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Benjamin Cardozo and American Natural Law Theory

Benjamin C. Zipursky*

INTRODUCTION

Unlike many Supreme Court Justices, Benjamin Cardozo led a rather humdrum existence outside of the courthouse, and it is quite clear that he was not especially interested in or adept at all versions of the game of social life.¹ One wonders whether Cardozo was a man who was comfortable in his own skin. *The Nature of the Judicial Process*² tells us that at least in one very important dimension of his life, he was indeed comfortable in his own skin, he was his own man, and he was quite unapologetic for who he was. The book and the lecture series that spawned it reveal a person supremely comfortable reflecting on what he did in his job, all in the knowledge that *what he did in his job was good and right and indeed exemplary for those who hold that position*. Sufficiently exemplary, indeed, to warrant a whole book of reflections on what he did. One might view this as immodesty on Cardozo's part, but I view it quite the opposite way. Here was someone for whom the job of legal interpretation and appellate judging was a special comfort zone. And even within that comfort zone, there were multiple and quite sincere expressions of humility. Cardozo saw himself as a public servant lucky enough to have an interesting job that was of considerable importance to his state and his nation.

The Nature of the Judicial Process—stemming from public lectures Cardozo was invited to give at Yale Law School—was Cardozo's first expansive writing on jurisprudence. In it, he describes a myriad of jurisprudential views and comments on their strengths and weaknesses. It is only natural to ask where, in the end, he placed himself in the range of jurisprudential theories. The short answer is that he did not classify himself as a legal realist or a legal positivist or a natural law theorist, and indeed he

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1. ANDREW L. KAUFMAN, *CARDOZO* (1998).

2. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) [hereinafter *NJP*].

identified significant shortcomings in each of these views as they were understood in his time. He was entirely comfortable checking “No” to all of the above, and explaining why, notwithstanding his admiration for insights of each. I conclude that his reluctance to self-classify in any of these ways was warranted. Moreover, I argue that his grounds for rejecting each—as he reasonably understood them—were entirely defensible.

Cardozo is often classified as a legal realist, but I agree with my collaborator John Goldberg that this is a mistake, one that *The Nature of the Judicial Process* allows us to see.³ Cardozo’s relationships with legal positivism and natural law theory were at least as complicated, especially if we consider the many different views that can go under those names. An insufficiently appreciated feature of *The Nature of the Judicial Process* is the extent to which it anticipated important aspects of H.L.A. Hart’s positivism, both in Hart’s famous Holmes lecture and in *The Concept of Law*. However, of the three views—realism, positivism, and natural law—it is the third view that Cardozo comes closest to embracing explicitly. Not only does he constantly refer to the imperative of deciding cases in a manner that merges morality and law,⁴ he expressly admires what he calls a form of jurisprudence that rejects the ancient versions of natural law, but adapts natural law themes to modern times. And yet he expresses skepticism about whether such views are really versions of natural law theory at all.

For better or worse, this article is written in a philosophical spirit of anxious skepticism rather than the juristic spirit of confident synthesis that pervades *The Nature of the Judicial Process*. The anxiety does not stem principally from my failure to give a clean classification of Cardozo’s cluster of views, for there would be nothing too troubling about the contention that Benjamin Cardozo was unique. My concern is, ironically, quite the opposite. Cardozo’s cluster of views resembles quite closely those of many judges, lawyers, and law professors today. The concern that Cardozo’s views were less than coherent and perhaps philosophically untenable is thus not a mere historical curiosity. If I am right that many jurists today hold roughly the same cluster of views, then such a conclusion as to Cardozo would tend to imply a similarly negative verdict about those jurists. In my view, it is just such suspicions that have led many to contemporary forms of positivism notwithstanding the enduring problems of those views. So it is with great anxiety indeed that I ask whether Cardozo’s resting place is a satisfactory place to have been.

The short answer to my question is, “Yes, Cardozo’s combination of views was stable and coherent, and was a more than satisfactory resting

3. See John C.P. Goldberg, *The Life of the Law*, 51 STANFORD L. REV. 1419 (1998).

4. John C.P. Goldberg, *Community and the Common Law Judge: Reconstructing Cardozo’s Theoretical Writings*, 65 N.Y.U. L. REV. 1324 (1990). Goldberg’s views on Cardozo have influenced me (and thus, this paper) in ways too pervasive to identify. All errors here are, however, my own.

place.” The long answer is that Cardozo’s *The Nature of the Judicial Process* was the progenitor of a powerful and coherent jurisprudential view that was developed through the Twentieth Century, especially by Lon Fuller and Ronald Dworkin. I call this view “American natural law theory,” and I suggest that its coherence is vital to recognize today. While Cardozo’s views were in several respects less sophisticated than those of Dworkin, in their modesty, their realism, and their sensitivity to core features of the legal system, they were arguably superior.

Part I depicts the cluster of views Cardozo appeared to hold in *The Nature of the Judicial Process*, rejecting legal realism, legal positivism, and natural law theory, while finding something to like in each. Part II observes that Cardozo’s combination of views is in fact quite plausible to many judges, lawyers, law professors, and law students, but it appears fundamentally incoherent. I then float the suggestion that this putative incoherence is perhaps part of the reason that so many legal minds today are attracted to a rather hard-nosed jurisprudential view I call “Washington legal positivism,” typified by the textualism and originalism advocated by Justice Antonin Scalia. Conceding the oddity of my ploy, I suggest in Part III that *The Nature of the Judicial Process* is best interpreted as an early version of the jurisprudence defended by Lon Fuller and then Ronald Dworkin. Part III concludes by setting forth reasons to think that a synthesis of Cardozo, Fuller, and Dworkin will strengthen the theoretical positions of all three.

The underlying hope of the project sketched above is fundamentally both interpretive and synthetic. It is interpretive because it purports to find at the analytical core of Cardozo’s, Fuller’s, and Dworkin’s understanding of law the very same challenging idea that the social life that grounds law is at once factually real and normatively fertile. It is synthetic because it aims to repair the shortcomings in each of their views by bringing to bear the strengths of the others. In my view, for example, Dworkin’s explicit distinction among types of discretion is an improvement of Cardozo’s eloquent but confusing comments which point in that direction, just as Fuller’s acknowledgement of both fiat and reason in law is more tenable than the unbounded rationalism at which Dworkin ultimately arrived. A theme of this article is that Cardozo’s considerably more modest and community-oriented moral epistemology is likely to be more defensible than Dworkin’s overbearing insistence on Herculean judges.

I. CARDOZO: LEGAL REALIST, LEGAL POSITIVIST, OR NATURAL LAW THINKER?

A. *Legal Realism*

Leading figures in legal theory have typically regarded Cardozo as a legal realist. Chicagoans Edward Levi, Richard Posner, and Brian Leiter have all

taken this position over the decades, and Posner wrote a whole book on Cardozo with this theme.⁵ Cardozo's striking torts opinions, including both *MacPherson* and *Palsgraf*, are typically treated as evidence for this depiction. It is fairly easy to see why the language of judicial "creativity," "gap-filling," and "legislation" in *The Nature of the Judicial Process* would be supportive of this view.

As indicated above, I reject this view of Cardozo, and this is not simply because I defer to the historical work of my longtime collaborator John Goldberg on this point.⁶ It is, relatedly, because Goldberg and I have found in Cardozo's great opinions an attention to the substance, structure, and fecundity of common law concepts that is utterly inconsistent with the realist view frequently attributed to him. Relatedly, Ernest Weinrib's now classic *The Idea of Private Law* offers a compelling depiction of how important conceptual structure and content were to Cardozo's understanding and adjudication of tort cases.⁷

On the present occasion, I wish to point out that *The Nature of the Judicial Process* displays a similar antipathy to legal realism. Because this theme will loom larger in this essay, I quote Cardozo at some length. Describing Jethro Brown's view, he writes,

Real law . . . is not found anywhere except in the judgment of a court. In that view, even past decisions are not law. The courts may overrule them. For the same reason. . . . There are no such things as rules and principles: there are only isolated dooms.⁸

Cardozo unreservedly rejects Brown's view, and indeed bristles at calling such a view "realism." He regards Brown's own conclusions as practically a *reductio ad absurdum* of his jurisprudential position:

A definition of law which in effect denies the possibility of law since it denies the possibility of general operation must contain within itself the seeds of fallacy and error. Analysis is useless if it destroys what it is intended to explain. Law and obedience are facts confirmed every day to us in all in our experience of life. If the result of a definition is to make them seem to be illusions, so much the worse for the definition; we must enlarge it till it is broad enough to answer to realities. The outstanding truths of life, the great and unquestioned phenomena of society, are not to be argued away as myths and vagaries when they do not fit within our little moulds. If necessary, we must remake the moulds. We must seek a conception of law which realism

5. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990); Brian Leiter, *In Praise of Realism (and Against Nonsense Jurisprudence)*, 100 GEO. L.J. 885 (2012).

6. See Goldberg, *supra* note 3; Goldberg, *supra* note 4.

7. See ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

8. NJP, *supra* note 2, at 126.

can accept as true.⁹

No doubt there is a field within which judicial judgment proceeds untrammelled by fixed principles. Obscurity of statute or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function. In such cases, all that the parties to the controversy can do is to forecast the declaration of the rule as best they can and govern themselves accordingly. We must not let these occasional and relatively rare instances blind our eyes to the innumerable instances where there is neither obscurity nor collision nor opportunity to diverse judgment. . . . Lawsuits are rare and catastrophic experiences for the vast majority of men, and even when the catastrophe ensues, the controversy relates most often not to the law, but to the facts. In countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful.¹⁰

Eleven years after he published *The Nature of the Judicial Process*, Cardozo raised the volume on his critique of legal realism in a Jurisprudence address to the New York State Bar Association.¹¹ While expressly leaving open the possibility that he could be classified as a realist in some very limited sense and that his critique was too ungenerous, Cardozo laid into Oliphant, Frank, Llewellyn, and Pound in a manner that bordered on the acerbic. In criticizing what he evidently regarded as a kind of missionary ecstasy, he mocked their criticisms of other scholars and judges.

