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Cardozo's Views on Law and Adjudication Revisited

*Edgar Bodenheimer**

INTRODUCTION

The present Essay was written fifty years after the death, in 1938, of that overtowering figure in the annals of the American judicial system, Justice Benjamin Nathan Cardozo. Many of his writings and court opinions evoked admiration, sometimes amounting to exuberant praise, among judges, practitioners, and legal educators.[1] This admiration has not remained confined to the substantive contents of his legal pronouncements; it has also extended to his writing style. Cardozo's use of words has an almost magical quality. He had the ability to express the

* Professor of Law Emeritus, University of California, Davis; Dr. Jur., University of Heidelberg, 1933; LL.B., University of Washington, 1937.

[1] For evaluations of Cardozo's work, see J. POLLARD, MR. JUSTICE CARDOZO: A LIBERAL MIND IN ACTION (1935); Aronson, *Cardozo's Doctrine of Sociological Jurisprudence*, 4 J. SOC. PHIL. 5 (1938); *Benjamin Nathan Cardozo Commemorative Issue*, 1 CARDOZO L. REV. 1 (1979); Patterson, *Cardozo's Philosophy of Law*, 88 U. PA. L. REV. 71, 156 (1939); *Proceedings in Memory of Mr. Justice Cardozo*, 305 U.S. v, v-xxviii (1938); Weissman, *Cardozo: "All-Time Greatest" American Judge*, 19 CUMB. L. REV. 1 (1988).

most abstract and complex thoughts in a terse, lucid, graphic, and often artistic way. Therefore, a study of his writings is apt to generate in the reader not only a deep intellectual satisfaction but also an ample measure of aesthetic pleasure.

This Essay will focus on Cardozo's legal philosophy. Special emphasis shall be placed on his analysis of the judicial process; the Essay will, for the most part, not address his contributions to the improvement of positive law. The passage of half a century since the demise of the great judge provides an appropriate time for a reappraisal of his jurisprudential work. This appraisal will take into account subsequent developments in this domain of legal thought. The Essay will pose the question whether and to what extent Cardozo's views can stand up and remain valid before a forum of scholarly inquiry not in existence during his lifetime.

This agenda encounters the difficulty that the amount of research and writing done particularly on the judicial process during the last fifty years has been exceedingly large. Therefore, it is necessary to limit the investigation to some of the modern authors and schools of thought currently occupying the front stage. The theory of adjudication advanced by Ronald Dworkin in the context of his general legal philosophy falls into this category. Two contemporary movements in jurisprudence, the Law and Economics school and the Critical Legal Studies (C.L.S.) group, also fit in this category. Considering the findings made by these authors and schools of thought, does the approach taken by Cardozo require reconsideration and, perhaps, substantial correction? The conclusions reached by the Author of this Essay will of course strongly reflect his own opinion of proper judicial methodology.

In pursuing this line of inquiry, it bears emphasis that Cardozo was a thinker of the "grand design." Cardozo was never content to restrict the scope of his studies to narrowly focused problems in his vocational field. His reflections on the art of judging were grounded on broad conceptions concerning the natural and social forces that affect the legal evolution of a society. The next Section will attempt to trace the philosophical foundations underlying these conceptions and to contrast them with wholly or partly inconsistent views expressed by some C.L.S partisans. The discussion in the subsequent Sections will deal with more specific methodological aspects of Cardozo's theory of adjudication. Cardozo's most important thoughts, in their theoretical formulations, are chiefly found in four of his publications: *The Nature of the Judicial Process* (1921), *The Growth of the Law* (1924), *The Paradoxes of Le-*

gal Science (1928), and an address before the New York State Bar Association subsequently entitled *Jurisprudence.*[2]

I. The Philosophical Foundations of Cardozo's Thought

The German poet, dramatist, and novelist Johann Wolfgang von Goethe reportedly observed that two major principles manifest themselves in nature: the phenomenon of polarity, and the drive toward enhancement.[3] It is unlikely that Cardozo ever read this statement. If he was acquainted with it, it is likely that he would have fully endorsed it.

Polarity means the movement in different directions of elements belonging to the same system, without jeopardizing the unity and effectiveness of the system. In other words, polarity signifies the interdependence and interaction of entities or forces standing in a relation of contrast to each other. The planets maintain their orbit by the balance of two antithetical forces: gravity (a form of attraction) pulling them toward the sun, and centrifugal force (a form of repulsion), counteracting gravity and making the planets move in the direction given to them by the initial push. Mass and energy are opposites, but they interpenetrate and coexist in entities like protons and electrons.[4] Light quanta consist of particles (corpuscles) and waves, which complement each other, even though they exhibit the antinomic features of discontinuity and continuity.[5] To function properly, the human biological system requires tension as well as relaxation. In human society, the adjustment of opposite elements is present in the reconciliation of freedom and authority, stability and change, cooperation and competition.[6]

The second major principle, enhancement, manifests itself in organic nature as a tendency toward completion and perfection. Some secret force impels the acorn to reach its potential by developing into a full-

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[2] These writings have been collected in Selected Writings of Benjamin Nathan Cardozo (M. Hall ed. 1947) [hereafter Selected Writings]. All subsequent citations to Cardozo's writings will be to this compilation, which is the most widely used source and which contains references to the page numbers of the original publications.

[3] *See* 2 R. Friedenthal, Goethe: Sein Leben und Seine Zeit 528 (1968). The second principle appears to be limited to organic nature, including human nature.

[4] *See* L. De Broglie, The Revolution in Physics 69 (1953).

[5] *See* N. Bohr, Atomic Physics and Human Knowledge 37, 40 (1958); L. De Broglie, Matter and Light 220 ff (1939); L. Von Bertalanffy, Problems of Life 180 (1952).

[6] On the principle of polarity in general, see M. Cohen, Reason and Nature 165-68 (2d. ed. 1953). Cardozo refers specifically to Cohen's view on this subject in Selected Writings, *supra* note 2, at 25.

grown oak. Human individuals have a natural disposition to realize their possibilities by developing their native talents and skills. Human societies aspire to something that might be called betterment or improvement. However, it merits noting that the principle of enhancement retains its potency only in healthy organisms, individuals, and societies. Enhancement is obviated and frustrated (although not necessarily destroyed) in declining or sick organisms, individuals, and societies. It is also often counteracted by the force of inertia, impeding or slowing down its actualization.[7]

The writings of Cardozo show that he believed in both the principle of polarity and the impetus toward improvement. With respect to the former, Cardozo's most revealing comments are found in the *Paradoxes of Legal Science*:

> The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law. . . . We have the claims of stability to be harmonized with those of progress. We are to reconcile liberty with equality, and both of them with order. The property rights of the individual we are to respect, yet we are not to press them to the point at which they threaten the welfare or the security of the many. We must preserve to justice its universal quality, and yet leave to it the capacity to be individual and particular.[8]

These statements, which remind us of Hegel's philosophy of dialectics, throw light not only on Cardozo's view of social life, but also on his cosmic beliefs. The opposition between static and dynamic, Cardozo says, holds true for the universe.[9] Rest competes with motion, permanence with flux, conservation with change.[10] It merits mentioning that Friedrich Nietzsche disputed this philosophy, defining the universe as a realm of "incessant becoming." Nietzsche was unwilling to concede to the notion of repose any role in nature, but many reasons exist for questioning the validity of Nietzsche's view.[11]

The practical impact of Cardozo's dialectical interpretation of natural and social processes upon his theory of adjudication becomes mani-

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[7] *See* F. ALEXANDER, OUR AGE OF UNREASON 199-200 (1942); E. BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 305-06 (Rev. ed. 1974).

