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LAW, LITERATURE AND CARDOZO'S JUDICIAL POETICS

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TABLE OF CONTENTS

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PREFACE

The following article suggests a new perspective on Benjamin N. Cardozo's judicial theory. The introductory pages offer a comparison of Cardozo to a strikingly similar figure from the literary world, Flaubert, and in that light emphasize his awareness and acceptance of the place of culture and intuition in the judicial enterprise. Part I perceives Cardozo's imprecisely named "Method of Sociology" as pointing, in effect, to a "Method of Culture." This section also elaborates on the intuitive element of his judicial "poetics," not as a method in itself, but as the disciplined subjectivity which leads judges to use his four methods (logic, history, custom, sociology) as they do.

Part II (A) then expands, systematically, on the "Method of Culture" by identifying the poetic skills which inform that method: style and rhetoric, hermeneutics, value awareness and imagination. The essay concludes in Part II (B) with selected arguments and opinions by Cardozo exemplifying the four poetic skills within the "Method of Culture."

INTRODUCTION: ON CARDOZO AND FLAUBERT

A. Sainthood

Sainthood has enveloped in its ethereal aura the memory of a few long-departed individuals; fewer still are those only recently dead whose mere name inspires beatitude. The hagiographer's urge runs so deep, however, that even our increasingly secular culture has managed to promote its fair share of mortals to the blissful rank. Gustave Flaubert and Benjamin N. Cardozo, two literary men engaged in apparently disparate pursuits, have advanced to sainthood along parallel trails worth delineating and exploring.

Something more than extraordinary admiration ascends to these figures from the mouths and pens of those below. To critic Antoine Albalat, Flaubert was "the Christ of literature."[1] "Ecstasy" was, to another admirer, the mode of Flaubert's artistic enterprise.[2] Like the saints he created in his fiction, like the saint whose reincarnation he thought he was, Flaubert achieved greatness through a life of

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nell University, 1967; Ph.D. (Comparative Literature), Cornell University, 1970; J.D., Columbia University, 1974. I am greatly in the debt of Professor David Haber for his many insightful observations about this paper.

[1] *See* Levin, *Flaubert: Portrait of the Artist as a Saint*, 10 KENYON REV. 28, 31 (1948).

[2] Williams, *The Ecstasy of Gustave Flaubert*, 13 FRENCH Q. 53-61 (1931).

"heroic ascesis."[3] A quite untypical combination of a "sublimation of the ego"[4] and a vast creative talent produced masterpieces of craftsmanship and style.

Other artists of the last few centuries have also gained devoted followings precisely because, in a struggle between self and craft, they chose craft. Admirers read and reread Henry James' complex prose, fascinated by a man whose life was so utterly committed to the creation of fiction; as one of them puts it, "his art was his mistress."[5] Devoted analysts[6] applaud a whole school of nineteenth century French poets, not only for its marvelous hermetic verse, but also for its program of alienation from all but a symbolic earthly self:

> —La vraie vie est absente. Nous ne sommes pas au monde. (Rimbaud)[7]
>
> —Je suis parfaitement mort. (Mallarmé).[8]

Thus with the decline of religious faith as traditionally understood, there has arisen a new form of saintliness. Elevation demands not only great ability but also a kind of earthly abnegation and a virtual non-corporeality. Erich Auerbach, speaking about Flaubert in a familiar passage from *Mimesis*, describes one such process:

> [T]here occur in his letters, particularly of the years 1852-1854 during which he was writing *Madame Bovary* . . . many highly informative statements on the subject of his aim in art. They lead to a theory . . . of a self-forgetful absorption in the subjects of reality which transforms them (*par une chimie merveilleuse*) and permits them to develop to mature expression. In this fashion subjects completely fill the writer; he forgets himself, his heart no longer serves him save to feel the hearts of others. . . . [S]ubjects are seen as God sees them, in their true essence . . . the universe is a

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[3] M. NADEAU, THE GREATNESS OF FLAUBERT 298 (B. Bray trans. 1973).

[4] *See* Levin, *supra* note 1, at 32.

[5] Cargill, *Introduction* to H. JAMES, THE AMBASSADORS at vii (1963).

[6] *See, e.g.*, W. FOWLIE, MALLARMÉ (1962). Fowlie, an insightful analyst of the symbolist movement (particularly of Mallarmé), observes:

> Mallarmé was a man characterized by his separateness from life. An extreme and highly stylized portrait of Mallarmé is to be found in the character of des Esseintes, hero of Huysmans' novel, "A Rebours." The fervent adventure of the artist's mind, pursued throughout a banal existence, was a cerebral intoxication and possessed none of the disruptive passions of the ordinary man. His life was consecrated to a search for what he might have termed the "pure" communication, and not for the immediate kind of communication which most men would regard as their goal.

Id. at 25.

[7] "Real life is elsewhere. We are not in the world." RIMBAUD, *Delires I*, in OEUVRES 224 (S. Bernard ed. 1960). Translation by author.

[8] "I am perfectly dead." Letter from Mallarmé to Henri Cazalis (May 14, 1867), *reprinted in* MALLARMÉ, CORRESPONDANCE 240 (H. Mondor ed. 1959). Translation by author.

> work of art produced without any taking of sides, the realistic artist must imitate the procedures of Creation. . . .[9]

Not only the arts produced the saints. Wherever brilliance pierced a veil of personal unhappiness; better still, wherever self-enforced asceticism worked hand-in-hand with native talent, saint-hood might result. However unusual it was outside the realm of art (which in its intensely personal and aesthetic aspects has always seemed fairly close to religion), selflessness did occasionally join with and contribute to greatness. All the stronger was the praise for those who sacrificed self to purpose in more practical enterprises.

Cardozo's saintliness was of a piece with Flaubert's. As much as any two figures engaged in seemingly distinct enterprises, these masters of literature and the law evoke a comparative inquiry into the nature of modern narrative craftsmanship and its stance toward life. Adulated during their mature years for a virtually exclusive commitment to craft, both men abjured the traditional joys of spontaneous existence, domesticity, and extensive friendship, in favor of the demands of total professionalism. Prose fiction subsumed Flaubert while to Cardozo, in Beryl Levy's phrase, "the law has been a holy grail."[10] Graciousness in greatness, ascetic immersion in style and form, commitment to a small circle of fellow craftsmen—these were their predominant observable qualities. Levy recalls Cardozo's equivalent of Flaubert's "self-forgetful absorption": " 'The submergence of self in the pursuit of an ideal, the readiness to spend oneself without measure, prodigally, almost ecstatically, for something intuitively apprehended as great and noble, spend oneself one knows not why—some of us like to believe that this is what religion means.' "[11] Nineteenth century French Catholic novelist and twentieth century American Jewish judge, Flaubert and Cardozo seemed to profess an identical creed.

Upon their deaths, they were extolled as martyrs to their craft. Of Cardozo it was said that he "gave his life on the battle line as truly as any soldier of the Republic."[12] Learned Hand wrote eloquently of Cardozo's wisdom, born of a spirit "uncontaminated, because he knew no violence, or hatred, or envy, or jealousy, or ill-will."[13] Judge Lehman's personal friendship with Cardozo led him to stress

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[9] E. AUERBACH, MIMESIS 429-30 (W. Trask trans. 1957).

[10] B. LEVY, CARDOZO AND FRONTIERS OF LEGAL THINKING 22 (1938).

[11] *Id.* at 9 (quoting Address by Benjamin N. Cardozo, Jewish Institute of Religion (May 24, 1931), *reprinted in* 2 NEWS BULL. JEWISH INST. RELIGION at 6 (June 1931)).

[12] Stone, *Mr. Justice Cardozo*, 52 HARV. L. REV. 353, 355 (1939).

[13] Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361, 363 (1939).

the "selflessness" of the man,[14] and Felix Frankfurter compared him to St. Francis and Thomas More.[15] Distinguished legal figures who knew him write even today of their unforgettable contact with an almost angelic presence. Similar feelings of indescribable loss were noted by such men as Daudet, Zola, and Goncourt upon the death of Flaubert, their master.[16]

Flaubert and Cardozo followed a remarkably similar path to their well-deserved reward. If Flaubert's education pointed toward a legal career,[17] Cardozo's first culture[18] and lasting passion was literary. Both men quickly realized that their destiny lay in the lamp-side struggle for linguistic precision and beauty. Sartre depicts Flaubert's agonizing attempts to find self-expression through words;[19] and all who knew Cardozo perceived his tireless quest for "the argument strongly put," the fruits of a process of "strenuous selection and comparison."[20]

Coincidence of biographical detail, inevitable in a class chosen by admirers to represent an ideal of selfless achievement, gains importance in this comparison because of the curious parallelism in the crafts which these men single-mindedly pursued. Representative of the school of French "realist" novels, Flaubert's masterpieces brilliantly evoke the carefully observed social history of nineteenth century France. For Cardozo, too, observation of a given reality preceded the act of craftsmanship. Both men drew their sustaining vision from the world of active humanity to which neither fully belonged. With the stylistic gift that marked them both for greatness, Cardozo and Flaubert allowed the substance of the world before them to inspire enduring prose.

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[14] Lehman, *Judge Cardozo in the Court of Appeals*, 52 HARV. L. REV. 364, 366, 369 (1939).

[15] Supp. II DICTIONARY OF AMERICAN BIOGRAPHY 95 (R. Schuyler ed. 1958). *See also* Farnum, *Justice Benjamin N. Cardozo Philosopher*, 12 B.U. L. REV. 587, 598 (1932) (for a brief comparison to St. Paul, within the context of a fine article).

[16] *See* B. BART, FLAUBERT 744 (1967).

[17] Flaubert read the law in Paris for two years, failing his second year exams in 1843. *See* M. NADEAU, *supra* note 3, at 301. *See generally* B. BART, *supra* note 16, at 87.

[18] The broad literary culture of the Cardozo family is noted at length in G. HELLMAN, BENJAMIN N. CARDOZO: AMERICAN JUDGE 12-18 (1940). Benjamin Cardozo's childhood tutor was Horatio Alger, whose own proclivity toward "rags to riches" novels did not prevent him from inspiring the lad with a sensitivity to the literary classics. *Id.* at 14.

[19] *See* J. SARTRE, L'IDIOT DE LA FAMILLE (Gallimard publ. 1971).

[20] Cardozo here quotes and characterizes the literary quest of Henry James, and applies it to the law. B. CARDOZO, *Law and Literature*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 339 (M. Hall ed. 1947) [hereinafter cited as SELECTED WRITINGS]. This essay originally appeared in 14 YALE L. REV. 699 (1924-1925) and subsequently was the title essay in an independently published book, B. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES (1931). *See* SELECTED WRITINGS, *supra* at 338-39.

Great opinions, like great novels, strive to put a narrative structure around a specific and observable reality, and thus to create a more lasting representative universe. As much might be said in comparing the great literary artists and common-law judges of any period. But Flaubert and Cardozo also shared the fate of existing at a period of Western Culture in which that surrounding reality was becoming less easy to define. Distance, and even alienation, from a confused and increasingly relativistic culture became an apparent cornerstone of their common pursuit. Indeed, certain statements that they made outside their actual professional productivity (in letters or essays) might lead an observer to detect a kind of disdain in these men for the human sources of their enterprise. Flaubert's sense of distance from his subjects gained frequent expression:

> Whatever illusion there may be derives from the *impersonality* of the work. It is one of my principles that you must not project yourself in your writing. (. . . il ne faut pas s'écrire). The artist stands to his work like God before Creation, invisible and omnipotent: one should sense him everywhere but see him not at all. So art must be elevated above personal affection and emotional proclivities! It is time to give it, through a rigorous method, the precision of the sciences.[21]

> The artist, like the God of the creation, remains invisible, refined out of existence, indifferent, paring his fingernails.[22]

Flaubert needed the contemporary world, like the judge needs the litigating parties, as the generating agent of his craft. But he attempted disinterestedly to remove himself from that source, somewhat in the manner suggested by Cardozo in the following phrases:

> [The ultimate] queries are slumbering within many a common law-suit, which can be lifted from meanness up to dignity if the great judge is by to see what is within.[23]

> But as a system of case law develops, the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped.[24]

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[21] Letter from Gustave Flaubert to Mlle. Leroyer de Chantepie (March 18, 1857), *reprinted in* 3 G. FLAUBERT, CORRESPONDENCE at 80 (Bibliotheque-Charpentier ed.). Translation of passage in text by author.

[22] B. BART, *supra* note 16, at 329 (quoting J. JOYCE, PORTRAIT OF THE ARTIST AS A YOUNG MAN (1915), in which Joyce cited this phrase used by Flaubert in one of his letters).

[23] Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 685 (1931) [hereinafter cited as *Holmes*].

[24] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 35 (1921) [hereinafter cited as JUDICIAL PROCESS].

Through a methodology bordering on science, and through the use of a well-wrought style suitable to that science, both Flaubert and Cardozo at times appeared to crave escape from the reality upon which both were completely dependent. Flaubert felt that the mediocrity of contemporary life would attain significance only through narrative form and literary style.[25] Cardozo's "sordid controversies" would achieve grace only as "algebraic symbols from which the court could work out the formula of justice."[26]

> It is a false and cramping notion that cases are made great solely or chiefly by reason of something intrinsic in themselves. They are great by what we make of them. McCulloch v. Maryland—to choose almost at random—is one of the famous cases of our history. I wonder, would it not be forgotten, and even perhaps its doctrine overruled, if Marshall had not put upon it the imprint of his genius.[27]

Marshall's "genius" to Cardozo as he wrote this passage from his *Law and Literature* essay, was one part style for every part logic, precedent, or history. The judge, like the novelist, employed language to reconstitute a lesser reality. Words elevated their enterprise to godlike heights.

B. *Humanity*

Was Mrs. Palsgraf Cardozo's Madame Bovary? Where saint-makers congregate there will eventually be devil's advocates. John Noonan, in an exciting chapter of his fine book *Persons and Masks of the Law*,[28] suggests that Cardozo deliberately minimized Mrs. Palsgraf's humanity in that most famous of torts cases.[29] Distancing himself loftily from the real pain of the plaintiff and her daughters, the judge demonstrated an insensitivity to the common sufferings of ordinary people. Mrs. Palsgraf is recreated in the opinion shorn of her essence by Cardozo's prose.

The revisionist position, skeptical of saintliness as a viable status, perhaps overeagerly ferrets out the "all-too-human" motivation behind the theoretical words of godlike craftsmanship. So Sartre demys-

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[25] "Life is such a hideous thing that the only means to support it is to avoid it. And one avoids it in living through Art." Letter from Gustave Flaubert to Mlle. Leroyer de Chantepie (May 18, 1857), *reprinted in* 3 G. FLAUBERT, *supra* note 21, at 85. Translation by author.

[26] B. LEVY, *supra* note 10, at 10.

[27] B. CARDOZO, *Law and Literature*, *supra* note 20, in SELECTED WRITINGS, *supra* note 20, at 355.

[28] J. NOONAN, PERSONS AND MASKS OF THE LAW 111-51 (1976).

[29] *Id.* *See* Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

tifies Flaubert's saintliness and examines the underlying psychology which drove the artist from the world:

> [T]o create art—and thus to rise above life—two things are required: the systematic practice of anorexia (chastity, temperance, the rejection of ambition and human drives) and an indifference to material things . . . . But although Gustave always resisted human goals, he pretty much adhered to them nonetheless. He rejected his needs, being served by a too frail body, but sooner or later, and for good cause, he returned to them. He distrusted ambition but the Flaubert family had infected him with its horrible *arrivism*. . . .[30]

Flaubert's theory took him out of the world through his craft; heredity and environment inevitably trajected him back into the world (which he therefore resented). Solace through, and even revenge upon, literary characters such as Madame Bovary[31] became his artistic function. For Sartre, Flaubert's saintliness exists largely as a representative and pejorative irony.

As we have noted, the hyperbolic responses to Cardozo the judge have also inspired a healthy and more realistic inquiry into the "all-too-human" influences on his judicial theories and practice. First and foremost Jerome Frank,[32] but more recently and with considerably more deference, G. Edward White[33] and John Noonan,[34] refresh our understanding of and ultimately increase our admiration for Cardozo. These commentators, stressing alternatively the man's lack of trial court experience, his "alien" literary style, family problems, and

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[30] 2 J. SARTRE, *supra* note 19, at 1913, 1915. Translation of passage in text by author.

[31] For Sartre, as for other revisionist critics of Flaubert, Madame Bovary is one of these victimized characters. Sartre sees Flaubert as avenging his real-life "ressentiment" against Louise Colet through Emma. *See* 2 J. SARTRE, *supra* note 19, at 1275-89. Flaubert also demonstrates a kind of authorial cruelty to Félicité, the protagonist of *Un Coeur Simple*, translated as *A Simple Heart*, translated version in THREE TALES (1961).

[32] The relationship between Frank and Cardozo, insofar as it evoked the areas in which the realists differed from Cardozo, is worthy of lengthier analysis in a different forum. Frank's critique of Cardozo emphasized the latter's alleged disregard for the contingent nature of judicial fact-finding, *see generally* Frank, *Cardozo and the Upper-Court Myth*, 13 LAW & CONTEMP. LEGAL PROB. 369 (1948); Letter from Jerome Frank to Benjamin N. Cardozo (Sept. 9, 1932) (unpublished letter in Frank Collection, Yale University Library) [hereinafter cited as Frank Letter], as well as Cardozo's "alien grace" in writing style. *See* Frank, *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625, 630 (1943) (published anonymously under the name of Anon Y. Mous) [hereinafter cited as *Speech of Judges*]. The author is indebted to a student, Roger Newman, for many fine insights into Frank's view of Cardozo.