Seldom can one point to stumbling sinners the road to salvation, discerned for the first time, without displaying in so doing some exuberance of manner and hyperbole of phrase. The only sad thing is that so often the road turns out not to be new, and the salvation at the end a distant and receding goal.¹²

As Goldberg has chronicled, Cardozo's address was followed by a rancorous correspondence with Jerome Frank.¹³

It must be said, of course, that Cardozo shared with America's great legal realists not only a rejection of formalism, but more importantly a penchant for great candor about the judicial process. Insofar as *The Nature of the Judicial Process* is a high-water mark for such candor in the early Twentieth Century, it is not surprising that the realist label has stuck, notwithstanding

9. *Id.* at 126-27.

10. *Id.* at 128-29.

11. Benjamin N. Cardozo, *Jurisprudence*, PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION 263-307 (1932).

12. *Id.* at 271.

13. Goldberg, *supra* note 3, at 1453 (drawing upon KAUFMAN, *supra* note 1, at 458-61).

its poor fit on the level of substance.

B. Legal Positivism

Cardozo's rejection of both formalism and legal realism calls to mind H.L.A. Hart's Holmes lecture¹⁴ and his famous book *The Concept of Law*.¹⁵ Both were published about forty years after *NJP*, and while Cardozo and Hart are rarely mentioned in the same breath, the connections between the two appear quite significant today.

First, and most strikingly, the famous core/penumbra distinction found in *Positivism and the Separation of Law and Morals* arguably traces back to Cardozo's *The Nature of the Judicial Process*. After describing vast fields of law in which the law cannot be misread and asserting that "unnumbered human beings" live their whole life within this field, Cardozo acknowledges that there is a borderland where controversy about the meaning of the law begins and where legal interpretation is necessary. He calls this borderland "the penumbra." Although Holmes and a few other jurists had used the term "penumbra" going back to 1890s, Cardozo uses it here to contrast settled areas of law (which we would refer to as the "core") with the unsettled area, and he contends that the content of the law is a clear fact in the settled area, even if there do remain areas—the penumbra—where this is not the case. This usage is, of course, exceptionally close to the "core/penumbra" distinction found in Hart.

Second, and relatedly, Cardozo is not only interested in what will be easy cases for *judges* when he bridles at the views of the realists; he is, as indicated, deeply interested in the law as it is experienced by ordinary people and as it structures their lives. A large part of the rejection of legal realism is Cardozo's sense that it is philosophically jejune and unwise to overlook this glaring feature of human life. "Most of us live our lives in conscious submission to rules of law, yet without necessity of resort to the courts to ascertain our rights and duties."¹⁶

This passage presages Hart's statement in *The Concept of Law* that legal theorists must attend to:

the way in which the rules function as rules in the lives who normally are the majority of society. These are the officials, lawyers, or private persons who use them, in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticisms, or punishment, viz., in all the familiar transactions of life according to rules.¹⁷

14. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

15. H.L.A. HART, *THE CONCEPT OF LAW* (1962).

16. *NJP*, *supra* note 2, at 128.

17. HART, *supra* note 14, at 90.

Cardozo, like Hart after him, thought it audacious that so-called “realists” would overlook the place of law in what they view as a broad swath of ordinary people.

A trio of terms captures the third striking similarity: Cardozo, anticipating Hart, referred to “judicial *legislation*,” “*gaps in the law*,” and “judicial *discretion*.” Moreover, it seems to be the case that Cardozo used these terms in a manner that became central to Hart’s jurisprudence, including both his debate with Fuller and his multi-decade debate with Dworkin. Where penumbral questions arise, it is true that the law does not provide a clear answer. Judicial interpretation is – Cardozo says explicitly—“frankly legislative” in function. “This conception of the legislative power of a judge as operating between spaces,” says Cardozo, “is akin to the theory of ‘gaps in the law’ familiar to foreign jurists.”¹⁸ Over and over again, Cardozo tells us that judges have discretion, even though he—like Hart—believes the discretion has bounds.

He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the primordial necessity of order in the social life.” Wide enough in all conscience is the field of discretion that remains.¹⁹

Fourth, and relatedly, Cardozo of course emphasized the inevitability and the appropriateness of judges trying to craft solutions to problems in the penumbra, and doing so in a manner that drew upon concern for public welfare and the underlying purposes of the law. The presence of judicial discretion in the penumbra is far from *laisse faire* for Cardozo, and the same was true for Hart. Finally, Cardozo—like Hart—was serious about judicial candor. He did not believe in hiding the ball, and that is indeed part of why he wrote *The Nature of the Judicial Process*. Judges should be open about the normative reasoning that goes into their opinions.

In all of these ways, Hart in fact seems to have followed Cardozo: a belief that there was determinacy and a clear core of meaning in the great majority of cases, but indeterminacy of a certain sort in the penumbra; a commitment to the view that most members of a society structure their lives and behave according to the relatively clear law; a recognition that in this penumbra, judges must legislate to fill gaps, and in so doing they have discretion; and a conviction that judges should exercise that discretion to make the law better insofar as they are able, and an insistence on candor and openness about the judicial process itself. Strikingly, Hart himself expressly referred to Cardozo as an ally as against Dworkin in his Postscript to *The Concept of Law*, insofar as Cardozo recognized the existence of incompletely regulated cases that come before judges and require that they perform an

18. NJP, *supra* note 2, at 69-70.

19. *Id.*

“‘interstitial’ lawmaking task.”²⁰

There is one additional similarity between Cardozo and Hart, and I present it with a sense of foreboding or at least irony. Both men took it upon themselves in their famous lectures to applaud the great American jurist Oliver Wendell Holmes, Jr. In both cases, moreover, these highly analytically-oriented men went out of their way to highlight Holmes’ warning that a great deal of the law must be understood as a product of human *experience*, as a community’s developing tool of adaptation to the real world.

And yet it was of course Hart’s central purpose in *Positivism and the Separation of Law and Morals* to go one step further in endorsing Holmes—to adapt to the mid-Twentieth Century and to English analytic jurisprudence the contention that the legal and the moral should be kept separate if clear thinking is to be done in law. One could easily argue that a central purpose of *The Nature of the Judicial Process* was the polar opposite. Indeed, Cardozo expressly stated:

The constant insistence that morality and justice are not law has tended to breed distrust and contempt of law as something to which morality and justice are not merely alien, but hostile. The new development of “naturrecht” may be pardoned infelicities of phrase, if it introduces us to new felicities of methods and ideals. Not for us the barren logomachy that dwells upon the contrasts between law and justice, and forgets their deeper harmonies.²¹

Cardozo’s apparent rejection of the spirit of separationism so central to Hart of course forces us to come back to reality and acknowledge what may be gently put as significant distance between their views. It likewise raises at least a warning flag about the perils of categorizing Cardozo as a legal positivist. And it suggests that we ask the question of whether Cardozo should be understood as a modern natural law thinker, the matter to which we now turn.

C. *Natural Law Theory*

Parts I.A and I.B above would lead a well-organized jurisprudence student to ask whether Cardozo was some form of natural law theorist. This is for at least two reasons: one is that we seem to be ruling out both realism and positivism, and natural law theory might be thought the major theory left standing. A second is that the deeply anti-separationist tendency revealed at the end of our Part I.B suggests that perhaps Cardozo’s project was indeed to craft a conception of law in which law and morality were fundamentally fused. There is a third consideration of course: Cardozo’s

20. HART, *supra* note 14, at 274.

21. NJP, *supra* note 2, at 134.

most famous judicial decisions did in fact embrace moral notions as part of the law and appear to display moral reasoning as part of legal reasoning.

In *The Nature of the Judicial Process*, Cardozo is equivocal about whether he would wish to be considered a natural law theorist. At some points, he defines natural law theory in quite stark terms, and he describes it as very much a view of the past.

The old Blackstonian theory of pre-existing rules of law which judges found, but did not make, fitted in with a theory still more ancient, the theory of a law of nature. The growth of that conception forms a long and interesting chapter in the history of jurisprudence and political science. The doctrine reached its highest development with the Stoics, has persisted in varying phases through the centuries, and imbedding itself deeply in common forms of speech and thought, has profoundly influenced the speculations and ideals of men in statecraft and in law.²²

Cardozo then proceeded to summarize what he seems to regard as sound reasons (of natural law's critics) for dismissing this view:

The law of nature is no longer conceived of as something static and eternal. It does not override human or positive law. . . . The natural law school seeks an absolute, ideal law, 'natural law,' the law *κατ' ἔξοχ*, by the side of which positive law has only secondary importance. The modern philosophy of law recognizes that there is only *one* law, the positive law.²³

Let us add to this that the label of the fourth interpretative method—"the method of sociology"—seems to be more social scientific more than moral. It appears that either he means that empirical information about how the law works will allow interpreters who have gained relevant sociological facts to judge whether it should be changed to meet our political, moral, and economic goals, or he means that judges must actually ascertain what the relevant convictions of morality are about or say. And in any event Cardozo's pragmatism—his insistence on experimentalism, contingency, and fallibility in the crafting of the law—also seems at odds with the proposition that he was a natural law theorist.

Yet the passages quoted above are set within a discussion that also seems to acknowledge—with guarded enthusiasm—the possibility of a modern version of natural law theory with which Cardozo seemed to have had great sympathy. The quotations below reveal the fuller context of the passages above.