[8] SELECTED WRITINGS, *supra* note 2, at 254. Cardozo stated: "Antithesis permeates the structure. Here is the mystery of the legal process, and here also is its lure." *Id.* at 334.

[9] *Id.* at 254.

[10] *See id.* at 254-55.

[11] For a discussion and critique of Nietzsche's philosophy of nature, based on the findings of modern physicists, see E. BODENHEIMER, POWER, LAW, AND SOCIETY: A STUDY OF THE WILL TO POWER AND THE WILL TO LAW 4-8, 14-23 (1973).

fest in his strong conviction that a judge is often called upon to balance conflicting interests and values. According to Cardozo, the promotion of the social welfare provides the ultimate end of judicial activity.[12] Fulfilling this goal may sometimes call for the recognition or expansion of individual rights, at other times for their curtailment. His statement to the effect that the property rights of an individual may find their limits in the pressing and overriding needs of the community has already been quoted.[13] There may also be instances in which the enforcement of some contractual right would violate the public interest.[14] "The opposites, liberty and restraint, the individual and the group, are . . . at the heart of all being. Dichotomy is everywhere."[15]

We shall turn now to Cardozo's attitude toward Goethe's principle of "enhancement" (*Steigerung*). Cardozo firmly believed that legal philosophy can and must supply a principle of growth.[16] He realized that law requires a great deal of stability, but he was convinced that stability and progress, tradition and purposeful innovation could be combined in a properly apportioned blend. He objected to Savigny's exclusive emphasis on anonymous, silently operating forces as the sole measure of legal evolution.[17] The whole tenor of his jurisprudential arguments reflects an optimistic and idealistic mind-set that recognized the possibility of legal improvement through conscious and purposeful human action.[18]

In this respect Cardozo's views may be contrasted with the pessimism evident in various degrees of strength in the writings of the C.L.S. scholars.[19] C.L.S. devotees believe that law is indeterminate, ambiguous, and full of contradictions not only in its interpretation and application, but in its very core and essence. This notion is one of the main tenets of the movement. C.L.S. writers (at least many of them)

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[12] SELECTED WRITINGS, *supra* note 2, at 133.

[13] *See supra* text accompanying note 8.

[14] SELECTED WRITINGS, *supra* note 2, at 332. For a discussion of the need for judicial balancing of individual and group interests, see also *id.* at 306-07.

[15] *Id.* at 333.

[16] *Id.* at 186.

[17] *Id.* at 150.

[18] This positive attitude is also found in Cardozo's reflections on human destiny in general. *See* Cardozo, *Values: Commencement Address*, in SELECTED WRITINGS, *supra* note 2, at 1, 1-6.

[19] *See* ESSAYS ON CRITICAL LEGAL STUDIES: ARTICLES, NOTES, AND BOOK REVIEWS SELECTED FROM THE PAGES OF THE HARVARD LAW REVIEW (1986); D. KAIRYS, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (1982); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

also believe that law is politics dressed in a different garb, and that legal reasoning is not different from political reasoning. According to this view, law is in the last analysis nothing but an expression of the ideology predominant in the power hierarchy. C.L.S. scholars have also argued that the wholesale dependence of law on political commitment is masked by a conceptual apparatus of make-believe designed to create the impression that law is autonomous and neutral. Some of the critics also believe that law influences social behavior much less than is generally assumed.[20]

It is not always clear whether the essentially negative attitude displayed by C.L.S. toward the law is directed against American law in its present state, or whether it is aimed at the institution of law as such. Some of the broad and sweeping statements made by C.L.S. adherents suggest a deep-seated belief that law is burdened with inherent defects of such magnitude as to negate any potentially beneficial effects upon society.

How would Cardozo have reacted to the main tenets of the C.L.S. movement? He would have conceded the difficulties that have been created by the immense proliferation of judicial decisions: "The fecundity of our case law would make Malthus stand aghast."[21] Cardozo felt that the certainty of law, which to him was an important value, was seriously jeopardized when resourceful attorneys are able to discover precedents supporting almost any conceivable position.[22] Accordingly, he welcomed the initiation of the American Law Institute's project for a Restatement of the Law, designed to "bring certainty and order out of the wilderness of precedent."[23] Cardozo probably would have advocated the ultimate codification of the law if the Restatement project had turned out to be unsuccessful.

On the other hand, Cardozo would have felt that the emphasis of C.L.S. on the indeterminacy of law was too sweeping: "Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain."[24] Thus, serious doubt as to how to decide was, in his opinion, limited to a minority (albeit an important mi-

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[20] A good summary of the main tenets of Critical Legal Studies (C.L.S.) is found in Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 577-78 (1984). For a valuable brief critical evaluation, see Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 9-13 (1986).

[21] SELECTED WRITINGS, *supra* note 2, at 187.

[22] *Id.*

[23] *Id.* at 186; *see id.* at 186-90.

[24] *Id.* at 177; *see also id.* at 212-13 (implying similar conclusion).

nority) of cases.[25] Cardozo was aware that fixed principles often emerge out of the growth of case law, perhaps after a period of groping and experimentation with successive expansions, contractions, or reformulations of the ratio decidendi of a case.[26]

In contrast to C.L.S., Cardozo strongly believed in the possibility of an upward movement of the law. His enthusiasm about solving thorny problems in the administration of justice could not have been genuine in the absence of a conviction that the image of the law could be "enhanced." He wished to see a Ministry of Justice established that would make recommendations to legislative bodies on desirable improvements in the law.[27] This reflected his belief that law can and should serve as an effective instrument of social change aiming at a more just and healthy society.

This Essay is not the place for answering the skepticism running through many of the writings of C.L.S. authors. This skepticism results in their questioning the potential benefits that social control by law might bring to the human race. Only a few points should be made in response to their attitude of resignation.[28] First, even if it is conceded that the legal system of a nation mirrors the ideology of its dominant groups, it does not automatically follow that these groups passed laws exclusively for their own benefit. The histories of ancient Roman law and Anglo-American common law demonstrate that, with some significant temporary reverses, the position of the weaker classes of society improved over time (although this was sometimes accomplished only under strong social pressure).[29] Clearly, the law was the chief tool for carrying out these changes. Second, it is also indisputable that up to this day no institution other than law has been invented for the purpose of establishing and protecting human rights. Accordingly, one may conclude that, for the most part, the existence of a legal system has been experienced by human beings as a beneficial facet of social reality, while serious disturbances in the operation of law were accepted, if at all, only as inevitable transitions to more advanced forms of society.

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[25] *Id.* at 177.

[26] *Id.* at 178-83.

[27] *See id.* at 357-70.

[28] For a discussion of the advantages of social control through law, see E. BODENHEIMER, *supra* note 7, at 305-07.

[29] *See* E. BODENHEIMER *supra* note 11, § 16 ("The Strong and the Weak in Ancient Roman Law"); *id.* § 17 ("The Equality Record of Anglo-American Law").

II. Liberty and Restraint

"If liberty is a social conception," Hobhouse said, "there can be no liberty without social restraint."[30] Cardozo shared this view.[31] It is obvious that the liberty of one person must be curtailed if it is exercised in a manner detrimental to the liberty of another person. But individual liberties have also been restricted for the purpose of preventing harm to the social whole.

