

# CARDOZO

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ANDREW L. KAUFMAN

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## *Beginnings: 1870–1891*

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## *Cardozo's Heritage: The Sephardim and Tammany Hall*

Benjamin Nathan Cardozo lived for the law, and the law made him famous. He earned his fame both by his influential judicial opinions and by his lectures and books, which explained the work of judges and defended a creative lawmaking role for them. He enhanced his fame with a memorable literary style and a personal kindness, courtesy, and gentleness that led many to describe him in later life as a saint. Cardozo was no saint, though, for his life included the toughness of his many years as an ambitious lawyer, and his character contained such human failings as vanity and prejudice; however, he was a good man with extraordinary talents. He became one of the most distinguished judges in the history of American law.

Cardozo's life spanned a period of great change in American history. He was born in 1870, just after the Civil War, and died in 1938, near the end of the New Deal. His family, the Cardozos and the Nathans, were rooted in New York's old Sephardic Jewish community, and he took pride in the fact that his ancestors had arrived in America before the Revolution. Cardozo's father had disgraced the family, however, when he engaged in conduct that forced his resignation amid charges of judicial corruption. In the course of time, Benjamin Cardozo's achievements would help redeem the family name. His relationship with his older sister Nellie provided him with support and warmth as she helped raise him in his early years, as they later presided together over their family and their home, and finally as he took care of her during her last,

long illness. These experiences helped contribute to his strong personal values of duty, honor, and individual responsibility that were often evident in his judicial opinions. Cardozo's family life and loyalty to his Sephardic heritage also reflected a moral and social conservatism that balanced his progressive, modernizing instincts.

Cardozo was well bred, well educated, and elaborately courteous, and over time he revealed qualities of devotion and serenity. But he was also a self-confident, ambitious, and tough-minded man who looked out for himself and those he loved in a conscientious pursuit of success. For twenty-three years he was a first-rate practitioner in the trial and appellate courts of New York. His skill and his ties in the Sephardic community attracted the notice of influential people who referred cases to him and then helped advance his judicial career at every stage. Cardozo observed the conventions of judicial politics; he did not actively seek the positions that he attained, but he allowed his friends and supporters to work for him.

Cardozo earned a national reputation as an outstanding judge within a few years of his promotion to the New York Court of Appeals in 1914. During the twin eras of progressivism in politics and legal realism in jurisprudence, Cardozo supported the modernization of the law, approved many forms of legislative and executive activism, and practiced and advocated the role of the judge as a creative lawmaker. He did so not only eloquently and persuasively, but also carefully. Cardozo's eighteen years on the New York bench won him a national reputation as an outstanding judge, second only to that of Oliver Wendell Holmes among American judges; and when Holmes retired in 1932, Cardozo succeeded to Holmes's place on the United States Supreme Court. Cardozo spent the last six years of his life arguing out the constitutional issues that divided the country, and finally he became part of the majority that reshaped American constitutional law and set the Supreme Court on the doctrinal path that it has followed ever since.

Cardozo's importance lies in the impact of his judicial opinions and writings in a critical period in American law. During Cardozo's tenure as a judge, the central innovative forces in lawmaking were legislative and, to a lesser degree, executive; but the courts too responded to great changes in society, sometimes negatively. At the end of the nineteenth century an influential method of legal thought called *legal formalism* concealed or even denied the creative role of judges. Cardozo, following Holmes and Roscoe Pound, helped combat that doctrine. As a judge, he

reshaped rules in many areas of private and public law, such as refining many elements of negligence law and expanding the boundaries of government's power to regulate the economy in constitutional law. At the same time, in his extrajudicial work of lecturing and writing, he explained and defended judicial lawmaking.