The doctrine reached its highest development with the Stoics, has

22. *Id.* at 131-32.

23. *Id.* at 132-33 (quoting Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*,

24 HARV. L. REV. 607, quoting II BEROLZHEIMER, SYSTEM DER RECHTS UND WIRTSCHAFTSPHILOSOPHIE 27).

persisted in varying phases through the centuries, and imbedding itself deeply in common forms of speech and thought, has profoundly influenced the speculations and ideals of men in statecraft and in law. For a time, with the rise and dominance of the analytical school of jurists, *(a) it seemed discredited and abandoned.*

*(b) Recent juristic thought has given it a new currency, though in a form so profoundly altered that (c) the old theory survives in little more than name.*²⁴

At (a), he indicates apparent discrediting and abandonment; at (b), he indicates revival; at (c) he questions whether the survival is substantially more than in name.

Cardozo's subsequent statement is even more mixed, for it is clear what is abandoned and how important that is, but it is also more explicit about what is retained: "The law of nature is no longer conceived of as something static and eternal. It does not override human or positive law. It is the stuff out of which human or positive law is to be woven, when other sources fail."²⁵ Then, the full version of what we earlier quoted (from Berolzheimer through Pound through Cardozo) is more clearly brimming with an idea quite characteristic of what is in some sense natural law. "The modern philosophy of law recognizes that there is only one law, the positive law, *but it seeks its ideal side, and its enduring idea.*"²⁶

The following (double embedded) quotation renders unmistakable the resemblance between Cardozo and the oft-termed "modern natural law" philosophy that followed him:

The modern philosophy of law comes in contact with the natural law philosophy in that the one as well as the other seeks to be the science of the just. But the modern philosophy of law departs essentially from the natural-law philosophy in that the latter seeks a just, natural law outside of positive law, while the new philosophy of law desires to deduce and fix the element of the just in and out of the positive law—out of what it is and of what it is becoming.²⁷

On reading these latter passages, one might be led to ask: Was Cardozo really a natural law theorist who anticipated Ronald Dworkin? More to the point, is Dworkin's project best understood as a philosophical framework growing out of the fundamental inclinations of *NJP*? That is indeed a major

24. *Id.* at 131-32 (emphasis and letters added).

25. *Id.* at 132.

26. *Id.* at 133 (quoting Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 607, quoting II BEROLZHEIMER, SYSTEM DER RECHTS UND WORTSCHAFTSPHILOSOPHIE 27).

27. *Id.* at 132 (quoting Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 607, quoting II BEROLZHEIMER, SYSTEM DER RECHTS UND WORTSCHAFTSPHILOSOPHIE 27).

question of this article—one to which we shall return in Part III. For the time being, however, I want to point out important reasons—both in and out of *The Nature of the Judicial Process*—for rejecting the modern natural law version of Cardozo. First, and most obviously, the parallels between Cardozo and Hart that we sketched in Part I.B were very substantial, and some of the features of Hart’s outlook that Cardozo anticipated have become emblems of the positivistic view within the Hart/Dworkin debate. The idea that there are gaps in the law, that judges in some sense “legislate” to fill those gaps, and that judges have discretion all became Hartian theses that Dworkin made it his business to undermine. But they were Cardozoan theses that Hart and Dworkin both saw as part of a positivistic picture, not a modern natural law picture. Conversely, the Dworkinian “right answer” thesis seems plainly at odds with the discretionary view advanced by Cardozo.

Second, notwithstanding my skepticism about Cardozo-as-realist in Part I.A, there is surely a pragmatist side of Cardozo displayed in his discussion of the method of sociology that strikes a note alien to at least Dworkin’s work. Relatedly, there is an emphasis on the importance of judges trying to ascertain what would be most conducive to social welfare. And even if one were to credit the rather aggressive claim that Cardozo was mainly interested, within the method of sociology, in resonance with community values, one would still seem to have a view utterly different from natural law and from Dworkin.

Third, Cardozo quite explicitly and self-consciously pulls a punch in his third and extremely important lecture, and he does so just as it seems he might expressly sign on to the modern natural law view.

I am not concerned to vindicate the accuracy of the nomenclature by which the dictates of reason and conscience which the judge is under a duty to obey, are given the name of law before he has embodied them in a judgment and set the imprimatur of the law upon them. I shall not be troubled if we say with Austin and Holland and Gray and many others that till then they are moral precepts, and nothing more. Such verbal disputations do not greatly interest me. What really matters is this, that the judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience.²⁸

In this passage, Cardozo seems to be presupposing the following: *A jurist does not really count as a natural law theorist proper unless he or she is saying that “the judge who decides a case based on a moral precept which is then worked into the positive law is stating what the law is, not legislating*

28. *Id.* at 133.

new law based on a moral precept.” Cardozo seems to be saying, “I am willing to refrain from making that statement; it does not matter to me whether I go all the way on that proposition; that is not really what I care about.” In taking the position he takes and doing so in the way he does it, Cardozo seems to be content to exclude himself from the natural law category. He ironically seems to be somewhat dismissive of the analytical positivists, too: if he does formally take their position that controversial legal decisions are simply creations of new law (not articulations of what was in some sense already there as law), it is only because he wants to pick his battles, not because he believes they must be right about it as a matter of legal and moral metaphysics. In a deep sense, Cardozo seems to be announcing that he does not care much about what we would call the positivism/anti-positivism divide, so long as the judicial duty to decide penumbral cases using moral precepts is accepted.

II. CARDOZO’S COMFORT AND LEGAL POSITIVISM

Cardozo rejected legal realism because he insisted that for the great majority of legal questions, there are correct answers and the answers exist as law before they are articulated by judges. We can say, if somewhat anachronistically, he rejected a separationist version of legal positivism because he thought the enterprise of saying what the law is should not always be pulled apart from the enterprise of saying what morality or justice require; to the contrary, “their deeper harmony” must be borne in mind by judges saying what the law is. And he rejected natural law theory because he thought it misguided to obscure the reality that judges fill gaps in the law, that judging is, at least sometimes, a creative enterprise, and that judges have discretion in how they choose to craft the law in an important range of difficult cases. Cardozo provided arguments for each of these claims, or at least he defended each of these claims in a manner that, taken on its own, has struck many readers as persuasive. And I think it fair to say that each of these claims has garnered a fair bit of support from legal and jurisprudential scholars in the century since *The Nature of the Judicial Process* was published. Indeed, it strikes me as plausible that a huge number of judges, lawyers, and law professors are attracted to each of these views, and many are attracted to all three.

There is, to my knowledge, no good name for this view, but that is not the principal reason for declining to embrace all three positions—an overwhelmingly large domain of facts about the existence and content of law; a recognition that judges exercise discretion in filling what are, in an important sense, gaps in the law; and a commitment to the view that morality and justice should not be separated from saying what the law is. It is that the three positions appear to be mutually inconsistent. One can of course distinguish factual statements about what the law is from

constructive statements of judges that are themselves exercises of normative judgment in crafting the law, and one can say that judges should engage in moral reasoning in deciding cases. But such a position typically requires admitting a basic ambiguity about assertions as to the law's content, and a certain amount of skepticism about whether there really are true descriptive statements to be made about the law's content at all, and it is hard to take this position while rejecting legal realism, as Cardozo did. A positivist can accept the existence of legal facts and the creative role of judges in crafting new law, but seemingly must anchor the existence of legal facts in social facts, and this appears to leave no room for a judge's moral judgment in saying what the law actually is.²⁹ A natural law thinker can say that there really is law and that moral judgment is often part of a judge saying what the law is, but typically does not regard the judge as exercising discretion in so doing, and typically does not regard the judge as gap filling or legislating. Certainly, it was core to Dworkin's account to reject this view.

My own view of jurisprudence in the United States today is that there is a great deal of anxiety about the possibility of holding all three views simultaneously. Some of those who name themselves jurisprudence scholars as such have tended to downplay the result of such anxiety: a tremendous draw among American judges to a sharp form of legal positivism (not always identified as such). On this view, the anti-realist tenet recognizing an abundance of settled law is combined with the anti-natural law view that calls judicial decision-making in gap cases discretionary and legislative. A normative political-theoretic premise is added to the effect that lawmaking and moralizing from the bench are unacceptable or at least deeply suboptimal in a democracy, and in any event to be minimized. And the separationist tenet is thus warmly embraced, like a version of what Jeremy Waldron called "normative positivism."³⁰ This is, in my view, quite explicitly the analytic and normative jurisprudence of Justice Antonin Scalia and those who followed him or follow him today.

Because of the outsized role of Justice Scalia and other Supreme Court Justices in advocating this view, I shall call it "Washington legal positivism." In my view, it is defensible to classify many of the advocates of hard textualism and originalism as being (or at least as purporting to be) legal positivists of a certain sort, although it is of course not justifiable to insist that all legal positivists must adopt such a view. Textualists and

29. I have elsewhere laid out in detail reasons for rejecting the claim that inclusive positivism rooted in a "social facts thesis" is simultaneously defensible and an authentic form of legal positivism. A soft or inclusive positivistic view like Waluchow's or Coleman's may be acceptable, I have argued, but only in a form that does not deserve the name "positivism" in any sense, because the social facts thesis must be weakened beyond recognition to remain tenable. Benjamin C. Zipursky, *Pragmatism, Positivism, and the Conventionalistic Fallacy*, in *LAW AND SOCIAL JUSTICE* (J. Campbell, M. O'Rourke, & D. Shier, eds., 2005).

