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CARDOZO AND UNCERTAINTY IN THE COMMON LAW

Shyamkrishna Balganesh*

INTRODUCTION

Since at least the time of Blackstone, scholars have identified the “uncertainty” of the common law as a problem that is endemic to its functioning.¹ Indeed, to Blackstone the idea was “so generally adopted” that any attempt to “refute it” was likely to result in ridicule.² Yet, even to him, the precise source of the uncertainty was something of a mystery, variously attributed to the multiplicity of laws and judicial decisions, the resulting abundance of potentially contradictory rules, and the heightened discretion afforded to judges to declare the law in individual disputes.³ All the same, to Blackstone, the fault—if any—was not with the common law but with the nature of laws more generally. As he wrote:

It has sometimes been said [that uncertainty] owe[s] its original to the number of our municipal constitutions, and the multitude of our judicial decisions; which occasion, it is alleged, abundance of rules that militate and thwart with each other, as the sentiments or caprice of successive legislatures and judges have happened to vary. . . . People are apt to be angry at the want of simplicity in our laws: they mistake variety for confusion, and complicated cases for contradictory.

. . . .

Whatever instances therefore of contradiction or uncertainty may have been gleaned from our records, or reports, must be imputed to the defects of human laws in general, and are not owing to any particular ill construction of the English system. Indeed the reverse is most strictly true. . . . When therefore a body of laws, of so high antiquity as

* Sol Goldman Professor of Law, Columbia Law School. Many thanks to participants at the Symposium on Benjamin Cardozo’s *The Nature of the Judicial Process*, held at Yale Law School on March 25, 2022, and participants at a Columbia Law School faculty workshop, for helpful comments and suggestions. All errors are mine.

1. For an account of how Sir Edward Coke engaged the question in the seventeenth-century version of the common law, see DAVID CHAN SMITH, EDWARD COKE AND THE REFORMATION OF THE LAWS 19–58 (2014); R.A. MacKay, *Coke: Parliamentary Sovereignty or the Supremacy of the Law?*, 22 MICH. L. REV. 215, 219 (1925).

2. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *325 (1765).

3. *Id.* at *328.

the English, is in general so clear and perspicuous, it argues deep wisdom and foresight in such as laid the foundations, and great care and circumspection, in such as have built the superstructure.

....

But is not (it will be asked) the multitude of law-suits, which we daily see and experience, an argument against the clearness and certainty of the law itself? By no means: for among the various disputes and controversies which are daily to be met within the course of legal proceedings, it is obvious to observe how very few arise from obscurity in the rules or maxims of law.⁴

Conspicuous in Blackstone's account is a ready acknowledgment that some level of uncertainty was inevitable in the working of the law. Therefore, instead of attempting to refute the existence of this uncertainty, he sought to address how it could be managed through the method of the common law. Living with the lack of certainty in the common law while appreciating the rationality of its mechanisms for addressing the consequences of that uncertainty was thus a central theme of Blackstone's refrain.

In varying forms, theorists and defenders of the common law since Blackstone have offered a similar defense of the institution.⁵ In the style of Blackstone, these arguments have sought to reveal the layered nature of uncertainty in the common law, differentiating between two separate forms of uncertainty and their divergent causes, even while recognizing the two to be analytically interdependent.⁶ The first is a form of *substantive uncertainty*, an uncertainty that was seen as emanating from common law doctrine. The fuzziness of the common law's open-ended rules, which courts molded from one case to another, and which manifested itself in multiple, often-contradictory precedents, was taken to be the source of this substantive uncertainty. The second form of uncertainty is best characterized as the *uncertainty of process*, wherein the cause of the uncertainty was identified as the manner in which rules were interpreted, applied and reconciled by courts, tasked by the common law with making law in individual cases.

The two forms of uncertainty have of course always been related: the common law's very process of rule development has long depended on the open-textured nature of its doctrinal rules, which allowed for circumstantial tailoring.⁷ Yet in addressing the concern with uncertainty, defenders of the

4. *Id.* at *325–30.

