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## The Double-Consciousness of Judging: The Problematic Legacy of Cardozo

### INTRODUCTION

There is a growing awareness in legal scholarship that a crisis of sorts pervades the legal field. In the now famous *The Lost Lawyer*, Dean Anthony Kronman has identified an adverse transformation of the character of the legal profession.<sup>1</sup> Professor Mary Anne Glendon has put forth a critique of the rights-based rhetoric that predominates legal discourse.<sup>2</sup> Professor Steven Smith has both broadened and deepened these discouraging observations by suggesting that the legal community is suffering from a crisis of faith. As Smith astutely points out, there is a fundamental problem with the integrity of legal discourse in that legal actors operate in a state of discordance between their beliefs and practices. Participants in this discourse have come to take for granted that the reasons they present in support of their positions are quite distinct from the “real reasons” that underlie

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<sup>1</sup> ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

<sup>2</sup> MARY ANNE GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

them.<sup>3</sup> Smith coined this duplicity a “schizophrenic condition,” suggesting that it is a “sign of something deeply wrong in modern legal thought.”<sup>4</sup>

This paper explores the possibility that judicial reasoning might be one of the causes of this state of duplicity. This proposition is explored through an analysis of the work of Benjamin Nathan Cardozo, an exemplary and distinguished inhabitant of the American judicial pantheon. I will briefly review recent scholarship that champions his legacy as the product of renaissance-like qualities: encompassing brilliant judicial performance and insightful writing about judging. I will suggest that this resurgent literature fails to identify a troubling conflict that pervades Cardozo’s legacy. Oddly, this conflict has been instrumental in making him so successful in the eyes of generations of lawyers, scholars, and, above all, judges.

Cardozo’s greatness is considered by many to be second only to that of Oliver Wendell Holmes, Jr. The roster of Cardozo’s devotees is studded with the caliber of the likes of Learned Hand,<sup>5</sup> Harlan Fiske Stone,<sup>6</sup> Henry J. Friendly,<sup>7</sup> William Brennan, Jr.,<sup>8</sup> Judith Kaye,<sup>9</sup> Ruggero Aldisert,<sup>10</sup> Patricia Wald,<sup>11</sup> Shir-

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<sup>3</sup> See Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041, 1081, 1135-36 (1999).

<sup>4</sup> *Id.* at 1046. As Smith pointed out, this sense of duplicity might not be altogether new. It can be traced to Karl Llewellyn’s distinction between two kinds of judicially stated rules. Real rules are rules that serve the predictive function of what courts and government officials will do. Paper rules, on the other hand, have little predictive power. They appear to be prescriptive directives, but they contain a “pseudo-description” of what legal actors are really expected to do with them. The fate of a paper rule is muffled by a “tendency to move quietly into falsifying the prediction in fact, while laying on an ointment of conventional words to soothe such as to wish to believe the prediction has worked out.” Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 449-50 (1930).

<sup>5</sup> Learned Hand, *Nature of the Judicial Process*, 35 HARV. L. REV. 479, 480 (1922) (reviewing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921)); LEARNED HAND, *THE SPIRIT OF LIBERTY* (1960).

<sup>6</sup> Harlan F. Stone, *Mr. Justice Cardozo*, 39 COLUM. L. REV. 1 (1939).

<sup>7</sup> Henry J. Friendly, *Reactions of a Lawyer-Newly Become Judge*, 71 YALE L.J. 218 (1961).

<sup>8</sup> William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law,”* 42 REC. ASS’N B. CITY N.Y. 948 (1987).

<sup>9</sup> Judith S. Kaye, *Cardozo: A Law Classic*, 112 HARV. L. REV. 1026, 1029 (1999) (book review) [hereinafter Kaye, *A Law Classic*]; Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 CORNELL L. REV. 1004 (1988) [hereinafter Kaye, *The Human Dimension*]. Judge Kaye is the chief judge of the New York State Court of Appeals.

<sup>10</sup> Ruggero J. Aldisert, *The Nature of the Judicial Process: Revisited*, 49 U. CIN. L.

ley Abrahamson,<sup>12</sup> Robert Keeton,<sup>13</sup> Alvin Rubin,<sup>14</sup> Bernard Schwartz,<sup>15</sup> and Richard Weisberg.<sup>16</sup>

Though at the same time, Cardozo's legacy has been dogged by persistent skepticism. The sizeable and hardly dismissible chorus of detractors includes Jerome Frank (strangely disguising himself under the pseudonym Anon Y. Mous),<sup>17</sup> Edward Levi,<sup>18</sup> Grant Gilmore,<sup>19</sup> Leon Lipson,<sup>20</sup> John Noonan,<sup>21</sup> William Powers,<sup>22</sup> and G. Edward White.<sup>23</sup> A central theme in this line of criticism is that Cardozo was a disingenuous judge.<sup>24</sup> Moreover, scholars continue to question what is it about this judge that makes him so

REV. 1 (1980). Judge Aldisert is a senior circuit judge on the Third Circuit Court of Appeals.

<sup>11</sup> Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 897 (1987). Judge Wald serves on the United States Court of Appeals for the District of Columbia.

<sup>12</sup> Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965 (1993). Justice Abrahamson is chief judge of the Wisconsin Supreme Court.

<sup>13</sup> ROBERT E. KEETON, *VENTURING TO DO JUSTICE* 11 (1969) (citing BENJAMIN N. CARDOZO, *GROWTH OF THE LAW* (1924)) [hereinafter KEETON, *VENTURING*]. Elsewhere Keeton has stated: "Cardozo was a major contributor to our casting off mechanical jurisprudence and casting off excessive formalism." Robert E. Keeton, *Andrew Kaufman's Benjamin Cardozo as Paradigmatic Tort Lawmaker*, 49 DEPAUL L. REV. 301, 303 (1999) [hereinafter Keeton, *Paradigmatic*]. Judge Keeton is a United States district judge in the District of Massachusetts.

<sup>14</sup> Alvin B. Rubin, *Doctrine in Decision-Making: Rationale or Rationalization*, 1987 UTAH L. REV. 357, 361.

<sup>15</sup> Bernard Schwartz described Cardozo as "the outstanding common-law jurist of the twentieth century," and one who deserves to be placed "securely in the judicial pantheon." BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* 473, 481 (1993). For similar expressions, see David A.J. Richards, *The Theory of Adjudication and the Task of the Great Judge*, 1 CARDOZO L. REV. 171, 172 (1979); MORTON HORWITZ, *TRANSFORMATION OF AMERICAN LAW 1870-1960* (1992).

<sup>16</sup> Richard H. Weisberg, *Law, Literature and Cardozo's Judicial Poetics*, 1 CARDOZO L. REV. 283 (1979).

<sup>17</sup> Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625 (1943); see also JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

<sup>18</sup> EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 6-7 (1949).

<sup>19</sup> GRANT GILMORE, *THE AGES OF AMERICAN LAW* 75 (1977).

<sup>20</sup> Leon S. Lipson, *The Alleghney College Case*, 23 YALE L. REP. 8, 11 (1977), cited in RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 15-16 n.31 (1990).

<sup>21</sup> JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* 150 (1976).

<sup>22</sup> William Powers, Jr., *Reputology*, 12 CARDOZO L. REV. 1941 (1991) [hereinafter Powers, *Reputology*]; William Powers, Jr., *Thaumatrope*, 77 TEX. L. REV. 1319, 1334 (1999) (book review) [hereinafter Powers, *Thaumatrope*].

<sup>23</sup> G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 259 (1979).

<sup>24</sup> See *infra* notes 98-108 and accompanying text.

great. Implicitly, these ongoing inquiries keep alive a lingering doubt as to Cardozo's greatness. True greatness, it would seem, does not require constant affirmation.

Recent scholarship has given Cardozo's legacy a boost. In a book entitled *Cardozo: A Study in Reputation*, Richard Posner advances an original approach towards the examination of judicial careers. Inspired by the doubts revolving around Cardozo's legacy, Posner set out to test whether, as an empirical matter, Cardozo was indeed a prominent figure within the judicial tradition.<sup>25</sup> Posner concludes that the credentials are well deserved.<sup>26</sup>

The Cardozo debate reached a highpoint, perhaps the point of saturation, with the publication of Professor Andrew Kaufman's compendious biography entitled, plainly, *Cardozo*.<sup>27</sup> Forty years in the making, extensively researched, heavily footnoted and encompassing in scope, Kaufman's 731-page book bears an aura of finality. At the most rudimentary level, this book amounts to an almanac of Cardozo's life (at least of what remains after the destruction of his private papers). With regard to Cardozo's personality, Kaufman's work was cut out for him. Previous opinions of the man ranged from intimations of sainthood<sup>28</sup> and laudatory biographical sketches,<sup>29</sup> to loaded charges of sneakiness and phony-ness.<sup>30</sup> Kaufman lands safely somewhere in the midst. He describes Cardozo as a kind, courteous and gentle person,<sup>31</sup> but also acknowledges that "he was no saint. He was simply a good

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<sup>25</sup> RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* vii (1990).

<sup>26</sup> *Id.* at 143.

<sup>27</sup> ANDREW L. KAUFMAN, *CARDOZO* (1998). Kaufman's book followed the publication of RICHARD POLENBERG, *THE WORLD OF BENJAMIN CARDOZO* (1997). Both biographies were published by Harvard University Press, one year apart.

<sup>28</sup> For a review of the saintly image pinned on Cardozo, see Richard Polenberg, *The "Saintly" Cardozo: Character and the Criminal Law*, 71 U. COLO. L. REV. 1311, 1311-14 (2000). Grant Gilmore also reported that "[b]y the unanimous testimony of his contemporaries, Cardozo was a saint." GRANT GILMORE, *THE AGES OF AMERICAN LAW* 75 (1977).

<sup>29</sup> For early writing on Cardozo, see JOSEPH P. POLLARD, *MR. JUSTICE CARDOZO* (1935); BERNARD L. SHIENTAG, *MOULDERS OF LEGAL THOUGHT* (1943); ARTHUR L. GOODHART, *FIVE JEWISH LAWYERS OF THE COMMON LAW* (1949). Much of this early writing on Cardozo originated in the Jewish community and bares a sense of admiration for and identification with Cardozo. For an example of how a Jewish judge's conception of his social identity intersects with his professional identity, see Pnina Lahav, *The Chicago Conspiracy Trial: Character and Judicial Discretion*, 71 U. COLO. L. REV. 1327, 1340-41 (2000), which excerpts a speech by federal Judge Julius Hoffman.

<sup>30</sup> See *infra* notes 98-108 and accompanying text.

<sup>31</sup> KAUFMAN, *supra* note 27, at 1.

man, with ordinary human failings that included some prejudices.”<sup>32</sup>

Much of Kaufman’s work is devoted to warding off the charges that Cardozo’s judicial decisions were result-oriented rather than principle-driven, and correspondingly, that the opinions supporting these decisions were insincere. In this vein, Kaufman combed laboriously through a mass of Cardozo’s judicial opinions to show that Cardozo’s results were principled and consistent. While acknowledging Cardozo’s occasional misjudgment (how could there be none?), Kaufman concludes convincingly that Cardozo’s decisions were not exceptionally result-oriented. Kaufman also goes to great lengths to defend Cardozo from the charge that his decisions relied too heavily on dodgy reasoning and skewed renditions of factual bases. Here Kaufman’s success is incomplete.<sup>33</sup> It is interesting to note that on both counts, Cardozo would have settled for less protection than Kaufman struggles to provide him.<sup>34</sup>

The part of the project that is obviously most precious to Kaufman is the book’s final chapter, entitled “*Legacy*.” While main-

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<sup>32</sup> *Id.* at 161.

<sup>33</sup> Kaufman did not deny that many of Cardozo’s important decisions were “heavily influenced by his particular vision of the facts.” *Id.* at 570-71. He attempted to defend Cardozo by describing his treatment of facts as an unintended consequence of his literary style:

Cardozo’s desire to write with “style” affected his presentation of the facts in many cases. He disdained lengthy factual statements, perhaps for literary reasons, perhaps because he found them distracting. He had a fondness for pithy presentations of the details of a case. The best of them, like *Wood v. Lucy, Lady Duff Gordon* and *Jacob & Youngs v. Kent*, are masterpieces.

*Id.* at 445-46. However, Kaufman conceded: “[S]ometimes, as in *Palsgraf* and *Allegheny College*, he left out some facts that now seem important to a full understanding of the problem, especially from the perspective of the losing party. This situation did not happen often, and I see no evidence that Cardozo was being manipulative.” *Id.* at 446. One would have expected Kaufman to be more critical on this issue.

<sup>34</sup> Cardozo would probably have dismissed Kaufman’s extensive efforts to harmonize his decisions under a detailed doctrinal order. For Cardozo, cases are not decided by singular precepts, but rather by their overall effect, that is, by their “architectonics”: the “groupings of fact and argument and illustration so as to produce a cumulative and mass effect; these, after all, are the things that count above all others.” BENJAMIN N. CARDOZO, *LAW AND LITERATURE* 332 (1931). Cardozo also seemed to have preempted Kaufman’s defense of the liberties he took with the molding of facts and doctrine: “I often say that one must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement.” *Id.* at 7. He continued: “Of course, one must take heed that the margin is not exceeded, just as the physician must be cautious in administering the poisonous ingredient which magnified will kill, but in tiny quantities will cure.” *Id.*

taining the studious tone that is present throughout the biography, Kaufman ties his momentous research together and imparts the imprimatur of greatness on Cardozo's career. Cardozo, Kaufman concludes, was "a great judge"<sup>35</sup> who "remains in the public memory as a standard of judicial excellence."<sup>36</sup> He "deserves the high place that he has held in the judicial hall of fame."<sup>37</sup>

Kaufman's biography has been well received within the legal profession,<sup>38</sup> as it has among most legal academics, who have described it as "beautifully crafted, thorough, perceptive, balanced,"<sup>39</sup> "magnificent" and a "masterful job."<sup>40</sup> The book has also been tagged as a "venerable biographical project," an "epic judicial biograph[y],"<sup>41</sup> a "model judicial biography"<sup>42</sup> and the "definitive" Cardozo biography.<sup>43</sup> The skeptical voices of William Powers, Jr.<sup>44</sup> and John Goldberg<sup>45</sup> are barely heard amidst

<sup>35</sup> KAUFMAN, *supra* note 27, at 577.

<sup>36</sup> *Id.* at 569; *see also* POSNER, *supra* note 25.

<sup>37</sup> KAUFMAN, *supra* note 27, at 569.

<sup>38</sup> The book is described as a "fascinating, distinguished, and thorough work." Alexander Wohl, *Cardozo: The Judges' Justice*, LEGAL TIMES, Oct. 12, 1998, at 70.

<sup>39</sup> Richard D. Friedman, *Cardozo The [Small r] Realist*, 98 MICH. L. REV. 1738, 1738 (2000).

<sup>40</sup> Lynn D. Wardle, *Cardozo*, 16 CONST. COMMENT., 459, 459, 476 (1999) (book review).

<sup>41</sup> Clyde Spillenger, *Cloistered Cleric of the Law*, 66 U. CHI. L. REV. 507, 508, 516 (1999).

<sup>42</sup> Endorsement by G. Edward White printed on the book's jacket.

<sup>43</sup> Mark Silverstein, *Cardozo*, 104 AM. HIST. REV. 592 (1999) (book review).

<sup>44</sup> In a thoughtful review, William Powers Jr. revisited the critical views of Cardozo he had expressed in Powers, *Reputology*, *supra* note 22. Powers conceded that his critiques were softened somewhat by Kaufman's biography. Though at bottom, he remained incapable of shedding the sense that there is something tricky looming in this judicial reputation. Powers concluded: "And yet—and yet—when I read some of Cardozo's opinions, especially *Palsgraf*, I still can't quite shake Leon Lipson's image of the Thaumatrope." Powers, *Thaumatrope*, *supra* note 22, at 1334. Of all commentaries on Cardozo, the underlying theme of this paper resonates most with the apprehension lacing Powers' view of Cardozo.

