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**JUSTICE BENJAMIN NATHAN CARDOZO AND HIS TWO  
MOST IMPORTANT QUESTIONS:  
REFLECTIONS ON THE CHOICE OF TYCHO BRAHE**

*Randy Lee\**

Professor Jeff Powell once observed that we are defined as much by the questions we “think important as the answers [we] think correct.”<sup>1</sup> Justice Benjamin Nathan Cardozo considered two questions to be particularly important for those invested in our legal system: first, how do judges decide cases, and second to what purpose does our judicial process work.

Justice Cardozo is especially remembered for the passion he brought to the first of these questions, how judges decide cases. In *The Selected Works of Benjamin Nathan Cardozo*, at least 309 pages are devoted to Justice Cardozo’s writings on the nature of the judicial process.<sup>2</sup> In his writings, Justice Cardozo described how judges begin with a rule or law, essentially an expression of order generated by their community.<sup>3</sup> Judges then apply this rule to the circumstances of their neighbors, and, as they do so, these judges are guided by the understandings of the words of this rule that judges before them have expressed in opinions.<sup>4</sup> In this process of understanding the words of the rule and applying those understandings to the circumstances of life,

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<sup>1</sup> H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM* 30 (1993).

<sup>2</sup> BENJAMIN NATHAN CARDOZO, *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE* 7-46, 77-337, 414-21 (Margaret E. Hall, ed. 1980).

<sup>3</sup> BENJAMIN NATHAN CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE* 107, 110 (Margaret E. Hall, ed. 1980).

<sup>4</sup> *Id.* at 112.

“certainty and order and rational coherence . . . are . . . among the greatest and most obvious” “ends to be achieved.”<sup>5</sup>

Justice Cardozo acknowledged, however, that there is in this process a “margin of error,” an “increase of entropy,” a “principle of indeterminacy,” that can creep in.<sup>6</sup> Reasonable minds differ on when these uncertainties creep in:

what, for example, constitutes *ratio decidendi* and what constitutes *dicta*;

what contexts make words clear and which make them ambiguous; and

to what degree there is a value in creating ambiguity where none exists.<sup>7</sup>

But when these uncertainties do creep in, a judge must engage in what Justice Cardozo described as the “creative function”<sup>8</sup> if the judge is to determine the meaning of the law that he is called upon to apply. As a judge does so, Justice Cardozo insisted that the judge must remember that while the “virtues of symmetry and coherence” remain important, they

can be purchased at too high a price; that law is a means to an end, and not an end in itself; and that it is more important to make [a law] consistent with what men and women really and truly believe and do than what judges may at times have said in an attempt to explain and rationalize the things they have done themselves.<sup>9</sup>

For Justice Cardozo, this question of how judges decide cases mattered because the work of judges inevitably “shape[s] the lives of others.”<sup>10</sup> When we evaluate people’s contracts, oversee their

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<sup>5</sup> BENJAMIN NATHAN CARDOZO, *Jurisprudence: Address before the New York State Bar Association Meeting, Hotel Astor, January 22, 1932*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE 7, 30 (Margaret E. Hall, ed. 1980).

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

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 20.

<sup>9</sup> *Id.* at 32.

<sup>10</sup> BENJAMIN NATHAN CARDOZO, *Law and Literature and Other Essays and Addresses*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE 338, 420 (Margaret E. Hall, ed. 1980).

disputes, define the extent of their “liberty,” facilitate their businesses and their bankruptcies, terminate their parental rights, invalidate their licenses, revoke their benefits, and punish their perceived misconduct, we are, all the time, shaping their lives. Much attention is given, of course, to the opportunities judges like Justice Cardozo, who sit on the highest of courts, have to impact the lives of the people of the nation, but even judges in local municipal courts, traffic courts, and other so-called “inferior courts” shape a life that happens to come before them.<sup>11</sup>

Yet, if Justice Cardozo considered the question of how judges decide cases passionately important, it was still not the question he considered most important. The question Justice Cardozo considered most important was his second question: to what purpose do judges and lawyers do what we do.<sup>12</sup> Ironically, in his selected works, only six pages are devoted to this question, and Justice Cardozo did not, at least initially, pose this question directly to lawyers. Instead, he posed it to the graduates of the Jewish Institute of Religion, and he then left this question on its own to find its way into the imaginations of the nation’s lawyers.<sup>13</sup>