5. For prominent examples, see Oliver Wendell Holmes, Jr., *The Path of the Law*, 25 HARV. L. REV. 457, 465–66 (1897); BLACKSTONE, *supra* note 2, at 325–35; 1 THE SELECTED WRITINGS AND SPEECHES OF EDWARD COKE 306–07 (Steve Sheppard ed. 2003).

6. See, e.g., COKE, *supra* note 5, at 306.

7. See Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common*

common law have invariably focused on the uncertainty of process, while neglecting substantive uncertainty. These efforts attempt to show that the common law's method of rule-making disciplines judicial discretion, while balancing the flexibility of situational tailoring against the need for intelligible rules. And while such arguments have for the most part been successful at portraying lawmaking in the common law as a process that is far from being *ad hoc*, they have also done surprisingly little to address the concern with any uncertainty underlying the product of that process, i.e., the common law's own doctrinal rules. Open-ended rules are thus seen as inevitable, and the uncertainty associated with them is to be tamed by the rationality of the underlying process.

Benjamin Cardozo's *The Nature of the Judicial Process* is best understood as one of the most successful contributions to this category of work defending the common law on the basis of its process.⁸ In the book, Cardozo offers a spirited and principled defense of the judicial process, all in an effort to highlight the manner in which judges manage the seemingly pervasive uncertainty of the common law method in the discharge of their duties. All the same, it is obvious that he considered the project to be necessarily incomplete. Just a few years after the publication of the *Judicial Process*, he published a second set of lectures as a "supplement" to the *Judicial Process*, recognizing that a few ideas were "imperfectly developed" and required fuller elaboration.⁹ This second set would come to be published under the title *The Growth of the Law*.¹⁰

What makes *Growth* a somewhat curious sequel to *Judicial Process* is not just the relative contemporaneity of the two. *Judicial Process* reads as a self-contained volume, with a single-minded focus on the process of common law decision-making. As such, its core message is relatively straightforward: the judicial process embodies a set of techniques that render it less uncertain and less *ad hoc* than might be imagined from the outside. In *Growth*, by contrast, Cardozo's focus is—as the title suggests—"the law", rather than just its process of creation and expansion.¹¹ And it is here that he makes a move that takes his project beyond the confines of the category previously described, while at the same time exposing a potential contradiction.

A central theme of *Growth* is the uncertainty of common law doctrine. Yet Cardozo's method of solving it extends beyond the judicial process. He instead endorses the need for a "restatement" of the common law and

Law, 163 U. PA. L. REV. 1241, 1261 (2015).

8. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921). (hereinafter "JUDICIAL PROCESS").

9. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* (1924) (hereinafter "GROWTH") (Introductory Note).

10. *Id.*

11. *Id.* at 1–108.

identifies the American Law Institute (ALI) as a potentially ideal vehicle to engage in this process.¹² But while he extols the need for the limited certainty that such codification-through-restatement would bring about, he glosses over the manner in which such codification would impact the judicial process, which he had valorized (and rationalized) in *Judicial Process*. In other words, was the substantive certainty plausibly introduced by the Restatements an aid or an impediment to the methods that he had laid out as devices for judges to manage the uncertainty of the process? On this question, he powerfully equivocates. Given his abbreviated treatment of these questions, one is left asking why it is that Cardozo chose to “supplement” the relatively coherent and comprehensive account in *Judicial Process*. The answer, one suspects, may have had to do with Cardozo’s stature in the legal profession and his prominence at the time of the lectures, not just as a leading judge, but also as a judicial statesman who was actively involved in ongoing efforts to reform the law and the legal profession. Thus, while *Judicial Process* focused on his role as a judge, *Growth* spoke directly to his non-judicial roles. Yet, ironically, he appears to have given insufficient attention to the question of how the two related to each other.

In this Essay, I argue that Cardozo’s commitment to certainty in the common law embodied a complex structure, masking a potential analytical paradox. Whereas *Judicial Process* was directed at making readers comfortable with the uncertainty of the common law and having them accept it as an innate feature of the system, *Growth* readily acknowledged that the uncertainty of common law doctrine deserved being addressed on its own terms. Implicit in that acknowledgement was a recognition of the inadequacy of the common law process to tame the uncertainty of common law doctrine. And while Cardozo attempted to reconcile the two with a grossly underdeveloped theory suggesting that the certainty of the common law would invigorate the judicial process, that theory has seen little validation not just since, but in the very opinions that Cardozo wrote.

