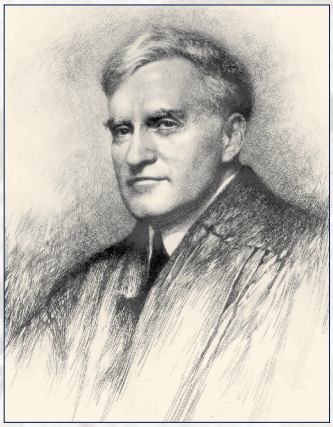
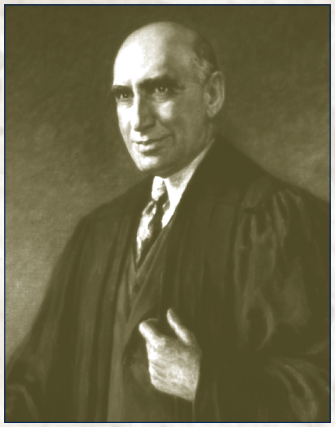
A Periodical of New York Court History

Judicial Notice

Issue 6 ~ January 2009





Featured Biography: Benjamin Cardozo ~ *Judith S. Kaye*

The Election of Chief Judge Irving Lehman ~ *Henry M. Greenberg*

The Impeachment of Governor Willliam Sulzer ~ *John Dunne*

The Historical Society of the Courts of the State of New York

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Dear Members

We proudly present a renamed, enhanced version of our newsletter, now called ***Judicial Notice.*** We are grateful to the designer, Teodors Ermansons, whose vision can be seen on each page, and to our editorial staff. They have worked hard to produce a beautiful, readable publication, containing articles of interest on a variety of topics about the legal history of our State, in addition to updates about Society events and activities.

In this issue of **Judicial Notice,** we feature a brilliant and insightful biography of Benjamin Nathan Cardozo written by Chief Judge Judith S. Kaye. We are fortunate beyond measure to publish this piece, written by one of our greatest judges, about another of the greats in American legal history.

Society Trustee Hank Greenberg provides us with an original piece of scholarship about Irving Lehman's election to the office of Chief Judge in 1939. It is altogether fitting that the Cardozo and Lehman articles appear back to back in this issue, given that the two were not only contemporaries who served together on the Court of Appeals, but also because they shared a brotherly bond. In fact, their relationship found its culmination when Cardozo chose to spend his final days and died in 1938 at Lehman's home in Port Chester, New York.

In this issue, you will also find an article by John Dunne on the impeachment in 1913 of New York Governor William Sulzer. Only once in the State's history has a Governor been so removed from office. The Society is delighted that the State's foremost expert on the Sulzer impeachment, Mr. Dunne, has contributed his wonderful essay.

Last year, in an effort to reach out to New York's student population, the Society launched, with the support of Barry and Gloria Garfinkel, an essay contest aimed at community college students across the State. We are happy to present in this issue the winning essay, *The Courts and Human Rights in New York: The Legacy of the Lemmon Slave Case*, by Elijah Fagan-Solis.

Finally, in this issue we review recent Society events and provide information on coming happenings. In particular, we include a new feature, the **Society Store,** listing Society books and merchandise that may be purchased on our website. With the holidays nearing, we hope many of you will do your shopping with us.

Marilyn Marcus, Executive Director

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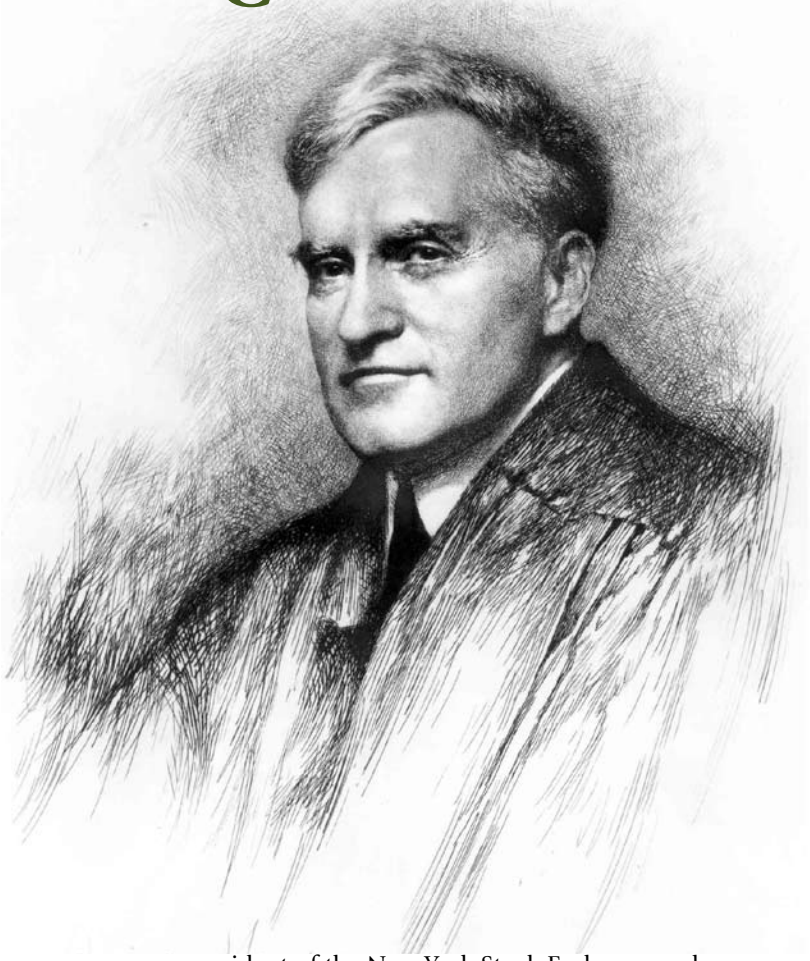
BENJAMIN NATHAN CARDOZO (1870-1938)

Court of Appeals 1914–1932

Chief Judge 1927–1932



JUDITH S. KAYE

Anyone preparing a portrait of Benjamin Nathan Cardozo would necessarily approach the task with great trepidation. Already there are so many wonderful writings about him, most especially Professor Andrew Kaufman's 731-page masterpiece, which took more than 41 years to complete.[1] Surely, by now everything about Cardozo has been said. Moreover, the man and his work were, and remain, objects of reverence. As Professor Kaufman observes, "Cardozo's record and reputation have made him a point of comparison for other judges, usually in terms of a judge or judicial nominee falling short of the mark, as being 'no Cardozo.'"[2] He set the standard of judicial excellence for his day, and he continues to set the standard of judicial excellence for ours.

Family and Early Years

Benjamin Nathan Cardozo and his twin sister, Emily Natalie, were born in New York City on May 24, 1870, into an elite, prominent, Sephardic Jewish family, the fifth and sixth surviving children of Albert Jacob and Rebecca Nathan Cardozo.[3]

Despite a glorious heritage, his childhood was not an easy one, beginning with feeble health in his first days of life. Weeks later, his mother's brother, Benjamin Nathan (for whom he was named), vice president of the New York Stock Exchange and president of Congregation Shearith Israel (the family's house of worship), was brutally murdered when returning home from services. Controversy swirled for months, but the murderer was never found. When Cardozo was two years old, his father, at the pinnacle of his career as a justice of the New York State Supreme Court, was compelled to resign the bench in disgrace amid charges of corruption during the William "Boss" Tweed era. And though he managed as a lawyer to maintain his family in comfort, theirs always was a solitary, reclusive life.[4] Cardozo's mother, long chronically ill, died when he was nine years old, leaving his upbringing largely to his sister, Ellen (Nell), 11 years his senior, with whom he made his home. Neither of them married. Indeed, only one of

This biography of Benjamin N. Cardozo appears in **The Judges of the New York Court of Appeals: A Biographical History,** *edited by Albert M. Rosenblatt, and published in 2007 by Fordam University Press. The book features original biographies of 106 chief and associate judges of the New York Court of Appeals and is a unique resource. It is available for purchase from major book retailers, directly from Fordham University Press (800.996.6987), and on our website.*

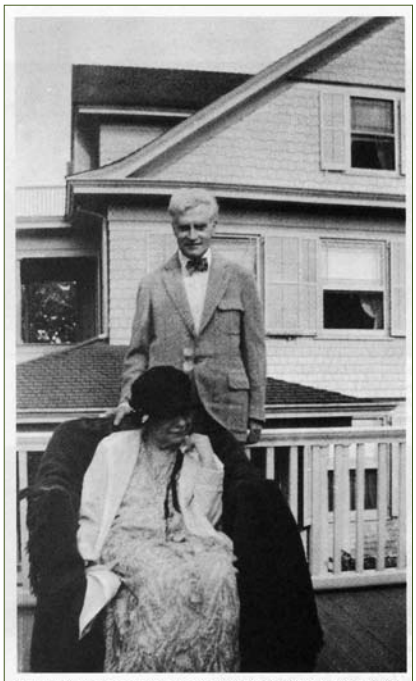
his siblings (his twin, Emily) married. (She married a Christian and was declared dead by the family.) In 1885, the year Cardozo entered Columbia College, at age 15, both his sister Grace and his father died.[5]

Add to these tragic events the centrality of Congregation Shearith Israel—the nation's oldest synagogue, orthodox and formal in its traditions—in Cardozo's early life. Cardozo's father for a time served as vice president; several family members were presidents and ministers of the congregation, including his great-granduncle, who in August 1776 fled New York City with the holy scrolls to escape invading British forces. In the family, no detail of religious observance was neglected. When Cardozo's father was required to be at the courthouse on Saturdays, he first consulted the Beth Din (the rabbinic court of law) in London, learned that necessary public business took precedence, and after services walked to the courthouse.[6]

Inevitably, Cardozo's early years shaped the person he became.

First, it is plain that he was a person of extraordinary intelligence and that he found pleasure, and refuge, in study. Superbly educated at home by Horatio Alger (who transmitted his love of poetry to his student), Cardozo clearly enjoyed learning, read widely, and had a flawless memory. By the age of 15, he had passed Columbia University's five-day examination covering, among other things, English, Latin, and Greek grammar; Greek and Latin prosody (the rhythmic and intonational aspect of language); Greek, Latin, and English composition; modern geography and ancient history; arithmetic, algebra, and geometry. Latin and Greek, and then German or French, readings were required during most of his four-year undergraduate program.[7] As the 1889 Columbia yearbook described him:

Tis he, 'tis Nathan, thanks to the Almighty.
Women and men he strove alike to shun, And
hurried homeward when his tasks were done.[8]



Ben and Nellie in the summer at Allenhurst. (Courtesy of Rosalie Nathan Hendricks)

At 19, Cardozo graduated at the top of his class, voted by his classmates "cleverest" and "most modest."[9] Then, while at Columbia Law School, he broadened his studies by additionally enrolling both in Columbia's Faculty of Philosophy and in its School of Political Science, earning a master of arts degree in June 1890. There he learned to look to the spirit as well as the letter of the law. Cardozo withdrew from law school in 1891, one year short of graduation, to enter his brother's law practice.

Related to his love of books and learning is Cardozo's lifelong quality of modesty, gentility, and reticence, evident even in his visage.[10] As artist William Meyerowitz wrote, "The extreme delicate and sensitive forms of his face, his penetrating eyes under his heavy eyebrows, gave one an impression never to be forgotten."[11] Though of great personal charm in his dealings with others, Cardozo lived a life of intense privacy and intellectual meditation, the life of a scholar.

Second Circuit Chief Judge Learned Hand described his friend in these words:

He was wise because his spirit was uncontaminated, because he knew no violence, or hatred, or envy, or jealousy, or ill-will. I believe it was this purity that chiefly made him the judge we so much revere; more than his learning, his acuteness and his fabulous industry.[12]

He was, in short, much loved and admired, for qualities that set him apart from others.

One writer has suggested that "by the unanimous testimony of his contemporaries, Cardozo was a saint."[13] His biographer, Professor Kaufman, exposes a few signs of imperfection. For example, we learn that Cardozo courted academics who in return showered

New York Court of Appeals collection

Judge Cardozo on the steps of the New York Court of Appeals.

him with praise, and that he fussed over his clothing and famous "tousled hair."[14] Kaufman also reveals some of Cardozo's attitudes on race and gender that, although common at the time, unsettle the modern reader.[15]

We also know a third lifelong quality likely traceable to Cardozo's early family history: his sense of rectitude, responsibility, and dedication to duty—duty to the law, duty to his family, duty to his family name.[16] Happily, however, we also know that Cardozo's personal life was neither "a cold nor an empty one."[17] His circle of friends and family filled whatever little leisure time he had, and he was surrounded by people fiercely devoted to him. His law office staff and court staff loved him, his housekeeper of 46 years said he was "the most unique and lovable soul I have ever known," even Albany hotel personnel spoke of his kindness.[18]

One final thought on Cardozo's early influences. After his bar mitzvah at age 13, Cardozo remained a member of Shearith Israel—he was known as a Sephardic Jew and apparently drew a significant part of his law practice from that affiliation—but in his level of religious observance he became a somewhat distant member. At a commencement address delivered at the Jewish Institute of Religion on his 61st birthday, Cardozo acknowledged that he was unable to claim that the beliefs of the students there assembled were "wholly [his]" or "that the devastating years have not obliterated youthful faiths."[19] In a letter to a friend two years before his death, Cardozo wrote:

> *I think a good deal these days about religion, wondering what it is and whether I have any. As the human relationships which make life what it is for us begin to break up, we search more and more for others that transcend them.*[20]

Despite this admission, Cardozo throughout his life held "fast to certain values transcending the physical and temporal."[21] "So, in our own body of law," he wrote, "the standard to which we appeal is sometimes characterized as that of justice, but also as the equitable, the fair, the thing consistent with good conscience,"[22] "the principle and practice of men and women of the community whom the social mind would rank as intelligent and virtuous."[23] One early biographer who knew the family summed up these qualities as follows: "Cardozo had reverence for the past. He was, it must not be forgotten, an aristocrat by descent. Certainty, order, coherence, that make for the 'symmetry of the law' meant to him what a sonnet means to a poet."[24]

Aristocrat, scholar, bookish, formal, reclusive, withdrawn, modest; imbued with a sense of rectitude, responsibility, dedication to duty, and a reverence for the past. Surely, there was a lot more to Cardozo—as he would shortly show the world.

Prelude to the Court of Appeals

At the tender age of 21, Benjamin Nathan Cardozo embarked on the career to which he singly dedicated his life: the law. For 23 years as a New York City practitioner, he enjoyed acclaim as a "lawyer's lawyer," a walking encyclopedia of law. His knowledge was astounding, his memory photographic. He could prepare a brief, including references to all pertinent cases and materials, simply from memory.

In his very first year in his brother's practice—apparently a highly successful firm—Cardozo argued five appeals and won four; within five years, he had argued 24 appeals. After one argument before the Court of Appeals, the chief judge reportedly asked him to stop by, and complimented him on his presentation.[25] His busy, lucrative law practice—largely commercial law—appears to have been drawn mainly through the Jewish business and legal community. While skilled in both trials and appeals, he was for the most part retained by lawyers to argue difficult law issues. Kaufman's comprehensive chapters establish that Cardozo was a tough, resourceful lawyer. As one friend observed:

> *He was unfitted for any struggle where scrupulous integrity and fine sense of what is right might be a handicap; but judges felt the persuasive force of his legal argument, and lawyers and laymen sought his counsel and assistance in the solution of intricate legal problems.*[26]

Evidencing both his industry and his intimate familiarity with the Court of Appeals and its work, Cardozo managed in 1903—in addition to a busy law practice—to publish a book, *The Jurisdiction of the Court of Appeals of the State of New York*, which merited an updated, second edition in 1909.

The year 1909 was significant for yet other reasons: Based on his reputation, Cardozo, then 39, was sought out for appointment to the Federal District Court. The death of his brother Albert that same year added even further to his responsibility for support of the household—by then a townhouse for himself, his sister Nell, and staff at 16 West 75th Street—and he declined for financial reasons.[27] Barely four years later, opportunity knocked again. This time Cardozo (a Democrat) was asked to run for the State Supreme Court on the Fusion ticket, and he accepted. Financial considerations were less an obstacle, because the state bench paid far more than the federal salary at that time. But even more important, the Supreme Court was the court from which his father had resigned in 1872 under charges of corruption. Cardozo bore that stain like a personal wound and several times expressed the desire to restore his family's honor.

Cardozo's reputation apparently enabled him to avoid not only the maneuvering required to win nomination but also the campaigning required to win election. He was ardently supported by the leaders of the New York bar and endorsed by major newspapers. Nonetheless, political forces made the election close. Cardozo jested that his victory over Bartow Weeks was due to the support of Italian-American voters who believed from his name that he was of Italian descent.[28]

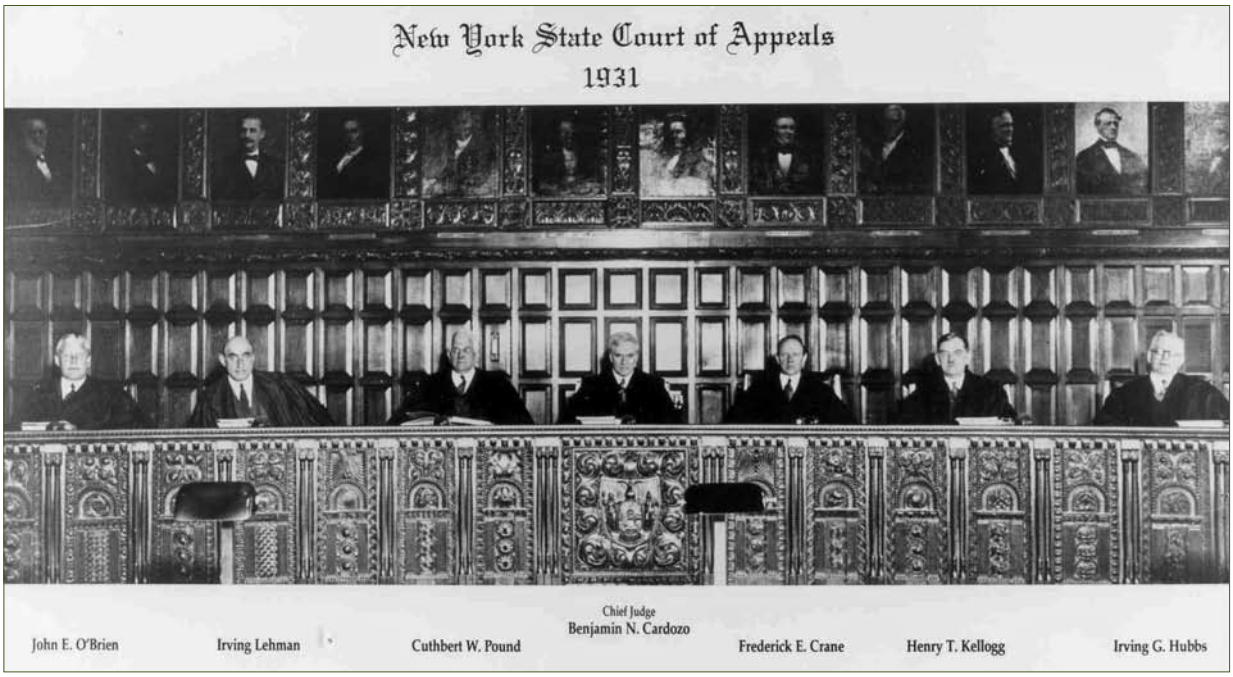
Cardozo never filled out his term as a trial judge—indeed, he never really began it. At that time, because the Court of Appeals had a huge backlog of cases, the governor made three additional temporary appointments to the court from the ranks of Supreme Court justices. Although Governor Martin Glynn was concerned about Cardozo's lack of judicial experience—he had not yet even written his first judicial opinion—the Court of Appeals judges, who traditionally recommended candidates to the governor for these temporary positions and knew Cardozo's qualities firsthand, urged Glynn to designate Cardozo. In February 1914, Glynn appointed Cardozo to fill a three-year temporary position on the Court of Appeals. Years later the governor said he was prouder of that designation than any other act of his career. On January 15, 1917, Governor Charles Whitman appointed Cardozo to fill the vacancy created when Samuel Seabury resigned to accept the Democratic nomination for governor. Cardozo retained that seat by winning (with bipartisan endorsement) election as an associate judge later that year. In 1926, again with bipartisan endorsement, Cardozo was elected chief judge.

