

Justice Benjamin Nathan Cardozo and the Unmasking of the Judicial Process

Enric Mallorquí-Ruscalleda¹
Indiana University-Purdue University Indianapolis

To Justice Paulo Ferreira Da Cunha,
for all these years of collaboration
within the CEMOrOC-FEUSP / IJI-Univ. do Porto
and to celebrate his election as Magistrate
of the Supreme Court of Justice of Portugal.

Abstract: In this essay I explore a major figure within the U.S. legal system history: Justice Benjamin Nathan Cardozo. Even though he was a product of his time and did not transform the judicial system in general, he was crucial in unmasking the processes by which a judge chooses and limits his application of the law, thereby having great impact on judicial debates in the decades that followed him. In order to present this, after briefly discussing his jurisprudence, I present some of his major cases, which settle some legal principles and doctrines that are still active nowadays.

Keywords: Justice Benjamin Nathan Cardozo: Jurisprudence; Legal Language; Case Law, *MacPherson v. Buick Motor Co.*; *Wagner v. International Railway Company*; *Palsgraf v. Long Island Railroad Co.*

Resumen: En este ensayo exploré una de las grandes figuras de la historia legal de los Estados Unidos de América: el juez del Tribunal Supremo Benjamin Nathan Cardozo. A pesar de que fue un producto de su tiempo y de que, en realidad, en su momento, no logró transformar el Sistema judicial en general, lo cierto es que su tarea fue crucial a la hora de desenmascarar los procesos legales desde un punto de vista judicial hasta el punto que su huella siguió muy presente décadas después, estando aun muy presente incluso hoy día. Para llevar a cabo mi propósito, y después de hablar brevemente de su teoría legal, presento algunos de sus casos más importantes, a partir de los cuales sentó precedentes legales aun en boga.

Palabras Clave: Justice Benjamin Nathan Cardozo: Jurisprudencia; Lenguaje Legal; Case Law, *MacPherson v. Buick Motor Co.*; *Wagner v. International Railway Company*; *Palsgraf v. Long Island Railroad Co.*

An important figure who has made a major impact in the field of law is Justice Benjamin Nathan Cardozo (1870-1938). Even though he was a product of his time and did not transform the judicial system in general, he was crucial in unmasking the processes by which a judge chooses and limits his application of the law, thereby having great impact on judicial debates in the decades that followed him. He was instrumental in looking at an otherwise disordered and at times, prescriptive approach and unraveled the processes by which decision-making should happen for a justice. In

¹ Enric Mallorquí-Ruscalleda (PhD Princeton) teaches Spanish Literature and Translation Studies and is the Director of the Program in Spanish at Indiana University-Purdue University Indianapolis. Although he is primarily a scholar of literary and cultural studies, he also has a huge interest in law. Among other professional legal national and state associations, he is a member of The *Southern California Mediation Association* and serves on the Language Access Advisory Committee of the Indiana Supreme Court (USA).

fact, the publication by Yale University Press of *The Nature of the Judicial Process* (1921) is considered the second most influential writing of the twentieth century regarding legal theory (Miraut 2). As a native of the Big Apple, during his eighteen-year tenure in the New York Court of Appeals, which began in 1914, Cardozo cemented his ideas through his lived experiences. The focus of this study is to in fact, connect his time in the Court of Appeals, with his decision-making by looking at three specific cases from 1916, 1921, and 1928, and simultaneously demonstrate that his actions reflected the ideals, thoughts and methods included in his famous 1921 text noted above. Those would later serve him as a justice of the United States Supreme Court.

Cardozo contributed through his writings and ideas in many ways but of particular interest here are his ideas regarding the legal thought process, as explained by Richard D. Friedman in “Cardozo the [Small r] realist:” “His historical significance lies almost entirely in his judicial opinions and in his other formal legal writings” (1740). Among his significant judicial opinions are his reflections on jurisprudence theory and the four methods that should be applied to decision-making. Through specific cases, I will explore how his theories interacted with his understanding of the role of privity in contracts, the tort concept of duty and proximate cause, as well as how unforeseeable consequences must be accounted for in protecting social well-being. Additionally, he formulated theories on moral equality that were based on an understanding of society having access to the same opportunities and these ideals were also explained in his texts and upheld in the courtroom.