I. THE ROLE OF UNCERTAINTY IN THE *JUDICIAL PROCESS*

The scholarly literature reviewing *The Nature of the Judicial Process* is voluminous: much of it is complimentary, while some of it is quite critical.¹³ My objective here is neither to summarize *Judicial Process* nor to add to that body of literature. It is instead to suggest that a central theme of the book is Cardozo’s attempt to convince the reader that the uncertainty of the common law was capable of being managed from the bench. Cardozo’s

12. *Id.* at 1.

13. For some of the critical commentary, see Jerome Frank, *Cardozo and the Upper-Court Myth*, 13 *LAW & CONTEMP. PROBS.* 369 (1948); Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion*, 29 *VA. L. REV.* 625 (1943).

engagement with uncertainty in the book has a clear autobiographical aspect to it. By the end of the book, we learn that it took Cardozo many years to come to terms with the uncertainty of the common law which he then describes as “inevitable.”¹⁴ But what exactly is the source and form of uncertainty that Cardozo is addressing and which lead him eventually to his position of comfort?

The uncertainty that Cardozo really is engaging in *Judicial Process* is the apparent subjectivity underlying the discretion vested in judges by the common law process of rule development.¹⁵ He notes that the easy cases involve nothing more than the direct application of a rule or statutory provision to a set of facts when that rule or provision is abundantly clear. He even states that these simple cases constitute a majority of cases confronted by the common law.¹⁶ To him, the perception of uncertainty emanates from those cases where a judge is not presented with a clearly applicable rule or indeed any pre-existing rule of decision for the case, and must instead enter into the domain of lawmaking, an underappreciated reality of the judicial function that he believes is worth acknowledging and embracing.¹⁷ In these cases where a pre-determined rule does not dictate a judge’s task, the discretion underlying the lawmaking function generates the perception of uncertainty, which in turn calls into question the legitimacy of the very judicial role.¹⁸ Cardozo’s central objective in the book is to suggest that judges do in fact employ discernible methods that embody principle and reason when they embark on this lawmaking function.

In his rich description of each individual method, Cardozo on occasion directly addresses the extent to which that particular method counteracts the existence and perception of uncertainty underlying the judicial function. For instance, in his discussion of the method of philosophy, which is a modified version of analogical reasoning specific to precedent, he concludes by emphasizing how the method is at base driven by a yearning for certainty and consistency in the application of rules derived from precedents.¹⁹ The reliance on precedent and its repetitiveness is seen to contribute to certainty by suggesting the existence of a predictable pattern in the law. He makes a similar claim in his discussion of the method of sociology, when he notes how the common law has emphasized the virtue of tradition as a mechanism of ensuring greater certainty and consistency in its functioning.²⁰

While certainty makes an occasional appearance in the early parts of the

14. JUDICIAL PROCESS, *supra* note 8, at 166.

15. *Id.*

16. *Id.* at 164.

17. *Id.* at 165.

18. *Id.* at 165–67.

19. *Id.* at 50.

20. *Id.* at 66–67, 69.

book, it is only in the later sections that Cardozo directly engages the idea and admits to it being a unifying theme in the narrative. In doing so, he makes two crucial analytical moves that are worthy of close examination. The sections below address each in turn.

A. Uncertainty of Process and Product

The first of these analytical moves is Cardozo's implicit effort to conceptually disambiguate the idea of certainty as a defense to the open-endedness inherent in his methods. The last part of *Judicial Process* addresses the extent to which deviations from precedent are ever justifiable as part of the judicial method. Having previously extolled precedent as the principal basis of certainty in the common law method, Cardozo here attempts to address how judicial law making that deviates from precedent might indeed be justifiable.²¹ His answer acknowledges the inevitability of uncertainty in the common law, but plays on a crucial equivocation:

Our survey of judicial methods teaches us, I think, the lesson that the whole subject matter of jurisprudence is more plastic, more malleable, the moulds less definitely cast, the bounds of right and wrong less preordained and constant, than most of us, without the aid of some such analysis, have been accustomed to believe. We like to picture to ourselves the field of the law as accurately mapped and plotted.²²