The metaphor of the thaumatrope has become something of a staple in the critiques of Cardozo. It seems to have been originated by Leon Lipson:

A Thaumatrope is a device in which two objects are painted on opposite sides of a card, for example, a man and a horse or a bird and a cage, and the card is fitted into a frame with a handle. When the handle is rotated rapidly, the onlooker sees the two objects combined into a single picture—the man on the horse's back or the bird in the cage.

Lipson, *supra* note 20, at 11.

<sup>45</sup> Another dissonant voice is that of John Goldberg. However, while Goldberg has challenged Kaufman's understanding of Cardozo's jurisprudence, he is no critic of Cardozo's legacy. John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV.

this chorus of praise.

Most consistently enthusiastic reviews have come from the judicial rank. Judge Keeton has lauded the book as a “stellar, strikingly creative, and original contribution.”<sup>46</sup> Other members of the bench have praised it as a “stunning intellectual biography,”<sup>47</sup> a biography “most definitely . . . worth the wait” of forty years,<sup>48</sup> and a “great work.”<sup>49</sup> Former critic of Cardozo, now judge, John T. Noonan, Jr., has described the book as “a major event in the world of law, judicial biography and legal literature.”<sup>50</sup> And Richard Posner is captured on the book’s jacket endorsing it as “perhaps the best biography of a major American judge ever written.” Kaufman’s *Cardozo*, then, seems to have the potential to quell the lingering misgivings and afford his subject a more tranquil tenure in the pantheon.<sup>51</sup>

This essay does not question whether Cardozo’s legacy is appropriately branded with the label of greatness. The reputation of an icon is best treated as a positive fact susceptible to empirical verification. By these terms, Cardozo was indeed a “great” judge.<sup>52</sup> Rather, the inquiry conducted here continues the examination of the reasons for his eminence. Obviously, Cardozo harbored an impressive array of talents and personality

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1419 (1999) (book review); see also John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998).

<sup>46</sup> Keeton, *Paradigmatic*, *supra* note 13, at 301.

<sup>47</sup> Stan Bernstein, *Cardozo*, N.Y. L.J., May 19, 1998, at 2. Stan Bernstein is a U.S. bankruptcy judge in the Eastern District of New York.

<sup>48</sup> Kaye, *A Law Classic*, *supra* note 9, at 1029.

<sup>49</sup> Henry S. Cohn, *Book Review*, FED. LAW., Oct. 1998, at 55. Henry Cohn is a judge of the Connecticut Superior Court.

<sup>50</sup> John T. Noonan, Jr., *Sitting in Judgment*, N.Y. TIMES, June 21, 1998, § 7, at 7. Judge Noonan serves on the United States Court of Appeals for the Ninth Circuit.

<sup>51</sup> Somewhat lost in the commotion is Richard Polenberg’s biography of Cardozo. See POLENBERG, *supra* note 27. Polenberg, a historian from Cornell University, devoted much of his biography to exposing and exploring the influence of Cardozo’s underlying system of personal values on his judicial decisions. The existence of such influence is, of course, all too familiar. It has been a staple critique of American realists and their theoretical offspring. The value of Polenberg’s effort is in the closeness and wealth of its examination of the relationship between personal values and exertion of judicial power. Despite the importance of the topic and the quality of analysis, Polenberg’s work has failed to garner the attention it deserves within legal scholarship. Most likely, this is because he has shunned the questions that tend to grip the imagination of the legal community. Polenberg’s project is made of the gritty mold of social scientific analysis; it does not offer distilled evaluations of people’s life projects and rankings of overall greatness. This probably explains why his biography is mentioned only in footnotes.

<sup>52</sup> See *supra* notes 5-16 and accompanying text.

characteristics that are necessary ingredients for the making of a successful career in such a scrutinized social role.<sup>53</sup> He was also an ambitious judge (aren't all icons?).<sup>54</sup> There might, however, be more to the making of Cardozo's legacy.

A central assessment shared by most extant analyses of Cardozo's work is that his greatness is the product of a combination of his judicial performance and his extra-judicial writings. For instance, Posner argues that Cardozo's ability to write fine and demystifying statements of his decision-making process, compounded with his outstandingness as a judge, "both lends authority to his statement of his judicial philosophy and enables the statement to reinforce his judicial reputation."<sup>55</sup> Similarly, Kaufman explains that Cardozo's enduring importance is derived from the fit between his opinions and his approach to judging: "He declared his views in *The Nature of the Judicial Process* . . . and exemplified them in his judicial opinions."<sup>56</sup> Judith Kaye also suggests that a central factor of his greatness was that he

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<sup>53</sup> Kaufman portrayed a person harboring characteristics on any judge's wish list: a commanding personality, intelligence, a solid intuition, abundant time, and access to influential social and political circles. In addition, Kaufman depicted a finely-tuned balance of judicial wisdom: deference to other branches of government, acceptance of established law, a good sense of social tides, impartiality and disinterestedness, a striving for consistent application of rules, prioritizing societal values over one's own, and an astute sense of factual situations. See KAUFMAN, *supra* note 27, at 566-78. Similarly, Goldberg pointed to his professionalism, his facility for expression, his aptitude for careful analysis, and combination of detachment, self-awareness, modesty of judgment and imaginative sympathy. See Goldberg, *supra* note 45, at 1473. Posner concluded that the two primary reasons were Cardozo's rhetorical skills and his policy-oriented jurisprudence. In addition, Posner noted the contribution of some historic contingencies, Cardozo's likeableness, and his character. See POSNER, *supra* note 25, at 131-32.

Cardozo's rhetorical style has received considerable scholarly attention. See *id.* at 33-58, 125-43; Weisberg, *supra* note 16, at 293-296. Powers, on the other hand, maintained that Cardozo's style hurts his performance. He suggested that the poetic nature of his opinions invites an anticipation of serious reasoning, and that "[I]t is only against this great expectation that, for Cardozo's detractors, Cardozo's opinions sometimes fall short." Powers, *Thaumatrope*, *supra* note 22, at 1334. There is little disagreement that Cardozo's rhetorical style was indeed impressive and memorable, and that it most likely contributed to his reputation. That, however, explains only a limited part of the riddle surrounding his greatness.

<sup>54</sup> See WHITE, *supra* note 23.

<sup>55</sup> POSNER, *supra* note 25, at 130.

<sup>56</sup> KAUFMAN, *supra* note 27, at 199. Elsewhere, Kaufman stated: "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." *Id.* at 3; see also *id.* at 570.



elucidated his craft in his extra-judicial writing.<sup>57</sup> The fusion of Cardozo's judicial and extra-judicial writing figures prominently also in the works of Richard Weisberg,<sup>58</sup> Richard Friedman,<sup>59</sup> and Mark Silverstein.<sup>60</sup>

I argue that herein lies a crucial misconception of Cardozo's life project. It seems that these assessments manifest a failure to resist a temptation, common among biographers, of imposing synchronic, if not diachronic, coherence on the life of their subjects.<sup>61</sup> To understand Cardozo and his legacy, we should go beyond the view that treats his enterprise as a single, uniform

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<sup>57</sup> Kaye, *A Law Classic*, *supra* note 9, at 1029.

<sup>58</sup> Weisberg, *supra* note 16, at 293-96. Weisberg defended Cardozo from Noonan's critique of the famous and controversial *Palsgraf* opinion. Weisberg retorted that Cardozo's aesthetics were anything but inhumane: "The human grounding of Cardozo's aesthetic derived from his consistent acceptance of his own subjectivity." *Id.* at 295. In support, Weisberg cited in length from *THE GROWTH OF THE LAW*: "[W]e can never rid ourselves of our dependence upon intuition or flashes of insight transcending and transforming the contributions of mere experience." *Id.* (quoting BENJAMIN CARDOZO, *THE GROWTH OF THE LAW* 89-90 (1924)). Similarly, Weisberg responded to Noonan's charge of Cardozo's "severe impartiality," by citing from *The Paradoxes of Legal Science* about the importance of moderating one's prepossessions with "an informed and liberal culture." *Id.* at 296 (citing BENJAMIN CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 127 (1928)).

<sup>59</sup> Friedman, *supra* note 39, at 1757.

<sup>60</sup> Mark Silverstein stated: "Cardozo's impressive reputation rests on the fact that he was the first jurist to try to explain how he decided cases, how he made law, and, as Kaufman notes, by implication how others should do so." Silverstein, *supra* note 43, at 592.

<sup>61</sup> Synchronic consistency presumes that the person is fairly uniform and consistent at a given point in time. Diachronic consistency presumes likeness over the course of time. The latter is more often relaxed in biographical work. For example, researchers tend to describe the life course of people by breaking it down to major periods. Thus, some biographers of Holmes have depicted "two Holmes" theories, distinguishing the young iconoclast reformer from the older formalist judge. *See, e.g.,* HORWITZ, *supra* note 15, at 109-44; G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 215-24, 253-55 (1993). This view of Holmes is seriously challenged by Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19, 28 (1995).

The tendency towards biographic synchronic consistency is not surprising in light of psychological research into the way people generally make social judgments of other people. In brief, we tend to evaluate people holistically, focusing on perceived central traits. Such judgments of seemingly immutable, central traits tend to minimize the role of contextual influences on behavior. *See, e.g.,* E. E. Jones & K. E. Davis, *From Acts to Dispositions: The Attribution Process in Person Perception*, in 2 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 219 (L. Berkowitz ed., 1965); Daniel T. Gilbert, *Ordinary Personology*, in 2 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* (Daniel T. Gilbert et al. eds., 4th ed. 1998); Daniel T. Gilbert, *Inferential Correction*, in *HEURISTICS AND BIASES* (D. Kahneman et al. eds., forthcoming 2001).

project. A close observation reveals instead an uneasy tension running through the corpus of his work, namely, that his practice as a judge was profoundly inconsistent with the account of judging he offered in his off-bench writings. This discrepancy will be presented in the first part of this essay.

In the second part, I explore some of the difficulties associated with the maintenance of this discrepancy and offer an explanation grounded in psychological research. The final part of the essay is devoted to an examination of how the coexistence of incompatible accounts affected Cardozo's legacy. I will first suggest that the incompatible accounts facilitated the maintenance of conflicting aspects of his professional life. I then will agree with extant assessments that Cardozo's reputation relies heavily on the combined effect of his judicial and extra-judicial work, though it is for a very different reason. Specifically, it is not because these two facets complemented or reinforced one another; rather, it is the profound incompatibility between the two facets that has contributed to Cardozo's vitality as a judicial icon and an exemplar for generations of judges. To this day, these incompatible accounts continue to produce a type of jurisprudence that embodies the discrepancy that pervaded Cardozo's life project. While this jurisprudence serves judges in fulfilling their testing social role, it takes a toll on the integrity of judicial reasoning. The ultimate objective of this essay extends beyond the legacy of that enigmatic, elusive judge now dead for sixty years. By appreciating what makes Cardozo great to us, we might better understand the legal culture from which we judge him so.

## I

### THE DISCREPANT ACCOUNTS OF THE JUDICIAL PROCESS

#### A. *Cardozo's Account of Judging in Off-Bench Writings*

Cardozo wrote extensively on the judicial process, and more than any other judge he ventured to capture the mental processes by which judges arrive at their decisions. Thanks to his rare introspection, he has bequeathed us a rich account of this complex activity.<sup>62</sup> His major contribution was, of course, *The Nature of the Judicial Process*, but he revisited this subject in three books and a number of essays published in the subsequent eleven

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<sup>62</sup> See *infra* note 197.

years.<sup>63</sup>

Cardozo's account of judging derives from his basic observation that legal questions that come before the appellate judge are not readily deduced from an orderly conceptual system of precepts: "The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively."<sup>64</sup> The tasks the judge faces are complex, difficult, and replete with clashes between seemingly irreconcilable opposites; he explained: "[D]eep beneath the surface of the legal system, hidden in the structure of the constituent atoms, are these attractions and repulsions, uniting and dis severing as in one unending paradox."<sup>65</sup> Everything is "penetrated with casuistry and dialectics."<sup>66</sup> Cardozo's portrayal of the law resonates with the best of legal realism: "[T]he whole subject-matter of jurisprudence is more plastic, more malleable, the moulds less definitely cast, the bounds of right and wrong less preordained and constant, than most of us, without the aid of some such analysis, have been accustomed to believe."<sup>67</sup>

A central feature of Cardozo's characterization of the judicial process is a debunking of the then prevalent view of the oracular judge, whose role was perceived as merely finding and pronouncing the extant law. Rather, he insisted that the judicial role necessarily entails creation of law. *The Nature of the Judicial Process* is based on the premise that "judge-made law [is] one of

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<sup>63</sup> His most relevant subsequent publications include: *THE GROWTH OF THE LAW* (1924), *THE PARADOXES OF LEGAL SCIENCE* (1928), *LAW AND LITERATURE* (1930), and an Address before the New York Bar Association entitled *Jurisprudence* (1932). All of these publications can be found in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* (Margaret E. Hall ed., 1947) [hereinafter *SELECTED WRITINGS*].

<sup>64</sup> BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS*, *supra* note 63, at 114.

<sup>65</sup> See BENJAMIN N. CARDOZO, *The Paradoxes of Legal Science*, in *SELECTED WRITINGS*, *supra* note 63, at 255; see also *id.* at 253-54.

<sup>66</sup> *Id.* at 226. Cardozo depicted the same tension in *The Nature of the Judicial Process*: "For every tendency, one seems to see a counter-tendency; for every rule its antinomy. Nothing is stable. Nothing absolute. All is fluid and changeable." BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS*, *supra* note 63, at 115-16.

<sup>67</sup> BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS*, *supra* note 63, at 175. Cardozo added: "The mere recognition of the truth that there are more methods to be applied than one, that there is more than one string to harp upon, is in itself a forward step and a long one upon the highway to salvation." BENJAMIN N. CARDOZO, *The Growth of the Law*, in *SELECTED WRITINGS*, *supra* note 63, at 214.

the existing realities of life.”<sup>68</sup> In the paragraph that contains the book’s title, Cardozo described his own intellectual transformation:

As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation. . . .<sup>69</sup>

Creation of law, Cardozo insisted, entails choice among alternative decisions. He announced that “[w]e must ‘spread the gospel that there is no gospel that will save us from the pain of choosing at every step.’”<sup>70</sup> He added that within the gaps of the law, “choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator’s wisdom.”<sup>71</sup> Indeed, the prevalence of choice is emphasized throughout his writing.<sup>72</sup>

The ever-present need to make choices renders the judicial process susceptible to human fallibility. Cardozo refused to “underrate the tribulations of the process”:<sup>73</sup> judges are afflicted by “misgivings,”<sup>74</sup> they are generally “uncertain of [their] strength,” and “beset with doubts and difficulties.”<sup>75</sup> The decision-making process is inherently human: “Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.”<sup>76</sup> As a judge, Cardozo insisted, one cannot free oneself

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<sup>68</sup> BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS*, *supra* note 63, at 109.

<sup>69</sup> *Id.* at 178.

<sup>70</sup> BENJAMIN N. CARDOZO, *The Growth of the Law*, in *SELECTED WRITINGS*, *supra* note 63, at 214.

<sup>71</sup> BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS*, *supra* note 63, at 154-55.

<sup>72</sup> *See, e.g., id.* at 122, 132, 148, 149-50. Cardozo added: “[J]udges would do well to keep before them as a living faith that a choice of methods is theirs in the shaping of their judgments.” BENJAMIN N. CARDOZO, *The Growth of the Law*, in *SELECTED WRITINGS*, *supra* note 63, at 215.

<sup>73</sup> BENJAMIN N. CARDOZO, *The Paradoxes of Legal Science*, in *SELECTED WRITINGS*, *supra* note 63, at 252, 300.