30. Jeremy Waldron, *Normative (or Ethical) Positivism*, in *HART'S POSTSCRIPT* (J. Coleman ed. 2001).

originalists tend to think—like Raz—that it is part of the idea of law that its content is identifiable in a manner that does not require the exercise of moral or political judgment. Or if they do not hold a view that is conceptual in quite the way Raz depicts it, they hold a normative view that in some ways runs parallel: a properly functioning legal system would be one whose primary rules were provided sufficient content by social facts and whose interpretive norms directed judges away from their own values and politics and strictly towards social fact inquiries.

Many judges, justices, and law professors embrace a form of legal positivism akin to Washington legal positivism,³¹ even if few of today's analytic philosophers of law do so. Moreover, in recent years important scholars from outside of analytic jurisprudence narrowly conceived have expressly embraced Scalia-like methodological views on interpretation and housed them within a Hartian legal positivist framework. Of the three, it is the moral values in adjudication piece that seems to have been rejected. A range of legal and philosophical scholars has battled the Washington positivist views, and some legal positivists have tried to accommodate openness or even insistence on moral decision-making within adjudication while still retaining their positivistic bona fides.³² Indeed, it must be said that, among analytic philosophers of law as such, the leading American positivist (Scott Shapiro) has put forward a view that might indeed find a way through the trilemma I have depicted.³³ It is, nonetheless, the value-rejecting version of legal positivism that has gained most traction in the courts, and that version has gained prominence among jurisprudentially oriented law professors who support the methodologies advanced by those judges.

In the past decade, a movement has developed within modern natural law anti-positivism too. In particular, Mark Greenberg and Scott Hershovits have aimed to push Dworkin's morally-infused interpretivism further away from positivism and closer to a view that assigns judges a larger role in moral-political reasoning than that favored by Dworkin himself.³⁴ And in

31. See, e.g., William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, (2017); cf. Charles Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323 (2017) (criticizing claims of originalists to provide tenable versions of positivism).

32. Joseph Raz's, *Legal Principles and the Limits of the Law*, 81 YALE L. J. 823 (1972) and John Gardner's *Legal Positivism: 5 ½ Myths*, 46 AM. J. JURIS. 199 (2001) are distinguished examples. Far more than a footnote is of course needed to address Razian response to Dworkin on the phenomenon of moral reasoning in adjudication and Gardner's additions to Raz. The nub of my concern is that once one characterizes the judicial activity in question as "gap filling" rather than "law application," a range of concerns about judicial activism and judicial competence are properly seen in a different light and are subjected to a wider range of substantial qualifications. This observation is not meant as an argument against Raz or Gardner, but as a basis for denying that the Raz/Gardner position as a form of legal positivism would have been unproblematic for Cardozo.

33. SCOTT J. SHAPIRO, LEGALITY, 279-81 (2011). Responding to Shapiro's nuanced position is beyond the scope of this article; for a variety of different reasons, I reject the claim that judges have an obligation to craft the morally best answer to legal questions in law's gaps.

34. See, e.g., Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L. J. 1288-1342 (2014);

the past year, Adrian Vermeule has flipped Dworkin's position on its head and urged the adoption of a profoundly conservative natural law constitutionalism, in the Roman law and canon law tradition.³⁵ My goal here is not to refute the Washington positivists, the neo-Dworkinians, or Vermeule but simply to make the mundane observation that we are experiencing a polarization in jurisprudential views, as in other kinds of views. Cardozo's aim for moderation—as beautifully depicted by Andrew Kaufman in his biography³⁶ and as exhibited so colorfully in *NJP*—seems more elusive today than ever.

III. CARDOZO AND AMERICAN NATURAL LAW THEORY

A. *Cardozo, Fuller, and Dworkin*

Is it true that we have lost the capacity for comfort that Cardozo enjoyed? Is it appropriate to have lost such a capacity because it was never really warranted? Was this a phase of intellectual history that has just fallen away? My goal in this Part is to explore the line of theorizing in American jurisprudence that expressly rejects legal realism and also holds itself out as the antagonist of legal positivism. In this sense, I am returning to the possibility that Cardozo's *NJP* view was actually an early form of American modern natural law theory. I have three reasons for doing so: one pertaining to Cardozo, one pertaining to Fuller and Dworkin, and one pertaining to jurisprudence more generally. To understand Cardozo's own view fully, I argue, one should understand it as containing the seeds of what came later in Fuller and Dworkin: Cardozo was the progenitor of what became a distinctive, American, form of natural law theory in the hands of Fuller and Dworkin. To provide the most sympathetic understanding of Dworkin's jurisprudence, I suggest, one should understand it as a descendant of Cardozo's views, through Fuller. Both this claim and the prior one are, for lack of a better term, interpretive claims sounding in intellectual history. Finally—and in what is barely even a sketch of substantive jurisprudential claim—I suggest that the comfort of Cardozo in *The Nature of the Judicial Process* was indeed justifiable, and that there may be more modest and judicious versions of Ronald Dworkin's jurisprudential theory that merit adherence today.

At the end of my discussion of modern natural law, above, I quoted a passage from *NJP* in which Cardozo said he would be content to go along with positivists who insisted that pervasive social norms were not law until after they were declared as such by courts.³⁷ This was one of my reasons for

Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160 (2015).

35. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

36. ANDREW L. KAUFMAN, CARDOZO (1998).

37. See text accompanying note 28, *supra*.

declining to categorize Cardozo as a natural law theorist. In this vein, it is instructive to look at a lecture on Jurisprudence given eleven years after the publication of *NJP*. There, he described his view on this precise issue in a subtly different manner, revealing that he was in fact inclined to take the broader rather than the narrower view of what can count as law.

Now personally I prefer to give the label law to a much larger assembly of social facts than would have that label affixed to them by many of the neo-realists. I find lying around loose, and ready to be embodied into a judgment according to some process of selection to be practiced by a judge, a vast conglomeration of principles and rules and customs and usages and moralities. If these are so established as to justify a prediction with reasonable certainty that they will have the backing of the courts in the event that their authority is challenged, I say that they are law, though I am 'not disposed to quarrel with others who would call them something else.³⁸

If I am correct, above, that such a position—combined with the insistence on the duty to employ moral precepts in articulating the law—qualifies someone as a modern natural law theorist in Cardozo's book, then by 1932 he was a modern natural law theorist by his own lights. He seems to have been saying that *what the law is is in one respect constructive, but that is not to say that it is confabulation or even legislation*. It is not an invention of a norm of conduct out of whole cloth. It is rather an articulation, expression, and concretization, of norms, rules, customs, and usages that already exist in some respect prior to the judge's acknowledgement. In this sense, it is indeed discovered by the judge. Moreover, the faculties of judgment that permit judges to discern these "principles and rules and customs and usages and moralities" are in part moral faculties. Although Cardozo remained, in 1932, rather uninterested in quarreling over the terminology selected, he expressly concludes that he wishes to call these discerned norms "law." In this sense, he does indeed seem to be announcing himself as a version of a modern natural law thinker.

Cardozo's emphasis on moral reasoning within adjudication and his attraction to a modern natural law theory bring to mind not just Ronald Dworkin, but Lon Fuller preceding him. These men plainly agreed with Cardozo that the extant norms of adjudication and interpretation called upon judges to engage in moral reasoning of a certain sort. Both agreed on the prescriptive front. And both rejected the analytical separation of legal and moral reasons famously advanced in Hart's Holmes lecture and in *The Concept of Law* and continued in the work of Raz and his followers. Indeed, the untenability of this separation is a hallmark of the work of both Fuller and Dworkin. Each, in his own way, displayed deeply positivistic

38. Cardozo, *supra* note 2, at 276.

tendencies insofar as he aimed to find the right answers to legal questions by mining the notion of fidelity *to the law*, rather than *fidelity to an independently defined domain of right and wrong*. Each displayed natural law tendencies insofar as he regarded adjudication as far more than the registering of social facts. In these ways, each was an exponent of what Cardozo referred to as modern natural law.

The writings of Fuller and Dworkin reveal a debt to Cardozo's thinking, sometimes implicitly but other times explicitly. In 1946, Fuller published his Cardozo lecture in the *Harvard Law Review* under the title *Reason and Fiat in Case Law*.³⁹ Like Cardozo, whom he purported to follow, Fuller insisted that while judicial decision-making has an irreducible element of fiat, its basis in reason and morality was ineliminable. Writing about Cardozo, he said:

If the common law had not attained the perfection of reason, it could be understood only as an unremitting quest for that perfection. His view rejected neither branch of the antinomy of reason and fiat. For him law was by its limitations fiat, by its aspirations reason, and the whole view of it involved a recognition of both its limitations and its aspirations.⁴⁰

Fuller confidently and explicitly rejected the conception of natural law as a "brooding omnipresence in the sky" and candidly admired Cardozo for advancing a down-to-earth spirit in thinking about natural law. And just as Cardozo shifted from a naturalistic and Aristotelean notion of natural law, Fuller too expressly embraced the importance of the positive law as a kind of basis for the natural law. "Man's nature consists partly of what he has made of himself, and natural law, therefore, demands that we must within certain limits respect established positive law."

Dworkin's debt to Cardozo, while less rooted in Cardozo qua legal theorist, is nonetheless enormous. In what is arguably his most famous paper—*Hard Cases*⁴¹—Dworkin illustrates his account of judicial decision-making by selecting *MacPherson v. Buick*, the 1916 opinion on the duty of care that brought Judge Benjamin Cardozo to national attention.⁴² One might indeed suggest that Cardozo's crafting of a justification in *MacPherson* for the rejection of the privity rule was a model for Dworkin's Judge Hercules, as against the positivist Herbert. *Hard Cases* became the template for Dworkin's *Law's Empire*,⁴³ which again took the duty of care in negligence law as a prototype for judicial decision-making that displays law as integrity. In a posthumously published *Harvard Law Review* article

39. 59 HARV. L. REV. 376 (1946).