The key lies in his use of the term "jurisprudence," where it is unclear whether he is referring to the body of rules contained in the common law or instead to the method of studying and reasoning through those rules in their application to individual cases. Having thus far focused on the method of adjudication and the role of judges, one might well be led to believe that Cardozo was here suggesting that the judicial process was what was "malleable."²³

Yet as we get deeper into the defense, we see that Cardozo likely has something else in mind. In acknowledging that most questions before courts are questions of "degree," Cardozo appears to suggest that the rules needed in individual cases leave a significant amount of judgment to courts and thus ought to take a good amount of the blame for any perceived uncertainty. He writes:

We are tending more and more toward an appreciation of the truth that, after all, there are few rules; there are chiefly standards and degrees. It is a question of degree whether I have been negligent.²⁴

This move would be the standard move reminiscent of the literature on

21. *Id.* at 160.

22. *Id.* at 161.

23. *Id.*

24. *Id.*

uncertainty in the common law, which, as discussed, traces back to Blackstone. It would, in other words, lay most of the blame for any uncertainty on the rules themselves, and valorize the rationality of the judicial process as a mechanism of curtailing the downsides of such a rule-based uncertainty. In this understanding, a good part of the justification for the open-endedness of the judicial process and the existence of multiple seemingly contradictory methods emanates from the vagueness of the common law's rules.

In all fairness, Cardozo does concede that in a vast number of instances the common law does contain a clear rule or precedent such that many decisions may be delivered summarily without opinion, or indeed through the rote application of precedent.²⁵ All the same, he concedes that his whole enterprise in the book is not directed at this body of cases but instead limited to the minority of cases where there is no clearly applicable rule of decision, demanding a judge's invocation of different methods to create a rule for the case.²⁶ And in these cases, even if they are in a minority, Cardozo readily concedes that uncertainty is inevitable since the judge must be a lawmaker:

Here it is that the judge assumes the function of a lawgiver. I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the question for it was futile. I was trying to reach land, the solid land of fixed and settled rules. . . . As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable.²⁷

The absence of a land with "fixed and settled rules," he concedes, led him to the realization that uncertainty was an inevitable component of the common law but that it may be tamed through the application of reason.²⁸ The "law", in other words for these cases, is not an objectively expressed truth but instead a declaration that emanates from the decision maker. The main point here is that Cardozo directs the criticism of uncertainty towards the common law's rules and the law itself, thereby suggesting that the rationality and principled nature of the methods he is describing offer a needed antidote to that uncertainty. The inevitability of that uncertainty thus offers the very justification for his defense of the judicial process. Since *Judicial Process* is directed at the judicial process where the judge is a lawgiver either consciously or subconsciously, it is the uncertainty of the common law's applicable rules that triggers the very need for Cardozo's

25. *Id.* at 164.

26. *Id.* at 165.

27. *Id.* at 166.

28. *Id.*

account. Here, Cardozo's approach is very much in keeping with prior defenses of uncertainty in the common law.

B. Uncertainty as Perceptual and Real

The second and related analytical move that we see Cardozo making in relation to the uncertainty of the common law is perhaps even more subtle. During the entire discussion of uncertainty, Cardozo equivocates between the question of whether uncertainty in the common law is real or merely a perception.

At times, he appears to suggest that claims of uncertainty in the common law are based on a misunderstanding of the judicial role.²⁹ At other times, he admits that the vagueness of common law rules detracts from the ideal of certainty.³⁰ As should be apparent, the distinction maps onto the difference between rules and process that he makes in addressing the question itself.

The difference is hardly inconsequential, especially when coupled with the admission that uncertainty is inevitable. An uncertainty that is merely perceived is obviously far less of a problem than one that is objective and real. Addressing the former requires little more than correcting a false perception about the law, whereas correcting real uncertainty might well require changing the actual content of the law.