<sup>74</sup> *See id.* at 301.

<sup>75</sup> BENJAMIN N. CARDOZO, *Law and Literature*, in *SELECTED WRITINGS*, *supra* note 63, at 345.

<sup>76</sup> BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS*, *supra* note 63, at 178.

from “the empire of inarticulate emotion,” nor from the “beliefs so ingrained and inveterate as to be a portion of our very nature.”<sup>77</sup> In a passage that has become famous, Cardozo added: “We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.”<sup>78</sup> Even the most scrupulously executed decision-making process cannot escape the human element: “After the wearisome process of analysis has been finished, there must be for every judge a new synthesis which he will have to make for himself.”<sup>79</sup>

The result of this creative process, then, cannot be anything but imperfect. Making decisions is akin to groping in the dark,<sup>80</sup> an exercise of testing and retesting hypotheses,<sup>81</sup> a process informed by “a hint, an illustration, a suggestion.”<sup>82</sup> In line with his propensity for self-deprecation, Cardozo compared himself to a designer of “a mighty bridge.” He lamented: “My bridges are experiments. I cannot span the tiniest stream in a region unexplored by judges or lawgivers before me, and go to rest in the secure belief that the span is wisely laid.”<sup>83</sup> Cardozo conceded also that his opinions reveal “all sorts of cracks and crevices and loopholes.”<sup>84</sup>

In sum, Cardozo portrayed the judicial process as embedded in an environment that is replete with gaps and ambiguities. Fallible people are called on to solve these intricate, seemingly intractable problems, with no obvious solution simply waiting to be

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<sup>77</sup> BENJAMIN N. CARDOZO, *The Paradoxes of Legal Science*, in *SELECTED WRITINGS*, *supra* note 63, at 330.

<sup>78</sup> BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS*, *supra* note 63, at 110. Cardozo added, judges “do not stand aloof on these chill and distant heights.” *Id.* at 178.

<sup>79</sup> *Id.* at 176.

<sup>80</sup> See BENJAMIN N. CARDOZO, *The Paradoxes of Legal Science*, in *SELECTED WRITINGS*, *supra* note 63, at 253 (“So I keep reaching out and groping for a pathway to the light. The outlet may not be found.”).

<sup>81</sup> See BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS*, *supra* note 63, at 175-76, 183.

<sup>82</sup> BENJAMIN N. CARDOZO, *The Growth of the Law*, in *SELECTED WRITINGS*, *supra* note 63, at 214.

<sup>83</sup> BENJAMIN N. CARDOZO, *The Paradoxes of Legal Science*, in *SELECTED WRITINGS*, *supra* note 63, at 252.

<sup>84</sup> BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS*, *supra* note 63, at 116. Cardozo repeated this notion in *Law and Literature*, stating that when one revisits previously rendered decisions, “[a]ll sorts of gaps and obstacles and impediments will obtrude themselves before your gaze.” BENJAMIN N. CARDOZO, *Law and Literature*, in *SELECTED WRITINGS*, *supra* note 63, at 341.

found. The making of decisions inevitably entails creation of law, and the results of the process are bound to be subjective and somewhat imprecise.

This is not to say that Cardozo held a view of radical indeterminacy.<sup>85</sup> He explained that at times the judicial task will amount to no more than matching the case to the extant precedents, “much like matching a new color to a sample of colors spread out on the desk.” However, for him, simple matching did not capture the essence of the judicial process: “It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins.”<sup>86</sup> Overall, Cardozo’s account of the process of making a judicial decision can be characterized as *openness*.

### B. Cardozo’s Practice as a Judge

A radically different characterization emerges, however, from Cardozo’s work as a judge. One of the most notable features of Cardozo’s opinions is their distinct sense of obvious correctness.<sup>87</sup> His reasoning is typically cast in the mold of formalism,<sup>88</sup> following established doctrines as a matter of perceived necessity.<sup>89</sup> Even when the law was unclear, his conclusions appeared routine and compelling.<sup>90</sup> Cardozo’s opinions rarely left unresolved issues in their wake. Friend and former clerk Joseph Rauh described that, in arriving at his decision, Cardozo would “explore and explode the obstructions which stood in the way of

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<sup>85</sup> Cardozo explicitly rejected radical indeterminacy in favor of what has been called underdeterminacy. Cardozo rejected what he considered to be the excesses of legal realism, the “missionary ecstasy” and “over-zealous” positions. Though he explained: “I am persuaded that these extravagances are not of the essence of the [Realists’] faith.” BENJAMIN N. CARDOZO, *Jurisprudence*, in SELECTED WRITINGS, *supra* note 63, at 14, 15. Cardozo openly identified with their objective of disparaging law’s “illusion of order and certainty and coherence.” *Id.* at 15.

<sup>86</sup> BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, in SELECTED WRITINGS, *supra* note 63, at 113. Elsewhere, Cardozo stated: “Now, *stare decisis* is an important factor in the judicial process, but it is not the entire process by a long shot.” BENJAMIN N. CARDOZO, *Jurisprudence*, in SELECTED WRITINGS, *supra* note 63, at 16.

<sup>87</sup> H.V. Evatt described Cardozo as one who “was able to reconstruct the concrete factual situation existing at a time long past and to do this in such a way that his legal conclusions appeared almost inevitable.” H.V. Evatt, *Mr. Justice Cardozo*, 39 COLUM. L. REV. 5, 5 (1939); *see also* NOONAN, *supra* note 21, at 150.

<sup>88</sup> *See* Shirley S. Abrahamson, *Commentary on Jeffrey M. Shaman’s The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 633 (1996).

<sup>89</sup> *See* SCHWARTZ, *supra* note 15, at 478.

<sup>90</sup> *See* ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER* 46-47 (1985).

the fair result.”<sup>91</sup> Learned Hand reported that Cardozo’s opinions had an “unerring accuracy.”<sup>92</sup> Karl Llewellyn observed that “no judge has ever had a stronger urge to leave an opinion in clean harmony with the authorities.”<sup>93</sup>

Another distinguishing feature of Cardozo’s judicial work is the absence of doubt in the decisions he reached. As H.V. Evatt observed, Cardozo “presented a strange spectacle, a judge who, in every word he wrote, showed that he had thoroughly enjoyed his search for the just judgment but in the end had resolved all doubts.”<sup>94</sup> Justice Stone commented that when Cardozo reached his decision, his uncertainties were cast aside in “serene and justified confidence.”<sup>95</sup> As Hand observed, at the point of resolution, he seemed “inflexible.”<sup>96</sup>

The following anecdote reported by Ambrose Doskow, one of Cardozo’s clerks, is telling. Justice Brandeis approached Doskow and said: “The trouble with [Cardozo] is that he thinks that he has to be one hundred percent right. He doesn’t realize that it is enough to be fifty-one percent right.” Upon learning of Brandeis’ comment, Cardozo responded: “The trouble with that is that when you are only fifty-one percent right, it may be forty-nine percent.”<sup>97</sup> This urge to attain high levels of exactness and certitude is a distinctive characteristic of Cardozo’s judicial work.

As the foregoing discussion relates, Cardozo’s actual opinions portray the judicial process as perfectly capable of providing obviously correct solutions to legal questions. These inevitable solutions can be found within extant legal doctrines. The process, then, is impersonal, and it requires little judicial creativity. Overall, Cardozo’s actual judicial practice resonates with Langdellian geometrical jurisprudence. This characterization can be described as bearing a sense of *closure*.

We see then that Cardozo generated two disparate and irreconcilable views of the judicial process. What, one would like to prod Cardozo, is judging *really* about? Are legal problems in-

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<sup>91</sup> Joseph L. Rauh, Jr., *A Personal View of Justice Benjamin N. Cardozo: Recollections of Four Cardozo Law Clerks*, 1 CARDOZO L. REV. 5, 7 (1979).

<sup>92</sup> HAND, *supra* note 5, at 131.

<sup>93</sup> Llewellyn noted that Cardozo’s opinions attained a level of harmony with the authorities “that on the point in hand it supersedes them.” KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 443 (1960).

<sup>94</sup> Evatt, *supra* note 87, at 5.

<sup>95</sup> Stone, *supra* note 6, at 2.

<sup>96</sup> HAND, *supra* note 5, at 131.

<sup>97</sup> Ambrose Doskow, *A Personal View*, 1 CARDOZO L. REV. 16, 18-19 (1979).

tractable or are they solvable? Are legal questions open-ended or are they inevitably determined? Is judging susceptible to human frailties or is it immune to them? Are decisions created by judges or are they merely found? In short, is the decision-making process governed by *openness*, or is it better characterized as *closure*?

### C. *The Candor Debate*

The usefulness of teasing apart Cardozo's off-bench writings from his judicial practice becomes immediately apparent as we approach the controversy surrounding his candor. The issue of Cardozo's candor is particularly telling since in the majority of judicial careers, candor is not an issue at all. In the case of Cardozo, however, views polarized and intensely persisted.

Probably like no other judge of his stature, Cardozo's legacy has been marred by an "undercurrent of dubiety."<sup>98</sup> Ted White described Cardozo's judicial technique as "retreat[ing] behind conventional techniques of judicial subterfuge—of which he was a master." White added that his decisions can be "close to being disingenuous."<sup>99</sup> In the view of then-critic John Noonan, Cardozo's opinions masked the real operations of his decisions.<sup>100</sup> Arthur Corbin, a supporter of Cardozo, observes that Cardozo "molds doctrine without repudiating it."<sup>101</sup> Posner identifies instances of suppression of detail and unfair statements of facts and points to Cardozo's talent for smoothening innovation and concealing change.<sup>102</sup> In the *Allegheny College* and *De Cicco* cases, Cardozo is said to have based his decisions on illusory solutions generated by way of whirling doctrines in a thaumatrope.<sup>103</sup> In

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<sup>98</sup> POSNER, *supra* note 25, at vii.

<sup>99</sup> WHITE, *supra* note 23, at 256, 260.

<sup>100</sup> Noonan critically analyzed Cardozo's opinion in the famous *Palsgraf* case: "Out of [an improbable] sequence of events . . . reconstructed by lawyers seeking partisan advantage, on a factual basis that was probably inaccurate, above the pain of Helen Palsgraf . . . Cardozo fashioned a statement of clarity, symmetry, simplicity." Ultimately, Cardozo's opinion attained a troubling form of "order and aesthetic design." NOONAN, *supra* note 21, at 150.

<sup>101</sup> Arthur L. Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 39 COLUM. L. REV. 56, 86 (1939). In this context, see Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 666 (1983); LEVI, *supra* note 18, at 6-7; K.N. LLEWELLYN, *THE BRAMBLE BUSH* 56-69 (1930).

<sup>102</sup> See POSNER, *supra* note 25, at 40-42, 106.

<sup>103</sup> On Leon Lipson's metaphor of the thaumatrope, see *supra* note 20. It has also been stated that "[his] analysis in *Allegheny College* is regularly criticized as contrived and artificial." Lawrence A. Cunningham, *Cardozo and Posner: A Study in*



*In re Fowles* he is accused of brushing by the relevant cases on the way to his conclusions.<sup>104</sup> In the *Hynes* case, he is said to have employed dialectical gymnastics.<sup>105</sup> Edward Levi described Cardozo's famous *MacPherson* decision as "a tour de force of judicial casuistry."<sup>106</sup> And in the familiar *Palsgraf* case, Cardozo is said to have turned the doctrine on its head, and having done so without blinking an eye.<sup>107</sup> As Posner observed, Cardozo's greatness is perceived by many like deceit, concealment, and manipulation; in short, like the "lawyer's shady arts."<sup>108</sup>

At the same time, however, Cardozo has also been singled out as being exceptionally forthright. Commenting on *The Nature of the Judicial Process*, Stone, Hough, Learned Hand, and Van Voorhis explicitly heralded Cardozo for his frankness and sincerity.<sup>109</sup> In a chapter entitled *The Candor of Cardozo*, Jerome Frank extolled Cardozo for being "in the forefront of those who realistically face the unavoidable uncertainties in law, the actualities of judicial law-making."<sup>110</sup> Justice Burch described Cardozo's work as stripping the sacred garments of mystery off the judicial process.<sup>111</sup> Justice Brennan praised Cardozo for providing an "honest reflection and candid confession" of the process

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*Contracts*, 36 WM. & MARY L. REV. 1379, 1402 (1995); see also Joshua P. Davis, *Cardozo's Judicial Craft and What Cases Come to Mean*, 68 N.Y.U. L. REV. 777 (1993).

<sup>104</sup> See Weisberg, *supra* note 16, at 341 (discussing *In re Fowles*).

<sup>105</sup> Walton Hamilton explained:

In an adroit reply Cardozo ranged from the sheer gymnastics of dialectic to the compulsions of social policy. . . . It is all very much of a legal to-do, a display of craft which commands the admiration of his brethren, a parade of argument which no rebutting legalism can halt. . . . His intricate and nimble dialectic gives voice to a revolution in caste, in values and in ideas.

Walton H. Hamilton, *Cardozo the Craftsman*, 6 U. CHI. L. REV. 1, 9 (1938).

<sup>106</sup> See LEVI, *supra* note 18, at 9-25. Posner described the decision as "the quietest of revolutionary manifestos, the least unsettling to conservative professional sensibilities." POSNER, *supra* note 25, at 109; see also Powers, *Reputology*, *supra* note 22.

<sup>107</sup> See Powers, *Reputology*, *supra* note 22, at 1949.

<sup>108</sup> POSNER, *supra* note 25, at 19.

<sup>109</sup> See Hand, *supra* note 5, at 479, 480; C. M. Hough, *The Native of the Judicial Process*, 7 CORNELL L.Q. 287, 288 (1922) (book review); Stone, *supra* note 6, at 384; John Van Voorhis, *Cardozo and the Judicial Process Today*, 71 YALE L.J. 202, 205 (1961).

<sup>110</sup> JEROME FRANK, *LAW AND THE MODERN MIND* 252 (1930). Seeped in psychoanalytical jurisprudence, Frank declared Cardozo to have "reached adult emotional stature." *Id.* at 253. Only Holmes attained higher marks. Frank declared Holmes "the Completely Adult Jurist." *Id.* at 270-77.

<sup>111</sup> Rousseau A. Burch, *The Nature of the Judicial Process*, 31 YALE L.J. 677 (1922) (book review).

by which judges decide cases.<sup>112</sup>

These contradictory assessments of Cardozo's candor manifest the benefit of distinguishing between Cardozo's judicial and extra-judicial writing. While his reflections on the openness of the judicial process have engendered nothing but praise and respect for his honesty, the closure he imposed on his opinions has spurred a sense of dubiety. It is interesting to note that when commentators appraise his judicial and extra-judicial work combined, the assessments tend to be mixed.<sup>113</sup>

#### D. *Allaying the Discrepancy*

It is curious that even though Cardozo was apparently never criticized for the discrepancy between the two accounts of judging, he nonetheless attempted to allay it. Essentially, he did so by downplaying his exposition of the openness of the judicial process. For instance, in *The Nature of the Judicial Process*, after having laid out his compelling and detailed account of openness, Cardozo inserted two disclaimers. First, he claimed that there was "nothing novel" in it.<sup>114</sup> Second, he sought to minimize the relevance of the account in stating that it applied only to "occasional and relatively rare" cases.<sup>115</sup> He explained that it is only with a small percentage of cases, "not large indeed," that "I have chiefly concerned myself in all that I have said to you."<sup>116</sup> In *The Growth of the Law*, he quantified this claim: "Nine-tenths, perhaps more, of the cases that come before a court are predetermined—predetermined in the sense that they are predestined—their fate preestablished by inevitable laws"; judicial creativity was accordingly confined to only one-tenth of the cases, perhaps

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<sup>112</sup> See Brennan, *supra* note 8, at 951.

