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## ONE JUDGE'S LEGACY AND THE NEW YORK COURT OF APPEALS: MR. JUSTICE CARDOZO AND THE LAW OF CONTRACTS

*Meredith R. Miller\**

### INTRODUCTION

Justice Benjamin Nathan Cardozo sat on the New York Court of Appeals from 1914 to 1932.<sup>1</sup> During those roughly 18 years, he authored over 100 contract law decisions.<sup>2</sup> By his own description and the description of others, Cardozo was a dedicated contextualist. Yet, at least in the area of contract law, the contemporary New York Court of Appeals has taken a decidedly textualist approach.

Using the backdrop of contract law, this article begins by contrasting the jurisprudential approach of Cardozo to that of the contemporary New York Court of Appeals. It then explores how Cardozo might have decided a couple of notable and relatively recent New York Court of Appeals contract law cases. The article draws on these comparisons to explore what the recent jurisprudence of the Court tells us about Cardozo's legacy and the Court as an institution.

Finally, the article concludes by questioning the doctrinal underpinnings of formalism – namely, the superiority of “certainty” and “predictability.”<sup>3</sup> Cardozo had it right – that is to say, the drive for doctrinal coherence and predictability should not underestimate the complexity of business relations or the nature of contracting. The best approach is that which most precisely aims to support the parties'

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<sup>1</sup> Judith S. Kaye, *Benjamin Nathan Cardozo*, HISTORICAL SOCIETY OF THE COURTS OF NEW YORK, <http://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/cardozo-benjamin.html> (last visited July 31, 2017).

<sup>2</sup> Arthur Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 48 YALE L.J. 426, 426 (1938-1939). The title of Corbin's article is appropriated for the title of this article.

<sup>3</sup> *Id.* at 457.

realistic expectations from the transaction. It is not possible for the law to achieve this goal if it ignores the surrounding context of a deal.

## I. CARDOZO AS A CONTEXTUALIST

In 1938, in Volume 48 of the *Yale Law Journal*, Arthur Corbin dedicated an entire article to the subject of Cardozo's contract law jurisprudence.<sup>4</sup> Corbin took a stroll through Cardozo's "greatest hits," often quoting liberally from the decisions.<sup>5</sup> From that exercise, Corbin observed: "Cardozo's opinions on contract law demonstrate his instinct for a justice that is human and practical."<sup>6</sup> Corbin wrote, "There is a clear genius in [Cardozo's] filling of gaps, his finding of promises by implication where none was put into clear words, his discovery and enforcement of the directing purpose for which a contract was made, not permitting that purpose to fail by reason of vagueness in details."<sup>7</sup>

Corbin's exposition and Cardozo's own writings support the characterization of Cardozo as a "contextualist." Indeed, Cardozo was transparent about his approach to judging in *The Nature of Judicial Process*,<sup>8</sup> the publication of a series of lectures Cardozo gave at Yale during his tenure on the Court of Appeals.<sup>9</sup> In the lectures, Cardozo described the judicial decision making process as involving a number of "forces," which include: logic, history, custom, utility and "accepted standards of right conduct."<sup>10</sup> Cardozo wrote that the weight of each of these forces was itself contextual: "[w]hich of these forces shall dominate in any case, must depend largely on comparative importance or value of the social interests that will be thereby promoted or impaired."<sup>11</sup>

Cardozo described the common law as "at bottom the philosophy of pragmatism."<sup>12</sup> His approach to deciding cases was a fluid one: "For every tendency, one seems to see a counter-tendency;

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<sup>4</sup> *Id.* at 426.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 427.

<sup>7</sup> Corbin, *supra* note 2, at 427.

<sup>8</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (Quid Pro Books ed., 2010) (originally published by Yale University Press, 1921).