Now if the uncertainty around the judicial process is perceived while the uncertainty around common law rules is real, Cardozo does not offer a sufficient justification for that distinction. The only plausible explanation connects back to the point previously made, namely, that the baseline of actual uncertainty in the common law rules is what justifies the enterprise of identifying a method in the judicial process so as to render it more certain. In other words, maintaining the fact that the uncertainty underlying common law rules was pervasive, real, and inevitable was crucial to the project's spirited defense of there being an identifiable and rational method in the judicial function. A significant part of the rationality underlying that function was driven by the real uncertainty underlying the rules and doctrines of the common law.

* * *

Despite acknowledging the inevitability of the common law's uncertainty, by which Cardozo meant the rules of the common law, *Judicial Process* is conspicuous in its unwillingness to pass full judgment on the virtues and vices of that uncertainty as such. While *Judicial Process* does not celebrate the uncertainty of common law doctrine as an unadorned good

29. See *id.* at 166-70, 171.

30. See *id.* at 168.

(despite conceding its inevitability), it at the same time does not condemn that uncertainty as a feature of the system that needed to be modified or eliminated. And in some respects, this lack of condemnation is understandable, for Cardozo's claim about the need for a method in the judicial process was driven in significant part by the persistence of the common law's doctrinal uncertainty. In thus serving as a foil for his account of the judicial process, the substantive uncertainty of the common law played an important anchoring role for Cardozo's theory of the judicial function.

II. *GROWTH* AND SUBSTANTIVE UNCERTAINTY IN THE COMMON LAW

Barely a few years after the publication of *Judicial Process*, Cardozo began to supplement it with another series of lectures, which he published as *Growth*. He categorically viewed the latter as a sequel to the former and sought to augment the process-based focus of *Judicial Process* with a somewhat disjointed engagement with the substantive content of the common law.³¹ This Part unpacks the extent to which *Growth* undermines the vision of uncertainty (and its inevitability) underlying *Judicial Process*.

A. *Judicial Process and the Substance of Common Law Rules*

Cardozo's identification of four separate methods of reasoning routinely adopted by courts has long been considered to be the most significant and original contribution of *Judicial Process*. The effort to offer a unifying vision of the judicial process has, however, been subjected to some significant criticism.³² While Cardozo purported to speak for the entire judicial process, his argument only ever really captures the manner in which appellate courts function. Altogether missing in the narrative is any discussion of how trial courts are to engage the factual record and mold the relevant rule to the facts in applying it thereto.³³ Closely connected to this inadequacy is another one more relevant to the present argument.

Cardozo's argument in *Judicial Process* is framed in a rather distinctive academic style. While it certainly deserves commendation for this feature and for its effort to engage the leading theorists and scholars of the common law at the time, conspicuously missing from the discussion is any real engagement with actual cases as examples to highlight the argument. What little engagement with caselaw there is appears towards the end of the book, and even there Cardozo provides us with little more than a perfunctory overview of the relevant rules and courts' engagement with them.³⁴ This is

31. *GROWTH*, *supra* note 9, at 1.

32. *See, e.g.*, Frank, *supra* note 13; Mous, *supra* note 13.

33. This is the basis of Frank's criticism. *See* Frank, *supra* note 13, at 369.

34. *See* *JUDICIAL PROCESS*, *supra* note 8, at 154–55.

somewhat surprising and distinguishes it from other classics of the same genre, such as Holmes's *The Common Law*.³⁵ There might of course be a simple explanation for this difference: in contrast to Holmes, Cardozo's purpose in the book is to offer a defense of the judicial *process* rather than to engage the law itself. But in as much as the necessity of that process is itself buttressed by the nature of the underlying rules and doctrine, Cardozo is surprisingly opaque about the latter. The omission of case law extends even to decisions that he himself delivered as a prominent state court judge, which would later become the subject of significant conceptual debate and disagreement.³⁶