The question arises, however, to what extent the problem of reconciling liberty with restraint is incumbent upon the judiciary. In this connection it is necessary to call attention to a theory of Ronald Dworkin's that is referred to as his "rights thesis." Dworkin draws a distinction between "principles" and "policies." He considers the former to relate to individual or group rights, and the latter to safeguard and promote the public interest. According to Dworkin, when rights are contested in litigation between individuals, judges should rely on arguments of principle. They should avoid policy arguments, except in cases where a statute prescribes the use of such arguments, and in cases of "special urgency."[32] The concept of "special urgency" is defined very narrowly by Dworkin. It is applicable only when "considerations of policy are of dramatic importance, so that the community will suffer a catastrophe if they are ignored."[33]

Dworkin believes that the history of the common law, by and large, confirms his "rights thesis."[34] However, Kent Greenawalt has shown in an elaborate study that Anglo-American courts have quite frequently balanced private rights against collective goals.[35] Courts have, for example, outlawed certain contracts on the ground that they were not consonant with public policy. They have restricted rights of persons accused of criminal offenses in order to promote the effective prosecution of crime. Courts have also curtailed private property rights for the purpose of protecting the environment.

One explanation why Dworkin does not wish to vest in judges the general power to pursue arguments of public policy stems from his be-

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[30] L. Hobhouse, Social Evolution and Political Theory 219 (1911).

[31] *See supra* text accompanying note 15.

[32] R. Dworkin, Taking Rights Seriously 82-84, 92, 96-97 (1977).

[33] R. Dworkin, A Matter of Principle 375 (1985).

[34] R. Dworkin, *supra* note 32, at 96-97, 123.

[35] *See* Greenawalt, *Policy, Rights, and Judicial Decision*, 11 Ga. L. Rev. 991 (1977); *see also* Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 Colum. L. Rev. 359 (1975).

lief that judges should not act as "deputy legislators."[36] However, many constitutional decisions have addressed the validity of statutes restricting individual rights on police power grounds. Examples include decisions involving the promotion of public safety, public morals, or public health.[37] Not even the contract clause of the federal Constitution, in spite of its categorical formulation,[38] obliterates the police powers of the states in the opinion of the United States Supreme Court.[39] Such instances of balancing private rights ("principles") against the public interest ("policies") need not necessarily be termed exercises of legislative power. They may be described as natural concomitants of the need to interpret a constitution that recognizes many individual rights but, simultaneously, states in its preamble that one of its objectives is to "promote the general welfare."

No passages in any of Cardozo's writings indicate that he would have accepted Dworkin's rights thesis. His frequent references to the judicial duty of weighing personal rights against collective needs are evidence that his convictions were sympathetic to the judicial balancing process. Additional proof is furnished by his repeated emphasis that the final goal of judicial activity is the promotion of the "social welfare."[40]

It bears emphasis that Dworkin was not opposed to social legislation serving the common good, including distributive schemes designed to improve the position of the underprivileged. What he thought was that *judges* were not well equipped to make decisions arbitrating between vested rights and the good of the whole. The Law and Economics movement, on the other hand, proposes to resolve the problem of liberty versus restraint in a different manner from Dworkin's approach. They advocate the curtailment of the *legislatures'* power to promulgate so-

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[36] R. DWORKIN, *supra* note 32, at 82.

[37] For a discussion of the pertinent cases, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 574-88 (2d ed. 1988).

[38] According to the Constitution, no State shall pass any law impairing the obligation of contracts. *See* U.S. CONST. art. I, § 10, cl. 1.

[39] The Court stated:

> It is the settled law of this Court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected.

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978) (quoting Manigault v. Springs, 199 U.S. 473, 480 (1905)); *see also* Energy Reserves Group v. Kansas Power & Light Co., 459 U.S. 400, 411-13 (1982). For a discussion of interest-weighing by the Supreme Court, see L. TRIBE, *supra* note 37, at 582, 589-613.

[40] *See supra* text accompanying note 12.

cial-reformatory, and in particular redistributive, schemes at the expense of individual entitlements. This movement represents a revitalization of the laissez-faire philosophy of social Darwinism, although different writers advocate libertarian ideas to varying extents.

One author, Judge Frank Easterbrook, has displayed in his academic work an aversion to regulatory statutes, which since the days of the New Deal have for the most part shown a social-reformatory orientation. This aversion is complemented by Easterbrook's exaltation of the common law, which in a number of its prescriptions has favored an economic laissez-faire approach beneficial to the employer class.[41] Easterbrook has proposed that legislation should be deemed inapplicable by the judiciary unless it "either expressly addresses the matter or commits the matter to the common law (or administrative) process."[42] He holds that this approach provides a guaranty that "some things remain in the private domain."[43]

This suggestion, if adopted by the courts, would probably lead to the disregard of a great many statutes and a resuscitation of the antiregulatory tendencies of the common law. Statutes designed to rectify some contemporary social ills rarely refer the matter to the common law, which after all was the product of a different era. Where a piece of legislation deals extensively with a problem of social policy, it often does not attack the problem clearly and directly. The reason is that many statutes represent compromises between conflicting interests, and such compromises usually require some blurring or masking of the original purpose. The end result may be a jumble of prescriptions that are to some extent at cross purposes and do not reveal a clear and unambiguous policy. Such statutes may nevertheless be needed, but how many would survive the stringent test advocated by Judge Easterbrook?

Judge Richard Posner has expressed a similar preference for common-law solutions over regulatory social legislation.[44] He considers the

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[41] Examples are (1) the rule that an employer was not liable to an employee for injuries caused by the negligence of a fellow employee; (2) the determination that an employee had assumed the risk of hazards normally incident to his or her employment; and (3) the rule that the slightest degree of negligence on the part of an employee barred his recovery of damages from a fellow employee guilty of a severe degree of negligence. *See* PROSSER & KEETON ON THE LAW OF TORTS 568-72 (W. Keeton 5th ed. 1984) [hereafter PROSSER & KEETON].

[42] Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 552 (1983).

[43] Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 85, 93 (1984).

[44] *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 21, 232, 527 (3d ed. 1986) [hereafter R. POSNER, ECONOMIC ANALYSIS]; R. POSNER, THE ECONOMICS OF JUSTICE 6

common law to be "efficient" because it supports the free market and tends to honor individual preferences, especially in the area of bargaining and trading.[45] Posner's writing expresses a concept of the common good that sees its only possible meaning in the arithmetical sum total of private goods. It follows logically from this assumption that Posner does not view the primary purpose of legislation as the implementation of an objectively conceived set of ideas about the requirements of the public interest. Legislation is instead regarded, for the most part, as an accommodation and reconciliation of divergent individual interests.[46]

The writings of Professor Richard Epstein express the most extreme version of libertarian thinking.[47] To him, laissez-faire occupies the status of a constitutional imperative.[48] Epstein reaches this result through an unusually narrow definition of the state's police power and an extraordinarily broad construction of the federal Constitution's "takings" clause.[49] According to Epstein, "[t]he sole function of the police power is to protect individual liberty and private property against all manifestations of force and fraud."[50] This is a far cry from the position of the United States Supreme Court. According to the Court, the police power, as stated earlier, is an exercise of the sovereign right of Government to protect the public safety, public health, public morals, and the general welfare of the people.[51] Pursuant to Epstein's definition, the police power would not be broad enough to protect the public health, unless it was jeopardized by acts or threats of force. This position explains Epstein's sympathy for the United States Supreme Court's holding in *Lochner v. New York*.[52]

Epstein's view of the takings clause would require the state to pro-

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(1981).

[45] *See supra* note 44.

[46] *See* R. POSNER, ECONOMIC ANALYSIS, *supra* note 44, at 495-501; Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265-67, 274-75, 285 (1982).

[47] *See* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

[48] *Id.* at 112.

[49] The Fifth Amendment provides that private property shall not be taken for public use without just compensation. *See* U.S. CONST. amend. V.

[50] R. EPSTEIN, *supra* note 47, at 112.

[51] In addition to the cases cited *supra* note 39, see Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 436-437 (1933); *see also* Nebbia v. New York, 291 U.S. 502, 537 (1934); Mugler v. Kansas, 123 U.S. 623, 661, 664 (1897).