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

<sup>10</sup> *Id.* at 70.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 64.

for every rule its antinomy. Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless ‘becoming.’”<sup>13</sup> This fluid approach, of course, does not give highest priority to certainty and predictability. Cardozo wrote of certainty:

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. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience . . . [A]nd as I have reflected more and more upon the nature of judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable.<sup>14</sup>

Cardozo opined that certainty and, with that, the “symmetrical development of the law” were not the only guideposts for decision making and are necessarily balanced against other concerns.<sup>15</sup> He wrote, “[t]he social interests served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare.”<sup>16</sup> This approach, which does not give highest priority to certainty and predictability, admittedly lacks in “precision.”<sup>17</sup>

A contextualist approach is apparent in Cardozo’s contract law decisions.

For example, in *Outlet Embroidery Co. v. Derwent Mills*,<sup>18</sup> there was an exchange of letters between two merchants concerning an order of goods. The seller wrote to the buyer, in relevant part, the following: “Also note that the price of \$3.10 per box on your Fil D’Angora brand which we are to ship to you is subject to change pending tariff revision.”<sup>19</sup> The buyer wrote back, confirming the order

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

<sup>14</sup> CARDOZO, *supra* note 8, at 106-07.

<sup>15</sup> CARDOZO, *supra* note 8, at 71.

<sup>16</sup> CARDOZO, *supra* note 8, at 71.

<sup>17</sup> CARDOZO, *supra* note 8, at 19.

<sup>18</sup> 254 N.Y. 179 (1930).

<sup>19</sup> *Id.* at 182.

at \$3.10 per box.<sup>20</sup> The seller then refused to deliver the goods, arguing that the agreement was not complete because its letter stated “all prices subject to pending tariff.”<sup>21</sup> Cardozo held the seller to the contract and refused to adhere to the literal interpretation the seller proffered.<sup>22</sup>

Cardozo wrote that the letters were “to be read as business men would read them, and only as a last resort are to be thrown out altogether as meaningless futilities.”<sup>23</sup> He went on to explain that the interpretation proffered by the seller, even if plausible on its face, could not possibly comport with the expectations of the parties:

The [seller] like the [buyer] supposed that in signing these documents it was doing something understood to be significant and serious. It not only accepted the [buyer’s] order, but it asked the [buyer] to confirm the terms of the acceptance, and followed this with a cable of the order to its manufacturer abroad. Was it all sound and fury, signifying nothing?<sup>24</sup>

Cardozo would not read the language literally because it would lead to “sheer absurdity,” especially given that, in June 1929, Congress was debating a new tariff, which was uncertain to pass and, if it did, could affect the prices of imports.<sup>25</sup> Given that context, Cardozo stated that, while the language was not perfectly expressed, no seller and no buyer would read it the way the seller now suggested.<sup>26</sup>

Another example is Cardozo’s decision in *Moran v. Standard Oil Co.*<sup>27</sup> There, an agent expressly agreed to sell the defendant’s paint and painting supplies on a commission basis for five years, but there was no express corresponding promise by the defendant to use the agent for five years.<sup>28</sup> When the defendant terminated the agent, the defendant argued that the agent was at will, subject to termination any time.<sup>29</sup> Cardozo disagreed and implied a promise by the defendant to keep the agent for those five years:

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

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

<sup>22</sup> *Id.* at 185.

<sup>23</sup> *Outlet Embroidery Co.*, 254 N.Y. at 183.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 183-84.

<sup>26</sup> *Id.* at 184.

<sup>27</sup> 211 N.Y. 187 (1914).

<sup>28</sup> *Id.* at 195-96.

<sup>29</sup> *Id.* at 196.

The law, in construing the common speech of men, is not so nice in its judgments as the defendant's argument assumes. It does not look for precise balance of phrase, promise matched against promise in perfect equilibrium. It does not seek such qualities even in written contracts, unless perhaps the most formal and deliberate, and least of all does it seek them where the words are chosen by the master under legal advice and accepted by the servant without the aid of like instruction. There are times when reciprocal engagements do not fit each other like the parts of an indented deed, and yet the whole contract . . . may be 'instinct with obligation' imperfectly expressed.<sup>30</sup>