[33] *See* G.E. WHITE, THE AMERICAN JUDICIAL TRADITION 251-91 (1976).

[34] *See* J. NOONAN, *supra* note 28.

even judicial ambitions,[35] diminish his reputation no more than Sartre does Flaubert's.

Indeed, biography, like theory, enforces the notion that these men sought the impersonality of craft as an escape from unmediated, non-narrative experience.[36] Neither Cardozo nor Flaubert ever married.[37] Both took longer than most to outgrow considerable paternal and sibling influences. Cardozo's exclusive lifetime devotion to his judicial art is frequently explained as an effort to restore his family's good name after the Tammany scandals ruined his father;[38] Flaubert, conversely, never overcame his father's disappointment with him.[39] Sisters profoundly affected the two men well into their adult years. Each responded to a sister's ailment and premature death as if to those of a spouse or child.[40]

Illness cloyingly sapped their strength. Flaubert's early years in Paris may or may not have provided him with a fair dose of spontaneous and zestful living;[41] if they did, the enjoyment quickly ended when a series of physical crises (perhaps epileptic seizures) depleted him. From the age of twenty-three his relationships wound down,[42] and all his energy was directed to writing. Cardozo, too, lacked robustness.[43]

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[35] *See id.* at 144-46; G.E. WHITE, *supra* note 33, at 255-57 for further discussion of the various aspects of Cardozo's "ambition."

[36] *See, e.g.*, Letter from Gustave Flaubert to Mlle. Leroyer de Chantepie, *supra* note 25. "View life, passion and yourself as a *subject* for intellectual exercise." *Id.* Translation by author.

[37] *See* B. LEVY, *supra* note 10, at 9. Mr. Levy, in comparing Cardozo to yet another giant, Spinoza, observes that they were not distracted "even to the extent of being married, from an ascetic untiring persistence in their work." *Id.*

[38] *See, e.g.*, G. HELLMAN, *supra* note 18, at 59, 211; G.E. WHITE, *supra* note 33, at 255. In this issue, Joseph Rauh questions this view of Cardozo's motivations. *See* Rauh, Siegel, Doskow & Stroock, *A Personal View of Justice Benjamin N. Cardozo: Recollections of Four Cardozo Law Clerks*, 1 CARDOZO L. REV. 5 (1979) [hereinafter cited as Rauh].

[39] For Sartre, this paternal disapproval explains Flaubert's problems with language as a child and even as a mature writer. *See* 1 J. SARTRE, *supra* note 19 at 62-81. *See also* B. BART, *supra* note 16, at 7-8.

[40] *See* G. HELLMAN, *supra* note 18, at 179-97, for a description of Cardozo's closeness with his sister Nell. As to Flaubert and "his closest confidante," sister Caroline, *see* B. BART, *supra* note 16, at 83, 133-34.

[41] The biographers differ as to such matters as Flaubert's sexual activities during the early Paris years. Mr. Bart speaks of a "sexual life which would have debilitated anyone." B. BART, *supra* note 16, at 83; Mr. Nadeau quotes the Goncourts as recalling Flaubert's declaration that, during the same years, "I didn't make love . . . because I had promised myself not to. . . ." M. NADEAU, *supra* note 3, at 51. (Although we should recall that Flaubert was in law school, the remark is significant.) Biography, like hagiography, involves as much the perspective of the viewer as the reality of the subject discussed.

[42] An exception to the general rule is Flaubert's complex relationship with Louise Colet, about which each biographer has his own theory. Louise herself described the liaison in tones of bitter reminiscence in her "vicious" novel LUI (1859). *See* B. BART, *supra* note 16, at 387.

[43] *See, e.g.*, Rauh, *supra* note 38, at 5.

To the saint-makers these traits serve further to demarcate a preserve of otherness and aloneness lying within the sphere of extreme talent. Skeptics see them rather as the very factors which distorted in part the use of these men's genius and overly alienated them from their surroundings. What both groups may perceive only obliquely is the vital sensitivity of Flaubert and Cardozo to their own humanity. Despite the theory of godlike creation, the two writers consistently discussed their inability to expunge self from craft. But whatever the similarities between them a major difference appears here: for Flaubert, subjectivity was anathema and painful; for Cardozo, and herein lies the hitherto underemphasized essence of his judicial theory, subjectivity became dynamic and creative.

C. *Poetry*

For many admirers of Cardozo who cannot quite accept his saintliness, the epithet "poetic" will suffice.[44] By this word they may mean not only Cardozo's attention to linguistic style and nuance, but also his self-conscious elevation of the judge's work to the level of "a fine art."[45] Cardozo's collected essays can be viewed as a kind of "Poetics"[46] of the judicial function. The *Law and Literature* piece,[47] for example, seeks to reveal, to practitioner and judge alike, the strongly aesthetic nature of effective legal professionalism.

Having said this, we leave open for the moment the issue of the *correctness*, in theory, of imposing an aesthetic upon a judicial act.[48] Here we note simply another possible distinction between Flaubert and Cardozo: whereas no critic of the former ever would question the ultimate aptness of the beautiful phrase for a work of literary art, the revisionist perception of Cardozo[49] integrates the perceived depersonalization of his existence into a critique of his use of style in judi-

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[44] *See* Hyman, *Benjamin N. Cardozo: A Preface to His Career at the Bar*, 10 BROOKLYN L. REV. 1, 4 (1940); Patterson, *Cardozo's Philosophy of Law* (pts. 1-2), 88 U. PA. L. REV. 1, 71, 72-73; 156, 174 (1939); Shientag, *The Opinions and Writings of Judge Benjamin N. Cardozo*, 30 COLUM. L. REV. 597, 599 (1930); Stone, *supra* note 12, at 353.

[45] *See* Hamilton, *Cardozo the Craftsman*, 6 U. CHI. L. REV. 1, 21 (1938).

[46] "Poetics" is used here in a manner after Aristotle's *Poetics*.

[47] B. CARDOZO, *Law and Literature*, *supra* note 20, in SELECTED WRITINGS, *supra* note 20, at 339.

[48] *See* Part II (A)(1)(a) *infra* for a full discussion of the relationship of aesthetics to the judicial opinion.

[49] Frank, more than others, disliked Cardozo's style. *See, e.g.*, Frank, *Speech of Judges*, *supra* note 32, at 630; Frank Letter, *supra* note 32.

cial opinions. If, as Sartre[50] (and Nietzsche before him[51]) suggests, Flaubert substitutes style for substance in his novels, we still may appreciate the incontestable delight of that style; but if Cardozo erases the line between style and substance in an appellate opinion, does he not fundamentally alter the notion of the judicial function?

Noonan's critique of *Palsgraf v. Long Island Railroad* partially extends Frank's assessment of the unfortunate mutual effect of judicial depersonalization and self-conscious stylizing. For these critics, Cardozo's style served largely to *mask* the basic subjectivity which they deemed to be active (but not expressed) in his opinions. First, Frank:

> Cardozo was a contradictory personality: although he was a recluse, a retiring man, he devoted most of his life to public service and was therefore constantly making a public appearance. Deeply hurt, in his youth, by a certain bitter personal experience, he withdrew from the manner of living followed by most of his fellow men. Yet he did not seek refuge in morbid introspection or in an ivory tower. He did indeed retreat from 20th Century living. But he re-entered it. And—here is the point—he re-entered it disguised as an 18th Century scholar and gentleman. His observations of the contemporary scene were keen, but they were not quite the observations of a contemporary. He wanted, at one and the same time, to be in and yet out of what was happening in the America of his time.
>
> He achieved a compromise. And that compromise expresses itself in his style. It is neither 20th Century nor American. It is imitative of 18th Century English: he wrote of 20th Century America not in the American idiom of today but in a style that employed the obsolescent "King's English" of two hundred years ago.
>
> The result was by no means ugly. His writings have grace. But it is an alien grace.[52]

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[50] For Sartre, Flaubert's values were negative; literary form provided an escape for what Sartre calls "the *Weltanschauung* of the vanquished, epitomized in Flaubert's passive approach to existence." *See* 2 J. SARTRE, *supra* note 19, at 1178, 1287.

[51] In regard to all artists of whatsoever kind, I shall now avail myself of this radical distinction: does the creative power in this case arise from a loathing of life, or from an excessive *plentitude* of life? In Goethe, for instance, an overflow of vitality was creative, in Flaubert—hate: Flaubert, a new edition of Pascal, but as an artist with this instinctive belief at heart: *"Flaubert est toujours haïssable, l'homme n'est rien, l'oeuvre est tout."* . . . He tortured himself when he wrote, just as Pascal tortured himself when he thought—the feelings of both were inclined to be "non-egoistic." . . . "Disinterestedness"—the principle of decadence, the will to nonentity in art as well as in morality.

F. NIETZSCHE, THE CASE OF WAGNER 19 (1888, A. Ludovic trans. 1911).

[52] Frank, *Speech of Judges*, *supra* note 32, at 630.

Now Noonan:

> Severe impartiality led in *Palsgraf* to the aspect of the decision which seemed least humane: the imposition by Cardozo of "costs in all courts" upon Helen Palsgraf. Under the New York rules of practice, costs were, in general, discretionary with the court. An old rule, laid down in 1828, was that when the question was "a doubtful one and fairly raised, no costs will be allowed." In practice, the Court of Appeals tended to award costs mechanically to the party successful on the appeal. Costs here amounted to $142.45 in the trial court and $100.28 in the appellate division. When the bill of the Court of Appeals was added, it is probable that costs in all courts amounted to $350, not quite a year's income for Helen Palsgraf. She had had a case which a majority of the judges who heard it—Humphrey, Seeger, Andrews, Crane, and O'Brien—thought to constitute a cause of action. By a margin of one, her case had been pronounced unreasonable . . . . The effect of the judgment was to leave the plaintiff, four years after her case had begun, the debtor of her doctor, who was still unpaid; her lawyer, who must have advanced her the trial court fees at least; and her adversary, who was now owed reimbursement for expenditures in the courts on appeal. Under the New York statute the Long Island could make execution of the judgment by seizing her personalty. Only a judge who did not see who was before him could have decreed such a result.[53]
>
> [O]ut of a sequence of events as improbable as a Rube Goldberg cartoon, reconstructed by lawyers seeking partisan advantage, on a factual basis that was probably inaccurate, above the pain of Helen Palsgraf and the plodding of Matthew Wood and the calculation of the Long Island, Cardozo fashioned a statement of clarity, symmetry, simplicity. Presented with that pervasive problem of sociology, government, and law, the "unintended consequences" of a social action, he imposed order and aesthetic design and generality.[54]

Did an overriding aesthetic disguised as a rigorous impartiality indeed replace both natural humanity and fundamental rightness in some of Cardozo's opinions, as it may have (but to less deleterious ends) in Flaubert's novels? A counter-thesis would suggest that *style became part of function* for Cardozo,[55] inseparable from his task of resolving the disputes before him. The "light-giving answer" (Llewellyn's phrase describing Cardozo[56]) which he so often discovered within

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[53] J. NOONAN, *supra* note 28, at 144.

[54] *Id.* at 150.

[55] *See* Part II (A)(1) *infra*.

[56] Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U.CHI. L. REV. 224, 236 n.14, *reprinted in* K. LLEWELLYN, JURISPRUDENCE at 167, 181 n.14 (1962).

the facts at bar derived, precisely, from his aesthetics, from his poetic sense of the situation. In *Palsgraf*, as in every case with which he dealt, Cardozo therefore thoroughly considered the complex humanity of the litigating parties.[57]

The human grounding of Cardozo's aesthetic derived from his consistent acceptance of his *own* subjectivity. Perhaps in deference to his early studies of the Platonic triad,[58] Cardozo emphasized the value of the non-empirical and purely personal response:

> The truth, of course, is that in the development of law, as in other fields of thought, we can never rid ourselves of our dependence upon intuition or flashes of insight transcending and transforming the contributions of mere experience. "The great historians," says Windelband,"had no need to wait for the experiments and research of our psychophysicists. The psychology they used was that of daily life, of the common man, coupled with the insight of the genius and the poet. No one has ever yet succeeded in making a science of this psychology of intuitive understanding." What is here said of the historian is true also of the lawyer. A perception, more or less dim, of this truth underlies the remark of Graham Wallas, that in some of the judges of our highest court there should be a touch of the qualities which make the poet. The scrutiny and dissection of social facts may supply us with the data upon which the creative spirit broods, but in the process of creation something is given out in excess of what is taken in. Gény, in his *Science and Technique of Law*, reminds us how this notion of the development of law fits into the general scheme of recent philosophical thought, and in particular with the philosophy of Bergson and Bergson's school. "It is necessary, they tell us, to complete and correct the rigidity of the intellect by the suppleness of instinct, in a way to auscultate the mystery of the universe by means of a sort of intellectual sympathy." "The new philosophy preaches under the name of 'intuition' a mode of knowledge . . . which instals [*sic*] itself, in the very heart of reality," and penetrates, not from without, but from within.[59]

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[57] *See* Part I (B) *infra*.

[58] At Columbia, Cardozo studied Plato; the Platonic definition of justice based on a tripartite view of the harmonic man in some ways remained Cardozo's throughout his life: "[A] specific virtue is assigned to each part of the soul. Corresponding to the sensual part is temperance; corresponding to the emotional part, courage; corresponding to the rational part, wisdom. The unity of these three virtues is justice." Cardozo, Philosophy Lecture Notes, plate 42 (1889-1890) (available in Cardozo Collection, Butler Library, Columbia University) [hereinafter cited as Cardozo Lecture Notes].

[59] B. CARDOZO, THE GROWTH OF THE LAW 89-91 (1924) (footnotes omitted) [hereinafter cited as GROWTH].

For Cardozo, "severe impartiality"[60] on the bench is not just impossible; even if attainable, it would run counter to judicial excellence. Depersonalization through pure logic or use of data and rules can never overcome the adjudicator's innate response to the facts before him. The good judge, recognizing this, seeks to hone his instincts with the fine edge of everyday wisdom and experience.

The dynamism of the common law derives, for Cardozo, from the healthy intuition of its best practitioners and judges. Ingrained in a balanced judicial method, poetry emerges through the judge's intuition as surely as science speaks through his logical analysis. Yet the judge differs from the poet or novelist, at least insofar as his intuition should reflect more than pure subjectivity:

> 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 likes and dislikes, but upon an informed and liberal culture, a knowledge (as Arnold would have said) of the best that has been thought and said in the world, so far as that best has relation to the social problem to be solved. Of course, when our utmost effort has been put forth, we shall be far from freeing ourselves from the empire of inarticulate emotion, of beliefs so ingrained and inveterate as to be a portion of our very nature. "I must paint what I see in front of me," said the elder Yeats to his son, the poet. "Of course, I shall really paint something different because my own nature will come in unconsciously." There is nothing new in all this.[61]

Cardozo's "informed and liberal culture" was to act as the mediating influence upon overly personalized responses. He perceived, as had Yeats, that subjectivity rules observation; yet, he came to trust the deepest surges of his own essential nature, knowing that the subjective flow had been enlivened, if not by experience, then at least by culture.[62]

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[60] *See* J. NOONAN, *supra* note 28, at 144.

[61] B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 127 (1928) [hereinafter cited as PARADOXES].

[62] Cardozo's sense of "culture" is discussed more fully in Part I (B) *infra*. Leon Green caught the spirit of that culture this way:

> Few judges have experienced less of the great activities of their day. Yet the scope of [Cardozo's] judicial decisions covers the whole range of human affairs and everywhere he is at home. He understood the problems of life about him without having much part in them. He learned by dwelling in the great storehouses of literature, history and science. He attuned his mental processes to translate the written word into human action however intricate.

Green, *Benjamin Nathan Cardozo*, 33 ILL. L. REV. 123, 123 (1938).

Flaubert distrusted his own basic nature and consequently sought, hopelessly, the impersonality of craft.[63] Cardozo, no richer in personal experiences or familial contentment than the novelist, chose nonetheless to call the culture around him onto himself, and to find it vibrant and developing. In that choice lay all Cardozo's nobility, if not his saintliness, and therein, too, lay his dramatic contribution to a poetic theory of law.

1. CARDOZO AS THEORIST: A POETICS OF THE JUDICIAL FUNCTION

A. *The Existential Judge*

Caught contextually between the "new faith" of the judicial realists and "the quest for certainty" of the bench and bar,[64] Cardozo's statements on judicial method express an existential dilemma. Rejecting the comfort of rules easily applied, Cardozo nonetheless criticized "a petulant contempt"[65] of whatever ordering wisdom judges had hitherto brought to bear on certain areas of human conduct. Categorically retaining, in every case that came before him, the power to employ the tools of judicial craftsmanship in a creative manner, Cardozo recognized the agony of that power and sought constraints on pure subjectivity. In difficult cases especially (and who but the judge so denominates them?), it is as though the judge swims in a

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[63] Many of Flaubert's letters indicate that the basis of his quest for artistic "impersonality" was this dissatisfaction with self. "Passion doesn't make poetry," he wrote in 1852, "and the more you're personal the weaker you'll be. I've always sinned that way—by putting too much of myself into what I've done." Letter from Gustave Flaubert to Louise Colet (1852), *reprinted in* 2 G. FLAUBERT, *supra* note 21, at 82. An explanation may lie in sentiments such as the following, expressed in a letter to his mother in 1850. In this letter, Flaubert articulates a sense of professional and historical alienation: "You paint wine, love, women, glory on the condition my friend that you are neither drunkard, nor lover, nor husband, nor hero. Once engaged in life one sees it poorly, one suffers from it or one enjoys it too much. To me, the artist is a monstrosity, something outside of nature . . . ." Letter from Gustave Flaubert to Mme. Flaubert (his mother) (Dec. 15, 1850), *reprinted in* 2 G. FLAUBERT, *supra* note 21, at 19. Translation by author.