Curiously, these contributions can be closely studied and understood by looking at a key year in Cardozo’s professional life; both the text described above as well as a key cases from the years he served as justice in the New York Court of Appeals, were foundational in the broader impact made by Justice Cardozo during his lifetime and beyond. Furthermore, of the many questions he asked in *The Nature of the Judicial Process*, there is one in particular that underlines his understanding of the role of the judge when laws do not explicitly point in any particular direction. In his own words, he pondered: “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?” (10). Given such profound considerations in his writings and despite his brief service to the United States Supreme Court and death in 1938, his legacy continued through most of the 20th century and beyond.

Justice Cardozo’s Jurisprudence: The Instrumental Character of Legal Language

Regarding his jurisprudence or philosophy of law, Cardozo wanted to explore the instrumental character of legal language. As Daniel G. Stroup notes in “Law and Language: Cardozo’s Jurisprudence and Wittgenstein’s Philosophy:” “It is because the outcome of legal discourse carries such great consequence for the everyday lives of the population at large that the element of continuity in that discourse takes on such great importance” (332). For Cardozo in particular through his text, *The Nature of the Judicial Process*, this core idea of legal language and its tangible connection to the real, every day world, becomes apparent. For him, there are customary and natural behaviors for human interactions that become the basis from which to draw legal language and its real-world implications. The law exists outside of the judge but in

cases where there are gaps, judges must interpret and apply the law as they see fit. As Edwin Patterson explains in “Cardozo’s Philosophy of Law,” “Finally, in his avowed and often exemplified distrust of conventional formulas and in his insistence that the rule must fit the case and not the case the rule, he shows that faith in the power of reflective problem-solving, as an interplay of data and ideas” (72). Furthermore, Cardozo understood that there were consequences to decision-making particularly in overruling past decisions or asserting new interpretations of the law.

For this purpose, he identified four methods that have had great significance. For Cardozo, as Patterson and also Stroup explain, there were four methods that could be applied in reaching a legal decision. Among them are logical progression to be able to follow a sequential development of the facts of a case, evolution that brings historical elements into decision-making, tradition or custom so that a judge may know how to apply rules to society, and finally, society as a whole so that its needs and welfare drive legal decision-making. Thus, a judge is called to determine “the comparative importance or value of the social interests that will be thereby promoted or impaired” (Stroup 344). In this sense, Cardozo made great strides in removing jurisprudence from absolutist points of view by demonstrating that the law needed to remain flexible without becoming relativist in order to best serve society as a whole. With the intent of holding social welfare as the greatest of goods, he sought the right approach and language to do so but was many times at a loss to find the needed words for his new, alternate position. Ultimately, his writings and professional life demonstrated his ideal that the law should serve society and that there was a fine balance between maintaining tradition and modernizing the legal system to reflect the values of the other branches of government, namely the executive and legislative branches.

3. Justice Cardozo’s Main Cases

3.1. *MacPherson v. Buick Motor Co.*

Well-known examples of Cardozo’s willingness to fill-in legal gaps and apply the law for the good of society as a whole can be demonstrated through a review of three of his most famous cases that involve duty of care to an individual when confronted with larger companies that provide services and goods to society. A classic example of Cardozo’s defense of society as a whole can be seen through *MacPherson v. Buick Motor Co.*² reviewed by the Court of Appeals of New York in 1916. In this case, there was a defective wheel installed by Buick Motor Co. on a car sold to a dealership, purchased by the MacPherson couple, that later caused an accident and injury. Here the issue was the privity of the contract since Buick had not directly sold the defective car to the MacPhersons. Additionally, the defective tire had been purchased by Buick not made by this company. Given that vehicles were intended for consumers of the general public, it is not surprising that Cardozo found that the manufacturer of a car part, as well as Buick Motor Co. responsible for assembling the car, were equally responsible in ensuring public safety. In this case, the date is important given that vehicles had not been a mainstream part of society for very long. In fact, for only about a decade had vehicles been available to the public. Here is where Cardozo’s method of history comes into play. It was not previously possible to

² *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

abstractly contemplate the construction of vehicles, how they are manufactured, who would purchase them, and anticipate issues that could go wrong in order to use Cardozo's method of philosophy to produce laws that would coincide with this new technology. Rather, as society was confronted with new manufactured goods, and the consequences of poor workmanship in relation to companies such as Buick and consumers such as the MacPherson couple, the judicial system had to play its part in deciding the legal outcomes of these new products and relationships. Cardozo himself expressed this in his 1921 text: "I mean simply that history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future" (53). From this perspective, it is clear that Cardozo understood that vehicles would continue to be part of the present and future, and that consumers of them, would continue to be at the mercy of well-made products to ensure their safety and well-being in using them. Clearly, social well-being for the present and the future played a key role as Cardozo relied on his method of history to reach this decision.