[52] 198 U.S. 45 (1905) (declaring unconstitutional a New York statute that limited bakery employees' hours of work to ten per day or to sixty per week because of the occupation's unhealthful nature); *see* R. EPSTEIN, *supra* note 47, at 108-09.

vide compensation for most restrictions of property rights, even though such restrictions may fall within the traditionally recognized rubrics of the police power.[53] He also claims that the takings clause "forecloses virtually all public transfer and welfare programs, however devised and executed."[54] Epstein contends that payment of compensation is obviously not feasible in this area.[55] Furthermore, he believes that progressive taxation, minimum wage laws, invalidations of yellow dog contracts, the Labor Relations Act, and rent control statutes violate vested property rights.[56] "It will be said that my position invalidates much of the twentieth century legislation, and so it does."[57] However, for pragmatic reasons, such as widespread reliance on the present benefit system, Epstein is not ready to have the welfare state eradicated by immediate action, legislative or judicial.[58] In the words of Thomas Grey, he would like to have it done "with, one might say, all deliberate speed."[59] In Epstein's own formulation, "[a]lthough the basic network of social and economic programs cannot be wholly dismantled, the present constitutional structure does admit a high degree of play at the joints."[60]

How would Cardozo, had he been alive today, have reacted to the Law and Economics movement and especially to its extreme libertarian wing? In a 1925 address to the American Law Institute, Cardozo made the following statement: "The existence of this Institute is a declaration to the world that 'laissez faire' in law is going or has gone the way of 'laissez faire' in economics."[61] Thus, at a time when the libertarian philosophy was still fairly well entrenched in American social life, he could see no future in it. As noted above Cardozo also believed that "[t]he property rights of the individual we are to respect, yet we are not to press them to the point at which they threaten the welfare . . . of the many."[62] His repeated assertion that the promotion of the social welfare was the ultimate goal of the law clearly indicates that Cardozo would not have shared the dislike of social legislation expressed in Posner's writings and, even more decisively, in those of Epstein.

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[53] *See* R. EPSTEIN, *supra* note 47, ch. 4.

[54] *Id.* at 322.

[55] *Id.* at 322, 324.

[56] *See id.* at 327-28, 279-80, 176-80; *see also* Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983).

[57] R. EPSTEIN, *supra* note 47, at 281.

[58] *Id.* at 327.

[59] Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 23 (1986).

[60] R. EPSTEIN, *supra* note 47, at 329.

[61] SELECTED WRITINGS, *supra* note 2, at 395.

[62] *Id.* at 254.

Cardozo participated in a number of decisions in which the constitutionality of social legislation was at issue, and he voted almost invariably in favor of upholding such legislation. As Chief Judge of the New York Court of Appeals, he voted to sustain a statute forbidding the employment of women in factories between the hours of ten in the evening and six in the morning.[63] He supported a decision to validate the New York Workmen's Compensation Act, which the Court of Appeals in an earlier decision had struck down.[64] He also concurred in a decision to uphold the legislative regulation of wages for railroad workers engaged in the elimination of grade crossings.[65]

As a Justice of the United States Supreme Court, Cardozo joined an opinion sustaining the constitutionality of a New York statute fixing the minimum and maximum price for the sale of milk.[66] He also voted in favor of a holding that validated minimum wage legislation.[67] He wrote the opinion of the Court in the case that affirmed the constitutionality of the Social Security Act of 1935.[68]

In the light of recent political and economic developments, should we conclude that Cardozo incorrectly predicted the demise of laissez faire? It is not the aim of this Essay to indulge in predicting the future. There are, however, some prognostications that, considering the nature of the problems the United States will have to cope with in the future, can be ventured with some degree of assurance. It is most unlikely that the United States Supreme Court would be willing to scale down the scope of the governmental police power to the minimal extent advocated by Epstein. This would unduly impede the effectuation of programs designed to combat social ills not necessarily involving force or fraud, such as the campaign to curb the use of dangerous drugs and the spread of life-threatening epidemic diseases.

It is also unlikely that (notwithstanding the contemporary trend toward deregulation) the government will abolish or further reduce the numerous governmental agencies exercising some degree of surveillance over private economic enterprise. These government agencies include, among others, the Interstate Commerce Commission, Federal Trade Commission, Federal Communications Commission, Securities and Ex-

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[63] *See* People v. Schweinler Press, 214 N.Y. 395, 108 N.E. 639 (1915).

[64] *See* Jensen v. Southern Pacific Co., 215 N.Y. 514, 109 N.E. 600 (1915).

[65] *See* Long Island R.R. v. Department of Labor, 256 N.Y. 498, 177 N.E. 17 (1931).

[66] *See* Nebbia v. New York, 291 U.S. 502 (1934).

[67] *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[68] *See* Helvering v. Davis, 301 U.S. 619 (1937).

change Commission, and many state administrative agencies.

It is also not to be expected that any state of the Union or the federal government will abandon minimum wage laws, maximum hours laws, labor relations regulation, zoning laws and rent control, *i.e.*, forms of economic control that Epstein views as constitutionally suspect. Since there is always in the background the threat of a recession apt to produce social unrest, every government will wish to retain a substantial measure of regulatory control over private economic behavior. Thus, Cardozo's position on social legislation and the regulatory powers of government is likely to survive the challenge of economic libertarianism.

III. Stability and Change

Cardozo emphasized the need for "a philosophy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth."[69] Quoting Roscoe Pound's apothegm "Law must be stable and yet it cannot stand still,"[70] he pointed out that we are confronted with a great antinomy calling for the harnessing of two tendencies pulling in different directions. Law requires a large measure of certainty, but a standpatism that ignores the movements of society may produce injustices and thus annul the beneficial aspects of stability.[71]

If the achievement of order, certainty, and predictability were the only valid objectives of a legal system, the institution of law could not as such supply a principle of growth. It would be logical from this perspective to adopt the rule of the ancient Empire of Persia that no law could ever be changed.[72] It is the second function of law, that of providing justice, which demands an adjustment of the law to the exigencies of societal development. Seen in this light, law may be viewed as a brake upon social momentum; but it is a brake designed to slow down the kinetic forces in human social life, not to arrest them. Such slowing down is made necessary by the fact that an unchecked social dynamism, because of the frictions and power struggles it engenders, may consume individuals, groups, and nations by its relentless impact.[73] However, it is also true that if the brake of the law is too rigorously applied in times of urgently needed social change, the legal order, or certain parts of it, may suffer a severe crisis and give way to turmoil or

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[69] Selected Writings, *supra* note 2, at 186.

[70] R. Pound, Interpretations of Legal History 1 (1930).

[71] *See* Selected Writings, *supra* note 2, at 186, 192-93.

[72] *See Daniel* 6:8.

[73] *See* E. Bodenheimer, *supra* note 11, at 41-49; Bodenheimer, *The Inherent Conservatism of the Legal Profession*, 23 Ind. L.J. 221, 227-33 (1948).

revolution.

Throughout most of the civilized world, laws are changed by legislatures whose members (even if they had legal training) are expected to act as representatives of society rather than as members of a specialized profession. The votaries of the legal profession, on the other hand, especially judges and attorneys, are deemed to be primarily entrusted with the administration and application of the law, rather than with its making. It has been found necessary, however, to allow the judiciary, assisted by practicing lawyers, a certain amount of lawmaking power, varying in degree in different countries. The judiciary has this power to provide justice for cases in which the positive law does not offer a secure answer to the problem before the court. It is obvious, however, that when judges apply new law to fact situations that have occurred in the past, the settled expectations of parties to a lawsuit, or the attorneys advising them, may be upset. Therefore, such judicial actions can interfere, at least in a number of cases, with the objective of the law to provide certainty.