Cardozo used the phrase "instinct with obligation" again in his famous decision in *Wood v. Lucy, Lady Duff-Gordon*.<sup>31</sup> In that case, to avoid a lack of consideration, Cardozo implied a return promise by plaintiff Otis Wood to make reasonable efforts to market Lady Duff-Gordon's designs.<sup>32</sup> In that decision, Cardozo named and addressed formalism head on:

It is true that [Wood] does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day. A promise may be lacking, and yet the whole writing may be 'instinct with obligation' imperfectly expressed.<sup>33</sup>

Along similar lines, in *Marks v. Cowdin*,<sup>34</sup> an employer signed a memo recognizing continued employment of an employee for two years.<sup>35</sup> Before the two years ended, the employer terminated the

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<sup>30</sup> *Id.* at 197-98.

<sup>31</sup> 222 N.Y. 88, 91 (1917). Cardozo also referenced this language and the *Wood* case in *The Nature of Judicial Process*. CARDOZO, *supra* note 8, at 62.

<sup>32</sup> *Lucy, Lady Duff-Gordon*, 222 N.Y. at 90-91.

<sup>33</sup> *Id.*

<sup>34</sup> 226 N.Y. 138 (1919).

<sup>35</sup> *Id.* at 140.

employee.<sup>36</sup> The agreement, which called for the provision of services for two years, came within the statute of frauds and was required to be in writing.<sup>37</sup> The memo did not identify the employee's position or describe the employee's duties, but Cardozo held that the memo was nevertheless sufficient to satisfy the statute of frauds because one must look beyond the language on the face of the memo itself:

In thus identifying the position we are not importing into the contract a new element of promise. We are turning signs and symbols into their equivalent realities. This must always be done to some extent, no matter how many are the identifying tokens. 'In every case, the words must be translated into things and facts by parol evidence.' How far that process may be extended is a question of degree. We exclude the writing that refers us to spoken words of promise. We admit the one that bids us ascertain a place or a relation by comparison of the description with some 'manifest, external, and continuing fact.' The statute must not be pressed to the extreme of a literal and rigid logic. Some compromise is inevitable if words are to fulfill their function as symbols of things and of ideas. How many identifying tokens we are to exact, the reason and common sense of the situation may tell us.<sup>38</sup>

Cardozo instructs that the contract is to be interpreted in light of what reason and common sense suggest in the given situation, not by literal adherence to the language on the face of a document.<sup>39</sup>

## II. THE FORMALISM OF THE CONTEMPORARY NEW YORK COURT OF APPEALS

By contrast, the modern institution of New York courts, and especially its highest court, adheres to formalism. Professor Geoffrey P. Miller has hypothesized that the formalism of New York courts explains why it is common for major business transactions to contain

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<sup>36</sup> *Id.* at 141-42.

<sup>37</sup> *Id.* at 142.

<sup>38</sup> *Id.* at 143-44 (citations omitted).

<sup>39</sup> *Marks*, 226 N.Y. at 144-45.

choice of law clauses that opt for New York law.<sup>40</sup> Professor Miller compared many facets of contract doctrine in New York and California—from formation to interpretation—and determined that, in most areas of the doctrine, New York adheres to formalism.<sup>41</sup> Professor Miller opined that this formalism, which leads to certainty and predictability, explained why businesses opt for New York law.<sup>42</sup> Miller found: “New York judges are formalists. Especially in commercial cases, they have little tolerance for attempts to re-write contracts to make them fairer or more equitable, and they look to the written agreement as the definitive source of interpretation.”<sup>43</sup>

He continued:

Both New York and California recognize freedom of contract as fundamental, although limited at times by other values; however New York gives comparatively more weight to contractual freedom. In the absence of severe inequality of bargaining power, New York courts almost never upset private arrangements, no matter how inequitable they may appear *ex post*. New York’s tenderness for freedom of contract expresses itself, at times, in a seemingly atavistic pleasure in imposing the consequences of bad bargains.<sup>44</sup>

On this point, Miller cited *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*,<sup>45</sup> a 1995 New York Court of Appeals decision, which, at least for “sophisticated parties,”<sup>46</sup> unambiguously expressed an adherence to formalism:

Freedom of contract prevails in an arm’s length transaction between sophisticated parties such as these, and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain. If they are dissatisfied

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<sup>40</sup> Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475, 1477 (2010) [hereinafter BARGAINS BICOASTAL].