The Court of Appeals Years

The 18 years Cardozo served on the Court of Appeals—1914 to 1932—surely must have been the happiest, most fulfilling years of his life.[29] There is ample contemporaneous evidence for that conclusion in Cardozo's own words, in his prodigious writings (both judicial and jurisprudential), and in the open adoration of the legal community and the public at large. According to a 1930 *New Yorker* profile, "hard-boiled lawyers" compared him to a "saint, a medieval scholar, and Abraham Lincoln"; and the deans of Harvard, Yale, and Columbia Law Schools unsuccessfully importuned President Harding to appoint him to the United States Supreme Court; his Court of Appeals brethren regarded him with a mixture of "awe and protective tenderness."[30]

Most touching, and perhaps most enlightening about what Cardozo's years on the Court of Appeals were actually like, are the words his colleague Cuthbert W. Pound spoke on March 3, 1932, the day Cardozo left Albany for Washington. Emotion leaps off the page. Addressing him as "Beloved Chief Judge," Judge Pound said:

> *The bar knows with what earnestness of consideration, firmness of grasp, and force and*



New York Court of Appeals collection

grace of utterance you have made your power felt; with what evenness, courtesy and calmness you have presided over the sessions of the court. Only your associates can know the tender relations which have existed among us; the industry with which you have examined and considered every case that has come before us; the diligence with which you have risen before it was yet dawn and have burned the midnight lamp to satisfy yourself that no cause was being neglected. At times your patience may have been tried by the perplexities of counsel and of your associates, but nothing has ever moved you to an unkind or hasty word. You have kept the court up with its calendar by promoting that complete harmony of purpose which is essential to effective work. The rich storehouse of your unfailing memory has always been open to us.

We shall miss not only the great Chief Judge whose wisdom and understanding have added glory to the judicial office but also the true man who has blessed us with the light of his friendship, the sunshine of his smile.[31]

However felicitous the personal associations may have been, clearly it was the work of the court that Cardozo loved. He was superbly suited to that common law court—an extraordinary person for an extraordinary process—molding out of the clay of everyday human experience principles that not only resolved immediate controversies but also guided conduct long into the future. As Cardozo himself explained the work of the court in his 1909 treatise: "The wrongs of aggrieved suitors are only the algebraic symbols from which the court is to work out the formulate of justice."[32] His skill was to see "the general in the particular,"[33] and then to clothe his writings in a rich and majestic style that endured in the mind of the reader. "Conservative in his habits, his dress, his manners, and in most of his opinions, he [was] a great liberalizer of the law."[34]

Take, for example, *MacPherson v Buick Motor Company.*[35]

Astoundingly, in 1916, while still a temporary Court of Appeals judge, shortly after leaving private practice, Cardozo succeeded in persuading three of his colleagues—over the dissent of then Chief Judge Willard Bartlett—to join him in abandoning the traditional requirement known as "privity" and allowing the buyer of an automobile with a defective wheel to sue the wheel manufacturer directly. The vote alone is breathtaking evidence of Cardozo's confidence and conviction, as well as the esteem in which he was held, even at the very outset of his judicial career.[36]

In *MacPherson,* Cardozo and Bartlett looked at the same set of facts, but Cardozo saw the potentiality of the automobile and the principle of law. While

a common-law high court's role is to "declare and settle" the law,[37] both the immediate consequences of a broad rule and the long-term impact of stare decisis are strong, moderating influences. If we adopt this principle today, where will it take the law in the next, unforeseeable cases?[38] Another brand-new junior judge might have found the circumstances intimidating, taking respectable refuge on narrower ground.

Cardozo, however, writing for a bare majority of four,[39] saw a green light of opportunity rather than a signal for caution. Plowing through a line of cases generally recognized as exceptions to the general no-liability-without-privity rule, he extracted a new principle that unified the exceptions: Foresight of danger creates a duty to avoid injury.[40] The exceptions now became the rule. A new product, the automobile, had created new dangers; the law would therefore evolve to create new protections. His opinion breathes with the elasticity and forward progress of the common law:

> *Precedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization need them to be.*[41]

His bold reasoning is, moreover, lit by learning and literary style. Succinctly, he reviews New York cases, federal decisions, British cases, other states' holdings, as well as treatises and academic commentators. And while *MacPherson* does not display Cardozo's most distinctive prose, the language is forthright and strong:

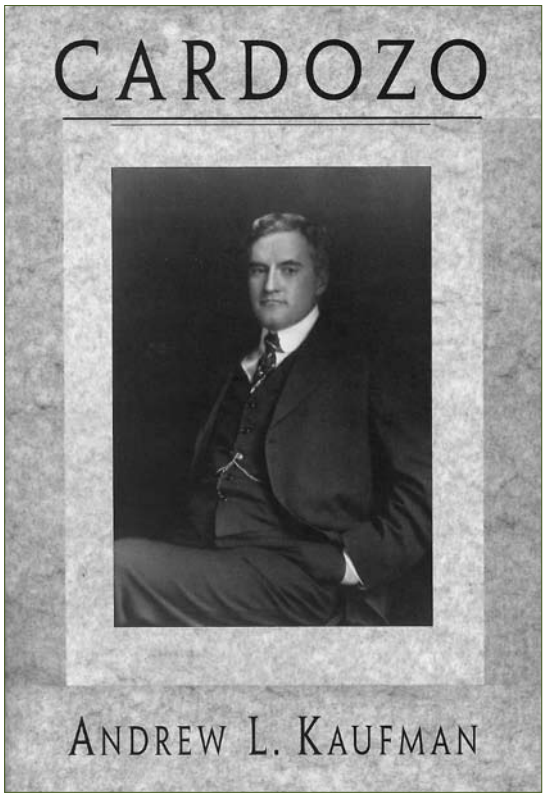
> *We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.*[42]

Chief Judge Willard Bartlett, by contrast, wrote a fact-bound, "technically sound"[43] but crabbed dissent. He saw only a creaky runabout and stayed with stagecoach precedents. Plaintiff's automobile, after all, was traveling at a speed of only eight miles an hour—barely outrunning the stagecoach—at the time of the accident; Buick had purchased this wheel from a reputable manufacturer that had previously furnished 80,000 wheels, none defective. If the rule allowing suit by a subvendee against a manufacturer were to be enlarged, let that be for the legislature. As Judge Richard Posner observed, *MacPherson* has proved itself "the quietest of revolutionary manifestos,"[44] the perfect vehicle to guide the law of torts in an increasingly motorized, mobile, mass-produced society.

Viewed narrowly, *MacPherson* involved a one-car accident on a country road. But seen in another light it raised an issue emblematic of a society that was becoming increasingly motorized, mobile, and mass-produced: Should a manufacturer be liable for injuries sustained by a remote purchaser of a defective product?[45] The general rule—based on a case involving a stagecoach accident—limited liability to those with whom the manufacturer was "in privity," with exceptions for fraud and inherently dangerous products, like poisons. In *MacPherson* Cardozo grasped the larger implications of the village stonecutter's vehicular misfortune and forged a new rule to better serve the emerging social realities.

Meinhard v Salmon is a second Cardozo classic—there are so many! One may forget the details of the dealings between the real estate operator Walter J. Salmon and the wool merchant Morton H. Meinhard, but never Cardozo's ringing words: "A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[46]

Chief Judge Irving Lehman later acknowledged that he hesitated over whether he would deliver the critical fourth vote to Judge Cardozo or to Judge Andrews, but concluded that few words contained in any judicial opinion had a greater or more salutary effect than the quoted words that flowed from Cardozo's pen.[47] Although Salmon had fully conformed to the commercial ethics code of the 19th century, Cardozo understood that the code was simply inadequate for the 20th. So he created a new standard. A fascinating analysis by Nicholas Georgakopoulos in the 1999 edition of the Columbia Business Law Review credits Cardozo's standard with facilitating the financing of modern business ven-



Courtesy Prof. Andrew L. Kaufman, Harvard Law School and Judge Louis Pollak.

tures by allowing passive investors to expect a greater portion of a project's remote potential.[48] Not a bad day's work in the year 1928.

What extraordinary talents Cardozo had: to see the opportunity, to win over at least three colleagues, and then to fashion a sensible, exquisitely expressed rule that is timeless.

Professor Kaufman's consistent conclusion is that Cardozo "was, and only aimed to be, a modest innovator"[49]; that, as a person to whom the values of tradition and order were important, he was only a "cautious" innovator.[50] Others authoritatively second that conclusion.[51] Cardozo was surely no firebrand. Yet as so many of his Court of Appeals opinions show, in at least two important respects, as a judge he was bold: he thought globally—he looked beyond the immediate facts to the future course of the law—and he wrote daringly.

From his "search for the just word, the happy phrase"[52] to his "groupings of fact and argument and illustration so as to produce a cumulative and mass effect,"[53] literary style mattered to Cardozo. People differ about the "architectonics" (Cardozo's word)[54] of his opinions. There is a hearty band on both sides of this issue.[55] But whether one's literary taste runs to the florid or the frugal, Cardozo is without doubt among America's most quotable judges. Professor Kaufman suggests the following candidates for "legal writing's Hall of Fame":[56]

> *Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.*
>
> *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.*
>
> *Danger invites rescue.*
>
> *The assault upon the citadel of privity is proceeding in these days apace.*

Favorite among Cardozo's literary flights was the technique of sentence inversion: "Not lightly vacated is the verdict of quiescent years."[57] Vivid. Attention-getting. Memorable. "To this hospital the plaintiff came in January 1908."[58] Well—chalk one up for the other side.

Cardozo advocated for sparse statements of fact in judicial decisions,[59] and his opinions prove that this approach can yield arresting results. Who, after all, can forget the defendant who "style[d] herself 'a creator of fashions,'" whose "favor help[ed] a sale?"[60] Or the sketch of events on the Long Island Railroad platform that immortalized Helen Palsgraf?[61] Or the terse account of George Kent's pursuit of plumbing perfection for his pricey country residence?[62] The wealth of detail in Kaufman's book gives a glimpse of the types of facts Cardozo left on the cutting room floor: that Mrs. Palsgraf's principal injury was a stutter allegedly caused by the accident, that Mr. MacPherson suffered his accident while driving a sick neighbor to the hospital.[63] While some judges might have opted for more atmospherics, Cardozo knew when too many facts impeded the force of his legal argument.

Time and again throughout his opinions, Cardozo shows not only an ability to perceive precisely the right balance that will "settle and declare the law" but also a gift to articulate it persuasively, in words that fix the principle forever. A lawyer's lawyer, he thought rigorously and wrote vigorously. What better description of a jurist's jurist?

The Storrs Lectures

Cardozo's first, and best known, jurisprudential exposition was *The Nature of the Judicial Process,* delivered in February 1921 as the Storrs Lectures at the Yale Law School. His performance in New Haven was, by all accounts, mesmerizing. Professor Kaufman quotes Arthur Corbin:

> *Standing on the platform at the lectern, his mobile countenance, his dark eyes, his white hair, and his brilliant smile, all well lighted before us, he read the lecture, winding it up at 6 o'clock. He bowed and sat down. The entire audience rose to their feet, with a burst of applause that would not cease. Cardozo rose and bowed, with a smile at once pleased and deprecatory, and again sat down. Not a man moved from his tracks; and the applause increased. In a sort of confusion Cardozo saw that he must be the first to move. He came down the steps and left, with the faculty, through a side door, with the applause still in his ears.*[64]

"Never again have I had a like experience," Corbin wrote. "Both what he had said and his manner of saying it had held us spell-bound on four successive days."[65]

Cardozo's statement early on in the first of the Storrs Lectures—"I take judge-made law as one of the existing realities of life"—was seen by some as an admission verging on heresy.[66] As Kaufman makes clear, Cardozo was not the first to espouse such a view.[67] Yet his account seems to have struck a nerve others missed. The word was out: Judging is more than a matter of "match[ing] the colors of the case at hand against the colors of many sample cases spread out upon [a] desk."[68] It is an endeavor marked, within limits, by indeterminacy and discretion, by creativity and choice.

In the lectures, Cardozo explored four interrelated "methods" of deciding cases when existing precedents do not determine the controversy at hand: logic ("the method of philosophy"), history ("the method of evolution"), the customs of the community ("the method of tradition"), and "justice, morals and social welfare, the mores of the day" ("the method of sociology").[69] He posited a functional approach to law: The ultimate test of legal rule is not how well it fits in some abstract theory but how well it actually performs in the real world.

Although at the time a judge of the New York State Court of Appeals—where common law, not constitutional issues dominated the docket—Cardozo made special note of the applicability of his approach to constitutional adjudication. While the words and phrases enshrined in the Constitution were unchanging, their meaning varied with time: "a constitution states or ought to state not rules for the passing hour, but principles for an expanding future."[70] Judges must therefore construe constitutional concepts flexibly, in light of current conditions and with due respect for the judgments of the legislative branch. When reviewing statutes, judges must be careful not to substitute "their own ideas of reason and justice for those of the men and women whom they serve."[71]

Some have observed that Cardozo's outline is "not very helpful in the decision of actual cases."[72] True, *The Nature of the Judicial Process* provides no algorithm for judging. Yet it is no brief for nihilism either.[73] Cardozo is careful to stress the limits on a judge's discretion,[74] and he notes that stability and predictability play a significant role in a well-ordered society.[75] But he recognizes that ultimately, the issue comes down to individual wisdom and humanity:

> *If you ask how [a judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as a legislator gets it, from experience and study and reflection; in brief, from life itself.*[76]

The Nature of the Judicial Process stated Cardozo's juridical philosophy; his opinions applied it. Clearly, he was preaching what he practiced. From the bench of the Court of Appeals, he inveighed against "the dangers of 'a jurisprudence of conceptions,'"[77] chastising those "who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result. . . ."[78] He used his four "methods" in deciding cases, and made no attempt to hide it.[79] His common law opinions drew upon accepted notions of justice and reasonable conduct, such as he saw them, to decide individual dis-

putes and lay down guidelines for future action.[80] And even his most progressive decisions stress the continuity of the common law: the stability of the system, if not the precise application of doctrines, over time.

After first explaining that the result in most cases is foreordained by precedents of the past, Cardozo writes that he has become more and more reconciled to uncertainty:

> *I have grown to see that the process in its highest reaches is not discovery but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.*

The confession that judges actually made law instead of simply applying existing precedents, was regarded, as one commentator observed, as a legal version of hard-core pornography; a less saintly man, he adds, would have found himself close to impeachment for such expressions.[81]

To this day, Cardozo's exposition of the nature of the judicial process and the growth of the law remains new and exciting. It's an excellent read!

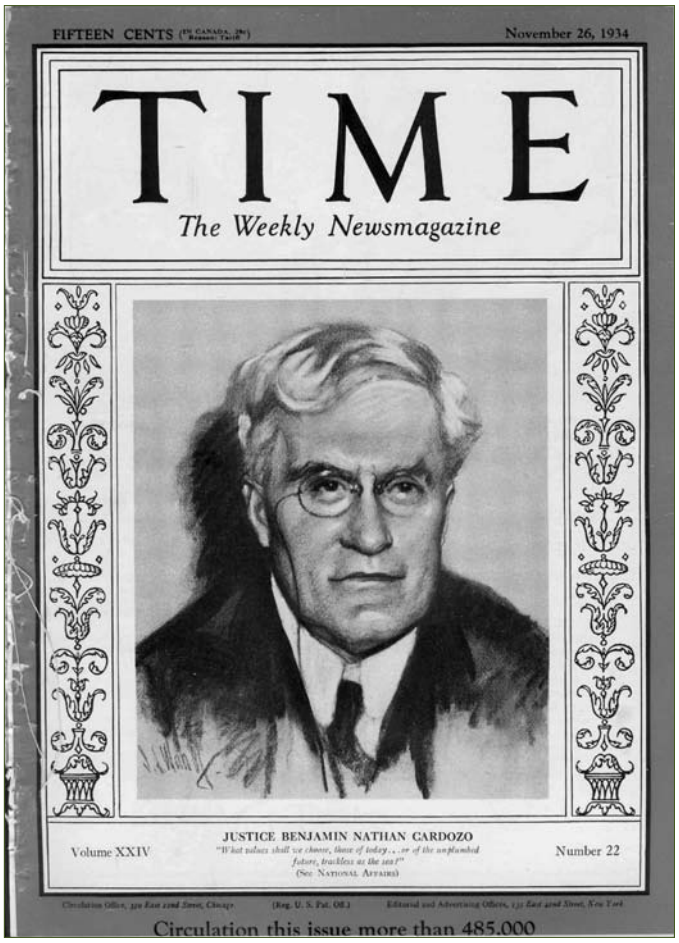
Career on the Supreme Court

In 1932, President Herbert Hoover appointed Cardozo to the Supreme Court of the United States, to succeed his idol, Justice Oliver Wendell Holmes. Cardozo served a brief six years, until his death at the age of 68 in 1938. From Washington, he wrote of homesickness and loneliness for his Court of Appeals life and his New York City life.

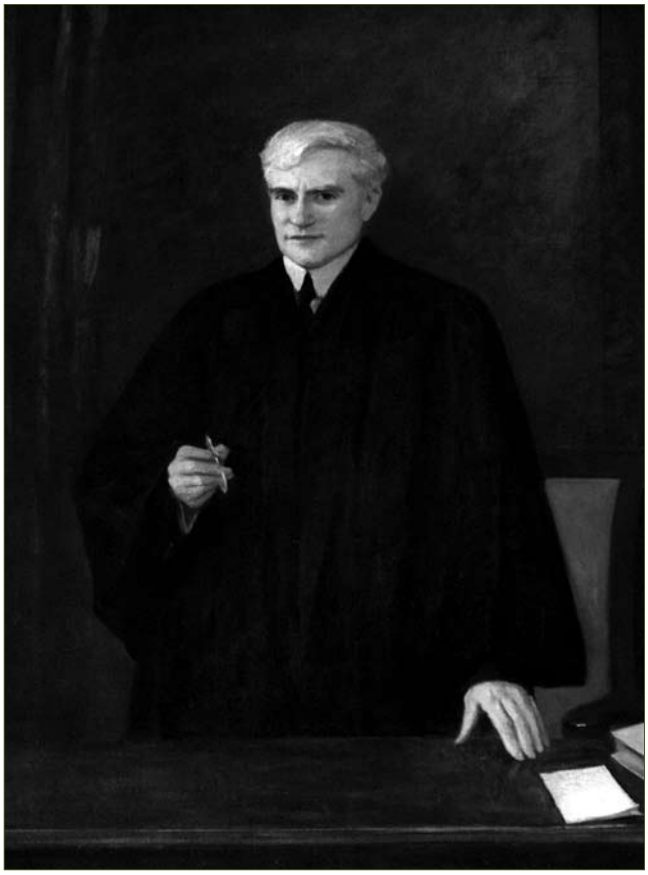
At the Supreme Court, Cardozo continued to follow a pragmatic, case-by-case approach. He decided the issues before him on the facts of the cases, leaving further glosses and extensions to the future.[82] He also advocated for a flexible construction of constitutional restraints on regulation of economic matters, frequently voting, often in the minority, to uphold legislative efforts to improve social and economic conditions.[83] Cardozo's support of New Deal legislation caused him to be viewed as a "liberal," but his approach to cases was a method not an ideology. As Professor Kaufman suggests, "most judges still go about the job of deciding cases within the framework that Cardozo described."[84]

Cardozo's Impact on the Law

The 68 years of Benjamin Nathan Cardozo's life spanned a period of enormous social change. Society became more highly industrialized; we had a great war and a great depression. His genius as a judge was in maintaining the order, certainty, and regularity of the law while at the same time recognizing that no judge-made rule can or should survive when it has gone out of harmony with the thoughts and customs of the people. He applied existing doctrines to contemporary problems with wisdom and discretion,



Courtesy Time *magazine, cover date November 26, 1934*



leaving an indelible mark in the evolutionary process of the law.

Though Cardozo's impact was felt in every field of the law, his greatest influence was in "deepening the spirit of the common law."[85] Sixty years ago, he perceived, for example, that an automobile was a potentially dangerous instrument and sustained recovery by an injured person on a broader basis than had previously been recognized; he held the fiduciary to the highest ethical standards; he extended the reaches of liability in some areas of law, and yet limited recovery against public utilities and others on policy grounds where liability otherwise would be crushing. He found implied promises and constructive trusts to achieve the just result in contract cases, and laid sturdy foundations for development of the law away from mechanical application of principles that barred enforcement of promises. And always his opinions were of incomparable beauty, because of his ability and because he believed that judicial writing was also literature, and that form of expression had importance.