The omission becomes particularly acute when Cardozo engages the question of whether his account is representative of the everyday judicial function or is instead exceptional. As noted earlier, he readily concedes that in a vast majority of cases the judge is not called upon to make law in a creative manner, but instead merely applies a rule that is relatively predetermined to the case.³⁷ These cases, to Cardozo, "leave jurisprudence where it stood before."³⁸ According to Cardozo, here the judge merely searches and compares, presumably an allusion to the judge's task of choosing among potentially competing applicable precedents. The distinction that Cardozo draws here traces back to Salmond's distinction between *static* and *dynamic* precedents. The dominating characteristic of "static" cases in this account is that "the law and its application alike are *plain*."³⁹ By "plain," Cardozo presumably means uncontroversial and without need for further elucidation and exposition. To this he then adds another significant set of cases where "the rule of law is *certain*, and the application alone doubtful," this time seemingly a reference to the process of fitting the factual record to the "certain" elements of the law.⁴⁰ The important contrast that he appears to draw between these situations suggests that the absence of illustrations and examples to highlight the difference is stark, and leads one to believe is likely deliberate.

By the end of *Judicial Process*, Cardozo is therefore ready to concede that the creative element demanded of judges, which he is taking great pains to describe, is called for in but a fraction of the cases that come before courts. Of course, the implication is that even if the cases in which it is called for are numerically fewer, they are nevertheless of greater importance and salience. But where the creative element is not called for, matters seem relatively straightforward. In these instances, judges must instead undertake

35. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881).

36. See, e.g., *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916); *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88 (1917); *Jacobs & Youngs, Inc. v. Kent*, 230 N.Y. 239 (1921).

37. *JUDICIAL PROCESS*, *supra* note 8, at 163.

38. *Id.* at 164.

39. *Id.* (emphasis added).

40. See *id.*

a different process, which Cardozo treats as unworthy of elaboration. They must either choose and compare among competing precedents and simply adopt the more appropriate one mechanistically, or instead examine the factual record to fit the facts into a rule that is otherwise clear in its contours. In the latter, the controversy and skill (if any) is seen to lie in connecting the facts to the law. In both of these instances “jurisprudence remained untouched.”⁴¹ If the rest of *Judicial Process* valorized the complexity and nuance of the judicial process, Cardozo’s description here exhibits an artificial naïveté that he surely could not have intended.

Undoubtedly, the choice of applicable precedent involves determining the amplitude of that precedent holding before making the selection. Similarly, fitting the facts into a rule requires ascertaining the meaning and parameters of the rule and its elements.⁴² Cardozo’s description instead appears largely rhetorical and strategic rather than analytical. And it is important, as we move to seeing where he picks things up in *Growth*.

Doctrinal or rule-based uncertainty is therefore for the most part a non-issue in *Judicial Process*. For a good number of cases, it simply does not exist since the rules are certain. For another large number of cases, it is immaterial since the dispute requires no more than the application of the facts to a rule, and any uncertainty is thereby rendered irrelevant. And in a minority of cases—those that Cardozo’s theory deals with—it is successfully managed by the methods of the judicial process so as to be unproblematic.

B. Certainty and Restatements in Growth

While Cardozo’s precise reasons for supplementing *Judicial Process* with *Growth* remain mysterious, what is nevertheless clear is that he considered *Growth* to be an addition to the first set of lectures and to some degree repetitive of them.⁴³ Instead of focusing on the process of adjudication and the manner in which judges arrive at the reconciliation of competing normative considerations, in *Growth* Cardozo chose to focus on “the law.”⁴⁴ As others have pointed out, Cardozo was no Legal Realist and certainly did not believe in the purely predictive theory of the law, which simplistically assumed that the content of the law was entirely determined by individual decisions.⁴⁵ Legal rules—including those of the common law—did play a role and constrained what judges did in individual cases.

41. *Id.* at 165.

42. For a well-known criticism of this position, see Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

43. GROWTH, *supra* note 8 (as explained in Cardozo’s Introductory Note).

44. *Id.* at 1 (“The law of our day faces as twofold need.”)

45. See JUDICIAL PROCESS, *supra* note 8, at 126-27 (disavowing the prediction theory of law). See also Edwin W. Patterson, *Cardozo’s Philosophy of Law*, 74 U. PA. L. REV. 71 (1939); John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1423 (1999).

All the same, *Growth* begins in a somewhat disjointed manner. Cardozo sets out what he sees as the twofold needs of “the law” at the time: first, the introduction of greater certainty to its content, and second, the need for a clear philosophy that allows it to balance stability and progress.⁴⁶ Certainty thus emerges as the key ideal motivating one of the two central premises of the book.