Cardozo was deeply concerned with the problem of reconciling legal certainty with the task of reaching fair decisions for cases in which the existing law does not provide satisfactory answers. He understood that leaving the judge with a free choice to adhere to, or depart from, prior decisions would not afford an adequate solution. He felt it would introduce an excessive amount of unpredictability into the administration of justice. He insisted, therefore, that *stare decisis* should provide the everyday working rule of the law, which should be relaxed only in exceptional situations.[74] As Cardozo put it, "judges are not commissioned to make and unmake rules at pleasure in accordance with changing views of expediency or wisdom."[75]

Cardozo felt strongly, however, that under certain circumstances the price of uniformity and symmetry in the case law will be too high:[76]

> Uniformity ceases to be good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey.[77]

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[74] SELECTED WRITINGS, *supra* note 2, at 112-13; *see also id.* at 153 ("[I]n the main, there shall be adherence to precedent.").

[75] *Id.* at 133.

[76] *See id.* at 154.

[77] *Id.*

The creative activity of the judge, which Cardozo sometimes described as "legislative,"[78] arises in two contingencies. First, there may be open spaces in the law where no general principles or suitable analogies are available to the judges in their endeavor to solve a legal problem. Second, a court may find a well-established rule of law so obsolete or unsatisfactory that it chooses to overturn it and replace it with a fairer and more adequate rule. Cardozo states that such situations do not occur frequently.[79] Furthermore, in filling gaps, tradition, the collective judgment of the profession, and the "pervading spirit of the law" limit a judge's discretion.[80] Concerning the judge's power of innovation, he declared: "Insignificant is the power of innovation of any judge, when compared with the bulk and pressure of the rules that hedge him on every side."[81] But he recognized the need for judicial reform when new societal conditions rendered it urgent.[82]

It has been pointed out that "judicial legislation" can seldom be found in Cardozo's own judicial output.[83] The case of *Hynes v. New York Central Railroad*[84] provides a good example of Cardozo's reluctance to reform the law even when a strong case existed for overruling a set of precedents. In this case, Harvey Hynes, a boy of sixteen, stood upon a springboard projecting over the waters of the Harlem River, poised for a dive. The springboard (used by swimmers for five years without objection) was fastened to land belonging to the New York Central Railroad. The railroad operated its trains at that location by high tension wires, strung on poles and crossarms. A crossarm with electric wires fell from a pole and struck Hynes, plunging him to his death below. His mother, suing as administratrix, brought an action for damages. The intermediate appellate court held for the defendant. The court argued that Hynes trespassed on the railroad's land, and thus the railroad was under no duty of ordinary care.[85] The New York Court of Appeals, in an opinion written by Cardozo, reversed and awarded damages to the plaintiff.[86]

It was widely felt at that time that the rule denying redress for negligence to "trespassers" on unenclosed private lands used by the public

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[78] *Id.* at 111, 155.
[79] *Id.* at 160, 163.
[80] *Id.* at 154.
[81] *Id.* at 163.
[82] *Id.* at 154.
[83] *See* D'Amato, *Judicial Legislation*, 1 CARDOZO L. REV. 63, 65-66 (1979).
[84] 231 N.Y. 229, 131 N.E. 898 (1921).
[85] Hynes v. New York Cent. R.R., 188 A.D. 178, 176 N.Y.S. 795 (1919).
[86] *Hynes*, 231 N.Y. at 231-36, 131 N.E. at 898-90.

without protest was highly unjust. The *Hynes* case presented a good opportunity for overruling the antiquated rule. Cardozo and the judges joining in his opinion did not avail themselves of this opportunity.[87] They held for the plaintiff on the ground that Hynes' technical trespass was immaterial, and that at the time of his death he was under the protection of the public waters.[88]

The circumstances under which judges may legitimately overrule earlier decisions present a problem which has only received sketchy attention by Cardozo and subsequent interpreters of the judicial function. This problem raises different issues from those involved in the case of judicial "gap-filling." When there is no law, or only highly ambiguous law covering a litigated point, neither the common law nor the civil law permit the courts to refuse rendering a decision. Courts in these situations must "make" law. In the case of overruling, on the other hand, judges sometimes abandon long-established norms and replace them with innovative prescriptions. This provides a more free-wheeling form of judicial activity than the interstitial lawmaking characteristic for the gap-filling process. From a conservative standpoint, overruling may be at odds with the widespread popular conviction (finding some support in the separation of powers doctrine) that lawmaking in a decisively reformatory sense should be reserved for the legislature.

Cardozo wrote the following about the legitimacy of overruling precedents:

> I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.[89]

Cardozo also made the following brief remark on overruling before the New York State Bar Association: "The necessity is deeply felt for a rationalizing principle whereby precedents that are outworn may be decently discarded without affront to the sentiment that there shall be no breach of the legal order in the house of its custodians."[90] These statements pinpoint Cardozo's opinion on the occasions when precedents may be scrapped. They throw little light on the question whether

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[87] If Cardozo was ready to reform the law but was unable to get sufficient support from his colleagues, he probably would have written a separate opinion, which would have carried great weight.

[88] *Hynes*, 231 N.Y. at 232-36, 131 N.E. at 899-900.

[89] SELECTED WRITINGS, *supra* note 2, at 171.

[90] *Id.* at 8-9.

such outworn precedents may be replaced by any normative pronouncements of the judge's free choosing.

Two influential post-Cardozo commentators on the judicial process, H.L.A. Hart and Ronald Dworkin, have also been rather tight-lipped in discussing outright changes made by judicial tribunals. Hart speaks a great deal about the large discretionary powers possessed by judges "in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents."[91] Hart stays away from a full discussion of overruling, but drops a hint that courts should rarely depart from their own precedents[92] (a position that is in accord with the practice of English courts).

The same reluctance to take on the problem of outright judicial reform of the law characterizes the work of Dworkin. In his comments on *Brown v. Board of Education*,[93] a case in which the United States Supreme Court overruled an earlier decision permitting racial segregation in public schools, Dworkin probes into the specific reasons justifying departure from precedent in this particular case.[94] However, Dworkin does not provide any general standards for legitimizing an incisive judicial change in the law.[95]

Dworkin does, however, take the general position that a judge may "disregard some part of institutional history as a mistake."[96] This means, apparently, that judges may refuse to enforce a standard or principle underlying a precedent or a set of precedents if they regard the standard or principle as ill conceived. Judges may also treat some legal source materials as obsolete.[97]

It would seem necessary, however, to circumscribe the scope of judicial overruling powers somewhat more definitely (although true precision cannot be attained in an area of jurisprudence as open-textured as this one). The distinction between legislative power and judicial power should be preserved as much as possible, although situations will arise when the distinction becomes blurred and indistinct.

It cannot be assumed that judges possess competence to elevate any

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[91] H.L.A. HART, THE CONCEPT OF LAW 132 (1961).

[92] *Id.* at 150.

[93] 347 U.S. 483 (1954).

[94] *See* R. DWORKIN, LAW'S EMPIRE 379-92 (1986).

[95] Robert Justin Lipkin has also voiced this criticism. *See* Lipkin, *Conventionalism, Pragmatism, and Constitutional Revolutions*, 21 U.C. DAVIS L. REV. 645, 742-46 (1988).

[96] R. DWORKIN, *supra* note 32, at 119.