Cardozo's career placed him on two significant courts during two watershed periods: the New York Court of Appeals from 1914 to 1932, when many basic common-law principles were being tested in light of new social and economic realities, and the United States Supreme Court from 1932 to 1938, when cataclysmic battles raged over the constitutional status of the regulatory state. Cardozo distinguished himself in both roles, although without question, he is best remembered for his work as a common law judge.[86]

As a man who believed in progress and accepted the fact of change, Cardozo understood that time would take its toll on even the best judges' work:

> *The work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years.*[87]

Cardozo has clearly passed his own test with flying colors. In this day when opinion polls seem to settle so many contested issues, Judge Posner's computerized calculations of Cardozo's standing are one good source for gauging his current value. The data show that Cardozo stands head and shoulders above the next-best-known state court judge, Roger Traynor, in citations in academic writings. He is consistently cited ahead of his Court of Appeals colleagues by state and federal courts, and leads them all in opinions in torts and contracts casebooks. His federal jurisprudence also left its mark: In the last decade, Cardozo's Supreme Court opinions were cited more frequently than those of his most highly regarded colleagues—Harlan Fiske Stone and Louis Brandeis—from the same period.[88]

While those statistics are surely impressive, even more meaningful for the Court of Appeals "family" is the fact that Cardozo's writings remain significant in the court's decisionmaking process. The changes in the landscape since Cardozo's day are manifest. Technology is obviously different: *MacPherson's* runabout would be left in the dust on the New York

Thruway. Social relations are also different thanks to the civil rights movement and a sexual revolution. The legal landscape is different too. Since Cardozo's day, we have witnessed relentless "statutorification"[89] of the law, with legislation displacing the common law in many areas as the primary source of legal precepts.[90]

Yet in this vastly changed world, Cardozo's opinions continue to shine as a polestar for the resolution of disputes. "The Flopper" may be long gone from the Coney Island boardwalk, but just recently the basic principles of *Murphy v Steeplechase Amusement Co.*, Inc.[91] lived on in fixing the responsibility of sport facilities that cater to some of today's popular recreational pursuits: indoor tennis and karate.[92] The primitive firefighting system at issue in *Moch Co. v Rensselaer Water Co.*[93] has also gone by the boards, but its conclusion that the zone of duty may be limited to avoid crushing levels of liability helped resolve a suit that arose from the last New York City blackout.[94] Stony Point, New York, may no longer be merely a place of little cottages and fields, as it was in Cardozo's day, but the rule of *People v Tomlins*[95] remains unwavering that a person under attack has no duty to retreat from his or her own home. "Evil practices" are, of course, no longer "rife" among members of the bar, but when individuals in the professions are investigated for wrongdoing, we adhere to the admonition of *People ex rel. Karlin v Culkin*[96] that "[r]eputation in such a calling is a plant of tender growth, and its bloom, once lost, is not easily restored."

Some controversies, alive and well before and during Cardozo's time, such as the tension recognized in *Beecher v Voght Mgt.*,[97] between an attorney's right to collect under a charging lien and another's right to a setoff, remain alive and well today.[98] And while a particular dispute over attorney's fees in *Prager v New Jersey Fidelity & Plate Glass Ins.*[99] has long since been extinguished, the rule lives on that the purpose of awarding interest is to make an aggrieved party whole.[100] In matters of statutory interpretation—so important today—his canons of construction continue to guide the court.[101] And frankly, does any reader searching for the basic rule governing severability need to consult the books to know its author? The poet's touch is evident:

> *Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment. The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots.*[102]

Cardozo's bean weigher in *Glanzer*[103] and accountant in *Ultramares*[104] were central to the court's definition of duty for contemporary architectural engineers[105] and worldwide accounting firms.[106] And to this day, Mrs. Palsgraf regularly resurfaces in modern dress—one of her last appearances as a nurse injured by a falling wall fan, seeking recovery against a maintenance company under contract with the hospital.[107] Court of Appeals decisions continue to cite Cardozo, building upon precedents of an earlier age to fit the law to modern society, blending a phrase from the Hall of Famer, borrowing the halo that surrounds his work.

Of course, not all of his opinions have withstood the test of time. The rule of *Schloendorff v New York Hospital*[108]—exempting charitable hospitals from liability for the negligence of its medical staff—was found to be "at variance with modern-day needs and with concepts of justice" in *Bing v Thunig.*[109] *Mapp v Ohio*[110] paid homage to Cardozo's image of the blundering constable, but overruled *People v Defore*[111] all the same.

While time may have undermined some of Cardozo's holdings, it has not eroded the vitality of his description of the judicial process.[112] Debates over whether judges "find" law or make it, and what sources they should draw upon when rendering a decision, continue to this day.[113] Cardozo stated the case for dynamic (yet restrained) judicial innovation as well as anyone has, or probably will. Across the decades, his voice still elevates the discourse:

> *The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure.*

> *He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life."*[114]

Nor has time dulled the brilliance of Cardozo's prose. Today's judges need not copy his ornate style flourish for flourish—what tripped off the tongue 70 years ago sometimes sticks in the throat today. Yet appellate judges must struggle to find the elusive phrase, the expression that will capture and fix the principle that controls the case. To make a rule and make it memorable. This occurs only at the intersection of law and literature, a juncture Cardozo—but few other judges—frequented.

His Death

Cardozo died on July 9, 1938. He was buried alongside his family in Beth Olom Cemetery (also known as Congregation Shearith Israel Cemetery) located on Cypress Hills Street in Brooklyn. While praises of Cardozo were received the world over, at his funeral, as he had requested, only the traditional Sephardic prayers were recited. There was no eulogy, and no word of English. As Irving Lehman (a close friend and colleague, himself later a distinguished chief judge of the Court of Appeals) said of him in a memorial service at the City Bar Association:

> *There is little of drama in this brief record of Justice Cardozo's life. It was a life of fruitful thought and study, not of manifold activities. Quiet, gentle and reserved, from boyhood till death he walked steadily along the path of reason, seeking the goal of truth; and none could lure him from that path.*[115]

Progeny

From Benjamin Nathan Cardozo, his brother and four sisters, there are no progeny. There are, however, some notable cousins. Among the Nathans are sisters Maud Nathan and Annie Nathan Meyer (one of the founders of Barnard College), Emma Lazarus, and New York City lawyer-brothers Frederic S. and Edgar J. Nathan 3rd (and their sisters and children), who to this day are prominent members of Congregation Shearith Israel. On the Cardozo side, the "Michael H. Cardozos" (tracing their lineage back to Ellen and Michael Hart Cardozo [1800-55]) are up to Michael H. Cardozo VI. Ellen and Michael Hart Cardozo were Judge Cardozo's grandparents. They are the great-great-great grandparents of New York City Corporation Counsel Michael A. Cardozo.

ENDNOTES

1 Andrew L. Kaufman, *Cardozo* (1999) [hereinafter Kaufman]. This chapter borrows very liberally from Kaufman's biography and from Judith S. Kaye: "Book Review—Cardozo: A Law Classic," 112 Harv. L. Rev. 1026 (1999).

2 Kaufman 569.

3 On both sides of his family, Cardozo could trace his American roots to colonial times. Kaufman 6, 9. Cardozo once wrote to a friend that the name "Cardozo" was common in Spain and Portugal, and that someone of that name even claimed to be the Messiah. George S. Hellman, *Benjamin N. Cardozo: American Judge 8* (1940); *see generally* Stephen Birmingham, *The Grandees: American's Sephardic Elite* (1971) [hereinafter *Grandees*]; Rabbi Marc D. Angel, *Remnant of Israel: A Portrait of America's First Jewish Congregation* (2004).

4 *See "A Personal View of Justice Benjamin N. Cardozo: Recollections of Four Cardozo Law Clerks,"* 1 Cardozo L. Rev. 5, 20 (1979) (compilation of four essays written by former law clerks Joseph L. Rauh Jr., Melvin Siegel, Ambrose Doskow, Alan M. Stroock).

5 Indeed, all of Cardozo's siblings predeceased him; none had children. Even for the 19th century, when childhood illness and death were more commonplace, Cardozo's early family portrait seems somewhat bleak. Descriptions of his early years can be found in Kaufman 1-39; Hellman 33-42; Paul Bricker, "Justice Benjamin N. Cardozo: A Fresh Look at a Great Judge," 11 Ohio N.U. L. Rev. 1, 24-29, 32-33 (1984) (discussion of factors that helped mold Cardozo's life, intellect, and philosophy).

6 Cardozo's religious background is described in Kaufman 23-25; Hellman 10-13; Paul Bricker, "Justice Benjamin

N. Cardozo: A Fresh Look at a Great Judge," 11 Ohio N.U. L. Rev. at 30-31; Judith S. Kaye, An Appreciation of Justice Benjamin Nathan Cardozo: A Lecture by Judge Judith S. Kaye, delivered at Congregation Shearith Israel, Shabbat morning May 20, 1995, at 2-6 (published by the Centennial Committee of Congregation Shearith Israel, Jun. 6, 1995) [hereinafter "Shearith Israel 1995"].

7 Cardozo's early education is described in Kaufman 25-26; Paul Bricker, "Justice Benjamin N. Cardozo: A Fresh Look at a Great Judge," 11 Ohio N.U.L. Rev. at 31-32.

8 Kaufman 37-38.

9 *Id.* at 27-39.

10 Once he described himself as a "plodding mediocrity," explaining that "a mere mediocrity cannot go far, but a plodding one can go quite a distance." *Grandees* 303. See, *e.g.*, Edgar Nathan Jr., "Benjamin Cardozo," *The American Jewish Yearbook 5700* at 28 (1939) ("sensitively modest man"); Judith S. Kaye, A Lecture About Judge Benjamin Nathan Cardozo by Judge Judith S. Kaye, Presented at Congregation Shearith Israel, Tuesday evening, Dec. 2, 1986, at 3 (published by Congregation Shearith Israel and Sephardic House 1986) [hereinafter "Shearith Israel 1986"] (describing his personal appearance); "A Personal View of Justice Benjamin N. Cardozo: Recollections of Four Cardozo Law Clerks," 1 Cardozo L. Rev. 5, 10-11, 15, 20, 18 (1979).

11 From the description accompanying an etching of Justice Cardozo included in 39 Colum. L. Rev. lii and 48 Yale L.J. i (1939).

12 Learned Hand, "Mr. Justice Cardozo," 52 Harv. L. Rev. 361, 363 (1939).

13 Grant Gilmore, *The Ages of American Law,* 75 (1974).

14 Kaufman 143, 184.

15 *See, e.g.*, Kaufman 155, 232, 404.

16 As Stephen Birmingham observes, "had it not been for the family misfortunes, . . . it is quite unlikely that Benjamin Cardozo would have become the man he came to be. Because, from his earliest boyhood, he set out upon a life plan designed to exonerate, or at least vindicate, his father, and bring back honor to the Cardozo name." (*Grandees* 296.)

17 Kaufman 568.

18 Kaufman 104, 138, 166, 183.

19 Cardozo, "Values: Commencement Address, or The Choice of Tycho Brahe," in *Selected Writings of Benjamin Nathan Cardozo* 1 (M. Hall, ed., 1947) [hereinafter *Selected Writings*].

20 Hellman 264-65.

21 Cardozo, "Values: Commencement Address," in *Selected Writings* 1.

22 Cardozo, "The Paradoxes of Legal Science," in *Selected Writings* 275.

23 *Id.* at 274.

24. Hellman 92. In 1895, a movement within Congregation Shearith Israel sought to "modernize" the service by, for example, eliminating gender-segregated seating, installing an organ and shortening the services. Cardozo (then age 25) made "a long address impressive in ability and eloquence" at the synagogue meeting in opposition to all change. David & Tamar De Sola Pool, *An Old Faith in the New World* 375 (1955). As a consequence, today's chief judge of the Court of Appeals (a woman and a member of Shearith Israel) sits upstairs.

25 Babette Deutsch, "Profiles: The Cloister and the Bench,"New Yorker, Mar. 22, 1930, p. 25.

26 Irving Lehman, "A Memorial," reprinted in *Selected Writings* xi.

27 George Martin, *CCB: The Life and Century of Charles C. Burlingham, New York's First Citizen 1858-1959* at 187-88 (2005); Kaufman 100-01.

28 The fascinating story of Cardozo's nomination and election is more fully set forth in Martin 179-91; Kaufman 117-25. Beryl Harold Levy depicts the political scene as follows:

Then, in November 1913, he was elected a Justice of the Supreme Court in New York City in the course of the Fusion movement which elected John Purroy Mitchel mayor. "As an independent Democrat, Judge Cardozo would probably never have been put forward for his first candidacy either by Tammany Hall or by the Republican organization," William M. Chadbourne has pointed out. And indeed, Charles C. Burlingham, chairman of the committee on judicial nominations of the Fusion Committee of 107, has related how the Republican organization held back for a time, preferring to place in nomination one of its stalwarts.

Beryl Harold Levy, *Cardozo and Frontiers of Legal Thinking* 4 (rev. ed. 1969) [hereinafter Levy] (footnotes omitted). Burlingham indicated that "about 70 different people" tried to take credit for having nominated Cardozo. Id; *see also* Kaufman 118-19.

29 But a great sadness for Cardozo, his sister Nell died in 1928.

30 Babette Deutsch, "Profiles: The Cloister and the Bench," *New Yorker* Mar. 22, 1930, at 25.

31 Cuthbert W. Pound, "Address to Chief Judge Benjamin Cardozo—Upon his Retirement from the Court of Appeals to Accept Appointment as Associate Justice of the United States Supreme Court," 258 N.Y. v-vi (1932). Another colleague's highly informative insight about Cardozo's influence at the conference table is found in Chief Judge Irving Lehman's Cardozo Memorial Lecture—the very first—delivered at City Bar Association on Oct. 28, 1941. Irving Lehman, "The Influence of Judge Cardozo on the Common Law," in 1Associa-

tion of the Bar of the City of New York, *The Benjamin N. Cardozo Memorial Lectures* 15, 24-25 (1995).

32 Benjamin N. Cardozo, *The Jurisdiction of the Court of Appeals of the State of New York* 11 (2d ed., 1909).

33 Paul A. Freund, "Foreword: Homage to Mr. Justice Cardozo," 1 Cardozo L. Rev. 1, 2 (1979).

34 Babette Deutsch, "Profiles: The Cloister and the Bench," *New Yorker,* Mar. 22, 1930, at 28.

35 217 N.Y. 382 (1916).

36 Cardozo's intimate familiarity with Court of Appeals procedures and personnel unquestionably facilitated his transition from the trial bar to the court. Additionally, the court at the time had a heavy commercial docket, which had been the essence of his law practice.

37 Benjamin N. Cardozo, *Jurisdiction of the Court of Appeals* 11 (2d ed., 1909).

38 Professor Kaufman noted (at 446-47):
"As a working judge, Cardozo avoided large questions of doctrine most of the time. It was hard enough to get agreement in the court on a difficult case within the short time in which he and his colleagues had to decide it before moving on to the next one. . . . Sometimes it was apparent that he was unsure how he would decide the next relevant case, didn't want to commit himself in advance, and therefore was careful to explain the current case in a way that left himself and court flexibility for the next one. Cardozo's candor consisted in trying to explain the present result without encumbering the future. It was a difficult job, and on the whole, he did it well."

39 Only Judges Frank Hiscock, Emory Chase, and William Cuddeback joined in Cardozo's opinion. Judge John Hogan concurred only in the result, Chief Judge Bartlett dissented and Judge Cuthbert Pound did not vote at all.

40 Starting with an 1852 case, *Thomas v Winchester,* that had carved an exception to *Winterbottom* to create liability to a remote purchaser of a falsely labeled poison, Cardozo then traced the application of *Thomas* to a widening array of products: collapsing scaffolds, exploding coffee urns, bursting soda bottles. The "principle" of *Thomas* grows with each application, until the exception—skillfully generalized—swallows the rule.

41 217 N.Y. at 391.

42 217 N.Y. at 390.

43 Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* 434 (1960). Llewellyn called Cardozo's opinion a masterpiece.

44 Richard A. Posner, *Cardozo: A Study in Reputation* 109 (1990) [hereinafter "Posner"]. *MacPherson* not only settled the law here but also after a time settled the law for the House of Lords. *McAlister v Stevenson,* [1932] All E.R. Rep. 1, [1932] A.C. 562.

45 Donald MacPherson had bought his vehicle from a car dealership in Schenectady, not from the defendant Buick Motor Company.

46 249 N.Y. 458, 464 (1928).

47 *See* Irving Lehman, "The Influence of Judge Cardozo on the Common Law," in Association of the Bar of the City of New York, 1 *The Benjamin N. Cardozo Memorial Lectures* 15, 25 (1995).

48 Nicholas L. Georgakopoulos, *"Meinhard v Salmon and the Economics of Honor,"* 1999 Colum. Bus. L. Rev. 137 (1999).

49 Kaufman 248.

50 Kaufman 359.

51 Posner 13; G. Edward White, *Tort Law in America* 123 (1980).

52 Benjamin N. Cardozo, *The Growth of the Law* (1924), *reprinted in Selected Writings*186, 225.

53 Benjamin N. Cardozo, *Law and Literature* (1925), *reprinted in Selected Writings* 339, 352.

54 *Id.* at 352.

55 Kaufman quotes Jerome Frank's anonymously published view that Cardozo's style was "awkward" and "sometimes ornate, baroque, rococo"; his ornaments at times "annoyingly functionless" and his metaphors "elaborate." Kaufman 448-49. On the other side, another Cardozo contemporary, Professor Zechariah Chafee, opined that "Cardozo possesses one of the best prose styles of our times." *Id.* at 449.

56 *Id.* at 449-50.

57 *Coler v Corn Exchange Bank,* 250 N.Y. 136, 141 (1928).

58 *Schloendorff v New York Hospital,* 211 N.Y. 125, 127 (1914). Since this was among Cardozo's very first opinions, plainly he brought this literary technique to the bench with him. As Chief Judge Lehman noted in his first Cardozo Memorial Lecture, "every student of the law has recognized that judges who phrase their opinions with artistry have at times persuaded great courts and even themselves, where reason, unadorned, might have pointed to a safer path." Irving Lehman, "The Influence of Judge Cardozo on the Common Law," in 1Association of the Bar of the City of New York, *The Benjamin N. Cardozo Memorial Lectures 1941-1995* 15, 19-20 (1995).

59 Benjamin N. Cardozo, *Law and Literature* (1925), *reprinted in Selected Writings* 341 ("There is an accuracy that defeats itself by the overemphasis of details. . . .The picture cannot be painted if the significant and the insignificant are given equal prominence. One must know how to select").

60 *Wood v Lucy, Lady Duff Gordon,* 222 N.Y. 88, 90 (1917).

61 *Palsgraf v Long Island RR Co.,* 248 N.Y. 339 (1928).

62 *Jacob & Youngs, Inc. v Kent,* 230 N.Y.2d 239, 240 (1921).

63 Kaufman 270, 287.

64 Kaufman 204 (quoting Arthur L. Corbin, *The Judicial Process Revisited: Introduction*, 71 Yale L. J. 195, 197-98 (1961)).

65 *Id.* Corbin mentions Cardozo's eyes, hair and smile, but curiously not—as one might expect after a two-hour reading—his voice. Kaufman reports that after hearing a tape of Cardozo at a celebratory dinner:

> I was blown away. I might have been listening to William Jennings Bryan himself. Cardozo was an orator, in the style of the 19th century. In one minute, I had learned why he was a captivating speaker, and I understood a good deal more about his success at the bar. I also ended up rewriting portions of the book." Andrew Kaufman, Adventures of a Biographer: Professor Kaufman Recounts his Forty-Year Pursuit of Cardozo, Harv. L. Bull. 9-10 (summer 1998).

66 Professor Gilmore put it more starkly: "Cardozo's hesitant confession that judges were, on rare occasions, more than simple automata, that they made law instead of merely declaring it, was widely regarded as a legal version of hardcore pornography." Grant Gilmore, *The Ages of American Law* 77 (1974). Cardozo initially resisted publication of his manuscript by the Yale Press, protesting that "if it were published, I would be impeached." Corbin, *supra* note 77, at 198.

67 *See* Kaufman 200-03 (discussing Oliver Wendell Holmes, John Chipman Gray and Roscoe Pound).

68 Cardozo, *The Nature of the Judicial Process* 20 (1921) [hereinafter *Judicial Process*].

69 *Id.* at 30-31.

70 *Id.* at 83.