<sup>41</sup> *Id.* at 1478-80.

<sup>42</sup> *Id.* at 1522.

<sup>43</sup> *Id.* at 1478.

<sup>44</sup> *Id.* at 1479.

<sup>45</sup> 86 N.Y.2d 685 (1995).

<sup>46</sup> *Id.* at 695.



with the consequences of their agreement, ‘the time to say so [was] at the bargaining table.’<sup>47</sup>

### III. WHAT WOULD CARDOZO DO?

If Cardozo was on the New York Court of Appeals today it is uncertain whether he would influence its approach to decision making or simply wind up a frequent dissenting voice.

#### A. Conditions & Substantial Performance

Take for example *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, quoted above. In that case, plaintiff (a national, full-service investment firm) had three years remaining on a lease of the 33rd floor of One New York Plaza in Manhattan.<sup>48</sup> Defendant (an accounting firm) was already a tenant on the 29th floor of the same building.<sup>49</sup> Plaintiff was looking to vacate the premises and sublease the space on the 33rd floor. Plaintiff and defendant entered into a letter agreement setting forth certain conditions precedent to the formation of a sublease between them.<sup>50</sup>

Defendant wanted to construct a telephone linkage system between the 29th and 33rd floors.<sup>51</sup> Thus, one express condition precedent to formation of the sublease was that plaintiff provide defendant with the prime landlord’s consent in writing on or before a date certain.<sup>52</sup> On that date certain, plaintiff’s attorney called defendant’s attorney to say that the prime landlord had consented to the work.<sup>53</sup> When defendant later refused to go forward with the sublease, plaintiff sued for breach of contract.<sup>54</sup>

Defendant moved to dismiss the complaint in its entirety, claiming that the sublease was never formed because plaintiff failed to comply with the express condition precedent that plaintiff provide defendant with *written* notice of the prime landlord’s consent.<sup>55</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 687.

<sup>49</sup> *Id.* at 688.

<sup>50</sup> *Oppenheimer & Co.*, 86 N.Y.2d at 688.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 689.

<sup>55</sup> *Oppenheimer & Co.*, 86 N.Y.2d at 687-90.

Plaintiff argued that its attorney notified defendant orally and, therefore, substantially complied with the condition.<sup>56</sup> The New York Court of Appeals held for defendant on the ground that the express condition precedent required *written* notice and, therefore, it had not been satisfied.<sup>57</sup>

It is black letter law that an express condition requires strict compliance.<sup>58</sup> The reasoning is that the court should not frustrate the clearly expressed intention of the parties.<sup>59</sup> In *Oppenheimer*, the oral notice of the prime landlord's consent did not satisfy the strict requirement of written notice.<sup>60</sup> For sure, the result seems harsh and overly technical. The parties' attorneys had a discussion, and through that discussion, defendant was on actual notice of the prime landlord's consent to the work.<sup>61</sup> Certainly, plaintiff had complied with the spirit of the condition.

Notably absent from the decision was any discussion of what Cardozo likely would have paid the most attention to: the parties' intent in requiring written notice. One can certainly imagine that defendant wanted tangible evidence of the prime landlord's consent before taking on any obligations. On the other hand, another very plausible view of the case is that defendant was not so concerned about having the notice in writing but was able to use the written notice condition as a pretext, as a way to walk away from the sublease based on a technicality. The Court appeared to recognize the technical nature of the decision (some might describe it as "gotcha formalism"). Absent more context concerning the condition, despite the fact that he is quoted and his name is invoked, it is hard to imagine that Cardozo would have joined with the majority.

The parties in *Oppenheimer* each relied on the 1921 Cardozo decision in *Jacob & Youngs v. Kent*<sup>62</sup> to support their positions. In *Jacob & Youngs*, a builder contracted to build a summer residence and the written contract called for use of Reading pipe.<sup>63</sup> For most of the house, the builder used Cohoes pipe instead.<sup>64</sup> Cohoes pipe was

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<sup>56</sup> *Id.* at 692.