<sup>113</sup> For example, Walton Hamilton spoke of Cardozo as being sincere, but he also emphasized his craftsmanship, his nimble use of his kit of tools, and his "facile rhetoric [that] hides many an argument." Hamilton, *supra* note 105, at 6, 11, 19. Similarly, in addition to his criticism of some of Cardozo's opinions, Posner spoke favorably of the contribution of Cardozo's "character, in the sense of integrity and trustworthiness." POSNER, *supra* note 25, at 131.

<sup>114</sup> Cardozo stated: "There is in truth nothing revolutionary or even novel in this view of the judicial function. It is the way that courts have gone about their business for centuries in the development of the common law." BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS*, *supra* note 63, at 155.

<sup>115</sup> Cardozo added that the rare case should not "blind our eyes to the innumerable instances where there is neither obscurity nor collision nor opportunity for diverse judgment." *Id.* at 160.

<sup>116</sup> *Id.* at 177.

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Upon close scrutiny, both of these disclaimers—the *nothing-novel* claim and the *nine-tenths* claim—fall flat. The novelty of *The Nature of the Judicial Process* is evidenced both by the way it was received at the time it was published, and by how it has since been judged. Hand predicted that the book would be received as “the voice of heresy”; that legal orthodoxy would find “a scandal in so much subjectivity.”<sup>118</sup> Stone said that the book “may seem to exhibit radical tendencies.”<sup>119</sup> Justice Burch states that Cardozo had “drawn back the veil”; that his account was a “daring” one.<sup>120</sup> It has also been described by others as a “pioneer work”;<sup>121</sup> something “so brilliantly different.”<sup>122</sup> In the Foreword to the *Selected Writings of Benjamin Nathan Cardozo*, Edwin Patterson describes Cardozo’s revelations as “tear[ing] away the veil from the secrets of the consultation room and the judge’s study.”<sup>123</sup> Arthur Corbin reports that when Cardozo delivered the Storrs Lectures at Yale (on which the book is based) the capacity audience was “spell-bound.”<sup>124</sup>

Looking back in time, Llewellyn observes that *The Nature of the Judicial Process* “shocked our legal world”;<sup>125</sup> while Ted White reports that Cardozo’s audience reacted to his book with great enthusiasm;<sup>126</sup> and Polenberg describes Cardozo’s work as having radically subverted the conventional understanding of judicial decision making.<sup>127</sup> In a similar vein, Brennan stated that

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<sup>117</sup> BENJAMIN N. CARDOZO, *The Growth of the Law*, in *SELECTED WRITINGS*, *supra* note 63, at 212-13. In his final lecture on judging, *Jurisprudence*, presented in 1932, Cardozo spoke of “cases where the creative function is at its highest” as being “exceptional.” BENJAMIN N. CARDOZO, *Jurisprudence*, in *SELECTED WRITINGS*, *supra* note 63, at 20.

<sup>118</sup> HAND, *supra* note 5, at 480.

<sup>119</sup> Stone, *supra* note 6, at 385.

<sup>120</sup> Justice Burch added: “Judges of a certain type of mind may feel some dismay at the frank account of this voyage of discovery, and some of them may be inclined to put on war paint.” Burch, *supra* note 111, at 677.

<sup>121</sup> Nathan Isaacs, *The Nature of the Judicial Process*, 20 MICH. L. REV. 688, 688 (1922) (book review).

<sup>122</sup> Hough, *supra* note 109, at 290.

<sup>123</sup> Edwin W. Patterson, *Foreword* to *SELECTED WRITINGS*, *supra* note 63, at v, ix.

<sup>124</sup> Arthur L. Corbin, *The Judicial Process Revisited: Introduction*, 71 YALE L.J. 195, 204 (1961).

<sup>125</sup> LLEWELLYN, *supra* note 93, at 11.

<sup>126</sup> WHITE, *supra* note 23, at 259.

<sup>127</sup> POLENBERG, *supra* note 27, at 86. Judge Ruggero Aldisert reminded us that in 1921, Cardozo’s depiction of creative judging was considered revolutionary. Aldisert, *supra* note 10, at 2.

through *The Nature of the Judicial Process*, “one person was able . . . to alter the course of American legal thought.”<sup>128</sup> The book has also been called “a sensational event,”<sup>129</sup> nothing less than “a legal version of hard core pornography.”<sup>130</sup>

It seems that Cardozo’s attempt to mitigate the impact he made on the legal world cannot stand. It is plainly implausible that the legal community would have responded so enthusiastically to a stale account of how decisions are made in only a marginal fraction of cases. On the backdrop of the very real impetus of his writings, Cardozo’s by-the-way disclaimers ring hollow.<sup>131</sup>

Furthermore, there is good reason to believe that Cardozo himself did not fully perceive his account to be insignificant.<sup>132</sup> Cardozo described *The Nature of the Judicial Process* as his “confessions,”<sup>133</sup> as “lay[ing] bare my own soul and the souls of my associates and tell[ing] you what was going on inside.”<sup>134</sup> Corbin observed that Cardozo knew that his conception of the judicial process was not the generally accepted one. Cardozo himself re-

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<sup>128</sup> Brennan, *supra* note 8, at 950. *The Nature of the Judicial Process* was assigned as obligatory reading for some judges. As C. M. Hough reported, following Dean Wigmore, “Every new-made judge should be compelled to mark, learn, and inwardly digest that essay before putting pen to opinion-paper.” Hough, *supra* note 109, at 288. Indeed, the book has since become a classic of legal education. See WHITE, *supra* note 23, at 259.

<sup>129</sup> Gary T. Schwartz, *Cardozo as Tort Lawmaker*, 49 DEPAUL L. REV. 305 (1999).

<sup>130</sup> Kaye, *The Human Dimension*, *supra* note 9, at 1007; see also Friedman, *supra* note 39, at 1755.

<sup>131</sup> *But cf.* KAUFMAN, *supra* note 27. Cardozo’s breakup into percentages “was an eminently accurate statement, at least for his day.” *Id.* at 205. “Cardozo was right to disclaim novelty in his description of the judicial process.” *Id.* at 213. Heralding the notion of judicial creativity, Richard Weisberg played down Cardozo’s disclaimers: “Far too much has been made of the single passage in which Cardozo appears to quantify cases in which the judge has little creative sway.” Weisberg, *supra* note 16, at 298 n.68. As described above, this disclaimer was not limited to a single passage. For a different interpretation of this point, see Ernest Nagel, *Reflections on “The Nature of the Judicial Process,”* 1 CARDOZO L. REV. 55, 56 (1979).

<sup>132</sup> It is interesting to note that throughout his writing he talked about the practice of judging in general, not about a marginal fraction of it. In the opening of *The Nature of the Judicial Process*, he announced that the purpose of the book was to describe “[w]hat is it that I do when I decide a case,” not what he did when he happened to encounter a rare and exceptional case. BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, in SELECTED WRITINGS, *supra* note 63, at 108. Indeed, that is precisely what he was asked by the Yale law faculty to do in his Storrs lectures. See Corbin, *supra* note 124, at 197.

<sup>133</sup> BENJAMIN N. CARDOZO, *Jurisprudence*, in SELECTED WRITINGS, *supra* note 63, at 7.

<sup>134</sup> BENJAMIN N. CARDOZO, *Faith and a Doubting World*, in SELECTED WRITINGS, *supra* note 63, at 101.

marked—though perhaps tongue in cheek—that if he were to publish *The Nature of the Judicial Process*, he would be impeached.<sup>135</sup> Cardozo later stated that it was a “rash” thing to have published the book.<sup>136</sup> It is further clear from his address before the New York County Lawyers Association in 1931 that he knew that he was considered a reformer. In his address, he set out to deflect a “fairly general notion among [his] brethren at the Bar” that he had contributed to a transformation of the judicial process from its previous “simple, natural, spontaneous” state into one that is “conscious of itself [and] crafty like the serpent.”<sup>137</sup>

## II

### WHAT TO MAKE OF THE DISCREPANCY?

We turn now to the second part of this essay, in which I will examine the maintenance of the discrepancy between Cardozo’s explicit account of judging and the account that was implicit in his practice as a judge. Three explanations are explored.

#### A. Deception

One explanation is that Cardozo was simply deceitful in the sense that he intentionally misled us to believe one of the accounts while knowing that it was false.<sup>138</sup> That would be the case had he believed that judging was a complex process, susceptible to human fallibility, requiring judicial creation and choice, and resulting in subjective imprecise results. But he nonetheless consciously denied all of this in the opinions he wrote. Alternatively, it would be considered deceit had he believed that judging is an impersonal process by which judges merely find law’s inevi-

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<sup>135</sup> Arthur L. Corbin, *Foreword* to BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* vii (1963).

<sup>136</sup> BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS*, *supra* note 63, at 131. Edwin Patterson described *The Nature of the Judicial Process* as a piece in which Cardozo “poured from the stuff of his own troubled thoughts and gave them inspiring form with but little aid from the apparatus of professional philosophy.” Edwin W. Patterson, *Foreword* to *SELECTED WRITINGS*, *supra* note 63, at v, ix.

<sup>137</sup> Cardozo’s response seemed to be directed at assuring both his listeners and himself: “All this, however, as most of you must know, is calumny and fable.” BENJAMIN N. CARDOZO, *Faith and a Doubting World*, in *SELECTED WRITINGS*, *supra* note 63, at 99, 101.

<sup>138</sup> For a conventional definition of lying, see SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 6 (1978).

table conclusions, but he described the process as one of openness. Cardozo certainly described his life project as one driven by genuine truth seeking, even soul searching.<sup>139</sup> And notwithstanding charges of disingenuousness leveled by latter-day scholars,<sup>140</sup> those who surrounded him considered him to be a man of integrity.<sup>141</sup> It seems doubtful that Cardozo was plainly deceitful; if he were, evidence to that effect would have likely shown up elsewhere. Before denouncing him for deceit (and rebuking two generations of scholars for excessive gullibility), we ought to explore alternative explanations.

### B. *Self-Deception*

A second explanation for the maintenance of the discrepancies is that Cardozo deceived himself. That is, he believed one of the accounts, but somehow convinced himself in the veracity of the other. Self-deception has traditionally been modeled on the basis of intentional deception-of-others, in which the person is perceived to be simultaneously holding contradictory beliefs—i.e., that of believing both *P* and *not P*.

For philosophers, this concept has posed a persistent difficulty: since a person cannot believe what she disbelieves, she cannot deceive herself. Self-deception has thus traditionally been viewed as a paradox and, therefore, an impossibility. Jean Paul Sartre, for example, explained: “It follows first that the one to whom the lie is told and the one who lies are one and the same person, which means that I must know in my capacity as deceiver the truth which is hidden from me in my capacity as the one deceived.”<sup>142</sup> This difficulty, dubbed the epistemological paradox, is accompanied by a similarly perplexing paradox of a moral kind. In his classic work, Herbert Finagrette explained that the moral quandary is borne by the fact that ignorance and blindness tend to exculpate, while knowledge, insight and foresight inculpate; both judgments fit a person in a state of self-deception.<sup>143</sup>

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<sup>139</sup> See *supra* notes 133-136 and accompanying text.

<sup>140</sup> See *supra* notes 98-108 and accompanying text.

<sup>141</sup> See KAUFMAN, *supra* note 27, at 568.

<sup>142</sup> JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* 302 (Hazel E. Barnes trans., 1956).

<sup>143</sup> Indeed, much of the work on self-deception seems to be torn between positive and normative analyses, a chasm that tends to correspond to the disciplines from which they are being examined. Finagrette pointed out the difference between Sartre's and Freud's treatment of what they both considered to be an instance of false consciousness. Sartre cast the question in teleological terms, emphasizing choice,

Various avenues have been explored in the philosophical literature to avoid this epistemological paradox and its ensuing moral rejoinder. Much of this work, however, has shifted the debate from one paradigmatic set of questions to another. The discussion has turned away from examining the classic situations of holding contradictory beliefs to situations in which a person holds on to a belief in the face of incoming counter-evidence.

This latter paradigm, dubbed *belief persistence*, examines instances such as mothers overlooking their children's dishonesty, people denying symptoms of terminal illnesses, and lovers ignoring signs of infidelity.<sup>144</sup> In this paradigm, the epistemological paradox is solved, or circumvented, by means of distinguishing between different levels of consciousness, and by means of discerning biases in the way the threatening evidence is processed.<sup>145</sup> However, as scholars of self-deception come to rely increasingly on psychological theories to explain the problem of belief persistence, a different field of psychology is becoming available to solve the more problematic cases of holding contradictory beliefs.

### C. *Self-Complexity and Mental Compartmentalization*

The third explanation is based on a body of *self-theories*, a branch of personality-psychology that examines personality and human behavior largely through the construct of the *self-concept*. Generally speaking, the self-concept consists of a person's view, perception, and evaluation of him or herself. One of the tenets of self-theories, as postulated by William James, is that a person's actions and beliefs are strongly reflected in their self-concepts.<sup>146</sup>

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integrity, and ultimately, moral responsibility, whereas Freud conceived of self-deception in a positive framework, of defense mechanisms and mental systems. HERBERT FINAGRETTE, *SELF-DECEPTION* 136, 137 (1969).

<sup>144</sup> See Alfred R. Mele, *Real Self-Deception*, 20 *BEHAV. & BRAIN SCI.* 91, 92 (1997); Amelie Oksenberg Rorty, *The Deceptive Self: Liars, Layers, and Lairs*, in *PERSPECTIVES ON SELF-DECEPTION* 11, 19 (Brian P. McLaughlin & Amelie Oksenberg Rorty eds., 1988).

<sup>145</sup> For a review, see Alfred Mele, *Recent Work on Self-Deception*, 24 *AM. PHIL. Q.* 1 (1987); cf. Maria Miceli & Cristiano Castelfranchi, *Denial and Its Reasoning*, 71 *BRIT. J. MED. PSYCHOL.* 139 (1998).

<sup>146</sup> As James proposed:

Every thought tends to be part of a personal consciousness. . . . It seems as if the elementary psychic fact were not *thought* or *this thought* or *that thought* but *my thought*, every thought being owned . . . . On these terms the personal self rather than the thought might be treated as the immediate datum in psychology.

The self-concept is employed in a variety of domains, including the formation of identity and role-conceptions,<sup>147</sup> the regulation of behavior,<sup>148</sup> the maintenance of one's public image,<sup>149</sup> and social perception.<sup>150</sup>

A core insight offered by self-theories is the repudiation of the image of the self as a monolithic, unitary entity, as it has prevailed in the rationalist tradition.<sup>151</sup> Instead, their view resonates with Irving Goffman's Dramaturgy Theory in which people are likened to actors, constantly playing different roles on the different stages of their lives.<sup>152</sup> Self-theorists view the self as a con-

<sup>1</sup> WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 225-26 (1901).

<sup>147</sup> Sociologist Ralph Turner explained: "The idea of person is related to the ideas of self and identity, and merger of role and person is related to identification with a role." Ralph H. Turner, *The Role and the Person*, 84 *AM. J. OF SOC.* 1, 2 (1978).

<sup>148</sup> Markus and Wurf have suggested: "[I]t has become increasingly apparent that the representations of what individuals think, feel, or believe about themselves are among the most powerful regulators of many important behaviors." Hazel Markus & Elissa Wurf, *The Dynamic Self-Concept: A Social Psychological Perspective*, 38 *ANN. REV. PSYCHOL.* 299, 308, 311-12 (1987).

<sup>149</sup> See Barry Schlenker, *The Self*, in *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* (Leonard Berkowitz ed., 1985).

<sup>150</sup> See Keith J. Holyoak & P. C. Gordon, *Social Reference Points*, 44 *J. PERSONALITY & SOC. PSYCHOL.* 881, 881-87 (1983).

<sup>151</sup> See, for example:

One of the formidable stumbling blocks to linking the self-concept to behavioral regulation has been the view of the self-concept as a stable, generalized, or average view of the self. How could this crude, undifferentiated structure sensitively mediate and reflect the diversity of behavior to which it was supposedly related?