[97] R. DWORKIN, *supra* note 94, at 227.

principle of communal morality or social policy to the status of law. On the other hand, judges should have the ability to forestall the perpetuation of grave injustices. Here again, the privileged position accorded to the legislature in the area of law reform should be respected. In many situations calling for decisive change, the courts should leave this task to the legislature. It is well known, however, that legislators often procrastinate or fail entirely to act when the proposal for reform is not one of the electorate's immediate political concerns. Legislative inertia should warrant judicial intervention when the problem is one of fundamental justice and lends itself to rectification by the courts; there are, to be sure, problems that are so complex, polymorphous, or multilayered that they require a statutory solution. Furthermore, the members of the court embarking upon an innovative action should be convinced that such action would receive widespread approval in the lay community. In other words, judges should be justified in assuming that the public would be willing to have the new principle backed up by the coercive force of the state.

The Justices of the California Supreme Court could safely assume far-reaching community consensus when they struck down the doctrine of sovereign immunity,[98] replaced contributory negligence with comparative negligence,[99] and abolished the artificial and unfair differentiation in the liability of landowners toward business visitors and social guests.[100] The same public endorsement could have been expected when courts in a substantial number of states, at an earlier period of time, recognized an individual right of privacy, which had previously been denied.[101] Additionally, when courts held that certain forms of previously tolerated competition in business life were unfair, legal and nonlegal sources of criticism of the status quo existed that testified to the emergence of a refined sense of fairness.[102]

Principles selected by the judiciary for incorporation into the law by means of an overruling decision should be considered part of the law.[103] But these principles are law in a weaker sense than statutory provisions

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[98] *See* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

[99] *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

[100] *See* Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

[101] *See* PROSSER & KEETON, *supra* note 41, § 17.

[102] *Id.* § 130, at 1013-27.

[103] This appears also to be the position of Cardozo and Dworkin. *See* SELECTED WRITINGS, *supra* note 2, at 207; R. DWORKIN, *supra* note 94, at 225.

or firmly established norms of case law. This is true because it is never certain whether courts will embark upon reformatory action rather than leave such action to the disposal of the legislature. The principles recognized by an overruling decision may be viewed as a form of incipient or inchoate law that is converted into positive law by the innovative action of the court. This position is justified if fundamental justice, along with public order and predictability of official action, is recognized as an integral part of the concept of law.[104]

There are, of course, overruling decisions that deal with technical problems of law, such as tax law or negotiable instruments law, problems that are unrelated to a basic standard of fairness and justice. It would be a doctrinaire position to hold, on the basis of the preceding arguments, that courts do not have power to overrule precedents in these areas of the law. A better position is that, because of the very technicality of the issues involved, the perplexing problems of judicial lawmaking in matters of wide public concern (which on a prima facie view seem to call for solution by a representative body) normally do not arise.

The upshot of these considerations is that a broadly conceived theory of legal sources, which includes fundamental requirements of justice and accepted principles of fairness, enlarges the field in which judges find the law rather than make it. Therefore, when judges overrule a precedent on the ground that it was initially unreasonable, or had become obsolete because of a change of social conditions, and substitute for it a holding believed by them to elicit a broad consensus because of intrinsic reasonableness, it does not overstep the bounds of linguistic usage to view the new ruling as an application of law rather than as an act of "judicial legislation." It is the obligation to search as thoroughly as possible for preexisting principles of fairness and justice that distinguishes judges from legislators in cases of reformatory decision making.

A problem that has provoked a great deal of attention in legal literature and court decisions involves the retroactive application of an overruling decision. To the extent that a party relied on a preexisting law when entering into a transaction or engaging in some other form of conduct, the change accomplished by the reformist ruling disappointed settled expectations of that party and in this sense was prejudicial to its interests. How should the legal system respond to this predicament?

The theory of law adopted by the classical common law with respect to this problem was the so-called "declaratory theory."[105] According to

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[104] *See* Bodenheimer, *Law as Order and Justice*, 6 J. PUB. L. 194 (1957).

[105] For a good account, see Wesley-Smith, *Theories of Adjudication and the Status*

this theory, an overruling decision has its source of authority not in a volitional act by a judge, but in reason, fairness, or strong popular acceptance. Thus, this theory is in accord with the position that such a decision derives its legitimacy from considerations of societal justice rather than from its imposition by judicial command. If a judge ignores or overturns an earlier decision on the ground that it was contrary to justice from its incipience, that decision, according to the declaratory interpretation, was never the law. If the judge overrules a precedent on the ground that its ruling had become obsolete because of supervening developments, it was assumed that the precedent had lost its legal force.

John Austin, a legal positivist, attacked the declaratory theory as a "childish fiction."[106] From the point of view of legal positivism, law applied by courts must emanate from articulated, formalized sources such as constitutional provisions, statutes, administrative regulations, and precedents. Austin insisted, therefore, that unwritten customs and principles of justice not yet embodied in statutes or court decisions did not constitute a form of law.[107] Justice Holmes reached a similar conclusion when he stated that the common law was not "a brooding omnipresence in the sky"[108] but should be conceived as "the articulate voice of some sovereign or quasi-sovereign that can be identified. . . ."[109]

Good reasons exist, however, for giving some credit to the view of the classical common law. When we look at the common-law actions and equitable remedies recognized by the courts of the English king, it cannot be denied that many of them were a reflection of urgent requirements of justice. There was a need for an action in which a dispossessed landowner could recover the land. Justice demanded that the proprietor of a stolen chattel be provided with a remedy for vindicating his rights. The sense of equity called for the recognition of a defense against the enforcement of a contract that had been induced by fraud. In the field of criminal law, sanctions were provided against the commission of certain acts that no civilized society could tolerate.

The declaratory theory was therefore not as "childish" as Austin assumed when it located the foundations of legal actions and defenses in the needs of the people rather than in the fiat of judges. This view

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of Stare Decisis, in L. GOLDSTEIN, PRECEDENT IN LAW 73-87 (1987); *see also* People ex rel. Rice v. Graves, 242 A.D. 128, 273 N.Y.S. 582 (1934).

[106] J. AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 634 (R. Campbell 5th ed. 1885).

[107] *See* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 30-32 (H. Hart ed. 1965).

[108] Southern Pacific R.R. v. Jensen, 244 U.S. 205, 222 (1916).

[109] *Id.*

could be maintained with some degree of reasonableness at least in those areas of the law that are most essential to the well-being of the people.

This theory also exhibits some strong points when we deal with the issue of retroactivity. If the principal purpose of overruling is to correct serious past mistakes or to do away with outdated decisions, there are some advantages in denying the status of law to the overruled precedent. According to the positivist position, it is the overruled decision that represented the law, while the new holding originated in an act of judicial discretion rooted in arguments of social morality or public policy.[110] This position may not carry more persuasiveness than the view advocated here, namely, that overruling should generally be restricted to situations in which the new rule selected by the court possesses such a measure of obligatory strength that it may be regarded as a form of nascent law capable of being transformed into positive law through judicial action. It does not seem inappropriate to hold under this theory that the old rule had lost its force by the time it was negated by the court.

These considerations do not dispose of the issue of potential hardship arising from the fact that an overruling decision may disappoint expectations of a party relying on the discarded precedent. Cardozo dealt with this problem and concluded that reliance on a specific court decision is infrequent and causes no more hardship than in cases where no law exists on the question before the court, or where the applicable law is ambiguous or uncertain.[111] One device for remedying prejudicial reliance is that of making the overruled decision purely prospective. In other words, the court would not apply the new rule to the litigated case in which the overruling occurs. This solution has been authorized by the United States Supreme Court for federal as well as state courts in an opinion written by Cardozo.[112] But this authority has, for good reasons, rarely been used by the courts. Prospective overruling deprives the party that, through its attorney's efforts, has caused the court to change its mind of the fruits of its victory. It thereby remedies an injustice that would result to one of the parties from overruling a precedent by an act of unfairness inflicted on the other party. The predicament inherent in the retroactive application of an overruling decision, and the unsatisfactory nature of prospective overruling, furnish additional argu-

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[110] *See* H.L.A. HART, *supra* note 91, at 200; Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 612-14 (1958).

