CARDOZO AT 100*

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The shelf life of judicial reputation is short. How many judges from a hundred years ago can most lawyers recall, except perhaps as a name? My subject, Benjamin Cardozo, is the exception. The year 2013, when this essay went to press, marks a hundred years since Cardozo was first elected to the New York Supreme Court, the leading New York trial court, and seventy-five years since he died as a Justice of the United States Supreme Court. He is one of the very few judges of that era whose name currently means something to the legal profession and beyond. Unlike any other contemporary, he is still remembered for his career as a state court judge and also, albeit somewhat less, for his career on the United States Supreme Court. My thesis is that the public memory is somewhat askew as to the essence of what ought to be remembered in both venues.

First as to the memory of the Benjamin Cardozo of the New York Court of Appeals. Cardozo is remembered as the judge who brought the common law into the twentieth century, the judge who adapted the general principles underlying centuries of traditional law to the dynamic changes of an industrializing society, the judge who realized that the atomized societies of previous centuries were becoming more and more interdependent and that law needed to recognize the new economic and social reality. While a careful reading of the body of Cardozo's work supports that conclusion, it does not portray the whole Cardozo. There was another Cardozo, who gave more

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weight to, or put more burdens on, the other organs of government. A great many of his most famous opinions are matched by an opinion in an analogous case in which he did not modernize the law, did not create a new duty to reflect changes in society. Cardozo modernized most in situations where the way had been foreshadowed, or at least hinted at, in previous legislative or judicial action in his own state.

On the other hand, Cardozo believed that his position as a judge in a democratic society counseled leaving the responsibility for law reform to the legislature when issues were complex and the consequences of change uncertain. His references in many opinions to possible limits on the doctrine being enunciated were not window dressing to be ignored in subsequent opinions. Quite often the lawyerly ingenuity that expanded a principle enunciated a limitation to the principle as well. Thus the seminal opinion imposing liability on auto manufacturers to the ultimate buyer of its defective product is matched by an opinion refusing to impose liability on a public utility to the company whose property was destroyed by fire, allegedly because of failure of the water company to supply water at specific hydrants. Indeed, a series of cases in which Cardozo invoked doctrine and policy in support of liability based on foreseeability is matched by a series of cases in which he invoked doctrine and policy to deny foreseeability-based liability. One can find other series of such paired cases throughout the various areas of doctrine that he considered during his eighteen years on the New York Court of Appeals.

The same ambiguity can be seen in his writings, most notably in *The Nature of the Judicial Process*,[1] a series of lectures that continues to be reprinted and sold in substantial numbers over ninety years after they were delivered. Cardozo trumpeted the then-contested doctrine that judges make law. That was what his listeners and readers heard and read. But he also cautioned that judges were constrained by history, precedent, and the powers and responsibilities of other branches of government. His performance on the bench demonstrated that the cautions carried weight with him. Cardozo's judicial philosophy was shaped by his twenty-three years as a practicing

1. Yale U. Press 1921.

lawyer. He was a tenacious, hard-headed practical lawyer who relied on the facts when they were favorable and on every legal technicality when they were not. His philosophy was a lawyer's eclectic philosophy; he generally avoided sweeping pronouncements that might embarrass the future. A certain ambiguity was the result. He was not the captive of any particular approach, and one can often find general language in his opinions to support both sides of the argument with respect to particular issues.

A similar approach characterized Cardozo's work during the relatively brief period he served on the Supreme Court of the United States. He is remembered as one of the trio of Justices—Brandeis and Stone were the other two—who forcefully dissented as the Supreme Court invalidated so much of the economic legislation of the New Deal. Especially relevant in view of the resuscitation of limits on the Commerce Clause by the Supreme Court in 2012 is the fact that even Cardozo, with his expansive opinions on the reach of the Commerce Clause, found a limit when he wrote that Congress had gone too far in extending the reach of the National Labor Relations Act to slaughterhouses in New York City, arguing that finding a relationship in that case to interstate commerce would be to find it almost everywhere and end our federal system. That does not sound like the Cardozo we remember, but the Cardozo we should remember was an accommodationist. When two important doctrines clashed, he usually found a way to give some recognition to one even when he generally leaned in the direction of the other, and not just in language but also in result.