Markus & Wurf, *supra* note 148, at 300-01 (1987). Patricia Linville explained: "[T]he richness of self-knowledge demands not a unitary cognitive structure, but one housing many concepts and distinctions corresponding to various roles and aspects of the self." Patricia W. Linville, *Self-Complexity and Affective Extremity: Don't Put All of Your Eggs in One Cognitive Basket*, 3 *SOC. COG.* 94, 96 (1985).

This is not to say that this has been the sole view within personality theory. Lecky, for example, advocated a theory in which the conceptual system was taken to be an "integrated whole," "a unified scheme of experience." PRESCOTT LECKY, *SELF-CONSISTENCY: A THEORY OF PERSONALITY* (1961).

<sup>152</sup> In his dramaturgy approach to social behavior, Erving Goffman posed a distinction among regions of behavior, most notably between the front of a stage and its back part. The front stage is where people play out their official, desired and expected roles. The backstage is where performers express their suppressed behavior and construct the illusions and roles to be presented on the front stage. The backstage is where the performer can relax, drop her front, forgo speaking in lines, and step out of the restrictions of the designated character. Backstages are typically partitioned from their front counterparts by well guarded passageways. Thus, Goffman exemplified, to preserve the bereaved's illusion that their beloved deceased is in a tranquil state of rest, the undertaker must be able to keep them away from the room in which the corpses are drained, stuffed, and painted. Similarly, in many service trades, technicians request their customers to leave them to repair



struct that varies significantly across time and space.<sup>153</sup> People have different aspects or identities, which are influenced by social situations, role expectations, audiences, goals, mood states, or by combinations of these and other variables.<sup>154</sup> For example, imagine a person who is a teacher, a researcher, a parent, a spouse, a tennis player, and a friend. Which of these self-aspects, or identities, will be prominent at a given time is contingent on the particular situation, encounter or relationship one is experiencing at that moment.<sup>155</sup>

This observation of the variability and multiplicity of self-aspects has significant consequences for the self-concept. The self-concept that emerges in the literature is that of a differentiated,<sup>156</sup> multifaceted,<sup>157</sup> dynamic,<sup>158</sup> and flexible<sup>159</sup> construct.

their goods in private. When the customer returns, the product is presented to her in good working order, that incidentally conceals the amount and kind of work that was performed, the mistakes that were made before getting it fixed, and other details the customer would have to know in order to be able to assess the reasonableness of the fee asked. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 106-40 (1959).

<sup>153</sup> See John F. Kihlstrom & Stanley B. Klein, *Self-Knowledge and Self-Awareness*, in *THE SELF ACROSS PSYCHOLOGY: SELF RECOGNITION, SELF-AWARENESS, AND THE SELF CONCEPT* 5, 7 (John Gay Snodgrass & Robert L. Thompson eds., 1997).

<sup>154</sup> See Carolin Showers, *Compartmentalization of Positive and Negative Self-Knowledge: Keeping Bad Apples Out of the Bunch*, 62 *J. PERSONALITY & SOC. PSYCHOL.* 1036 (1992). Within sociology, this view of the self construct is particularly associated with the strand of Symbolic Interactionism. See SHELDON STRYKER, *SYMBOLIC INTERACTIONISM: A SOCIAL STRUCTURAL VERSION* (1980).

<sup>155</sup> See Linville, *supra* note 151, at 97-98; see also Markus & Wurf, *supra* note 148, at 300. As Brown and Kenrick have explained: “[C]urrent research on the relationship between beliefs and behaviors indicates that people often have a number of different beliefs on the same topic.” Stephanie L. Brown & Douglas T. Kenrick, *Paradoxical Self-Deception: Maybe Not So Paradoxical After All*, 20 *BEHAV. & BRAIN SCI.* 109 (1997).

<sup>156</sup> Criticizing the view of the mind as an undifferentiated unity, Livermoore and Meehl have endorsed a “model of the mind which postulates the existence of distinguishable processes, state-variables, part-functions, factors, intrapsychic ‘structures,’ and the like.” Joseph M. Livermoore & Paul E. Meehl, *The Virtues of M’Naghten*, 51 *MINN. L. REV.* 789, 811 (1967). Similarly, Amelie Rorty depicted one image of the self according to which “the mind is not a unified system but rather ‘a problematically yoked-together bundle of partly autonomous systems. Not all parts of the mind are equally accessible to each other at all times.’” Rorty, *supra* note 144, at 17.

<sup>157</sup> Citing William James, Linville explained:

The self is cognitively represented as a complex structure that develops to help organize vast amounts of self-relevant knowledge and is evoked to process information about the self. While the exact form of self-knowledge remains an open question, what does seem clear is that we think about ourselves in terms of multiple aspects.

Linville, *supra* note 151, at 95; see also Showers, *supra* note 154, at 1036.

We are talking of an aggregate of self-aspects that are constructed and activated to fit the particulars of given situations.<sup>160</sup> John Kihlstrom and Stanley Klein have concluded: “[E]ach of us possesses a repertoire of context-specific self-concepts—a sense of what we are like in different classes of situations.”<sup>161</sup>

This view of the self raises serious questions with respect to the structure of the self-concept.<sup>162</sup> How elaborate is this construct? How does the self organize this array of aspects? To what extent do the individual aspects relate to one another? Are there systematic relationships among the various self-aspects? This paper does not purport to offer a general model of the structure of the self-concept. For our current purposes, it is sufficient that we focus on the interrelatedness of self-aspects within the structure of the self.

It is becoming increasingly evident that it is not only the content of one’s self-knowledge that is important in determining its significance, but also the way in which that knowledge relates to and interacts with other aspects of the self.<sup>163</sup> Patricia Linville offered a model of the self that is based on a large associative network. She explained: “Not all self-aspects are activated at any given time. Rather, specific self-aspects are activated depending on such factors as the context and associated thoughts, their relation to currently activated self-aspects, and their recency and frequency of activation.”<sup>164</sup>

In such associative networks, the more strongly related the self-aspects, the more they influence one another; in Linville’s

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<sup>158</sup> See Markus & Wurf, *supra* note 148, at 299-300.

The unifying premise of the last decade’s research on the self is that the self-concept does not just reflect on-going behavior but instead mediates and regulates this behavior. In this sense the self-concept has been viewed as dynamic—as active, forceful, and capable of change. It interprets and organizes self-relevant actions and experiences; it has motivational consequences, providing the incentives, standards, plans, rules, and scripts for behavior; and it adjusts in response to challenges from the social environment.

*Id.*

<sup>159</sup> See Kihlstrom & Klein, *supra* note 153, at 7.

<sup>160</sup> See Showers, *supra* note 154, at 1036.

<sup>161</sup> See Kihlstrom & Klein, *supra* note 153, at 7.

<sup>162</sup> See Linville, *supra* note 151, at 98.

<sup>163</sup> See Sheldon Stryker & Richard T. Serpe, *Identity Salience and Psychological Centrality: Equivalent, Overlapping, or Complimentary Concepts?*, 57 SOC. PSYCHOL. Q. 16, 17 (1994).

<sup>164</sup> Patricia Linville, *Self-Complexity as a Cognitive Buffer Against Stress-Related Illness and Depression*, 52 J. PERSONALITY & SOC. PSYCHOL. 663, 664 (1987).

terms, they “spill over to color thoughts and feelings about the other.”<sup>165</sup> A self structure that consists of a great number of self-aspects which are unrelated or weakly interrelated is characterized by Linville as high in *self-complexity*.<sup>166</sup> Similarly, Carolin Showers referred to such self structures as ones that are high in compartmentalization.<sup>167</sup> A *compartmentalized self* is one in which there is a relatively high degree of isolation and insulation among the self-aspects. When a self-concept is compartmentalized, its self-aspects will tend not to spill over into other aspects of the self and not to be affected by them in return.<sup>168</sup>

Compartmentalization, it must be appreciated, is an effective apparatus in our cognitive toolbox. It enables people to efficiently process different kinds of self-relevant information, to act a greater number of roles, and to respond to a wider array of demands in a variety of situations.<sup>169</sup> Turner suggested that a compartmentalized personal organization is a useful way of handling conflicting situations, in that “one can ‘be’ whichever role provides the more favorable evaluation in the situation at hand.”<sup>170</sup> Philosopher Amelie Rorty underscores the benefits that follow from compartmentalization and other capacities that inhibit the integration of the self.<sup>171</sup>

Compartmentalization relieves us of the need to coordinate, criticize, or change our beliefs merely because they contradict beliefs that are better suited for different situations. It is important to note that beliefs do not necessarily erase previously held ones: “Belief systems may be like works in progress—a potpourri of compatible, semi-contradictory, and totally contradictory ideas.”<sup>172</sup> Indeed, this view of the compartmentalized self-concept corresponds to a larger body of research demonstrating the

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 663.

<sup>167</sup> See Showers, *supra* note 154, at 1036.

<sup>168</sup> See Linville, *supra* note 164, at 664.

<sup>169</sup> See Linville, *supra* note 151, at 99. Brown and Kenrick have provided an example:

When I am talking to my physician during my annual checkup I may fully believe alcohol has all the toxicity of strychnine. Later that same day, when I am chatting with my friends in a pub, I may just as fully believe that a few drops of the spirits can have all the benefits of ambrosia.

Brown & Kenrick, *supra* note 155, at 109.

<sup>170</sup> Turner, *supra* note 147, at 14.

<sup>171</sup> Rorty, *supra* note 144, at 16-17.

<sup>172</sup> Brown & Kenrick, *supra* note 155, at 109-10.

existence of multiplicity and contradiction within attitudes,<sup>173</sup> norms,<sup>174</sup> and theories of human perception.<sup>175</sup> This view also corresponds to psychodynamic theories that emphasize the defensive function served by insulating contradictory aspects of the self.<sup>176</sup>

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<sup>173</sup> Wilson and his colleagues have explained that a growing body of research indicates:

[A]ttitudes are constructed from whatever information happens to be currently accessible. Several authors have suggested that people often have a large, conflicting database relevant to their attitudes on any given topic and that the attitude people have at any given time depends on the subset of these data to which they attend. If so, then, attitudes will be unstable to the extent that the information that is accessible at one time implies a different evaluation than the information that is accessible at a later time. We refer to this approach as the *attitudes-as-constructions* model, which assumes that people's attitudes vary in an almost whimsical fashion, depending on the information about the attitude object that happens to come to mind.

Maureen Wang Erber et al., *Attitude Strength, Attitude Stability, and the Effects of Analyzing Reasons*, in *ATTITUDE STRENGTH: ANTECEDENTS AND CONSEQUENCES* 433-434 (Richard E. Petty & Jon A. Krosnick eds., 1995) (citations omitted); see also Timothy D. Wilson & Sara D. Hodges, *Attitudes as Temporary Constructions*, in *THE CONSTRUCTION OF SOCIAL JUDGMENTS* 37, 60 (Leonard L. Martin & Abraham Tesser eds., 1992); Timothy D. Wilson, et al., *A Model of Dual Attitudes*, 107 *PSYCHOL. REV.* 101 (2000); J. Richard Eiser, *Toward a Dynamic Conception of Attitude Consistency and Change*, in *DYNAMICAL SYSTEMS IN SOCIAL PSYCHOLOGY* 197, 216 (Robin R. Vallacher & Andrej Nowak eds., 1994); Abraham Tesser, *Self-Generated Attitude Change*, in 10 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 289, 313 (Leonard Berkowitz ed., 1978); Abraham Tesser & Claudia Cowan, *Some Attitudinal and Cognitive Consequences of Thought*, 11 *J. RES. PERSONALITY* 216 (1977).

<sup>174</sup> Robert Cialdini and his colleagues have observed that incompatible norms can exist simultaneously. They have stated, however, that "the simultaneous existence of incompatible social norms is no longer a damaging criticism of normative accounts if we assume that the conflicting norms may coexist within the same society but that the one that will produce congruent action is the one that is temporarily prominent in consciousness." Robert B. Cialdini et al., *A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior*, in 24 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 201, 205 (M. Zanna ed., 1991).

<sup>175</sup> John Darley offered a similar explanation for the often contradictory ways by which people explain other people's behavior. Because cultural truisms are often conflicting, we carry around contradictory rules for reading the meaning of the conduct of others. Darley stated, "[T]hese differential decoding schemes will be differentially called upon when they suit the case that a person is trying to make." John M. Darley, *Mutable Theories That Organize the World*, 6 *PSYCHOL. INQUIRY* 290, 293 (1995).

<sup>176</sup> Karen Horney, for example, stated that by compartmentalizing, "[T]he person disconnects conflicting currents and thereby no longer experiences conflicts as conflicts." KAREN HORNEY, *NEUROSIS AND HUMAN GROWTH: THE STRUGGLE TOWARD SELF-REALIZATION* 185 (1950). Similarly, Showers stated that, like splitting

It is important to note that compartmentalization not only enables the adoption of discrepant positions, it also serves an ancillary function of keeping the discrepancy out of one's awareness.<sup>177</sup> The insulation of the inconsistent self-aspects avoids recognition of the incompatibilities, thus preventing any discomfort that might otherwise have been experienced.<sup>178</sup> In sum, Rorty claims: "The structures and capacities that enable us to manipulate ourselves in situations of indeterminacy allow self-deception as an unintended, tangential consequence."<sup>179</sup>

This approach to the self-concept, however, must not be taken to mean that the self consists only of disjointed fragments of selfhood.<sup>180</sup> Compartmentalization is never complete. Rather, it is a relative feature. Healthy, adaptive people always have some de-

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the self into positive and negative aspects, compartmentalization serves an important defensive mechanism for coping with negative experience and negative knowledge about the self. See Showers, *supra* note 154, at 1036. Linville explained that "greater self-complexity moderates the adverse impact of stressful events on physical and mental health outcomes." Linville, *supra* note 164, at 663.

<sup>177</sup> See Rorty, *supra* note 144, at 21.

<sup>178</sup> Baumeister and Leith have explained:

[S]elf-deception involves biased links between plausible ideas, so even careful scrutiny would only find each individual conclusion plausible. Self-deception is spotted only by comparing patterns of aggregated observations . . . . Like prejudice, self-deception may be difficult to prove in the single act and hence can be seen only after aggregating many responses and making suitable comparisons. Self-deceivers can thus assure themselves that their individual conclusions were reached by plausible, reasonable, justified inference processes.

Ray F. Baumeister & Karen Pezza Leith, *Biased Steps Toward Reasonable Conclusions: How Self-Deception Remains Hidden*, 20 BEHAV. & BRAIN SCI. 106, 107 (1997). Brown and Kenrick add: "[W]e may rarely dedicate the effort required to pull all our beliefs together and come to a logical conclusion on most of what we think." Brown & Kenrick, *supra* note 155, at 110.

Wilson and Brekke offer a theory of what they call mental contamination. They suggest that biases are most powerful when they are accompanied by an ancillary mechanism that prevents attention to their distorting effect. See Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117 (1994). A similar explanation can be offered with regard to the finding that when people's attitudes undergo change, they tend to be unable to recall their original, pre-changed attitudes. See Keith J. Holyoak & Dan Simon, *Bidirectional Reasoning in Decision Making by Constraint Satisfaction*, 128 J. OF EXPERIMENTAL PSYCHOL.: GEN. 3 (1999); George R. Goethals & Richard F. Reckman, *The Perception of Consistency in Attitudes*, 9 J. OF EXPERIMENTAL SOC. PSYCHOL. 491 (1973).

<sup>179</sup> Rorty, *supra* note 144, at 17 (citation omitted). *But cf.* Mark Johnston, *Self-Deception and the Nature of the Mind*, in PERSPECTIVE ON SELF-DECEPTION 63-91 (Brian P. McLaughlin & Amelie Oksenberg Rorty eds., 1998).