3.2. *Wagner v. International Railway Company*

Similarly, Cardozo found for Wagner in the famous 1921 ruling of *Wagner v. International Railway Company*.³ Here he imposed liability on a defendant, the International Railway Company, for the injuries suffered by a person who came to the rescue of another. In this case, Arthur Wagner was trying to help his cousin, Herbert Wagner, who had fallen out of the train as it took a curve and simultaneously lurched. As he de-boarded the train to help his cousin in the dark and near a bridge, he also suffered injuries when he lost his footing. Through the case, which ended-up in the New York Court of Appeals, Arthur Wagner, despite choosing himself to go look for his cousin, asked that his injuries be considered in relation to the cause of the initial injury, which later became known as "proximate cause." In this case, it was determined that a person injured (Arthur Wagner) while trying to rescue another person (his cousin, Herbert Wagner) who was impacted by the defendant's negligence may also recover damages. In Cardozo's own words: "We may assume, though we are not required to decide, that peril and rescue must be in substance one transaction; that the sight of the one must have aroused the impulse to the other; in short, that there must be unbroken continuity between the commission of the wrong and the effort to avert its consequences" (<https://h2o.law.harvard.edu/cases/1451>). Here Cardozo focused on the importance of the relationship between the initial negligence that resulted in the cousin falling-out of the train and the subsequent risk taken by Arthur Wagner that resulted in a second injury related to the first. For Cardozo the International Railway Company had a duty not only to the initial victim but also to Mr. Arthur Wagner for the injuries suffered in trying to rescue his cousin.

Thus, this case is an example of the real-world response that Cardozo made as judge considering previous legal practice but also understanding that the ambiguity of the law required that he take other and all factors into consideration in his decision while also bearing in mind the impact that it should have on the rest of society. It is in this context that he considered and applied the method of custom. For Cardozo custom does not refer to the behaviors of different social groups, rather it speaks to judicial decisions and how their traditions create customs. As he explains it in *The Nature of the Judicial Process*: "In these days, at all events, we look to custom, not so much for the creation of new rules, but for the tests and standards that are to determine how

³ *Wagner v. International Railway Company*, 232 N.Y. 176, 133 N.E. 437 (1921).

established rules shall be applied” (56). From this perspective, in *Wagner v. International Railway Company*, there was a clear issue of neglect that made the cousin fall out of the train to begin with. Even though the train lurched, it should not be the case that in its movement through the train tracks, passengers should fall out. The safety of all passengers using trains was a key factor in the decision made. For Cardozo, the natural expectation in boarding and using a train, is that you will remain on-board until you reach your destination; it is unnatural and therefore wrong to expect to fall out as you are travelling. That point is clear in the case but the ambiguity arose in the behavior, subsequent decisions, and injury sustained by Arthur Wagner. Neither the methods of philosophy nor history could in this case guide Cardozo, as that second injury arose out of vary particular circumstances. Yet, Cardozo understood that his decision would ultimately create a new custom or tradition in ruling and as expected, he ruled in favor of what would benefit society as a whole by extending duty of care to proximate cause and highlighting the relationship of that first injury to the second one.

3.3. *Palsgraf v. Long Island Railroad Co.*

Again, in the 1928 New York Court of Appeals case, *Palsgraf v. Long Island Railroad Co.*,⁴ he broadened the understanding of negligence to demonstrate that unforeseeable consequences do play a role and that society as a whole must be protected. In this case, Mrs. Palsgraf was injured by the fireworks that were set off when they fell from an unidentifiable package held by a man who lost his balance while boarding the train. Even though there was no intention to cause harm, the Court of Appeals found that there is a broader responsibility to protect society against unforeseen dangers rather than to protect individuals under specific circumstances. Once more, for Cardozo it was the railroad company that had a duty to protect its customers from such harm. When the methods of philosophy, history or custom did not clarify a direction for Cardozo, he relied on the most important method of all, *sociology*. He felt that it was his duty as a justice to understand and discover what constituted social welfare or social justice in his decision-making. In this case, Mrs. Palsgraf was engaging in natural behavior, waiting on a platform when she was injured. Additionally, the person and item that caused her harm, was from a fellow traveler. In this case, all involved seemed to demonstrate both a normal intellect and conscience in their behavior, yet there was a serious injury. This is where Cardozo relied on what he called sociology to make a final decision; the Long Island Railway Company had a larger responsibility towards society as a whole, to protect it when using its trains. The decision of this case, certainly brought about greater awareness in the way train employees “helped” customers board a train, how dangerous packages should be labeled and transported in public areas, and the general role played by a public entity in ensuring that its customers were not injured when normally and naturally using its services. Therefore, in the three cases explained above, Cardozo was applying his methods of philosophy, history, tradition, and sociology to defend the well-being of society as a whole in its purchase of consumer goods such as a vehicle as well as the use of public transportation such as a train.