When Benjamin Cardozo was invited, in 1931, to address the graduating students of the Jewish Institute of Religion, he initially thought to decline.<sup>14</sup> After all, what did he have to offer such a group? Wouldn’t these students be better served by someone more perfectly aligned with their spirituality, someone not so damaged by time and the darkness of the world; wouldn’t these students resent his obvious lack of fitness for the task?<sup>15</sup>

The director of the institute, however, prevailed upon Justice Cardozo to speak, despite the Justice’s reservations.<sup>16</sup> The director of the institute assured Justice Cardozo that he was, after all, a man of

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<sup>11</sup> Roscoe Pound, *Courts of Injustice*, 105 U. PENN. L. REV. 427, 430 (1957) (book review) (“The author urges that the ‘so-called inferior courts’ are of the first importance, should be part of the unified system, and should be manned by the ablest, most upright and most experienced judges at the command of the state. (p. 756). He makes this a ‘fundamental point’ in his program and his discussion is sound and well put.”).

<sup>12</sup> Indeed this question became so associated with Justice Cardozo’s identity that the essay in which he first posed it came to serve as the subtitle of the volume of his selected works. CARDOZO, *supra* note 2.

<sup>13</sup> Benjamin Nathan Cardozo, *Values: Commencement Address or The Choice of Tycho Brahe*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE* 1 (Margaret E. Hall, ed. 1980).

<sup>14</sup> *Id.* at 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

deeply held values, that he could share with the students those values, and that the students would welcome Cardozo's words "with the gladness born of the perception that what is noble and high and sacred reveals itself in many forms and is discerned in many aspects by the faltering sons of men."<sup>17</sup>

So it was that Benjamin Cardozo, on May 24, 1931, set out to share with the graduating class of the Jewish Institute of Religion a tale of values, which would ultimately require them to make a choice.<sup>18</sup> It was a tale borrowed from a poem by Alfred Noyes entitled *Watchers of the Skies*, and it told the story of one Tycho Brahe, an astronomer who studied the stars from his observatory, Uraniborg.<sup>19</sup>

For twenty-five years, life at Uraniborg went well for Tycho.<sup>20</sup> He studied the stars by night and calculated and mapped his observations by day until he had "with exquisite precision" set down on his charts the proper places for more than seven-hundred stars.<sup>21</sup> One day, however, his benefactor, King Frederick, died, and the court of the new king, King Christian, began to question "the treasure that had been lavished upon the upkeep of Tycho Brahe's observatory and this feckless charting of the stars."<sup>22</sup>

Ultimately, messengers were sent to Uraniborg to audit the work of Tycho Brahe and determine if there was any value in what he was doing.<sup>23</sup> Painstakingly, Tycho Brahe showed these messengers his tables and showed them his stars.<sup>24</sup> Finally, however, these messengers, having lost patience, stopped Tycho Brahe, and they asked him, "To what end are these to be the means?"<sup>25</sup>

For Tycho Brahe, the answer rested simply in a knowledge of the heavens, a knowledge of the stars, a knowledge that future generations might expand upon beyond our present imaginations.<sup>26</sup> For Justice Cardozo, however, the purpose of the work at Uraniborg went deeper than that. For Justice Cardozo, the work at Uraniborg reminds us what it is that can justify the investment of a human life:

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<sup>17</sup> *Id.*

<sup>18</sup> CARDOZO, *Values*, *supra* note 13, at 6.

<sup>19</sup> CARDOZO, *Values*, *supra* note 13, at 2-3.

<sup>20</sup> CARDOZO, *Values*, *supra* note 13, at 4.

<sup>21</sup> CARDOZO, *Values*, *supra* note 13, at 2.

<sup>22</sup> CARDOZO, *Values*, *supra* note 13, at 2-3.

<sup>23</sup> CARDOZO, *Values*, *supra* note 13, at 3.

<sup>24</sup> CARDOZO, *Values*, *supra* note 13, at 3.

<sup>25</sup> CARDOZO, *Values*, *supra* note 13, at 3, 5.