40. *Id.* at 377.

41. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

42. *MacPherson v. Buick Motor Co.*, 110 N.E. 1050 (N.Y. 1916).

43. RONALD DWORIN, *LAW'S EMPIRE* (1986).

on Hart's *Postscript* (itself published posthumously), Dworkin went out of his way to contest Hart's characterization of Cardozo as a positivist.⁴⁴

As my commentator Charles Barzun reminded me, Dworkin implicitly adverted to *The Nature of the Judicial Process* in the opening pages of *Law's Empire*. In an introductory chapter called "What is Law?" Dworkin characterized the possibility of a jurisprudential view based on the idea of "judicial craft" rather than "plain fact."⁴⁵ Indeed, he suggested that the project of *Law's Empire* was "to throw discipline" around the judicial craft notion.⁴⁶ A short endnote (accompanying the introductory text) in reference pages at the end of *Law's Empire*, reveals that Cardozo's *The Nature of the Judicial Process* was the prototype of the "judicial craft" notion that Dworkin announced he was striving to rebuild with greater discipline.⁴⁷

Among the many threads running from Cardozo through Fuller to Dworkin, one is especially striking. On page 3 of *The Nature of the Judicial Process*, Cardozo provides the first of many cases in that work which serve as an example of the judicial process: the New York case of *Riggs v. Palmer*.⁴⁸ The New York Court of Appeals, in its now-famous *Riggs* decision, refused to enforce a murdered man's will on behalf of the named beneficiary, his grandson, on the ground that he had murdered the testator. In the competition between the principle that a valid will should be enforced and the principle that civil courts ought not add to the difficulties already brought by a crime, came a third principle superior to both: "No man shall profit from his own wrong." Explaining how the court resolved the case, Cardozo wrote: "One path was followed, another closed, because of the conviction in the judicial mind that the one selected led to justice. Analogies and precedents and the principles behind them were brought together as rivals for precedence; in the end, the principle that was thought to be most fundamental, to represent the larger and deeper social interests, put its competitors to flight."⁴⁹

Fuller chose this principle—"No man shall profit from his own wrong"—in his Cardozo lecture (discussed above), and he used it to illustrate "moral principles" expressed in rules of law (insisting however, that their significance would only be understood in the context of the property and duty relationships before the court). Needless to say, Dworkin's first great jurisprudence article—*The Model of Rules*⁵⁰—selects *Riggs* as its first case, uses "No man shall profit from his own wrong" as the prototype of a legal principle, and uses legal principles to provide a foundation for his critique

44. Ronald Dworkin, *Hart's Posthumous Reply*, 130 Harv. L. Rev. 2096, 2128 n.74 (2017).

45. DWORKIN, *supra* note 44, at 10.

46. *Id.*

47. *Id.* at 417, n.7.

48. 22 N.E. 188 (N.Y. 1889).

49. NJP, *supra* note 2, at 3.

50. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHIC. L. REV. 14 (1967).

of positivism. It is as if *Riggs v. Palmer* and the principle that “No man shall profit from his own wrong” have been, since the first pages of *NJP*, the emblem of jurisprudential views that regard moral principles as ineliminable parts of the law itself. In this sense, it pushes one to explore the degree to which Cardozo’s *The Nature of the Judicial Process* is a landmark for a distinctively American version of modern natural law theory, that which Fuller and Dworkin went on to develop.

B. Pragmatism, Discretion, and Creativity

I now return explicitly to the point earlier in this essay, in which I identified several obstacles to any effort to read into Cardozo’s *NJP* a version of Dworkin’s jurisprudence: policymaking, pragmatism, discretion, and creativity. It is plausible to argue that a central feature of Dworkin’s jurisprudence is his rejection of the idea that judges should be engaged in policymaking. Hercules, he argued, must ascertain the principles that underlie extant law and move principles forward that capture the conceptualization of a domain of rights to which the system is already committed. This Herculean enterprise is distinct from policymaking in ways described in some detail. Yet Cardozo is open about the need for judicial policymaking, often talking about the role of the judge in reaching the result that will be best for social welfare. This seemingly cuts against viewing Cardozo as a proto-Dworkinian or Dworkin as a neo-Cardozoan. Relatedly, Cardozo uses the language of empirical social science and policymaking throughout his lectures, and these inclinations seem to harmonize with his self-description as a pragmatist. Dworkin railed against pragmatism in *Law’s Empire*.

As John Goldberg cautioned decades ago,⁵¹ we must be careful to avoid anachronism in interpreting Cardozo’s use of certain phrases. Cardozo used “social welfare” to connote something forward-looking and to identify the law that would function most successfully for the community, not to summarize a particular plan with a consequentialist justification. On this matter, his view is consonant with those of Dworkin. The goal of deciding new cases well and the criteria of success in doing so—these do not contemplate a judge using law as a tool to achieve the right result. The point is rather for judges to employ the legal and institutional framework so that the system continues to do well and the society continues to flourish. This idea is perhaps best grasped through looking at Fuller’s conception of the role of aspiration in legal interpretation.

Even if one gets beyond the language of “social welfare” in *NJP*, however, there remains the question of how to square Cardozo’s self-identification as a pragmatist with what appears to be the profoundly anti-

51. Goldberg, *supra* note 3.

instrumentalist conception of adjudication held by Fuller and Dworkin. My own view is that the history of pragmatism can help us a great deal.

While the late 20th century legal pragmatism of thinkers like Richard Posner was illustrative of the sorts of instrumentalism and realism that lay far from Dworkin's thinking, there were deeper developments of 20th century pragmatism that had features far more congenial to a Dworkinian point of view. In particular, the philosophical pragmatism developed at Harvard by W.V.O. Quine and Morton White through Hilary Putnam is largely consistent with key features of Dworkin's own view.⁵² As I shall explain, I also think it built upon aspects of the Peircean and Jamesian view of philosophical pragmatism that Cardozo arguably had in mind.

The philosophical pragmatism pioneered by Charles Peirce in the nineteenth century was built upon four ideas; in a concededly anachronistic manner, I would label them: anti-representationalism, experimentalism, holism, and internalism. Beliefs, on this view, are not putative pictures of reality but rather states of a person that simultaneously connect with perception, speech, and dispositions to action. More importantly, the process of developing knowledge is a process of exposing oneself to greater experience and in that way forcing one's set of beliefs to adjust to the world around. There is an entire web of beliefs that needs to hang together; further experience causes us to adjust our beliefs to better accommodate the reality around us. It is never clear exactly which beliefs will have to be adjusted as new experience unfolds. The improvement of our set of beliefs is the increasing adjustment of the whole system to the challenges human beings face in confronting the world. Crucially, while truth is, at one level, about being adeptly adjusted in one's beliefs to the world, this is not a case of the picture in one's mind matching the world outside. It is the concept of the entire set of beliefs providing an increasingly well-adjusted system to the world that we are trying to negotiate.[cites]

The Nature of the Judicial Process plainly exhibits pragmatist thinking in all of these respects. Most obviously, Cardozo emphasizes the extent to which judges' efforts to forge the best decisions they could were deemed promising, epistemologically, in part because they were to be tested by human experience over time: they were never the final word.⁵³ Part of Cardozo's recognition that modern natural law was different from classical natural law was his rejection of the idea that there were static and eternal rules or forms out there to be represented by the statements of judges about the law.⁵⁴ Nonetheless, there is an aspiration in legal reasoning and in the judicial process to develop the law in a manner that enhances the

52. I argue this in several places, most extensively in Benjamin C. Zipursky, *Legal Pragmatism and Legal Pragmatism*, in PRAGMATISM, LAW AND LANGUAGE 238 (G. Hubbs & D. Lind eds., 2013).

53. NJP, supra note 2, at 23.

54. *Id.*, at 131-32.

community's well-being.⁵⁵

As I have argued elsewhere, Dworkin's jurisprudential views can also be seen as presenting a version of philosophical pragmatism⁵⁶—in this case, the pragmatism that developed in the 1940s and 1950s when Dworkin studied at Harvard and then more broadly in the 1960s through 1990s.⁵⁷ Like both Peirce and Cardozo, mid-century American pragmatists placed great emphasis on the use of language as the community's means of crafting webs of belief that allowed them to capture the world. More importantly, they viewed the constant pressure of human experience as pressing thinkers to use language to craft theoretical accounts that fit the world increasingly well over time. The engagement of inquirers in argument and justification to recraft their theoretical views was critical to moving forward in our understanding of the world. As this view moved into the later part of the century, philosophers like Hilary Putnam used it as an epistemological basis for rejecting the kind of external skepticism that had troubled philosophers since: inquiry is only possible from within an internal mindset. Philosophers from Donald Davidson to Robert Brandom and John McDowell (and Putnam himself) resisted the claims from more both radical and skeptical thinkers to depict their views as a kind of relativism. As I have argued elsewhere, Rawls' embrace of a reflective equilibrium as a form of moral epistemology alongside of a constructivist approach to moral philosophy is plausibly understood as a form of late twentieth century philosophical pragmatism in this sense.⁵⁸

It is plausible to understand Dworkin as a late-twentieth century philosophical pragmatist in this sense. His core critique of external skepticism in the law is virtually an application of philosophical and anti-representationalist arguments in this sense. Although Dworkin—among the most litigious academics in spirit—was always hesitant to concede anything in the domain of objectivity and therefore rejected the label “constructivist” insofar as it suggested any form of idealism, Dworkin's interpretivism in *Law's Empire* is almost manifestly a form of philosophical constructivism. And the emphasis on coherence rather than correspondence in Dworkin's legal epistemology replicates the web-of-belief features that characterized a great deal of anti-foundationalist pragmatist epistemology from Quine and Sellars to Rawls. In all of these respects, there is great continuity between the pragmatism of Cardozo and the internalist philosophical framework embraced by Dworkin.⁵⁹ In all of these respects, Cardozo's emphasis on

55. *Id.*, at 66-67.