Although Flaubert stands as the finest example in modern literature of the tension between internal and external realism, some great novelists after Flaubert also grappled with the subjective nature of creative observation, and seemed more at home with the idea. To Proust and Joyce, for example, the literary act consisted not in the recreation of the world "as it is," but, rather, as seen by the artist. There was a conscious acceptance that objective reality consisted in the sum total of the genius' own subjective impressions over time. *See* G. LUKÁCS, THE THEORY OF THE NOVEL (1920, translated ed. 1971) for the finest theoretical discussion of the place of subjectivity in the mimetic genre of the modern novel.

[64] Address by Benjamin N. Cardozo, New York State Bar Association (Jan. 22, 1932), *reprinted in* SELECTED WRITINGS, *supra* note 20, at 7, 8-9 [hereinafter cited as Cardozo State Bar Address].

[65] *Id.* at 14.

self-defined sea, between two predetermined harbors (his own pure subjectivity and the tyranny of rules), both of which he must avoid to remain viable:

> What Professor Dewey says of problems of morals is true, not in like degree, but none the less, in large measure, of the deepest problems of the law; the situations which they present, so far as they are real problems, are almost always unique. There is nothing that can relieve us of "the pain of choosing at every step."[66]

One individual (or seven, or nine) confronts a reality, unique in its flavoring aspects, which seeks his ordering hand. But that individual himself floats free; not being defined, how will he define?

> There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. 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 [William] James's phrase of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice shall fall.[67]

Few cases relieve the adjudicator, through some intrinsically clear sign, of his freedom of choice. Cardozo generally resisted quantifying them,[68] realizing that the judicial ordering of facts itself determines the ease or difficulty with which any case will then be decided.[69] Every circumstance engages the adjudicator's "indwell-

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[66] B. CARDOZO, GROWTH, *supra* note 59, at 67 (footnote omitted).

[67] B. CARDOZO, JUDICIAL PROCESS, *supra* note 24, at 12 (footnote omitted).

[68] Far too much has been made of the single passage in which Cardozo appears to quantify cases in which the judge has little creative sway. The passage, *see* B. CARDOZO, GROWTH, *supra* note 59, at 60, must be read in its context, a limited but stern reminder to lawyers that if they neglect the basics of their trade they will pay the price. Creativity, the subject of the rest of GROWTH, arises only when the legalistic elements of any case have been effectively assimilated. This lesson having been communicated, Cardozo proceeds to make clear that the good judge is almost always functioning in a mode of potential creativity. As Frankfurter put it of Cardozo: "He imparted his qualities to all cases in which he wrote, great or small, . . . some causes are born great and the judge need only be equal to the occasion. Other causes achieve greatness through the insight and creative power of the judge conveyed with art." Frankfurter, *Mr. Justice Cardozo*, 24 A.B.A.J. 638, 638 (1938).

[69] In his long letter to Cardozo, Frank criticizes him directly for failing to recognize how strongly the judge's subjective ordering of the facts affects the legal reasoning which then ensues. Frank Letter, *supra* note 32. The criticism is misplaced; Cardozo not only exemplified the variation in fact-structuring from case to case, he also was conscious of it. As Cardozo stated: "Let the facts be known as they are, and the law will sprout from the seed and turn its branches

ing, creative energy";[70] reasons are "nicely balanced"[71] only rarely, and even then solely on the adjudicator's self-constructed scales. The rule itself comes into being only when a particular judge lucidly translates the primal response to a given set of facts into terms of future-oriented generalization: "I have no doubt that the inspiration of the rule is a mere sentiment of justice. That sentiment asserting itself, we have proceeded to surround it with the halo of conformity to precedent."[72]

Aids exist to temper the dilemma of the judge who might otherwise find himself constantly in the throes of a Heraclitan "endless 'becoming.'"[73] Four categories of assistance are delineated in Cardozo's well-known "methods":[74] legal logic, legal history, legal custom, and "the *mores* of the day, with its outlet or expression in the method of sociology."[75] But each method is merely "one organon among many";[76] thus, although the four methods provide an element of salutary depersonalization to what would otherwise be an awesomely subjective task, they can do no more than create an additional area of choice:

> Which method will predominate in any case may depend at times upon intuitions of convenience or fitness too subtle to be formulated, too imponderable to be valued, too volatile to be localized or even fully apprehended. . . . There are vogues and fashions in jurisprudence as in literature and art and dress. But of this there

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toward the light . . . . The worst [judicial blunder] would have been escaped if the facts had been disclosed to us before the ruling was declared." Address by Benjamin N. Cardozo, New York Academy of Medicine (Nov. 1, 1928), *What Can Medicine Do for Law?, reprinted in* SELECTED WRITINGS, *supra* note 20, at 371, 373. *See also In re* State Indus. Comm., 224 N.Y. 13, 119 N.E. 1027 (1918) ("We deal with the particular instance, and we wait till it arises.") *Id.* at 18, 119 N.E. at 1028. *See generally* Howard v. City of Buffalo, 211 N.Y. 241, 257, 105 N.E. 426, 430 (1914), for an articulation of the judge's need for, and power over, the particular factual circumstances before him. As Bernard L. Shientag characterized it in the course of a fine article which is particularly sensitive to Cardozo's fact-awareness: "The predominant characteristics of his philosophy are pragmatic—a flexibility, rather than a dogmatic rigidity; a concern with facts and realities and consequences, rather than with abstractions and formal rules and metaphysical subtleties. . . ." Shientag, *supra* note 44, at 601. Leon Green observed simply that Cardozo was "far more interested in the solution of the particular problem than in setting up a rule." Green, *supra* note 62, at 124.

[70] B. CARDOZO, JUDICIAL PROCESS, *supra* note 24, at 43.

[71] B. CARDOZO, GROWTH, *supra* note 59, at 58.

[72] B. CARDOZO, JUDICIAL PROCESS, *supra* note 24, at 44-45.

[73] *Id.* at 28.

[74] *Id.* at 31.

[75] B. CARDOZO, GROWTH, *supra* note 59, at 62 (emphasis in original); *see* B. CARDOZO, JUDICIAL PROCESS, *supra* note 24, at 30-31.

[76] Cardozo, *Holmes*, *supra* note 23, at 685.

> will be more to say when we deal with the forces that work subconsciously in the shaping of the law.[77]

Cardozo's judicial method stresses its own inexactness. It is more a poetics than a logical treatise, and it attempts less a methodological depersonalization than a creative framework of decision-making.[78] "No recipe for the mingling of the ingredients has yet been formulated,"[79] he tells us. Certain only is the adjudicator's freedom, the awful burden of choice, the unknowable depths of human motivation.

B. *Culture as Cardozo's Fourth Method*

Existentially alone during the judgmental act, communing with an internal force about which little is known, the judge may turn for guidance to four more objective sources of wisdom. Cardozo never doubted that past judges have said and done things worth preserving in, and applying to, many new cases; present adjudicators apply these precedents through the methods of legal logic, history, and custom. But judges also frequently draw inferences from a more representative base of knowledge, available within Cardozo's fourth method. In the following passage, Cardozo expands on the obscurely named "method of sociology" (which Beryl Levy prefers to call "ethics"[80] or "social values"[81] and which Myres McDougal recently called "justice or sociology"[82]) and adds to his "poetics" a new source 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 many of the 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 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 the law.[83]

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[77] B. CARDOZO, JUDICIAL PROCESS, *supra* note 24, at 58.

[78] Cardozo disliked formulae and positivistic data-gathering in a vacuum of principle and choice. He pitied the judge who "lacks an adequate philosophy," for "he either goes astray altogether, or at best does not rise above empiricism . . . . We must learn that all methods are to be viewed not as idols but as tools." B. CARDOZO, GROWTH, *supra* note 59, at 102-03.

[79] *Id.* at 64.

[80] B. LEVY, *supra* note 10, at 48.

[81] Levy, *Cardozo Twenty Years Later*, 13 REC. A.B. City N.Y., 461, 461 (1958).

[82] *See* McDougal, *The Application of Constitutive Prescriptions: An Addendum to Justice Cardozo*, 1 CARDOZO L. REV. 135, 136 (1979).

[83] Cardozo State Bar Address, *supra* note 64, in SELECTED WRITINGS, *supra* note 20, at 18.

Some years ago, these words helped Edwin G. Patterson to fathom the extent to which Cardozo's fourth method adapted the fullness of the "social mind" to his everyday tasks on the bench.[84] But Patterson erred in distinguishing (as Cardozo never did) this method from the first three, calling it "the residuary legatee of the testament conferring judicial powers."[85] To the contrary: for Cardozo, culture joins *equally* in the judicial mix. It is more than G. Edward White's "reserve" available only on those rare occasions when the three strictly "legal" methods do not suffice.[86] Culture, for Cardozo, *is* law; it can interrelate in almost every case with precedent to achieve effective judgment.

The method of sociology allows Cardozo to remind the judge of his duty to be sensitive to the values of his surrounding culture. Rules alone will persuade only where they are clear *and*, in a sense, where no convincing view of the case exists that would take it out of the rule's sway. (Cardozo puts it this way: "if they [the precedents] are plain and to the point, there *may* be need of nothing more."[87]) As we shall shortly note,[88] Cardozo's own example at the bar and on the bench serves to indicate that, even when a rule seems clearly applicable, the persuasive and culturally attuned advocate and judge need not decide to use it.

Anarchy? Neo-realism? Neither. Cardozo's judicial system is predicated upon an expansive inductionism with precedent and culture at its base. Where culture inheres in one of the precedents logically evoked by the facts, the adjudicator need only summon that precedent, or rule, to the fore; but the precedent's functional correctness *depends on its juxtaposition* to that individual case. Llewellyn, discussing precisely the particular aesthetic of the rule, notes the tension in our legal system between the need for some order and the need to be alive to the nuances of each set of facts:

> Besides economy and efficiency, the rule of law requires rightness. The situation must be rightly grasped, the criterion rightly seen, the effect neatly devised to purpose, else neither clarity nor economy of language can serve true beauty . . . . Let me put it thus: a graceful structure of doctrine can intoxicate—as Langdell's has. But if it does not serve sense, it remains bad legal esthetics. Per contra, to seek merely to serve sense, case by case, will yield a welter. A welter also is plainly unesthetic.

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[84] Patterson, (pt. 2), *supra* note 44, at 168.

[85] *Id.* at 164.

[86] G.E. WHITE, *supra* note 33, at 258.

[87] B. CARDOZO, JUDICIAL PROCESS, *supra* note 24, at 20 (emphasis added).

[88] *See* Part II (B) *infra*.

> The larger whole of rules must thus serve not only the immediate, but the larger need: sense, finder-value, balance—as well as relative precision. That is, to be esthetically satisfying. Here, there is a range of creative effort which no individual rule can offer.[89]

For Cardozo, the discovery of the proper balance between rule and facts became an aesthetic. The facts start the logical process; the way they are organized[90] allows the inductive invocation of a limited number of precedents. Once the universe of possibly applicable rules has been inductively laid bare, the deductive process back to the facts will normally close the inquiry.

Assume the following hypothetical: a baby crawls into the ocean while a healthy man looks on, munching a hot dog. He moves not a limb, save to finish his snack, and the baby drowns. Sued by the aggrieved parents, he demurs. Our cultural sense is offended, but the centuries-old rule negating an affirmative duty to rescue seems to foreclose liability. Deduction from the rule to the facts would require sustaining the demurrer. Taken before Cardozo, how would the hypothetical plaintiffs fare? Precedent calls for a nonsuit, but culture makes a more complex plea. On the one hand, culture, for Cardozo, *is* the rule; even in cases where "injustice and anachronism"[91] follow from its application, the rule will not lightly be avoided. "The gain may justify the sacrifice," says Cardozo, "yet it is not gain without deduction. There is an attendant loss of that certainty which is itself a social asset."[92] On the other hand, culture involves more; it is the *trained sense in the adjudicator of the common perception of the surrounding society*, not so much in its ideal as in its *actual* form ("a vast conglomeration of principles and customs and usages and moralities"[93]). The single judgment, on the right set of facts, can untangle a mass and clarify a culture.

For Llewellyn, too, the aesthetic of the rule needs to include this larger meaning of culture, and his words deserve application to our hypothetical drowning case:

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[89] K. LLEWELLYN, *supra* note 56, at 195.

[90] "[Cardozo] was able to reconstruct the concrete factual situation existing at a time long past and to do this in such a way that his legal conclusions appeared almost inevitable . . . . [I]n Cardozo's hands, the apparently trivial case often turned out to be of telling significance." Evatt, *Mr. Justice Cardozo*, 52 HARV. L. REV. 357, 357 (1939).

[91] *See* B. CARDOZO, *Law and Literature*, *supra* note 20, in SELECTED WRITINGS, *supra* note 20, at 360.

[92] *Id.* at 360.

[93] Cardozo State Bar Address, *supra* note 64, in SELECTED WRITINGS, *supra* note 20, at 18.

> And still, in regard to the rule of law itself, there remains an esthetic aspect undiscussed . . . right law must be intelligible, intellectually accessible, to the people whom that law is to serve, whose law it is, the law-consumers and the citizen "makers" of the law. "Function," conceived purely in terms of the staff of legal technicians, could indeed be achieved by language which would carry no meaning or wrong meaning to such laymen. But as I have tried to develop elsewhere, even the high temporary effectiveness which can be had by skillful black-art language is unsound because it cannot be relied on to continue effective. Only the rule which shows its reason on its face has ground to claim maximum chance of continuing effectiveness; *so that to satisfy, in this, the lay need of relative accessibility, of friendliness and meaningfulness of the reason, is at the same time to do a functionally more effective job on the side of pure technique.* There is thus no need, in widening one's view of what the function of rules of law is, to risk confusion on the marks of beauty. Quite the contrary. For to see the wider function is to find the road back to that rightest and most beautiful type of legal rule, the singing rule with purpose and with reason clear, whose nature, whose very possibility, the Formal Perpendicular has led our legal thinkers to forget—almost to deny.[94]

The cultural sense of the adjudicator will determine the liability of our hot dog muncher, the rule being only part of the wisdom which may be aptly applied to the case. In Cardozo's court, unlike some others, the imperative voice of a wider culture would never be stilled by the existence of a strong precedent (for a Massachusetts court in an analogous case,[95] the moral issue disappears as "immaterial"); yet, Cardozo's respect for judicial utterances, especially those honored by time, must command his attention first. On this matter, we have a text:

> For years there has been a dogma of the books that in the absence of a special duty of protection, one may stand by with indifference and see another perish, by drowning, say, or fire, though there would be no peril in a rescue. A rule so divorced from morals was sure to breed misgivings. We need not be surprised to find that in cases of recent date, a tendency is manifest to narrow it or even whittle it away. We cannot say today that the old rule has been supplanted. The rulings are too meagre. Sown, however, are the seeds of scepticism, the precursor often of decay. Some day we may awake to find that the old tissues are dissolved. Then will come a new generalization, and with it a new law.[96]

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[94] K. LLEWELLYN, *supra* note 56, at 195.

[95] Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928).

[96] B. CARDOZO, PARADOXES, *supra* note 61, at 25-26.

How often Cardozo's court found in the facts before it the mechanism to transform decayed precedent into culturally attuned generalization! "Law accepts as the pattern of its justice the morality of the community whose conduct it assumes to regulate,"[97] he observed. The generalization discovered by the court to be applicable ideally embodies the wisdom of the surrounding culture; it is not, like the French symbolist poem, a hermetic piece of prose designed to generate "drily logical" analyses in a social vacuum.

As we have seen in various passages from his essays, Cardozo uncovers a broad canvas when he reveals the cultural aspect of judicial craftsmanship. "A vast conglomeration" of knowledge, almost Solomonic in its scope, can become part of the law if the right factual situation arises before the right judge. The particular *use* of culture in any given case depends on the intuitive leanings of the individual judge. It is possible (and it indeed happened) that the same culture might produce a *Palsgraf v. Long Island Railroad*[98] and a *Hynes v. New York Central Railroad*.[99] The judge in the first case, moved to emphasize the social detriment in extending liability to all natural consequences of a negligent defendant's act,[100] demonstrates thereby no less a cultural sense than if he had compensated Mrs. Palsgraf for her injuries.[101] (Indeed, if the judge extended his analysis to the strictly personal aspects of Mrs. Palsgraf's admittedly harrowing fate during and after the incongruous incident, should he not then logically proceed to factor in the equally pathetic fate of the railroad employees who might be fired if their sloppy handling of the infamous newspaper-wrapped package resulted in liability?) But in the *Hynes* case, the same judge sensed that ancient property law definitions of trespass no longer embodied social values when applied to personal injuries and the everyday swimming habits of children.[102] He thus stressed in *Hynes* what he refused to stress in *Palsgraf:* the dramatic personal aspects of plaintiff's case.

How does the judge develop a refined sense of his community's culture? If a rule strives to be the best possible expression of a society's wisdom on a given issue, including a constant awareness of rele-

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[97] *Id.* at 37.

[98] 248 N.Y. 339, 162 N.E. 99 (1928).

[99] 231 N.Y. 229, 131 N.E. 898 (1921). *See* detailed discussion of this case at Part II (B)(1) *infra*. *See also* Hamilton, *supra* note 45, at 9.

[100] 248 N.Y. at 342-45, 162 N.E. at 99-101.

[101] *See* J. NOONAN, *supra* note 28, at 150, and text accompanying note 53 *supra*, for a contrasting view of this case. An answer to Noonan's critique of *Palsgraf* is offered in Weyrauch, *Law as Mask—Legal Ritual and Relevance*, 66 CALIF. L. REV. 699, 710 (1978).