71 *Id.* at 89.

72 Paul A. Freund, "Foreword: Homage to Mr. Justice Cardozo," 1 Cardozo L. Rev. 1, 3-4 (1979) (quoting Justice Frankfurter). It is unlikely that Frankfurter thought the process of deciding cases could be reduced to a formula. "Whenever Frankfurter was asked how he weighed the elements of history, precedent, custom and social utility in reaching a decision, he was likely to reply, 'When Velazquez was asked how he mixed his paints, he answered, 'With taste.'" *Id.* at 4.

73 Ten years after the Storrs Lectures, Cardozo gave an address specifically distancing himself from the more radical Legal Realists who "exaggerate[d] the indeterminacy, the entropy, the margin of error, [and] treat[ed] the random or chance element as a good in itself and a good exceeding in value the elements of certainty and order and rational coherence. . . ." Benjamin N. Cardozo, *Jurisprudence, reprinted in Selected Writings* 7, 30. Cardozo's address infuriated Jerome Frank, who expressed his views in a sizzling 31-page letter, complete with a 31-page appendix. Kaufman 460-61.

74 "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. . . . All that the method of sociology demands is that within this narrow range of choice he shall search for social justice." *Judicial Process 136-37*.

75 "One of the most fundamental social interests is that law shall be uniform and impartial. . . . Therefore in the main there shall be adherence to precedent." *Id.* at 112.

76 *Id.* at 113. *See also* Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 Cornell L. Rev. 1004, 1015 (1988).

77 *Hynes v N.Y. Cent. R.R.*, 231 N.Y. 229, 235 (1921).

78 *Jacob & Youngs, Inc. v Kent*, 230 N.Y. 239, 242 (1921).

79 *See, e.g.*, *Hynes*, 231 N.Y. at 236 ("We think that considerations of analogy, of convenience, of policy, and of justice, exclude [plaintiff] from the field of the defendant's immunity . . . "); *People ex rel. Karlin v Culkin*, 248 N.Y. 465, 477 (1928)("The argument from history is reinforced by others from analogy and policy").

80 As Kaufman observes (at 359): "when it came to enforcing promises in the commercial context, he looked to contemporary commercial practice for enlightenment. When it came to enforcing promises relating to marriage or charitable subscriptions, he relied heavily on general social preferences or specific governmental policies."

81 Gilmore, *The Ages of American Law* at 77.

82 In *Palko v Connecticut*, 302 U.S. 319 (1937), for example, he employed an issue-by-issue approach on incorporation of the Bill of Rights into the 14th amendment, concluding that the right in question—the 5th amendment's immunity from double jeopardy—was not "implicit in the concept of ordered liberty" and thus not binding upon the States. His view was overruled decades later in *Benton v Maryland*, 395 U.S. 784 (1969).

83 Cardozo voted—in majority or dissent—to sustain a wide range of state and federal regulatory efforts. *See* Kaufman 491-533. But Cardozo also voted to strike down such efforts when he concluded that reasonable limits had been exceeded. *See e.g.*, Kaufman 503-04, 511-12.

84 Kaufman 200.

85 *See* Irving Lehman, "The Influence of Judge Cardozo on the Common Law," in 1 Association of the Bar of the City of New York, *The Benjamin N. Cardozo Memorial Lectures* 15, 17 (1995).

86 Cardozo himself thought his greatest contribution was his work in New York. He wrote that in Albany he "really accomplish[ed] something that gave a new direction to the law," but in Washington he had to be satisfied if he "accomplished something by his vote." Kaufman 493. The brevity of Cardozo's service on the Supreme Court limited his impact, although some believe that he did

well with the time he had. *See* Richard Friedman, "On Cardozo and Reputation: Legendary Judge, Underrated Justice?," 12 Cardozo L. Rev. 1923, 1932 (1991) ("Cardozo's was one of the greatest short tenures on the Court in its history. . . .")

87 *Judicial Process* 178.

88 Posner, Chap. 5.

89 Guido Calabresi, *A Common Law for the Age of Statutes* 1 (1982).

90 *See generally* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions,* 70 N.Y.U. L. Rev. 1 (1995).

91 250 N.Y. 479 (1929).

92 *Morgan v New York,* 90 N.Y.2d 471 (1997).

93 247 N.Y. 160 (1928).

94 *Strauss v Belle Realty,* 65 N.Y.2d 399 (1985); see also *Church v Callanan Industries, Inc.,* 99 N.Y.2d 104 (2002).

95 213 N.Y. 240, 243 (1914); see *People v Aiken,* 4 N.Y.3d 324 (2005); *People v Jones,* 3 N.Y.3d 491 (2004); *People v Hernandez,* 98 N.Y.2d 175 (2002).

96 248 N.Y. 465, 478 (1928); see *Anonymous v Bureau of Professional Medical Conduct/State Bd. for Professional Medical Conduct,* 2 N.Y.3d 663 (2004).

97 227 N.Y. 468, 469 (1920) (observing the revival of "smouldering fires of an ancient judicial controversy").

98 See *Banque Indosuez v Sopwith Holdings Corp,* 98 N.Y.2d 34 (2002).

99 245 N.Y. 1, 5-6 (1927).

100 See *Spodek v Park Property Development Assoc.,* 96 N.Y.2d 577 (2001).

101 *East End Trust Co. v Otten,* 255 N.Y. 283, 286 (1931), *quoted in Matter of Francois v Dolan,* 95 N.Y.2d 33 (2000).

102 *People ex rel. Alpha Portland Cement Co. v Knapp,* 230 NY 48, 60 (1920); *quoted in CWM Chemical Services v Roth,* 6 N.Y.3d 410, 413 (2006).

103 *Glanzer v Shepard,* 233 N.Y. 236 (1922).

104 *Ultramares Corp. v Touche,* 255 N.Y. 150 (1930).

105 *Ossining Union Free Sch. Dist. v Anderson,* 73 N.Y.2d 417 (1989).

106 *Credit Alliance Corp. v Arthur Andersen & Co.,* 65 N.Y.2d 536 (1985).

107 *Palka v Servicemaster Management,* 83 N.Y.2d 79 (1994).

108 211 N.Y. 125 (1914).

109 2 N.Y.2d 656 (1957).

110 367 U.S. 643, 659 (1961).

111 242 N.Y. 13 (1926).

112 Kaufman reports (at 204) that between 1960 and 1994, *The Nature of the Judicial Process* sold 156,637 copies—more than six times as many as during its first 39 years. Posner reports (at 20) that between 1966 and 1988, the book was cited an average of 28.4 times a year in journals tabulated by the *Social Sciences Citation Index*—making it the third most often cited pre-1960 work of jurisprudence (trailing only Holmes's *The Common Law* and "The Path of the Law").

113 That debate began with the birth of the judicial branch. *See* William J. Brennan Jr., *Reason, Passion and "The Progress of the Law,"* in 3 Association of the Bar of the City of New York, *The Benjamin N. Cardozo Memorial Lectures* 1439 (1995).

114 *Judicial Process* 141.

115 Irving Lehman, *Benjamin Nathan Cardozo: A Memorial* 8 (1938).

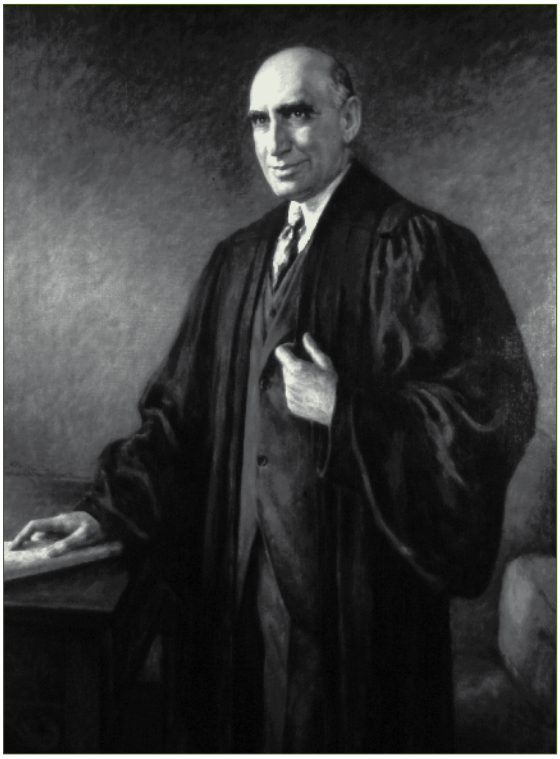
116 The number of articles about Cardozo's life and jurisprudence is simply huge. This list represents only a small sampling. No compilation would be complete, however, without reference to the Benjamin N. Cardozo Memorial Lectures, an esteemed annual lecture delivered at the City Bar Association in New York City. The Lectures were instituted in 1941, just three years after Cardozo's death, the first—"The Influence of Judge Cardozo on the Common Law"—delivered by his close friend Chief Judge Irving Lehman. Forty-seven of those lectures, many dealing with Cardozo's work and influence, were published in three volumes by the city bar in 1995; several of the lectures (both before and since 1995) have been published in law reviews.

Sources Consulted intentionally deleted. They are available in the version of this biography found in *The Judges of the New York Court of Appeals: A Biographical History,* edited by Albert M. Rosenblatt, and published in 2007 by Fordham University Press.

THE ELECTION OF CHIEF JUDGE IRVING LEHMAN

HENRY M. GREENBERG

By the 1930s, the New York Court of Appeals was widely regarded as the greatest common law court in the nation.[1] New York was the nation's most populated state as well as its financial and commercial center, and such preeminence was reflected in the quality of its high court's leadership.[2] Indeed, the Court enjoyed a succession of extraordinary Chief Judges, including Frank H. Hiscock (1917-1926),[3] Benjamin N. Cardozo (1926-1932),[4] Cuthbert W. Pound (1932-1934),[5] and Frederick E. Crane (1934-1939).[6] Each was renowned for his wisdom, integrity, and scholarship. And their respective promotions were anticipated as "'worthy — one would almost say apostolic — succession in this high judicial office.'"[7]



All seven of the Court's Judges, including the Chief Judge, were elected in statewide campaigns for fourteen-year terms.[8] For years prior to 1939, however, the State avoided the unseemly spectacle of a contested race for Chief Judge. An understanding existed between leaders of the Republican and Democratic parties to nominate jointly the senior Associate Judge for Chief Judge regardless of political affiliation.[9] "[T]he political leaders recognize[d] that to tamper, or even appear to tamper, with the court would affront the public's conception of what is right and what is wrong."[10]

Thus, in 1926, Cardozo, a Democrat, was elected Chief Judge with the endorsement of the Republican Party. In 1932, Pound, a Republican, was elected Chief Judge with the endorsement of the Democratic Party. And in 1934, Crane, a Republican, was elected Chief Judge with the endorsement of the Democratic Party.[11]

Chief Judge Crane's Retirement

As the 1930s drew to a close, so too did the tenure of Chief Judge Crane. In 1939, he turned 70 and was forced to retire at the end of the year because the State Constitution forbids a Judge of the Court of Appeals from serving past that age.[12] Crane's logical successor was Irving Lehman, the senior Associate Judge on the Court.[13] A finer candidate for Chief Judge could not have been imagined. Lehman was a towering figure in the law. A jurist since 1908, he had served on the Court of Appeals as an Associate Judge for 15 years.[14] Commentators placed him in the upper echelon of the American judiciary, alongside Oliver Wendell Holmes, Jr., Cardozo and Pound.[15]

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In addition to his eminent qualifications, Lehman had influential friends who wanted him to be Chief Judge. One was his younger brother, Herbert H. Lehman, who was New York's Governor.[16] The Lehman brothers were exceptionally close. "For all of their adult life, when one or the other was away from Albany, they communicated by phone at least once a week, and supplemented this with periodic correspondence, particularly when one of them was on vacation."[17] In fact, when Herbert was pressed to run for a fourth term as Governor in the summer of 1938, he declared that his only interest in politics was to see Irving head the Court of Appeals.[18]

Despite all that Irving Lehman had going for him — merit, tradition, and political connections — his becoming Chief Judge was not a foregone conclusion. Multiple obstacles stood in his way. First, as a Democrat, Lehman had to contend with Republican leaders who believed that a qualified GOP candidate could defeat him in a head-to-head race.[19] While Democrats typically prevailed in statewide elections, the tide was turning against them. In recent years, Republican candidates had competed more effectively.[20] Moreover, the race for Chief Judge in 1939 would be the only statewide election on the ballot. This enhanced the chances of a Republican victory because it presaged a light turnout in Democratic strongholds, like New York City.[21]

Second, Republicans had an issue on which to run against Lehman. No precedent existed in New York history for brothers simultaneously heading the executive and judicial branches of state government. Some saw it as an inherent conflict of interest, with too much political power concentrated in a single family.[22]

Third, Lehman was anything but a natural political campaigner. He had an aristocratic bearing and tended to avoid social encounters.[23] He also was almost completely deaf, requiring a hearing aid to communicate with others.[24]

Making the Case for Lehman

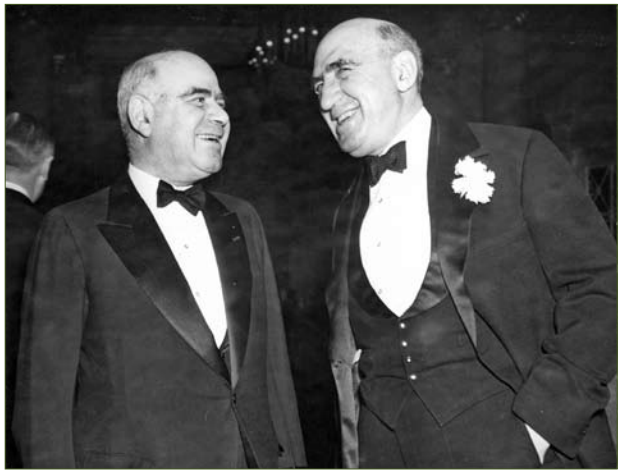
Recognizing Lehman's vulnerabilities, Republican leaders dropped hints that they would oppose his candidacy. In March of 1939, the New York World-Telegram reported there was "grave doubt whether the Republicans will give . . . Lehman an unopposed nomination for Chief Judge of the Court of Appeals."[25] "One of the most influential Republican leaders" stated:

> *I find there is considerable opposition to our party entering into a fusion arrangement with the Democrats on Judge Lehman. The objection to him is based on the fact that if he becomes Chief Judge of the Court of Appeals, it will mean that the the Lehman family will be at the head of two of the three departments of the State government, and naturally this does not meet with the approval of thousands of voters.*[26]

In response to the threat of a contested race, Lehman's allies crafted a public relations strategy. Its central message was that Lehman should be elected without opposition, because of his superlative credentials, because the office of Chief Judge should be removed from the arena of partisan contest, and because the major parties had historically "cross-endorsed" one candidate for that office. This message was carried to the public by leading bar associations and the media, most notably the New York Times, whose publisher, Arthur Sulzberger, was a Lehman family friend.[27]

The organized bar began early promoting Lehman's candidacy in New York City. Six months before the election, the Association of the Bar of the City of New York ("City Bar") and the New York County Lawyers Association ("NYCLA") adopted resolutions urging all political parties to nominate Lehman for Chief Judge. The City Bar's resolution stated that its purpose was to free Lehman's "candidacy . . . from the needless uncertainties of a political contest."[28] To this end, the City Bar's leadership would "communicate and advise [the major political parties] concerning [Lehman's] preeminent qualifications for [Chief Judge] and the recommendation that he be selected as their nominee . . . ."[29] Similarly, NYCLA directed its President to confer with other lawyers' organizations to win support for Lehman.[30]

On May 10, 1939, the New York Times endorsed Lehman in an editorial entitled "Promotion for Merit."[31] The Times praised the City Bar for getting



Herbert Lehman (left) with his brother Irving Lehman

"early into the field" and working "for the non-political nomination of Judge Lehman."[32] "Of Judge Lehman's eminent qualifications," the Times huffed, "it is almost impertinent to speak."[33] The Times then fired a shot across the bow of political leaders who might be pondering whether to run a candidate against Lehman:

> *At this time in particular neither party can afford, even if it wishes, to break worthy precedents and drag into the mud of politics a post held by so many illustrious Judges. . . . It was right [for the City Bar] to begin long before the Fall [campaigning for Lehman]. The public has notice, which it probably needed; and public opinion can be depended upon to give notice to the politicians, if any of them need it.*[34]

Taking nothing for granted, Lehman personally sought the support of prominent lawyers who were leaders in an active "good government" movement.[35] On June 8, for example, Irving wrote his brother about "a very satisfactory talk" he had with Samuel Seabury, New York's most influential reformer,[36] and then President of the City Bar.[37] Seabury was a political force unto himself, best known for his government investigations of misconduct, particularly that of New York City's playboy Mayor, James J. "Jimmy" Walker.[38] His support for Lehman proved valuable later in the campaign.[39]

In addition to his activities behind the scenes, Lehman raised his visibility in the public mind. On June 25, 1939, he delivered a patriotic speech on the Mall in Central Park at a citizenship rally attended by 20,000 people.[40] Modern-day political consultants could not have planned a better event. Massed on both sides of the speakers' platform were more than 100 national flags and flags of the American Legion, Veterans of Foreign Wars, Gold Star Mothers and other patriotic groups. Lehman was joined on the platform by two United States Senators, the Attorney General of New York State, and Jack Dempsey, the former heavyweight champion of the world.[41]

La Guardia Throws His Hat in the Ring

The efforts of Lehman and his supporters paid dividends. During the summer, Herbert Lehman ran into Charles Evans Hughes, the Chief Justice of the United States, and a former New York Governor. Hughes told Herbert: "Your brother, of course, will be the next Chief Judge of the Court of Appeals. . . . [T]he Republican Party could not possibly do other than to nominate him."[42] This mirrored the view in political quarters that Irving was headed towards the Democratic and Republican nominations, as well as that of the American Labor Party.[43]

On July 24, while vacationing in Canada, Herbert wrote Irving: "Everything, in your matter so far as I can see, is running along smoothly."[44] Unbeknownst to Herbert, however, on that same day a political bombshell detonated on the front page of the New York Times: "MAYOR REPORTED IN RACE FOR CHIEF OF APPEALS COURT."[45] The headline referred to none other than Fiorello La Guardia, the "Little Flower," the combustible, dynamic, beloved leader of the City of New York.