56. *Id.* at 248; I ultimately conclude that Dworkin was in crucial respects not a legal pragmatist, but the overlap is substantial and substantive.

57. See Zipursky, *supra* note 52.

58. *Id.*

59. Charles Barzun provides a rich discussion of Justice Souter's philosophical background with the same pragmatist philosophers (Quine and White) at Harvard, and contrasts Souter with Dworkin

pragmatism and the enhancement of community welfare are actually reasons to see Fuller and Dworkin as continuing his work.

There remain aspects of *The Nature of the Judicial Process* that sound notes markedly different from those which emerge from Dworkin's work, and any effort to display connections between these Cardozo and Dworkin must acknowledge at least some interpretive cacophony. One pertains to Cardozo's and Dworkin's dramatically divergent treatments of the notion of discretion. To be sure, Cardozo insists that "[i]n countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps." The implication of this passage is, however, that there is a range of cases in which judges do have discretion, for Cardozo expressly states that the law is full of gaps. That appears to be precisely the thesis that Dworkin set out to refute in *The Model of Rules*, in *Hard Cases*, and in *Law's Empire*. Because there is always (or almost always) a right answer to legal questions, even in hard cases, judges turn out not to have discretion: they must decide as the law, properly interpreted, requires. Because the juxtaposition of fit and justification yields a right answer, for Hercules, there is a way that the law requires.

A more careful reading of both Dworkin and Cardozo yields a picture that is more mixed on the presence of discretion in the judicial process. For one thing, Dworkin does not actually reject the role of discretion in adjudication in *The Model of Rules*; he rejects the role of strong discretion but accepts the role of weak discretion. If discretion means that judgment must be exercised and the application of the law to the facts will not be clean cut, Dworkin agrees that judges have discretion in adjudication: that is one form of weak discretion. If discretion means that any choice will be permissible, that is strong discretion, and Dworkin rejects it. Cardozo's conception of discretion is plainly more like the first than the second:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." . . .⁶⁰

Cardozo is thus talking about discretion as judgment constrained in a manner that is not reducible or mechanistic, and in this sense his view appears consistent with Dworkin's.

We now come to an equally challenging apparent disconnect—Cardozo's

(and Posner). See Charles.L. Barzun, *Justice Souter's Common Law*, 104 VA. L. REV. 655 (2018).

60. NJP, *supra* note 2, at 140.

treatment of “creativity.” The quotation just provided, and my quick precis of it, will not satisfy those who dispute the Dworkin-Cardozo connection. They will rightly say that Dworkin’s advocacy of a “right answer” thesis is presaged by nothing in *The Nature of the Judicial Process* or in Cardozo’s other work. Judicial decision-making in hard cases is of course a large part of the topic of *NJP*, and, as indicated, Cardozo’s view of the constraints upon judges in the judicial process is vital to the whole lecture series. It must be admitted, however, that Cardozo plainly rejects the sort of “one right answer” approach that came to be the center of Dworkin’s. The final sentence of the passage quoted above, reads: “Wide enough in all conscience is the field of discretion that remains.” Moreover, the word “choice” as applied to judges appears throughout *NJP*. As mentioned, Cardozo frequently describes his view as one acknowledging that judges engage in something akin to “legislation.” Likewise, Cardozo repeatedly describes the role of the judge as one involving creativity.

We do not pick our rules of law full-blossomed from the trees. Every judge consulting his own experience must be conscious of times when a free exercise of will, directed of set purpose to the furtherance of the common good, determined the form and tendency of a rule which at that moment took its origin in one creative act.⁶¹

Perhaps Fuller was exaggerating when he characterized Cardozo as recognizing the place of “fiat” along the place of “reason” in law. But it is plainly true that Cardozo rejected the idea that judges merely *apprehend* the correct answer to legal questions. Deciding cases involves a creative act.

Does Cardozo’s full-fledged recognition of *creativity* finally bring my Cardozo-Dworkin game to an end, given Dworkin’s insistence that great judges are identifying “the right answer” in hard cases? Yes and no. Dworkin himself was deeply attracted to a characterization of judges as creative, notwithstanding the apparent theoretical awkwardness of his doing so. His magnum opus, *Law’s Empire*, of course relies, above all, on the depiction of a judge as analogous to a great fiction writer. Indeed, the magnetism of *Law’s Empire* and *Hard Cases* as pieces of philosophical writing derives in part from his display, in those cases, of the Herculean virtuosity in moral and legal analysis. To that extent Dworkin does indeed seem at one with Cardozo in depicting the judicial process as one of significant craft and creativity. As indicated earlier in this essay, Dworkin was in fact explicit about seizing the Cardozoan notion of “judicial craft” and making it central to his view.⁶²

But of course, there is a negative answer too, and while the negative answer may at first seem superficial, I fear that it is in fact very deep and

61. *Id.* at 103.

62. See note 44, *supra*, and accompanying text.

marks quite a critical divide between Cardozo and Dworkin. While I have argued that Cardozo was not a legal realist, it is understandable that he was often mislabeled as such. That is because he brought extraordinary candor to his audience—the admission that the judges performing creative acts of adjudication simply have to do the best they can. Dworkin, while remarkably forthright about the role of moral and political thinking in adjudication, conveys a very different sensibility. It is a sensibility of expertise and superiority. A judge’s job assignment is difficult and critically important: finding the right answer to legal and constitutional questions sometimes is at the very foundation of our system. Yet there is a right answer, and judges are the best suited to finding it.

I often wonder how it could be that a defender of law’s objectivity in the 1980s, which Dworkin was, could have chosen literary interpretation as his preferred analogue to constitutional adjudication. How could anyone think looking at judges as literary interpreters would fortify our sense of their capacities to converge in the objectively right place? Worse still, how could anyone think an analogy to fiction writers trying to produce the best novel would bring skeptics on board for the right answer thesis? Dworkin’s detractors may be forgiven for finding in his philosophical corpus a level of confidence in normative theorizing bordering on the arrogance of the would-be philosopher-king.

It is striking how different from Dworkin Cardozo was in explicitly addressing the question of judicial competence:

You may say there is no assurance that judges will interpret the mores of their day more wisely and truly than other men. I am not disposed to deny this, but in my view it is quite beside the point. The point is rather that this power of interpretation must be lodged somewhere, and the custom of the constitution has lodged it in the judges. If they are to fulfill their function as judges, it could hardly be lodged elsewhere. Their conclusions must, indeed by subject to constant testing and retesting, revision and readjustment; but if they act with conscience and intelligence, they ought to attain in their conclusions a fair average of truth and wisdom. The recognition of this power and duty to shape the law in conformity with customary morality is something far removed from the destruction of all rules and the substitution in every instance of the individual sense of justice the *arbitrium bon viri*. That might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law.⁶³

Cardozo forcefully rejects the notion of special expertise, while simultaneously emphasizing the reliance of judicial decision-making on the fact that it is constantly provisional, subject to testing and change. What he claims for the system is simply “a fair average of truth and wisdom.” And

63. NJP, *supra* note 2, at 136.

above all, he rejects the prospect of judges' own individual moral judgment as a relinquishment of the rule of law. While Dworkin, too, depends on judges expounding the morality inherent in the legal system (rather than their own), one cannot miss the startling difference in emphasis: quotidian and correctable judicial efforts for Cardozo, virtuoso robust theories arriving at the right answer for Dworkin.

C. Dworkin v. Cardozo on Moral Epistemology

1. The Apparent Superiority of the Dworkinian Position

While many will no doubt sympathize with my comments that Cardozo's humility markets better than Dworkin's overconfidence, one might object that Dworkin's notion of expertise and his treatment of right answers are not merely unfortunate stylistic attributes but rather key features of his account. More pressingly, one might contend that modern natural law theory of the sort I am attributing to both jurists (Cardozo and Dworkin) only really works (if at all) if one follows Dworkin's moral objectivism and confidence in judicial access to moral truth and rejects the deliberately modest features of Cardozo's account. Here are slightly sharpened versions of two central concerns.

First, the language of "legislation," "creativity," and "gap-filling" appears to be inconsistent with the anti-separationism attributed to Cardozo when characterizing his rejection of positivism. If reasoning about morality and justice is sometimes critical to saying what the law *is* and if that is the reason separationist positivism is rejected, then moral reasoning by judges is *deducing, describing and applying* the legal reality, not *creating and legislating it*. Likewise, the results arrived at *do not* fill a gap in the law, they describe a place *that appears to have a gap but actually does not*.

Second, while both Cardozo and Dworkin put forward accounts of normative reasoning by judges as somewhat different from straight up first-order moral reasoning, they have different accounts, and, one might argue, Dworkin's fit-and-justification account of interpretation is far superior to Cardozo's Method of Sociology (atop the three other methods). In particular, Dworkin connects with the actual legal materials and sources by insisting on a level of fit, but amongst possible interpretations that fit, it is really first-order moral reasoning that determines which shall be deemed the law. By contrast, one might argue, the method of sociology is fundamentally descriptive and conventionalistic; judges aim, above all, at capturing *conventional* morality, and their inquiry is essentially a *descriptive* one. This renders the account both inconsistent with the critique of positivism (which appears to depend on the importance of incorporating first-order morality, not conventional morality) and deeply unsatisfactory from a normative point of view, descending, in the end, to a sort of

conventionalism.