[102] 231 N.Y. at 233-36, 131 N.E. at 899-900.

vant prior judicial utterances, what endows the adjudicator with that wisdom? In word and deed, Cardozo gives us the hint of an answer to this question.[103] Speaking with the voice of his lifelong idol, Matthew Arnold,[104] he asks the law to "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."[105] Culture, like precedent, must be discovered. It arises not only from the judge's own experiences, but also from the assimilation of a *notion* of culture, available from the populace and from the body of great texts to which every epoch should refer in its quest for social coherence and wisdom. For Cardozo in particular, this acquired culture arose from his training in the humanities, approached from a firm base of classical and Jewish influence.

Along with the humanities, Cardozo looked to judge-made law as a source of culture.[106] Thus, for all his sensitivity to the judge's ultimate freedom in any case, Cardozo actively supported various attempts to "restate" formally the case law. Consistently influenced by his Judeo-classical background, Cardozo surely believed that culture could also be embodied in such restatements (or codes), for the organization and articulation of legal precedent and rule in and of itself would give expression to "the principle and practice" of the community, as refracted, of course, through the sensitivities of the individual codifiers.[107]

C. *Intuition and the Use of the Four Methods*

However consistent with culture was Cardozo's quest for a restatement, his essential jurisprudence normatively elevated intuition

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[103] *See* Part II *infra*.

[104] *See* B. Cardozo, *The Moral Element in Matthew Arnold* 1 (unpublished paper in Cardozo Collection, Butler Library, Columbia University) [hereinafter cited as *Arnold*], a copy of which appears in a slightly different form in SELECTED WRITINGS, *supra* note 20, at 61. To assist the reader, parallel citations to the Hall edition have been provided.

[105] B. CARDOZO, PARADOXES, *supra* note 61, at 37.

[106] Some commentators appear to overemphasize the purely legalistic elements of Cardozo's theories. *See* text accompanying notes 85-86 *supra*.

[107] Interestingly, Llewellyn, who shared many of Cardozo's views on intuition and aesthetics in the law, *see* discussion in Part II (A)(1)(a) *infra*, also shared his urge to codify. *See* Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975). Cardozo's fundamental criterion in the law was growth; for him (and Llewellyn), restatement aided growth. "[It] will clear the ground of debris. It will enable us to reckon our gains and losses, strike a balance, and start afresh." B. CARDOZO, GROWTH, *supra* note 59, at 19. For both these thinkers, restatement may have provided an aesthetically pleasing medium for the cultural wisdom of judicial precedent, as tempered by the ordering hand of the codifier (rather than the legislature). *See* Danzig, *supra* at 625 (citing K. LLEWELLYN, THE COMMON LAW TRADITION 122 (1960)).

over rule in any given case. Thus, in what we have called Cardozo's poetics,[108] competence in the legalities was a necessary,[109] but not a sufficient, approach to the law. He tells us of his discovery "that the creative element was greater than I had fancied."[110] He learned that non-legal culture, too, was a part of the law, and that effective practice and through adjudication consisted of the correct mix of disparate ingredients.[111]

This "mix" is the idiosyncratic element in the law, the intuition which, for Cardozo, made the field meaningful, fascinating, and dynamic. Personal as it was, however, it would not be true to say, with G. Edward White, that Cardozo's "intuitions were sound, but he rarely revealed their existence."[112] To the contrary, Cardozo consciously adopts intuition into his method. The process of intuition deserves careful study and is susceptible to at least some tentative generalizations. Methodological approaches to the personal, in Cardozo's words, may yield "not so much a key as a clew."[113]

In active dialogue with the realists, Cardozo's notion of intuition partakes somewhat of Hutcheson's "hunch"[114] and considerably more of Pound's "trained intuition,"[115] but differs ultimately from both. It is neither the result of that morning's breakfast, nor even "the instinct of the experienced workman."[116] Rather it is the ineffable surging forth of everything that defines the individual: personal experience, of course, but also the transcending and transforming power of sensate[117] and inherited knowledge. The common law grows as each generation produces its share of poetic practitioners, those whose everyday words about the law have filtered through a sensitivity almost poetic in its inclusiveness.

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[108] *See* text accompanying note 46 *supra*.

[109] "I assume then, what Holmes calls a working knowledge of the business." B. CARDOZO, GROWTH, *supra* note 59, at 98.

[110] *Id.* at 57; *see* B. CARDOZO, JUDICIAL PROCESS, *supra* note 24, at 166.

[111] *See* text accompanying note 79 *supra*.

[112] G.E. WHITE, *supra*, note 33, at 283.

[113] B. CARDOZO, GROWTH, *supra*, note 59, at 93.

[114] Cardozo State Bar Address, *supra* note 64, in SELECTED WRITINGS, *supra* note 20, at 26.

[115] B. CARDOZO, GROWTH, *supra* note 59, at 93.

[116] *Id.*

[117] In every stimulus, in every sensation, some trace of each of these three elements, knowledge, feeling and will, is present. There is no sensation that does not contribute something, however small, to our knowledge, to our pleasure and pain, and to our future action. An act is distinguished as an act of knowledge, feeling, or will, according to that feature of it which is predominant at the moment.

B. CARDOZO, *Psychology Lectures*, in SELECTED WRITINGS, *supra* note 20, at 53, 59.

Returning briefly to the Flaubert comparison discussed above,[118] we see that Cardozo was striving for a kind of depersonalization within the craftsman's deepest subjectivity, a process which he always associated with poetry. Like Flaubert's creative act, Cardozo's consisted of an emptying out of self solely to allow subsequent replenishment of a high order. The judge's voice was to be in part an almost reflexive instrument of an extrinsic, absolute model:

> Justice in this sense is a concept by far more subtle and indefinite than any that is yielded by mere obedience to a rule. It remains to some extent, when all is said and done, the synonym of an aspiration, a mood of exaltation, a yearning for what is fine and high. "Justice," says Stammler in a recent paper, "is the directing of a particular legal volition according to the conception of a pure community."[119]

Cardozo's language here reveals the *ethical basis* of his notion of intuition, grounded in an almost anachronistic ethical absolutism tempered by a pragmatic sense of judicial balance.[120] Judgment requires refined intuition as well as cold logic. It requires an instinctive awareness of the correct outcome on the facts, an outcome that is "correct" not solely from the judge's personal perspective:

> Many are the times, however, when there are no legislative pronouncements to give direction to a judge's reading of the book of life and manners. At those times, he must put himself as best he can within the heart and mind of others, and frame his estimate of values by the truth as thus revealed. Objective tests may fail him, or may be so confused as to bewilder. He must then look within himself.[121]

Each opinion, then, gives voice to the judge's intuitive approach to reality, which may be narrow or broad, ignorant or informed, purely instinctual or experientially rich. "Wisdom does not come to those who gape at nature with an empty head," says Cardozo quoting Morris Cohen;[122] rather it is the result of an "advanced intuition,"

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[118] *See* text accompanying notes 21-22 *supra*.

[119] B. CARDOZO, GROWTH, *supra* note 59, at 87.

[120] "If by the word 'truth'," says Santayana, "we designate not the actual order of the facts, nor the exact description of them, but some minor symbol of reconciliation with reality on our own part, bringing comfort, safety and assurance, then truth also will lie in compromise; truth will be partly truth to ourself, partly workable convention and plausibility."
B. CARDOZO, GROWTH, *supra* note 59, at 128.

[121] B. CARDOZO, PARADOXES, *supra* note 61, at 55-56.

[122] M.R. COHEN, REASON AND NATURE 17 (1931), *quoted in* Cardozo State Bar Address, *supra* note 64, in SELECTED WRITINGS, *supra* note 20, at 26-27.

"flashes of insight"[123] derived from "experience usually extensive and often profound."[124]

Cardozo's notion of "experience" includes, as we have seen, knowledge acquired from others through books. His judicial mix, his manner of organizing and then formulating into words the factual and legal possibilities before him, demonstrates the power of education upon intuition. His models came from the disciplines of humanistic culture, particularly literature and philosophy, producing a fine intuition and an expansive culture. Although these central elements of Cardozo's jurisprudence may, by their challenging amorphousness, leave him open to criticism, their example for us is thereby no less forceful:

> "Those who make no mistakes," we are reminded by Sir Frederick Pollock, "will never make anything, and the judge who is afraid of committing himself may be called sound and safe in his own generation, but will leave no mark on the law." We are not to forget that generalizations have their value, their fructifying virtue, in law as in science generally, though the later years may prune them or discard them altogether. The judicial method of the future must see to it that judicial inventiveness shall not be dessicated or stunted, that generalization shall be as free and as bold as in the past, perhaps freer and bolder. Unless it can accomplish this, it is headed toward disaster.[125]

II. CARDOZO AS MODEL: THE POETIC SKILLS IN THE METHOD OF CULTURE

A. *Disciplined in the Humanities*

In a period of growing technological impersonality, Cardozo's stress on culture and intuition in the law should be revived. The increasing influence of positivism in legal data-gathering reminds us that "disaster" may follow where expansiveness and imagination no longer find a place in the law. It may be time to recall the essential Cardozo, the great judge whose lasting contribution to the law was at least as poetic as it was scientific.

Characterized by Judge Irving Lehman as "[a] student of literature and philosophy, a lover of the classics,"[126] Cardozo brought

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[123] *See* B. CARDOZO, GROWTH, *supra* note 59, at 89.

[124] Cardozo State Bar Address, *supra* note 64, in SELECTED WRITINGS, *supra* note 20, at 27 n.4.

[125] *Id.* at 31.

[126] Lehman, *Memorial to Justice Cardozo*, 24 A.B.A.J. 728, 728 (1938).

with him to bar and bench a rigorously disciplined intuitive culture. His strengths were those of the liberal humanities: foreign languages, mathematics, the history of ideas. Verbal gifts emerged from childhood on; before he reached the age of ten, surrounded by a highly literate family and tutoted by a well-known popular writer, he composed an altogehter witty poem called "The Dream."[127] At nineteen he graduated from Columbia, having won honors in Greek, written an essay of lasting excellence on Matthew Arnold and been voted "the cleverst man and the second most modest"[128] in the class.

If dexterity with the word marked him early, so did a strong ethical sense. George Hellman describes the significance to the Cardozo family of its Jewish heritage;[129] scholars have since observed in Cardozo's style and opinions an occasional tone of prophetic fire.[130] His urge to codification through restatement indicates less an allegiance to rules than a kind of Judaic faith in legal culture and intuitively sound generalization. Justice lived in Cardozo as it lives in most Jews, not as a metaphysical abstract but as a social *fact*, the presence or absence of which helps to define an individual, a situation, or a society. We may infer from his background that Cardozo possessed four specific skills ordinarily associated with literary culture: style and rhetoric, hermeneutics, value awareness, and imagination. All coalesce in what Cardozo calls the "architectonics"[131] of the opinion. Each skill is worthy of individual description and exemplification.

1. *Style and Rhetoric*

(a) *Style and Judicial Opinion: An Overview*

Except by Cardozo's example, this essay intends neither to define the word "style," nor to analyze systematically its place in the typical judicial opinion. Suffice it to suggest here that style inevitably contributes to, and often controls, the present and future meaning of appellate opinions, even those not actually written by the judge who signs them. Cardozo's case clearly demonstrates, particularly given his awareness of the integral place of style in the law, that the effec-

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[127] G. HELLMAN, *supra* note 18, at 16.

[128] *Id.* at 25.

[129] *Id.* at 12-14.

[130] *See, e.g.*, B. LEVY, *supra* note 10, at 26; J. NOONAN, *supra* note 28, at 147. George R. Farnum styles this as "moral austerity." Farnum, *supra* note 15, at 596. *See also* cases discussed in Part II (B)(3) *infra*.

[131] B. CARDOZO, *Law and Literature*, *supra* note 20, in SELECTED WRITINGS, *supra* note 20, at 352.

tive use of style, as often as "logic," underlies successful appellate advocacy and adjudication.

But style here implies more than an author's particular choice of individual words. There is a kind of contra-sense in one observer's position that Cardozo's "facile rhetoric hides many an argument that does not click or marches to a wrong conclusion."[132] Cardozo realized that the *form of an opinion actively contributes to its correctness*;[133] style thus conceived is an element to be evaluated as part of the correctness of a decision, not as an ancillary or merely ornamental element. For him, the use of language was subservient to what he called the "architectonics" of the opinion, *the aesthetic structure of the whole*. Architectonics subsumes elegant language (or "facile rhetoric"), but it also embodies within it the functional organization of the facts and the legal conclusions to be drawn.[134]

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[132] Hamilton, *supra* note 45, at 19.

[133] His undergraduate exposure to Aristotle gave rise to Cardozo's synthesis of form and content: "[F]orm is identical with essence . . . . Matter has no significance until it has form." Cardozo Lecture Notes, *supra* note 58, at plates 99-100. The mature Cardozo retained this belief: "Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity." Cardozo, *Law and Literature*, *supra* note 20, in SELECTED WRITINGS, *supra* note 20, at 340. Flaubert, similarly, fused form and substance:

> You tell me that I pay too much attention to form. Alas! It's like body and soul, the form and the idea; for me, they are a unity, and I don't know what one is without the other. The more beautiful an idea is, the more sonorous the phrase, believe me. The precision of the thought makes (and is itself) that of the word . . . .

Letter from Gustave Flaubert to Mlle. Leroyer de Chantepie (Dec. 12, 1857), *reprinted in* 3 G. FLAUBERT, *supra* note 21, at 116. Translation by author.

Despite the superficial similarity between them, Cardozo's view differed from Flaubert's in that, for the latter, form ultimately overcame substance. The phrase existed for itself and the "idea" behind it all but disappeared into the aesthetic. *See* text accompanying note 50 *supra*. For Cardozo, however, substance (values) had a dynamic existence which pervaded the formal. This essential difference between the two becomes critical when we attempt to square the notion of the identity of form and substance with the idea of justice. Although some modern theories of justice posit that the attainment of a just result should be independent of form, they elevate into a *duty* the importance of articulating the reasons for the result. *See* Dworkin, *Justice and Rights*, 40 U. CHI. L. REV. 500, 510-19 (1973), *reprinted in* R. DWORKIN, TAKING RIGHTS SERIOUSLY at 150, 160-68 (1977); J. RAWLS, A THEORY OF JUSTICE 54-60 (1971). Ronald Dworkin, for example, has reformulated the position of John Rawls regarding the duty of the adjudicator to explain to the general public how each particular decision conforms to a consistent theory of justice: "[I]t demands that decisions taken in the name of justice must never outstrip an official's ability to account for these decisions in a theory of justice. . . ." R. DWORKIN, *supra*, at 162. The central role of form in Cardozo's notion of the judicial decision thus can even be reconciled with the modern theory that form has no place in the process of achieving the just result. Indeed, Cardozo does not suggest that style governs how the result is reached, he merely puts forth the proposition that style contributes to the correctness of the judicial decision. Thus, for both Cardozo and Dworkin the judicial decision has a special place in jurisprudence. Cardozo, however, not only accepted the idea that a judge is under a duty to explain the result reached, he went so far as to develop a theory of effective explanation—the poetics of the judicial method.

[134] For a detailed discussion of Cardozo's "architectonics," *see* Part II (A)(1)(b) *infra*.

Above all, style can be described in Cardozo as the drive to express through the opinion's form the essential *rightness* of the ultimate decision reached in each case. There inheres in this view of style a kind of Judeo-classical aesthetic[135] wholly in keeping with Cardozo's perception of culture more generally. Style for Cardozo exists exclusively to serve the *function* of the appellate opinion: to apply to the particular dispute, as correctly as possible and in a manner which can be employed again, the wisdom of the surrounding culture. The beautiful opinion is the functional opinion, to be judged not merely in terms of strictly legalistic (or "logical") correctness, but also in terms of cultural (or ethical) correctness.

In evaluating Cardozo's style, then, we should have in mind at least three elements: the beauty of his language in itself; the presence of some harmonic relationship between the language used and a possible perception of the applicable precedents' meaning; and the integration of language and structure to the larger cultural sense of the given opinion.

As we enter these cases, we may pose a question such as the following: "To what extent is Cardozo's style a *necessary* element in the furthering of the understanding of the legal rule in question and the correctness of the decision as between the parties?" Llewellyn appears to be establishing this model in the following passage toward the end of his essay, on *The Good, the True, the Beautiful, in Law*:[136]

> Thus the only esthetic rule which I recognize about adornment in relation to function is that adornment is best when it can be made to serve function, and is bad when it interferes with function; beyond that, the quest for richness of beauty and meaning seems to me a right quest. You may call these prejudices; to me, they are considered values. But whether you like them or not, in general, you will have difficulty in dodging their applicability to things of law.
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> Consider the single legal rule. Its esthetics are functional, in the strictest sense. It has room for not one jot of ornament; and the measure of its beauty is the measure of its sweetness of effect. Spencer's approach to style in terms purely of economy and effi-

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[135] As Irving Howe observes: "The Jews would have been deeply puzzled by the idea that the aesthetic and the moral are distinct realms. One spoke not of a beautiful thing but of a beautiful deed." I. HOWE, WORLD OF OUR FATHERS 11 (1976); *see* note 133 *supra*. It follows that not all opinions which are "merely" well-written and intelligently organized have stylistic beauty in Cardozo's sense. An opinion which contrives to use form to avoid legal and cultural accuracy would be an ugly opinion.

[136] K. LLEWELLYN, *supra* note 56.