The period in which Cardozo served on the Supreme Court marked the beginning of a new approach to civil rights, not just with respect to the race issue but also with respect to other provisions of the Bill of Rights. Here too one can see Cardozo feeling his way in expanding the scope of constitutional civil liberties. While he wrote important opinions protecting the rights of African-Americans, both in individual criminal cases and in cases involving group rights, and while he made an important contribution to the constitutional protection of a free press, he also wrote opinions containing restrictive views of the double jeopardy and jury-trial provisions of the Constitution and he also refused to give First Amendment protection to the

principles of conscientious objection to military service. Cardozo was ready to open the Constitution's door to admit new constitutional principles, but not to open it too wide.

There was one very large constitutional issue, however, where Cardozo should be remembered for abandoning his usual reluctance to make sweeping generalities or to stake out a major theoretical position. Although, in the end, he withdrew a concurring opinion from publication to accommodate Chief Justice Hughes, who had borrowed from it, Cardozo took a stand on what is still a major controversial issue today. Addressing the ability, the right, of the Supreme Court to reinterpret the open-ended provisions of the Constitution in light of changes in society over time, Cardozo took his text from John Marshall's dictum that it was a constitution that the Court was interpreting, a doctrine designed to endure for ages. He eschewed notions of "original meaning" and literal interpretation of words. He stated clearly and emphatically his belief that the Constitution was not meant to be a straitjacket and should not be interpreted as such. It was designed to be adapted to changes in economic, social, and political conditions. Despite the fact that the opinion was not published and exists only in Cardozo's papers, it is a document for which he should be remembered, especially because it reflected an uncharacteristic approach in his opinions. He must have felt strongly about the issue to have departed from his usual case-by-case, fact-oriented method of expression to have been willing to take a public position on one side of a very controversial theoretical issue. Unfortunately for history, institutional considerations led him to withhold publication.

Finally, Cardozo is remembered for his style. His main hobby was reading and he read widely in literature, philosophy, and even to some extent in science. He was fascinated by language and its ability to convey thought in striking fashion. He employed his love of words in a constant effort, occasionally a bit strained, to express his reasoning in memorable language. That unique style helped make him known in his day and has helped perpetuate his memory as law teachers use his opinions to catch the interest of their students. I have ended many a talk I have given about Cardozo by letting him speak for himself. I can think of no better way to end an essay devoted to the is and the

ought of the memory of Cardozo than by quoting some of his more memorable words:

> The criminal is to go free because the constable has blundered.
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> – *People v. Defore*, 242 N.Y. 13, 21 (1926)

> Not lightly vacated is the verdict of quiescent years.
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> – *Coler v. Corn Exch. Bank*, 250 N.Y. 136, 141 (1928)

> Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.
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> – *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 94 (1926)

> The tendency of a principle to expand itself to the limit of its logic may be counteracted by the tendency to confine itself within the limits of its history.
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> – *The Nature of the Judicial Process*, 51 (Yale U. Press 1921)

> Danger invites rescue.
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> – *Wagner v. Intl. R. Co.*, 232 N.Y. 176, 180 (1921)

> The timorous may stay at home.
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> – *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 483 (1929)

> The assault upon the citadel of privity is proceeding in these days apace.
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> – *Ultramares Corp. v. Touche*, 255 N.Y. 170, 180 (1931)

A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

– *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928)

One who is a martyr to a principle . . . does not prove by his martyrdom that he has kept within the law.

– *Hamilton v. Regents of the U. of Cal.*, 293 U.S. 245, 268 (1934)

[O]f freedom of thought and speech . . . . one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.

– *Palko v. Conn.*, 302 U.S. 319, 326–27 (1937)

[W]e are not to close our eyes as judges to what we must perceive as men.

– *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 63 (1920)

Justice is not to be taken by storm. She is to be wooed by slow advances.

– *The Growth of the Law* 133 (Yale U. Press 1924)

[A] great principle of constitutional law is not susceptible of comprehensive statement in an adjective.

– *Carter v. Carter Coal Co.*, 298 U.S. 238, 327 (1936)