Cardozo's Philosophy of Law: His Concept of Judicial Process

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CARDOZO'S PHILOSOPHY OF LAW: HIS CONCEPT OF JUDICIAL PROCESS

by

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A Thesis Submitted to the Faculty of the Graduate School of Loyola University in Partial Fulfillment of the Requirements for the Degree of Master of Arts

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LIFE

William Charles Cunningham, S.J., was born in Joliet, Illinois, on February 13, 1930.

He was graduated from Joliet Catholic High School, Joliet, Illinois, in June, 1947; from Marquette University, Milwaukee, Wisconsin, in June, 1951, as a Bachelor of Philosophy, and in June, 1953, as a Bachelor of Law.

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In September, 1956, the author entered the Society of Jesus at Milford, Ohio. Two years later in 1958, he enrolled as a graduate student in the Department of Philosophy of West Baden College, West Baden Springs, Indiana, a branch of Loyola University, Chicago, Illinois, as a candidate for the degree of Master of Arts.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION AND FOUNDATION</td>
<td>1</td>
</tr>
<tr>
<td>Cardozo's education and judicial experience--Review of literature on Cardozo--Opinions on Cardozo's philosophy--Cardozo's estimate of his role--His phenomenological approach--Scope and method of thesis.</td>
<td></td>
</tr>
<tr>
<td>II. THE NATURE OF THE JUDICIAL PROCESS</td>
<td>20</td>
</tr>
<tr>
<td>What constitutes &quot;judge-made law&quot;?--Need for stability in law--Four methods of applying principle of law--Methods of philosophy, history, custom, and sociology--Method of sociology serves social welfare--Need for objective standard--Judge's role creative--Necessary connection of law and morals--Role of stare decisis: static vs. dynamic precedents.</td>
<td></td>
</tr>
<tr>
<td>III. THE GROWTH OF THE LAW</td>
<td>41</td>
</tr>
<tr>
<td>Need for principle of growth in law--Meaning of law--Natural law as concern of moral science--Need for practical approach--Other writers on Cardozo's approach to natural law--Cardozo's methodological positivism--Growth of law--Four methods as means to end--Justice includes charity--Standard for values must be objective--Function of laws studied through social sciences--Philosophy affects development of law--Legislature insufficient agency of growth for law--Need for creative work of judicial process.</td>
<td></td>
</tr>
<tr>
<td>IV. THE PARADOXES OF LEGAL SCIENCE</td>
<td>68</td>
</tr>
<tr>
<td>Judicial process reconciles antinomies--Antinomy of stability and progress in law--Law's change balanced by use of values--Judge's duty to stabilize moral standards; to insure moral content in law--Progress in compromise between idealism and positivism--Justice includes morality--Hierarchy of values: moral preferred to economic, economic to aesthetic--Personal sentiment of judge to be avoided--Antinomy between liberty and government--Judiciary's work with legislature--Cardozo's address to New York State Bar</td>
<td></td>
</tr>
</tbody>
</table>
Association—Cardozo's position contrasted with neo-realists' position.

V. CONCLUSION

Judicial process not defined—Distinguishing characteristics of judicial process—Evaluation of Cardozo's contribution to legal philosophy.

BIBLIOGRAPHY
CHAPTER I
INTRODUCTION AND FOUNDATION

Benjamin Nathan Cardozo was born in New York City on May 24, 1870. He attended and was graduated from Columbia University with an A.B. degree in 1889, an A.M. degree in 1890, and in 1915, he received an LL.D. degree, honoris causa. The latter degree was the first of fourteen honorary degrees to be conferred upon Cardozo. Other universities and colleges conferring the LL.D. degree, honoris causa, were: Yale, New York University, University of Michigan, Harvard, St. John's College, St. Lawrence, Williams, Princeton, Pennsylvania, Brown, University of Chicago, and finally the University of London in 1936. In 1935, Cardozo received an L.H.D. degree from Yeshiva.¹ Cardozo, consistently sketched by his biographers as humble, under this barrage of academic honors, commented tersely upon the award of the doctorate by the University of London: "My London degree did give me a bit of a thrill."² So much for Cardozo's academic training and honors.

The life and work of Benjamin Cardozo as an appellate court

¹Who Was Who in America (Chicago, 1943), I, 191.
judge was as productive as it was long. Elected to the Supreme Court of New York in 1914, he was designated, instead, to serve on the New York Court of Appeals to fill a vacancy on that court. He served on the Court of Appeals until 1932, the last six years in the capacity of Chief Judge. On February 15, 1932, Cardozo was elevated to the position of associate justice of the Supreme Court of the United States, where he served until retirement in 1937.³

The writing of Mr. Justice Cardozo falls into three separate classes. There are the judicial opinions he wrote: more than 500 opinions while he served on the New York Court of Appeals, and 154 opinions while he served on the Supreme Court of the United States.⁴ Next there are his extra-judicial writings that were philosophical in nature: The Nature of the Judicial Process (1921); The Growth of the Law (1924); The Paradoxes of Legal Science (1928); and an essay entitled "Jurisprudence" which was originally an address given before the New York State Bar Association on the eve of his appointment to the Supreme Court, January 22, 1932.⁵ Finally, there are many addresses and lectures given by Cardozo together with law review articles that comprise a smaller legacy to legal literature. They are less important for the consideration of his

³Who Was Who in America, p. 191.

⁴The opinions of Cardozo, as Judge and Chief Judge of the New York Court of Appeals, are to be found in 210 to 258 N. Y.; and as Justice of the United States Supreme Court in 285 to 302 U. S.

⁵Who Was Who in America, p. 191.
concept of judicial process. There are, however, flashes of his thought on this question of judicial process even in these writings. Indeed, Cardozo's preoccupation was with his work as an appellate judge; but it would be unfair to attempt an analysis of his philosophical thought from these less technical writings. Like all his writing, they have a grace of diction that sets them apart in the field of legal literature. The finest of these works are collected into a volume, *Law and Literature* (1931).

Mr. Justice Cardozo died on July 9, 1938, in the home of his dear friend, Judge Irving Lehman, who had served with him on the bench of the New York Court of Appeals.

A review of the literature dealing with Cardozo's life and work reveals no lack of material. But this is to be expected when the subject was a judge of the New York Court of Appeals and the United States Supreme Court. Besides his decisions, the extra-judicial writings and the lectures that were published gave ample material for criticism to both jurists and philosophers. Yet the prevailing tone of the criticism is frankly laudatory. These writings about Cardozo may be separated into the following periods: criticisms prior to his appointment to the Supreme Court of the United States; criticisms during his term on that same court from 1932 to 1938; eulogies and tributes on the occasion of his death; and, those other books and articles which have appeared after his death in 1938. The most penetrating of these works were published after his death in 1938.
When Cardozo began his lectures and writings on the nature of the judicial process, there were some basic misconceptions prevalent among the jurists and philosophers of his time as to the scope and function of the judicial task. There were those who saw the dichotomy between legislative and judicial function as complete. For them the judge's role was to determine whether the case fell under a given statute and, this determined, his task was complete. Or in the absence of a controlling statute the judge had merely to determine whether the instant case fell under a prior decision on the same point. This conception of judicial process gives plenary power to the legislature, and ignores the right and duty of the judge to see the reasons behind the rule, and to use the law as a means of social improvement. Law thus limited becomes a self-contained power blind to the needs that confront it. At the other extreme there were those who saw the law as what the courts had said and done. For these, the reality of law was in the pronouncements by the courts, and until pronounced by the courts enactments of the legislature did not obtain to the dignity of law. This was judicial legislation with a vengeance. Cardozo, however, saw the judge's function as analogous to the legislator's, and to determine wherein were the similarities and the differences he turned to philosophy to give him a knowledge of the first principles of the judicial process at appellate level. To what extent he was successful may be determined at the end of this thesis when Cardozo's concept of the judicial process has been evaluated.
It might be well here to take a brief look at some of the writings on Cardozo, his work, his philosophy of law, and the importance these works have been assigned in contemporary jurisprudence. Of Cardozo's philosophical writings, Miriam Rooney, Dean of Seton Hall Law School, has this to say:

Their influence and significance has, however, attained a proportion considerably greater than their modest manner of presentation would seem at first glance to indicate. The fact that their author held important offices in two leading courts for approximately a quarter of a century would of course recommend them as keys to the meaning and interpretation of court decisions rendered during the judicial service of their author. Apart from their official connections with American decisions, however, they have a value all their own as a theory of American jurisprudence which writers, teachers, and judges have quoted again and again in recent years, in class, in law review articles, and in books and lectures, on account of the philosophical guidance on the judicial process which they supply as well as for the appealing diffidence with which they are presented.6

Dean Rooney's article is along Thomistic lines. It is a thorough treatment, and no further work seems necessary in that line. In 1939, Dean Acheson wrote an article for the Michigan Law Review covering Cardozo's decisions that affected problems of government. Moses Aronson, editor of the Journal of Social Philosophy, wrote an article appraising Cardozo's work as a sociological jurisprudent and philosopher. In May, 1930, Bernard Shientag wrote for the Columbia Law Review a very complete treatment of Cardozo's decisions rendered on the New York Court of Appeals. And in January, 1939, Columbia, Yale and Harvard dedicated jointly the issue of their

law reviews carrying articles on many different phases of Cardozo's life and work. Edwin Patterson, in an article written after Cardozo's death, has furnished a very thorough and accurate analysis of Cardozo's philosophy. In 1939 Patterson writes in this vein: "Benjamin Nathan Cardozo's contribution to the juristic culture is not confined to doctrinal illuminations and improvements which are to be found in his judicial opinions. He was a great judge; he was also a philosopher of law. How great a philosopher of law is a question that is, perhaps, premature to ask or to attempt to answer." Walton H. Hamilton, in an extremely well done article on the juristic "craft" of Cardozo, observes: "We cannot, however, assign to Cardozo his exact place in the great tradition. The entries are too fresh for time to give its perspective." Dr. Rooney's article followed most of the previous writing on Cardozo, but did not deal with those writings. Most of the other writing on Cardozo's contribution to legal philosophy came shortly after his death in 1938, and faced the difficulty that must be surmounted in attempting an evaluation of Cardozo's contribution to legal philosophy so shortly after his death. It would seem that at this time more than twenty years after Cardozo's death, some evaluation of his contribution to and influence upon legal philosophy,


garnered both from his writings and the criticisms of his writings, might not be out of place. This evaluation will be deferred until the content of Cardozo's writing on the judicial process has been set out in detail.

It must remain conjecture whether Cardozo could have foreseen the misunderstanding that would arise between legislature and appellate courts, or, indeed, among the several appellate courts of our country today. Certainly this problem, although not in its present intensity, was no stranger to his day. As early as 1921, in an eloquent plea for a ministry of justice designed to coordinate the work of the legislative and judicial branches, Cardozo could write: "Legislature and courts move on in proud and silent isolation. Some agency must be found to mediate between them." Though this plan for a ministry of justice was used in New York with some success, Cardozo's most effective work was to be his writing on the nature of the judicial process. For this was the work for which he was so well suited—wedding the philosophical outlook to a mind conditioned by serious reflection upon the law. Both his undergraduate and graduate study had included philosophy, and his writings reveal a familiarity with the works of Gény, Kantorwitz, Saleilles, Ehrlich, Duguit, Brutt, Jhering, Stammler, Charmont, Vinogradoff, Tourtoulon, James, Dewey, Windelband, Peirce

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9Margaret E. Hall, ed., Selected Writings of Benjamin Nathan Cardozo (New York, 1947), p. 357. Selected Writings of Benjamin Nathan Cardozo will be referred to hereafter as Selected Writings.
and Santayana. His life was devoted to study and research in philosophy as well as law.

There seems little questions that legal scholars as well as philosophical scholars considered Cardozo to be a philosopher of law. In his first writing on the judicial process in 1921, Cardozo comments: "I have little hope that I shall be able to state the formula which will rationalize this process for myself, much less for others. . . . A richer scholarship than mine is requisite to do the work aright. But until that scholarship is found and enlists itself in the task, there may be a passing interest in an attempt to uncover the nature of the process by one who is himself an active agent, day by day, in keeping the process alive."10 In a series of lectures given at Yale University in 1924, that are a supplement to those given in 1921, Cardozo speaks with more confidence: "I have made myself today the self-appointed spokesman and defender of the philosopher in the field of law. I am not concerned to vindicate philosophy, either in jurisprudence or outside of it, as an inquiry of cultural value or speculative interest. Pretensions thus limited, would perhaps be feebly contested, or even grudgingly allowed. My concern is with the relation of

philosophy to life." Not without some humor he states his case in the address to the New York Bar Association in 1932:

The lawyers, I say, have been talking philosophy or what they thought was philosophy; but then on the other hand the philosophers have been talking law or what they thought was law, and some of them certainly have learned more about law than the lawyers or the judges have learned about philosophy. So we have the heartening spectacle of lectures by John Dewey on the place of logic and of ethics in legal science, and lectures by Morris R. Cohen on the meaning of law and the function of the judge, and essays and addresses by others too many to be catalogued--by psychologists on the law of evidence, by moralists on the theory of the state--till indeed it seems at times that the lawyers and the judges are playing a minor role and may soon be elbowed off the stage. 12

Thus, Cardozo from the modest appraisal of his ability at the outset of his writing in 1921, progressed to a point of advocating for the members of his profession an approach to the problems dealt with in the philosophy of law. That he should, on the eve of his appointment to the country's highest judicial office, in the address to the New York Bar Association, reaffirm his stand on the importance to be attached to precedent in judicial decision--to the role played in judicial decision by the doctrine of stare decisis--is eloquent testimony to the value he placed upon philosophical concerns. It seems certain, then, that while he did not consider himself a formal, professional philosopher, he frankly avowed an interest in and striving for solutions to the perennial problems of


12 Benjamin Nathan Cardozo, "Address," N. Y. State Bar Assoc. Rept., LV (January 1932), 265. This will be referred to as Address.
his own work and the work of his profession through a better understanding of the nature or essence of the judicial process. Of philosophy he says: "Here you will find the key for the unlocking of bolts and combinations that shall never be pried open by clumsier or grosser tools."\(^\text{13}\)

He would understand Cardozo imperfectly who would look for his concept of the judicial process in a tightly-knit, systematized exposition of thought. Rather, the statement of this concept will be found scattered through all his philosophical writings, in more than an occasional burst of prose, verging at times on the poetical. This cultivation of expression will prove, at times, as helpful in interpreting his thought as it can be harmful. In this regard Edwin Patterson remarks: "A critical analysis of Cardozo's philosophical thought is eluded at the outset by his exquisite style. It is so much easier to quote from Cardozo than to give one's own clumsy paraphrase, that one is tempted to summarize his ideas by a selection of quotations."\(^\text{14}\) At the risk of some length this thesis will attempt a treatment of Cardozo by a combination of both quotations and the "clumsy paraphrase."