> ciency seems to me to have application to one sole type of literature: to wit, stripped technical discourse. That is the rule of law. In it, a waste word is not waste only; it is peril.
>
> But Spencer's approach does not exhaust the esthetics of the individual rule of law. Besides economy and efficiency, the rule of law requires rightness.[137]

(b) *Cardozo's Notion of Style*

Lawyers and critics alike, with only one or two exceptions, responded well to the style (in its less inclusive sense) of Cardozo's opinions and essays.[138] Harry W. Taft theorized that Cardozo's judicial effectiveness *derived essentially* from his literary acumen: "Of Judge Cardozo it may be said that his influence among his colleagues stems from his elevated character, his disinterestedness, his thorough scholarship in law and literature, his logical processes and his engaging personality."[139] The *U.S. Law Review*, pondering the relative ignorance in the United States (compared to England and Europe) of "the link between law and literature, and between legal writing and good writing," praised Cardozo for articulating and embodying the link in his writings.[140] Many observers benefited in particular from the fundamental revelation of Cardozo's *Law and Literature* essay: the absolute necessity *in the effective judicial opinion* for an "architectonics," an overall sense of structure and form without which few arguments will gain their maximum effect.

For Cardozo, as for Flaubert years earlier,[141] form not only furthered substance; the two were indistinguishable.[142] The organization of an opinion, the correct placement of particular words and

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[137] *Id.* at 194-95.

[138] The response to Cardozo's book of essays, entitled LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES, *supra* note 20, was typical of this admiration. Short and overwhelmingly positive reviews of the group of essays were published in a score of law reviews. *E.g.*, Clark, Book Review, 40 YALE L.J. 1012 (1931); Claus, Book Review, 31 COLUM. L. REV. 906 (1931); Cox, Book Review, 17 CORNELL L.Q. 189 (1931). Cox stated: "His writings, like those of Holmes, give meaning to [the] dictum that the judges of our highest courts should have that poetic touch, and that the two callings, law and letters can be joined." *Id.* at 189. *See also* Jenkins, Book Review, 18 VA. L. REV. 920 (1931) where it was stated: "The argument in the essay proves that legal principles can be literally transfigured by skillful literary treatment." *Id.* at 920.

[139] Taft, *One Aspect of Judge Cardozo's Noteworthy Career*, 18 A.B.A.J. 172, 172 (1932).

[140] Book Review, 65 U.S. L. Rev. 347 (June 1931).

[141] *See* note 133 *supra*. *See also* M. NADEAU, *supra* note 3, at 6.

[142] *See* note 133 *supra*.

arguments "so as to produce a cumulative and mass effect"[143]—this "architectonics" surpassed "the mere felicities of turn of phrase."[144] Even in his lecture notes as a student at Columbia, Cardozo's formal self-discipline appears: they were always done in complete sentences of almost literary quality. For example, having written "The death of Socrates seemed to him [Plato] the result of popular government, and deepened his hatred of such government," the young man struck out the last two words and replaced them with the pronoun "it," believing that even lecture notes should produce the maximum stylistic effect.[145] When student became practitioner and then judge, the proclivity to form increased:

> The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb, and the maxim. Neglect the help of these allies, and it may never win its way. With traps and obstacles and hazards confronting us on every hand, only blindness or indifference will fail to turn in all humility, for guidance or for warning, to the study of examples.[146]

In matters of style—particularly style when linked to argument—Cardozo throughout his life sought the masterful model. His Columbia lecture notes indicate the forceful influence of Aristotle's rhetorical theories,[147] and George Hellman reports that the classics of rhetoric had even earlier held Cardozo's attention:[148] "The oratory of Cicero, the younger Pliny, Epictetus on 'The Power of Speaking' were familiar to him before his instructors recommended them."[149] Toward the opposite end of his life, in his address to the New York County Lawyers' Association, Cardozo indicates that Cicero and the rhetoricians still made good leisure reading.[150] Thus, if

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[143] B. CARDOZO, *Law and Literature*, *supra* note 20, in SELECTED WRITINGS, *supra* note 20, at 352.

[144] *Id.* at 352.

[145] Cardozo Lecture Notes, *supra* note 58, at plate 65.

[146] B. CARDOZO, *Law and Literature*, *supra* note 20, in SELECTED WRITINGS, *supra* note 20, at 342.

[147] Cardozo's perspective on Aristotle's *Rhetoric* as a college student, foreshadows his lifelong exemplification of the need to tie rhetoric to ethics. *See* Part II(B)(3) *infra*. "The rhetorician must be able to present either side of a disputed position, but the good rhetorician will present only the true side." Cardozo Lecture Notes, *supra* note 58, at plate 118.

[148] G. HELLMAN, *supra* note 18, at 122.

[149] *See In re* Swartz' Will, 79 Misc. 388, 139 N.Y.S. 1105 (Sur. Ct. 1913), discussed in Part II(B) *infra*, for an example of Cardozo's use of Cicero at the bar.

[150] *See* Address by Benjamin N. Cardozo, New York County Lawyers Association (May 26, 1930), *The Home of the Law*, *reprinted in* SELECTED WRITINGS, *supra* note 20, at 405, 408.

most of the models chosen in the *Law and Literature* essay and in traditional legal training are judges, the lessons of the ancients also pervade the wisdom of Cardozo's pages. They are still available for us today.[151]

Cardozo simply states what every lawyer knows: words are our tools, our "scalpel and insulin."[152] Indeed, Cardozo admits with considerable candor, that style sometimes contradicted logical accuracy and completeness (but not rightness!) within his own opinions.

> There is an accuracy that defeats itself by the overemphasis of details. I often say that one must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement. . . . The picture cannot be painted if the significant and the insignificant are given equal prominence. One must know how to select.[153]

We return, inevitably, to Cardozo's judicial poetics, and to the Flaubert comparison. Both writers perceived words as a disturbingly imperfect medium for the communication of ideas[154] (a notion which law professors rarely recognize, at least in print[155]). Yet both understood the power of the medium when structured into an effective formal pattern. Beyond this, however, Cardozo succeeded, where Flaubert could not, in recognizing that the very contingent quality of language could be an exhilarating and creative experience:

> We find a kindred phenomenon in literature, alike in poetry and in prose. The search is for the just word, the happy phrase, that will

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[151] My colleague in the field of Law and Literature, Professor Judith Koffler, has suggested a reading list for a law school course in rhetoric, employing such texts as ARISTOTLE, RHETORIC; THE PHAEDRUS; K. BURKE, GRAMMAR OF MOTIVES (1969); CICERO, RHETORIC; M. FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (R.D. Laing, trans. 1970); L. FULLER, LEGAL FICTIONS (1967); E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949); C. PERELMAN, NEW RHETORIC: A TREATISE ON ARGUMENTATION (1969).

[152] Chafee, *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381 (1941).

[153] B. CARDOZO, *Law and Literature*, *supra* note 20, in SELECTED WRITINGS, *supra* note 20, at 341.

[154] Flaubert, in an early literary passage, states: "If I've felt great excitement at times, I owe it to art, yet what vanity art is! The need to place man in a stone block or to paint the soul with words, feelings with sounds . . . . Art, art, what a lovely vanity!" Flaubert, *Memoires d'un Fou* (1838), *reprinted in* I OEUVRES COMPLÈTES 229 (Seuil Publ. 1964); Cardozo believed that words, as a medium to convey reality, were weak. This theme is consistent through his opinions. *See* Part II (B) *infra*. *See, e.g.*, Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 299-300, 169 N.E. 386, 391-92 (1929).

[155] *See generally* M. RHEINSTEIN & M. GLENDON, CASES AND MATERIALS ON DECEDENTS' ESTATES (1971), where the authors of this extraordinary casebook on wills uncompromisingly grapple with the problem of language and interpretation. *See also* Chafee, *supra* note 152, at 382-84; Probert, *Law, Logic and Communication*, 9 W. RES. L. REV. 129 (1958).

Cardozo greatly respected Holmes' articulation of the need to avoid entrapment by the medium in which we work. *See* Cardozo, *Holmes*, *supra* note 23, at 685-91.

> give expression to the thought, but somehow the thought itself is transfigured by the phrase when found. There is emancipation in our very bonds. The restraints of rhyme or metre, the exigencies of period or balance, liberate at times the thought which they confine, and in imprisoning release.[156]

These words from *The Growth of the Law*, typify the place of style and rhetoric in Cardozo's judicial method. Cardozo, although a "word-skeptic,"[157] nonetheless grasped the immeasurable "vitalising power"[158] of the lawyer's medium.

2. *Hermeneutics*

Hans-Georg Gadamer, a distinguished Heideggerian whose interests have extended to the relationship of legal and literary interpretation, has observed that the Greek word "hermeneutics" originally applied to commercial and real estate brokers.[159] Charged with the task of *bridging the gap* between a buyer's "bid" and the seller's "asked," the broker came to be analogized to the interpreter, whose aim is to find a middle ground of meaning between a text and a reader. No word better describes the lawyer's everyday enterprise, whether his brokerage be literal or in the guise of interpretation of statutes, cases, documents, or the wishes of various parties.

Anyone who has grappled with administrative regulations, complex statutes, or even simple wills, recognizes that the lawyer stands arm-in-arm with the literary scholar in a quest for the meaning "secreted in . . . forms and ceremonies."[160] Yet, like the other poetic skills, hermeneutics as a discipline, as a body of knowledge, rarely engages the lawyer's attention. It is normally not part of the law school curriculum, even within the traditional jurisprudence course. Only an occasional law professor approaches theoretical questions of interpretation, be it within a "Law and Literature" seminar,[161] or,

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[156] B. CARDOZO, GROWTH, *supra* note 59, at 89.

[157] "Word-skeptic," as used here, is defined as an individual whose consciousness of the contingent nature of language is constant. As Cardozo put it: "We seek to find peace of mind in the word, the formula, the ritual. The hope is an illusion." B. CARDOZO, GROWTH, *supra* note 59, at 66. *See* note 154 *supra* and accompanying text; cases discussed in Part II (B)(2) *infra*.

[158] B. Cardozo, *Arnold*, *supra* note 104, at 16, in SELECTED WRITINGS, *supra* note 20, at 70.

[159] Private conversation with H.G. Gadamer, Cornell University, Ithaca, New York (Nov. 6, 1975). *See generally* H.G. GADAMER, TRUTH AND METHOD (1960, translated ed. 1975). For specific references to law and literature, see *id.* at 36-37, 274-78.

[160] Address by Benjamin N. Cardozo, St. John's University School of Law Commencement (1928), *Our Lady of the Common Law*, 13 ST. JOHN'S L. REV. 231, 240 (1939).

[161] Such seminars are presently being offered in a score of law schools around the country. Not all stress interpretation in a formal way; indeed, the nature of the subject proscribes uniform approaches to it. However, various groupings of scholars in the field are beginning to

like the revered Max Rheinstein, in more established fields such as wills.[162] In 1941, Professor Chafee wrote a classic article in which the connection between lawyers and semanticists is strongly put:

> Our case-law provides a vast storehouse of examples of the imperfect system of language. It offers four centuries of reflection by judges on the meaning of words, some of it very acute. Long before the problem of interpretation received systematic attention from nonlegal writers, it was explored by such able writers as Hawkins, Holmes, Thayer, Wigmore, and Williston.[163]

Cardozo divined the innate resemblance of lawyer and professional interpreter; indeed, he would have taken issue with Professor Chafee only insofar as the quoted passage appears to disregard the "systematic attention" which western thought has given to hermeneutics beginning millenia before the birth of Chafee's jurists. Plato, the biblical exegetes, Aristotle, Aquinas, Spinoza, Hegel[164]—these and other theorists on the interpretative act had been studied by Cardozo extensively.

At Columbia, "inspirited" into the hermeneutic tradition, Cardozo turned his essayistic attention to Matthew Arnold, a model of critical excellence. Arnold struck the youthful Cardozo as one who knew "how to separate the gold from the alloy in the coinage of the poets by the test of a few lines,"[165] a glittering phrase eminently applicable to Cardozo's own later interpretative powers on the bench. Cardozo learned from Arnold that although interpretation may be a purely aesthetic act, it can also serve an ethical end:

> It is possibly as a critic that Mr. Arnold is best known; but his criticism, like his culture, took an ethical turn. To know the best that has been thought and said in the world as a means to the expansion of all our powers,—this is culture; but it is criticism's part to distinguish and separate in the first instance what has been *well* from what has been *badly* said. And thus since criticism is a

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bring method and definition to it. Law professors and literary scholars meet every year at the "Special Session" in Law and Literature of the Modern Language Association, for example, and the undergraduate aspects of the interdisciplinary area have been explored creatively by such groups as the American Legal Studies Association at the University of Massachusetts in Amherst. For recent symposia on Law and Literature, *see Law and Literature*, 9 U. HARTFORD STUD. IN LITERATURE 83 (1977); *Law and the Humanities*, 7 U. MD. L.F. 83 (1977); *Law and Literature*, 29 RUTGERS L. REV. 223 (1976).

[162] *See generally* M. RHEINSTEIN & M. GLENDON, *supra* note 155, at 343-420.

[163] Chafee, *supra* note 152, at 394.

[164] *See, e.g.*, B. Cardozo, *Arnold*, *supra* note 104, at 12-13, in SELECTED WRITINGS, *supra* note 20, at 67.

[165] Cardozo, *Holmes*, *supra* note 23, at 686.

> means to culture, and culture a means to perfection, the critic too may rank among those workers whose efforts are making for the happiness and order of the world. . . . [Arnold] saw and felt that the humanities gratify something more than the demands of an idle social convention; and that whatever the apostles of positivism and of material progress may declare, there is in spiritual things a virtue that lapse of time cannot efface.[166]

Critics of Cardozo's style and interpretative technique occasionally question the validity (if never the brilliance) of his comprehension of textual meaning in certain cases. We shall observe that the clever use of the interpretative skill *was* part of Cardozo's judicial craft; he "marvels," in *Law and Literature*, "at the ingenuity with which texts the most remote are made to serve the ends of argument or parable,"[167] but his ironic sense of awe needed no better object than his own briefs and opinions. This having been noted, however, Cardozo's training and his words on Arnold indicate a basis in ethics for the hermeneutic act which should predominate, if not always in the literary critic, certainly in the lawyer and judge.

It may fairly be said that every legal experience is a hermeneutic experience. We may interpret signs and symbols with less skill and for less lofty purposes than Cardozo, but we should recognize that an identifiable humanistic tradition exists to help us bridge the gap.

3. *Value Awareness*

> The tradition, the ennobling tradition, though it be myth as well as verity, that surrounds as with an aura the profession of the law, is the bond between its members and one of the great concerns of man, the cause of justice upon earth. . . . We may tell judges till doomsday than they are to love logic more than justice: as in affairs of the heart generally it is easier to give the command than to cause it to be heeded. . . . I know the stock distinctions between morals and law. I know that oftentimes the distinction is genuine. I have had occasion not infrequently to deplore the fact. But with it all I like to believe that law has the qualities of a cracknel biscuit, and that however solid and dry it seems when we bite into its crust, there is a fluid mixed with the solid and forming the better part.[168]

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[166] B. Cardozo, *Arnold*, *supra* note 104, at 14-16, in SELECTED WRITINGS, *supra* note 20, at 68-69.

[167] B. CARDOZO, *Law and Literature*, *supra* note 20, in SELECTED WRITINGS, *supra* note 20, at 341-42.

[168] Address by Benjamin N. Cardozo, New York County Lawyers Association (Dec. 17, 1931), *reprinted in* SELECTED WRITINGS, *supra* note 20, at 99, 105-06 [hereinafter cited as Cardozo County Lawyers Address].

We have suggested earlier that the saintliness of mortals springs as much from a need in others as from the qualities of the saints themselves. No men knew their shortcomings as well as Flaubert and Cardozo, yet others understandably chose to perceive the extraordinary as the perfect. The irony arises keenly, however, in discussing Cardozo's values. His ethical legacy was Jewish, his fundamental "axiology"[169] classical. These traditions knew no saints, but they possessed a teleology inherited or absorbed by Cardozo: the belief in, and search for, earthly justice.

Cardozo's values as a man have been described by observers as oriented toward personal humility and the quest for justice in this world, not the next. The Cardozo children were admonished "to recite the words of the Prophet Micah: 'To do justice, to love kindness, and to walk humbly with thy God.'"[170] His modesty and his belief in earthly justice worked within him to produce the extraordinary integration of ethics and aesthetics discussed above.[171] If I can improve, Cardozo seemed to say, so can society and its institutions. If I am a saint, or if I cede my ethical nature to others whose goodness lies in a hopelessly ethereal otherness, the notion of justice becomes, for me, static and purely metaphysical.

Although Cardozo's axiology occasionally appeared in all its prophetic shades of fire and righteousness,[172] he articulated his values more typically by associating them explicitly with his method of culture. The fine distinctions of traditional jurisprudence also had a place in his ethics, but a far smaller one than that of "pure community,"[173] a sense that the judge's use of a communal as opposed to a personal or legalistic voice should increase proportionately with the importance of the case before him. Pure community, as we have seen, includes but surpasses what Cardozo dismisses as mere "Zeitgeist," the judge's positivistic awareness of current trends.[174] Pure community means an instinct inherent in each individual, for the *best* (and against the worst) of contemporary culture, past and present.[175] The judge's

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[169] Cardozo uses this word frequently in his many discussions of the place of values in the judicial act. *See, e.g.*, B. CARDOZO, GROWTH, *supra* note 59, at 94, 95, 111; PARADOXES, *supra* note 61, at 52, 55, 58. "Axiology" involves the study of values in its broadest sense, not as an abstract but as a social phenomenon. This word also (like "hermeneutics"—*see* notes 159-67 and accompanying text *supra*) originated in an economic context.

[170] G. HELLMAN, *supra* note 18, at 13.

[171] *See* Part II (A)(1) *supra*.