<sup>180</sup> See Rorty, *supra* note 144, at 25.

gree of integration within their self-concepts; that is part of what characterizes us as individuals and makes us distinguishable from one another.<sup>181</sup> Kihlstrom and Klein propose that people's multiple self-aspects are governed by some personal "self-prototype,"<sup>182</sup> Seymour Epstein suggests that a personality structure is stabilized by means of broad postulates,<sup>183</sup> and Markus and Wurf offer a model of the self-concept that consists of a stable core and a malleable periphery.<sup>184</sup> People vary on this dimension, that is, self-concepts range from relatively high degrees of integration to high degrees of compartmentalization.<sup>185</sup>

When applied to the question of self-deception, this model of self-compartmentalization overcomes the difficulties that have traditionally plagued the debate. Instead of a paradoxical view of the self, it is possible to conceive of people holding incompatible, even contradictory, beliefs, more or less contemporaneously, as long as they can successfully compartmentalize the respective self-aspects from one another.<sup>186</sup>

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<sup>181</sup> See Showers, *supra* note 154, at 1048; see also Stryker & Serpe *supra* note 163.

<sup>182</sup> Kihlstrom and Klein suggest a concept which they call the self-as-prototype. "The self-as-prototype might be abstracted from these contextual selves. Thus, we might begin to think about a hierarchy of selves, with more or less context-specific selves at lower levels, and a very abstract prototypical self at the highest level." Kihlstrom & Klein, *supra* note 153, at 7.

<sup>183</sup> Seymour Epstein, *The Self-Concept: A Review and the Proposal of an Integrated Theory of Personality*, in PERSONALITY: BASIC ASPECTS AND CURRENT RESEARCH 82, 91 (Ervin Staub ed., 1980).

<sup>184</sup> Markus and Wurf state:

[T]he dynamic approach to the self-concept allows for a self-concept that can be at once both stable and malleable. Core aspects of self (one's self-schemas) may be relatively unresponsive to changes in one's social circumstances. Because of their importance in defining the self and their extensive elaboration, they may be chronically accessible. Many other self-conceptions in the individual's system, however, will vary in accessibility depending on the individual's motivational state or on the prevailing social conditions. The working self-concept thus consists of the core self-conceptions embedded in a context of more tentative self-conceptions that are tied to the prevailing circumstances.

(citation omitted). Markus & Wurf, *supra* note 148, at 306. Morris Rosenberg emphasized the notion of centrality of self aspects within the organization of the self-concept. He viewed self aspects as varying along a range from peripheral to central, or secondary to cardinal, which are determined primarily by the importance of that component to the person him- or herself. MORRIS ROSENBERG, *CONCEIVING THE SELF* 18-19 (1979). Stryker and Serpe prefer the concept of salience as a measure for the hierarchical ordering of the self-concept. See Stryker & Serpe, *supra* note 163, at 17.

<sup>185</sup> See Turner, *supra* note 147, at 14.

<sup>186</sup> As Herbert Kelman and Reuben Baron explained: "[A] person may continue to hold two incompatible beliefs, or to act in ways that contradict his values, by

Before turning to apply this approach to attain a better understanding of Cardozo, or any other judge for that matter, one might first pause to consider the following objection. This positive framework might unduly distract us from a needed normative evaluation. Labeling discrepant accounts as instances of *self-complexity* and *compartmentalization* draws us into a technical framework that runs the danger of ignoring possible ethical dimensions of people acting in ways that deviate from the accounts they give for their behavior. This is particularly acute with respect to functionaries vested with extensive powers over our social lives, and whose discretion is moderated primarily by their self-restraint. Perhaps we ought to condemn such people for failing to integrate their self-aspects, even if their deeds fall short of intentional misleading. Thus we could enunciate an affirmative duty to compare and integrate self-conceptions. Perhaps we ought to attach stricter sanctions to discrepancies that are borne and maintained by self-complexity and mental compartmentalization, or relax the definition of what amounts to a *lie* or a *hypocrisy*.<sup>187</sup> However, the development of such a moral framework extends well beyond the boundaries of this essay.

#### D. Back to Cardozo

This theoretical framework brings us closer to understanding the discrepancy that pervades Cardozo's work. As stated, to understand this man and his legacy we must substitute the prevailing view of Cardozo's legacy as a single, uniform project with an approach that isolates the aspects of the person that correspond to his profound inconsistencies. In particular, we should focus on the differences between Cardozo, the commentator on judging, and Cardozo, the judge. An interesting question is why did Car-

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keeping different areas of his life apart from each other." Herbert C. Kelman & Reuben M. Baron, *Determinants of Modes of Resolving Inconsistency Dilemmas: A Functional Analysis*, in THEORIES OF COGNITIVE CONSISTENCY: A SOURCEBOOK 670, 672-73 (Robert P. Abelson et al. eds., 1968). Baumeister and Leith explained: "Most cases of self-deception involve beliefs about the self, and we propose that typical people hold multiple, contradictory views of what they may be like. Their best guess of the correct view may wander back and forth among those views, as social interactions yield encouraging or discouraging feedback." Baumeister & Leith, *supra* note 178, at 106; *see also* Brown & Kenrick, *supra* note 155, at 109 ("[T]he simultaneous possession of logically contradictory beliefs can also be explained without any mysterious cognitive tricks.").

<sup>187</sup> For a definition of a lie, see BOK, *supra* note 138, at 6. For such a proposal, see DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 199-200 (1997).

dozo endorse such disparate characterizations of the judicial process? Why, in other words, did he expose himself to the risk of criticism (though the fact that this discrepancy has gone unnoticed suggests that he did not take much of a risk)? More generally, one would wonder whether there is something about the judicial function that promotes—and possibly benefits from—the emergence of disparate roles and inconsistent self-conceptions.

Let us begin by examining what causes judges to impose closure on their opinions. Like any complex social practice, judicial practice is multiply-determined. One natural candidate is the notion that closure serves the judicial function well.<sup>188</sup> This functional explanation is based on the belief that closure enhances the acceptability of the decisions, in that putative obviousness, inevitableness, and correctness carry more conviction. Concurrently, the seeming necessity of deciding in the only possible way minimizes judges' exposure to criticism. In this sense, closure is a self-perpetuating judicial style. Judges convey this implicit style as the standard of good judging, and the legal community expects nothing less.

This functional explanation is all too familiar. Indeed, it was operative in Cardozo's approach to his work. Like Holmes before him,<sup>189</sup> Cardozo was well aware of the value of closure. He stated critically that "discretion, unmeasured and unregulated, is felt to open the door to tyranny and corruption."<sup>190</sup> Elsewhere he lamented: "[A]s if judges must lose respect and confidence by the reminder that they are subject to human limitations."<sup>191</sup> Indeed, he brought this insight to bare in his own opinions by imparting opinions that were distinctly doubtless, obviously correct, and pre-determined.<sup>192</sup> It goes without saying

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<sup>188</sup> See Dan Simon, *A Psychological Model of Judicial Reasoning*, 30 RUTGERS L.J. 1, 15-18 (1998).

<sup>189</sup> Holmes explained:

Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as lawmakers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics.

But the certainty is only an illusion, nevertheless.

Oliver Wendell Holmes, Jr., *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 7 (1894).

<sup>190</sup> BENJAMIN N. CARDOZO, *Jurisprudence*, in *SELECTED WRITINGS*, *supra* note 63, at 23.

<sup>191</sup> BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS*, *supra* note 63, at 168.

<sup>192</sup> See *supra* notes 87-97 and accompanying text.



that Cardozo would never have made his way onto the Supreme Court and into the coveted pantheon had his opinions revealed the openness he described in his off-bench writing. Great reputations are rarely based on opinions that are admittedly filled with cracks, crevices, and loopholes,<sup>193</sup> and on decisions reached by groping for light and by testing and re-testing hypotheses.<sup>194</sup>

The functional explanation is supplemented and reinforced by the fact that closure is a naturally occurring cognitive phenomenon that accompanies mental tasks of the kind involved in legal decision-making. In a series of experiments performed by cognitive psychologist Keith Holyoak and myself, we examined such mental processes and identified something that we have called the *coherence bias*.<sup>195</sup> In brief, this research identifies some natural, though artifactual, consequences of mental processes of the kind judges perform. The findings show that even in the face of complex, difficult, underdetermined tasks, people ultimately experience their decisions as being solidly determined by the arguments and thus singularly correct. Accordingly, they report high levels of confidence in the decisions. It follows then that the judge's phenomenological experience of closure is largely genuine, rather than being a form of posturing or a means of persuasion. It is interesting to note that Cardozo's off-bench account of judicial decision making is virtually identical to this psychological explanation of the process.<sup>196</sup>

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<sup>193</sup> See *supra* note 84 and accompanying text.

<sup>194</sup> See *supra* notes 80-82 and accompanying text.

<sup>195</sup> The principal finding of these experiments is that the cognitive process results in some change in the way the decision variables are experienced by the decision maker. The change is always in the direction of providing the chosen outcome with stronger support than the same subjects believed when they evaluated the same inferences in a preliminary, spontaneous phase. See Holyoak & Simon, *supra* note 178; see also Dan Simon et al., *The Emergence of Coherence over the Course of Decision Making*, J. OF EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY AND COGNITION (forthcoming).

<sup>196</sup> The similarities between Cardozo's account and this psychological model are too numerous to specify, as can be seen throughout the article. See Simon, *supra* note 188. A notable demonstration is Cardozo's metaphor of how a compelling decision emerges out of obscurity:

The curious thing is that sometimes in the hardest cases, in cases where the misgivings have been greatest at the beginning, they are finally extinguished, and extinguished most completely. I have gone through periods of uncertainty so great, that I have sometimes said to myself, "I shall never be able to vote in this case either one way or the other." Then, suddenly the fog has lifted. I have reached a stage of mental peace. I know in a vague way that there is doubt whether my conclusion is right. I must needs admit

At the same time, a judge seeking insights into the judicial process is bound to render an account of openness. This is particularly true for an introspective judge; and few judges have shown the kind of introspection that emerges from Cardozo's account. Indeed, in the eyes of many (myself included), his insights are the most enlightening and valuable description of the mental processes involved in judicial decision making.<sup>197</sup> But over and above providing insight, his account was part of a broader project of updating jurisprudence and bringing it into line with modern thinking. Two decades into the twentieth century, the essentialist and foundationalist approaches to law could no longer be taken seriously. To be considered plausible, an account of judging required a concession to the imperfection of conceptual orderliness, to the fallibility of judges, and to the inevitable subjectivity and contingency of judicial decisions.

As Richard Weisberg has pointed out, Cardozo was caught in a difficult existential dilemma.<sup>198</sup> As revealed most clearly in an address he made before the New York State Bar Association in 1932, he was torn between the new faith of the judicial realists on the one hand, and the bar and bench's "quest for certainty" on the other. Throughout the lengthy address, he both endorsed and criticized the intellectual program of the realists.<sup>199</sup> Rather than solve the dilemma, Cardozo alternated skillfully and unnoticeably between its two horns. Thus, by admitting to the openness of the judicial process he appeals to our contemporary, sophisticated sensibilities, while his insistence on its closure made for more effective judging. It is apparent that Cardozo enjoyed

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the doubt in view of the travail that I suffered before landing at the haven. I cannot quarrel with any one who refuses to go along with me; and yet, for me, however it may be for others, the judgment reached with so much pain has become the only possible conclusion, the antecedent doubts merged, and finally extinguished, in the calmness of conviction. I have little question that these recurrent stages of agitation and serenity are the common experience of other toilers in fields of intellectual effort.

BENJAMIN N. CARDOZO, *The Paradoxes of Legal Science*, in *SELECTED WRITINGS*, *supra* note 63, at 80-81.

<sup>197</sup> See Kaye, *A Law Classic*, *supra* note 9, at 1041 ("[D]espite my own wide reading about my beloved craft, I have yet to find a better articulation of what appellate judges do."). Posner stated that Cardozo wrote "the first and still the best known demystified statement of a judge's philosophy of adjudication. . . ." POSNER, *supra* note 25, at 130; see also Simon, *supra* note 188, at 118.

<sup>198</sup> Weisberg, *supra* note 16, at 297.

<sup>199</sup> See *supra* note 85 and accompanying text. Cardozo's attitude towards judicial realism is deeply ambivalent. John Goldberg, however, interpreted his position as being more critical than supportive. Goldberg, *supra* note 45, at 1450-55.

the benefits of propagating both positions. Indeed, his extra-judicial account bolstered the credibility of his judicial image, while his off-bench reflections were heightened by his stature as a judge.<sup>200</sup>

One of the striking things about Cardozo is the perfection with which he performed each of the contradictory capacities. The way in which he seems to have both internalized, and dissociated himself from, the two roles suggests that his mental compartmentalization was profound.

In this regard, he was very different from Holmes. As Tom Grey has shown, the legacy of Holmes is not free of complexities. As a legal theorist, Holmes is best known for his propagation of a jurisprudence that was anti-conceptualist, experientialist and pragmatist. Less familiar is his exaltation of adherence to precedent and deference to legislatures. This ambivalence carried over into his judicial work. Notwithstanding some memorable opinions—most of which were dissents—that accentuated his anti-conceptualism, Holmes' general stance seems to have been devoted to the attainment of a conceptual ordering of doctrines and adherence to precedent and legislative will.<sup>201</sup>

In contrast to Cardozo, however, Holmes was forthright about the tension, and he provided an explanation that suited his elitist, detached personality. While conceding that certainty was illusory and that rules were invariably underdetermined, he urged that law should be followed nonetheless—if for no better reason than that the law was there.<sup>202</sup> Unlike Cardozo, on the rare occa-

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<sup>200</sup> As stated above, most observers treat Cardozo's judicial and extra judicial work as complementary parts of one successful life project. See *supra* notes 55-60 and accompanying text. As Judge Keeton observed, "It was probably best that [Cardozo] maintained that reluctance, lest as much candor about policy reasoning as I would urge today would have impaired his ability to participate effectively along with others in leading the profession away from mechanical jurisprudence as much as he and they succeeded in doing." Keeton, *Paradigmatic*, *supra* note 13, at 303-04.

<sup>201</sup> See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787, 816 (1989).

<sup>202</sup> In an address to the Massachusetts Bar Association, Holmes explained:

But we have a great body of law which has at least this sanction[:] that it exists. If one does not affirm that it is intrinsically better than a different body of principles which one could imagine, one can see an advantage which, if not the greatest, at least, is very great—that we know what it is. For this reason I am slow to assent to overruling a decision. Precisely my skepticism, my doubt as to the absolute worth of a large part of the system we administer, or of any other system, makes me very unwilling to increase the doubt as to what the court will do. I have noticed the opposite ten-

sions in which Holmes substituted his formalist stance with that of a reformer, he explicitly announced the change of roles.<sup>203</sup> It is interesting to note that Holmes' candor has not been placed under serious doubt.

Role-theorists explain that when people excel in their roles, they tend to internalize the related attitudes and behaviors.<sup>204</sup> Typically, this internalization generates some carry-over effect into other aspects of the self.<sup>205</sup> In Cardozo's case, it seems that neither role had any such effect. He performed both of these incompatible functions masterfully, and his excellence in the one role did not hinder his performance in the other. This unusual degree of compartmentalization might be attributable to Cardozo's complex, protean personality.<sup>206</sup>

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dency in minds that regarded our corpus juris as an image, however faint, of the eternal law.

OLIVER WENDELL HOLMES, *Twenty Years in Retrospect*, in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 154, 156-57 (Mark DeWolfe Howe ed., 1962).

<sup>203</sup> See Grey, *supra* note 61, at 41.

<sup>204</sup> It is important to remember that roles are not entirely an intra-personal matter. As Turner explained, there is a close relationship between one's evaluation in the eyes of significant others and role merger. In general, people tend to merge into positively evaluated roles which they enact well, and they tend to structure their identities around these roles. Turner, *supra* note 147, at 14-15; see also Stryker & Serpe, *supra* note 163, at 16.