One might cap off this critique of Cardozo by charging him with a fundamental equivocation between two ideas, each of which really amounts to what at the time would have been considered legal realism (and today might be viewed as consistent with legal realism *and* also consistent with legal positivism). Where there are gaps in the law, judges might in theory do one of two things: (1) fill the gaps by *moralizing* (or engaging in first-order moral reasoning) about what justice and right and good policy require (call this judge Mardozo); (2) fill the gaps by transplanting conventional *social norms* as they in fact are (call this judge Snardozo). Another possibility is: (3) fill the gaps by *flipping* back and forth between moralizing and social norm transplantation, so it appears normative and descriptive all at once (call this judge Fardozo). An uncharitable critic might say that Cardozo did not distinguish adequately between Mardozo and Snardozo and ended up advocating for what is, in effect, Fardozo. This character (on this line of criticism) is a confused realist, who does not even realize that he is a realist. In today's jurisprudential circles, a philosopher who believed the gaps were of manageable size and was merely reporting on the norms used to fill gaps would be happy saying that legal positivism can accommodate (descriptively) theories that characterize judges as Mardozo, Snardozo, and Fardozo, and would simply say they illustrate different judicial norms for gap-filling. The larger point, however, is that none of these three prototypes counts as saying what the law *is*, and Fardozo does not even have the virtues of candor, clarity, or consistency.

On the face of it, Dworkin figured out how to reject (what I have labelled) Mardozo, Snardozo, and Fardozo, while crafting a principled gap-filling strategy for the great judge, one that gives reasons for the particular combination of moralizing and prior norm incorporation that judges do use and should use. Dworkin's *Law's Empire*—which, as mentioned above, begins with an express statement that he wishes to discipline certain romantic conceptions of law, then identified in a note as *Cardozo's* conception—might be seen as a certain kind of reconstruction of the apparently confused view just set forth. The Dworkinian work on fit might be depicted as an effort to identify plausible candidates of conventionally recognized principles and norms as lying behind the law we have (in non-gappy places), then utilizing first-order moral judgments to choose among the candidates, and then using first-order moral judgment to apply the principles chosen. Because Dworkin actually identified “the law” with those among the principles that fit which are best morally justified, he did not conceive of this as gap filling, but as law application. He thus had grounds for rejecting the realist label. Because moral judgment is critical to saying which of these plausible candidates is the law, the positivist's separationism is rejected and the label of “positivism” (as most commonly

understood) does not fit. Conversely, because Dworkin was an objectivist about right answers in morality (as well as in law), the *Law's Empire* fit-justification methodology described above permitted him to be an objectivist about legal truth, too.

One might take the critique set forth in the last few paragraphs to have the following negative implication for Cardozo: even if a modern natural theory might seem more appealing if it does not rely upon judge's moral expertise and a robust moral epistemic capacity for judges, perhaps the cogency of any modern natural law theory *does* rely on such judicial expertise and epistemic capacity, and, more generally, upon a kind of moral objectivism. Put differently, Dworkin's version may be less attractive in its immodesty, but it appears to be more cogent and consistent as an alternative jurisprudential view that captures some of the merits of natural law thinking while avoiding the pre-modern essentialism that he, Cardozo, and Fuller all sought to avoid.

2. Cardozo Revisited

The account sketched above of Cardozo's methodology was uncharitable insofar as it attributed to him a view that he did not himself articulate (of Mardozo, Snardozo, and Fardozo) and then proceeded to criticize this view. Dworkin's *Law's Empire* view understandably seems like a great improvement. Recall, however, that I contended that Cardozo's *NJP* view was attractive in part because it did not appear to rely on the premise that judges in general have especially reliable access to moral truth. If it is right, as the prior subsection suggested, that a Cardozo-like view is incoherent without the Dworkinian reconstruction and the moral epistemological premises attendant to it, our hopes for a more modest Cardozoan modern natural law theory might be dashed.

In what follows, I shall sketch a picture quite different from that of *Law's Empire* and distinctly superior to the uncharitable Mardozo-Snardozo-Fardozo view. Fuller's corpus and Dworkin's earlier work resonate with a central theme of *The Nature of the Judicial Process*: the derivation of just legal decisions proceeds from within the positive law. Quoting Pound and Berolzheimer, this is how he put it:

The modern philosophy of law comes in contact with the natural law philosophy in that the one as well as the other seeks to be the science of the just. But the modern philosophy of law departs essentially from the natural-law philosophy in that the latter seeks a just, natural law outside of positive law, while the new philosophy of law desires to deduce and fix the element of the just in and out of the positive law—out of what it is and of what it is becoming. . . .⁶⁴

64. *NJP*, *supra* note 2, at 132.

The passage above is strikingly different from my earlier uncharitable sketch. It rejects the idea that judges are looking at one domain—morality—and then importing something from this domain into the different domain of positive law. Morality is *not at all* imperialistic on this view. On Fardozo's judicial process, there was less moral imperialism only because the judge flipped back and forth between such importation and quite stabilizing reifications of conventional norms. Dworkin's process involved lesser moral imperialism—at least in theory—because moral precepts were imported only when there was a good argument that the positive law (identified in a source-based manner) could fairly be said to fit with these precepts, that it was broadly speaking consistent with these precepts already.

Perhaps the easiest way to begin making progress on a different version of Cardozo's view is to see it as an almost willful rejection of his illustrious American jurisprudential predecessor, Oliver Wendell Holmes, Jr. Holmes of course thought it crucial never to forget that the rights and the duties of the common law were really not like moral concepts at all. Cardozo seems to have held almost the opposite view: we must never forget that these are like moral concepts, and in one sense *are* versions of moral concepts, after all. Cardozo thought that the fecundity of common law reasoning was a version of the fecundity of the reasoning that is done with concepts of rights and duties more generally. On the other hand, the common law judge begins in the common law. There is no need to import moral concepts, because the law already is already chock full of them.

Of course, the soundness of an argument does not turn only on the validity of the lines of inference utilized, but also on content of the premises that are fit to ground the argument. And so, a challenger might argue, the seemingly legal but actually moral premises must be true if the legal arguments are to be sound. The worry, then, would be two-fold: one is that a judge starting with premises about rights and duties will not be advancing sound arguments unless he or she is beginning with the moral truth about rights and duties, and this seems only to amplify the need for judicial access to moral truth; a second is that it is clearly unacceptable not to leave *any* room for a divergence between law and morality, and the view sketched above seems to fail in this way. By contrast, the separationist positivist (like Holmes or Hart) need not attribute moral knowledge capacities to judges, and does not struggle to recognize the distinctiveness of law and morality as concepts.

The critique rehearsed above erroneously assumes that if the moral content is already in the legal premises, those premises must be about morality. But Cardozo, in part because of his tremendous comfort with the common law, does not accept just two options in understanding the language of right and duty within legal discourse—one that is about moral

reality and one that is completely positive and non-moral. References to rights and duties in the law are legal, not moral, for Cardozo, even if the concepts in question are of a moral kind and the manner of reasoning with them in the law is a form of moral reasoning. What determines *which legal premises about rights and duties* can be utilized in a sound legal argument is not a matter of which statements match the moral reality. It is a matter of which legal statements are properly supported by legal authority (be that common law, statutory, constitutional, treaty-based, etc.). Put in more analytical garb, the assertibility of the legal statements hinges in significant part on the legal sources, even if the sense of the legal statements is robustly normative in a manner that is best understood as moral.

One way to understand *The Nature of the Judicial Process* is as a set of theoretical deliberations about what must be done with and added to those legal premises to achieve judicial results in the non-obvious cases. The method of philosophy involves the use of analogy and conceptual arguments to derive results from within the resources of the concepts of these legal statements about rights and duties, already in the law. Even here, the reasoning is in important ways moral reasoning. Similarly, where tradition, history, and custom supplement decisions about which direction to expand, contract, or revise the doctrine that is already there, Cardozo sees this as the development or evolution of the doctrinal building blocks. Because those doctrinal building blocks are, in an important sense, *statements about rights and duties*, and rights and duties are moral and justice-oriented in their content, however, their evolution is an evolution in the direction of a more successful, moral, and just elaboration of rights and duties. The sense in which this is gap-filling is that the results produced in these judicial decisions leave the legal system with products—further statements about rights and duties—that will *thereafter* be suited for the first-line, assertible statements about rights and duties (although they would not have been suited for this role before). The set of such first-line statements is thereby expanded. The sense in which judges have discretion over which results they reach is that *there is nothing besides good judgment on the quality of the legal argument to stop them from reaching a different result: the first-line respect for legal authority does not itself foreclose a different result*. It nonetheless remains coherent to contend, as Cardozo did, that in issuing the decision, the judge is *applying the law* rather than making it.

A positivistic critic of this sketch might parry as follows: “The only thing deserving the label ‘law’ is what you [Zipursky] are calling ‘the first-line legal authority’ —the statements with declared sources unambiguously supporting them.” Recall that Cardozo’s attack on legal realists and analytic positivists revealed that he himself rejected this view:

Now personally I prefer to give the label law to a much larger assembly

of social facts than would have that label affixed to them by many of the neo-realists. I find lying around loose, and ready to be embodied into a judgment according to some process of selection to be practiced by a judge, a vast conglomeration of principles and rules and customs and usages and moralities. If these are so established as to justify a prediction with reasonable certainty that they will have the backing of the courts in the event that their authority is challenged, I say that they are law, though I am 'not disposed to quarrel with others who would call them something else.⁶⁵

Two aspects of *NJP* arguably present a problem with attributing to Cardozo a natural law theory so conceived and arguably support the longstanding view of Cardozo as a realist or a positivist convinced that judges are at times required to use their own values to fill gaps and make new law. These are the two problems that led us to Mardozo, Snardozo, and Fardozo, and both relate to the undeniably knotty problem of what to say about his "method of sociology." As described in Part C.1, above, Cardozo at times suggests that judges are required to craft the law so that it is morally the best it can be—that is the view I called "Mardozo," and it appears quite close to the *Law's Empire* view, but without such a clear account of a fit constraint. It appears to be a rather unbridled form of perfectionism (albeit only for the gaps).