In a shocking development, La Guardia let it be known he was thinking about running as a Republican or Independent candidate for Chief Judge. La Guardia, a nominal Republican, was a political rival of Herbert Lehman, with whom he occasionally feuded about State aid for New York City.[46] La Guardia was also a notorious basher of the courts, including the Court of Appeals, whose Judges, he complained, were old and out of touch with New York City's problems.[47]

On July 25, a smiling La Guardia met with reporters on the steps of City Hall, and in response to questions about his running for Chief Judge replied: "Interesting, isn't it?"[48] He continued:

> *I can't see why a good candidate can not be found in whom the people will have confidence. That shouldn't be a difficult matter. The people will not stand for hand-picked Judges. By hand-picked I mean picked by a few political leaders, and lawyers with axes to grind. Something has to be done about it and the time to start is now. Another thing is that no greater mistake could be made than the old idea that Judges approaching the retirement age should be selected for the Court of Appeals.*
>
> *True, the job requires experience, but there is a vast difference between experience backed by vitality and strength and experience that cannot be applied — the tired, worn out body and mind that are easily swayed, if you get what I mean, and those six old boys know exactly what I mean.*[49]

The "six old boys" to whom La Guardia referred were the Judges of the Court of Appeals over age 60. They were Frederick E. Crane, 69; Irving G. Hubbs, 69; Edward R. Finch, 66; John F. O'Brien, 65; Harlan W. Rippey, 65; and Irving Lehman, 63.[50] By stating that the Judges were "easily swayed", La Guardia insinuated they corruptly took direction from the Governor — a charge he made on other occasions.[51]

On July 28, word of the La Guardia boom reached Herbert while he was still vacationing in Canada. Stunned, on the same day, he sent Irving a telegram and two letters. Herbert vented: "I cannot fathom La Guardia's motives. I know that he has taken every opportunity of slamming the courts, but he certainly has nothing against you."[52] "The whole thing seems entirely ridiculous to me and I cannot understand what his purpose may be unless it is to gain some publicity, or to attack the courts in general as he has done so frequently in the past."[53] "The papers mention the possibility that his action might have been inspired by a feud with me. If any feud exists it is news to me."[54]

Mayor LaGuardia

Herbert counseled that neither he nor Irving "show any concern over the matter", reasoning:

> *knowing the Mayor and some of his advisors as I do, I think [a show of concern] . . . would be just the thing that would please them and would encourage them possibly to take some definite action. I would continue the attitude that you take it perfectly for granted that you will receive the nomination of all parties. Above all things, do not show any concern in your relations with anyone. Those things get back pretty quickly.*
>
> *I wish to emphasize that I consider the Mayor's attitude of very little importance. The papers intimate that if he ran, or if he threw his support to a third candidate, it would insure the election of a Republican in the event that they did not endorse you. I do not, in any way, agree with this reasoning. His personal candidacy, in my opinion, would be a joke as I think that, regardless of his qualifications as Mayor of the City, no one would possibly believe that he has a judicial temperament or would make a good Judge. Furthermore, I feel that either his personal candidacy, or his support of some third candidate, would draw as many votes from the Republican as from you unless he had the support of the American Labor Party which I believe would be extremely doubtful. . . . [M]y personal belief is that, if anything, his statement has helped you, not*

harmed you. Your only danger has been that the Republicans might for political reasons decide to run their own candidate and that people would not be sufficiently aroused to support an issue of good government. By the Mayor's action I think that situation is entirely changed and if in the event — which I still believe is unthinkable — that the Republicans should put up someone against you the governmental issue would be very clear-cut. I am confident that people would be very greatly aroused.[55]

Before receiving his brother's analysis of the situation, Irving sent the following telegram to Herbert:

All my friends assure me that I should not be disturbed by [La Guardia's] talk although it is undoubtedly intended to make trouble for me. Nobody including newspapers seems to take matter seriously. There is absolutely nothing you could do at present and I hope you will continue to enjoy untroubled vacation. Will keep you informed.[56]

The advice Irving received from his brother and friends was sound. The air quickly went out of La Guardia's trial balloon. His advisers "were dissuading him from entering the race, on the grounds that he was carrying water to the wells of bigots."[57] Among those in La Guardia's inner-circle was the eminent Wall Street lawyer, Thomas D. Thacher, a Republican supporter of Lehman.[58] Thacher told La Guardia that opposing the elevation of Lehman (who was Jewish) on the ground of his brother being governor was a tacit appeal to anti-Semitism.[59] This struck a chord with La Guardia, who abhorred religious intolerance, and he backed out of the race.[60]

Republicans Search for a Candidate

Although La Guardia ceased to be a factor, his aborted entry into the race opened the door for Republican leaders to say publicly what was discussed privately — the Party should not nominate Lehman. On August 5, 1939, the umbrella organization for the State's Young Republicans adopted a resolution asserting that it would be contrary to the principles of American government to have the Lehman brothers simultaneously head the judicial and executive branches of government.[61] A Times story the next day reported that a "movement" was "beginning . . . to deny Judge Lehman the Republican nomination . . . ."[62]

On August 7, the Times reported that the nomination for Chief Judge was "wide open" and that "the argument that two brothers should not head the judicial and executive departments was said to have made some progress among the Republican leaders."[63] Unimpressed that Lehman was favored by leading bar associations, Kenneth F. Simpson, the Chair of the New York County Republican Committee, "questioned" the very idea that such groups "should influence party nominations for the bench."[64]

In particular, the anti-Lehman movement gained ground upstate, where Republican leaders believed they had a candidate who could beat Lehman. Rolland ("Rolly") Marvin, the rough and tumble Mayor of Syracuse and Chair of the Onondaga County Republican Committee,[65] urged the Party to nominate for Chief Judge a fellow Syracusan, Edmund H. Lewis, who was a Justice on the Appellate Division, Fourth Department.[66] Lewis would have been a formidable candidate. He had an exemplary record and was a proven vote-getter, having first won judicial office by prevailing as the Republican candidate against a sitting Judge following a contested election in 1929.[67] Furthermore, when Marvin ventured downstate in search of support for Lewis, he found it among Republican leaders in New York City.[68]

Lehman's Supporters Fight Back

But Lehman's supporters fought back. On September 13, the State Democratic Committee, through its Chair, Postmaster General James A. Farley, announced that they would give Lehman the nomination at the earliest possible date under the state's Election Law, which was in two weeks.[69] At the same time, Democratic leaders held out a carrot to the Republicans. As reported by the Times:

The present line-up of the Court of Appeals is four Democrats and three Republicans. Should Judge Lehman be elected Chief Judge, this

would create a vacancy in the Associate Judgeships. Although no commitment was claimed, leaders of the Democratic State organization said that there was no doubt that Governor Lehman, in the event of his brother's election to the Chief Judgeship, would appoint an up-State Republican to the vacancy to preserve the political and geographical balance of the court. It also was said that any Republican appointed by the Governor to the Court of Appeals bench would almost certainly receive the Democratic endorsement for election next year.[70]

Thus, the Democrats sought to put the Republican leadership on the spot, leaving it to them "to decide whether it wishes political contests for the Court of Appeals bench both this year and next year."[71]

On September 15, the Times criticized the Republican leadership for threatening to run a candidate against Lehman. In an editorial entitled "For Chief Judge," the Times wrote that, "[f]or whatever reason, the Republican State Committee has seemed disposed to break a long-standing precedent."[72] The Times dismissed as "ludicrous" the suggestion there was "danger in the air if the Chief Judge should be the Governor's brother," given Irving's "thirty years of distinguished service on the bench."[73] It also suggested that Herbert would appoint a Republican to fill the vacancy created by Irving's elevation to Chief Judge, stating: "Governor Lehman can be depended upon to make a worthy nonpartisan appointment to the vacancy left by the promotion of Associate Judge Lehman."[74]

The New York Times
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LEHMAN IS SWORN AS NEW CHIEF JUDGE

Head of the Court of Appeals Takes Oath in Presence of Brother, the Governor

Judge Irving Lehman took the oath of office as Chief Judge of the Court of Appeals, the highest judicial office of the State, yesterday afternon at his home, 119 East Seventy-first Street, in the presence of a group of friends and relatives, including his brother, Governor Herbert H. Lehman.

The ceremony was simple. The oath was administered by Chief Judge Frederick E. Crane of the Court of Appeals, whose retirement at the end of this year created the vacancy to which Judge Lehman was elected last November as the candidate of the Republican, Democratic and American Labor parties. The swearing in took place in the second floor living room of the Lehman home.

"I do," responded Judge Lehman after Judge Crane had administered the oath calling for support of the National and State Constitutions and for properly fulfilling the duties of the chief judgeship. "And, I hope I'll be able to perform the duties half as well as you have done."

After the swearing-in Judge Lehman was congratulated upon his new office, which he will assume tomorrow. Among those present were the Governor and Mrs. Lehman and their children, Hilda Jane and John; Nathan Straus Jr., Federal Housing Administrator; Robert Housing Administrator; Robert Benjamin, Henry Cohen, Mr. and Mrs. Philip Goodhart and Alfred A. Cook.

Attending the administration of an oath of office to his judicial brother was a novelty for the Governor. In the past Judge Lehman had administered the oath to his brother six times, twice as Lieutenant Governor and four times as Governor.

Shortly thereafter, the organized bar made a final push for Lehman. On September 23, the New York State Bar Association issued a resolution urging Lehman's nomination by the major political parties.[75] The resolution stated that the State Bar "wholeheartedly favors the promotion of Judge Lehman to the office of Chief Judge, and the committee on selection of candidates for judicial office is instructed to make known the sentiment of the association, in such respect, to the various political parties, to the end that each Party may select Judge Lehman as its nominee . . . ."[76]

The next day, the City Bar and NYCLA sent a joint letter to the political leaders of the major parties urging Lehman's nomination.[77] Signed by Samuel Seabury and other prominent lawyers, the letter argued for the preservation of the custom, on the retirement of a Chief Judge, for all major parties to join in promoting the senior Associate Judge. The City Bar and NYCLA rejected as meritless the "brothers issue", stressing that the Democrats and Republicans both endorsed Irving's nomination in 1937 when he stood for re-election as an Associate Judge, notwithstanding that Herbert was then Governor.[78]

Most important for Irving, Edmund Lewis bowed out of the race. Although it had appeared probable Lewis would run,[79] members of the judiciary successfully lobbied him not to do it.[80] Perhaps it was suggested to Lewis that, if he did not run, Herbert might appoint him to fill a vacancy on the Court of Appeals. Maybe someone reminded Lewis that Herbert appointed him to the Appellate Division in

1933, after less than four years of service on the trial bench.[81] Whatever was said, it worked. In late September, Lewis withdrew from consideration for Chief Judge, citing the need to preserve the nonpartisanship of the judiciary.[82]

Upstate Republicans' Last Gasp Effort to Find a Candidate

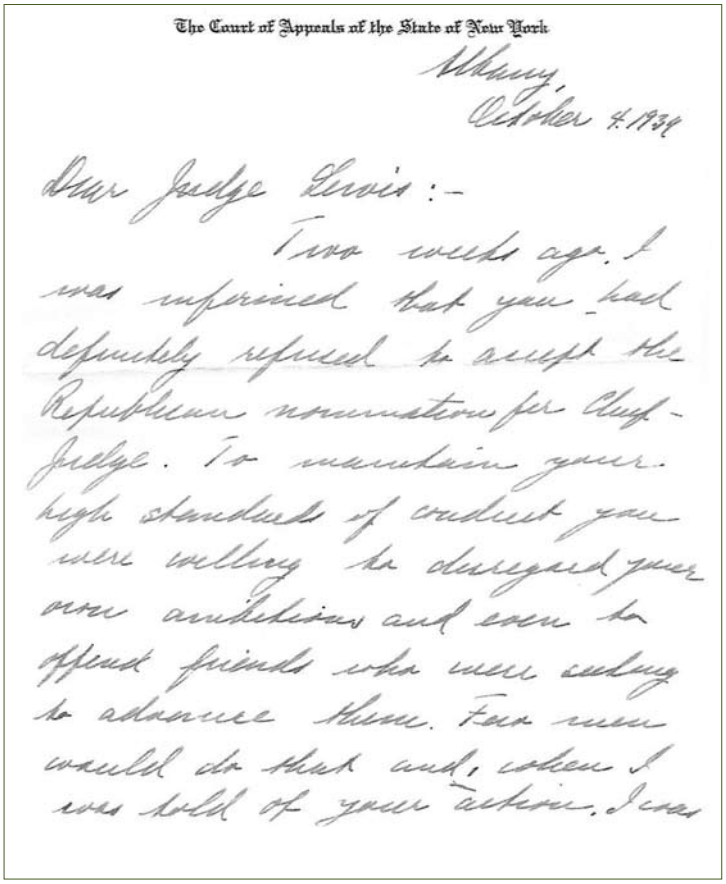
As expected, on September 27, the State Democratic Committee nominated Lehman for Chief Judge.[83] The American Labor Party followed suit a few days later.[84] The action now shifted to the State Republican Committee.

The Republicans' search to find a candidate to run against Lehman now divided the party on the basis of geography. Downstate leaders favored endorsing Lehman, concluding that it was bad politics locally to do otherwise.[85] But upstate, a rural bloc of Republican leaders were not ready to give in.

The State Republican Committee was scheduled to meet on October 3 to decide whom to endorse for Chief Judge. In the days leading up to the meeting, the rural bloc continued searching for a candidate to run against Lehman. The intensity of that effort led the Times on October 2 to report it was "doubtful" the Republican nomination would go to Lehman, and that the rural bloc was backing William F. Dowling, a Supreme Court Justice from Oneida County.[86] On the same day, the New York Sun wrote that Republican leaders were wooing Edward R. Finch, an Associate Judge on the Court of Appeals, to run for Chief Judge. The Sun stated that Finch was open to the idea.[87]

But the newspapers were wrong. On the morning of October 3, at the meeting of the State Republican Committee, the rural block's representatives conceded they did not have a viable candidate to run against Lehman.[88] Some at the meeting noted that the Chief Judgeship was not worth winning if doing so doomed the nonpartisanship of elections for that office. Others expressed concern a Republican victory against Lehman in 1939 could alienate voters in 1940, a presidential election year. There was a widely-held belief, too, that Herbert would preserve the present four-to-three political division of the Court of Appeals by appointing Republicans to fill expected vacancies on the Court. So, in the end, the State Republican Committee nominated Lehman for Chief Judge.[89]

Irving Lehman's Oct. 4, 1939 letter to Edmund Lewis



The Court of Appeals of the State of New York

Albany,
October 4, 1939

Dear Judge Lewis:-

Two weeks ago, I was informed that you had definitely refused to accept the Republican nomination for Chief-Judge. To maintain your high standard of conduct you were willing to disregard your own ambitions and even to offend friends who were seeking to advance them. Few men would do that and, when I was told of your action, I was

Lehman Thanks Lewis

On October 4, with the Chief Judgeship now assured, Irving Lehman took up his pen and wrote Edmund Lewis:

Dear Judge Lewis:

Two weeks ago, I was informed that you had definitely refused to accept the Republican

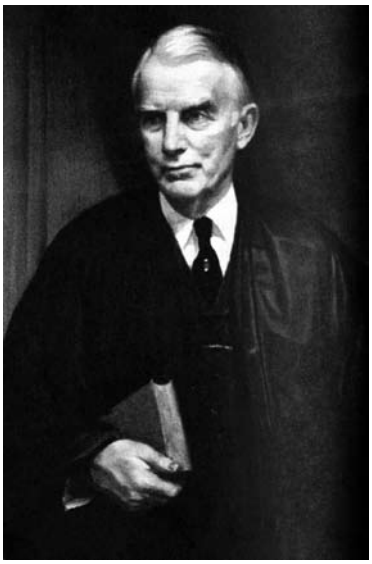
nomination for Chief Judge. To maintain your high standards of conduct you were willing to disregard your own ambitions and even to offend friends who were willing to advance them. Few men would do that and, when I was told of your action, I was eager to write to you to tell you of my deep appreciation. I felt however that I should remain silent well after the meeting of the State Committee.

Now that I may write, I shall say nothing of my feeling of relief that, through your generous loyalty, I am today assured that, without contest, I shall become Chief Judge; but I do want to tell you that quite aside from its effect on my future I have been stirred and heartened by your act. Last year I told friends that I looked forward to the time when you and I would sit together in this court. I hope for that more than ever.

Sincerely,
Irving Lehman[90]

And so, the path was cleared for Irving Lehman's election. After a series of congratulatory dinners, he was sworn in as Chief Judge on December 30, 1939 at his home in New York City, in the presence of friends and relatives, including Hebert.[91]

But the story of the 1939 election for Chief Judge does not end here. Irving Lehman's remarkable letter to Edmund Lewis closes with a reference to a conversation with "friends." Irving did not say which "friends" he consulted, but Herbert undoubtedly was one.[92] In any event, less than a month after Irving's election, Herbert announced he was appointing Lewis to fill a vacancy on the Court of Appeals.[93] Reporting on the Governor's action, the Times wrote that, "[i]n political quarters . . . , the selection of Lewis was regarded as a reward for his declination to oppose Judge Lehman for the Chief Judgeship."[94]



Judge Lewis

Irving Lehman and Edmund Lewis served together on the Court of Appeals for nearly five years, until Lehman died on September 22, 1945.[95] Lewis came to revere Lehman and expressed his feelings in 1951, when he delivered the prestigious Cardozo Lecture at the City Bar on the subject of "The Contribution of Judge Irving Lehman to the Development of the Law."[96] Lewis ended his lecture with these words:

Like all whose lives touched Irving Lehman's we of the Court of Appeals who had the rare privilege of working with him there will ever walk on higher ground because he labored with us and because he walked with us a little way along the road of life. For us his life is an inspiration; and for our work as a court his memory is a benediction.[97]

Proving that patience is a virtue, on April 22, 1953, Governor Thomas E. Dewey appointed Lewis Chief Judge of the Court of Appeals.[98] Later that year, Lewis was elected in his own right to the Chief Judgeship, on the nomination of both the Democratic and Republican parties.[99]

ENDNOTES

1 *See* William M. Wiecek, *The Place of Chief Judge Irving Lehman in American Constitutional Development,* 60 Am. Jewish Hist. Q. 280, 285 (1971) (noting that the Court of Appeals had "been called by high authority 'the second most distinguished judicial tribunal in the land' ceding pride of place only to the Supreme Court of the United States").

2 Richard A. Posner, Cardozo: A Study in Reputation 3, 85 (1990).

3 *See* Albert M. Rosenblatt & Timothy M. Kerr, *Frank Harris Hiscock, in* The Judges of the New York Court of Appeals: A Biographical History 362 (Albert M. Rosenblatt, ed. 2007) [hereinafter cited as "The Judges"].

4 *See* Judith S. Kaye, *Benjamin Nathan Cardozo, in* The Judges 376.

5 *See* Robert S. Smith, *Cuthbert Winfred Pound, in* The Judges 410.

6 *See* Barbara B. Mistishen, *Frederick Evan Crane, in* The Judges 426.

7 Posner, *supra* note 2, at 85 (quoting New York Times editorial anticipating promotion of Crane to the Chief Judgeship in succession to Pound).

8 Warren Moscow, Politics in the Empire State 150 (1948). By constitutional amendment effective April 1, 1978, all the Judges of the Court of Appeals are now appointed by the Governor, who must select his or her nominee from among names submitted by the Commission on Judicial Nomination. The Governor's appointment is subject to confirmation by the State Senate. N.Y. Const. Art. VI, § 2.

9 *See Democrats Vote Bench Nomination to Judge Lehman,* N.Y. Times, Sept. 28, 1939, at 19 ("It has long been the custom, on the retirement of a chief judge of the Court of Appeals, for all major parties to join in promoting the senior associate judge of the court to the position of chief judge."). This practice was reportedly engineered by leaders of the bar following a contested election for Chief Judge in 1913 between two sitting Associate Judges: Willard Bartlett and William Werner. That election, which was divisive within the Court and troubling to the bar, led to "a 'gentlemen's agreement' among Democratic and Republican leaders to nominate jointly the senior Associate Judge for any future vacancy in the Chief Judgeship." Andrew L. Kaufman, Cardozo 178 (1998).

10 Moscow, *supra* note 8, at 150.

11 *Bar Groups Back Lehman Promotion,* N.Y. Times, Sept. 25, 1939, at 21.

12 Mistishen, *supra* note 6, at 429. See N.Y. Const. former Art. VI, § 19. This provision today appears in N.Y. Const. Art. VI, § 25(b).

13 *See* Henry M. Greenberg, *Irving Lehman, in* The Judges 450.

14 *Id.* at 453, 457-58.

15 *E.g.,* Jerome Frank, Law and the Modern Mind 134 (1930) ("the conviction that justice will be done will be more certain when decisions are rendered by such Judges as Holmes, Cardozo, Hutcheson, Lehman and Cuthbert Pound").

16 Herbert Henry Lehman (1878-1963), a Democrat, was first elected Governor of New York in 1932, following service as Lieutenant Governor from 1929 to 1933. He was reelected Governor in 1934, 1936 and 1938 (the last time to a four-year term). In December 1942, President Franklin D. Roosevelt appointed Lehman to head the U.S. State Department's Office of Foreign Relief and Rehabilitation Operations, which was created to prepare for global needs at the end of World War II. That organization later merged into the United Nations Relief and Rehabilitation Administration, and Lehman became its first Director General, serving from 1943 until 1946. In 1949, Lehman was elected Senator to fill a U.S. Senate seat vacated upon the resignation of Senator Robert Wagner. Lehman was reelected in 1950 and served in the Senate until 1957. *See* Robert P. Ingalls, Herbert H. Lehman and New York's Little New Deal (1975); Arthur Schlesinger, Herbert H. Lehman: The Conservative as Radical (1967); Allan Nevins, Herbert H. Lehman and His Era (1963).

17 Wiecek, *supra* note 1, at 287.

18 George Morris, *Republicans Hint Opposing Lehman as Chief Judge,* N.Y. World-Telegram, March 23, 1939 (dateline).

19 *Republican Stand on Court in Doubt,* N.Y. Times, Aug. 7, 1939, at 20.

20 Moscow, *supra* note 8, at 22, 31, 75. For example, in 1938, Herbert Lehman, who had shown remarkable vote-getting power in the past, eked out a narrow victory for Governor by only 64,000 votes out of the almost five million cast. Ingalls, *supra* note 16, at 17; Nevins, *supra* note 16, at 196.

21 *Republican Stand on Court in Doubt,* N.Y. Times, Aug. 7, 1939, at 20.