<sup>57</sup> *Id.* at 690-91.

<sup>58</sup> *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 224 (AM. LAW INST. 1981).

<sup>59</sup> *Oppenheimer & Co.*, 86 N.Y.2d at 695.

<sup>60</sup> *Id.* at 687.

<sup>61</sup> *Id.* at 688-89.

<sup>62</sup> 230 N.Y. 239 (1921).

<sup>63</sup> *Id.* at 240.

<sup>64</sup> *Id.* at 246.

inferred to be no different in quality or grade than Reading pipe.<sup>65</sup> Nevertheless, the client refused to pay the builder because the contract specified Reading pipe.<sup>66</sup> Notably, the only way to change out the pipes was to tear down the entire structure and rebuild.<sup>67</sup>

Writing for the dissent, Judge Chester B. McLaughlin would have held that the client should get exactly what he contracted for – Reading pipe:

The defendant had a right to contract for what he wanted. He had a right before making payment to get what the contract called for. . . . What his reason was for requiring this kind of pipe is of no importance. He wanted that and was entitled to it.<sup>68</sup>

There is some appeal in McLaughlin's simply applied rule that adheres to the letter of the contract. But Cardozo, writing for majority, took a different approach.

Cardozo held that, even though the builder did not use the specified pipe, this entitles the client to damages – namely the difference in objective value between what he was promised and what he received (there, zero).<sup>69</sup> The failure, which was not substantial, did not excuse the client from paying the builder.<sup>70</sup> Cardozo explained:

Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another. The simple and the uniform will call for different remedies from the multifarious and the intricate. The margin of departure within the range of normal expectation upon a sale of common chattels will vary from the margin to be expected upon a contract for the construction of a mansion or a 'skyscraper.' There will be harshness sometimes and oppression in the implication of a condition when the thing upon which labor has been expended is incapable of surrender because united to the land, and equity and reason in the implication of a

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<sup>65</sup> *Id.* at 241.

<sup>66</sup> *Id.* at 246.

<sup>67</sup> *Jacob & Youngs*, 230 N.Y. at 240-41.

<sup>68</sup> *Id.* at 247 (McLaughlin, J., dissenting).

<sup>69</sup> *Id.* at 244.

<sup>70</sup> *Id.* at 245.

like condition when the subject-matter, if defective, is in shape to be returned. From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention. Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.<sup>71</sup>

He continued:

Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier. The decisions in this state commit us to the liberal view, which is making its way, nowadays, in jurisdictions slow to welcome it.<sup>72</sup>

In *Oppenheimer*, both sides discussed the *Jacob & Youngs* decision extensively in briefing to the Court.<sup>73</sup> Plaintiff argued that the written notice was just like the pipes in *Jacob & Youngs* – plaintiff told the defendant orally that the work had been approved.<sup>74</sup> Even though the notice was not in writing, the plaintiff had substantially complied and the intention of including that provision had been fulfilled.<sup>75</sup>

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<sup>71</sup> *Id.* at 242.

<sup>72</sup> *Jacob & Youngs*, 230 N.Y. at 242-43.

<sup>73</sup> See Brief of Defendant-Appellant, *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685 (1995) (No. 13916/87), 1995 WL 17050831 (N.Y.), at \*9; Brief of Plaintiff-Respondent, *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685 (1995) (No. 13916/87), 1995 WL 17050834 (N.Y.), at \*4, 27, 30, 35, 38, 40, 47; Reply Brief of Defendant-Appellant, *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685 (1995) (No. 13916/87), 1995 WL 17050837 (N.Y.), at \*5-6.

<sup>74</sup> Brief of Plaintiff-Respondent, *supra* note 73, at \*39-41.

<sup>75</sup> Brief of Plaintiff-Respondent, *supra* note 73, at \*36.