[172] *See* Farnum, *supra* note 15, at 595. *See also* cases discussed in Part II (B)(3) *infra*.

[173] *See* text accompanying note 119 *supra*.

[174] B. CARDOZO, JUDICIAL PROCESS, *supra* note 24, at 174.

[175] *See*, F. NIETZSCHE, ESSAY II, THE GENEALOGY OF MORALS, *Aphorism 11* (W. Kaufman trans. 1967) in which the philosopher speaks of justice in terms of a community's codification of the best intuitions of its active individuals.

knowledge of "the best that has been thought and said in the world"[176] aids him to detect and to implement impartially—indeed, as our constitutional generation did—a firm notion of justice.

If Flaubert lived and worked toward the beginning of the slow process of social disintegration and relativism in Western culture, so too Cardozo lived and worked in the midst of that very process. Both men were attuned, in part through the literary antennae which opened them to so much experience beyond their immediate scope, to the crisis in values. But, perhaps based on their contrasting ethical upbringing, the two ultimately followed divergent paths: Flaubert personified the day's relativism, while Cardozo never lost his faith in an ascertainable set of values, accessible to all sensitive members of a community. One way to be sensitized, perhaps the only way in so complex and varied a culture as our own, is through development of the poetic skills.

4. Imagination

> For Cardozo possessed one very special genius. In deciding an ordinary case according to admitted and well-established rules of law—was there a duty to take care?, was there negligence?, was the negligence the cause of the plaintiff's injury?—he was able to reconstruct the concrete factual situation existing at a time long past and to do this in such a way that his legal conclusions appeared almost inevitable. This great gift derived from an imagination fully disciplined and controlled by great learning and experience.[177]

As intuition controls the judge's mix of Cardozo's four methods, so the imaginative capacity controls the use of the first three poetic skills, style and rhetoric, hermeneutics, and value awareness. Imagination thus differs from the themes of "intuition," "expansiveness" and "flashes of insight" which run like a creative *Leitmotif* through Cardozo's discussions of the law's growth. Because the judge's organizing power—his sense of how the matter before his eyes and ears may best be used—controls the poetic skills which in turn control the method of culture, imagination stands as one of the most vital judicial faculties. It propels the common law, and keeps it from debilitating stasis: "The ingredient which sours if left alone, is preserved by an infusion, sweetening the product without changing its identity.

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[176] B. Cardozo, *Arnold*, *supra* note 104, at 14, in SELECTED WRITINGS, *supra* note 20, at 68.
[177] Evatt, *Mr. Justice Cardozo*, 52 HARV. L. REV. 357, 357 (1939).

You may give what recipes you will. A trained sense of taste, approving or rejecting, will pass judgment on the whole."[178]

As we have noted, precedent and culture (and the first three poetic skills which form a part of that culture) can be "discovered," at least to some extent. But where does the lawyer "find" an expansive imagination? In the service of this vital, organizing capacity, Coleridge's "agent of all human perception,"[179] there are no American Law Institutes, restatements, or hornbooks.

Realizing the essentially personal and poetic nature of imagination, Cardozo never overtly recommended an institutional approach by lawyers to this crucial element of their legal professionalism. The law must advance fortuitously, leaving to chance to each generation the coming to the bar of several creative individuals. The best guide to Cardozo's legal imagination thus inheres in the compendium of his most representative texts, the opinions.[180] It is time to turn to the cases, organized not by traditional subject but by the poetic skill most in evidence in each opinion.

B. *Selected Cases*

1. *Style and Rhetoric*

(a) *In re Swartz' Will*[181]

During the closing months of his career in practice, Cardozo represented a contestant claiming the invalidity (due to mistake) of provisions of a will.[182] His arguments, quoted by the Surrogate, reveal the effective, pragmatic humanism which had been impressing his colleagues for almost twenty-two years; not only his remarkable success record,[183] but also his imaginative thoroughness had brought him renown within his circle. Frequently employing the lessons of his humanistic education, as he does in *Swartz*, Cardozo's arguments demonstrate the creative attention to a specific interpretative environment which defines the lawyer's role.[184]

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[178] B. CARDOZO, GROWTH, *supra* note 59, at 87-88.

[179] Coleridge, *Biographia Literaria XIII* 516, in THE PORTABLE COLERIDGE (I.A. Richards ed. 1961).

[180] For another fine guide to the subject of legal imagination, see the casebook bearing its name, J.B. WHITE, THE LEGAL IMAGINATION (1973).

[181] 79 Misc. 388, 139 N.Y.S. 1105 (1913).

[182] *Id.* at 391, 139 N.Y.S. at 1108.

[183] *See* Hyman, *supra* note 44, at 13 for a chart of this record.

[184] *See also* cases discussed in Part II(B)(2) *infra*.

Swartz provides an example of the continuum, in Cardozo's work at the bar, of the poetic strains from his early background and college years. Faced with a difficult set of facts, Cardozo found the unusual argument. Attempting to convince the judge that, contrary to the established rule,[185] testatrix' mistaken view of the legal effect of a devise should allow the court to correct or delete the provisions prior to probate, Cardozo impressed Surrogate Fowler with a citation from Cicero's *De Oratore*, his lifelong rhetorical aid.[186] Although the Latin reference, together with one from the *Roman Digests*, failed to win the day for the contestant, the argument held the court's attention and almost persuaded it. Unfortunately for Cardozo, Surrogate Fowler also knew his Cicero and managed to distinguish the mistakes permitting successful invalidation of testamentary provisions in the ancient cases; they both involved heirs presumed dead and thus were *exheredatio* cases, not pure mistake or mistake of law situations.[187]

The Surrogate nonetheless praised the advocate, citing "the very elaborate argument of the learned counsel"[188] directly from his brief, and (as many judges had done in Cardozo's score of years at the bar) observing that the "arguments of counsel have been unusually thorough and profound."[189] Cardozo used his poetic skills modestly; they were, for him, not an excuse for worthless flamboyance, but instead a source of pragmatic argumentation and a method of *styling* the argument as well. The classical rhetoricians continued to teach him during his years on the bench.

(b) *Killian v. Metropolitan Life Insurance Company*[190]

Roman sources and stylistic nuances draw this life insurance contract case into the present context. The decedent had named his spouse and four children as beneficiaries of an insurance policy, but five months after his death, defendant insurer received a release as to the spouse toward whom it had denied liability on the grounds of breach of warranty and fraud. Some four years later, the decedent's children sued on the contract, asking to sever their case from the

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[185] *See* Gluckman's Will, 87 N.J. Eq. 638, 101 A. 295 (1917); Guardhouse v. Blackburn, L.R. 1 P.&D. 109 (1866) (for examples of the established rule).

[186] *See* notes 148-150 and accompanying text *supra*.

[187] 79 Misc. at 398-99, 139 N.Y.S. at 1113-14.

[188] *Id.* at 398, 139 N.Y.S. at 1113.

[189] *Id.* at 391, 139 N.Y.S. at 1108.

[190] 251 N.Y. 44, 166 N.E. 798 (1929).

mother's; defendant claimed accord and satisfaction (as well as breach of warranty and fraud).[191]

Cardozo's court unanimously affirmed the Appellate Division's grant of plaintiffs' severance motion,[192] basing its decision on a clause in the contract prohibiting contestability by the insurer "after two years from the date of its issue."[193] The chief judge's typically thorough and imaginative opinion revolved around the definition of a "contest." Despite the insurer's repudiation of liability and its successful demand for a release only five months after the insured's death, Cardozo asked whether its answer to the present action should not be viewed as its first "contest";[194] for if defendant could cite no earlier contest, it would be barred from disclaiming contractual liability to the children, the two-year clause acting as "a statute of limitations, established by convention."[195] So, what, then, is a "contest"? Repudiation by the insurer before maturity? Repudiation, as in the instant case, after maturity but long before the two-year period? Neither, said Cardozo: "From the viewpoint of the law, a contest in its proper meaning is still the *contestatio* of the Romans, or something close thereto. The word is redolent of association with witnesses and writs (cf. Buckland, Text of Roman Law, s.v. *litis contestio*; Oxford Dictionary, s.v. *litis-contestation;* 3 Blackstone, Comm. 296)."[196]

Style now seals into law Cardozo's discussion of the classical sources. The rule may involve "practical difficulties" (i.e., the insurer, to protect his rights, must either hope that the insured begins a "timely" action against it, or else sue in equity for annulment), but it embodies millenia-long learning on the active, adversarial nature of a contest: "For present purposes it is enough to say that a contest begins when the contestants, satisfied no longer with minatory gestures, are at grips with each other in the arena of the fight. When the fight is a civil controversy, the arena is the court."[197] One cannot help but picture lions, gladiators, and that very Roman past which formed the original legal basis for the decision. With exquisite relevance, Cardozo's imagery takes our minds beyond the parties to an exotic age in which most contests were decided by physical force. He then concludes that, these days anyway, such good fights take place only in

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[191] *Id.* at 47, 166 N.E. at 799.
[192] *Id.* at 50, 166 N.E. at 800.
[193] *Id.* at 47-48, 166 N.E. at 799.
[194] *Id.* at 48-50, 166 N.E. at 800.
[195] *Id.* at 49, 166 N.E. at 800.
[196] *Id.* at 48-49, 166 N.E. at 800.
[197] *Id.* at 50, 166 N.E. at 800.

court, not in "minatory" gestures such as phone calls, or letters between the parties.[198]

Rhetoric, Latin and English, finally won the day—unanimously.[199] But *ought* the plaintiff to have prevailed? In evaluating the use of rhetoric do we find that the aesthetic aspect furthers legal reasoning, or does it act antithetically to the legal norm? If we suggest that "style overcomes substance" in *Killian*, we violate Cardozo's poetic definition of judicial methodology. *Killian* forces us to recognize that we need not restrict the meaning of a word like "ought" to a mere deduction from perceived precedent. Rhetoric here serves the end of broadening the parameter of the legal "ought" to enclose within it both the correct outcome as between the parties and a workable "rule" for the future.

(c) *Foreman v. Foreman*[200]

Form and substance always merged, as a matter of law so to speak, in Cardozo's opinions. Another unanimous court thus followed him out of the thicket in *Foreman v. Foreman*, protected by Cardozo's style from the thorns of the Statute of Frauds. Plaintiff's wife had died intestate, vested with certain real property for which he had provided the purchase price, as well as payments for taxes, mortgages, and insurance.[201] Her name appeared on the deed, apparently because plaintiff legitimately desired to keep such privately used realty separate from his business holdings.[202] Perhaps so, said defendant (decedent's heir-at-law, claiming ownership subject only to plaintiff's rights by the courtesy of the State of New York)[203] but the realty legally belonged to his mother.[204] No, claimed plaintiff, it belonged to me by a constructive trust, as evidenced by the incidents of ownership and occupation already indicated.[205] Impossible, replied the heir, citing the Statute of Frauds (and prevailing below).[206]

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[198] *Id.*

[199] *Id.* at 48-49, 166 N.E. at 800.

[200] 251 N.Y. 237, 167 N.E. 428 (1929).

[201] *Id.* at 239-40, 167 N.E. at 428.

[202] *Id.* at 239, 167 N.E. at 428.

[203] N.Y. DECED. EST. LAW § 18, Laws of 1929 (currently N.Y. EST., POWERS & TRUST LAW § 5-1.1(a) (McKinney 1967)) abolished dower and curtesy prospectively in New York as of September 1, 1930, placing *Foreman* among the last group of fact situations involving curtesy in New York. Under the law then in effect, Mr. Foreman would have had a life estate in a fraction of his wife's real property, regardless of the outcome of this litigation.

[204] 251 N.Y. at 240, 167 N.E. at 428.

[205] *Id.* at 240, 167 N.E. at 429.

[206] *Id.* at 242-43, 167 N.E. at 430.

Early in the opinion, as he frequently did during his recitation of the facts,[207] Cardozo offered a stylistic hint of its outcome: "The dominion that goes with ownership was continuously [plaintiff's]."[208] Would the court have used the noun "dominion" if it were not preparing its audience for a decision favorable to the suddenly artistocratic-seeming plaintiff? We might be reluctant to take property away from one exercising "dominion" over it, even if someone else legally owned it. But Cardozo went further:

> The husband paid for the land and managed and improved it. The wife, far from attempting to rid herself of the trust because orally declared, submitted to it as completely as if seals and parchments had perfected the evidence of duty. . . . Her heir will not be suffered to nullify her submission to the call of equity and honor by disclaimer after death.[209]

Like the consistent imagery within a Shakespearian sonnet, Cardozo's words affect his reader subtly and cumulatively. *Dominion* plaintiff exercised; *duty* the wife showed to it as though it were legally perfected. Her "submission" to "equity," or at least to plaintiff's "dominion," cannot be questioned now that she is gone.

"Seals and parchments" were lacking here, but not the creative hand of the chancery jurisdiction. Cardozo's brilliance pierced the legalistic maze not by violating the precedents (for he was able to cite several cases taking such oral trusts out of the Statute), but by suiting style to substance to convey a persuasive perspective on the state of the law. More than curtesy shows the law of New York to the plaintiff; dominion is his, unanimously.

(d) *Hynes v. New York Central Railroad*[210]

"Shattered,"[211] "subjacent,"[212] "circumnambient,"[213] "*alio intuitu*"[214]—these modifiers protrude like defendant railroad's diving board from Cardozo's description of the Hynes' boy's tragic dive over the Harlem River. They join with words such as "bulkhead,"[215]

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[207] *See, e.g.*, Hynes v. New York Cent. R.R., 231 N.Y. 229, 231, 131 N.E. 898, 898 (1921). *See* discussion of this case at notes 210-33 and accompanying text *infra*.

[208] 251 N.Y. at 240, 167 N.E. at 428.

[209] *Id.* at 241, 167 N.E. at 429.

[210] 231 N.Y. 229, 131 N.E. 898 (1921).

[211] *Id.* at 232, 131 N.E. at 899.

[212] *Id.* at 233, 131 N.E. at 899.

[213] *Id.*

[214] *Id.* at 236, 131 N.E. at 900.

[215] *Id.* at 231, 131 N.E. at 898-99.

"rights of bathers,"[216] "sweep them from their stand,"[217] and "a lad of sixteen"[218] to bring lasting merit to a difficult legal decision. Cardozo takes note, in a later essay,[219] of the validity of the railroad's position that plaintiff's decedent was trespassing on the board (which extended horizontally from the railroad's property) when its electric wires fell and sent him tumbling to his death;[220] three lower courts[221] agreed that the seeming trespasser merited only the smallest duty from the defendant, the avoidance of willful or wanton negligence. But the plaintiff's arguments had persuasive force. The boy was a bather in navigable waters, and thus analogous to a highway traveler departing briefly from the public way; the wires would have fallen on him had he already started his dive, or been on the public beach below.

Cardozo sought the solution inspired by his culture, and he found for the plaintiff. Nowhere is his "realism," and what he calls a "distrust" of dry logic, more clear, yet we may venture a guess that Judges Hogan, Pound, and Crane agreed with him less because of reasoning than because they were dazzled by his style. The opinion merits stylistic analysis not only for its effective use of adjectives and nouns, but also for its consistent imagery. Seizing upon the dramatic visual aspects of the case (the board extending from the shore over the water), Cardozo thrice prepared his audience for the ultimate outcome by enveloping crucial legal points in metaphors of geometry and nature:

> Rights and duties in systems of living law are not built upon such quicksands.[222]
>
> Duties are thus supposed to arise and to be extinguished in alternate zones or strata.[223]
>
> We think there was not moment when he was beyond the pale of the defendant's duty.[224]

And finally, he sealed his argument with lines deliberately evocative, through their imagery, of the boy's tragic last moments:

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[216] *Id.* at 233, 131 N.E. at 899.

[217] *Id.*

[218] *Id.* at 231, 131 N.E. at 898.

[219] *See* B. CARDOZO, GROWTH, *supra* note 59.

[220] *See id.* at 99-103.

[221] A verdict for plaintiff was set aside by the trial court and a new trial ordered and affirmed upon defendant's motion. 188 A.D. 178, 176 N.Y.S. 795, *aff'd mem.*, 190 A.D. 915, 179 N.Y.S. 927 (1919).

[222] 231 N.Y. at 233, 131 N.E. at 899.

[223] *Id.* at 234, 131 N.E. at 899.

[224] *Id.* at 235, 131 N.E. at 900.

> Rules appropriate to spheres which are conceived of as separate and distinct cannot, both, be enforced when the spheres become concentric. There must then be readjustment or collision. In one sense, and that a highly technical and artificial one, the diver at the end of the springboard is an intruder on the adjoining lands. In another sense, and one that realists will accept more readily, he is still on public waters in the exercise of public rights. The law must say whether it will subject him to the rule of the one field or of the other, of this sphere or of that. We think that considerations of analogy, of convenience, of policy, and of justice, exclude him from the field of the defendants immunity and exemption, and place him in the field of liability and duty.[225]

"Quicksands,"[226] "zones,"[227] "strata,"[228] "pale,"[229] "spheres,"[230] "concentric,"[231] "collision,"[232] and "field"[233]—words that are employed to elaborate the law, graphically remind the reader of the tragic *facts* which the court has already discussed. The defendant's electric wires collided with the lad, sending him tumbling through various spatial zones to his death on the "quicksands" below. Duty is imagistically equated with the geometric patterns of the violent fall. "Concentric" rules of law, in conflict, are also rendered spatial; they exist, too, in the baroque spiral of the sad incident. Limited duties and ancient rules of property law tumble to their death with the lad of sixteen.