22 Wiecek, *supra* note 1, at 288-89.

23 *Id.* at 286. Professor Rudolf B. Schlesinger, who clerked for Lehman from 1942 to 1944, noted with humor that when he became a law clerk he truly understood "the depths and reality of the concept of the Judge-king." Vivian Grosswald Curran, *Fear of Formalism: Indications From the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law,* 35 Cornell Int'l L.J. 101, 164 n. 310 (2001) (citing Rudolf B. Schlesinger, *Reflections of a Migrant Lawyer,* in Der Einflub deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland 487, 488 (Marcus Lutter et al. eds., 1993)).

24 *See* Greenberg, *supra* note 13, at 455.

25 George Morris, *Republicans Hint Opposing Lehman As Chief Judge,* N.Y. World-Telegram, March 23, 1939 (dateline).

26 *Id.* (quoting unidentified Republican leader).

27 Nevins, *supra* note 16, at 310.

28 Annual Report of the Committee on the Judiciary for 1938-39, in 1939 Assoc. of the Bar of the City of N.Y. Y.B., at 221-23.

29 *Id.*

30 *Judge Lehman Backed,* N.Y. Times, May 9, 1939, at 14. Lehman also received endorsements from bar associations in upstate New York. In June, the Rochester Bar Association passed a resolution urging Lehman's nomination for Chief Judge by both the Democratic and Republican parties. *See* Letter from Arthur E. Sutherland to Irving Lehman, dated June 7, 1939, Special file: Irving Lehman, Herbert H. Lehman Suite and Papers, Columbia University (hereinafter cited as "HHL Papers"). Additionally, Lehman was endorsed by the Federation of Bar Associations of Western New York, which was made up of the bar associations of Allegheny, Cattaraugus, Cayuga, Northern Chautauqua, Erie, Genesee, Livingston, Niagara, Ontario, Orleans, Seneca, Steuben, Wayne, Wyoming and Yates Counties, the bar associations of the cities of Jamestown, Niagara Falls and Rochester; and the Lockport Lawyers Club. *Bar Groups Back Lehman Promotion,* N.Y. Times, Sept. 25, 1939, at 21.

31 *Promotion for Merit,* N.Y. Times, May 10, 1939, at 22.

32 *Id.*

33 *Id.*

34 *Id.*

35 These lawyers came from both major parties and opposed political party machines that staffed public offices with people chosen on the basis of clubhouse connections. They supported a merit system of civil service appointments and better quality on the local, state and federal benches. *See generally,* Avshalom Yotam, *Thomas Day Thacher, in* The Judges 558, 559.

36 Letter from Irving Lehman to Herbert Lehman, dated June 8, 1939, HHL Papers. In that same letter, Irving also wrote of "a very good talk" he recently had with Arthur A. Ballantine, a Republican, who was a member of the City Bar's Committee on the Judiciary, which championed Lehman's candidacy. 1939 Assoc. of the Bar of the City of N.Y. Y.B., at 16. Notably, Ballantine's name was later floated in the press as a potential Republican nominee for Chief Judge, although there is no evidence he was interested in the position. *Mayor Reported in Race for Chief of Appeals Court,* N.Y. Times, July 24, 1939, at 3.

37 1939 Assoc. of the Bar of the City of N.Y. Y.B., at 11.

38 *See* Devin J. Burstein, *Samuel Seabury, in* The Judges 400, 401-02, 404-08.

39 *See infra* notes 77 to 78.

40 *20,000 at Park Fete for 'Young Citizens',* N.Y. Times, June 26, 1939, at 18.

41 *Id.*

42 Letter from Herbert Lehman to Irving Lehman, dated July 28, 1939, at 4, HHL Papers (quoting Charles Evans Hughes) (hereinafter cited as "Letter I"). This is the first of two letters Herbert wrote Irving on July 28. The second letter, which is also in the HHL papers, is hereinafter cited as "Letter II".

43 *See Mayor Reported in Race for Chief of Appeals Court,* N.Y. Times, July 24, 1939, at 1 (stating that "the current report in political circles is that Judge Lehman will be favored for both the Democratic and Republican nominations for the office [of Chief Judge], as well as that of the American Labor Party"). The American Labor Party ("ALP") was then New York's leading minority party. It covered the political spectrum from Socialists through independent liberal Democrats who were not happy with voting for President Franklin D. Roosevelt under the Democratic Party banner because of their dislike of Tammany Hall. The ALP was run by leaders in the garment trade unions. Moscow, *supra* note 8, at 102-119; Alan Brodsky, The Great Mayor: Fiorello La Guardia and the Making of New York City 354 (2003).

44 Letter from Herbert Lehman to Irving Lehman, dated July 24, 1939, at 2, HHL Papers.

45 *Mayor Reported in Race for Chief of Appeals Court,* N.Y. Times, July 24, 1939, at 1.

46 Wiecek, *supra* note 1, at 288-89; Nevins, *supra* note 16, at 148, 204, 218-19.

47 Wiecek, *supra* note 1, at 289; Nevins, supra note 16, at 148, 204, 218-19. *See also Mayor Reported in Race for Chief of Appeals Court,* N.Y. Times, July 24, 1939, at 1 (noting La Guardia's "frequent criticism of the judiciary because of numerous decisions, both by the lower courts and the appellate tribunals").

48 *Court Candidacy of Mayor Doubted,* N.Y. Times, July 23, 1939, at 6.

49 *Id.*

50 *Id.* The youngest Judge then on the Court was John T. Loughran, who was 50. *Id.*

51 Nevins, *supra* note 16, at 218.

52 Letter II, *supra* note 42, at 2.

53 Letter I, *supra* note 42, at 1.

54 Letter II, *supra* note 42, at 1.

55 *Id.* at 2.

56 Telegram from Irving Lehman to Herbert Lehman, dated July 28, 1939, HHL Papers (adding periods in lieu of the word "stop") .

57 Wiecek, *supra* note 1, at 289.

58 Thacher had served previously as a U.S. District Court Judge, U.S. Solicitor General, and, subsequently, as Corporation Counsel of the City of New York in the La Guardia administration, and an Associate Judge of the Court of Appeals. Yotam, *supra* note 35, at 560-566. Also, in 1939, Thacher served on the City Bar's Committee on the Judiciary which championed Lehman for Chief Judge. *See* 1939 Assoc. of the Bar of the City of N.Y. Y.B., at 16. Ironically, Thacher was mentioned by the Times as a possible candidate for Chief Judge in the same article that reported La Guardia was interested in the post. *Mayor Reported in Race for Chief of Appeals Court,* N.Y. Times, July 24, 1939, at 3.

59 Yotam, *supra* note 35, at 565.

60 Wiecek, *supra* note 1, at 289; see Brodsky, *supra* note 43, at 123 (describing La Guardia's efforts as a Congressman to curb anti-Semitism in certain nations following World War I).

61 *Oppose I. Lehman as Head of Court,* N.Y. Times, August 6, 1939, at 30.

62 *Id.* In a similar vein, the Chair of the New York County Republican Committee, Kenneth F. Simpson, told the press: "The people of the State through their party representatives should give serious thought as to whether two brothers, no matter how well qualified, should hold the two highest offices of the State." *Id.*

63 *Republican Stand in Doubt,* N.Y. Times, August 7, 1939, at 2.

64 *Id.*

65 Moscow, *supra* note 8, at 142.

66 *See* Mary Lou Crowley, *Edmund Harris Lewis, in* The Judges 526, 527-28.

67 *Id.* at 528.

68 Warren Moscow, *Judge Lehman Wins Backing by G.O.P.*, N.Y. Times, Oct. 4, 1939, at 17.

69 *Irving Lehman Due to be Bench Choice,* N.Y. Times, Sept. 14, 1939, at 20.

70 *Id.* During this period in Court of Appeals' history, the Governor filled vacancies on the Court through interim appointments. Judges so appointed served for the remainder of the year only and at the next general election vacancies were filled for full 14-year terms. *Mayor Reported in Race for Chief of Appeals Court,* N.Y. Times, Sept. 24, 1939, at 3.

71 *Id.*

72 *For Chief Judge,* N.Y. Times, Sept. 15, 1939, at 22.

73 *Id.*

74 *Id.*

75 *State Bar Pleads for Judge Lehman,* N.Y. Times, Sept. 24, 1939, at 5.

76 *Id.*

77 *Bar Groups Back Lehman Promotion,* N.Y. Times, Sept. 25, 1939, at 21.

78 *Id.*

79 *See Democrats Vote Bench Nomination to Judge Lehman,* N.Y. Times, Sept. 28, 1939, at 1 (noting that a few days earlier it appeared likely that the Republicans would nominate a candidate and Lewis was the probable choice).

80 Warren Moscow, *Judge Lehman Wins Backing by G.O.P.*, N.Y. Times, Oct. 4, 1939, at 17.

81 Crowley, *supra* note 66, at 528.

82 Warren Moscow, *Judge Lehman Wins Backing by G.O.P.*, N.Y. Times, Oct. 4, 1939, at 17; *Democrats Vote Bench Nomination to Judge Lehman,* N.Y. Times, Sept. 28, 1939, at 1.

83 *Democrats Vote Bench Nomination to Judge Lehman,* N.Y. Times, Sept. 28, 1939, at 1.

84 *Judge Lehman Gets Labor Nomination,* N.Y. Times, Oct. 1, 1939, at 4.

85 Warren Moscow, *Judge Lehman Wins Backing by G.O.P.*, N.Y. Times, Oct. 4, 1939, at 1; George Van Slyke, *Tammany Hall Bars Fusion 5 Judicial Jobs,* New York Sun, October 2, 1939; *Republicans Plan Fight on Judgeship,* N.Y. Times, Oct. 2, 1939, at 15.

86 *Republicans Plan Fight on Judgeship,* N.Y. Times, Oct. 2, 1939, at 15.

87 George Van Slyke, *Tammany Hall Bars Fusion 5 Judicial Jobs,* New York Sun, October 2, 1939

88 Warren Moscow, *Judge Lehman Wins Backing by G.O.P.*, N.Y. Times, Oct. 4, 1939, at 17.

89 *Id.*

90 Letter from Irving Lehman to Edmund H. Lewis, dated Oct. 4, 1939. The original copy of this letter is presently in the possession of the author.

91 *Lehman is Sworn as New Chief Judge,* N.Y. Times, Dec. 31, 1939, at 14; Nevins, supra note 16, at 205.

92 Herbert often turned to Irving for advice on judicial appointments. Wiecek, *supra* note 1, at 287.

93 *Lehman Will Put Sears and Lewis on Appeals Bench*, N.Y. Times, Dec. 3, 1939, at 1. Governor Lehman formally appointed Lewis to the Court of Appeals on January 1, 1940. "There Shall be a Court of Appeals" 101, 107 (1997). On that same day, the Governor filled two other vacancies on the Court with Charles B. Sears and Albert Conway. *Id.* Sears was an upstate Republican and Conway a downstate Democrat. *See* Suzanne Aiardo, *Charles Brown Sears, in* The Judges 518, 521; Louise G. Conway, *Albert Conway, in* The Judges 532, 535-37. With these three appointments, Herbert preserved the existing political balance on the Court of four Democrats (Lehman, Loughran, Rippey and Conway) and three Republicans (Finch, Sears and Lewis).

94 *Id.*

95 *See* Greenberg, *supra* note 13, at 460.

96 Edmund H. Lewis, The Contribution of Judge Irving Lehman to the Development of the Law (1951).

97 *Id.* at 34-35.

98 Lewis' appointment filled the vacancy created by the sudden death of Chief Judge John T. Loughran. Crowley, *supra* note 66, at 528; David J. Kaplan, *John Thomas Loughran, in* The Judges 498, 503.

99 Crowley, *supra* note 66, at 528.

Lehman correspondence and other papers consulted in this research courtesy of the Herbert S. Lehman Suite and Papers at Columbia University.

Images of Chief Judge Lehman are from Mr. Greenberg's biography of the Chief Judge found in *The Judges of the New York Court of Appeals: A Biographical History,* edited by Judge Albert M. Rosenblatt and published in 2007 by Fordham University Press.

Fiorello La Guardia photo: Available at http://www.authentichistory.com/ww2/news/images/19430800_Mayor_LaGuardia.jpg.

Edmund Lewis portrait: Available at http://www.courts.state.ny.us/history/Gallery_*7.htm#r_3*.

IMPEACHMENT AS A POLITICAL WEAPON: *The Case of Governor Sulzer*

JOHN R. DUNNE

IMPEACHMENT, an act of political protest and the means for government to remove public officials who either abuse or violate the public trust, is a process the success of which depends on achieving just alignment of motivating concerns — impeachment as a legal process, on the one hand, and impeachment as a political weapon, on the other.[1] And when the vast power of impeachment is utilized by venal politicians for partisan political ends, "as a means of crushing political adversaries or ejecting them from office,"[2] the public trust in the political process is then truly violated. Such was the experience in 1913 when New York's Governor William Sulzer was impeached, convicted and removed from office.

The Sulzer impeachment was engineered by Charles Murphy, the powerful leader of the Manhattan Democratic Party organization know as Tammany Hall, and facilitated by two rising political stars of the day — Assembly Speaker Alfred E. Smith and State Senate Majority Leader Robert F. Wagner. The proceedings, described by one participant as "the most sensational and tragic public event in the history of the State,"[3] could well have descended into an even more demeaning tragedy had it not been for the wise and steadying hand of Chief Judge Edgar M. Cullen of the New York Court of Appeals, who presided over the month-long proceedings of the Court for the Trial of Impeachments.

Governor William Sulzer 1913
Library of Congress, Prints & Photographs Division
[LC-USZ62-95136 (b&wfilm copy neg.)]

The Court for the Trial of Impeachments

The special court, constitutionally ordained (see Article VI, Section 24 of the State Constitution), resembled the original "Court for the Trial of Impeachments and the Correction of Errors which, prior to 1847, had been composed of a number of sitting judges from different state courts and the members of the State Senate.[4] The 1846 Constitutional Convention had separated the impeachment role from that of "correction of errors" and formed, to address the latter, the Court of Appeals, consisting of ten Judges, seven elected by the people and three designated by the Governor from the ranks of sitting Justices of the State Supreme Court.[5] In the Court for the Trial of Impeachments, these Judges joined 48 State Senators, sat together in a body, and voted with equal weight on all issues.

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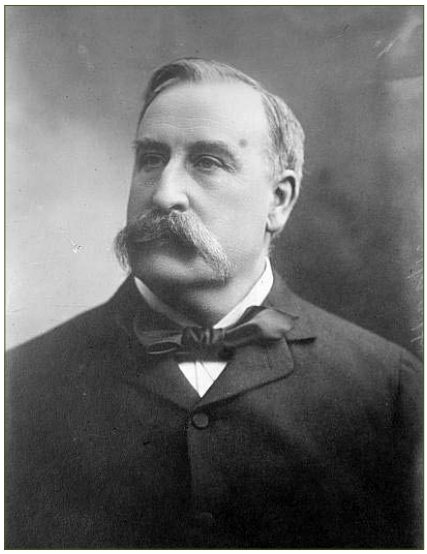
The 57-member court had jurisdiction of both law and facts. Following Chief Judge Cullen's suggestion for managing the business of this unusually large judicial body, the court adopted the practice of deciding questions of law and procedure on the spot.[6] Judge Cullen proposed that he be the first to express an opinion as to the proper disposition of the question, stating his reasons, and then to invite any expressions of dissent.[7] The record shows that his opinions repeatedly prevailed by unanimous vote.

Sulzer's Impeachment

But just what lead to this "use of impeachment as a political weapon," which resulted in the removal of the State's highest official? William Sulzer had previously been elected to the State Assembly, served as its Speaker, and completed seven terms in the United States Congress, all under the patronage of Tammany Hall, which he had once described as "the greatest vehicle for the accomplishment of the good of the people."[8] But Sulzer also had a tendency to work independently of the party hierarchy.[9] In fact, he was a progressive and dedicated himself to electoral reforms designed to curb the power of party machines and their bosses. That proclivity is what lead to his downfall.

Sulzer was elected Governor in 1912 as a result of a complicated play of forces within the Democratic Party structure and with Boss Murphy's tacit consent. Sulzer initiated a vigorous campaign for legislation to replace party conventions with direct primaries as the method for nominating candidates for public office, thereby enraging both Democratic and Republican party leaders. When the Legislature rejected his legislation, Sulzer retaliated by cutting off all patronage for opposing political leaders and vetoed legislation of members who had obstructed his plan.[10] Despite efforts by mediators to resolve this deadlock, the powerful Tammany boss resorted to what may be described as the "nuclear option".

Once activated, the impeachment process moved swiftly. One day before the Legislature was scheduled to adjourn, both houses, under the leadership of Smith and Wagner, adopted a joint resolution to create a joint legislative commission to investigate "the governor's use of patronage and of the veto in opposing the legislature's wishes on direct primary."[11] The following day, the Legislature adjourned and, within one week, the Governor summoned them to return to Albany for a special session on June 16 to address certain issues, including direct primaries. Once again, the Legislature made swift work in defeating Sulzer's direct primary bill by overwhelming margins.[12]



Chief Judge Edgar M. Cullen 1910
Library of Congress's Prints & Photographs Division under the Digital ID ggbain.04795

On July 3, the legislative commission, referred to as the Frawley Commission after its chairman, Senator James J. Frawley of Manhattan, opened hearings, at which the Governor declined to appear. By August 11, the Commission had issued its report, which was promptly adopted by the Assembly. One day later, by a 79-45 vote, a bare 3 votes more than the constitutionally-required super-majority, the Assembly ratified articles of impeachment containing eight separate counts of "willful and corrupt conduct in office, and high crimes and misdemeanors."[13]

At this point, Lieutenant Governor Martin Glynn laid claim to the governorship. Sulzer, however, refused to yield and it was not until the first day of the impeachment trial that he relinquished the powers of Governor, but not the office itself.

What were these charges of political infidelity? During the course of its "deliberations" the

Commission had expanded its probe beyond the original charter to investigate alleged improper acts to influence the vote of a legislator, expenditures by any statewide candidate in the preceding election and the filing of all statements required by law. Consequently, the first two counts against Sulzer charged him with the filing of false statements of campaign receipts and expenditures prior to taking office. They were followed by two counts of suppressing evidence, one count of converting campaign funds to personal use, one count of bribing witnesses before the Frawley Commission, one count of bribing Assemblymen in order to secure their votes for one of the Governor's bills, and one count of using his authority to affect the prices on the New York Stock Exchange of stocks he owned.[14]

The Trial

Just one month later, the Court for the Trial of Impeachments convened in the Senate Chamber. One Court of Appeals Judge was absent on vacation in Europe, and three Senators were missing: one, a certain Franklin D. Roosevelt, had been appointed Assistant Secretary of the Navy, another was ill, and a third was in a position ill-suited to serve as a judge — he was in prison for attempted extortion.[15]

It was in the initial days of the trial that Chief Judge Cullen imposed on the Court his personal mark, which prevailed through the final adjudication of guilt and removal. From the outset, his deferential attitude toward his colleagues but firm and intelligent disposition of complex issues, for many of which there was no precedent, nor guiding rule or custom, set a tone of respect for the tribunal, as well as for the vigorously expressed views of the contentious adversaries.

Judge Cullen's initial ruling was to defend the integrity of his appointed colleagues on the Court of Appeals by expressing the opinion that the three non-elected members of that court were "in every respect as fully judges of the Court of Appeals as those who have been elected" — an opinion that was unanimously endorsed by the Impeachment Court.[16] This collegial theme had its real test in his rulings on two basic jurisdictional issues facing the Court, namely, could the Legislature consider impeachment at a special session called for limited purposes and, more troublesome, could the court convict Sulzer for corrupt or unlawful acts alleged to have been committed before he took office?