In addition to the problems caused by the absence of strict system, and by a style which might distract, there is also the problem of Cardozo's drawing upon so many and such varied sources

\(^{13}\)growth, 23.

\(^{14}\)Patterson, "Cardozo's Philosophy of Law," 72.
for the expression and formulation of his thought. A study of his work reveals a breadth of reading uncommon among jurists engaged in the work-a-day world of appellate process. Thus, as will be seen in a later chapter dealing with Cardozo's notion of the natural law, one must be cautious in attributing to Cardozo the thought of some philosopher Cardozo quoted in delineating a problem or proposing a solution to some problem. He is clearly eclectic. On interpreting Cardozo's thought, Patterson counsels: "In summarizing his own thought, then, one will do well not to rely upon his quotations unless he clearly approves or paraphrases them."15

The method of this thesis will be to analyze Cardozo's writings of a philosophical nature, and this, in their chronological order. Cardozo almost certainly had thought of the judicial process in terms of philosophy prior to 1921, when he wrote The Nature of the Judicial Process. But it remained to articulate the process in which he was daily engaged in order to attempt a description of what the judicial process is. It is of more than passing interest that the philosophical writings appeared at quite regular intervals: The Nature of the Judicial Process (1921); The Growth of the Law (1924); The Paradoxes of Legal Science (1928); and the address to the New York Bar Association in 1932. Each of these reflects the fruit of a gradual analysis Cardozo made of his work on the New York Court of Appeals. The burden of judicial work alone during

15 Ibid., 74.
the years between 1921 and 1928 would have kept most judges on the New York Court of Appeals from writing on the philosophical questions of judicial process. But such was the scholarship of Cardozo in the interests of an enlightened judiciary. And so it seems fairest to deal with his thought as it evolved, and to attempt an analysis of the development of his central theme of the nature of the judicial process from a chronological approach.

Judicial opinions do not always accurately reflect the writer's philosophy of law, though they may give some indications in that regard. Of Cardozo's opinions Miriam Rooney has said: "Even more than Holmes he injects philosophical serums into his legal opinions. And he prescribes even more insistently than Holmes did the study of the philosophy of law for the legal profession as well as for purely speculative thinkers."16 An opinion might, therefore, be philosophical in its approach, but no great significance should be attached to this official utterance as an expression of the writer's philosophy. The opinion, if it is the majority's, is the opinion of each judge who joins in the majority decision. Again it is Patterson who puts it so well: "These divinations may be of great importance for legal development, yet they are, due to the limitations of the judicial opinion, either implicit or at most fragmentarily explicit. . . . Fortunately, he has given in his books, articles and addresses more coherent and studied statements of his

ideas. A fortiori, the per curiam opinion must be rejected as a source for the expression of a man's philosophy since that opinion is adopted by every member of the court that heard the case. But what of the dissent as a source of a man's philosophical thought, and this when it is solitary and not shared by any of his brothers of the bench? True, Cardozo has said on this score: "The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years." But on the same subject he adds: "Comparatively speaking at least, the dissenter is irresponsible. . . . He has laid aside the role of the hierophant, which he will be only too glad to resume when the chances of war make him again the spokesman of the majority. . . . The poor man must be forgiven a freedom of expression, tinged at rare moments with a touch of bitterness which magnanimity as well as caution would reject for one triumphant." Little wonder then that Cardozo during his life was such a vigorous spokesman for the majority; and during his eighteen years on the New York Court of Appeals, while writing over 500 opinions, wrote only fourteen dissenting opinions. Quite apart from any further speculation on the importance of the dissent as a source of one's philosophy, Cardozo's thought on the

17 Patterson, "Cardozo's Philosophy of Law," 71.
18 Selected Writings, 354.
19 Ibid., 353.
matter is quite clear.

In a certain sense it is true to say that the method of a thesis might be controlled by the type of exposition that has been made of the subject under study. Cardozo's method was to analyze what courts had done in the past, what he had done as a member of those courts, and what he thought should be done. Rather than beginning from any philosophical position of school and working out, from that, a philosophy of law, Cardozo's method was the reverse. In a book dealing with historical perspective in the philosophy of law, Carl Friedrich observes: "Every philosophy of law is part of a particular general philosophy, for it offers philosophical reflections upon the general foundation of law. Such reflection can either be derived from an existing philosophical position or may lead to such a position. It is characteristic of the philosophy of law, and very natural too, that philosophers have been inclined toward the first approach, lawyers and jurists toward the second." Cardozo's approach is clearly the second type mentioned.

Some have written of Cardozo's philosophy of law and his concept of the judicial process as being in part a descriptive process. And one has said that "he consciously ventures to formulate the rules of legal methodology, rendering articulate the heuristic principles by which the law is made to grow at the hands of a

judge."22 But Cardozo's philosophy has never been termed phenomenological in its approach. Some of the previous analyses of his thought have touched on what is equivalent to a phenomenological approach, but none have elaborated the point. Indeed, phenomenology, a comparatively recent development in the field of philosophy, has not often been applied to the philosophy of law.23 Time does not permit, nor does this thesis require, a lengthy disquisition on phenomenology or the phenomenological method. It must be enough here to say that phenomenology has been defined as a "descriptive philosophical method, which, since the concluding years of the last century, has established (1) an a priori psychological discipline, ... and (2) a universal philosophy, which can supply an organum for the methodological revision of all sciences."24 One is not accustomed to reflect upon the act of experience, but rather upon particular matters, values or opinions. It is the object of phenomenology to catch the "act of experience" of these particulars and reflect upon it. From this reflection upon an experience will


23 The only treatment of this point found by this writer is an analysis of the methods used in philosophy of law in Giorgio Del Vecchio's book Philosophy of Law, translated by Thomas O. Martin, Catholic University of America Press, 1953.

24 "Phenomenology," Encyclopaedia Britannica, 1954 ed. (Chicago, 1954), XVII, 699. Italics not in original. The article is by Edmund Husserl. He may justly be called the "Father of Modern Phenomenology"; he was unquestionably its most articulate spokesman.
come the basis for a descriptive analysis of what is contained in
the "act of experience." In Husserl's words: "Instead of the
matters themselves, the values, goals, utilities, etc., we regard
the subjective experience in which they appear." Phenomenological
description will comprise "two parts, description of the
'noetic' \(\langle\text{\text{\noetico}}\rangle\) or 'experiencing' and description of the 'noematic'
\(\langle\text{\text{\noemico}}\rangle\) or the 'experienced.'" By this method one may arrive at
a knowledge of the nature or the essence of a thing. But while
Cardozo's approach was phenomenological in that it was descriptive
of an act of experience of an individual, the experience which he
described was of norms, principles, and values which for Cardozo
comprised the total fabric of law itself. In other words, the ap-
proach used by him was never so radically Husserlian that it became
method for the mere sake of method. It was, instead, an investiga-
tive-descriptive approach to the judicial phenomenon of appellate
process which never aimed at definition in strict terms, but which,
beyond method itself, was looking for the values and norms that
could demarcate judicial process as an area of human positive law
to which the name law, written large, could be applied.

Toward an understanding of Cardozo's approach to the

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\(^{25}\) \text{Ibid.}, 700.

\(^{26}\) \text{Ibid.}

\(^{27}\) \text{Ibid.}
nature of judicial process as phenomenological one would do well to know the context in which his first lectures were given. In 1920, Professor Corbin of Yale asked Cardozo to give the Storr's lectures at Yale Law School. Clarence Morris in his recent book relates: "When he said he had nothing worth saying to law students Corbin asked him to come and tell the students how he decided cases. He agreed and the resulting lectures were his most famous work, The Nature of the Judicial Process." In this context then, he began to analyze, reflect upon and describe the nature of the judicial process. A few quotations from the introduction to The Nature of the Judicial Process will open up his line of thought:

Any judge one might suppose, would find it easy to describe the process which he had followed a thousand times before. Nothing could be farther from the truth.

We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. We must apply to the study of judge-made law that quantitative analysis which Mr. Wallas has applied with such fine results to the study of politics.

Concerning the judicial process he asks himself:

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportion do I permit them to contribute to the result? In what proportion 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 a logical consistency, the symmetry of the legal structure, how far shall I seek it? At

29 Nature, 9; 15.
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?\textsuperscript{30}

There seems little doubt that Cardozo was, in the fullest sense of the word, reflecting upon both the "act of experience" and the "experienced" to attempt to arrive at the nature or the essence of the judicial process. In 1924, in the work that was to supplement the lectures of 1921, he writes in this vein:

Description may serve where definition would be hazardous. A philosophy of law will tell us how law comes into being, how it grows, and whither it tends. Genesis and development and end or function, these things, if no others, will be dealt with in its pages. To these it will probably add a description of the genesis and growth and function, not only of law itself, but also of some of those conceptions that are fundamental in the legal framework.\textsuperscript{31}

Though his scope is quite extensive, Cardozo's method of describing his reflection upon experience—in fine, phenomenological method—is the same as that used by modern phenomenologists.

This thesis will have as its object to show that all of the writing of the late Mr. Justice Cardozo centered upon, and developed in some way his concept of the judicial process. If some of his commentators have expressed dissatisfaction that this treatment ignored the judicial process at trial court level, this is to be regretted. The fault for this is not Cardozo's. This task he left for others, in his opinion more qualified than himself, and there

\textsuperscript{30}Ibid., 10.
\textsuperscript{31}Growth, 24-25. Italics not in original.
is no dearth of material on this subject. He was, as Patterson has observed "a philosopher of law within the limits of the judicial function."32 Even this statement must be further restricted to the function of a judge at appellate court level.

Other points to be covered from an analysis of Cardozo's writings will be (1) what he means by judicial process, (2) what this judicial process is opposed to, and (3) how his writings subsequent to The Nature of the Judicial Process develop or modify this original thesis. There shall be, as noted before, a presentation of what other writers in the field of legal philosophy and jurisprudence have thought of Cardozo's contribution to those fields. And finally, there will be an analysis made by this writer in the light of all this material. The writings of Cardozo will be covered in chronological order, for this seems the most reasonable approach. Actual judicial decisions will be used only in so far as Cardozo himself makes use of them to illustrate a point or to exemplify some principle.

32Patterson, 156.
CHAPTER II

THE NATURE OF THE JUDICIAL PROCESS

In the first chapter it was stated that this thesis would attempt to show that all the philosophical writings of Cardozo dealt in some way with the judicial process and the inquiry into the nature or essence of that process. It is of great importance, then, that the first work dealing specifically with that question be examined carefully. Such is the purpose of this chapter: to analyze his first work on that process, The Nature of the Judicial Process.

As early as 1903, Cardozo had focused his attention on the jurisdiction of the New York Court of Appeals. In that year he wrote a volume on jurisdictional questions of that court which is to this day an authority in the field.¹ But the questions of jurisdiction was not the object of concern for Cardozo in 1920. Beyond the narrower confines of the question of legal jurisdiction there was the reality of "judge-made law." To this type of law he now turned his attention. "I take," said Cardozo, "judge-made law as one of the existing realities of life."² To understand this state-

²Nature, 10.
ment with all its implications is to understand his concept of the judicial process.

Cardozo's discussion on the nature of the judicial process begins with a series of questions asking precisely what a judge does when he decides a case. He sees as the force formulating "judge-made law" some principle whether it is unavowed, inarticulate, or subconscious. Conscious principles which are to guide the judge in arriving at decisions in appellate cases are latent within the cases, and they may be separated and classified. Of the subconscious forces which lie behind a judge's decision he says: "All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James' phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice will fall." These subconscious forces, however, and their influence in decision, were never treated very completely by Cardozo.

The question arises as to where the law is to be found that the judge will apply. Cardozo does not deny that when constitution and statute are clear, the judge's search is at an end. In this event the role of the judge becomes secondary. But not so clear is

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3Ibid., 11.
4Ibid., 12.
the area left by the gaps in the law. For these exigencies he advocates a method of interpretation by the judges within the interstitial limits of the *jus scriptum* suggested by Geny and Ehrlich—"a method of free decision—'libre recherche scientifique.'" Of this judicial interpretation he says: "The function flourishes and persists by virtue of the human need to which it steadfastly responds." It is important to note here that Cardozo is urging this method of free decision in the instance where statute and constitution fail. At this point the common law as interpreted by the judge comes into play in filling the gap. He freely admits that *stare decisis* is "at least the every day working rule" of the law. Yet he sees the method of free decision as the process that gives a system of living law. Finally, he points to the need for a guide to govern the choice of judgments potentially applicable in a given case, in order that the judgment rendered be not the personal whim or caprice of the judge.

Cardozo warns that common law, though a gradual development of judicial decisions over the years, does not work from "pre-established truths of universal and inflexible validity to conclusions derived from them deductively." Rather, it develops inductively,

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moving from the particular to the general. He observes the phenomenon of change in judicial decisions in specific areas of law: construction of spite fences, once allowed, is now prohibited; rights of action, formerly non-assignable, may now be assigned. He has seen the process of gradual change in man-made law come full circle, holding something lawful that was formerly unlawful, and it prompts the remark: "Nothing is stable. Nothing is absolute. All is fluid and changeable. There is an endless 'becoming.' We are back with Heraclitus." From these observations of ceaseless change in law, the need for a stability upon which to predicate decision emerges clearly. This is the heart of his problem.

