern the few that are, and that precedents restrict the area and outcomes for a judge’s social policy judgments.<sup>164</sup> Strauss illustrates the point by drawing from *MacPherson v. Buick*.<sup>165</sup> Elsewhere, Strauss refers to *The Nature of the Judicial Process* as “the leading statement of the common law approach” in the 20<sup>th</sup> century and one which emphasizes “the importance of innovation.”<sup>166</sup>

One might frame the modes of legal reasoning differently than the four methods Cardozo identified. Others have. Yet Cardozo

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<sup>160</sup> CARDOZO, *supra* note 2, at 174.

<sup>161</sup> DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 39 (2010).

<sup>162</sup> *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

<sup>163</sup> STRAUSS, *THE LIVING CONSTITUTION*, *supra* note 161, at 39 (“The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. . . . [But] I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.”) (quoting CARDOZO, *supra* note 2, at 67).

<sup>164</sup> STRAUSS, *THE LIVING CONSTITUTION*, *supra* note 161, at 39.

<sup>165</sup> STRAUSS, *THE LIVING CONSTITUTION*, *supra* note 161, at 39.

<sup>166</sup> Strauss, *Common Law Constitutional Interpretation*, *supra* note 162, at 888; *see also* Strauss, *Common Law Constitutional Interpretation*, *supra* note 162, at 900 n.54 (calling it the “leading modern statement of the common law approach”).

identified the various instruments—logic, philosophy, tradition, history, moral and social consequences—at the root of modern approaches, and suggested that judicial reasoning was pluralistic, not single-factored.

The reputation and unique talent of Cardozo, and the interaction between those variables, explains in part why *The Nature of the Judicial Process* retains contemporary resonance nearly a century after it was written. Yet part of the reason the book had such impact in 1921 and ever since is that our greatest common law jurist used common law-like tools in constructing it. Like the common law's greatest decisions, Cardozo's most significant insights in his book were not sprung without any warning on a surprised public. Rather, like the common law, he took emerging insights which were tested by experience and formulated them in a convincing manner. Grant Gilmore said Cardozo's confession that judges sometimes made law "was widely regarded as a legal version of hard-core pornography,"<sup>167</sup> but this characterization is more catchy than correct. The idea Cardozo embraced, that judges sometimes made law, was controversial but plausible in 1921, and had respected advocates like Holmes and Roscoe Pound. It is no disparagement of Cardozo that he adopted ideas others had previously advanced. His genius in the Storrs Lecture, like that of the common law, was in distinguishing the unworkable products of the past from its promising ideas, in translating the latter into changing times, and articulating them in a way that resonated with his readers. Like the common law, *The Nature of the Judicial Process* performed this task of synthesizing law through sensitivity to experience and to the needs of changing times.

Much as the common law process continually tests rules and principles against different fact patterns, Cardozo's four lectures repeatedly returned to examine the same basic premises and ideas from different angles. Cardozo's first lecture (and chapter) introduced his topic and discussed "The Method of Philosophy." The second addressed the other three "Methods," of "History, Tradition and Sociology." Chapter three returns to the "Method of Sociology" and takes a focused look at "The Judge as a Legislator." And although the role of precedent was implicated in the first three discussions, in chapter four Cardozo takes a focused look at "Adherence to Precedent" as well as "The Subconscious Element in the Judicial Process" in

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<sup>167</sup> Gilmore, *supra* note 3, at 1033.

concluding. In *The Nature of the Judicial Process*, Cardozo constantly revisits his core ideas, considering themes previously presented in the new context of the subject then under discussion, measuring their validity from different angles and distance, and against fresh objections. Chief Justice Charles Evans Hughes wrote that Justice Louis D. Brandeis was a master of the microscope and the telescope,<sup>168</sup> but Cardozo demonstrates his own facility in putting those judicial tools to scholarly use as, in common law-like fashion, he varies his perspective to illuminate his subject in its detail and generality. Like the common law, Cardozo's method in his classic involves a continual exchange between particular and general and continual testing and retesting of ideas to measure their validity.

Like the common law, Cardozo's approach in *The Nature of the Judicial Process* was balanced and pragmatic. Cardozo's content and tone is progressive, yet moderate, not disruptive. He recognizes the necessity and inevitability of change yet confines judicial creativity to law's gaps while recognizing that most doctrine the judge finds will be applied and perpetuated. Like the common law, *The Nature of the Judicial Process* recognizes that law must change to accommodate new social norms yet it values stability, familiarity, predictability and justice by generally deferring to inherited rules.

And like the common law, Cardozo took emerging ideas and provided the justifications and context to help make them consensus. The greatness in Cardozo's discussion was reflected in the fact that it was fresh enough to impart new insights yet balanced and persuasive enough to allow his nomination to the Supreme Court a decade later to succeed Holmes to be the product of widespread demand.

Cardozo's judicial approach may have been better suited to his age than to modern times given the greater degree of consensus that then existed. Yet his classic continues to provide a true and candid account of the nature of an important part of the judicial process.

Cardozo closed his Lectures and book as follows:

The future, gentlemen, is yours. We have been  
called to do our parts in an ageless process.  
Long after I am dead and gone, and my little

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<sup>168</sup> CHARLES EVANS HUGHES, *Mr. Justice Brandeis*, in MR. JUSTICE BRANDEIS 3 (Felix Frankfurter, ed., 1932).

part in it is forgotten, you will be here to do your share, and to carry the torch forward. I know that the flame will burn bright while the torch is in your keeping.<sup>169</sup>

As *The Nature of the Judicial Process* nears its centennial, we can safely conclude that Cardozo clearly understated the enduring light his contributions have provided. How much illumination his successors provide remains to be seen.

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<sup>169</sup> CARDOZO, *supra* note 2, at 179-80.