Sulzer never once appeared at the trial, but left his defense to a team of able lawyers, including former State Supreme Court Justice D. Cady Herrick, Harvey D. Hinman and Louis Marshall. They argued that the Assembly was without power to vote impeachment during an extraordinary session called by the Governor since impeachment was a "subject" falling within the Constitution's specific prohibition that "no subject shall be acted upon, except such as the governor may recommend for consideration."[17] The Assembly managers, counseled by former Chief Judge Alton B. Parker, countered that once the Assembly was in lawful session, it could exercise powers specifically granted in the Constitution even if not recommended by the Governor to the Legislature.[18] The contending parties argued the constitutional authority issue at length in what has been described as a casebook study of the impeachment process.[19] When it came time for a vote, Chief Judge Cullen stated in detail his position that the constitutional limitation on subjects to be considered related to the normal bicameral legislative function, and not the special powers of one house once it was lawfully called into session. He declared that the constitutional limitation applied to "such business as was the Governor's business and not that of the Legislature or the Assembly alone…… the limitation relates to what the Legislature as a body can do, and not to power vested in one branch of the Legislature. I vote no."[20] His position was supported by a vote of 51 to 1 in favor of dismissing the objection.[21]

The next challenge presented to the Court, and which became the main legal issue of the trial, was Sulzer's argument that certain acts contained in the articles of impeachment had occurred before he had taken office as Governor and therefore were not valid grounds for impeachment.[22] The difficulty was that there seemed no clear-cut answer to the question of what is an "impeachable offense," either as to time of commission or substance, except that it must be related to the public office in some significant way and was usually an offense committed in office. The impeachment managers asserted that the acts stated

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LOYAL FEW HEAR SULZER FAREWELL

Admirers Present Loving Cup and the Impeached Governor Again Denounces Murphy.

LETTER FROM ROOSEVELT

Regrets Governor Did Not Give Details of His Defense "So I Could Speak More Strongly."

BIG OFFERS FOR LECTURES

One as High as $100,000 for Season —Mr. and Mrs. Sulzer Go to Cooperstown To-day.

Special to The New York Times.

ALBANY, Oct. 18.—In a drizzling rain about one hundred men, headed by a band, marched to the Executive Mansion to-night and presented to William Sulzer a silver loving cup and to Mrs. Sulzer a huge bouquet of American Beauty roses. The procession was led by William Furlong, an undertaker, and at its head was carried a transparency, reading on one side, "Our Bill; He Dared to do Right," and on the other,

in the articles, including the filing of a false statement of campaign contributions, were so closely related to the basic qualifications for office as to fall within the scope of misconduct in office. At the conclusion of a lengthy exchange, covering more than 200 pages of the trial record, Chief Judge Cullen proposed that a final decision on the dismissal motion be deferred, suggesting that it would be preferable to get all the facts before deciding the legal question and that a preliminary denial of the Governor's motion would not be a definitive ruling on the merits of the legal argument.[23] At the end of the roll call, the motion to dismiss was defeated, 49 to 7.[24]

The jurisdictional and procedural objections having been resolved, the trial began. It lasted for one month, as the court received detailed proofs involving complicated facts. The central charges, of which there was ample evidence, were that Sulzer had diverted contributions to his gubernatorial campaign to his personal use and -- the more serious charge -- that he had made and filed a false statement under oath as to the receipt and disposition of those funds, which included significant contributions from such business leaders as Jacob Schiff, Henry Morganthau and Thomas Fortune Ryan.

During the trial, a question was raised as to the admissibility of testimony about checks for certain campaign contributions to Sulzer. Chief Judge Cullen expressed his opinion that articles of impeachment are

> *not to be construed with the absolute strictness of an indictment in a criminal case….. and my notion is that articles of impeachment are not to be construed and judged in the same way that you would articles of indictment. They ought of course to conform to the requisites of substantial justice. They should inform the defendant fairly what is to be charged against him, but I do not think that it is, as already said, to be construed with the specification, the nicety and refinement that is requisite in a criminal case. I hope, as this will come up often, that someone will demand a vote on this ruling.*[25]

A vote was taken in which the Court unanimously agreed with Judge Cullen.[26]

The Verdict

Finally, on October 16, when the contenders rested their cases, Judge Cullen's conduct of the proceedings elicited general praise for its spirit of both severe judicial fairness and common sense.[27] The Court was then faced with three major questions: was Governor Sulzer innocent; if found guilty, should he be removed from office; and, finally, should he be barred from future office?

When it came his turn in the roll call, Chief Judge Cullen voted for acquittal on all counts on the strictly legal ground that Sulzer had not committed an impeachable offense while in office. Judge Cullen declared:

> *As has often been expressed, the object of impeachment is to remove a corrupt and unworthy officer. But a corrupt and unworthy officer is an entirely different thing from an officer who has, before his office, been unworthy and corrupt…The rule contended for amounts in reality to an ex post facto disqualification from office for an offence which had no such penalty when committed, without*

affording opportunity for showing repentance or atonement.[28]

At the same time, however, he characterized Sulzer's acts as displaying "such moral turpitude and delinquency that if they had been committed during the respondent's incumbency of office I think they would require his removal."[29] When the roll call ended, three of Cullen's fellow Judges on the Court of Appeals supported his position and five voted "guilty." The Court as a whole found Sulzer guilty on only three counts – the two involving misappropriation of campaign funds[30] and one for suppression of evidence.[31] The remaining five counts were unanimously rejected.

The Court then considered whether the Governor should be removed from office. Judge Cullen abstained from voting, but the motion to remove was adopted by a 43 to 12 vote,[32] greatly exceeding the required two-thirds of those voting. The final act before adjournment was the unanimous decision by the Court not to disqualify Sulzer from ever again holding public office.[33]

Its business having been concluded, the Court for the Trial of Impeachments went out of existence. Within hours, Martin H. Glynn was sworn in as Governor – in Judge Cullen's private office.

Text of the Sulzer Impeachment Resolution

Special to The New York Times.

ALBANY, N. Y., Aug. 11.—This is the text of the resolution for the impeachment of Gov. Sulzer as presented in the Assembly to-night

Whereas, The Joint Legislative Investigating Committee has filed a report in the Assembly on the 11th day of August, 1913, together with testimony, annexed thereto, showing or tending to show that William Sulzer, Governor of the State of New York, made a false and fraudulent report to the Secretary of State under his oath, as required by law, that the total contributions in aid of his campaign as candidate for the office of Governor were $5,460 and no more; and,

Whereas, In truth and in fact the amount was greatly in excess of said sum, to the personal knowledge of said Sulzer, such report further showing or tending to show that he converted to his own private use contributions given in aid of his said election for the purchase of securities or other private uses; that he engaged in stock market speculations at a time when he was Governor and vigorously pressing legislation against the New York Stock Exchange which would affect the business of and prices on the Exchange; that he used the power of his office as Governor to suppress the truth and to prevent the production of evidence in relation to the investigation of campaign contributions and violations of law in respect thereto by ordering and directing witnesses, some of whom were employes of the State, to act in contempt of the Joint Legislative Investigating Committee; and that, further, he used his office as Governor in rewarding or attempting to reward such witness or witnesses by securing or influencing their appointment or promotion in the State Government; that as Governor the said William Sulzer has punished legislators who disagreed or differed with him in legislation enacted in the public interest and public welfare, and has traded Executive approval of bills for support of his Direct Primary and other measures in which he was personally interested; that as Governor he willfully and corruptly made false public statements, advising and directing citizens to suppress evidence in reference to his unlawful use of contributions made to him for campaign purposes; and,

Whereas, He has otherwise corruptly and unlawfully acted or omitted to act.

Therefore, Be it resolved that William Sulzer, Governor of the State of New York, be and hereby is impeached for willful and corrupt conduct in office and for high crimes and misdemeanors.

Epilogue

As a result of the public furor over the brutally partisan removal of the Governor, all of Tammany Hall's candidates lost in the 1913 election for New York City Mayor, Board of Aldermen and Board of Estimate and it lost control of the State Assembly — defeats from which it would take years to recover. Upstate Democrats suffered a similar fate.[34] By contrast, within one month of his removal, William Sulzer was elected to the State Assembly on the Fusion Party ticket.

In February 1914, Sulzer tested the validity of his removal by filing a petition for a writ of mandamus directing the State Comptroller to pay him his salary from the date of removal until the end of 1914, when his term would ordinarily have expired. He raised all of the contentions which had been rejected by the Court for the Trial of Impeachments. The trial court dismissed the petition, the Appellate Division unanimously affirmed[35] and the Court of Appeals in June unanimously affirmed on the ground that, having become a member of the State Assembly, Sulzer had automatically vacated the governorship.[36]

ENDNOTES

1 *See* (Alexander Hamilton, in II The *Federalist*, Nos. 65 & 66, 208-21 (J. & A. McLeaon eds. 1788).

2 Alexis deTocqueville, *Democracy in America* 110 (Bradley ed. 1945).

3 Francis Bergan, *The History of the New York Court of Appeals, 1847-1932* 237 (1985).

4 N.Y. Constitution, Art. XXXII (1777).

5 Croswell & Sutton, *Debates and Proceedings in New York State Convention for the Revision of the Constitution* (1846).

6 *See* 1 State of New York Proceedings of the Court for the Trial of Impeachments In the Matter of the Impeachment of William Sulzer, Governor of the State, at 14 (Albany-Lyon, 1913) [hereinafter Proceedings].

7 1 Proceedings at 43.

8 From a speech delivered at Tammany Hall, February 13, 1902; see N.Y. Tribune, Oct. 18, 1913.

9 *See* 4 Theodore Roosevelt Papers 3 (1969).

10 J.A. Friedman, *The Impeachment of Governor Sulzer* 110 (1939).

11 Assembly Journal, Vol. IV, 55; Senate Journal, Vol. II, Appendix II, 77-78.

12 Assembly Journal, Vol. IV, 35; Senate Journal, Vol. II, Appendix II, 69.

13 Assembly Journal, Vol. IV, 102-03.

14 1 Proceedings at 46-56.

15 *Id.* at 5.

16 *Id.* at 45.

17 *Id.* at 63.

18 *Id.* at 181.

19 Bergan, *supra* n. 3, at 240.

20 1 Proceedings at 222.

21 *Id.* at 225.

22 *Id.* at 228.

23 *Id.* at 429.

24 *Id.* at 432.

25 *Id.* at 563.

26 *Id.* at 566.

27 Friedman, *supra* n. 10, at 232.

28 2 Proceedings at 1625.

29 *Id.* at 1621-22.

30 *Id.* at 1686, 1698.

31 *Id.* at 1723.

32 *Id.* at 1759.

33 *Id.* at 1762.

34 *N.Y. Times,* November 6, 1913.

35 People ex rel. Sulzer v. Sohmer, 162 App. Div. 921, 146 N.Y.S. 1108 (3d Dept. 1914).

36 People ex rel. Sulzer v. Sohmer, 211 N.Y. 565, 105 N.E. 647 (1914). The Court also held that mandamus was not a proper remedy.

The David A. Garfinkel Essay Prize Winner 2008

The Courts and Human Rights in New York: The Legacy of the Lemmon Slave Case

With the generous backing of Gloria and Barry Garfinkel, in memory of their son David, the Society launched an essay competition inviting community college students across the State to submit an essay on *The Courts and Human Rights in New York: The Legacy of the Lemmon Slave Case.* The winner, Elijah Fagan-Solis, received a prize of $500 and was honored at the Law Day ceremony at the Court of Appeals. His essay follows. At the time of the award, Elijah was a senior in Hudson Valley Community College's Criminal Justice program. Criminal Justice faculty member Kathryn Sullivan encouraged Elijah to enter the essay contest, which is open to any student within the community colleges of the State University of New York and City University of New York systems. "He's an excellent student, attentive to his academic performance. His work is always well formed conceptually and he's a great critical thinker," said Sullivan. "I'm just so excited for him. This is life changing for him." Elijah plans to continue his education this fall, transferring to a baccalaureate program at Sage College of Albany. He hopes to earn a law degree and eventually enter politics or government service. Elijah had the opportunity to meet with Chief Judge Kaye to discuss his essay. "When I walked into the Court of Appeals, they were hearing a case and I was able to sit in on that, which was great. After they were done, I was able to sit down with Chief Judge Kaye and talk about my essay. She was really nice and very, very encouraging," he observed.

Chief Judge Judith S. Kaye and essay contest winner Elijah Fagan-Solis.

The winner with Gloria and Barry Garfinkel (left and behind), Court of Appeals Chief Legal Reference Attorney Frances Murray (left rear), and Society Executive Director Marilyn Marcus (right).

ELIJAH FAGAN-SOLIS

Since the creation of the United States, New York has been an advocate for human rights in a nation where slavery was protected by the Constitution.

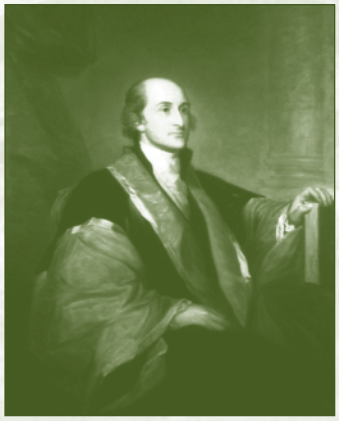
In 1785, a bill for the immediate abolition of slavery passed in the Legislature, but failed in the Council of Revision as the Assembly insisted on a provision denying freed slaves the right to vote (Gordan, III, 2006, p. 9). Just three years later, in 1788, the Legislature passed "An Act Concerning Slaves" which prohibited the sale of slaves brought into or exported from New York, punishable by one hundred pounds per offense as well as declaring those slaves imported shall be free (Du Bois, 1896/1970, p 1). Eleven years later a statute guaranteed

eventual freedom to all children born slaves after July 4, 1799 and provided a mechanism for immediate manumission of slaves.

After several more enactments, New York recognized slave marriages, and the right of slaves to own property, and protected them against forced expatriation. The Legislature provided for the emancipation of slaves born prior to 1799, and allowed non-residents to enter New York with their slaves for up to nine months. In 1841, New York repealed the portion of the statute allowing non-residents to enter with slaves, thereby becoming an entirely slave-free state (Gordan, III, 2006, p. 9).

Perhaps New York's greatest stand against slavery came in 1860 when in *Lemmon v People* (commonly known as the Lemmon Slave Case) the New York Court of Appeals made its pivotal stand for human rights, renouncing the then recently decided *Dred Scott* decision of the Supreme Court of the United States.

The Lemmon Slave Case was a legal effort to free slaves brought to New York where slavery was illegal. Eight slaves (one man, two women, two infants and three older children) were in route to Texas from Virginia with their owners, Jonathan and Juliet Lemmon, when they stopped at New York Harbor to make a steamship connection, and stayed in a boarding house for the night. Louis Napoleon, a free black man, discovered the slaves on November 8, 1852 and petitioned for a writ of habeas corpus before Justice Elijah Paine of the Superior Court of the City of New York. Justice Paine granted the writ of habeas corpus, and the slaves were brought before the court the next day with Erastus Culver and John Jay as their counsel (Gordan, III, 2006, p. 9).



I wish the time may come when all our inhabitants of every colour and denomination shall be free and equal partakers of our political liberty.

John Jay, 1785

John Jay, first Chief Justice of the New York State Supreme Court, and the first Chief Justice of the Supreme Court of the United States, and a president of the Manumission Society, signed, as New York Governor, the Gradual Emancipation Act of 1799.

The next day at the hearing, Jonathan Lemmon claimed that the slaves were his wife's inherited property under the laws of Virginia and that, pursuant to the Privileges and Immunities Clause, they had the right to pass through New York with their slaves without the risk of them suing for their freedom. The Lemmons claimed that they were simply in New York to board another steamship in transit to Texas, another state that would recognize their slaves as personal property. Thus, they claimed, they were additionally protected by the Law of Nations, which allows the transportation of goods in possession of their owner. Justice Paine decided four days later that New York, by legislative enactment in 1841, had abolished slavery within the State in all forms and under all circumstances. The Privileges and Immunities Clause only gave the Lemmons the rights of the citizens of New York; thus, when they brought their slaves into New York, the slaves automatically were emancipated under the law. Finally,

Justice Paine ruled that the Law of Nations analogy would not apply to the case, as slaves were not goods under the Law of Nations (Gordan, III, 2006, p. 10).

When Justice Paine held that Jonathan Lemmon's slaves should be set free, it caused uproar in the south. The Virginia Legislature directed its attorney general to appeal the decision, and on November 19, 1852, H.D. Lapaugh applied for a writ of certiorari to review Justice Paine's decision, which the Governors of Georgia and Virginia denounced (Gordan, III, 2006, p 10). The Virginia General Assembly set aside money to retain counsel in New York to obtain a reversal in the case. In 1855, the New York Legislature also appropriated money for counsel, except its motive was to affirm Justice Paine's ruling. Now a case that originally was argued by lawyers for individuals was being argued by the State of New York, in furtherance of human rights for slaves, and the Commonwealth of Virginia, in furtherance of its belief that slaves were property and not subject to rights accorded to citizens of any state.

While Virginia and New York were occupied with obtaining counsel and while the appeal was being perfected, the Supreme Court of the United States was hearing another case with equal, if not paramount, importance.

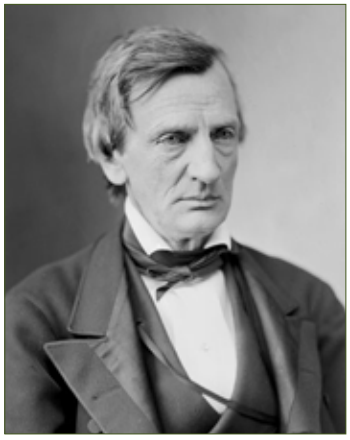
Dred Scott was a slave purchased in Missouri and taken by his owner to live at Fort Armstrong in Illinois, a free state. Scott was then brought to live at Fort Snelling in Minnesota, another state where slavery was prohibited by the Missouri Compromise, before returning to live in Missouri where his owner died. Scott sued his owner's widow in Missouri courts on the grounds that he was emancipated by having lived in Illinois and in Minnesota. The Missouri Supreme Court ruled that Scott was still and had always been a slave, overruling its own precedent which squarely favored Scott. After slave ownership was transferred to John Sanford, the widow's brother, Scott brought a new federal suit and eventually applied to the United States Supreme Court for review.

The March 6, 1857 decision had an enormous impact as the Supreme Court affirmed seven-to-two that Scott was still a slave. The Court decided that Scott's status was governed by the law of the state where he was purchased, in his case Missouri where slavery was legal. Chief Justice Taney, joined by two other justices, went much further to say that slaves and their descendants, whether slave or free, could never be citizens of the United States and could never sue in America's courts. Chief Justice Taney's opinion also deemed the 1820 Missouri Compromise unconstitutional, thus effectively allowing slavery in all territories of the United States (Gordan, III, 2006 p.10).

This one case had an enormous impact as it sent a message to America stating that slavery was legal, even in so-called "free" states. The Supreme Court also sent a message to slaves and freed blacks alike, stating they are not, and could never be, citizens of the United States, and therefore could not use our court systems.

New York's reaction to the Dred Scott case was swift as a joint committee of the Senate and the Assembly, led by Samuel A. Foot, a former New York Court of Appeals Judge, condemned the decision on April 7, 1857 and stated: "That New York would not allow slavery within her borders, in any form or under any pretence or for any time." (Gordan, III, 2006, p. 11).

Finally, five years it began, the Lemmon Slave case appeal was to be heard in the General Term of the New York Supreme Court before five justices. New York had retained William M. Evarts, a great advocate at the New York bar. Virginia retained Evarts's rival Charles O'Conor, who had pro-southern and pro-slavery leanings. O'Conor placed his emphasis on the Commerce Clause of the United States Constitution, which lead to predictions that the slave



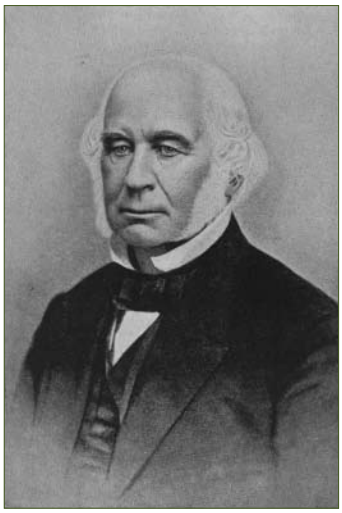
Attorney William Evarts
Library of Congress, Washington, D.C.
(Digital File Number: cwpbh-05065)

trade would resume in New York; however, New York had other plans. The court held "that the holding of slaves in this state, for any purpose is as injurious to our condition and to the public peace, as it is opposed to the sentiment of the people of this state." (26 Barb 270, 289). The court upheld Justice Paine's decision reasoning that the Legislature had intended to exclude slavery completely from the state. The Court also held that the act of setting the slaves free was a valid exercise of state police power, and slavery was a matter for state regulation. The Court held that interstate commerce was not implicated as the Lemmons' trip ended in New York when the writ was taken out. Virginia, on behalf of Mrs. Lemmon, filed another appeal on January 4, 1858 (Gordan, III, 2006, p.11).