Cardozo states this problem that confronts the judge as two-fold: "He must first extract from the precedents the underlying principle, the ratio decidendi; he must then determine the path or direction along which the principle is to move or develop, if it is not to wither and die." He does not dwell long on the first part of the judge's method, the extraction of the principle from the cases decided in the past, but turns quickly to his main concern, the application of the principle extracted to the case before the judge. Edwin Patterson has observed, concerning the lectures comprising The Nature of the Judicial Process, that they are "the most philosophically naive and yet the most vigorous and construc-

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9 Ibid., 28.
10 Ibid.
tive of the three books\textsuperscript{11} which Cardozo wrote on the philosophy of law. The vigor and urgency of this work stems from the formulation of what have now become the famous four methods of applying a principle or rule of law to a case.

Cardozo states the four methods: "The directive force of principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the line of justice, morals and social welfare, the mores of the day; and this I will call the method of sociology."\textsuperscript{12} These methods outlined, he turns to the first method, the method of philosophy, to analyze and describe it.

Cardozo treats the method of philosophy first because it has a certain "presumption" in its favor. "It has the primacy," he says, "that comes from natural and logical and orderly succession."\textsuperscript{13} Again he speaks of "the principle of philosophy, i.e., of logical development."\textsuperscript{14} In the absence of some sufficient reason to the contrary, the method of philosophy is to be used. It might seem

\textsuperscript{11} Patterson, "Cardozo's Philosophy of Law," 74.
\textsuperscript{12} Nature, 30-31.
\textsuperscript{13} Ibid., 31. Italics not in original.
\textsuperscript{14} Ibid., 32. Italics not in original.
that for Cardozo the method of philosophy is equivalent to the method of logic, or that philosophy is viewed by him as being simply logic. But perhaps his real thought may be found in his observation on the need for the use of this "logical" method: "Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts."\(^{15}\) Thus Cardozo did not simply equate philosophy and logic, but rather considered that simple adherence to precedent was a logical, and hence a philosophical, approach. Moreover, it seems that in this method Cardozo saw a partial solution to the problem of giving stability to judge-made law. He views the work of the judge in applying this method as a task of "keeping the law true in its response to a deep-seated and imperious sentiment."\(^{16}\)

To describe further the method of philosophy he turns to cases in which the method is applied. The cases analyzed are predominantly those in which a strictly logical and unbending application of a principle of law has worked a grave injustice, or that class of cases in which an injustice was averted by resorting to an opposite principle. It is when two lines of logical progression converge, both stemming from an established legal principle, that "\(\wedge\)istory or custom or social utility or some compelling sentiment

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\(^{15}\)\textit{Ibid.}, 34.

\(^{16}\)\textit{Ibid.}, 35.
of justice . . . must come to the rescue of the anxious judge, and tell him where to go."\textsuperscript{17} He realizes that sentiment cannot yield to logic, and that reason must control the play of sentiment. Justice and sentiment guide in the choice between two principles, and reason "in its turn reacted upon sentiment by purging it of what is arbitrary, by checking it when it might otherwise have been extravagant, by relating it to method and order and coherence and tradition."\textsuperscript{18}

Cardozo points out that the misuse of this method of philosophy "beings when its method and its ends are treated as supreme and final."\textsuperscript{19} With Gény, he recognizes the need for a human positive law that grows with the times. The method of philosophy will furnish in part that principle of growth for human positive law. For the essence of the method of philosophy is "the derivation of a consequence from a rule or a principle or a precedent which, accepted as a datum, contains implicitly within itself the germ of the conclusion."\textsuperscript{20} It will be interesting for one reading Cardozo's first philosophical work to note the frequent reference

\textsuperscript{17}Ibid., 43.
\textsuperscript{18}Ibid., 45.
\textsuperscript{19}Ibid., 46.
\textsuperscript{20}Ibid., 49.
to François Gény.21

Cardozo describes the other three methods or principles of selection guiding the judge in the path of developing the system of living law. These are the methods of history, custom and sociology. He does not delay long on the method of history. For him the method of history is predominantly an investigation of origins as opposed to the method of philosophy or logic which is mainly the work of reason. It is clear that in his development of the method of history he limits that method to clarifying a problem in law rather than solving it. Equally clear is Cardozo's refusal to approve of a historical school of jurisprudence, such as that advanced in the nineteenth century by F. C. von Savigny (1779-1861). Of this historical school A. P. d'Entreves has this to say: "The historical

21Edwin Patterson in his article on Cardozo's philosophy notes that Cardozo paid more frequent tribute to Professor Dewey than to any other philosopher; he counts eleven references to Dewey in two books by Cardozo. Yet if one falls to counting in Cardozo's first work alone, he will find no less than eighteen references to Gény's Méthode d'interprétation et sources en droit privé positif. It would be idle to try to prove Gény's influence on Cardozo's work, but it is interesting to note that Gény advocated three methods of judicial review not unlike Cardozo's. Gény lists his hierarchy of means of interpretation of law: "La loi, interprétée . . . a la lumière d'une logique tout interne [this would include an historical interpretation]; . . . la coutume . . . ; enfin, les moyens nombreux et variés de l'investigation purement scientifique, scrutant la nature des choses. . . ." Méthode d'interprétation et sources en droit privé positif, 2nd ed. (Paris, 1954), I, 177. Cardozo's methods of logic, history, custom, and sociology at least echo Gény's hierarchy of methods of interpretation!
school had begun by stressing the growth and development of law, it ended by fostering its scientific study. It had begun with an apology for history. It ended with an apology for jurisprudence."\(^{22}\)

To such a narrow view of jurisprudence Cardozo did not give his approval. For him the duties of a judge went beyond bare historical exigesis of the problems occurring in judicial process.

Cardozo admits that the development of positive law has taken place in an historical context. He realizes also that the development of positive law considered apart from that context would be meaningless for those interpreting it.\(^{23}\) It seems clear that his sympathy does not lie with this historical method, though he admits its utility in areas such as the interpretation of the law of feudal tenures and contracts.

The third method or principle of selection to guide the judge in determining the application of a principle of law is the method of custom. Cardozo rejects Coke's theory that the common law is separated from custom, and Blackstone's that custom pervades all of the law. These were the old views, the views that prevailed at different times in the thought of English jurisprudence. Cardozo's view is more moderate. "In these days," he says, "at all events, we look to custom, not so much for the creation of new rules, but


\(^{23}\)Nature, 57.
for the tests and standards that are to determine how established rules shall be applied." Custom, if it is to obtain the dignity of positive human law must do so through legislation. It is enough for Cardozo that the method of custom exercise its creative power "not so much in the making of new rules as in the application of the old ones." But the potential of custom to be extended until it becomes identified with "customary morality, the prevailing standard of right conduct," brings the method of custom or tradition to the point of convergence with the last method, the method of sociology.

From the first three methods of selection, i.e., of philosophy, of history, and of custom, we see that no one method is free from all trace of one or more of the other methods. The same phenomenon is true of the last method, the method of sociology. Cardozo understands the method of sociology as a larger and more all-inclusive method than any of the former three. Of this method he says: "Finally, when the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history, and bend custom in the pursuit of other and larger ends." He states as the final cause of law the welfare of society, and points

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24 Ibid., 60.
25 Ibid., 62.
26 Ibid., 63.
27 Ibid., 65.
out that all other methods are dominated by this cause. Since this
method of sociology is to be the tool or instrument of the judge,
there must be some limit to the method to prevent its uncontrolled
exercise by the judge. The method of sociology is, for Cardozo,
the method *par excellence* for filling up the "gaps in the written
law."

Many jurists and philosophers of law have stressed the restric-
tion on the discretion of the judge in his "filling in the gaps." Few
summed it up more tartly than Holmes: "I recognize without
hesitation," he said, "that judges must and do legislate, but they
do so only interstitially; they are confined from molar to molecu-
lar motions."28 But Cardozo is concerned not so much with the size
of the gap to be filled as he is with "the principle that shall
determine how they are to be filled, whether their size be great or
small."29 Here again the emphasis is placed on the method of selec-
tion rather than on what is selected, and the method of sociology
in making this selection takes as its criterion the social welfare.

Difficult enough is the task of formulating the methods of
selection, but more difficult by far is the task of interpreting
them. "Social welfare" is sufficiently broad in scope to resist
any telling definition. Cardozo realizes that social welfare can

28 *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 221.
29 *Nature*, 71.
mean public policy or social gain from adherence to a standard of right conduct—the morea of a community. "In such cases," he says "its demands are those of religion or of ethics or of the social sense of justice, whether formulated in creed or system, or immanent in the common mind." That Cardozo's theory of law within the judicial process had a high moral content will emerge more clearly with time. One may see, however, that he constantly stresses the need for a moral content in law within his concept of the social welfare so essential to his method of sociology. This concept of the social welfare is in many respects analogous to the bonum commune in the Thomistic definition of law. For Cardozo insists that one must look not only to individual reason for the rule, but to the social welfare, the common good as well.

Cardozo analyzes and describes the method of sociology within a class of cases both in constitutional law and in certain branches of private law. He regards the area of constitutional law as perhaps the most suited to the application of this method, since the constitution extends to a larger area than other rules and laws. Accordingly, the treatment of certain rights must be in larger and more general concepts. In the reduction to the particular case, there is the opportunity and need for the judge to rule whether an act or a statute is violative of or in accord with the restriction or guaranty stated in the constitution.

30 Ibid.
Liberty within the due process clause of the constitution clearly requires the interpretation of the judge to set its limits in particular cases. For Cardozo, the method of sociology is to be used to define liberty in these cases, but with the reservation that it may include a part of one or more of the other methods. Cardozo realizes the need for an interpretation of what "liberty and property" are, but he also realizes the need for an objective criterion to control the judge's interpretation. It is interesting to note the conclusions of his passages urging a technique of "free decision" consistently end with a caution against extreme subjectivity. His position may be said to be moderate, though at the beginning of his philosophical writing on the judicial process he was regarded as a liberal.

Of Cardozo's method of sociology Edwin Patterson says: "The fourth method, that of sociology, is not coordinate with the other three. In a sense it is subordinate or inferior to them, because of the probability that the logical attainment of established rules will give the court a guide which will be adequate to the needs of justice."31 The method of sociology signifies, for Patterson, an "appeal to 'equity' in the Aristotelian sense."32 But to view the method of sociology merely as an appeal to equity is unnecessarily to limit that method. Closer to Cardozo's estimate of the role of

31 Patterson, "Cardozo's Philosophy of Law," 164.
32 Ibid.
that method is the description of it by Helmut Coing, Dean of the Law Faculty, University of Frankfurt, Germany: "He understands by this method of sociology the decision on consideration of the Bonum Commune, equity and social justice." The decision spoken of by Coing is that of the appellate judge. So the method of sociology, rather than being limited to determining exceptions to the law (as is equity), would provide material for the formation of new laws where adherence to old laws would simply result in injustice because of social change. Beyond a mere appeal to "equity," then, the method of sociology seems the method par excellence to exert the principles of natural law. And though the method lacks the definiteness that may attach to the other methods, it cannot, for that reason alone, be subordinate or inferior. The very fact that for Cardozo this method of sociology regulated the other three methods when they were in conflict with one another militates against any such conclusion.

The method of sociology is for Cardozo the method by which the end of law, i.e., the social welfare, is served. He believes the teleological conception of law is constantly before the judge, and he concludes that the "common law is at bottom the philosophy of pragmatism." But Cardozo insists that the fact that a law is

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34 Nature, 102.
successful has nothing to do with its validity. He urges that such an extreme position would be destructive of the consistency and uniformity secured by using the other methods. This method of sociology is guided by viewing the end of law. As Cardozo puts it: "The final principle of selection for judges, as for legislators, is one of fitness to an end." But he is careful to stress the duty of the judge in attaining this end: "Nothing less than conscious effort," he says, "will be adequate if the end in view is to prevail. The standards or patterns of utility and morals will be found by the judge in the life of the community. They will be found in the same way by the legislator." The analogy between the functions of judge and legislator now emerges in Cardozo's thought. The legislator creates by framing new laws suited to the needs of the community for which he legislates; the judge legislates only in the gaps left by the legislation, but cannot, in Cardozo's opinion, be blind to the same needs he observes in the community. The judge's function is performed by using one of the methods of selection; in this way he is said to legislate.

Cardozo points out the divergence of thought on the question of whether the judge should use a subjective or objective standard to determine the norms of right and useful conduct. He notes and approves the need for an objective standard to prevent "what the

35 Ibid., 103.
36 Ibid., 105.
Germans call 'Die Gefühlsjurisprudenz,' a jurisprudence of mere sentiment or feeling. He rejects the view that the subjective standard should prevail, and says the standard should be that of the community, the mores of the time. But here he cautions that this does not mean "that a judge is powerless to raise the level of prevailing conduct." Cardozo is concerned with the case in which practices that do not meet accepted standards of morality have gained a temporary hold. In such a case he believes that it is the duty of a judge to hold to the accepted standards of morality. This action he seems to equate with a subjective measure, when in reality it would be objective if measured by the "accepted standards of morality" in the event that they are not interpreted subjectively. The predominating desire is to raise the standards of morality at a high level and keep them there. This is one of the notes in his concept of the judicial process—the judge must insure that the law in its application has a high moral content.

Misleading both in its brevity and simplicity is his analysis of the judicial process itself: "My analysis of the judicial process comes then to this, and little more: logic, and history, and custom and utility, are the accepted standards that singly or in combination shape the law." Here the search for Cardozo's

37 Ibid., 106.
38 Ibid., 108.
39 Ibid., 112.
concept of the judicial process might stop, if this scant statement did not contain within itself the obvious question as to what determines the application of one method in preference to another, and at what point the desirability for symmetry—the elegantia juris—should be sacrificed for larger interests. In the main, he urges adherence to precedent. But equity is not administered by legislatures. "The social interest," says Cardozo, "served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare." The balance of these interests in the proper choice of methods is the hallmark of judicial process.