My second concern predictably relates to that strand of the sociological method represented by Snardozo. In gap-filling by transplanting contemporary social mores or social norms as the judge understands them, courts are doing something somewhat different from, and (in at least one respect) more problematic than, reifying custom and tradition. It is a longstanding jurisprudential idea, both in common law jurisdictions and beyond, that custom *is* a form of law. Positivists like Raz and Hart understand custom as patterns of behavior with a history and that history is relevant in three respects to the cogency of understanding it as law (aspects arguably unmatched by the dependency on contemporary social norms). First, and most obviously, there appear to be ascertainable social facts associated with it that are not necessarily available with "social norms" or contemporary mores. Second, and relatedly, there is a salience for members of the legal community, lawyers, and courts, to "custom" (as there is to "tradition") that does not typically or unproblematically apply to contemporary social mores. Third, and drawing from both of these ideas, there is a *notice* aspect to custom that is important in rule-of-law terms, and contemporary social mores appear to lack that.

There are thus two concerns that the method of sociology presents for this version of Cardozoan natural law theorist: one pertaining to the

65. Cardozo, *supra* note 2, at 276.

perfectionistic aspect of the method of sociology (the Mardozo critique), and one pertaining to its appeal to contemporary social mores transplantation (the Snardozo critique). As to the first, I offer two responses. The core idea of my account is that Mardozo is largely not *reverse engineering to the morally best scheme* (as conceived from within an independent conceptualization of morality), but rather elucidating the moral framework that is already in a legal discourse that proceeds from first-line authorized statements. That is the deep sense in which it is in the positive law, and any perfectionism is grounded in the law (as was the case with the other three methods).

The Snardozo critique is that it is also based on a misunderstanding of what Cardozo was trying to say. Cardozo did not—despite his unfortunate choice of label—conceive of the judge as sociologist any more than he thought of the judge as historian. Contemporary social norms or social mores are understood to affect and constrain the judge’s reasoning in a different manner—a manner different from the incorporation of propositions about what the current social mores or social norms are. Because she or he is a member of the community that actually has these social norms and social mores, the reasoning done through the moral concepts that are in the law will inevitably be, to some extent, the working out of the answers to problems in accordance with one who takes these norms and mores seriously.⁶⁶ It is true that some judges might aim to abstract away from contemporary values to as great an extent possible, but that is plainly not what Cardozo thought judges do or should do. Conversely, he did not think judges ought to be slavishly adherent to contemporary mores in their detail and application.

Let us suppose, for illustration, a judge who looked upon theatre-going as a sin. Would he be doing right if, in a field where the rule of law was still unsettled, he permitted this conviction, though known to be in conflict with the dominant standard of right conduct, to govern his decision? My own notion is that he would be under a duty to conform to the accepted standards of the community, the *mores* of the times. This does not mean, however, that a judge is powerless to raise the level of prevailing conduct. In one field or another of activity, practices in opposition to the sentiments and standards of the age may grow up and threaten to intrench themselves if not dislodged. Despite their temporary hold, they do not stand comparison with accepted norms of morals. Indolence or passivity has tolerated what the considerate judgment of the community condemns. In such cases, one of the highest functions of the judge is to establish the true relation between

66. See JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (2020); Goldberg, *supra* note 4.

conduct and profession.⁶⁷

It is critical, for Cardozo, that judges understand themselves as members of the community charged with the role of working out the law in the cases brought before them. In so doing, they *are* aspiring to bring the law into accordance with what is just, but they are not doing so by bringing in something external. Neither true morality nor contemporary social mores is *transplanted*, because the legal discourse that judges employ by its nature already incorporates both in some sense. It is moral concepts as understood by members of the community, in the hands of a process that is and has been aimed at what is just.

Needless to say, the sketch above is very preliminary. It is worth reviewing, however, what its merits might be should it prove ultimately justifiable. First, and most directly relevant to the admittedly odd dialectical space I have created, the judge utilizing the methodology just described is neither Mardozo, nor Snardozo, nor Fardozo. This is not about transplantation of morality or transplantation of social mores or flipping between the two: it is about a form of judicial reasoning within judicial discourse that has aspects of aspirational moral reasoning and is nonetheless tied to social norms in certain respects. Second, it is, by design, distinct from the Dworkin of *Law's Empire*, and distinct in a manner that reduces the need for an ambitious moral epistemology or an inflated views of judges' moral expertise. Third, it is faithful to the constraints that ought to be held in mind by one interpreting *The Nature of the Judicial Process*: it takes seriously Cardozo's pragmatism, his moralism, his conventionalism, and his emphasis on the creativity of the judicial process all at once. And it is consistent with his rejection of legal realism, legal positivism, and traditional natural law theory. Finally, it is quite strikingly similar in its aspirationalism and process orientation to the American natural law theory of Lon Fuller, and what many have regarded as the best aspects of Dworkin's *The Model of Rules*.

CONCLUSION

I have asked readers to follow what might be generously labeled a dialectical inquiry in this article, so a summary will be useful. To be clear, this is where I take myself to have arrived: the view sketched in *The Nature of the Judicial Process* is best understood as an early and underdeveloped version of what I have called the American natural law theory ultimately developed by Lon Fuller and Ronald Dworkin. As to each of what struck Cardozo as the three main jurisprudential choices—legal realism, legal positivism, and natural law—Cardozo found something to embrace and

67. NJP, *supra* note 2, at 107-08.

something to reject. He treasured the candor of the legal realists but categorically rejected their skepticism about the existence of legal facts prior to judicial articulation, claiming that overwhelmingly the legal rights and duties that guide citizens' lives are really there, and overwhelmingly judges really are just applying the law in deciding cases. His common sense and small c "conservative" approach to *all the law that is really there* and his insistence that judges have discretion in gap cases anticipated the positivism of H.L.A. Hart, but Cardozo rejected "the constant insistence that morality and justice are not law" which he regarded as central to legal positivism (and arguably remains central to the most prominent forms of positivism today). While he fully embraced the claim that "the judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience" and in that sense appeared to be an adherent of natural law theory, he characterized that school as seeking "an absolute, ideal law, 'natural law,'" relative to which "positive law has only secondary importance" and he expressly rejected that view. If clearly standing for some jurisprudential "position" is a prerequisite for becoming a canonical text in jurisprudence, it is not surprising that *The Nature of the Judicial Process* may not have achieved that particular status.

Instead of lamenting Cardozo's ambivalence, I have suggested that his great lecture series elegantly encapsulates the tensions felt by judges, lawyers, law professors, and law students through the twentieth century and right to the present day. Rather than criticizing him for his incoherence, I have expressed admiration for his ability to retain a kind of comfort with this mix of positions. Cardozo's brilliant judicial opinions in common law, statutory interpretation, and constitutional decision-making are part of why I land on admiration rather exasperation; the overwhelming majority of his work as a judge was accomplished in the years *after* his precocious Storrs lectures in 1921.

If this seems to be a bit of hero worship, so be it. My worry is that the difficulty of maintaining the combination of positions above has led to a rather extreme position today, which I call "Washington legal positivism": an insistence that the resources available to judges for legitimate legal interpretation are limited to those rooted social facts—in addition to decided case law, textualism in statutory interpretation (purportedly relying on social and linguistic facts) and originalism in constitutional interpretation (purportedly relying on a combination of linguistic and historical facts). Although most professional philosophers of law as such do not adhere to this view, theoretically-minded judges, lawyers, and law professors are increasingly in its grip, and many proudly defend this view because of its perceived strength from a jurisprudential and political-theoretic point of view. Insofar as natural law theorists over the past couple of decades have

strived to meet the challenge, their views have tended to rely on philosophical premises in metaphysics and moral epistemology that have only polarized the debate and energized their positivistic foils.

The perceived untenability of combinations of views like those which Cardozo advanced led me to an admittedly odd rescue strategy: interpret *The Nature of the Judicial Process* as a progenitor of the American natural law theory of Lon Fuller and Ronald Dworkin. As I indicate, there is plenty in the work of each of those scholars to warrant this characterization. The more interesting challenge is to reconcile what appear to be striking differences between Cardozo and Dworkin: Cardozo's pragmatism appears to conflict with Dworkin's moral objectivism; Cardozo's embrace of discretion appears to conflict with Dworkin's express rejection of it; Cardozo's concern over social welfare appears to conflict with Dworkin's elevation of principle over policy, for judges; Cardozo's open acknowledgment of the "creative" acts of judges in hard cases appears to conflict with Cardozo's insistence that judges in hard cases aim to find the right answer, which virtually always exists.

Drawing upon the intellectual history of sophisticated pragmatism in analytic philosophy, I defended the view that Dworkin's philosophical commitment were in fact tantamount to those of a pragmatist, like Cardozo. To the extent that Dworkin's differences from Cardozo turned on Dworkin's moral objectivism and confidence in judicial epistemic excellence, I suggested that a more modest, Cardozoan version of modern natural law theory might indeed be more promising. If the Cardozoan form of American natural law theory sketched in the concluding sections of article can indeed be fleshed out in the future, humility, candor, and morality will turn out to be complementary, not conflicting, in the adjudicative enterprise of applying the law.