Defendant also pointed to *Jacob & Youngs* by distinguishing it.<sup>76</sup> Defendant argued that, unlike *Jacob & Youngs*, the agreement, by using the word “unless,” had used language of express condition, requiring strict adherence.<sup>77</sup> Defendant successfully argued that, unlike *Jacob & Youngs*, the express condition required more than substantial compliance.<sup>78</sup> In siding with defendant’s literal interpretation, the Court held that the express condition did not permit for substantial performance but, rather, required strict compliance with the requirement of *written* notice.<sup>79</sup> The Court looked to Cardozo’s language in *Jacob & Youngs*:

But Judge Cardozo was careful to note that the situation would be different in the case of an express condition:

“This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery. That question is not here. This is merely to say that the law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture.”<sup>80</sup>

Certainly, this was what Cardozo had written in *Jacob & Youngs*. But it is difficult to concede that he would have reached the same result in *Oppenheimer*. Cardozo would have wanted to know more: what was the purpose of requiring a writing? What was customary in these types of subleases? In the words of his decision in *Outlet Embroidery*, was the Court reading the words of the agreement “as business men would read them”?<sup>81</sup>

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<sup>76</sup> Brief of Defendant-Appellant, *supra* note 73, at \*9-10.

<sup>77</sup> Reply Brief of Defendant-Appellant, *supra* note 73, at \*8.

<sup>78</sup> Reply Brief of Defendant-Appellant, *supra* note 73, at \*3-4.

<sup>79</sup> *Oppenheimer & Co.*, 86 N.Y.2d at 694.

<sup>80</sup> *Id.* (quoting *Jacob & Youngs*, 230 N.Y. at 243-44).

<sup>81</sup> *Outlet Embroidery Co.*, 254 N.Y. at 183.

**B. Vagueness and Indefiniteness**

Cardozo was not afraid of vagueness or indefiniteness. This placed him in the dissent in *Varney v. Ditmars*.<sup>82</sup> There, an employer was paying \$35 per week and when the employee was offered another job that would pay more, the employer told the employee to stay with the company and the employee would receive \$40 per week plus, at the end of the year, a “fair share of [] profits.”<sup>83</sup> When the employer did not follow through on the promise, the issue was whether the promise to pay a “fair share” was too vague, indefinite and uncertain to enforce.<sup>84</sup> Judge Emory Chase, writing for the majority of the court, held that the promise was too indefinite to bind the employer:

The statement alleged to have been made by the defendant about giving the plaintiff and said designer a fair share of his profits is vague, indefinite and uncertain and the amount cannot be computed from anything that was said by the parties or by reference to any document, paper or other transaction. The minds of the parties never met upon any particular share of the defendant’s profits to be given the employees or upon any plan by which such share could be computed or determined. The contract so far as it related to the special promise or inducement was never consummated.<sup>85</sup>

Cardozo dissented, on the firmly held belief that, if presented with relevant evidence, the Court could figure out what was “fair” and there was, thus, a promise that could be enforced.<sup>86</sup> Cardozo wrote:

I do not think it is true that a promise to pay an employee a fair share of the profits in addition to his salary is always and of necessity too vague to be enforced. The promise must, of course, appear to have been made with contractual intent. But if that intent is present, it cannot be said from the mere form of the promise that the estimate of the reward is inherently

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<sup>82</sup> 217 N.Y. 223 (1916).

<sup>83</sup> *Id.* at 225, 226.

<sup>84</sup> *Id.* at 227.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 233 (Cardozo, J., dissenting).

impossible. The data essential to measurement may be lacking in the particular instance, and yet they may conceivably be supplied.<sup>87</sup>

Approximately fifty years after Cardozo left the New York Court of Appeals, in *Joseph Martin, Jr. Delicatessen v. Schumacher*,<sup>88</sup> the Court maintained this approach to indefiniteness when it took a decidedly formalist approach to “agreements to agree.”<sup>89</sup> Agreements to agree are a classic contract law problem for courts because, absent an ability of the parties to reach an agreement, without clear instruction, the manner enforcing the promise to agree is indefinite.<sup>90</sup> The case involved a renewal clause in the lease of a space operated as a deli.<sup>91</sup> The renewal clause was described by the Court as “unadorned” because it did not set a renewal rent or provide a method for calculating the renewal rent.<sup>92</sup> Instead, it only provided that the renewal rent was “to be agreed.”<sup>93</sup> Judge Jacob D. Fuchsberg held that the renewal clause could not be enforced: “[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable.”<sup>94</sup>