[111] *See* SELECTED WRITINGS, *supra* note 2, at 169-70, 295-97.

[112] *See* Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932).

ments for using the power of overruling precedents sparingly.

IV. Rule and Discretion

Cardozo firmly believed that the bulk of the law should consist of rules of general operation. He rejected the view that the extent of diversity and variation in human affairs was so great that the evaluation of human conduct did not permit the application of uniform yardsticks.[113] The latter view was at one time held by Plato, but he later abandoned it.[114] It was revived by some of the American legal realists, especially by Jerome Frank. To Frank, law was embodied in individual court decisions, rather than in general rules. Until a court had passed on some particular question, he thought, no law on that subject was yet in existence.[115] Although Frank subsequently moderated his view to some extent, especially after he had ascended to the federal bench, he always remained convinced that all rules should contain a large dose of discretion, and that judges should not be fettered by universals and abstract generalizations.[116]

Cardozo had a different approach to the problem of judicial discretion. Since he believed that a legal system was not worth its salt unless it afforded a substantial measure of certainty and predictability, he had no sympathy for the conception of court decisions as "isolated dooms."[117] The striving after impartial uniformity was for him one of the lodestars of judicial decision making. Cardozo stated:

> What is wrong in neo-realism is a tendency manifest at times to exaggerate the indeterminacy, the entropy, the margin of error, to treat the random or chance element as good in itself and a good exceeding in value the elements of certainty and order and rational coherence, — exceeding them in value, not merely at times and in places, but always and everywhere.[118]

Although certainty and regularity of law "have at least a presumption in their favor,"[119] these values, according to Cardozo, lose their potency when the law on a certain point is vacuous, ambiguous, or bad. In these situations, reliance on judicial discretion becomes inevitable. The term "discretion" meant to Cardozo a certain amount of choice — "not a choice between two decisions, one of which may be said to be

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[113] Selected Writings, *supra* note 2, at 159.
[114] *See* E. Bodenheimer, *supra* note 7, at 8-9.
[115] *See* J. Frank, Law and the Modern Mind 46 (1930).
[116] *See* J. Frank, Courts on Trial 383-84, 395, 409 (1950).
[117] Selected Writings, *supra* note 2, at 159; *see also id.* at 15, 134, 201-02.
[118] *Id.* at 30.
[119] *Id.* at 25.

almost certainly right and the other almost certainly wrong, but a choice so nicely balanced that when once it is announced, a new right and a new wrong will emerge in the announcement."[120] The balance is swayed, he thought, not by "gusts of fancy," but by reason.[121] Reason demands that judges should not enact into law their own preferences and idiosyncracies, but that they should pay attention to the value judgments and standards prevailing in the political and legal order.[122]

It is apposite at this point to compare Cardozo's approach to judicial discretion with the theory put forward in recent years by Ronald Dworkin. In *Taking Rights Seriously*, Dworkin distinguished between two basic forms of judicial discretion. The first is the strong form of discretion, which allows judges (although they are generally bound by standards laid down by a higher authority) to make genuine choices between two or three solutions, all of which are of equal legal validity.[123] The second is the weak kind of discretion, which exists when a judge is bound by norms requiring a particular decision, but in which reasonable persons may disagree about the required decision.[124] Dworkin believes that judges have discretion only in the second sense of the term; he argues that the standards by which judges are bound cannot be applied mechanically, but demand the use of good judgment to find the answer most in consonance with the pertinent legal source materials.[125]

In *Law's Empire* Dworkin set forth the proposition that rights and responsibilities flow from past decisions not just when they were made explicit in these decisions, but also "when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification."[126] These principles Dworkin regards as part of the law, and as instruments enabling the judiciary to provide right answers even in hard cases. The judges, imbued with the ideal of "adjudicative integrity," must fit their decisions into a framework of political and moral principles that offer the best explanation and justification of

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[120] *Id.* at 212.

[121] *Id.*

[122] *See id.* at 151-52, 154.

[123] *See* R. DWORKIN, *supra* note 32, at 32-33, 69.

[124] *See id.* at 31-32, 69.

[125] *See id.* at 31, 69. Dworkin points out that discretion is sometimes used in a third sense: when some official has final authority to make a decision and cannot be reviewed or reversed by a higher official. *Id.* at 32. This third sense is not relevant to the points discussed in the text.

[126] R. DWORKIN, *supra* note 94, at 96; *see also id.* at 152.

relevant past decisions.[127] It is true, Dworkin points out, that conflicts may exist between principles pulling in different directions. However, a conscientious judge in most cases can ascertain accepted priorities among these principles, although an element of personal conviction cannot be wholly excluded from this search.[128]

The difference between Cardozo's and Dworkin's view of discretion appears to lie in the fact that, according to Cardozo, judges in some hard cases have genuine choices between two or more solutions, and that all of these solutions can be defended by arguments finding support in the relevant sources. Dworkin, on the other hand, believes that an informed and discerning interpretation of the legal authorities will, in the large majority of cases, yield one correct answer. If this is true, judges have a choice only between a correct and an incorrect answer, which is not an acceptable choice.

Dworkin admits, however, that no clear-cut proof of the correctness or incorrectness of a solution in a complicated case may exist.[129] This admission puts in question the practical usefulness of debating whether judges in such cases make choices between defensible alternatives, or whether they merely make judgments regarding the correct solution. The judge accepting Dworkin's views may be sure to have *found* the law in some objectively existing standards or principles of the legal order. But the critic who disputes the judge's interpretation of these principles or standards will argue that the judge *made* the law according to his or her personal preferences. There will be no supreme arbiter to settle the matter; all that remains is the subjective conviction of the judge to have found the key to the truth. Thus, the inherent uncertainty of the judge's "judgment" makes it extremely difficult to distinguish it from an act of choice. Nevertheless, there is a difference in *attitude* between judges who accept Dworkin's theory of adjudication and those who are steeped in the tenets of other traditions (such as the approach of legal realism).[130] Judges in the former group will be less inclined to give expression to their personal preferences. They will feel bound by general principles and basic values deemed by them to underlie, explain, and justify the positive legal order, although the nature and scope of these principles may be controversial. This attitude moves the con-

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[127] *See id.* at 119-20.

[128] *See id.* at 255-56, 286; *see also* R. DWORKIN, *supra* note 32, at 36-38.

[129] *See* R. DWORKIN, *supra* note 94, at viii-ix; *see also id.* at 411 (stating that legal judgments "are pervasively contestable").

[130] *See* Wasserstrom, *Review Essay: The Emperor's New Clothes*, 75 GEO. L.J. 199, 273 (1986).

ception of the judicial function closer to the widely held popular view that the courts should, as much as possible, find rather than make the law.

While Dworkin's theory contains implicit reservations with respect to Cardozo's analysis of judicial discretion, a critique coming from an entirely different direction questions Cardozo's assumption that a legal system must be primarily a regime of rules. Duncan Kennedy, a representative of C.L.S., has insisted that rule-mindedness provides the distinguishing mark of a social system favoring individual self-assertion over social cooperation.[131] Kennedy points out that rules, at least when they are rigidly formulated and applied, tend to be overinclusive, comprehending within their scope situations that pursuant to the teleology underlying the rule should be excluded.[132] They are also, in his opinion, apt to be underinclusive, *i.e.*, being inapplicable to cases that according to the social policy behind the rule should be covered by it.[133] The underinclusiveness of many rules, Kennedy asserts, permits the "bad man" to operate close to the line demarcating the outer limits of the rule and to take conscious advantage of the underinclusion by perpetrating socially obnoxious acts. The overinclusiveness of rules, on the other hand, may have the effect of making a rule applicable to perfectly innocent behavior. These defects, Kennedy points out, are the result of the rather definite and precise formulation of rules, a factor that often prevents a judge from applying them according to their true purpose and rationale.[134]

Kennedy asserts further that a society encouraging altruistic behavior and a spirit of communitarianism will prefer standards to rules (although rules may sometimes be necessary).[135] By standards he means vaguely formulated principles, such as good faith, due care, fairness, reasonableness, unjust enrichment, and unconscionability.[136] Standards enable the judge much more effectively than rules to deal adequately with all of the situations that (according to the policies and social values underlying the standard) should be included within its purview, and those that should be excluded.[137] This approach will render the "good man" secure in his expectation that "if he goes forward in good

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[131] *See* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-89, 1745, 1776 (1976).