2. *Hermeneutics*

(a) *Ostrowe v. Lee*[234]

Early in his career at the bar, Cardozo had represented a plaintiff in a successful defamation action, *Alliger v. Mail Printing Association*.[235] Defendant had published in its newspaper a statement that plaintiff had been arrested for forgery. On appeal from plaintiff's verdict, defendant had claimed that plaintiff's negative response to the

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[225] *Id.* at 236, 131 N.E. at 900.
[226] *Id.* at 233, 131 N.E. at 899.
[227] *Id.*
[228] *Id.*
[229] *Id.* at 235, 131 N.E. at 900.
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] 256 N.Y. 36, 175 N.E. 505 (1931).
[235] 72 N.Y. Sup. Ct. (65 Hun) 619, 19 N.Y.S. 584, *aff'd*, 73 N.Y. Sup. Ct. (66 Hun) 626, 20 N.Y.S. 763 (1892), *cited in* Hyman, *supra* note 44, at 21-22.

question "You were *never* arrested?" falsely concealed his unrelated previous arrest for criminal conversion.[236] Cardozo's brief cited Quackenbos' *Rhetoric* to show that "never" colloquially means "not," and contextually related only to the nonexistent crime of forgery alleged in the defamatory statement.[237] The youthful advocate prevailed, and the verdict was affirmed. Almost forty years later, in *Ostrowe,* Chief Judge Cardozo again loaned his interpretative talents to the dissection of a libel action; once again, the signs and symbols of the evidence led to a finding of defamation.

Again, too, the alleged libel related to defendant's accusation, in print, that plaintiff had committed a crime (larceny). The assertion was made in a letter from defendant to plaintiff, and the former claimed the absence of publication.[238] True, defendant had dictated the letter to a stenographer, but this would be the publication of a slander, a point conceded for purposes of appeal.[239] The question before the court, grounded in hermeneutics as much as in defamation, was whether the stenographer's act of reading over his shorthand notes of the dictated message amounted to the publication of defendant's libel.[240]

Because only the stenographer had written anything at all prior to the transcription of the letter, defendant wondered how he could be said to have published the libel. Cardozo, however, perceived the stenographer both "as an instrument to give existence to the writing,"[241] (as, in effect, the arm of the defamer) and as a third party for the purposes of publication (although privilege might be pleaded affirmatively at a later stage). Up to the point where the stenographer translated the defendant's spoken words into written signs, he *was* the defendant; but as he read the signs over upon defendant's request that they be typewritten, he became himself again. "The author who directs his copyist to read, has displayed the writing to the reader as truly and effectively as if he had copied it himself."[242]

But what of the fact that the stenographer was reading a *series of signs* which the defendant could not have understood? On this point, Cardozo observed:

> Many things that are defamatory may be said with impunity through the medium of speech. Not so, however, when speech is

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[236] 72 N.Y. Sup. Ct. (65 Hun) at 619, 19 N.Y.S. at 585.
[237] *See* Hyman, *supra* note 44, at 21-22.
[238] 256 N.Y. at 38-39, 175 N.E. at 505.
[239] *Id.* at 39, 175 N.E. at 505.
[240] *Id.* at 40, 175 N.E. at 506.
[241] *Id.* at 39, 175 N.E. at 505-06.
[242] *Id.*

> caught upon the wing and transmuted into print. What gives the sting to the writing is its permanence of form. The spoken word dissolves, but the written one abides and "perpetuates the scandal."—When one speaks of a writing in this connection, one does not limit oneself to writings in manuscripts or books. Any symbol suffices—pictures, hieroglyphics, shorthand notes—if only what is written is intelligible to him who reads. . . .[243]

Cardozo may have had in mind as he wrote this passage the contingent nature of all communication. Language, too, merely creates a series of signs which, as Cardozo recognized from his first contact with hermeneutic theory, almost always differ from the objects or thoughts to which those signs are meant to refer.

Alliger thus stands with *Ostrowe* to indicate two representative responses by Cardozo to the most complex element of the legal (and, for that matter, literary) perspective on reality. The law (or literary text) necessarily infuses into a pristine prior reality the ambiguities of verbal signs. In *Ostrowe*, Cardozo articulates the irrelevance to the law of libel of a possible distinction between sign and referent.[244] If a sign perceived by the average audience as defamatory has been committed to writing, and published to such an audience, libel exists, whatever the defendant's intended referent in using that sign. But in *Alliger*, Cardozo argues that some legal contexts, including the interpretation of words commonly used, allow an opening out of the quest for meaning beyond the sign to the communicator's referent. As we proceed through many of the following cases, we will observe further the hermeneutic tension between language as uttered or written and meaning as intended by the communicator.

In all events, Cardozo's conscious participation in the hermeneutic tradition[245] demarcates another of his contributions to the law. He came to the bench fully apprised of an approach to verbal reality first

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[243] *Id.* at 39-40, 175 N.E. at 506.

[244] The terms "sign" and "referent," familiar to contemporary semiologists, derive from such texts as C. OGDEN & I. RICHARDS, THE MEANING OF MEANING (1923). That excellent and useful text casts into question the notion of a direct link between a word and its "meaning," showing systematically that the latter exists on too many levels ever to be unambiguous or "plain." *See generally*, F. SAUSSURE, COURSE IN GENERAL LINGUISTICS (1922, translated ed. 1974).

[245] Hermeneutical theory is divided on the question of how validity in interpretation is to be achieved. The more relativistic school, exemplified by M. Heidegger, *see, e.g.*, BEING AND TIME (1927, translated ed. 1962) and his student, H.G. Gadamer, *see, e.g.*, *supra* note 159, posits that the historical viewpoint of the interpreter circumscribes the interpretative process. Thus, even if it can be said that a meaning inheres in a text, the interpreter of that text still cannot expunge his own biography and context from its meaning. The objective school, on the other hand, exemplified by F. Schleiermacher, *see, e.g.*, THE CHRISTIAN FAITH (translated ed. 1948) and W. Dilthey, *see, e.g.*, SELECTED WRITINGS (translated ed. 1976), posits that the only

propounded by the Greek philosopher, Gorgias: "When we speak in words, we don't give realities."[246]

(b) *Marchant v. Mead-Morrison Manufacturing Company*[247]

The inadequacy of the signs of the English language provided the source of Cardozo's analysis in this breach of contract action. An arbitration clause between the parties read as follows:

> If for any reason any controversy or difference of opinion shall arise as to the construction of the terms and conditions of this contract, or as to its performance, it is mutually agreed that the matter in dispute shall be settled by arbitration, each party to select an arbitrator, and the two so selected to select a third, and the decision of the majority of such arbitrators given after a full hearing and consideration of the matter in controversy shall be final and binding upon the parties . . . .[248]

As a partial consequence of defendant's failure to deliver a full load of 500 tractors, plaintiff went into bankruptcy. Each party accused the other of breaching the contract, and the arbitration clause was activated. Because the two arbitrators could not agree upon a third, the trustee in bankruptcy petitioned the court to appoint one. In an earlier proceeding,[249] defendant unsuccessfully raised a jurisdictional objection, alleging the New York court had no right to make such an appointment since the arbitration was to have taken place only in Massachusetts.

The lower court appointed the third arbitrator. A long contest finally resulted in a two-to-one finding that defendant had breached the contract, and was responsible not only for the lost profits on the use of the tractors, but also for all the plaintiff's capital investment in the now bankrupt business, $850,000.[250]

This decision was appealed by defendant,[251] who gained the Appellate Division's modification as to the extent of damage on the

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significance of a text is its original meaning, and that such original meaning is capable of being divined. Cardozo's method, while exhibiting a general tendency toward the latter school, partakes of a common element of both. For, Cardozo, the mainstay of knowledge and experience was culture and ethics, which guided the understanding of language and thereby defined its meaning. Cardozo's general law of language, unlike the law of libel, turns on determining how a series of signs is to be *properly* understood.

[246] Cardozo Lecture Notes, *supra* note 58, at plate 42.

[247] 252 N.Y. 284, 169 N.E. 386 (1929).

[248] *Id.* at 305-06, 169 N.E. at 393-94.

[249] Marchant v. Mead-Morrison Mfg. Co., 226 A.D. 397, 235 N.Y.S. 370 (1929).

[250] 252 N.Y. at 291, 169 N.E. at 388.

[251] *Id.* at 291-92, 169 N.E. at 388.

ground that the arbitrators had exceeded the scope of their contractually-prescribed powers in assessing the entire bankruptcy loss to defendant.[252] Both plaintiff and defendant appealed, the former to reinstate the arbitrators' award, the latter to strike down even the finding of fault, on the theory that the lower court, in ordering arbitration, had lacked jurisdiction.[253]

The first difficult question of interpretation to engage Cardozo's attention was whether the lower court had exceeded its power by allowing the appointment of a third arbitrator. Defendant contended that the parties intended the arbitration clause to be governed by Massachusetts law, which did not allow such judicial appointment, thereby rendering the entire arbitration proceeding a nullity.[254] But Cardozo inquired whether the trial court had merely sought out the intentions of the parties "by discarding the subordinate and preserving the essential."[255]

Having introduced the subject in that style, it was predictable that Cardozo would resolve the inquiry by interpreting the clause, and the contract as a whole, to indicate (at least by permissible inference) that the parties may well have desired arbitration rather than a strict adherence to the *manner* in which the arbitrators were chosen:

> In the forefront of the clause is the statement of the dominant purpose that controversies of a given order shall be settled by arbitration. What follows may be figured, at least with a show of reason, as incidental and subsidiary. The error [by the lower court], if it be assumed, is not so utterly indefensible, so free from the possibility of genuine contest and debate, as to be equivalent to defect of power.[256]

The jurisdictional authority of the arbitrators having thus been affirmed, a second difficult question of interpretation arose by virtue of plaintiff's cross-appeal asking that the arbitrators' award of damages be fully reinstated.[257] Plaintiff read the phrase "or as to its performance" in the arbitration clause to allow the finding not only of a contractual breach, but also of a causal connection to the bankruptcy.[258] Cardozo refused to bridge the gap between text and

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[252] *Id.* at 292, 169 N.E. at 388.
[253] *Id.*
[254] *Id.* at 294, 169 N.E. at 389.
[255] *Id.* at 295, 169 N.E. at 389.
[256] *Id.* at 297, 169 N.E. at 390.
[257] *Id.* at 301, 169 N.E. at 392.
[258] *Id.* at 290, 169 N.E. at 388.

reader in that manner. Affirming as a principle of interpretation in this case the understanding of isolated words in association with their context,[259] Cardozo observed:

> The clause to be interpreted is instinct with tokens of a purpose to encompass the submission with limitations and conditions. It does not say that any and all controversies growing out of the contract shall be settled by arbitration, though the plaintiff would have us hold that its effect is nothing less. The submission is to be confined to controversies or differences of opinion as to "the construction of the terms and conditions" of the contract, and controversies or differences as to the "performance" of the contract. Each of these phrases is to be weighed in association with the other. Dismemberment may be necessary in aid of the process of analysis, but in the end there must be a synthesis that will bring the severed parts together.[260]

Thus, although the clause's disjunctive "or" might signify the parties' willingness to have the arbitrators look into every aspect of their "performance" (including, arguably, the causal link between defendant's breach and plaintiff's bankruptcy), Cardozo employed a different hermeneutic tool to avoid this extreme result:

> The words, extracted from their setting, are said to include by implication the consequences of non-performance through all the chain of jural clauses. But this is to ignore the transforming power of association for phrases as for men. The words "as to its performance" do not stand in isolation. If they had been understood to cover everything, there would have been no sense in providing for arbitration as to the meaning or construction of the "terms and conditions." The controversies envisaged must have fallen short in some degree of the sum total of the possible. "Few words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension." . . . Color and content will vary with the setting.[261]

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[259] Cardozo's quest here, as in *Marchant* and *Alliger*, embodies the quest of objective hermeneutics, exemplified by Dilthey and Schleiermacher, *see* note 245 *supra*, where the principal concern is to reach the original (authorial) meaning in a text, rather than to interpret the text in a manner only reflective of the interpreter's concerns. Just as there can generally be no knowledge of a part without a prior knowledge of the whole (since the part exists only in relation to the whole), the meaning of a part of a text is provided only by a knowledge of the whole of a text. Objective hermeneutics seeks to reach the original meaning of any part of a text by minimizing the perspectivism of contemporary viewpoints. Rather, it proceeds to consider the part as something to be understood outside of our own historical time, the whole of the text providing the historical context.

[260] 252 N.Y. at 299, 169 N.E. at 391.

[261] *Id.* at 299-300, 169 N.E. at 391.

The argument in avoidance of the disjunction had to be carefully crafted. A superior principle—context—permitted the interpretative deduction that the parties would have been drafting a meaningless first provision ("terms and conditions") if the second ("performance") were deemed to subsume findings such as those disputed by defendant. With characteristic elegance in his generalizations, Cardozo concluded the argument by emphasizing the significance of tone and association in the understanding even of seemingly unambiguous contractual language.

(c) *Palko v. Connecticut* [262]

The same quest for an interpretative principle that we have observed in the two previous cases underlies Cardozo's effort in this well-known decision. But, as will be shown, Arnold's ethical influence on Cardozo's hermeneutic theories also came to the fore. Palko faced execution because Connecticut had successfully won a second trial against him after substantial errors in his favor were found to have been made at the first.[263] He begged the Court to invalidate the statute allowing the second trial, claiming that it violated the fifth amendment's double-jeopardy clause and that the amendment applied to the states via the due process clause of the fourteenth amendment.[264]

The judge's task relentlessly imposes method upon substance, whether the substance be $850,000 lost in a bankrupt company or a life hanging in the balance. The same hermeneutic concerns which motivated Cardozo as he interpreted the arbitration clause in *Marchant* moved him here to divine the meaning of a more enduring phrase, "Nor shall any State deprive any person of life . . . without due process of law."[265]

The text stands, waiting for the inevitable violation of the interpreter. By no manner of means will its full secret be divulged to the most respectful of readers, but some valid sense, however imperfect, must be elicited from the phrase. Several rights enumerated in the first eight amendments had previously impressed the Supreme Court as subsumed in those problematic words. What about the privilege against double jeopardy? The *Palko* reasoning recalls that of *Marchant*: "Is double jeopardy in such circumstances, if double

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[262] 302 U.S. 319 (1937).

[263] *Id.* at 321-22.

[264] *Id.* at 322.

[265] U.S. CONST. amend XIV, § 1.

jeopardy it must be called, a denial of due process forbidden to the States? The tyranny of labels . . . must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other."[266]

Meanings are contingent. The simplest word may mean something different to its author than to the dictionary, the reader, or some future generation. Holmes had put it magnificently for the Court in analyzing a will, employing language equally applicable to interpretative acts in other fields of law and the humanities: "[T]o a certain extent, not to be exactly defined, but depending on judgment and tact, the primary import of isolated words may be held to be modified and controlled by the dominant intention, to be gathered from the instrument as a whole."[267] Much depends on the adjudicator's (and his implied audience's) sense of "judgment and tact."[268] In a capital case, an explicit announcement of interpretative principle belongs to that sense. So, just as he did in construing the arbitration clause in *Marchant*, Cardozo read the words in their context. But he viewed the constitutional question as permitting him a broader context than applicable in *Marchant*, one that took account of other Supreme Court perceptions on the same language. The cases, too, must be reread for the discovery of an interpretative principle. Cardozo thus spanned the bridge between the instant facts and the enduring text:

> The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty.[269]

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[266] 302 U.S. at 323.

[267] Eaton v. Brown, 193 U.S. 411, 414 (1904).

[268] Holmes' phrase "judgment and tact" means to stress particularly the relationship of interpreter and audience. No hermeneutic act (in whatever field) will be persuasive unless the audience's probable perceptions are recognized by the interpreter. An interpretation of a text may be impeccable, but it will lack *authority* in the absence of tact. Holmes and Cardozo avoid, however, the extreme view that the mere lack of tact (or authority) deprives the interpretation of *correctness*; the text, after all, deserves as much consideration as the audience. In this regard, a statement by Jacques Derrida bears repeating; speaking on the relationship of text and reader, he granted that *le texte se passe de nous* (the text needs us not). Lecture by Jacques Derrida on Francis Ponge at Cornell University (Sept. 27, 1975).

[269] 302 U.S. at 325.

The process had been arduous, worthy of the grave substantive decision to which it led. The facts triggered, inductively, a reference to one group of words; the meaning of these words gained illumination from another group of words in the same document. Wisdom as to the latter was to be found in other texts (the cases), which themselves had to be construed in order to discover "a unifying principle."[270] Three inductive acts had led to a single generalization—that only fundamental liberties would necessarily be constitutionally privileged against state action. The interpreter could then proceed to what he fatefully called a "final"[271] act of deduction. Did Connecticut's statutory grant of a second trial for the same offense violate the "essence of a scheme of ordered liberty"?[272]

> If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge . . . has now been granted to the State. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.[273]

Closing on a complex metaphor, Cardozo alluded stylistically to the difficult analytical structure he himself just traversed. But is it only style which leaves us with an impression of the accuracy of the route he followed, despite the fatal results of the journey? Has the impersonality of the hermeneutic process deadened our sense that this case could have gone either way?

Context as an interpretative strategy,[274] after all, might have encouraged Cardozo to *restrict* himself (as in *Marchant*) to the four corners of the document itself. This decision, in turn, would have justified an incorporation of at least the fifth amendment (with its strikingly similar language) into the fourteenth. Attention to the cases violates the strategy and merely adds words to an already difficult muddle. We know, of course, that Cardozo followed Arnold (and another Columbia influence, Aristotle[275]) in perceiving the hermeneutic

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[270] *Id.* at 328.

[271] *Id.*

[272] *Id.* at 325.

[273] *Id.* at 328.