<sup>205</sup> As Turner explained:

By each individual, some roles are put on and taken off like clothing without lasting personal effect. Other roles are difficult to put aside when a situation is changed and continue to color the way in which many of the individual's roles are performed. The question is not whether the role is played well or poorly or whether it is played with zest or quite casually. Role embracement can coexist with strict role compartmentalization. . . . The question is whether the attitudes and behavior developed as an expression of one role carry over into other situations. To the extent that they do, we shall speak of a merger of role with person. . . . When a role is deeply merged with the person, socialization in that role has pervasive effects in personality formation. When there is little or no merger, role-socialization effects remain strictly compartmentalized.

Turner, *supra* note 147, at 1-2 (citation omitted).

<sup>206</sup> Cardozo's biographers note that he was something of a "protean figure." Polenberg explained:

People saw in Cardozo what they wished to see, made of him what they wanted him to be, largely because he was such a protean figure. Commitment and detachment, liberalism and conservatism—all were parts of his many-sided makeup, and all found their way into his writing and his opinions.

POLENBERG, *supra* note 27, at 242. Similarly, Kaufman contended with the charges that Cardozo was perceived as an ambiguous person. Admitting that "[i]t is possible to find ambiguity because Cardozo did not supply a single formula for making deci-

## III

## CARDOZO'S ENDURING SIGNIFICANCE

Before we can appreciate the significance of Cardozo's legacy, we should first ask to what extent his account of the judicial function is still relevant in contemporary legal thought.

A. *Contemporary Accounts of the Judicial Function*

In the vast majority of current off-bench writing about the judicial process, judges continue to depict an image of openness. Judge Kaye states that the idea that appellate decision making is devoid of judicial creation amounts to "intellectual nonsense."<sup>207</sup> Former Judge Wachtler states that "[t]he former characterization has long given way to the frank recognition that judicial evolution . . . is, call it what you will, really a distinct form of lawmaking."<sup>208</sup> Judge Aldisert observes that judicial lawmaking is "now widely accepted."<sup>209</sup> Justice Traynor states that today's judge is "necessarily an active analyst and not a passive oracle."<sup>210</sup> Making judicial decisions, Justice Pollock explains, is "unavoidably creative,"<sup>211</sup> and requires "myriad choices at every step."<sup>212</sup> Judge Keeton describes judicial lawmaking as an "inevitable need."<sup>213</sup> Moreover, the creative character of judging is considered by many judges to be normatively desirable.<sup>214</sup>

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sions," Kaufman attributed any erroneous inferences to our mistaken observations. He simply concluded that "Cardozo was not ambiguous about his own position." See KAUFMAN, *supra* note 27, at 576.

Posner observed some of this elusiveness in Cardozo's jurisprudence:

Cardozo wrote opinions that can be invoked by judges and scholars who want to broaden the scope of liability, and also opinions that can be invoked by judges and scholars who want to limit or reduce that scope. Such were his narrative and casuistical skills that each set of opinions is a powerful support for one of the opposing positions, while the apparent (and I think real) inconsistency between the two sets provides a challenge to the imaginative powers of law professors, students, trial lawyers, and judges.

POSNER, *supra* note 25, at 113.

<sup>207</sup> Kaye, *The Human Dimension*, *supra* note 9, at 1006.

<sup>208</sup> Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1, 2 (1990).

<sup>209</sup> Ruggero J. Aldisert, *Philosophy, Jurisprudence, and Jurisprudential Temperament of Federal Judges*, 20 IND. L. REV. 453, 473 (1987).

<sup>210</sup> Roger J. Traynor, *The Limits of Judicial Creativity*, 29 HASTINGS L. J. 1025, 1026 (1978).

<sup>211</sup> Stewart G. Pollock, *The Art of Judging*, 71 N.Y.U. L. REV. 591, 593 (1996). Justice Pollock is a member of the New Jersey Supreme Court.

<sup>212</sup> *Id.* at 594.

<sup>213</sup> Keeton, *Paradigmatic*, *supra* note 13, at 302.

<sup>214</sup> Justice Brennan states: "Sensitivity to one's intuitive and passionate responses,

However, it would be erroneous to conclude that these depictions of openness accurately reflect the dominant legal culture. A quick glance in the case law produced by courts reveals that these off-bench statements fail to reflect the reality of the way law is actually applied. As some astute critics have insisted, although officially pronounced dead, legal formalism continues to dominate judicial reasoning.<sup>215</sup> The majority of judicial opinions actually generated in courtrooms across the country continue to sound as if discovering extant law is the primary *modus operandi* of judging.<sup>216</sup> Posner observed that most decisions are couched in a “vocabulary of apodictic certainty,”<sup>217</sup> and purport to have been dictated by authoritative legal standards.<sup>218</sup> Eskridge and Frickey have similarly criticized opinions for being wooden, overstated, and one-sided.<sup>219</sup> Duncan Kennedy emphasizes the puta-

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and awareness of the range of human experience, is therefore not only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than feared.” Brennan, *supra* note 8, at 959. Justice Pollock asks: “Does anyone really want judges to be devoid of imagination, good sense, courage, and compassion?” Pollock, *supra* note 211, at 594. Justice Scott asserts: “[J]udges do make, are duty bound by, and are obligated under our republican form of government, to make law.” Gregory Kellam Scott, *Judge-Made Law: Constitutional Duties & Obligations Under the Separation of Powers Doctrine*, 49 DEPAUL L. REV. 511, 512 (1999). Justice Scott is a member of the Colorado Supreme Court.

It should be noted that some judges still deem the creative function as an undesirable, if unavoidable, feature of the practice. Justice Clarence Thomas, for example, concedes: “[I]t is perhaps here that the legal realist critique of the law has some merit: many cases will have some play in the joints.” Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 5, (1996). Nonetheless, he insists that the “popular idea that Justices and judges somehow ‘make’ the law . . . is a dangerous idea that is at war with the very concept of impartial judging.” *Id.* at 2.

<sup>215</sup> See Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989 (1996).

<sup>216</sup> See Simon, *supra* note 188, at 10-12.

<sup>217</sup> RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 30 (1990).

<sup>218</sup> See *id.* at 189. Posner explained:

Most judicial opinions even in the toughest cases depict the process of reasoning as a logical deduction (syllogistic or enthymematic) from previous decisions or from statutes viewed as transparent sources of rules, and, consistent with the logical form, imply that even the very toughest case has a right and a wrong answer and only a fool would doubt that the author of the opinion had hit on the right one.

Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 865 (1988).

<sup>219</sup> William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 364-65 (1990). They explain: “The Court unrealistically asserts that all of the interpretive factors support the Court’s interpretation or are at least neutral; very often the Court simply ignores those considerations that point in a different direction.” *Id.* at 365. Eskridge and Frickey add: “Too often the Court’s statutory interpretations ignore opposing arguments or treat

tive inevitableness of opinions.<sup>220</sup> Scott Altman notes that most judicial opinions are written as if the outcome were obvious and void of doubt.<sup>221</sup> Thus, judicial argument continues to be described as an act of discovery,<sup>222</sup> and to be framed in a rhetoric of inevitability,<sup>223</sup> and closure.<sup>224</sup>

This is not to say that nothing has happened to judicial reasoning in the wake of the Realist Revolution. The pragmatic espousal of policy as a form of legal argument—a second centerpiece of Cardozo’s theory of adjudication<sup>225</sup>—has changed much about the way we engage in legal argument. But the account of judging—the depiction of the fallible, subjective, creator judge—is notably absent from the judicial practice.

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them in a dismissive, mechanical fashion, typically in footnotes, and too rarely do they engage in an open dialogue that notes the virtues of various positions and explains why one of them is preferable.” *Id.* at 371.

<sup>220</sup> DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 28-29 (1997). Paul Gewirtz states: “The typical . . . opinion is marked by a rhetoric of certainty, inevitability, and claimed objectivity, a rhetoric that denies the complexity of the problem and drives to its conclusion with a tone of self-assurance.” Paul Gewirtz, *On “I Know It When I See It,”* 105 *YALE L.J.* 1023, 1042 (1996).

<sup>221</sup> Scott Altman, *Beyond Candor*, 89 *MICH. L. REV.* 296, 305 n.29 (1990). Altman adds that “each of the applicable factors miraculously counsels ruling in favor of the winning party . . . [and] the judge need not select among competing rules, because the same party wins under all possible rules.” *Id.*

<sup>222</sup> See Frederick Schauer, *Giving Reasons*, 47 *STAN. L. REV.* 633, 642 n.23 (1995). Joseph Singer explains that liberal theories of adjudication “substantially rely on ‘finding’ metaphors; they hope to ‘discover’ the right answer, to ‘elaborate’ existing community values, to ‘uncover’ the principles embedded in precedent and social practice, to ‘balance’ interests.” Joseph William Singer, *Legal Realism Now*, 76 *CAL. L. REV.* 465, 532-33 (1998).

<sup>223</sup> Ferguson explains: “The monologic voice, the interrogative mode, and the declarative tone build together in what might be called a rhetoric of inevitability.” Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 *YALE J. L. & HUMAN.* 201, 213-16 (1990).

<sup>224</sup> Gerald Wetlaufer describes the judicial opinion as one where the judge’s arguments “are backed by as many authorities as circumstances require. Whenever possible, they take the form of deductive, syllogistic proofs. Thus, the judge announces the one true state of the facts and the one true meaning of the relevant texts.” Gerald Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 *VA. L. REV.* 1545, 1562 (1990). In Wetlaufer’s view, the rhetoric of law is a linked set of rhetorical commitments to

toughmindedness and rigor, to relevance and orderliness in discourse, to objectivity, to clarity and logic, to binary judgment, and to the closure of controversies. They also include commitments to hierarchy and authority, to the impersonal voice, and to the one right (or best) answer to questions and the one true (or best) meaning of texts.

*Id.* at 1552.

<sup>225</sup> See BENJAMIN N. CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS*, *supra* note 63, at 98-142.

We see then that the current judicial practice exists under an intensive, though generally ignored, dialectic tension between the characterization of openness and the practice of closure. The Realist Revolution's successful slaying of the dragons of conceptualism, objectivism, and foundationalism has left the judicial function in an epistemological morass and an institutional crisis.<sup>226</sup> Contemporary judges continue to feel pulled by the professional and institutional need to provide certainty and conceptual order, and thus resort to a narrative of obviousness, lack of doubt, adherence to past authorities, and impersonality.<sup>227</sup> Opinions that depict the decisions as having been determined by someone or something other than the judges themselves serve to ward off the persistent countermajoritarian objection.<sup>228</sup> On the other hand, judges can hardly stand by the implications of admitting to the account of closure. This characterization of the law and of their work is simply unconvincing.

To maintain its legitimacy and intellectual stature, the judicial branch needs more than its prescribed constitutional powers and the sheer force it exerts through the rhetoric of its opinions. Judges must also win over their wariest of audiences—critical students of the law. Thus, judges have no alternative but to admit that the law is not a gapless system and that judging necessarily entails openness.

On rare occasions, courts are called to bring the opposing accounts of the judicial function into consideration. Such was the case of *James B. Beam Distilling Co. v. Georgia*,<sup>229</sup> in which the U.S. Supreme Court decided a question regarding the retroactiv-

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<sup>226</sup> See Singer, *supra* note 222, at 504; see also ELIZABETH MENSCH, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 33 (David Kairys ed., 3d ed. 1998).

<sup>227</sup> Shirley Abrahamson explains: “[T]he sense that a decision is foredoomed by the law—or at least that the judge’s discretion is significantly limited—all give the judicial decision an authoritative, definitive quality.” Abrahamson, *supra* note 88, at 637. Justice Brennan states: “[T]he struggle for certainty, for confidence in one’s interpretative efforts, is real and persistent.” Brennan, *supra* note 8, at 962.

<sup>228</sup> Justice Ellen Ash Peters, senior justice on the Connecticut State Supreme Court, states: “[C]ourts risk much and gain little unless they use their constitutional powers sparingly.” Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. PITT. L. REV. 995, 1007 (1982). For a classic exposition of the counter-majoritarian debate, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962). For current scholarship, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971 (2000).

<sup>229</sup> 501 U.S. 529 (1991).



ity of the application of one of its own decisions. Speaking for a plurality, Justice Souter supported the retroactive application based on a view that the traditional function of courts is to decide cases in accordance with their “best current understanding of the law.”<sup>230</sup> Most notably, Justice Souter explained that this “reflects the declaratory theory of law, according to which the courts are understood only to find the law, not to make it.”<sup>231</sup> In a concurring opinion joined by Justices Marshall and Blackmun, Justice Scalia elaborated the meaning of the court’s power “to say what the law is,” as pronounced in *Marbury v. Madison*.<sup>232</sup> He explained:

I am not so naïve (nor do I think our forebears were) as to be unaware that judges in a real sense “make” law. But they make it *as judges make it*, which is to say *as though* they were “finding” it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.<sup>233</sup>

Probably more than any other contemporary judicial expression, the notion that judges make law but do so *as though* they were “finding” it, encapsulates and manifests the judicial duplicity inherent in the judicial process.

This duplicity has not been lost on the astute judges. Posner explained most judges believe that their effectiveness depends on “a belief by the public that judges are finders rather than makers of law.”<sup>234</sup> He also cautioned us from being misled by the fact that judges and their defenders “emit a continuous stream of disclaimers that judges exercise power.”<sup>235</sup> Judge Mikva explains that most judges “deny that they are making policy even when they do fill in the gaps.”<sup>236</sup> In a similar vein, Judge Wald comments that “while judges still typically write as if they were absolutely certain about the rightness and soundness of their analysis and decisions, everyone (including the judges) knows that’s not necessarily the case.”<sup>237</sup> Indeed, Cardozo himself was aware of

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<sup>230</sup> *Id.* at 535 (citations omitted).

<sup>231</sup> *Id.* at 535-36 (citations omitted).

<sup>232</sup> *Id.* at 549 (Scalia, J., concurring).

<sup>233</sup> *Id.* (citations omitted).

<sup>234</sup> POSNER, *supra* note 217, at 190.

<sup>235</sup> *Id.* at 191.

<sup>236</sup> Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979, 981 (1989).

<sup>237</sup> Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1417 (1995). Similarly, Judge Wald explains that judges write opinions mainly for two reasons:

judges' denial of the double-consciousness. He spoke of the tendency of judges "to disguise the innovation even from themselves, and to announce in all sincerity that it was all as it had been before."<sup>238</sup> The sensitivity of judges to the limits of their power is not lost on commentators of judging.<sup>239</sup>

In sum, like Cardozo in his time, contemporary judges hold on to two disparate characterizations of their practice. In their judicial capacity they operate as if legal decisions can be shut as readily as they are opened, while from an extra-judicial perspective they insist that closure is nothing but a fiction. Thus, judges effectively operate in two disparate roles and alternate between two disparate states of consciousness. To perform successfully, they must keep these contradictory roles apart. They do so by compartmentalizing their self-concepts.

### B. *Cardozo's Continued Presence*

We can now turn to examine the relationship between Cardozo's legacy and contemporary legal thought. One of the most obvious indicia of a judicial legacy is the frequency with which the judge is cited and the extent to which her writings are relied upon. As Posner has shown, Cardozo's legacy is based upon a solid, testable professional reputation. His opinions are cited

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[F]irst, to reinforce our oft-challenged and arguably shaky authority to tell others—including our duly elected political leaders—what to do. . . . One of the few ways we have to justify our power to decide matters important to our fellow citizens is to explain why we decide as we do.

*Id.* at 1372.

<sup>238</sup> BENJAMIN N. CARDOZO, *Jurisprudence*, in *SELECTED WRITINGS*, *supra* note 63, at 37. In a dramatic passage, Cardozo states:

Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity.

BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 66 (1924). For a literary critique of this passage, see POSNER, *supra* note 217, at 22.

<sup>239</sup> For example, Eskridge and Frickey state that "[t]o avoid the charge of subjectivity, the Justices feel a strong pull toward justifying their decisions by reference to 'objective' evidence—text, legislative intentions, even statutory purposes—that is the evident product of majoritarian preferences." Eskridge & Frickey, *supra* note 219, at 379 n.208. Robert Ferguson states: "[S]omewhere in every judicial decision a belief in neutral judgment deflects criticism." Ferguson, *supra* note 223, at 207. Paul Gewirtz adds that the "rhetoric of certainty seems connected to judges' perceived need to preserve the institutional authority of the court. Acknowledging complexity, ambivalence, and subjectivity, on this account, threatens the legitimacy of a decision backed by state power." Gewirtz, *supra* note 220, at 1042.

more heavily than those of even more distinguished judges of his time. This is true both for his work on the New York Court of Appeals and on the U.S. Supreme Court.<sup>240</sup> For instance, in a recent examination of the case law of the state of Georgia, Cardozo's legacy was found to dominate those of John Marshall and Holmes.<sup>241</sup>

The significance of Cardozo's legacy becomes even more apparent when we examine the widespread endorsement of his extra-judicial writing. A survey of judges' off-bench literature indicates that no other account of judging has been heralded so consistently by judges—particularly by those who also engage in extra-judicial writing (and these tend to be reputable and influential judges). Cardozo's account is the most frequently invoked to prop up the depiction of judicial discretion, creativity, subjectivity and the like. A number of judges, including Shirley Abrahamson,<sup>242</sup> Ruggero Aldisert,<sup>243</sup> Henry Friendly,<sup>244</sup> and Judith Kaye<sup>245</sup> have written entire articles embracing Cardozo's account. Former Justice William Brennan based his now famous plea for passion in judging on Cardozo's account of openness.<sup>246</sup> Cardozo's account has been celebrated also in the writings of

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<sup>240</sup> See POSNER, *supra* note 25, at 74-91.

<sup>241</sup> See R. Perry Sentell, Jr., *Juristic Giants: A Georgia Study in Reputation*, 34 GA. L. REV. 1311 (2000). Cardozo was cited more often than Marshall and equal to Holmes. Sentell suggests that given Cardozo's shorter judicial service, he emerges as the dominant of the three. *See id.* at 1342.

<sup>242</sup> Abrahamson, *supra* note 12.

<sup>243</sup> Aldisert, *supra* note 10.

<sup>244</sup> Friendly, *supra* note 7.

<sup>245</sup> Kaye, *A Law Classic*, *supra* note 9.

<sup>246</sup> Brennan states:

Cardozo it was, who, more than any other observer, awakened America to the human reality of the judicial process. From him we learned that judging could not properly be characterized as simply the application of pure reason to legal problems, nor, at the other extreme, as the application of the personal will or passion of the judge. Cardozo drew our attention to the interplay of forces, rational and emotional, conscious and unconscious, by which no judge could remain unaffected. It is my thesis that this interplay of forces, this internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality.

Brennan, *supra* note 8, at 951.

In the homage Judge Kaye pays to Brennan, she emphasizes Cardozo's contribution in that he "stepped forth and openly acknowledged that judges are not oracles of pure reason, demigods to whom objective truth has been revealed. They are flesh-and-blood human beings necessarily bringing their experience, emotion, and passion to the judicial process." Judith S. Kaye, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 14, 18 (1997).

Charles Breitel,<sup>247</sup> Charles Clark,<sup>248</sup> Joseph Grodin,<sup>249</sup> Robert Keeton,<sup>250</sup> Alvin Rubin,<sup>251</sup> Walter Schaefer,<sup>252</sup> John Paul Stevens,<sup>253</sup> Sol Wachtler,<sup>254</sup> and Patricia Wald.<sup>255</sup>

This brings us closer to the completion of the proposed understanding of Cardozo's place in contemporary legal theory. Cardozo is the quintessential model of a judges' judge. He provides a prototypical solution for the conflict judges experience due to the incompatible roles they are assigned to play. When reflecting on the practice from afar, judges can comfortably resort to Cardozo's admission that, at bottom, the process is infused with openness. And when sitting on the bench and deciding cases, they impose closure on the complexity of issues just as that great judge did.

Furthermore, it is noteworthy that a significant proportion of the judges who resort to Cardozo's account of openness, also invoke the *nine-tenths, perhaps more* disclaimer. That is, while insisting on the creative nature of judging, they disclaim its significance by confining it to a marginal fraction of cases.<sup>256</sup> The

<sup>247</sup> Charles D. Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 769 (1965). Breitel is a former judge of the Supreme Court of New York, Appellate Division.

<sup>248</sup> Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255 (1961).

<sup>249</sup> Joseph R. Grodin, *The Nature of the Common Law*, by Melvin Eisenberg, 41 HASTINGS L.J. 1457, 1460 (1990) (book review). Grodin is a former associate justice of the California Supreme Court.

<sup>250</sup> KEETON, VENTURING, *supra* note 13.

Elsewhere Keeton states, "Cardozo was a major contributor to our casting off mechanical jurisprudence and casting off excessive formalism." Keeton, *Paradigmatic*, *supra* note 13, at 303.

<sup>251</sup> Rubin, *supra* note 14, at 361.

<sup>252</sup> Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3 (1966).

<sup>253</sup> John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 5-6 (1983) (discussing the restrictions rules impose when the judge is filling in the gaps).

<sup>254</sup> Wachtler, *supra* note 208, at 16-19.

<sup>255</sup> Wald, *supra* note 11, at 897 (citing Holmes, Cardozo, and Hand's supportive review of Cardozo's *The Nature of the Judicial Process*); see also Leon R. Yankwich, *The Art of Being a Judge*, 105 U. PA. L. REV. 374, 378 (1957).

Very few judges have refrained from joining in Cardozo's praise. Two notable examples are Posner (whom I consider a critic of Cardozo, despite his final endorsement of the man), and Frankfurter. The latter belittled *The Nature of the Judicial Process* by stating that it was "not very helpful in the decision of actual cases." Paul A. Freund, *Foreword: Homage to Mr. Justice Cardozo*, 1 CARDOZO L. REV. 1, 4 (1979).

<sup>256</sup> See, e.g., Abrahamson, *supra* note 12, at 973; Burch, *supra* note 111, at 677; Friendly, *supra* note 244, at 222-23; Hough, *supra* note 109, at 288; Harry W. Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 803

legacy of Cardozo, then, serves subsequent generations of judges not only in that it facilitates the maintenance of the contradictory accounts, but also in that it helps keep the discrepancy out of their awareness. It should come as no surprise that the list of Cardozo's most devoted followers are judges; his critics are mostly law professors.

### C. Some Troubling Implications

Cardozo seemed to have failed to heed his own admonition that "the virtues of symmetry and coherence can be purchased at too high a price."<sup>257</sup> His own legacy is exemplary in exposing the cost of imposing putative closure. His attempts to portray law's inherent under-determinacy as gapless, were achieved by means of some distortion of the legal materials and transgression of the jurisprudence employed, thus precipitating the wrath of his critics.<sup>258</sup> It is likely that the critics have been particularly disconcerted because his questionable jurisprudence was immersed in, and veiled by, his all-too-persuasive rhetoric.<sup>259</sup>

It is important to appreciate that the widespread endorsement

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n.16 (1961); KEETON, VENTURING, *supra* note 13, at 13; Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 737 (1979); Rubin, *supra* note 14, at 363-64; Schaefer, *supra* note 252, at 4; Stone, *supra* note 6, at 382. Other judges have offered very similar typologies without referring explicitly to Cardozo. For example, Judge Aldisert suggested that ninety percent of federal court cases come within the category of what Professor Jaffe called "the disinterested application of known law." Aldisert, *supra* note 209, at 462; *see also* Clark & Trubek, *supra* note 248, at 256; Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 389-92 (1984); Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 857. Judge Edwards is chief judge on the United States Court of Appeals for the District of Columbia.

A minority of judges have claimed that Cardozo's division understates the complexity extant in appellate judicial decision-making. Without explicitly citing Cardozo, Justice Benjamin Kaplan, former justice on the Massachusetts Supreme Judicial Court, referred to the ninety percent rule, and comments: "I would not myself have made such bland estimates; but it may be that I was lacking abnormally in resoluteness." Benjamin Kaplan, *Encounters with O.W. Holmes, Jr.*, 96 HARV. L. REV. 1828, 1848 (1983); *see also* POSNER, *supra* note 217, at 78; Richard A. Posner, *Judges' Writing Styles and Do They Matter?*, 62 U. CHI. L. REV. 1421, 1441 (1995).

<sup>257</sup> BENJAMIN N. CARDOZO, *Jurisprudence*, in *SELECTED WRITINGS*, *supra* note 63, at 32.

<sup>258</sup> *See supra* notes 98-108 and accompanying text.

<sup>259</sup> I do not agree that imposing closure on judicial opinions necessarily entails conscious disingenuousness, as charged by Cardozo's critics. There is empirical evidence to suggest that the sense of obviousness, confidence, and constraint reported by judges corresponds to a genuine phenomenological state experienced by the judge at the end of the judicial decision-making process. *See* Holyoak & Simon,

of Cardozo's account of openness bears little impact on the actual practice of judging. As stated above, the style of closure that is imposed on decisions day by day throughout the judiciary system, dominates judicial discourse and thus affects the ways by which law is made, developed, and executed. In contrast, the account of openness is confined primarily to academic exchanges, commencement addresses and occasional confirmation hearings. The evidence thus far indicates that even those judges who vociferously espouse openness in their off-bench writing, tend to produce opinions that do not differ substantially from the widespread style of closure.<sup>260</sup> Once again, Cardozo is exemplary, as evidenced by the fundamental antithesis between his style of judging and his revealing account.<sup>261</sup>

Herein lies an irony. Not only has the extra-judicial account of openness failed to influence the way cases are decided and opinions are written, but it seems to be bastioning the formal, rigid style of judging. The fact that in off-bench writing, prominent and sophisticated judges depict the judicial process in a realistic and plausible light has the effect of distinguishing and distancing

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*supra* note 178; Simon, *supra* note 188. Any attempt to reform the style of judicial opinions will, then, require more than merely charging deceit.

<sup>260</sup> For example, researchers have questioned whether there was anything special about the opinions of Jerome Frank—once realist, then judge. Frank's biographer pointed out that despite his fierce criticism of judicial writing, "Judge Frank wrote lengthy opinions, fine-tuned legal rules, quibbled over the scope and intended meaning of prior judicial decisions, and adumbrated policy considerations to govern the present and future cases." ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW* 129 (1985). William Domnarski pointed out that Frank "wrote many opinions in the style of the traditional values of opinion writing he sometimes inveighed against. That is, he frequently sounded like the other judges." WILLIAM DOMNARSKI, *IN THE OPINION OF THE COURT* 101 (1996).

Richard Posner has leveled a similar critique of Judge Patricia Wald. See Posner, *supra* note 256, and response, Patricia M. Wald, *A Reply to Judge Posner*, 62 U. CHI. L. REV. 1451 (1995). As of yet, Posner's own style of reasoning has received nothing but praise from scholars. See Domnarski, *supra* note 260; Robert F. Blomquist, *Playing On Words: Judge Richard A. Posner's Appellate Opinions, 1981-82—Ruminations on Sexy Judicial Opinion Style Writing During an Extraordinary Rookie Season*, 68 U. CIN. L. REV. 651 (2000).

<sup>261</sup> This description is supported by an observation of Learned Hand: "That a judge of Judge Cardozo's standing should so frankly own the way in which he works is itself a portent, though in fact he probably disposes of his cases by no saliently different methods from the judges who have preceded him." Hand, *supra* note 5, at 480. Similarly, Justice Abrahamson observed that "Cardozo's opinions tend to follow the traditional mode of formal opinion writing; they are carefully grounded on legal arguments and precedent rather than invoking considerations of policy or morality." Abrahamson, *supra* note 88, at 643.

it from the discredited Langdellian orthodoxy which it so approximates. In other words, the concession of openness enables judges to pay homage to the expectations of their critical audiences, while continuing to render unrealistic, inflated and exaggerated judicial opinions. At the end of the day, the account Cardozo propagated lends undeserved credibility and thus confers legitimacy on the ever problematic judicial process.

I have argued elsewhere that the style of closure is an undesirable mode of judicial reasoning,<sup>262</sup> foremost, because it compromises the integrity of the judicial opinion. Opinions that overstate the obviousness and inevitableness of decisions fail to attend to the nuanced conflict and complexity that pervade our social world. The unrealistic depiction of the law tends also to obfuscate the real and appropriate grounds for the decision, and thus blunts the guidance it might lend for future cases. There is, I contend, much to gain by substituting the style of closure with a more realistic, pragmatic jurisprudence.<sup>263</sup> Right now, however, the prospects for any real transformation appear rather slim.<sup>264</sup>

Judicial opinions deserve serious attention because of their formative impact on legal discourse.<sup>265</sup> The words of judges serve as a medium through which generations of lawyers are trained, socialized and professionalized. It is through judicial texts that the legal community learns how to converse in legal language and how to harness the power of legal reasoning. Judges are the primary role models whom we emulate when we learn how to function within the field of law.<sup>266</sup> Judicial opinions, then, set the standards for the levels of ingenuousness and conviction with which we hold beliefs and advocate them in the name of others. I offer that the multiplicity of levels of consciousness emitted by judges sets a tone of duplicity throughout

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<sup>262</sup> See Simon, *supra* note 188, at 129-34.

<sup>263</sup> Richard Posner has advocated a pragmatic jurisprudence of this kind: “[T]he highest realistic aspiration of a judge faced with a difficult case is to make a ‘reasonable’ (practical, sensible) decision, as distinct from a demonstrably correct one.” POSNER, *supra* note 217, at 456; see also Simon, *supra* note 188, at 26.

<sup>264</sup> See Simon, *supra* note 188, at 137-41.

<sup>265</sup> See JAMES BOYD WHITE, *Rhetoric and Law: The Arts of Cultural and Communal Life*, in HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 128-48 (1985); JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 101-02 (1990).

<sup>266</sup> Frederick Schauer stated: “As long as the appellate opinion remains the primary teaching vehicle in American law schools, . . . those opinions will play a large part in determining the skills, aspirations, and self-understanding of American lawyers.” Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1472 (1995).

legal discourse, and this might be a contributing factor to the crisis of faith that is said to pervade the legal community.<sup>267</sup>

### CONCLUSION

I have suggested that Cardozo's legacy is best understood not as a single corpus, but rather as an uneasy hybrid of two thoroughly inconsistent bodies of work. In his extra-judicial writing about judicial decision-making, he candidly exposed the creativity, fallibility, and subjectivity inherent in the process; as a judge, he conveyed a distinct sense of inevitableness, certitude, and objectivity.

The judicial role continues to be pulled apart as it was in Cardozo's day. To succeed in their office, contemporary judges sense the need to comply with the polity's expectations and satisfy the perceived demands of their role, while also addressing the concerns of skeptical onlookers. Thus, performing in the judicial capacity, a judge is drawn towards imposing closure on the opinions, while a judge engaged in providing an accurate and introspective account of her activity is bound to expose its openness.

An effective way to survive and thrive in this testing environment is to compartmentalize one's self-concept, as Cardozo himself did so remarkably. Cardozo was an astute expositor of the human functioning, but also a concealer of his own doing. His insightful account serves current judges well in that it provides them with a favorable conception of their activity and of themselves as they continue to produce opinions forged in the dubious mold he helped perpetuate. Indeed, it is the very contrariness and conflict embodied in his work that makes him so vital. Understanding the reputation of this complex figure thus helps us better understand the double-consciousness of the judicial function and the contradictory nature of our legal system.

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<sup>267</sup> See Smith, *supra* note 3.