Ex Officio Court of Appeals Judge William B. Wright
by permission of the New York Court of Appeals from its collection

Charles O'Conor continued as the retained counsel for the Lemmons, though in actuality he was representing the state of Virginia. In the Lemmon case's final appeal, O'Conor argued that slavery brought blessings to its "inferior" and "dependent" victims. He also argued — with the recently decided Dred Scott case as the basis for the argument — that slavery conflicted with neither law nor natural justice. William M. Evarts's arguments were more measured and to the point. Evarts relied on earlier Supreme Court decisions to support the proposition that slavery was a matter for the law of each state. The Privileges and Immunities Clause was used again to illustrate that the privileges and immunities accorded to the Lemmons were the same as those accorded to citizens of New York (Gordon, III, 2006, p.12).

By a five-to-three vote, the Court of Appeals affirmed, ending slavery in New York State for good. Judge Denio predicated his opinion on New York's clear policy against slavery in any form and held that the Commerce Clause did not protect the Lemmons' slave property. Justice Wright, who also wrote an opinion, denied that the Constitution granted Congress any power affecting domestic slavery with the exception of the Fugitive Slave Clause. Justice Wright also stated that the Commerce Clause did not apply as New York law could validly prohibit slavery in her territory, for any purpose (Gordon, III, 2006, p.12).



Court of Appeals Judge Hiram Denio
by permission of the New York Court of Appeals from its collection

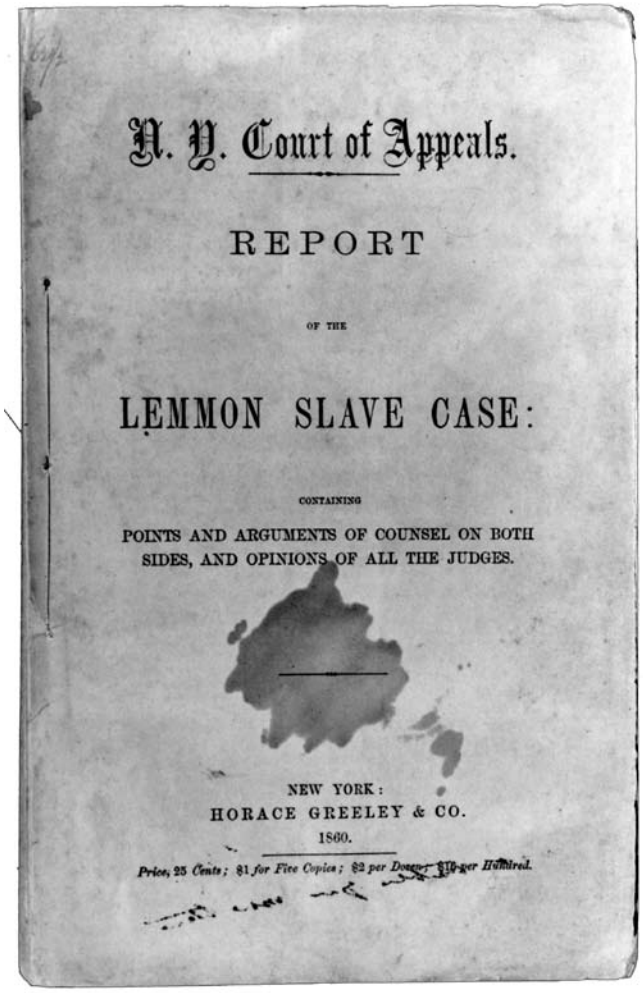
Virginia filed an appeal to the Supreme Court of the United States, and many feared a reversal that would establish slavery in the free states. That appeal, however, was never argued as both New York and Virginia, along with the rest of the country, became engulfed in a bitter and bloody Civil War. The Lemmon and Dred Scott decisions, and the underlying economic and human rights issues implicated by those cases, fueled the fire to the beginning of the Civil War. Virginia, along with the rest of the Confederacy, attempted to have their views of slavery recognized and to uphold slavery where it existed, but New York, and other states that remained in the Union, had different views — a principle of all men being created equal, a belief that slaves were humans, and that they had rights: the right not to be the property of another man, the right to be citizens of the state in which they resided, and the right not to be discriminated against based on race or color.

The Lemmon Slave Case was a pivotal decision that established human rights long awaited by slaves. New York's quest for human rights did not stop there, as New York continued its advocacy through the twentieth century and still protects human rights today. New York has the proud distinction of being

the first state to enact a Human Rights Law. In it, every citizen, whether male or female, black or white, is afforded "an equal opportunity to enjoy a full and productive life." The Legislature created the New York State Division of Human Rights to enforce the Human Rights Law, and to ensure that "every individual . . . is afforded an equal opportunity to participate fully in the economic, cultural and intellectual life of the state" (New York State Division of Human Rights, 2007).

One of the ways the New York State Division of Human Rights enforces the law is through investigation, hearing, and resolution of complaints filed by individuals against alleged discriminators. The courts are critical in the protection of human rights as well.

In 1974, prior to the passage of the Pregnancy Discrimination Act of 1978, the New York State Court of Appeals held in *Union Free School Dist. No. 6 v. New York State Human Rights Appeal Bd.*, that a personnel policy that singled out pregnant women for treatment different from that accorded to other disabilities was prohibited under the Human Rights Law (Aiardo, 1988, p. 6). In 1984, the Court of Appeals, in the landmark case *People v. Liberta*, declared the exemption for rape and sodomy for married couples, as well as the gender based exemption for females in such cases, to be unconstitutional (McCoy, 1988, p.5). Later in 2004, the Court of Appeals struck down New York's death penalty in *People v. Stephen LaValle*, holding the instructions that were statutorily-required to be given to the jury in capital cases were unconstitutional (New York State Court of Appeals, 2004). Most recently, in *State of N.Y. ex. rel. Harkavy v. Consilvio*, the Court of Appeals reversed a decision and ruled that "the state improperly used involuntary civil commitment procedures in Mental Hygiene Law article nine to transfer offenders directly from prison to mental health facilities" (New York State Court of Appeals Recent Decisions, 2007).



N. Y. Court of Appeals.

REPORT

OF THE

LEMMON SLAVE CASE:

CONTAINING

POINTS AND ARGUMENTS OF COUNSEL ON BOTH SIDES, AND OPINIONS OF ALL THE JUDGES.

NEW YORK:
HORACE GREELEY & CO.
1860.

Price, 25 Cents; $1 for Five Copies; $2 per Dozen; $10 per Hundred.

The decisions and arguments of counsel, published by Horace Greeley and Co. (1860)

The Lemmon Slave case is a landmark case not only for human rights, but also for the nation as a whole. Imagine where America would be today if New York had not taken a stand to protect human rights, or if the case had reached the Supreme Court of the United States and was overturned, thus allowing slavery. Would we have seen a slavery- dependent country, or would New York have denounced that decision as well and advocated, as it always has, for human rights? The attack on Fort Sumter prevents Americans from knowing the answer. Luckily, New York was not afraid when it made a stand for human rights in 1860. It continues to be fearless today, and boasts being the leading advocate for human rights.

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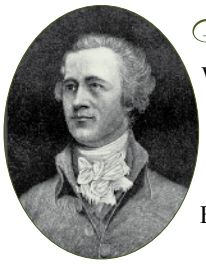
A look back

The Society has had an exciting round of events since our last publication. I hope many of you were able to participate. Our website now offers videocasts of several of these programs. Please take a moment to look back with us on past events.

Marilyn Marcus, Executive Director

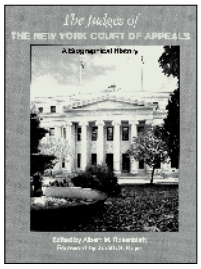
The Inaugural Stephen R. Kaye Memorial Program *September 18, 2007*

Alexander Hamilton: The Anchoring of American Law



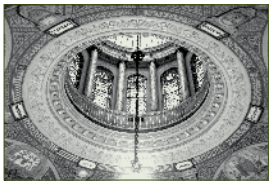
We were proud to launch in 2007 an annual program honoring the memory of our much loved Trustee, Stephen Kaye. This program brought together a distinguished panel, including Muffie Meyer and Ronald Blumer, the writer, producer & director team of a PBS documentary *Alexander Hamilton*; and distinguished Professors Eric Foner, Carol Berkin, and R.B. Bernstein to take a fresh look at this famous New York Founding Father.

Reception and Book Signing for *The Judges of the New York Court of Appeals: A Biographical History* *November 27, 2007*



We are grateful to Fordham Law School for hosting a reception and book signing celebrating the publication of this important reference work, edited by our own president, Albert M. Rosenblatt. This issue of *Judicial Notice* features a selection from the book, a portrait of Benjamin Nathan Cardozo by Chief Judge Judith S. Kaye. The book is available for purchase on our website, through Fordham University Press, and through many major book sellers.

2008 Gala Dinner Marking the 80th Anniversary of the New York County Courthouse and the 40th Anniversary of Honorable Norman Goodman *April 7, 2008*



Our annual fund-raiser was a huge success, drawing a crowd of over 400 to honor one of our State's most magnificent courthouses as well as to pay tribute to its guardian, Norman Goodman. Norman, in addition to his achievements as County Clerk, has devoted himself to the renovation, preservation, and maintenance of this important courthouse, and we were so glad to be able to share these achievements with our audience, along with the now famous *An Owed to Norman* created for and presented at the gala by Chief Judge Kaye and Judge Rosenblatt. The beauty of this courthouse is in the details as well as in its grand majesty, and our own very talented court photographer, Teodors Ermansons, showed us all how beautiful the courthouse is through his photo essay of the courthouse, lovingly prepared as a video by Nicholas Ullo. Ted's beautiful vision can been seen on our website.

Inaugural David A. Garfinkel Essay Competition Celebrated at Law Day *May 2, 2008*

With the generous backing of Gloria and Barry Garfinkel, in memory of their son David, the Society launched an essay competition inviting community college students across the State to submit an essay on *The Courts and Human Rights in New York: The Legacy of the Lemmon Slave Case.* The winner, Elijah Fagan-Solis, received a prize of $500 and was honored at the Law Day ceremony at the Court of Appeals. His essay appears in this issue along with photographs of this special day. We look forward to working with OCA to reach an even wider pool of coummunity college students for our next competition offering more prizes and opportunities for participation.

2008 Annual Lecture *May 12, 2006*

Courtrooms and Courthouses: What Do They Say? How Do They Say It?

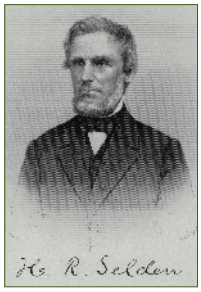
We were privileged to present for our annual lecture this very unique program that is available for viewing on our website. Renowned architects Henry N. Cobb and Paul Spencer Byard presented a joint lecture offering an appreciation of the courtrooms of the Court of Appeals and the Appellate Division, First Department, then traced the evolution of courthouse design from the late 19th century to the late 20th centuries, causing us all to view our courthouses with new eyes and newfound respect for their design. Their talk was complemented by Ronald Younkins, Chief of Operations, NYS Unified Court System, OCA. Ron made it clear why form must follow function in courthouse design. He discussed how OCA worked with architect teams to create successful design plans for the Queens Family Courthouse and Westchester County Courthouses by focusing on human need.

Stephen R. Kaye Memorial Program 2008 *September 16, 2008*

The Founding of the Republic: Has History Given New York Its Due?

For our second annual Stephen R. Kaye program we returned to the early days of this country's Founding to look at the role of New York and the towering New Yorkers who played a role in shaping the political, constitutional and judicial culture of the nation, in a conversation with eminent historians R. Kent Newmyer and Gordon S. Wood moderated by our own Judge Rosenblatt.

Annual Meeting of the American Association of State and Local History (AASLH) Rochester *September 11-12, 2008*



The Society co-hosted with The U.S. Supreme Court Historical Society a series of programs for legal history groups from across the country attending this annual event. The Appellate Division, Fourth Department, Law Library, 4th Dept., hosted us one day and provided a lovely reception. We are grateful to David Voisinet, Library Director, for his gracious hospitality. We toured the Selden Mansion, home of Henry and Samuel Selden, counsel to Susan B. Anthony following her arrest for attempting to vote in the presidential election of 1872, at the invitation of Van Henri White. Mr. White restored the mansion and uses it for his law practice and as The Center for Civil

and Human Rights, showing us how well a museum and work space can be integrated. We also heard Mr. White and Gregory L. Peterson, president and founder of the Robert H. Jackson Center in Jamestown, New York, also a working attorney, discuss the history of each of their centers. We were all impressed with the personal commitment and tremendous accomplishments of both these attorneys. Finally, we were treated to a luncheon talk by Hon. Richard C. Wesley, U.S. Court of Appeals, for the Second Circuit, on Susan B. Anthony and her legal campaign to gain suffrage for women. Many thanks to Frances Murray, our Secretary and a founding Trustee, as well as Kathy Shurtleff, Assistant Director, The Supreme Court Historical Society, for arranging this stellar lineup of speakers.

Lady Justice

The figure of Lady Justice, usually blindfolded holding scales, is ubiquitous in courthouses throughout New York State. She appears in a wide range of artistic media, from statues atop buildings to murals, wood carvings, and stone sculptures. Whatever form she takes, she is instantly recognizable as a symbol of justice. For the past 15 years, OCA photographer Teodors Ermansons has been photographing these icons. Hopefully, you are meeting a new figure each month as you turn a page of the Society's 2008 calendar. We have expanded upon that project and the Society, under the sponsorship of the New York State Judicial Institute, is presented an exhibit of Ted's collection of photographs at various judicial seminars.

Joint Program with United States Supreme Court Historical Society *October 27, 2008*

Ladies, Law, and Order: The First Generation of American Women Lawyers

The Society was honored, at our most recent program, to co-host with the United States Supreme Court Historical Society at the New York City Bar. It was a very special evening with noted scholar **Jill Norgren** on pioneering women in the law. **Chief Judge Judith Kaye** and **Justice Ruth Bader Ginsberg** graced the podium for introductory remarks. Over 400 attended this event. There was not a vacant seat in the great hall at the New York City Bar.

The Historical Society *of the* Courts *of the* State *of* New York

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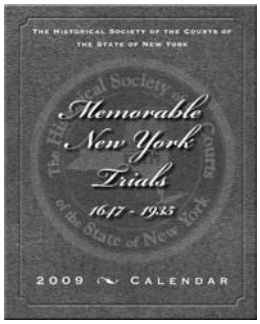

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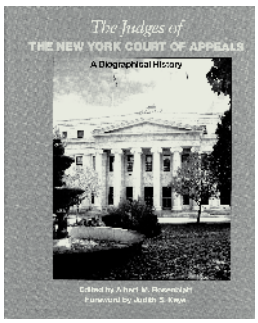

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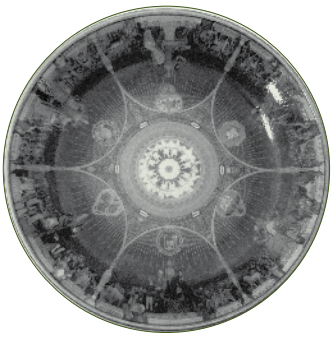

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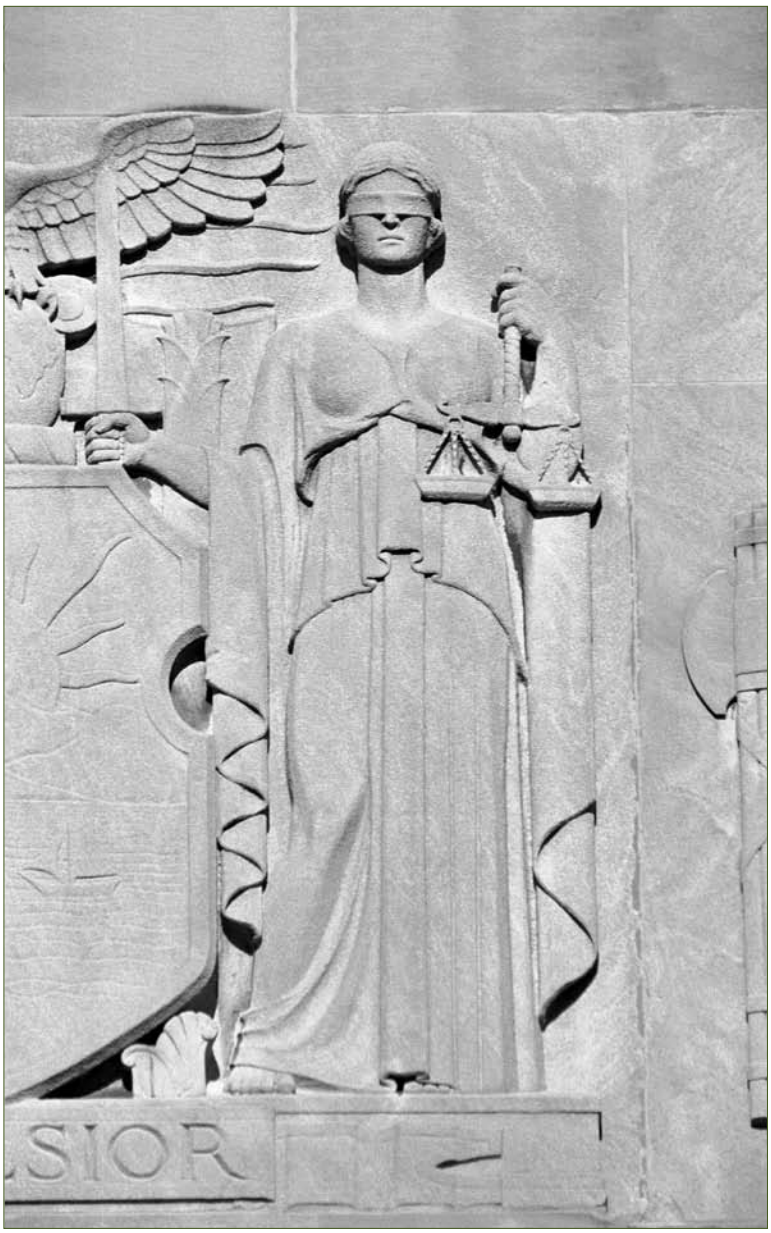

Bronx County, Bronx County Courthouse

This courthouse, a Works Progress Administration (WPA) project boldly designed by Max Hausel and Joseph H. Freedlander and completed in1934, dominates the Grand Concourse. The Herald Tribune called it a prime example of "Twentieth Century American style," a combination of neoclassical and modern. The courthouse is renowned for the quality and quantity of its sculpture. Its massive form is softened by numerous works both in the round and on friezes. This figure of Lady Justice appearing on the Great Seal of New York is repeated on all four sides of the building.

As we go to press...

WE NOTE WITH MUCH PLEASURE the appointment of Hon. Jonathan Lippman as our new Chief Judge of the State of New York. Chief Judge Lippman has been a long-standing Trustee of the Society and a supporter of its mission. We look forward to working with Chief Judge Lippman to develop our mission even further. It is, of course, with mixed emotions that we must simultaneously acknowledge the departure of our beloved Judith S. Kaye. The Society is her initiative, and her fingerprint can be clearly seen on every project the Society undertakes. She has personally proofed each issue of this publication before it goes to press. Even in this incredibly busy time for her, she managed to return her edits, including those from the most minute deviation in form in a footnote to large conceptual issues. She is a wonder, and we count ourselves immeasurable fortunate that she will continue to be a vital part of our organization.

2009 MARKS THE 400TH ANNIVERSARY of Henry Hudson's trip down the Hudson and arrival in New Netherland. The Society is pleased to join in New York State's celebration of the quadricentennial. We invite our readers to visit our website and click on the links to explore the Society's participation in this year-long New York State festival. We will be presenting a program scheduled as part of *5 Dutch Days* looking at the Dutch contributions to the democratic process on **Friday, November 13th, 6:00 PM, at the NYC Bar Association** (42 W. 44th St, NYC), details to follow. The Society will also participate through **The David A. Garfinkel Essay Contest,** open to students in the two-year SUNY and CUNY community college system, by asking the students to explore the legal history of New Netherland in their essay entries.

SUBMISSIONS - ***Judicial Notice*** accepts article submissions on a continual basis throughout the year. We attempt to publish twice a year. Submissions are reviewed by members of the Board of Editors. Authors are not restricted from submitting to other journals simultaneously. ***Judicial Notice*** will consider papers on any topic relating to New York State's legal history. Submissions should be mailed to the Executive Director.

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