The progressive side of Cardozo's work is well known, but there was also a cautious side to his work as judge and theorist. Cardozo was no revolutionary. What he described was a version of what English and American judges had done for centuries, reaffirmed and adapted for modern use. He believed that the major role in guiding social change in a democracy belonged to the legislature and the executive. Thus, he innovated the most when the step to be taken was modest and when the innovation did not violate the prerogatives of other institutions of government—and ideally when the legislative or executive branch had already pointed the way. Although Cardozo often adapted law to new social conditions, he also often declined to make such adaptations. Fairness was important to him, but he did not believe that judges could simply do whatever they thought was fair or just. Cardozo believed that he had to respect precedent, history, and the powers of other branches of government. He believed that judging involved taking all of those factors into account, methodically and impartially. The example that he set as a common law judge was another element of Cardozo's importance.

Cardozo presented his views to the profession and the public in a powerful and wide-ranging fashion. Even though he led a sheltered personal life, he was adventurous in the world of ideas. From his college years to his death he read widely, and he shared his learning as he tried to educate the legal profession and the public about the role of judges. His theories of judging, like his substantive decisions and his methods of decision-making, were often finely balanced, carefully limited, and subtle. Those theories fused and accommodated contending schools of thought. Cardozo's style, reflecting his personality and education, was elegant but, to modern ears, ambiguous. All these elements have made many of Cardozo's opinions a staple of legal education and a continuing influence in judges' work even sixty years after his death. Cardozo helped to modernize the law and to provide a structure for other judges to modernize it further; he illuminated the tradition and craft of judging; and he practiced that vocation supremely well.

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The family into which Benjamin Nathan Cardozo was born on May 24, 1870, was part of a distinct and well-established Jewish community in New York City. It was a Sephardic family, descended from those Jews who had fled from the Iberian peninsula during the Inquisition and had come to America via the Netherlands and England. Both branches of the family (the Cardozos and the Nathans) had arrived in the American colonies before the American Revolution. Albert Cardozo, Benjamin's father, was at the height of his legal career. The family was well-to-do, lived in a fashionable neighborhood just off Fifth Avenue, and had links with the political and mercantile powers of the city. Albert had been a judge for six years, the last two as a Justice of the Supreme Court of New York County, but trouble was brewing in his career. In addition, because Rebecca Nathan Cardozo, Benjamin's mother, had been in delicate mental health for several years, her condition was a matter of considerable concern within the family. Each of these elements—the Sephardic community, the prominent but tainted career of his father, and family duties—would play important roles in the life of Benjamin Cardozo.

Cardozo family tradition holds that their ancestors were Portuguese Marranos—Jews who practiced Judaism secretly after forced conversion to Christianity—who fled the Inquisition in the seventeenth century. They took refuge first in Holland and then in London.<sup>1</sup> Later, members of the family emigrated to the New World. Aaron Cardozo was the first Cardozo to settle in the American colonies, arriving in New York from London in 1752. He lived in Wilton, Connecticut, during the Revolution and later resided in Richmond, Virginia.<sup>2</sup> He married Sarah Nunez, his double first cousin.<sup>3</sup> In the small Sephardic community, marriage of close relations was common.

Two of Aaron and Sarah Cardozo's six children, David and Isaac, lived in Charleston, South Carolina, where there was an active Jewish community.<sup>4</sup> They both served in the Revolutionary War, David as a soldier who participated in the defense of Charleston, Isaac as a seaman. David Cardozo remained in Charleston after the Revolution, where he was a schoolteacher, a lumber measurer, and a prominent member of Congregation Beth Elohim. David's son, Jacob Nunez Cardozo, who later called himself Jacob Newton Cardozo, was well known as a political economist and statistician, an editor and later owner of an influential newspaper, *The Southern Patriot*, and a leading exponent of free trade

and an opponent of nullification. Jacob's brother, Isaac, was a weigher in the Charleston customs house and a vice president of the Reformed Society of Israelites. One of the two brothers, apparently Isaac, cohabited with Lydia Williams, a free woman of African American and Native American descent. Their three children are ancestors of the well-known African American branch of the Cardozo family.<sup>5</sup>