<sup>26</sup> CARDOZO, *Values*, *supra* note 13, at 4.

the submergence of self in the pursuit of an ideal,

the readiness, to spend oneself without measure, prodigally,  
almost ecstatically for something intuitively apprehended as  
great and noble,

the pursuit in the face of mockery and temptation of the values  
that were chosen by the prophets and saints of Israel.<sup>27</sup>

These are the values Justice Cardozo hoped the students of the Jewish Institute of Religion would embrace as the purposes for their own explorations of the Heavens.

Justice Cardozo, of course, recognized, that judges and lawyers, no less than students of the heavens, must be able to answer the question that was posed to Tycho Brahe: to what end are these to be the means. Were we to walk throughout Touro Law School today, were we to walk down the street to the courthouse for the Eastern District of New York, were we to tour these two buildings and meet the people who worked therein, we would encounter expenditures of wealth and human talent far greater than what the messengers sent to Tycho Brahe encountered in Uraniborg. Were we to be asked, “To what end are these to be the means?” what might we answer?

If law is not, as Justice Cardozo insisted it is not,<sup>28</sup> an end in itself but merely a means to an end, then when we do law, our means must be guided by that end we seek to achieve. As we evaluate the effectiveness of our means, we must measure the fruits of our labors against the purpose we sought to achieve. In other words, how we decide cases ultimately must be a function of what we hope our decisions will accomplish. The question posed at Uraniborg ultimately not only defines our purpose, but it guides the means by which we do our work. The answer to Cardozo’s important question of how we decide cases must be a function of the answer to his most important question, why we decide cases.

What end do we seek to achieve? As judges enter the creative function and even the not so creative function, they ultimately must

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<sup>27</sup> CARDOZO, *Values*, *supra* note 13, at 4.

<sup>28</sup> CARDOZO, *Jurisprudence*, *supra* note 5, at 32.

ask, “To what end are these steps, this judicial process, to be the means?”

For Justice Cardozo, the answer to this question rested “in the values chosen by the prophets and saints of Israel.”<sup>29</sup> In the context of law, those values are “[t]o act justly,” “to love mercy,” and “to walk humbly with our God.”<sup>30</sup> Thus, Justice Cardozo might well instruct the judge in the midst of his creative function to ask himself:

Are you walking humbly: are you disposed to respect the best efforts in the political process of your neighbors and to respect the wisdom that has been articulated in the relevant opinions before your own?

And, yet, as you prepare to shape the lives before you, do you also seek both justice and mercy together, recognizing, as did the likes of Thomas Aquinas<sup>31</sup> and William Shakespeare,<sup>32</sup> that mercy and justice are not opposites but compliments, compliments because

“[m]ercy without justice is the mother of dissolution,” while “justice without mercy is cruelty,”<sup>33</sup>

and

mercy “moves us to do what we can to help the other,”<sup>34</sup> while the aim of justice is the common good and all those who come before us still remain part of that common for which we seek good?<sup>35</sup>

A friend of mine, a former DA and a former judge, tells the story of how one Christmas Eve before cell phones, he was caught in a blizzard on his way home. Not wanting to worry his family, he pulled into a local mall and headed to their bank of pay phones to call home

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<sup>29</sup> CARDOZO, *Values*, *supra* note 13, at 6.

<sup>30</sup> *Micah* 6:8.

<sup>31</sup> See SAINT THOMAS AQUINAS, *SUMMA THEOLOGIAE*.

<sup>32</sup> See WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*. For a discussion of the complementary nature of justice and mercy in *The Merchant of Venice*, see Randy Lee, *Who’s Afraid of William Shakespeare?: Confronting Our Concepts of Justice and Mercy in The Merchant of Venice*, 32 U. DAYTON L. REV. 1, 18-24 (2006).

<sup>33</sup> SAINT THOMAS AQUINAS, *LECTURES ON I TIMOTHY* 2:259.

<sup>34</sup> See AQUINAS, *supra* note 31, at II-II.30.1.

<sup>35</sup> AQUINAS, *supra* note 31, at II-II.58.5.

and let his family know that he was all right but that he would be a little late.