If it is the judge's function to balance the social interests, there must be a standard by which to check his action. That standard is the same for the judge as it is for the legislator—life itself. In exercising his function the judge should be guided and restrained by tradition, the members of his own profession, example of the other judges, and the spirit of the law. Yet his work within these limits is still creative. "The law," Cardozo says, "is not found, but made." If this remark is taken at face value, he advocates usurpation of the legislative function. But Cardozo's view is not so broad, although he sees an analogy between the functions of judge and legislator. He notes the development of the

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40 Ibid., 113.
41 Ibid., 115.
analogy in countries where the judicial initiative is more restricted than in the U. S. Drawing on Geny to state the limits of that judicial function, he quotes the following passage:

While the legislator is not hampered by any limitations in the appreciation of a general situation, which he regulates in a manner altogether abstract, the judge, who decides in view of particular cases, and with reference to problems absolutely concrete, ought, in adherence to the spirit of our modern organization, and in order to escape the dangers of arbitrary action, to disengage himself, so far as possible, of every influence that is personal or that comes from the particular situation which is presented to him, and base his judicial decision on elements of an objective nature.42

Both in Cardozo's own remarks and in those he cites as authorities in support of his view of the judicial process as creative, the need for free decision coupled with an objective standard stand out clearly.

In affirming the power of the courts to declare law "and within limits the duty, to make law when none exists,"43 Cardozo is careful to point out that he does not ally himself with Coke, Blackstone, and Hale, who held that judges did not legislate; nor with Austin, Holland, or Gray, who held that there is no reality in law but the decisions of the courts. Rules of law which are


embodied in decisions do not, for Cardozo, lose their force as law merely because judges overrule them. Rather, the rules retain their force as law independent of the pronouncement of the judge in a given case. Thus the creative work of the judge lies in his choice of methods of selection; the law embodied in the precedents applied has existence apart from its application by the judge.

Concerning natural law Cardozo points out the revival of its older notion, but observes that it is in a form "profoundly altered." He expresses no desire to enter into the verbal speculation concerning the problem, but says: "What really matters is this, that the judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precedents of jurisprudence and those of reason and good conscience." There will be a fuller discussion of this question of natural law in the writings of Justice Cardozo in the third chapter of this thesis.

Cardozo then turns his attention to the weight and importance that should be placed upon precedents. He analyzes a number of cases in the fields of substantive and adjective law, and sees the need for development in those fields. Although impressed by the growing discussion as to whether the rule of adherence to precedent ought to be abandoned, he reasserts his position that adherence to

44 Ibid., 131.
45 Ibid., 133.
precedent should be the rule and not the exception. He will not sacrifice stability and symmetry of the legal order for a number of isolated cases. The change he envisions is by degrees, and not by a violent reversal of direction in the wake of a more stable policy of adherence to precedent.

In discussing adherence to precedent, Cardozo distinguished between static and dynamic precedents. The outcome of a case which involves a "static" precedent is not of great importance; such a case can seldom admit of any decision but one, and does not affect jurisprudence one way or the other. "Dynamic precedents," however, are those which when decided will have an effect on jurisprudence, and will effect as well a development in the law. "These are the cases," says Cardozo, "where the creative element in the judicial process finds its opportunities and power."\(^{46}\)

In conclusion, then, in this first work, *The Nature of the Judicial Process*, Cardozo elaborates the four methods of judicial decision. Their importance for understanding his philosophy cannot be overestimated. He placed stress definitely upon the first and fourth methods, the method of philosophy or logic, and the method of sociology. The method of philosophy gave to the law certainty and stability—the symmetry needed for reasonable predictability. The method of sociology gave room for the exercise of judgment by

\(^{46}\text{Ibid.}, 165.$
the court to mitigate the harshness of strict application of a rule which would work a hardship. The latter calls for the interstitial legislation of a judge in his application of precedent to fill the gaps left by the law in certain instances. In his other writings on the philosophy of law, Cardozo elaborates those principles, giving more precise expression to his concept of the judicial process.

In the next chapter there will be an analysis of how Cardozo developed his concept of judicial process in a series of lectures given at Yale Law School in 1923, published as The Growth of the Law. Here he deals principally with the problems of the meaning and genesis of law, its growth and development, and its end and function. Following the treatment of his notion of the meaning and genesis of law, will be an analysis of some of the writings on Cardozo's treatment of the natural law, and some reflections by the writer on that same question.
CHAPTER III

THE GROWTH OF THE LAW

In December of 1923, at Yale Law School Cardozo gave his second series of lectures which comprise the volume considered in this chapter, The Growth of the Law. The introduction to the work warns that the lectures are to be considered as a supplement to lectures given by Cardozo at Yale in 1921. The purpose of this chapter is to examine this work, The Growth of the Law, and determine in what way it modifies or develops his concept of the judicial process.

Cardozo states that a twofold problem confronts law: the need for a restatement of the bewildering amount of precedent, and the need for a philosophy of law "that will mediate between the conflicting claims of stability and progress, and supply a principle of growth." The latter of the two needs concerns Cardozo most, although he praises highly the work done by the American Law Institute, begun in February of 1923, to bring order to the chaos of precedent. He singles out for praise the work of the universities publishing law reviews, and recognizes their work as influential in shaping decisions in complex areas of law. But to

\[1\text{Growth, 1.}\]
Institute and law reviews alike he addresses the caution that the passion for stability should not betray them into perpetuating laws that should be revised. Law, if it is to grow, must have a principle of growth.

Cardozo regards philosophy of law as capable of furnishing a principle of growth for law. Philosophy of law will "tell us how law comes into being, how it grows, and whither it tends. Genesis and development and end or function, these things, if no others, will be dealt with in its pages." But to develop and describe law, it is necessary to describe conceptions that are basic to the legal framework. As Cardozo studied philosophy of law, he was driven in his search for the nature of judicial process to problems that lay beyond law and were common to all philosophy. Yet his approach to the problem remains the same, to consider the nature of the judicial process. "Analysis of the judicial process," he says, "involves analysis of the genesis and growth of law, and this involves a study of functions and of ends." It is important to keep in mind that Cardozo's remarks must always be measured in terms of the judicial process. This viewpoint is necessary to understand his concept of judicial process.

To begin his inquiry into the meaning and genesis of law Cardozo notes the difficulty in defining the term law itself. Before

\[ ^2 \text{Ibid., 24.} \]
\[ ^3 \text{Ibid., 26-27.} \]
a comprehensive definition can be given there must be an understand-
ing of the issues basic and fundamental to the science of law. This understanding, in turn, presupposes a knowledge of whether universals exist, or whether our knowledge must be limited to a succession of particulars. Thus, he points out that the student, if he is to read and understand his Blackstone, must settle for himself the vexing philosophical problems that are at the core of fundamental legal concepts. Yet the problem of definition is not restricted solely to the term law. There can be, according to one's philosophy, divergent philosophical views on the nature of a corporate entity. The nominalist maintains that the corporation is a sign for the corporate membership. The realist sees beyond the name and components a tertium quid. This is but one example of the disputes that can arise over issues which are fundamental to the science of law.

Cardozo, however, concerns himself first with the nature of law itself. He condemns the conception of law that attempts to confine the term law to legal precepts recognized by a tribunal at a given time or place. This view of law seems to him abortive, and ends in the position that law never is, but is always about to be.⁴ He notes the dispute in France concerning the difference between la loi and le droit, and the corresponding problem in Germany on the extent of Gesetz as compared to Recht. This problem does not

⁴Ibid., 31.
confront law in the U. S., because courts say daily what law is. "But," Cardozo adds, "even before that stage is reached, there has not been lacking altogether the element of coercive power."5 This element of coercive power is present because men can be seen regulating their business and their lives by grounding them on rules or principles which often are without the sanction of a judgment of the courts, and more often without the sanction of a statute. If all sanction of these rules were deferred until the rules were embodied in a statute or defined in a judicial decision, man, prior to such action by the courts and the legislature, would be left without any guide for his conduct. From his observation of life itself, Cardozo realizes that such is plainly not the fact. And so he sees that even without benefit of definitive adjudication by a court or action by a legislature, a stage of law is reached.

Regarding the degree of certainty that may be attached to a principle or a rule before it has been declared in a judgment, Cardozo says: "When there is such a degree of probability as to lead to a reasonable assurance that a given conclusion ought to be and will be embodied in a judgment, we speak of the conclusion as law."6 This remark precedes his observation on the obvious analogy between the principle or rule or standard as law, and the principles of order—which he terms "the natural or moral laws, which

5 Ibid., 32.
6 Ibid., 33.
are the concern of natural or moral science." Though Cardozo did not develop the doctrine on the analogy of this human law to the natural or moral law, such statements militate against the conclusion that he rejects entirely the notion of natural law.

The student groping for the law on a disputed question, the lawyer appealing an adverse decision from a lower court, and the judge writing his opinion, all seek to know what law is. Their vision must be at once prospective and retrospective. What have the courts said in the past? What will they say in the future? These are the elements that point up the fluidity of law, the constant change that often defies predictability. Here again Cardozo uses cases to describe this phenomenon of change. He draws chiefly upon that class of cases overruling decisions formerly held to be law on the point disputed. Of these he says: "In all these qualifying or overruling judgments, appeal was made to a body of judicial or professional opinion which displayed uniformities at variance with the judgment to be nullified or limited. . . . The quality of law was maintained as the expression through the courts of a principle of order."8

While not denying the existence of higher and broader uniformities, norms of right and justice to which lower and narrower uniformities must conform, Cardozo thinks they should be termed law.

7 Ibid., 34.
8 Ibid., 42.
only in so far as they are consistent with statute or decision. He does not share Duguit's view that statute or decision are law in so far as they share in the essence of the higher uniformity. "Speculations of this kind," says Cardozo, "are alien, after all, to the subject of our study." The study of these higher laws he leaves to "the statesman or the moralist." He draws a distinction between normative and constructive rules, but he would reject the normative rules as laws until they have been declared by the courts and agencies with the sanction of their power. To render Cardozo's dichotomy between the two types of rule complete, it is necessary to know where he thought the courts obtained their power. On this point he says: "The courts are creatures of the state and of its power, and while their life as courts continues, they obey the law of their creator."

It is essential to keep in mind the audience to which Cardozo was speaking in the lectures now being considered. The audience was composed of law students and some members of the bench and bar given to speculation and theory on legal problems. One might reasonably conclude from this that their concern was more with the nature of human positive law and its connection with the judicial process, than with a more general and universal discussion of the

9 Ibid., 48.  
10 Ibid., 49.  
11 Ibid.
nature of all law. But even if he had spoken before a group more trained in philosophy, it is doubtful whether his discussion would have dwelt more on the universal aspects and the nature of law. He seems more concerned to point up for investigation by lawyers, jurists and philosophers the need for an understanding of things basic and fundamental to philosophy of law. This he did by laying bare the process of judicial decision as it operated on the body of law affected by decisions of the appellate courts. Therefore, when he gives a description of a principle or rule of law, it is clear he does not intend it to serve as a definition of law in general. "A principle or rule of conduct," says Cardozo, "so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged, is, then, for the purpose of our study, a principle or rule of law."

Included in this description are norms and standards of behavior not yet rules or precedents, but such that statutes or decisions could conform to them. The norms or standards of behavior "have their roots in the customary forms and methods of business and of fellowship, the prevalent convictions of equity and justice, the complex of belief and practice which we style the mores of the day." Until these standards, rules, or principles are embodied in statute or decision, they may, for Cardozo, be regarded as law.

12 Ibid., 52. Italics not in original.

13 Ibid., 52-53.
Concluding his discussion of the meaning and genesis of law, Cardozo reveals his concern to avoid two streams of thought. He denies Blackstone's conception of law as pre-existing, waiting only for discovery. He rejects also the extreme position of Austin's view of each judgment as an isolated action giving emphasis to the particular rather than the general. For Cardozo both of these destroy judicial creativity.

Though any lengthy conclusions on Cardozo's concept of judicial process must be deferred until there has been a complete treatment of his writings, there seems need here for some observations on his notion of the meaning and genesis of law. This notion, together with his notion on the law of nature, is basic and fundamental to his concept of the judicial process; indeed, it is the ground upon which his philosophy has been accepted or rejected by those who have commented on his extra-judicial writings.

The writers who have commented on Cardozo's notion of the law of nature and the meaning and genesis of law have concerned themselves with two passages. The first appears in his book, *The Nature of the Judicial Process*, where, speaking of the law of nature, he says: "The law of nature is no longer conceived as something static and eternal. It does not override human or positive law. It is the stuff out of which human or positive law is to be woven, when other sources fail."14 It is important, however, to

14 *Nature*, 132.
note that this statement is documented by Cardozo and attributed to Vander Eycken's essay, "Methode positive de l'interprétation judiciaire." The extent to which Cardozo himself accepts or rejects this interpretation will be seen more clearly only in the light of his notion of the meaning and genesis of law as expressed in The Growth of the Law.

The second passage or passages appear in The Growth of the Law, and consist chiefly in his "definition of law" (see p. 47, supra), his affirmation of the existence of higher and broader uniformities—norms of right and justice to which lower and narrower uniformities must conform, and finally, his distinction between normative and constructive rules (see pp. 45-46, supra).

These are the passages upon which many of those who wrote on Cardozo have relied for their acceptance or rejection of his philosophy of law. Let us examine some of those interpretations.