Dissenting in part, Judge Michael J. Jasen channeled Cardozo and would have set the rent by implying a reasonable rent term, pointing to the Appellate Division decision written by Judge Leon Lazer that the Court was reversing.<sup>95</sup> Judge Lazer had held that

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<sup>87</sup> *Varney*, 217 N.Y. at 233. Another example of Cardozo’s fluidity and openness to uncertainty arises in *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 387-88 (1919). There, Cardozo held that a clause prohibiting oral modification of the contract was unenforceable because the clause itself is subject to amendment or waiver. He wrote:

Those who make a contract may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of an oral waiver, may itself be waived. . . . What is excluded by one act, is restored by another. You may put it out by the door; it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again.

Later, a New York statute was enacted to extinguish “the *Beatty* rule” and allow enforcement of “no oral modification clauses.” N.Y. GEN. OBLIG. LAW § 15-301 (McKinney 2018). In *Israel v. Chabra*, 12 N.Y.3d 158 (2009), the New York Court of Appeals reinforced the statute and the nullity of the *Beatty* rule.

<sup>88</sup> 52 N.Y.2d 105 (1981).

<sup>89</sup> *Id.* at 110.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 108.

<sup>92</sup> *Id.* at 110-11.

<sup>93</sup> *Joseph Martin, Jr. Delicatessen*, 52 N.Y.2d at 111.

<sup>94</sup> *Id.* at 109.

<sup>95</sup> *Id.* at 112 (Jasen, J., dissenting).

enforcement of the renewal clause better effectuates the intent of the parties than striking the clause altogether.<sup>96</sup> He further held that a “renewal option has a more sympathetic claim to enforcement than [] most vague [] terms” because valuable consideration will often have already been paid for the option.<sup>97</sup> This position is classic Cardozo: an interpretation that looks to context better effectuates the intent of the parties than a literal adherence to the words (or lack of words) of the written agreement.

#### IV.    **WHAT DOES THE FORMALISM OF THE NEW YORK COURT OF APPEALS TELL US ABOUT THE LEGACY OF JUDGE CARDOZO OR THE COURT AS AN INSTITUTION?**

Judge Cardozo was not making new laws or changing contract doctrine *per se*. He had a philosophy about judging that looked beyond the literal – especially to avoid absurd results. Given that he is the most revered and recognized judge to ever serve on the New York Court of Appeals, one might think that his judicial philosophy would be his legacy and would leave a mark on how the institution decides cases. That said, there is an insight that can be drawn from the divergent approaches of Cardozo and the modern court generally as an institution, but it is not a new one. The insight was already articulated in Professor Andrew Kaufman’s biography of Cardozo and more specifically in Professor Kaufman’s foreword to *The Nature of Judicial Process*.<sup>98</sup> There, Professor Kaufman wrote:

A common complaint, offered by judges, is that Cardozo’s prescription does not help a judge to decide a particular case. Of course not. Indeed, in a way, a subtheme of Cardozo’s lectures is that judicial decision-making involves a nuanced approach among different considerations, any one of which may be dominant with respect to a particular issue or in the context of particular facts. He was essentially an accommodationist, but the totality of the messages was ambiguous. That ambiguity, I think, has contributed to his enduring reputation. *How one applies Cardozo to*

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<sup>96</sup> Joseph Martin, Jr., *Delicatessen, Inc. v. Schumacher*, 419 N.Y.S.2d 558, 560 (N.Y. App. Div. 1979), *rev’d*, 52 N.Y.2d 105 (1981).

<sup>97</sup> *Id.*

<sup>98</sup> CARDOZO, *supra* note 8.