The Isaac Cardozo who was Aaron Cardozo's son left Charleston after the Revolutionary War and lived in Philadelphia for a while, where he helped found the Philadelphia Congregation. He married Sarah Hart, also a Sephardic Jew, whose family was among the founders of Easton, Pennsylvania. One of their children, Michael Hart Cardozo, was working in a shoe and clothing store in Richmond, Virginia, in 1819 when he married his first cousin, Ellen Hart.<sup>6</sup> Michael and Ellen Cardozo lived in Richmond for several years and then moved to Philadelphia, where Albert Cardozo, their fourth child and the father of Benjamin Cardozo, was born in 1828. Shortly after Albert's birth, the family moved to New York City and joined the oldest community of American Jews in the colonies.

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In the nineteenth century, many Sephardic Jews considered themselves the elite of American Jewry.<sup>7</sup> The Cardozo and Nathan families, which had arrived in the middle of the eighteenth century, shared this sense of superiority. Benjamin Cardozo, a fourth-generation member of this proud community, was influenced by its heritage all his life.

The Sephardic Jews had established their first permanent community in the New World in New York in the seventeenth century. A group of twenty-three refugees from Brazil arrived in New Amsterdam in 1654 after the Portuguese capture of Bahia from the Dutch. This first community of Jews in New York City grew, and in the last years of Dutch rule and the early years of English rule in New York, the community won freedom of religious worship. At first, the members held religious services in their homes; later, in 1730, their congregation, Shearith Israel, to which Cardozo belonged, built their first synagogue. Although its traditions and services remained Spanish-Portuguese Sephardic, Shearith Israel admitted Jews of other backgrounds as members. By the early years of the nineteenth century, the influx of the other main body of Jewish practice, the Ashkenazim, from Central and Northern Europe,



transformed the congregation from a Sephardic to a heavily Ashkenazic majority; however, the ritual and Sephardic traditions remained unchanged.<sup>8</sup>

Thus, in the mid-nineteenth century, when all of the other Jewish congregations were quite young, Congregation Shearith Israel was celebrating two hundred years of existence. Whereas the other congregations were composed largely of newcomers to the United States, most of the families of Shearith Israel had deeper roots in the city. Many of the family members had built business and civic relations with the Protestant leaders who controlled the political, social, and economic life of the city. Colonial Jews had entered the trading life of the country in substantial numbers, and many of them became important in business and amassed substantial fortunes.<sup>9</sup> Close family ties were reinforced by intermarriage within the community. Thus, when the numbers of Jews began to swell in the 1830s, 1840s, and 1850s with increased immigration from Western Europe and especially when huge numbers of people came at the end of the century from Eastern and Central Europe, there existed in New York City a small, closely connected group of older Jewish families, many of whom had achieved economic success and even some cultural and political influence.<sup>10</sup> Emma Lazarus, author of the famous poem of welcome to newcomers inscribed on the pedestal of the Statue of Liberty, was one of Benjamin Cardozo's many first cousins. Small wonder that a feeling of pride and achievement existed within the older group and that many felt superior to the struggling newcomers.

That family feeling was evident years later as Maud Nathan, another of Benjamin Cardozo's first cousins, gave a revealing explanation of her resentment about the exclusion of Jews from the Grand Union Hotel in Saratoga in the 1880s: "Proprietors of fashionable resort hotels and of New York apartment houses frankly advertise that they exclude all Jewish patrons, using no discernment between Jewish families who have had generations of culture and refinement and those who lack such a background."<sup>11</sup> Her sister, Annie Nathan Meyer, one of the founders of Barnard College, expressed the same point of view somewhat differently:

We are all Sephardim which is defined in the Jewish Encyclopaedia as those whose "many sufferings, which they had endured for the sake of their faith, had made them more than usually self-conscious; they considered themselves a superior class—the nobility of Jewry." Looking back on it, it seems to me that this intense pride, accompanied by a