In her article on Cardozo's philosophy of law Miriam Rooney concludes that: "The exact test as to whether a juridical norm or principle is in fact law or not is ultimately the same for Mr. Justice Cardozo as it was for Mr. Justice Holmes—whether the state will enforce it or not."¹⁵ This seems a rather harsh reading of the section dealing with the meaning and genesis of law. Rather than define law solely in terms of prediction, Cardozo describes

¹⁵Rooney, "Mr. Justice Cardozo's Relativism," 17.
the existence of law apart from its predictability—the stage not "lacking altogether the element of coercive power."\textsuperscript{16} He points out that "the quality of law was maintained by the expression through the courts," and no quality, whether of law or anything else, could be maintained that had not already been in existence prior to the expression of the courts. That is, law may be expressed formally by the courts, but is potentially a thing always about to be declared by the courts and legislature. In other words, law evolves and its new form is revealed in part by judicial decision. Behind this new form, however, is a slow genesis from the principles and order which make up the body of rules of more general application, which, in turn, are made specifically applicable to individual cases by judicial decisions. To say, then, that Cardozo would define law in terms of predictability alone (the predictability guaranteed by maintaining the \textit{ultima ratio} of law as force) would be to ignore his clear statement that "at some point back of definitive adjudication, of perfect or unfailing certainty, we reach the stage of law."

Cardozo's notion of the law of nature and the meaning and genesis of law can be distinguished from Holmes' on still other grounds. One may distinguish between Holmes' notion of the \textit{ultima ratio} of law as force, and a position that regards positivism as a method applicable in human positive law. It is the distinction

\textsuperscript{16} See footnotes 4 and 5, supra.
between an ontological and a methodological positivism. In other words, for Holmes enforcement of a statute by the state makes a rule law. For Cardozo enforcement of a statute by the state gives the sanction of the state's authority to a rule or a principle which did not entirely lack coercive power prior to the state's enforcement. Seen in this light, Cardozo's position differs toto caelo from Holmes' position.

Commenting on Cardozo's so-called "definition" of law in The Growth of the Law, Dr. John C. H. Wu, the famous Chinese jurist, has this to say: "He Cardozo looks at the law chiefly as a process and his approach is predominantly psychological. The saving grace of this definition lies in the fact that it leaves the door open to the principles of natural law, which, if the court thinks rightly, will be a strong ground for their decision and therefore constitute a solid basis for our prediction. But this definition is one-sided, because it neglects the essence of law." Now, it is clear that Cardozo did not intend this description of a rule to serve as a comprehensive definition of law. From the beginning of his writing he had chosen description in place of definition. That this description neglects the essence of law cannot be

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17 This distinction between ontological and methodological positivism has been explained at great length by Rev. Peter Huizing, S.J., in his article "De 'Positivismo' Quodam Juridico Nota Practica" appearing in Periodica, Fasc. I (1959), 77-100.

18 John C. Wu, Fountain of Justice (New York, 1955), pp. 11-12.
denied; in this Dr. Wu's observation seems valid. What must be remembered, however, is that Cardozo was interested only in describing the role of judicial process within the study of human positive law; to interpret his remarks in a wider context is to misinterpret him.

Edwin Patterson admits that even though Cardozo at times may seem to reject natural law, in reality he does not. He admits also that there are other passages in Cardozo's writings that could support an argument for natural law, but he concludes that natural law is, for Cardozo, "the stuff of inspiring generality." 19

Huntington Cairns, in his work Legal Philosophy from Plato to Hegel, gives a more benign interpretation to Cardozo's writings on the law of nature. Commenting on a passage in The Nature of the Judicial Process, in which Cardozo states that within the method of sociology the judge must search for social justice by a constant appeal to the teachings of right reason and conscience, Cairns says: "Cardozo in a strong plea for the use of natural law as a part of the method of sociology takes the position that the judge must appeal to the 'teachings of right reason and conscience.'" 20 With this statement by Cairns, we have come full circle on American interpreters of Cardozo's writings about the law of nature and the

19 Patterson, "Cardozo's Philosophy of Law," 91.

meaning and genesis of law. According to Miriam Rooney, Cardozo had rejected natural law; according to Dr. John Wu, Cardozo had by his definition of a rule of law left the door open to the principles of natural law; according to Edwin Patterson, Cardozo had not precluded the possibility of holding a natural law theory; and finally, according to Huntington Cairns, Cardozo made a strong plea for the use of natural law as a part of the method of sociology.

Dr. Helmut Coing, Dean of the Law Faculty at the University of Frankfurt in Germany, commenting on the passage in The Nature of the Judicial Process, remarks: "Justice based on intuition is, for him, natural law; it is the source from which positive law is nourished. Natural law fills the gaps in positive law; clarity over what is existing and a philosophical comprehension of the developing law are necessary for the jurist."21 And further, Dr. Coing gives this general evaluation of Cardozo's work as compared with Holmes: "Although he (Cardozo) recognizes and stresses the unstable, changeable elements in living law and clearly recognized the influence of the forces in society and their development—all of which links him with Holmes—it is nevertheless the picture of a living, continually developing order which is forever being nourished from the ethical forces within the human soul."22

21 Helmut Coing, "Modern American Legal Philosophy," Georgetown Law Journal, XXXX (May 1952), 529. This article appeared originally in 1950, in Archiv für Rechts- und Social-philosophie, and was translated for the Georgetown Law Journal by Dr. Heinrich Kronstein.

22 Ibid.
observations and evaluations are added support for the conclusion that Cardozo's method was in the nature of a methodological positivism which treated the science of private positive law as a closed system for the purpose of developing a methodology for appellate review. In short, it seems that all the force of Cardozo's thinking on the nature of law and the meaning and genesis of law was directed toward developing a method of appellate review which he referred to under the name of judicial process. From Cardozo's writings it would be difficult to say whether he did or did not hold a theory of natural law based upon an absolute. This much, however, is certain: though an ardent admirer of Holmes', Cardozo did not join Holmes in denouncing the possibility and efficacy of natural law.

Returning to the lectures in his work *The Growth of the Law*, Cardozo next deals with the very question of growth in law. Initially he restricts his discussion to growth through judicial process. As in his first work on the judicial process, he sees few chances for the judge to exercise a creative function, while the restrictions on the judge's freedom are many. He seeks a principle of growth in law, a principle on which a judge can rely.

Cardozo retains the fourfold division of methods to decide a case which he first developed in *The Nature of the Judicial Process*. Speaking of the four methods he says: "The judicial process will not be rationalized until these methods have been valued, their functions apportioned, their results appraised, until a standard
has been established whereby choice may be directed between one method and another.\textsuperscript{23} The methods will provide for growth of the law, but the question remains as to which method should be used in a given case. This matter will be treated by Cardozo in his writing on the end and function of law.

Cardozo regards the four methods of deciding cases on appeal as means to an end and not as ends in themselves. But even though it would make the judicial process simpler to apply these methods with some uniformity, the fluidity of the law destroys the opportunity for uniformity. The principle or precedent is "the outcome of a quest for probabilities."\textsuperscript{24} For Cardozo, then, the study of law represents a gradual "striving toward an end, shaped by a logic which, eschewing the quest for certainty, must be satisfied if its conclusions are rooted in the probable."\textsuperscript{25} It is perhaps statements like these by Cardozo that prompt Lon Fuller to remark: "At the same time Cardozo did not follow the example of those who make relativism itself an absolute. If the common law had not attained the perfection of reason, it could be understood only as an unremitting quest for that perfection. His view rejected neither branch of the antinomy of reason and fiat. For him law was by its

\textsuperscript{23} \textit{Growth}, 63.

\textsuperscript{24} \textit{Ibid.}, 69.

\textsuperscript{25} \textit{Ibid.}, 70.
limitations, by its aspirations reason, and the whole view of it involved a recognition of both its limitations and its aspirations." No one more than Cardozo realized the limitations of judge-made law. These limitations, however, presented a challenge that called for the best efforts of jurists and philosophers to predicate the growth of law upon a more stable basis.

Cardozo then analyzes a number of cases in the area of public law where exceptions have been made to a rule of law when there was evident need for change. He realizes the need for these exceptions is conceded by all, but he seeks the all inclusive or general principle upon which to predicate the choice of method. Again the antinomy of method asserts itself. In his words: "We are not to bow down before our metaphysical conception of our historic datum, or shut our eyes to living needs, and yet we are not to find a living need in every gust of fancy that would blow to earth the patterns of history and reason."  

Cardozo concludes this discussion and analysis of the methods of deciding a case by cautioning that no one method is to be used in preference to another. Even when social welfare is the final test, the certainty and uniformity that comes from applying the method of philosophy or history is itself no small part of the

27 Growth, 76.
social welfare. "Given a problem," says Cardozo, "whether the directive force of a principle or a rule or a precedent is to be exerted along this path or along that, we must know how the principle or the rule or the precedent is functioning, and what is the end which ought to be attained."28 The remainder of his book deals with end and function in law.

In his treatment of the ends and function of law, Cardozo observes that his analysis will of necessity be brief, but he hopes to alert the students to the bond between philosophy and law. If his philosophical speculation is interspersed with illustrations from cases at law, the philosopher will excuse his efforts to draw the lawyer to the study of philosophy. He notes the work done by Dean Roscoe Pound on the analysis of ends of the law, but realizes that there is much more work to be done. The relative value of certainty as compared to justice, adherence to logic as compared to advancement of utility, is a "calculus which has not yet been definitively made by any master of juristic theory."29

Appraisal of social interests is guided by many factors for the judge. Cardozo lists some: "It will be shaped by his experience of life; his understanding of the prevailing canons of justice and morality; his study of the social sciences; at times, in the end, by his intuitions, his guesses, even his ignorance or

28 Ibid., 80.
29 Ibid., 83.
prejudice." He notes that justice itself may mean different things to different people at different times; yet justice is used as a test as well as an ideal. In this regard he lists Aristotle's classification of justice into corrective, distributive, and general, but rejects this classification as unsatisfactory for the reason that he (Cardozo) is not seeking the justice that results from a determination of rights and duties as they exist in the law.

"What we are seeking," says Cardozo, "is not merely the justice that one receives when his rights and duties are determined by the law as it is; what we are seeking is the justice to which law in its making should conform. Justice in this sense is a concept by far more subtle and indefinite than any that is yielded by mere obedience to a rule." And further he says: "Perhaps we shall even find at times that when talking about justice, the quality we have in mind is charity, and this though the one quality is often contrasted with the other." These standards professed in Cardozo's philosophical writings explain in part the high ethical and moral content of his opinions in appellate decisions.

The development of law, however, according to Cardozo requires flashes of intuition and insight which go beyond experience. To

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30 Ibid.  
31 Ibid., 87.  
32 Ibid.
support this position he again draws on François Gény. Gény in
turn was drawing on Bergson, but the substance of Cardozo's thought
is summed up when he says: "We do not need to become the disciples
of any theory of epistemology, Bergson's or any other, to perceive
the force of the analogy between the creative process here de-
scribed, and the process at work in the development of the law." 33
What Cardozo is stressing here is the portion of judicial process
that belongs to art rather than science. He is anxious to stress
that the bare application alone of one of the methods of decision
or the principles of selection will not result in the solution of
the case.

Cardozo next discusses axiology--the science of values. He
recognizes that the judge must use the conclusions of this science,
but always subject to objective standards. In the presence of a
determination of value by legislation, the judge, even though he
may differ with the legislature, may not substitute his own theory
of values for the legislature's. The judge's test is to be objec-
tive--the will of the community rather than his own. But when the
communal thought or will is different, and there is neither statute
nor custom nor any external standard to measure the difference, the
standard of value must be the judge's own. In other words, Cardozo
here asserts the duty of a judge to act, despite the fact that the

33 Ibid., 91.
only criterion he has for his action is his own moral standards, his own axiology. In this he would differ from the positivist jurists who would maintain that in the absence of an objective standard of the legislature, the judge has not only no duty to act, but, even further, he has no right to render a decision using his own moral standards as a criterion or standard.

In examining the end of law Cardozo is looking for general principles which will enable the judge deciding a case to rise above the particulars of the case involved. Thus he admits that the conflicting analogies and absence of precedent may be supplemented by a philosophy of law that concerns itself with the end and function of law.

From using methods of judging in accordance with the end to be achieved to show that law must be fluid and flexible, Cardozo passes to examples showing the need for certainty and uniformity. He analyzes some cases where certainty is necessary, among them a case on contract of which he says: "The end to be attained in the development of the law of contracts is the supremacy, not of some hypothetical, imaginary will, apart from external manifestations, but of will outwardly revealed in the spoken or the written word. The loss to business would in the long run be greater than the gain if the judges were clothed with power to revise as well as to interpret." Here, then, the judge promotes the social interest by maintaining uniformity and certainty.

34 Ibid., 111.
Cardozo then treats the function of law. He concludes that function is to some extent coextensive with end; i.e., he thinks one can tell whether law is performing its proper function by considering the ends that law endeavors to attain. The judge, however, does not frequently ask himself how well or ill a rule works. Enough for him if the rule exists and can be applied to cases before him. For Cardozo, then, it is the work of social science to test whether or not a law is working well.

The method of sociology emphasizes both end and function in law; for the method of sociology is the method to be used by the judge when the other methods of philosophy, history, and custom fail to secure the larger end—the welfare of society. Edwin Patterson notes that the method of sociology described by Cardozo was an "appeal to equity in the Aristotelian sense." The judge uses the method of sociology to soften the rigors of the law by using the principles of equity. But the judge cannot apply equitable principles unless he knows the judicial and social consequences of his ruling. Consequently this method involves a knowledge of facts beyond the immediate scope of law. Cardozo is impressed by Justice Louis Brandeis' rulings as showing an awareness of facts beyond the scope of law. Of Brandeis Cardozo says: "A study of the opinions of Mr. Justice Brandeis will prove an impressive lesson in the capacity of the law to refresh itself from extrinsic sources, and thus vitalize its growth. His opinions are replete with references to 'the contemporary conditions, social, industrial, and political,
of the community affected. 

Cardozo concludes that the method of sociology, by attending to the end and function of law, becomes an instrument of social control through the working of the courts.