[274] *See, e.g.*, Abraham, *Intention and Authority in Statutory Interpretation* (paper presented to the Special Session of the Modern Language Association on "Law and Literature") (Dec. 27, 1977) (copy on file at Cardozo Law Review) (to be published in *Symposium on Law and Literature*, 32 RUTGERS L. REV., Fall 1979).

[275] *See* note 147 *supra* and accompanying text.

act as tied to a sense of ethical reality. The principle of contextual expansiveness which underlies *Palko* (all relevant texts must be examined in order to understand the Constitution), derives from Cardozo's education into the notion of justice. The final metaphor in the opinion articulates the ultimate context which makes the case seem correct: justice requires the state to have the same rights as the individual to prove its case at "a trial free from the corrosion of substantial legal error."[276]

Cardozo's edifice, in *Palko*, combines a systematic hermeneutic exterior with a foundation of principled morality. Did the foundation precede the facade in the architectonic planning of the whole? The answer, in light of the final structure of the opinion, is well worth pondering.

3. *Value Awareness*

(a) *Morningstar v. Lafayette Hotel Co.*[277]

Cardozo's sense of the "contest," as exemplified in *Killian*,[278] sometimes moved him to recall bygone days of pitched battles, and even to compare modern courts with Roman arenas. His ironic nostalgia contained an element of serious personal perspective, however. The adversary system struck him as a cultural development of some importance, permitting individuals with a grievance to give vent, peacefully, to their natural urge for justice.

In *Morningstar*, a feisty plaintiff sued an innkeeper for ejecting him from the hotel dining room after he complained about a one dollar charge. Defendant offered into evidence the testimony of other innkeepers to the effect that Morningstar was a "kicker" and a chronic complainer.[279] His repute being small to begin with, what damages could he have suffered from the incident? The evidence was admitted, and the jury found for the defendant.[280]

Cardozo could not countenance the trial judge's stance toward the other innkeepers' testimony, and he reversed.[281] But in so doing, he added to our understanding both of his values and of the basic premises of an adversary system:

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[276] 302 U.S. at 328.
[277] 211 N.Y. 465, 105 N.E. 656 (1914).
[278] 251 N.Y. at 50, 166 N.E. at 800.
[279] 211 N.Y. at 467, 105 N.E. at 657.
[280] *Id.*
[281] *Id.* at 467-68, 105 N.E. at 657.

> It is no concern of ours that the controversy at the root of this lawsuit may seem to be trivial. That fact supplies, indeed, the greater reason why the jury should not have been misled into the belief that justice might therefore be denied to the suitor. To enforce one's rights when they are violated is never a legal wrong, and may often be a moral duty. It happens in many instances that the violation passes with no effort to redress it—sometimes from praiseworthy forbearance, sometimes from weakness, sometimes from mere inertia. But the law, which creates a right, can certainly not concede that an insistence upon its enforcement is evidence of a wrong. A great jurist, Rudolf von Ihering, in his "Struggle for Law," ascribes the development of law itself to the persistence in human nature of the impulse to resent aggression, and maintains the thesis that the individual owes the duty to himself and to society never to permit a legal right to be wantonly infringed. There has been criticism of Ihering's view, due largely, it may be, to the failure to take note of the limitations that accompany it, but it has at least its germ of truth. The plaintiff chose to resist a wrong which, if it may seem trivial to some, must have seemed substantial to him; and his readiness to stand upon his rights should not have been proved to his disparagement.[282]

(b) *In re Findlay*[283]

A stern moralism joined here with an imaginative attack on an absurd judicial fiction to produce a typically rich Cardozo opinion. Alfred Brooks petitioned to be the administrator of the estate of his brother John Findlay (né Brooks), and to obtain letters of administration previously granted to the decedent's half brother, William Findlay. William had claimed to be decedent's full brother, and hence to have a superior claim to the estate.[284] It was true that John and Alfred had been born in England to the same set of parents; it was also true that William was born eleven years after their mother had run off with another man to live in America. But the first marriage was never dissolved.[285] Thus, two lower courts[286] applied, in William's behalf, the common law presumption of legitimacy, despite the overwhelming unlikelihood of conjugal relations between his mother and the abandoned Englishman.

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[282] *Id.* at 468, 105 N.E. at 657.
[283] 253 N.Y. 1, 170 N.E. 471 (1930).
[284] *Id.* at 4, 170 N.E. at 471.
[285] *Id.* at 4-5, 170 N.E. at 472.
[286] *Id.* at 6, 170 N.E. at 472.

Cardozo's patience for the presumption reached its limits in this case. How likely was it that, as to William's conception, his mother "was visited by her abandoned husband while she was living away from him in adultery. . . ."[287] A line of cases, chipping away at the solidity of the presumption, allowed the surfacing of the full flush of Cardozo's fiery resistance to this respondent's arguments:

> There is no evidence that Henry Brooks [the abandoned husband] was a man of perverted or indecent habits. He must have been this in shocking measure if he was continuing carnal commerce with his wife who had run away from his home and was living apart from him in unconcealed adultery. . . . We presume a vileness and degradation so improbable as at least to border on extravagance when we infer without proof that the relation thus established, a relation of *de facto* marriage, was soiled by the disgrace of a clandestine connection between the separated spouses.[288]

There is a touching quality to these lines, a willingness to express sharply both an offended moral sense and a repugnance for a legal rule "gone mad."[289] How unsusceptible to glibness, relativism, or indifference was this adjudicator, a figure whose values found their way, overtly, into his paragraphs.[290] Like Jeremiah, Cardozo could not disguise his disillusionment when his own people turned from the paths of justice and reason. He excoriates here not William Findlay, but the legalisms which almost validated his claim.

4. Imagination

(a) *In re Fowles*[291]

As Leon Green once said of Cardozo's opinions, "the dullest case under his creative art is justice set to cadence."[292] No less than his

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[287] *Id.* at 6, 170 N.E. 471.

[288] *Id.* at 10, 170 N.E. at 474.

[289] *Id.* at 13, 170 N.E. at 475.

[290] Through two decades of growing cynicism without the law and growing mechanism within, he upheld the intrinsic value of the simpler virtues and scourged the simpler vices with the language of the poet and the seer. This alone would make him a significant bearer of moral tradition. More significant for the philosophy of law is his insistence that the law in its more technical aspects—its rules, its administration, its judicial process—should justify itself by the test of consequences, by an analysis of its instrumental values. Here, if in any one place, is his contribution to jurisprudence.

Patterson, (pt. 2), *supra* note 44, at 156, 173; Hamilton, *supra* note 45, at 21 (briefly discusses this case).

[291] 222 N.Y. 222, 118 N.E. 611 (1918).

[292] Green, *supra* note 62, at 125.

most active imagination addressed each case before him, and he knew enough about the marvelous spontaneity of life (if largely through literature[293]) to perceive the dynamic aspect of almost any conflict. *Fowles* emerges from a dramatic background—the sinking of the *Lusitania*—but the case could have been lost in a sea of legalisms had Cardozo not extended his imaginative line.

Husband and wife had drowned; there was no way to determine who died first. Mr. Fowles had left a sizable estate, the bulk to his equally wealthy and unfortunate spouse by way of specific bequests, and a residuary article which, through its power of appointment clause, became the subject of the instant litigation.[294] Forty-five percent of the residuary was for the lifetime use of Mrs. Fowles, the remainder to be divided in halves, with one-half (or 22½ percent of the total residuary estate) going to whomever she appointed by her last will and testament.[295] In the absence of her exercising the power, Mr. Fowles' daughters would become the income beneficiaries, remainder to their own children upon their deaths.[296]

Mrs. Fowles also left a will. In its residuary clause, she exercised the power and bequeathed the 22½ percent to her sister for life, remainder in equal thirds to Mr. Fowles' nephew and the same two daughters.[297] Mr. Fowles' sister-in-law claimed her income interest upon the probate of both wills, but Fowles' two daughters and the trustees disagreed, viewing the power as unexercised due to the impossibility of determining Mrs. Fowles' survivorship, and arguing, on the same grounds, that the specific bequests to her did not pass through her will, but lapsed before reaching it.[298]

Cardozo, deferring to Judge Crane's explanation in dissent as to the valid passing to Mrs. Fowles of the specific bequests,[299] turned his attention exclusively to the power of appointment clause. Article Nine of Fowles' will contained a standard simultaneous death provision, attempting to create an assumption that he predeceased his wife in the event of a joint disaster. Although Cardozo and Crane concurred that Fowles had intended this provision to prevent lapse of the specific bequests (Judge McLaughlin disagreed),[300] Cardozo

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[293] *Id.* at 123.
[294] 222 N.Y. at 228, 118 N.E. at 611.
[295] *Id.*
[296] *Id.*
[297] *Id.* at 228-29, 118 N.E. at 612.
[298] *Id.* at 229, 118 N.E. at 612.
[299] *Id.* at 234, 118 N.E. at 614.
[300] *Id.* at 243-44, 118 N.E. at 617 (McLaughlin, J., dissenting).

realized that its effect on the power of appointment provision was less clear. A power of this kind appears to be a gift, the completion and exercise of which cannot occur until the death of the donor.[301] Fowles' death, either simultaneous with, or subsequent to, his wife's extinguished the gift before it could be utilized by Mrs. Fowles. She had not the power to transfer the property by her will.[302]

Could the language, "I hereby declare it to be my Will that it shall be deemed [in such an event] that I shall have predeceased my said wife," act as a sufficient mainstay to the attempted gift?[303] In *In re Piffard*,[304] the testator directed in his will that certain property be given directly to whichever trustees his daughters (if they predeceased him) had named in their wills; he reaffirmed this in a codicil after the death of one of the daughters. The gift into her estate was allowed. Although the case differs from *Fowles* in that Piffard made provision for a direct gift to the daughter's estate in the event she predeceased him, Cardozo found the case on point, and the distinction to be "purely verbal."[305] His imagination thus was poised, on these facts, to hurdle two obstacles: the rule of property law as to powers, and the New York cases as to the relationship between one testamentary instrument and another. With a double stylistic inversion[306] emblematic of the ensuing analysis, he proceeded toward his daring feat:

> Of his intention, there can be no doubt. In that, we all agree. He was about to set sail with his wife upon a perilous journey. He knew that disaster was possible. He knew that if death came, there

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[301] *See id.* at 241, 118 N.E. at 616 (Crane, J., dissenting in part). That a power given in the will of X to Y cannot be exercised by Y until X's death needs little elucidation; it is a mere expectancy at best. If Y predeceases X, and if there is a provision in his will exercising the power which X hoped to give him, the provision would be unenforceable, tantamount to bequeathing personalty from X before X has decided to complete the gift. (Nor, indeed, could Y, if given the power to be exercised only by Y's will, contract with a third party to exercise the power during his lifetime, even *after* X's death. This distinguishes the power from an outright testamentary gift from X to Y.) Suppose a contingent bequest by X to Y's estate if Y predeceases; can this be analogized to *Fowles*? *See* text accompanying note 304 *infra* for a discussion of the case of *In re* Piffard, 111 N.Y. 410, 18 N.E. 718 (1888). On powers of appointment in the law of New York, *see generally* Powell, *Powers of Appointment*, 10 BROOKLYN L. REV. 233 (1941).

[302] 222 N.Y. at 229, 118 N.E. at 612.

[303] *Id.* at 228, 118 N.E. at 612.

[304] 111 N.Y. 410, 18 N.E. 718 (1888).

[305] 222 N.Y. at 231, 118 N.E. at 612.

[306] Characteristic of Cardozo's style, the placement of a preposition at the beginning of a sentence inverts the normal pattern and draws attention quickly to the principal noun in the phrase.

> would be no presumption to whom it had come first . . . . He told the courts what he wished them to do if all other tests of truth should fail. They were to distribute his estate as they would if his wife were the survivor. We cannot know whether she was in truth the survivor or not: there is no break in the silence and obscurity of those last hours. The very situation which was foreseen has thus arisen. If intention is the key to the problem, the solution is not doubtful. We are now asked to hold that under the law of the state of New York, a testator may not lawfully declare that a power executed by one who dies under such conditions shall be valid to the same extent as if there were evidence of survivorship.[307]

The first hurdle to the implementation of the drowned man's intention he left in the dust as though it were pure ephemera: "The question is not whether this power of appointment lapsed. The question is whether the testator has avoided the consequences of a lapse."[308] If the joint death provision could be said to apply to the intention behind the gift of the power, then Mr. Fowles may have incorporated in his own will whatever provisions his wife had made in hers as to his residuary estate.

New York to this day rejects the doctrine of incorporation by reference.[309] Even if the testator specifically refers to a document already in existence as he executes his will, the provisions of that extrinsic document ordinarily may not be given testamentary effect regarding his property. For Cardozo, *Piffard* answers the jurisprudential disinclination to incorporate: the testator's gift to his daughter's estate in that case substantially duplicates Fowles' gift to his wife's legatees in this.[310] Furthermore, the rule against incorporation

> is the product of judicial construction. Its form and limits are malleable and uncertain. . . . It is a rule designed as a safeguard against fraud and mistake. In the nature of things, there must be exceptions to its apparent generality. Some reference to matters

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[307] 222 N.Y. at 229, 118 N.E. at 612.

[308] *Id.* at 230, 118 N.E. at 612.

[309] Exceptions to the rule against incorporation by reference have been carved out by the courts and the legislature in response to individual fact situations (such as *Fowles*) and to modern economic needs. Thus, the Estates, Powers and Trusts Law specifically allows such devices as the "pourover trust," which, as an estate planning device, allows an active reciprocal relationship between a will and a revocable trust. *See* N.Y. EST., POWERS & TRUSTS LAW § 3-3.7 (McKinney 1967).

[310] Judge Crane, dissenting in part, and Judge McLaughlin, dissenting, refused to concur, on the ground that Piffard's was a direct gift to his daughter's executors upon the fulfillment of a condition, her death. 222 N.Y. at 240, 245, 118 N.E. at 615, 617.

> extrinsic is inevitable. Words are symbols, and we must compare them with things and persons and events. . . . No general formula can tell us in advance where the line of division is to be drawn.
>
> It is plain, therefore, that we are not to press the rule against incorporation to a "drily logical extreme. . . ."[311]

A few short lines elucidate the expansive principles of interpretation—the skepticism of mere words or forms of words—which always characterized Cardozo. Using here something of what he called the style "magisterial or imperative,"[312] he brushes by the New York cases on the way to his conclusions. Fowles meant to have his wife declare, finally, how part of his residuary estate should pass, and she did so. Had she died six months or a year before him, perhaps his intention would have changed, but since we will never know the exact "time at which death came to him or his wife in the depths of the ocean,"[313] we should strive to implement his will in the direction of its signs. By doing so, we touch neither the law of powers nor the cases against incorporation by reference. Extrinsic references are "inevitable"; Fowles' wife's will is one referent among many (others are people, places, "plain" and "legal" terms, etc.), and the court does well to tie his will's signs to that referent.[314]

Imagination—the use of Holmes' "judgment and tact" in the structuring of a judicial opinion—stands as the architectonic principle in *Fowles*. Style, hermeneutics and value awareness seek and find their level in response to Cardozo's imaginative touch. So, in teaching us about the interpretation of a will—discover testator's intent through the context of his complete will, and then implement it wherever his signs can be tied to a legitimate referent—he teaches us again about poetry in the law.

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[311] *Id.* at 232-33, 118 N.E. at 613.

[312] B. CARDOZO, *Law and Literature*, *supra* note 20, in SELECTED WRITINGS, *supra* note 20, at 342.

[313] 222 N.Y. at 234, 118 N.E. at 613.

[314] *See* C. OGDEN & I. RICHARDS, *supra* note 244. Cardozo, as we have shown, always recognized the distinction between sign and referent; in *Fowles*, he implements his sensitivity to the multifaceted nature of written communication. Thus, although the holding may be explained as allowing "facts of independent significance" to affect a will, the more complete view is that it permits the offering of "extrinsic" evidence to understand the meaning of a document whenever that evidence can be shown to relate to a contested aspect of the document's meaning, irrespective of the document's apparent non-ambiguity. This approach to language has, in recent years, been characterized as the "liberal," as compared with the "plain meaning," approach. It recognizes the contingent nature of linguistic "meaning," and more freely admits evidence assisting an understanding of a *particular* party's meaning when he had the contested words drafted. *See* RESTATEMENT OF PROPERTY § 242, comments d & i at 1199, 1204 (Tent. Draft No. 7, 1937); 5 J. WIGMORE, EVIDENCE § 2462 (2d ed. 1923). *See generally* M. RHEINSTEIN & M. GLENDON, *supra* note 155, at 379-420.

CONCLUSION

The Advocate's Perspective

About to appear before Cardozo's court, the advocate ponders his arsenal of argumentation. Will it suffice if it includes the fullest possible array of factual and legalistic weaponry? Or will the imaginative judge ultimately declare those weapons obsolete and provide the adversary with a protective armor never before seen on the field of battle?

How, in other words, can lawyers who are neither saints nor poets benefit from Cardozo's marvelous example? This is not the forum for even a partial approach to such a question, but it does seem to me that the body of poetic knowledge which Cardozo employed so richly ought to be made available, systematically, to the profession. His creativity, like Flaubert's (like anyone's), flowed from a unique intuitive spring; but the humanities, the identifiable source of his special approach to the law, offer a set of skills accessible to judge, practitioner, and professor alike.

Cardozo's opinions do not retrospectively acquire an idiosyncratic and therefore frightening quality. On the contrary, they glitter with the particular culture of the law. Even his most imaginative decisions, as we have seen, convey a synthesis of the facts and applicable law perfectly in harmony with the legally possible. But in the absence of *education*, such synthetic creativity will be blocked. We risk, then, the stasis of a legal system bereft of its Cardozos, its dynamism, and its human essence.