As my friend engaged in this phone conversation, he began to notice a woman whom he did not recognize watching him, and when one is a former DA, being checked out by strangers tends to make one nervous. Thus, as my friend continued in his phone call, he began to plot a strategy for what he would do if something were to unfold after he completed his call.

And so, it did. No sooner had my friend hung up the phone than the woman approached him and said to him, “You were the prosecutor in my case. You said to me things I did not want to hear, and you punished me in ways I did not want to be punished.”

So far, the conversation did not seem to be going well, and it appeared that my friend’s earlier anxiety and plotting would not go to waste.

But then the woman added, “But you also saved my life, and I just wanted to thank you.”

And then she left.

We are all not so accosted by those whose lives we have shaped, but we have all shaped lives just the same, and when we shape them, we do act with a purpose. What is to be that purpose? Do we know what that purpose is—what justifies the courtrooms and the offices and the staffs and the lawyers and the judges? What is our answer to the question posed to Tycho Brahe?

One night at the end of a performance by the pianist and comedian Victor Borge, the audience threw roses upon the stage where Borge had performed. As the audience continued to applaud, Borge set out to pick up each rose. Borge was wearing a wire and a microphone at the time, and ultimately one rose was just beyond the reach allowed by Borge’s microphone cable. Borge tried several times to stretch out far enough to reach the rose, but he just could not reach it, so, finally, Borge asked a member of the audience to retrieve the rose for him. As the audience member handed Borge the rose, Borge explained, “No flower should ever be wasted.”<sup>36</sup>

Are we to value the men and women who come before us in law as much as Victor Borge valued a flower—as we sort out the

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<sup>36</sup> DVD: *The Best of Victor Borge: Act One & Two* (Gmg Records 1990).

problems and failures, agreements and opportunities of our neighbors, is it our purpose that not one of the people who come before us should ever be lost or wasted?

Antoine Saint-Exupéry, the author of *The Little Prince*,<sup>37</sup> once encountered a gardener lying on his deathbed, preparing to die, and this gardener explained to the author

that though there had been pain and frustration in his work,

that though there had been days when the sweat had poured off his body and rheumatism had pulled at his leg,

that though there had been days when he had cursed himself, with each bite of the spade into the earth, for having to work like a slave,

now the only thing he remembered about his work, the only thing he held onto, was the beauty that it rendered, and his only concern was “who is going to prune my trees when I am gone?”<sup>38</sup>

“Labor,” as Justice Cardozo once remarked, “is a form of love, if it be worthy.”<sup>39</sup>

In our own work, there are so many great minds, so many great buildings, so much more even than Uraniborg and Tycho Brahe. To what end are all these to be the means? Is it enough to answer, “We work in the hope that no life that comes before us will ever be wasted.”

When Benjamin Cardozo went to speak at the Jewish Institute of Religion, he spoke of the heavens, but I wonder if, had he spoken to lawyers, he might just as easily have spoken of the earth. I wonder if he might have said to those in attendance that someday, when they are pressed to know or pressed to explain why they do what they do, they may explain that as lawyers we see the world, as did those prophets

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<sup>37</sup> ANTOINE DE SAINT-EXUPÉRY, *THE LITTLE PRINCE* (Richard Howard trans., 2000).

<sup>38</sup> ANTOINE DE SAINT-EXUPÉRY, *WIND, SAND, AND STARS* 38 (Lewis Galantière trans., Time Reading Program spec. ed. 1965).

<sup>39</sup> ANDREW L. KAUFMAN, *CARDOZO, VOLUME 16*, 196 (1998) (“Everything that is most precious in life is a form of love. Art is a form of love, if it be noble; labor is a form of love, if it be worthy; thought is a form of love, if it be inspired; and marriage is love incarnate.”).

and saints of Israel,<sup>40</sup> as God sees it, as a garden, and we nurture each flower so none are wasted.

And when the day comes when we will have expended our lives in this pursuit, we too will look back over our patch of garden, and we will see that our work has made the world a more beautiful place, and that vision of the fruits of our labors will be all that we will need to remember of the past.

And all that we will need to hope for in the future is that there will be someone of stout and noble heart who will continue the work when we are gone.

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<sup>40</sup> See *supra* note 29 and accompanying text.