For Cardozo the philosophy of function is closely related to the problem of the binding power of precedent. If change in the law is needed, it will be hampered to the extent that the rule of stare decisis is stressed. The judicial process alone, however, is not able to make all the necessary changes without aid from the social sciences. In Cardozo's words: "There are times when we can learn whether a rule functions well or ill by comparison with a standard of justice or equity, known, or capable of being known, to us all through a scrutiny of conscience or through appeal to everyday experience. There are times when the manner of its functioning will be unknown without the recorded observations, the collected facts and figures, the patient and systematic studies, of scientists and social workers." Law refreshed from such extrinsic sources represents the method of sociology. To the extent that social needs may be gauged by these sciences, social welfare may be provided by the court working in cooperation with the social sciences.

The influence of philosophy, apart from a philosophy of law, also affects the development of law. The judge on the bench should

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35 Ibid., 117.
36 Ibid., 122-123.
be aware of this influence of philosophy, and in the following passage Cardozo points out how important it is for the jurist to be aware of such philosophical notions as pragmatism. Speaking of pragmatism Cardozo says: "Its truth, if not genuine for the metaphysician, is genuine at least for those whose thought must be translated into action, who are not merely scientists, but craftsmen, and who must ever be satisfied with something less than the perfect and complete ideal."37 Questions of causation, substance and identity, and the metaphysical implications in the law of business corporations and juristic persons number among the areas touched upon by philosophy in general. The jurist or lawyer may begin to formulate his own philosophy of law or take that of someone else, but eventually the reflections of the jurist or lawyer will lead to a study of philosophy in general.

For Cardozo, legislatures are not a sufficient agency of growth. The judicial process with all its difficulties and limitations performs the indispensable function of suiting the law to a difficult case in order to promote the social welfare. He regards the court as a group of professional men trained to do that work, devoted wholly to interpreting the law as it is written or as it exists in the previous decisions. The legislature is, for Cardozo, a group of men dedicated "part time" to drafting legislation,

37Ibid., 127.
amidst a number of other duties. For the legislature, then, to take the place of the creative function of the courts would be, in Cardozo's words, "exchanging a process of trial and error at the hands of judges who make it the business of their lives for a process of trial and error at the hands of a legislative committee who will give it such spare moments as they can find amid multifarious demands." But one must not think that this is said only to disparage the legislature. He realizes the plight of the legislature and praises its work. "Legislation," says Cardozo, "can eradicate a cancer, right some hoary wrong, correct some established evil which defies the feeble remedies, the distinctions and the fictions, familiar to the judicial process." Yet the creative action of judicial process is necessary as a principle of growth. For no amount of enlightened and zealous legislation will ever free the judge from the duty of exercising his discretion when statute is silent on the point in question, and the litigant stands before the court seeking relief. Inaction by the judge in such a case would be, for Cardozo, an abuse of judicial discretion.

Cardozo points out the misconception prevalent among laymen and lawyers that statute law makes up the largest bulk of the law governing the conduct of men. He expresses doubt on this point,

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38 Ibid., 133-134.
39 Ibid., 134.
and notes also that much of the statute law is built upon a foundation of common law decisions. This observation is substantiated in numerous codes and statutes down to the present day. So the layman and the lawyer should see judicial decision as the basis for statute, and creative function as "the reservation for ourselves [the judges] of the same power of creation that built up the common law through its exercise by the judges of the past."\(^{40}\)

Cardozo quotes with approval Ulpian's definition of jurisprudence.\(^{41}\) He concludes:

Perhaps our little glimpse into the ultimate, our peep together into the empyrean whence philosophy and law derive their eternal essence, will fill you as it fills me with something of a kindred faith. We shall be spared at least the blunder of thinking meanly of our calling. We shall see that our little parish has its vistas that lie open to the infinite. We shall know that the process of judging is a phase of a never ending movement, and that something more is exacted of those who are to play their part in it than imitative reproduction, the lifeless repetition of a mechanical routine.\(^{42}\)

In conclusion then, in this second work, *The Growth of the Law*, Cardozo has added to his concept of judicial process his views of the meaning and genesis of law. His definition of law is limited to a description of a principle or rule of law as it is used in the discussion of judicial process. By no means did he intend

\(^{40}\) *Ibid.*, 137.

\(^{41}\) *Ibid.*, 141-142. "Jurisprudence is the knowledge of things human and divine, the science of the just and the unjust."

\(^{42}\) *Ibid.*, 142-143.
this description to serve as a definition of law in general. And while he did acknowledge higher or broader uniformities, norms of right and justice to which lower or narrower uniformities must conform, he thought that the former should be termed law only in so far as they are consistent with statute or decision. Far from denying that natural law exists, he admits its existence, but leaves any study of it to the "statesman or the moralist." It is this distinction, made by Cardozo, that seems to furnish us with an adequate basis for the distinction between a methodological positivism that would not deny the possibility of the existence of a natural law, but would question its practicality in the study of a very complex science of positive law, and an ontological positivism that would deny not only the practicality but also the possibility of the existence of a natural law at all.

Cardozo holds that to furnish law with a sufficient principle of growth the judge must exercise the judicial process in its creative capacity when circumstances demand. While he does not despise the role of the legislature in the growth of the law, the courts in his opinion must contribute to the growth and development by the creative work of the judge in deciding cases.

Finally, the end for which law works is the social welfare, and to determine whether the public and social welfare is being served by law is the task of both courts and legislature alike. To aid the court in determining whether a law is beneficial to the public, Cardozo would have both judge and legislature turn to the
social sciences to test the conclusions of law.

What had begun as a series of lectures in 1921, to elaborate a method of deciding a case on appeal, evolved gradually into a more complete philosophy of law. At the very center of the development of this philosophy of law is the hub from which the spokes of his philosophy stem—his concept of the judicial process. It is in terms of judicial process that his philosophy must be read and evaluated. In the next chapter we will see how his concept of judicial process developed in his last book, *The Paradoxes of Legal Science*, and in his address to the New York State Bar Association in 1932.
CHAPTER IV

THE PARADOXES OF LEGAL SCIENCE

In 1928 Cardozo published his last philosophical writing, a series of lectures given at Columbia University comprising the volume, The Paradoxes of Legal Science. This book dealt with questions that were more metaphysical than those considered in his earlier writings. The questions of justice and its relation to law, and morals in relation to law carried Cardozo farther into the field of philosophical speculation than his earlier work on method, growth, and development in law. As in his earlier works, the thought moves forward on two levels: he deals with principles that are general and applicable to a number of particular instances, and he exemplifies these general principles by the citation of cases which were, for the most part, familiar to his audience. The stress in this book, however, seems to be upon the theoretical level as opposed to the practical. In this regard, Edwin Patterson has said: "As he (Cardozo) became more the philosopher, he became less the philosopher of law."1 This remark is more in the nature of an observation than a criticism, for the problems dealt with by Cardozo in this book, i.e., justice, value, and morals, required a

1Patterson, "Cardozo's Philosophy of Law," 75.
more detached consideration than a strict and narrower philosophy of law affords. The matter treated in this last book controlled to a large extent the form of exposition. Though this was his last writing on the philosophy of law, and perhaps his most comprehensive, it must be understood in the whole context of his work. Here again he has as a point of departure the judicial process. The purpose of this chapter, then, will be to examine The Paradoxes of Legal Science to see how it amplifies and develops his concept of judicial process. The last part of the chapter will deal briefly with the address he gave to the New York Bar Association in 1932, to measure its effect on his total philosophy of law and his concept of judicial process.

Cardozo concerns himself at the outset with the judicial function in so far as it is creative and dynamic. For him there is little challenge or problem when judicial process is static and imitative. When the law in precedents is clear, the judge's role is reduced to an administrative function. But where precedent is absent and analogies conflict, the judge must be guided in his creative work by a philosophy if he is to achieve any degree of consistency or fairness.

The events that will give rise to the need for creative work in the judicial function have their roots in problems basic to all philosophy. "The reconciliation," says Cardozo, "of the irreconcilable, the merger of antitheses, the synthesis of opposites, these
are the great problems of the law."² These problems of the philosophy of law he recognizes as reflections of the more profound problems of "rest and motion, the one and the many, the self and the not-self, freedom and necessity, reality and appearance, the absolute and the relative."³ The need of stability and uniformity in law is met with the need for growth and development. Which is to prevail? Part of the answer will be supplied by the judge performing his judicial function by compromising between the extremes of these antinomies. But if at times Cardozo's statement of his philosophy rings with relativism, it is not so because he sees relativism, as Fuller has said, as an absolute in itself. The compromise he suggests is a stop-gap method. The real goal of his search is stated thus: "Until deeper insight is imparted to us, we must be content with many a makeshift compromise, with many a truth that is approximate and relative, when we are yearning for the absolute."⁴

Cardozo's study of the antinomies mentioned begins with that of rest and motion which he identifies with stability and progress in law. In The Nature of the Judicial Process he had proposed the method of philosophy or logic as the method of certainty and stability for the judicial process, while the method of sociology was

²Paradoxes, 4.
³Ibid., 4-5.
⁴Ibid., 6.
proposed as the principle of growth. Stability, rest, and certainty or inflexibility are opposed to progress, motion, and adaptability or fitness to an end, i.e., to the social welfare. One has uniformity as its objective, while the other lends itself to development. As Cardozo puts it: "If we figure stability and progress as opposite poles, then at one pole we have the maxim of *stare decisis* and the method of decision by the tool of deductive logic; at the other we have the method which subordinates origins to ends. The one emphasizes considerations of uniformity and symmetry, and follows fundamental conceptions to ultimate conclusions. The other gives freer play to considerations of equity and justice, and the value to society of the interests affected." \(^5\) In his opinion neither method should be used exclusively, but both are to be used in accordance with the needs of a particular case.

To understand Cardozo's development of the antinomy of rest and motion—or stability and progress—it is necessary to know what approach to the problem he used. "At the outset," says Cardozo, "there is need to delimit the subject matter of our study. Our concern is with the law as it is shaped by the judicial process." \(^6\) His remarks then will have significance for the field of philosophy of law only in so far as they illuminate or reveal his concept of the judicial process. Nothing more pretentious was intended by


Cardozo. Nothing more should be expected. His concern, as always, is with that distinct minority of cases that deal with the gap in law where legislation is silent and precedent absent. In this book he clarifies his concept of judicial process by showing its relation to justice, values, and other ethical considerations.

As he observes society changing and inconstant, Cardozo also notes law changing to meet the needs of the time. The progress in law is not between fixed points, but between changing ones, and this provokes Cardozo's remark about the use that can be made of relativity in the law: "We render judgment by establishing a relation between moving objects—moving at different speeds and in different directions. If we fix the relation between them upon the assumption that they are stationary, the result will often be to exaggerate the distance. True consistency consists in fitting our statement of the relation to the new position of the objects and the new interval between them." 7 Cardozo's position advocating relativity in law would be totally inadmissible if there were no stable base upon which to predicate the relativity. For relativism as a form of positivism is inconsistent with a sound philosophy of law in so far as it denies any relation to a system of values, and relies exclusively on power as the ultima ratio behind the law. Cardozo does not advocate such a position. Furthermore, it is clear from his stress upon the place of values in law that Cardozo

7 Ibid., 12.
cannot be numbered among any school of positivistic relativism. On the contrary, Cardozo's concern with the place of morals in the philosophy of law is so significant as to be a distinguishing characteristic of his whole philosophy of law. 8

Cardozo next uses cases to point up the necessity for relating law to the newly created demands of business usage and custom. He sees in judicial process the inherent energy needed to bring about the change. This position does not differ much from his former position that viewed judicial process as one of the proper tools to bring about in law a development or growth which would fit the growing needs of society. What he spoke of before in terms of growth and development, he now speaks of in terms of relativity. It seems in reality but another aspect of the same problem.

In addition to the changes in business usages and customs, Cardozo notes the changes in the realm of morals. Manners and customs he regards as a source of law and also as a source of morals. He notes the pressure of society exerted not only upon the individual, but also upon the judge. "The pressure of society," says Cardozo, "invests new forms of conduct in the minds of the multitude with the sanction of moral obligation, and the same pressure working upon the mind of the judge invests them finally through his action with the sanction of law." 9 To illustrate the movement of

8Nature, 108; Paradoxes, 42, 48, 57.
9Paradoxes, 18.
judge-made law in accord with the "mores" of the time he uses examples from the law of domestic relations. Though any sort of relativism in the field of morals has a potential for harm that is unlimited, we are concerned not with relativism in general, but with Cardozo's thought on the matter. Careful attention to the cases cited by Cardozo reveals that the judge's decision in each had the effect of raising the standard previously embodied in the precedent. Here is the judge performing his creative function, and, with it, raising the level of prevailing conduct. If the previous decisions gave approval to conduct now seen by the judge as substandard, the judge is not powerless to rectify that decision. Thus, the new reading of the "mores" is of a standard changed by the people themselves, or the judge's reading of a moral standard beyond that of the crowd. What is important here is Cardozo's insistence that law have a high moral content as it is interpreted by the judge in those decisions which are creative and dynamic. This conviction in his extra-judicial writings found some of its most eloquent expression in Cardozo's judicial decisions. 10

10 Meinhard v. Salmon, 164 N. E. 545 (1928), was a case in which Meinhard and Salmon were partners in operating a business in a building leased by them. The lease was about to end and with it the joint adventure of the two. Salmon secretly secured from the landlord a renewal of the lease in his own name alone. "He tried," says Judge Cardozo, "to steal a march on his comrade under cover of darkness and then hold the captured ground." But the court held that Salmon must hold the renewed lease for the benefit of Meinhard as well as himself. In Cardozo's words:

"Joint adventurers like copartners owe to one another, while the enterprise continues, the duty of the finest loyalty. Those
Cardozo considers the means of progress in law through judicial decision a compromise between idealism and positivism. He does not agree with Morris Cohen that idealism in law is losing favor, but he feels that jurists such as Gény of France and Stammler of Germany have brought idealism out into the open. From the quotes of Stammler used by Cardozo, he seems to understand idealism as an expression of the 'just law, the law, that is to say, whereby justice is attained.' With Stammler he sees just law as a subdivision of positive law. This concept of just law is to guide the judge when the positive law directs him either explicitly or implicitly.