[132] *See id.* at 1689-90.

[133] *See id.*

[134] *See id.* at 1688, 1695-96, 1773-74.

[135] *See id.* at 1685.

[136] *Id.* at 1688.

[137] *See id.* at 1685, 1688, 1746, 1776.

faith, with due regard for his neighbor's interest as well as his own, and a suspicious eye to the temptations of greed, then the law will not turn up as a dagger in his back."[138]

It cannot be conceded to Kennedy that there is a definite link between strictly defined legal rules and a society favoring self-assertive behavior over communitarian values. Those societies that favor communitarianism over individualism, such as the Soviet Union, China, and Cuba, have an abundance of rules in their codified legal systems. Even if Kennedy has in mind a type of society different from the present-day socialist countries, certain basic needs of people in all societies make a comprehensive use of legal rules imperative. People wish to know quite definitely (1) what they may do without incurring public sanctions; (2) what the legal consequences are of transactions they may wish to consummate; (3) what specific duties they owe to the government; and (4) what legal benefits they can expect to receive from the state. These needs make it necessary and desirable to have fairly clear-cut rules in many areas of the law, including contracts, torts, criminal law, inheritance, negotiable instruments, tax law, and social security.

Solutions other than a substantial replacement of rules by standards can solve the problems posed by the overinclusiveness and underinclusiveness of strictly formulated rules (although standards are needed in a system operating primarily on the basis of rules). Underinclusiveness of rules can be remedied in private law adjudication (which is the field dealt with by Kennedy) by an analogous application of rules to all situations falling within the policy rationale underlying the rules. Such analogous application of rules is very common in Anglo-American case law. Analogy has not, in the past, been used by English and American courts in the field of statutory law. Roscoe Pound has predicted that the courts would change their attitude on this problem in the future, and there are indications that this prediction is beginning to become true.[139]

The use of Aristotelian equity can eliminate or at least reduce the potential overinclusiveness of rules. According to Aristotle, when the application of a rule in a concrete case would result in a serious hardship or injustice, and if the judge could assume that the legislature, had it foreseen the case, would have created an exception, then the judge is

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[138] *Id.* at 1773-74.

[139] Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385-86 (1908). A few examples of analogous application of statutes are listed in E. BODENHEIMER, J. OAKLEY & J. LOVE, AN INTRODUCTION TO THE ANGLO-AMERICAN LEGAL SYSTEM 159 (2d ed. 1988).

justified in not applying the rule.[140] English and American courts committed to the literal "plain meaning" construction of statutes have rejected this doctrine. Aristotelian equity has, however, received the sanction of the United States Supreme Court in several decisions.[141] Furthermore, equitable exceptions from case law rules have frequently been made when the court has come to the conclusion that the policy underlying a precedent (as opposed to the words of the holding) has no application to the case at hand.

How did Cardozo feel about analogy and Aristotelian equity? In *Hynes v. New York Central Railroad*, a case involving the application of nonstatutory tort law, Cardozo stated explicitly that analogy was a proper tool for extending the scope of a common-law rule.[142] He also took a positive attitude toward the use of Aristotelian equity to prevent the commission of serious injustices. He commented unfavorably upon Bentham's view that judges were not at liberty to depart from the literal language of statutes on equitable grounds;[143] and in *The Growth of the Law*, he indicated his sympathy for the Aristotelian theory, as long as it was used by the judiciary with due caution.[144]

CONCLUSION

After the main tenets of Cardozo's legal and judicial philosophy have been discussed in some detail, the strong points and possible weaknesses of this philosophy can be stated in fairly terse summarizing propositions.

First, Cardozo's dialectical view of the law called for a proper balance between stability and progress, a judicious reconciliation of liberty and constraint, and a sound blending of adherence to general rules and dispensation of individualized equity. This fundamental basis of Cardozo's legal philosophy is, according to the position taken in this Essay, not in need of revision.

Second, it is submitted that notwithstanding Dworkin's "rights thesis," Cardozo's affirmation of the judiciary's power to harmonize the promotion of individual rights with the protection of the public interest

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[140] ARISTOTLE, THE NICOMACHEAN ETHICS vx (H. Rackham trans. 1947).

[141] *See, e.g.*, Train v. Colorado Pub. Interest Research Group, 426 U.S. 1, 9-10 (1976); United States v. American Trucking Ass'n, 310 U.S. 534, 543-44 (1940); Holy Trinity Church v. United States, 143 U.S. 457 (1892); United States v. Kirby, 74 U.S. (1 Wall.) 482 (1868).

[142] Hynes v. New York Central R.R., 231 N.Y. 229, 131 N.E. 898 (1919).

[143] *See* SELECTED WRITINGS, *supra* note 2, at 38-39.

[144] *See id.* at 186; *see also id.* at 121, 256.

stands unimpaired. It is also unlikely, as well as undesirable, that his views as a constitutional lawyer concerning the validity of social-reformatory legislation are going to be upset in legal practice in response to the critique leveled at such legislation by some adherents of the Law and Economics school.

Third, Cardozo took the position that when the positive law on a certain issue is nonexistent or unclear, judges sometimes exercise a discretion amounting to a choice between two or more defensible alternatives. Dworkin disputes the existence of genuine choice, holding that judges in such cases can almost always fall back on nonpositive principles pointing the way to the correct solution. Cardozo's position would appear to be more realistic. Yet, Dworkin's view has the merit of imbuing judges with the conviction that in cases not settled by positive law, instead of giving free reign to their personal preferences, they should as much as possible seek support for their decisions in principles and values embedded in the legal order.

Fourth, it might be advisable to avoid the phrase "judicial legislation," used by Cardozo to characterize innovative judicial activity. Use of the phrase tends to obscure the fact that judicial lawmaking power is much more constrained than the power of legislatures.

Fifth, Cardozo's reflections on the upper-court prerogative to overrule precedents are quite broad and sketchy. An attempt was made in this Essay to propose somewhat more concrete guidelines, although the nature of the subject limits the degree of attainable specificity.

Sixth, Cardozo stressed the need for a comprehensive system of legal rules. A representative of Critical Legal Studies, Duncan Kennedy, has advanced the view that rule-addiction is characteristic for an individualistic society, while a society dominated by a communitarian spirit will give preference to broadly conceived standards. This Essay has argued that any developed system of law must be primarily a regime of rules, although standards are also important.

Seventh, a point not made in the preceding analysis is that Cardozo's writings do not include elaborated theories of statutory and constitutional interpretation. This drawback finds its explanation in the fact that Cardozo's most influential works stemmed from a time when he, as Chief Justice of the New York Court of Appeals, was confronted primarily with common-law problems.

As a final conclusion, the belief shall be expressed that judges, other members of the legal profession, and law students are justified in regarding the bulk of Cardozo's reflections on law and adjudication not

as time-bound products of a past epoch, but as enduring insights from which they may draw inspiration in the performance of their vocational tasks.