In the cases discussed above, the application of his four methods came into play, particularly in relation to what he explained in the second lecture of his text *The Nature of the Judicial Process*, where he discusses his ideas of history, tradition, and

⁴ *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928).

sociology. In that second lecture, Cardozo notes that “The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders” (92). In other words, in order to protect liberty and equality for society as a whole, both public authority and judicial institutions must guard those great ideals since people do not have equal opportunities nor equal moral compasses. The decisions made by justices must reflect those limitations and freedoms that will ultimately give the greatest liberty to citizens as a whole by restraining the powerful and supporting the more socially disenfranchised. As Cardozo himself saw it: “Finally, when the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends” (Cardozo 65). If in the first case described above, Cardozo was using history as a method to determine the outcome of a defective car part that injured consumers, in the second, he was relying on judicial custom to establish new ways of protecting all through his understanding of “proximate cause.” Yet ultimately, as noted in the third case studied and his decision-making in general, all methods could and should be put aside when there was the larger question of social well-being at stake. His fourth and broadest method, sociology, was the most powerful in the decisions he made as justice both in the New York Court of Appeals, and later, as a Supreme Court justice.

4. Conclusion

Cardozo throughout his life continued revising and rethinking many of his legal opinions. He continued writing and expressing his views, always modifying and clarifying them with more acute understanding and language. An example of this progression and refinement can be seen through his later writings, particularly in *The Paradoxes of Legal Science* (1928) as explained by Miraut Martin. In that later text, Cardozo explained that if human moral dignity is equivalent for all beings, then the social opportunities that they have access to must also be equivalent (Miraut Martin 3). Motivated by the ideal of the well-being of society as a whole, Cardozo considered that social opportunities should be equally accessed by the whole. In this same vein, equality for Cardozo was a social imperative that could then allow society to correspondingly access liberty. In cases where social beings were not equal such as in regard to minors or those who were not capable of seeking such rights, then Cardozo believed a justice had to take on a more paternalistic approach in defending weaker or less capable individuals so that they could also reap the benefits of accessing equal social opportunities.

Yet Cardozo also understood that social beings do not always hold the same moral standards for themselves. Here again, he based his conclusions on the impact of history, tradition, and sociology to determine that there are such acts that can at any time and in any context be considered moral while others will be identified as immoral. For him, the role of a justice was once again to favor and uphold social morality for the good of the whole while not expecting either the highest standards of moral behavior nor the lowest in trying to respond to social needs and well-being in general. In this regard, the element of knowledge and understanding became crucial since morality could only come into play when individuals understood that there was a choice to be made when choosing how to behave, how to respond to a particular situation. In fact, one could argue that his perception that a normal person should be

inclined to save another, who is in serious danger, was ultimately the reason that he found for Arthur Wagner in the case described above.

In his writings, and in particular his 1921 *The Nature of the Judicial Process*, Cardozo pondered the myriad of questions before a judge when making decisions and interpreting the law. He understood that individuals from different backgrounds and generations would understand the functioning of society in their own way but here is precisely Cardozo's greatest contribution in responding to that ambiguity, it was the whole that should be prioritized within any particular historical moment. As demonstrated through this study, Cardozo took a reflective approach to his service as justice, understanding its limitations at every step but simultaneously creating various methods and responses so that his interpretation of the law could serve general social welfare rather than the individual. American society very much values individual rights and opportunities, Cardozo's contributions to unmasking the judicial process on the one hand unraveled how a justice can and should approach the interpretation of the law but more importantly cemented social well-being as a key component of the judicial system in the United States. To this day, and particularly with the technological transformations undergone in the last two decades, Cardozo's insistence that the judicial system needs to remain flexible and respond to the needs of the present while using the methods offered by philosophy, history, tradition, and sociology to respond to the well-being of society as a whole, remains as important today as it was at the turn of the previous century.

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Recebido para publicação em 03-09-19; aceito em 05-10-19