*different situations depends on what strand of thought is emphasized in different contexts. Even judges who subscribe fully to his message will put the elements of decision-making together in different ways in particular cases, each side citing different Cardozo words for support.*<sup>99</sup>

Indeed, part of Cardozo's enduring legacy is exactly that: because he took a contextual approach to deciding cases, his decisions are often used by both sides of the same case to support their position. This is true in *Oppenheimer*, where, as discussed, both sides invoked Cardozo's decision in *Jacob & Youngs* to the extent that it served their arguments.<sup>100</sup> There is a beauty in Cardozo's rejection of simplicity and certainty. In the complexities that contextualism embraces, his decisions will be invoked in varying ways, often in competing sides of the same case.

#### V. CONCLUSION: IS "CERTAINTY" AND "PREDICTABILITY" REALLY BETTER FOR BUSINESS?

The unexpected place this research leads is to question the apparent assumption of formalism in contract doctrine – that certainty and predictability in contract doctrine is better for business.<sup>101</sup> This, it seems, is an oversimplification of business relationships and the nature of contracting.

In *Regulating Contracts*, Professor Hugh Collins has written about "contractual behaviour" as existing in three dimensions: the business relation, the economic deal and the contract.<sup>102</sup> The business relation is in part social, or what might be described as relational, and "precedes the transaction and is expected to persist after performance."<sup>103</sup> Professor Collins explains "[i]t consists of the trading relation between the parties, made up by numerous interactions, some of which may involve contracts, but often will

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<sup>99</sup> CARDOZO, *supra* note 8, at x-xi (emphasis added).

<sup>100</sup> *Compare* Brief of Plaintiff-Respondent, *supra* note 73, with Reply Brief of Defendant-Appellant, *supra* note 73.

<sup>101</sup> Indeed, Professor Miller identified this premise as a reason that choice of law clauses in major transactions commonly opted for New York law. BARGAINS BICOASTAL, *supra* note 40, at 1522.

<sup>102</sup> HUGH COLLINS, *REGULATING CONTRACTS* 128 (Oxford Univ. Press 1999).

<sup>103</sup> *Id.* at 129.

consist of enquiries, discussions of plans, and sorting out problems which have arisen.”<sup>104</sup> The economic deal is the agreement between the parties – the economics of the obligations exchanged.<sup>105</sup> The contract is the standards of self-regulation set by the parties or, more commonly, their attorneys.<sup>106</sup>

A formalist approach to determining the parties’ obligations most intently (if not exclusively) focuses on this third dimension – the literal form of the written document. But, once these three dimensions are acknowledged, supporting the parties’ intentions becomes complicated. Cardozo recognized this complexity and the elusive nature of certainty. His approach, which valued context, left open the exploration of all three dimensions in interpreting whether and to what extent the parties had obligated themselves.

Brilliantly, Professor Collins explains that there can be a “tension between the objective of supporting the expectation of the parties and the distracting planning documents” and he posits that “the kind of legal regulation of contract which best suits the interests of business is one which supports the expectation of business in entering transactions.”<sup>107</sup> This approach to contracts would “give priority to the business relation, with secondary attention to the business deal, and relegate the contract to a peripheral role.”<sup>108</sup> Professor Collins recognizes that this view is controversial because of the “paramount importance” that lawyers attach to “the value of certainty.”<sup>109</sup> Professor Collins writes:

My contention is that the type of law that best contributes to the construction of markets and a vibrant economy would be one that avoids clear-cut entitlements based upon the contractual framework in favour of a more contextual examination of business expectations based upon the business relation and the business deal. In order to achieve this style of legal reasoning, it is necessary to reduce its formalism, and to point the courts towards an investigation of the

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 129-31.

<sup>106</sup> *Id.* at 131-32.

<sup>107</sup> COLLINS, *supra* note 102, at 175.

<sup>108</sup> COLLINS, *supra* note 102, at 175.

<sup>109</sup> COLLINS, *supra* note 102, at 175.

relations and expectations in which the contract is embedded.<sup>110</sup>

Cardozo understood this intuitively.

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<sup>110</sup> COLLINS, *supra* note 102, at 176.