Cardozo's notion of the just law stands out even more clearly in his treatment of justice itself. He examines the notion of justice because it has a place in the growth and development of law, and he specifies the justice he seeks by quoting a statement he had made in his book, The Growth of the Law: "What we are seeking is forms of conduct permissible in a work-a-day world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a higher level than that trodden by the crowd. It will not be consciously lowered by any judgment of this court."

11 Paradoxes, 27.

12 Ibid., 28.
not merely the justice that one receives when his rights and duties are determined by the law as it is; what we are seeking is the justice to which law in its making should conform. 13 He notes briefly Stammler's dichotomy between the law of justice and the law of morality, and recognizes as Kantian the position in which morality is concerned with the purity of the will, whereas the just law concerns acts. At the other extreme he sees the school of English neo-realists who hold goodness to be an ultimate and objectively subsisting entity. Both of these positions he rejects. Instead, he describes justice in a manner similar to that of Hans Vaihinger. Cardozo sees the quasi-contract, the adopted child, and the constructive trust as legitimate uses of fictions. 14 But Cardozo also has in mind a subtler fiction used in law: "As political economy has its economic man, so jurisprudence has its reasonable man, its negligent man, and, what is more in point for us just now, its moral man." 15 For law the jural pattern of values is the conduct of a man viewed "as if" he were endowed with the normal powers of will and understanding. That is what Cardozo sees as the conduct of the law's reasonable prudent man. It remains to see what Cardozo conceives as the norm for determining "normal powers of will and understanding."

14 Ibid., 34.
15 Ibid.
Justice considered as a jural norm is defined thus by Cardozo: "I hold it for my part to be so much of morality as juristic thought discovers to be wisely and efficiently enforceable by the aid of jural sanctions." In proposing this he realizes that there is an uncertainty involved. If law accepts as a standard the morality of the community it regulates, there is no guaranty that the conduct will be uniform from group to group within the community. When such a conflict arises, the law "will follow, or strive to follow, the principle and practice of the men and women of the community whom the social mind would rank as intelligent and virtuous." According to Cardozo justice as a jural norm is not a fixed phase of all moral conduct in a particular situation. For Cardozo the standard which defines legal justice is flexible. "It is so much of morality," he says, "as the thought and practice of a given epoch shall conceive to be appropriately invested with a legal sanction, and thereby marked off from morality in general." With this standard he sees the possibility of duties, formerly considered only as moral, being translated into law and invested with the sanction of the power of society. Perhaps Cardozo was too sanguine in his opinion that law would translate the moral norm to the jural norm, but there is no reason to condemn his effort to propose a

higher moral content in the law. In his first work, *The Nature of the Judicial Process*, he had lamented the dissociation of justice and morals from law as breeding distrust of law. He later develops that same theme in his other writings. In Cardozo's opinion the judge as well as the legislature has the power and duty to declare when the "norms and standards of behavior and opinion have become so organized through the forces of custom or of morals as to have become translated into law." 19 This function of the judge is an essential part in Cardozo's concept of the judicial process.

In urging the judge's right and duty to read the "social mind" Cardozo disavowed any desire to implicate himself in the dispute waged concerning the term "social mind." "Let it stand," says Cardozo, "for nothing more than the organ or organs, whether they be multiple or unitary, out of which public opinion is read as a product." 20 So Cardozo reads public opinion from a variety of sources, and over a sufficient period of time to enable the judge to see a strong and preponderant opinion, one not based upon the predisposition or whim of a certain judge. Although he admits the difficulty inherent in such an undertaking, he feels strongly that the judge has a duty to read the social mind just as the legislator must.

Though Cardozo has dealt solely with justice in speaking of

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jural norms, he envisions justice as part of a larger branch of study—the study of values in general—axiology. He finds in the social mind, moral, economic, educational, and aesthetic values.21 And justice or moral value is only one of several values that one must locate in the total scheme of values. In all this he does not fail to see the danger of subjectivism lurking in the judge's reading of the social mind. One might have a false set of values. When legislation, therefore, furnishes no guide to the judge for appraisal of values, the judge should endeavor to read the values as revealed in the minds of others, as objectively as possible, and this failing, he is to turn within himself. He is aware of the uncertainty of determining values in this way. He suggests as a general rule, however, that "where conflict exists, moral values are to be preferred to economic, and economic to aesthetic."22 His contribution to legal philosophy in this area of values is more the pointing up of needs than the furnishing of solutions. Of the impact of Cardozo's writing on this matter of values, Edwin Patterson has this to say: "His chief contribution to the philosophy of law was that, as judge of the highest court of the leading commercial state of a business-minded nation, he brought the articulation of

21 Ibid., 54.
22 Ibid., 57.
values into his juristic writings and judicial opinions. He not only made explicit the problems of value implicit in legal doctrines; he also showed how making them explicit made the judge more conscious and more worthy of his function, and made the judicial process an instrument of legal adaption and not merely the sterile logomachy of a professional technique." One might differ with Cardozo on the method to be used in the appraisal of values, or on the method of judicial process in general, but there can be little dispute concerning the propriety of the end for which the process is articulated.

Cardozo does not want to stress the fluidity of law to the exclusion of stability. The desired end in some areas of law may be achieved by developing some fundamental conceptions to the limit of their logic. The law of negotiable instruments exemplifies this.

Personal sentiment of the judge is likewise to be avoided. In Cardozo's words: "The tendency of principle and rule to conform to moral standards, . . . is not to be confounded with the suspension of all principle and rule and the substitution of sentiment or unregulated benevolence, which, pushed to an extreme, is the negation of all law." The mean for him is somewhere between the extremes of unregulated benevolence and too rigid adherence to the

23Patterson, "Cardozo's Philosophy of Law," 165-166.
24Paradoxes, 68.
decisions of the past. But the judge cannot simply and automatically compromise between one extreme and the other, for many times one of the extremes will yield the desired course of action. For Cardozo, the judge's role is to balance, compromise, and adjust the social interests based upon his reading of the social mind.

Cardozo next examines the apparent antinomy between liberty and government in law. Liberty in its most liberal sense would be for him a "negation of law, for law is restraint, and the absence of restraint is anarchy." So again there is a paradox—liberty is possible only where there is government among members of society. The legislative branch of government defines in broadest outline the limits of the liberty of its citizens. This done, the task of the legislature is complete, except in so far as the fundamental provisions are made more specific. The legislature is incapable of then judging whether the very statutes and constitutional provisions by which they sought to insure liberty to an individual are in fact effective. This is the task of the courts. Cardozo then examines cases in public law to see how judges have exercised the judicial process to define what liberty is in a particular case.

Judicial decision by appellate courts, unaided by lower court or legislature, is not the only means of securing individual justice. Cardozo approves of a case in which, because of insufficient information upon which to predicate a decision, the court remanded a case to the trial court for further investigation and reports. This is the type of interaction between courts that insures a more
enlightened judgment. The statute in question in the case retained its presumption of validity. In such a case Cardozo freely admits the legislature is in a better position to attain the just result through its action. In his words: "The very need for such inquiry is warning that in default of full disclosure of the facts, there should be submission, readier than has sometimes been accorded, to the judgment of the lawmakers. The presumption of validity should be more than a pious formula, to be sanctimoniously repeated at the opening of an opinion and forgotten at the end."\(^{25}\) The full picture of Cardozo's concept of the judicial process, reveals, therefore, its limitations and its weaknesses.

In this same vein, Cardozo warns against the danger of prepossessions on the part of the judge performing the judicial function. Speaking of these prepossessions of the judge he says: "The weakness is inherent in the judicial process. The important thing, however, is to rid our prepossessions, so far as may be, of what is merely individual or personal, to detach them in a measure from ourselves, to build them, not upon instinctive or intuitive likes and dislikes, but upon an informed and liberal culture, a knowledge of the best that has been thought and said in the world, so far as the best has relation to the social problem to be solved."\(^{26}\) With this statement Cardozo's concept of the judicial process had


\(^{26}\) *Ibid.*, 127.
reached its fullness of development. Nothing he would say or write after 1928, would substantially alter his thoughts as they were developed at that time. But Cardozo did make an address to the New York State Bar Association in 1932, in which he reaffirmed his position on the judicial process.

Some might find it curious that a man who in 1932, was Chief Judge of the New York Court of Appeals, and, to all appearances, the most likely prospect for appointment to the vacancy then existing on the bench of the United States Supreme Court, would make a public address reiterating and defending a policy of free judicial decision. Ambition for that appointment would have counselled at least a less public utterance of his judicial philosophy. By 1932, there should have been no doubt in the minds of the members of the legal profession that Cardozo frankly avowed a judicial process that included a freedom of decision extending in case of necessity to judicial legislation. There seemed little need, then, for his reiteration unless it was to clarify his position, or because he was in danger of being misunderstood, or because he had been attacked for his position. It seems likely that Cardozo made this address simply to clarify and defend his own position, not to draw attention to himself as a prospective appointee to the Supreme Court.

Patterson suggests that the address given in New York was in part a reply to the criticism made of Cardozo by Jerome Frank in his book, *Law and the Modern Mind*. Frank, speaking of Cardozo in
1930, had said: "Cardozo, it would seem, has reached adult emotional stature. Unlike some other thinkers we have discussed, he is able to contemplate without fear a public which shall know what he knows. And yet, surprisingly, he is not ready to abandon entirely the ancient dream. Just because he is bravely candid, just because he strives to do away with myth-making, unusual significance is to be attached to his backward glances, his admissions of a reluctance to forego altogether a yearning for an absolute and eternal legal system." 27 True, Cardozo did not back down from his statement of a "yearning for the absolute," but he devotes most of the address to stating his position on the judicial process as opposed to the position advocated by men such as Oliphant, Llewellyn, and Frank.

These men were styled by Cardozo "neo-realists," for he regarded such men as Jhering and Savigny of Germany, and Pound and Holmes of this country the original realists. The philosophy of the neo-realists signified for Cardozo "the exaltation of what is done by a judge as contrasted with what is said." 28 In other words, for the neo-realists, actions speak louder than words. Indeed, for some of the neo-realists words do not speak at all. For them principles and rules and concepts are but tentative explanations of the implications of an actual decision. To Cardozo this position is

28 Address, 269.
not new; it is merely an echo of Bentham's comment on Blackstone's Commentaries which saw individual judicial decisions as acts of authority. This, for Cardozo, is no more than an overstressed emphasis of the doctrine of stare decisis, which gives to each decision exaggerated importance. But in so far as the stress of stare decisis shows each individual decision to be an approach reminding us that precedents must be modified, and some abandoned, to that extent, the stress is good. To the extent that the neo-realist's position would render order and symmetry impossible in the judicial process, Cardozo condemns it.

The problem that the neo-realists face is two-fold. First they must determine whether the law embodied in the precedents is generative, that is, whether the rules and principles embodied in the decisions have the ability to perpetuate themselves and thus bring order and certainty to the whole body of judicial decision. The other problem is to determine what efficacy should be given to the rule of stare decisis, and whether it should be allowed to stifle progress in an area of law by sacrificing flexibility for too strict rigidity. Cardozo takes his stand against granting an exaggerated importance to stare decisis. He sees that if law is defined solely in terms of judicial decision, then, as he said before, "law never is, but is always about to be." To avoid such a narrow conception of law Cardozo reaffirms and amplifies his conception of law:

Now, personally I prefer to give the label law to a much larger assembly of social facts than would have that label
affixed to them by neo-realists. I find lying around loose, and ready to be embodied into a judgment according to some process of selection to be practiced by a judge, a vast conglomeration of principles and rules and customs and usages and moralities. If these are so established as to justify a prediction with reasonable certainty that they will have the backing of the courts in the event that their authority is challenged, I say they are law, though I am not disposed to quarrel with others who would call them something else.29

Cardozo, therefore, speaks of law in terms of predictability, but here, as elsewhere, his notion of law allows for law existing separate from, and independently of, positive enactment or adjudication by legislative or judicial bodies. His concept of judicial process includes the power of the judge to incorporate within his own ruling, principles, rules, customs, and moralities that have a coercive power independently of and antecedent to the declaration of the judge.30 When Cardozo speaks of law in terms of selection by the judge, such law must have an existence prior to and apart from the ruling of the judge. Without this prior existence, the rule enunciated by the judge would have to be said to be law only in terms of the judge's ruling. Such a position would be nothing but juridical positivism. There seems to be place, however, in Cardozo's concept of the judicial process for a methodological positivism as distinct from an ontological positivism.

Cardozo then outlines his position as it is contrasted with that of the neo-realists:

29 Ibid., 276. Italics not in original.
30 See Nature, 127 et seq.; Growth, 31 et seq.
I dissent from the neo-realists in their depreciation of order and certainty and rational coherence as merely negligible goods, if depreciation so extreme is of the essence of their teaching. On the other hand, I am wholly one with them in their insistence that the virtues of symmetry and coherence 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 it 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. 31

He then leaves it to the neo-realists to evaluate and name his position. But what stands out in his whole address is the scrupulous effort to evaluate fairly the position of the realists, and to extract any good it may contain. His intellectual integrity and fairness were animating forces that showed neo-realism within judicial process in its proper light, thus forcing its proponents to re-evaluate their own position.

Finally, Cardozo notes the mounting interest in judicial process both in this country and abroad. He comments briefly on the work similar to his own that is being done in England, France, Germany and Poland. In those countries he recognizes a growing interest and awareness by jurists and philosophers of the problem created by the need for a judicial process that views the end of law as controlling, and the judge's creative function as a necessary factor in shaping the law to that end.

In conclusion, then, in his last work, The Paradoxes of Legal Science, Cardozo deals with the antinomies that are apparent in law,
i.e., rest and motion, stability and progress, liberty and government, etc. He regards judicial process as capable of effecting a compromise or concordance between these antinomies. The place of justice in the field of law is examined extensively in an attempt to define more clearly what the justice is to which law in the making should conform. This brings him to the use of the fiction in law of the "reasonable prudent man" whose actions when considered objectively would constitute a jural norm. He stresses the need for an association of justice and morality with law. To amplify these notions he treats the realm of value in general and concludes that moral values are to be preferred to economic and aesthetic values in decision of cases. Interaction of appeal courts with lower courts and legislatures is encouraged. The weaknesses and limitations of the judicial process are pointed out, and credit is given to the legislatures for the important work they do.

In the address given to the New York Bar Association, Cardozo reaffirms his concept of the judicial process as creative in part, but distinguishes his position from that of the neo-realists of the time. He examines and points out the weaknesses of thought in the doctrine of neo-realism, warning against the danger of restricting the notion of law to judicial decision alone. He notes briefly the similar work being done by jurists and philosophers on the elaboration of the judicial process in other countries.

It remains in the final and concluding chapter to enumerate the distinguishing characteristics of Cardozo's concept of
judicial process, and to evaluate his contribution to legal philosophy in the light of his work on this concept.
CHAPTER V

CONCLUSION

What began as analysis now ends as synthesis. The characteristics contained in Cardozo's concept of judicial process are many and distinct. The more important ones must be selected to furnish a basis for evaluating the contribution he made to legal philosophy by his work in explaining this process.

Like any other process the judicial process that Cardozo explains will not be a simple concept; rather, it will be a description of an ongoing act or combination of acts that conduce to a certain and definite end. This description will issue in no neat and concise definition; and some of the elements of this process will be repeated, for many of its features stress the use of the same power to attain different objectives, though all these features are closely related to each other in the total process. A thorough analysis of any of the essential features of judicial process will necessarily include the relation that such a feature has to the whole process.

First, judicial process is a method of free decision or "libre recherche scientifique" as it was called by François Gény. This free decision is the common-law as interpreted by a judge in a case where statute or constitution are silent and precedent absent.
In this sense, free decision fills the gap in the *jus scriptum*; but it is balanced by *stare decisis* as at least an everyday working rule. Free decision also gives a partial explanation of the phrase "judge-made law." For the judicial process is more than a description of the merely static, imitative, and administrative function of the judge applying an existing rule or principle to a case before him for decision.

Secondly, judicial process is both science and art. The judge must first turn to statutes and precedents to extract the underlying principle, the *ratio decidendi*; then he must determine the path or direction along which the principle is to move or develop. As the extraction of the underlying principle or rule implies a science, the application of that principle to a case implies an art. Although Cardozo's emphasis is on the latter of the two aspects of judicial process, his concept of the whole process involved both elements of science and art.

Thirdly, judicial process is a methodology for applying the principle or rule of law to a case to be decided according to one or more of the four methods: the method of philosophy or logic, the method of history, the method of custom, and the method of sociology. The emphasis here is placed on the fact that judicial process is a method; in other words, Cardozo's view of the judicial process was radically structural rather than contentual both in its origin and development. This concept of judicial process as a methodology greatly influenced his notion on the question of
natural law or the meaning and genesis of law. For Cardozo's almost exclusive concern with method undoubtedly influenced his decision to leave the more basic and fundamental questions of natural or moral law to "the statesman and the moralist."

Fourthly, judicial process insures to law in general a high moral content. Cardozo freely admits that the judge must be objective in rendering his decisions. There must be no mark or trace of personal whim or caprice. This does not mean, however, that the judge is powerless to raise the level of the prevailing standard of conduct. And though the judge must be controlled by an objective standard, he should not be forbidden to take the initiative when either failure to act or resort to the legislature would leave the threatened wrong unremedied or unchecked. This concern for insuring a high moral content in law will be treated more specifically when we treat his notion of legal justice.

Fifthly, judicial process balances the use of the four methods of decision in such a way as to serve the social interests. The standard by which this balance is achieved is the same for the judge as for the legislator--life itself. In other words, the judge should be guided or restrained by such things as the example of other judges, the spirit of law, and the examples of the members of his own profession. Yet with all this as a guide the judicial process is still creative, since creation consists in applying principles and rules of law or in choosing the method for applying these things; this means that law has an existence apart from its
application by the judge. Here again the methodology of Cardozo shows the structural rather than the contentual approach to the question of law in the judicial process.

Sixthly, judicial process looks to social welfare as an end to measure the effectiveness of law. The four methods of decision are not ends in themselves but means to the end of securing social welfare. Social welfare is measured by a judge's experience of life, his understanding of the prevailing canons of justice and morality, and his study of the social sciences. But for a given case, in default of objective standards furnished by the social sciences, the judge must be guided by his own set of values. In this Cardozo differs from those positivists who would maintain that in the absence of an objective standard determined by the legislature the judge is not free to decide a case using his own set of values.

Seventhly, judicial process is an indispensable agency of growth for law. Though Cardozo admits that the majority of law does and must come from the legislature, he denies that the legislature is a sufficient agency for the growth of law. Central to this notion is his insistence that the actual work of legislating occupies only part of the time for those members of our government who act in the legislative branch, while the judiciary devotes full time to the work of deciding cases and dispensing justice. The creative action of judicial process is, for Cardozo, a necessary principle of growth for law.
Eighthly, judicial process insures legal justice which is "so much of morality as the thought and practice of a given epoch shall conceive to be appropriately invested with a legal sanction, and thereby marked off from morality in general." In other words, Cardozo's concept of the judicial process would have this process translate a moral norm to a jural norm. With this, duties formerly considered only as moral, may be translated into law and invested with the sanction of the power of society. While Cardozo agrees that the legislature can take steps to insure legal justice, he would maintain that legal justice cannot be attained without the aid of judicial process.

Ninthly, judicial process operates on a hierarchy of values. In cases where there are conflicting interests, the judge should prefer moral to economic interests, and economic to aesthetic interests. These values are to be read in the social mind—a phrase sufficiently vague to resist telling definition—but in the event that the legislature has furnished no guide for the appraisal of values, and the judge is unable to read the social mind, the judge is then to turn within himself to determine these values. It is in this instance that the judge is to be guided by the hierarchy of values of the judicial process.

Finally, judicial process must work closely with legislative process. This cooperation between legislature and judiciary was Cardozo's dream at the beginning of his career as a judge; and it furnished him with a topic for discourse on more than one of his
frequent speaking engagements. Indeed, he advocated and promoted a plan for a ministry of justice that coordinated the work of the judicial and legislative branches of the government of New York State. In his opinion, once a statute has been framed it must, if its effectiveness is not to be unreasonably curtailed, be sufficiently general to be applicable in many instances. It is then for the court to determine in conjunction with the legislature, when a given case falls within the purview of a statutory provision. Judicial process must, therefore, insure a close rapport with the legislative branch if the work of either is to be effective.

It seems clear that Cardozo's contribution to the field of legal philosophy must be measured in terms of his work on the concept of judicial process. This limitation was urged by Cardozo himself, and most of the evaluations of his work have been made in these terms. Certain writers, however, have not been content to limit their criticism to Cardozo's expressed purpose. Some would value his work by judging his writings as an attempt to state a strict and complete philosophy of law. This is to misinterpret his purpose. In the last analysis, Cardozo was a jurist and a judge—not a philosopher. It is true that he stressed the need for a philosophy as an aid to define the ends of law and to govern its application and growth. But his aim was to examine only one process to which the name "law" could be applied. It seems possible, therefore, to separate what he has done on method from the technical implications and consequences of his writings when this work is
viewed as an attempted philosophical analysis of the entire field of law.

That the force and vigor of most of Cardozo's thought and writing should have centered on developing a method for judicial review is by no means strange. As modern philosophy had been ushered in by Descartes' search for a method of developing a "scientific" philosophy, so contemporary philosophy has continued in that same tradition. And if this is the spirit in which François Gény had written his Méthode d'interprétation et sources en droit privé positif, Cardozo was by no means a stranger to that work. Indeed, even if Cardozo had not been influenced by Gény's work to develop a method of decision under the French Civil Code, there was a strong enough pragmatic strain in Dewey's work (to which Cardozo turned so frequently) to encourage Cardozo to work solely within the area of method rather than deal with the moral presuppositions

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1Gény leaves little doubt as to his practical purpose when he says:

"J'ai suffisamment, ce me semble, fait entendre, par ce que précède, que je me plaçais ici sur le terrain de l'interprétation du pur droit positif; domaine du praticien, du magistrat, du juriste-consulte, de tous ceux qui ont à dégager les solutions juridiques, applicables, non pas idéalement ou rationnellement, mais, concrètement et en fait, aux questions que soulevent les conflits d'intérêts humains. Il s'agit d'approfondir la méthode d'investigation, qui s'offre à eux, c'est-à-dire de distinguer les procédés de recherche et d'étude, les mieux adaptés à cette mission de mise en œuvre du droit positif, qui est proprement la leur." François Gény, Méthode d'interprétation et sources en droit privé positif (Paris, 1954), 2nd ed., I, 14. Italics not in original.
of this process of judicial review. Who more than Dewey would have urged the complete dichotomy between the legal and the moral order? But whether Cardozo was influenced by Gény or Dewey, the fact remains that ultimately Cardozo united the moral and the legal order, and there at least he parts company with Dewey.

Once Cardozo had settled on the methods to be used in judicial review, his reflections carried him deeper into the philosophical questions that lay beneath the surface of the methods themselves. It was the method of sociology more than any other that brought Cardozo to reflect on the ethical forces within the human soul, for this was the method by which the judge exercised his powers of equity to soften the rigors of law. This was the method that afforded most scope for the creative function of judicial process. But Cardozo realizes that there had to be some criterion to guide the judge's choice of method. For this criterion Cardozo had to develop a hierarchy of values for his own use in the event that the legislature furnished no standard by which to judge.

Some legal philosophers and jurists confronted with the need for moral values in law have maintained that the moral and the legal order should move independently of one another; they insist the dichotomy is complete. The reason they give for this is that the moral order governs the inner acts essentially related to convictions, while the legal order fixes only the rules for external conduct. Cardozo, however, believed that moral norms should be translated or incorporated into jural norms by the judicial process.
This conviction in his extra-judicial writings was also expressed vigorously and consistently in his own judicial opinions. His conviction that moral values should be preferred to economic values, and economic to aesthetic, was one of the guides he set for determining the limits of judicial function in a situation where the judge was expressing his creative function. This wedding of moral and legal orders in judicial process stands as one of Cardozo's most significant contributions to the field of modern legal philosophy.

Drawn from all his writings, the conclusion is irresistible that Cardozo did not deny the existence of natural law; that he did not choose to treat natural law as a specific part of judicial process is equally clear. Judicial process was for Cardozo a methodology for judicial review within a system of human positive law treated as a closed system, but not a closed system in the sense that certain ethical elements of the moral order could not be subsumed under the notion of positive law. What he meant to deny to law in the ethical or moral sense was a practical effectiveness superior to positive law. This position is reasonable when one takes into account Cardozo's position as Chief Judge of the New York Court of Appeals. For him judicial process was above all a practical concept, and the burden of his thought and writing went toward promoting a better understanding of this process. What Cardozo did do was to prepare the way for future writing on judicial process in a more philosophical manner. Now that Cardozo has given
such excellent descriptions of the process in all its subtleties, the task of applying a natural law jurisprudence to the judicial process is rendered infinitely easier.

In addition, the concept of judicial process has been marked off as a specific area of human positive law to which the name law may be applied. This done, the way is clear to apply the concept of judicial process to the many administrative processes in our government having quasi-judicial functions. He has, in fine, made the concept simpler and more flexible.

Were one to look for any extensive writings on the subject of judicial process, research would reveal few sources. In a sense the process is a hybrid. For not until our Federal Court system was established by the Constitution and the Judiciary Act of 1789, did the elaborate appeal system of our courts come into being. The states modeled their appellate systems largely on that of the Federal government. And so the problem of judicial process never really arose in this country until late in the development of jurisprudence and legal philosophy. Before one can apply the philosophy of any particular system to this process, it is of the greatest importance to know precisely the nature of the process itself apart from legal philosophical conclusions based on a corpus of law to which the judicial process was alien. It was the genius of Cardozo to have analyzed this process in great detail. The fact that he was a great judge would have won him a hearing on that basis alone, but added to his judicial capabilities was a
philosophical bent that prompted his reflections on the process in terms not only of law but philosophy as well.

In an age when natural law jurisprudence is growing in importance, legal philosophy would do well to analyze the problems involved in judicial review in light of Cardozo's work on this concept. That this may happen seems not remote. The very eminent and respected political scientist, Carl Brent Swisher, has recently paid Cardozo's work high praise when in 1958, giving the James Stokes Lectures on politics, he said:

Such illumination of the judicial process as the justices provide is provided largely through their judicial opinions, which must be read in the light of the contexts of the particular cases and not treated as aloof discussion of great universals. Although a considerable minority of the justices have written books of one kind or another and published articles on diverse subjects, the works of Justice Cardozo, written while he was Chief Judge of the New York Court of Appeals, mark the only outstanding contribution to jurisprudential analysis. Even the monumental works of Justice Story written more than a century ago when our institutions were less well defined than they now are, were concerned much more with showing what the law was than with analysis of its inner content.\footnote{Carl Brent Swisher, \textit{The Supreme Court in Modern Role} (New York, 1958), p. 169.}

This praise coming from a man of Swisher's reputation twenty years after Cardozo's death gives hope that Cardozo's work on judicial process will be the basis for further syntheses of philosophy and law.
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APPROVAL SHEET

The thesis submitted by William C. Cunningham, S.J. has been read and approved by a board of three members of the Department of Philosophy.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the Degree of Master of Arts.

January 16, 1961
Date

Signature of Adviser