What exactly certainty in the law means is of course a question that Cardozo altogether dodges. He rather quickly proceeds to treat it as a self-evident truth that certainty is valuable in a developed legal system. Its value is seen to lie in the guidance function of the law: not being able to know the law impedes its ability to influence behavior.⁴⁷ In support of his claim that certainty is valuable in the law, he merely falls back on the work of the founding committee of the American Law Institute (ALI) that had proposed initiating a program of “restating” the law in order to contribute to its certainty and simplicity.⁴⁸ Cardozo takes the committee’s identification of the causes of certainty in the law as a given and elaborates on them. The principal focus in his narrative however is the simple multitude of decisional law produced by courts from multiple jurisdictions, which requires synthesis and distillation for the law to move forward in a coherent manner.⁴⁹

What follows rather rapidly is a full-blown defense of the project of the American Law Institute as directed at grappling with the “monster of uncertainty” and “slaying him” through a scientific and accurate restatement of the law.⁵⁰ It is obvious that in offering this defense of the Restatements, Cardozo was aware that the push towards greater certainty could be seen as impeding the judicial process and indeed even undoing much of the defense of the creative energy that he had valorized and defended in *Judicial Process*. He therefore sought a reconciliation of the two, which bears unpacking.

As Cardozo notes, a “[r]estatement is needed, not to repress the forces through which judge made law develops, but to stimulate and free them.”⁵¹ The process of restating common law rules was meant to set the judges free and reinvigorate the process of judicial law making. Yet, Cardozo says no more beyond this. How might the creation of distilled rules from the common law further, rather than impede, judicial lawmaking and the deployment of the various methods that Cardozo so ably identified in *Judicial Process*? Beyond platitudes, Cardozo tells us very little. The reader is told of how academics and universities have an important role to play in

46. GROWTH, *supra* note 8, at 1.

47. *Id.* at 3 (describing law as a “guide to conduct”).

48. *Id.* at 3–6.

49. *Id.*

50. *Id.* at 6.

51. *Id.* at 9–10.

generating legal principles and organizational ideas to synthesize the law. The Restatements, to Cardozo, would serve a similar purpose that would prove to be a “potent force in bringing certainty and order out of the wilderness of precedent.”⁵²

It is here for the first time that Cardozo actually unpacks—or, at least, attempts to unpack—what “certainty” means. He makes a distinction between certainty that is *real* and *sound*, and that which is *illusory*, a sham, and therefore to be shunned. The analytical basis of this distinction, however, appears to be connected to little more than judicial behavior. Sham certainty is the certainty that judges strive for to keep the law consistent within their own normative ideals. This is in contrast with certainty that attempts to categorize the common law based on principles and postulates of justice.⁵³ Again, as is characteristic of most of Cardozo’s writing in these lectures, not a single example is given in support of the difference.⁵⁴

Cardozo soon relates this distinction to the manner in which precedent works. What he seems to have in mind is the situation where judges somewhat artificially adhere to precedent with minor modifications to the underlying rule in order to maintain a superficial consistency between the precedent and the new rules of decision, but in so doing actually move the law in an altogether new direction. The adherence to precedent in such situations is little more than a “lip service” and “pretense.”⁵⁵ This form of certainty is a sham, which Cardozo believes requires the Restatement to openly embrace law reform and change the law honestly whenever needed.

As should be fairly apparent, Cardozo is here invoking what would become the rallying cry of the Legal Realists. The sham adherence to precedent and courts purporting to speak in the voice of the declaratory theory of the law rather than embracing the reality of lawmaking directly was central to the Legal Realist critique.⁵⁶ The peculiarity of Cardozo’s attempt to associate himself with this concern is twofold. First, it is at odds with his account in *Judicial Process*, where he openly embraces the declaratory nature of common law development, at times even going so far as to suggest that the retroactive application of a new legal rule developed in an individual case is unproblematic.⁵⁷ What he appears to be implying in

52. *Id.* at 16.

53. *Id.* at 16–18.

54. *Id.*

55. *Id.* at 18.

56. See Brian Z. Tamanaha, *The Mounting Evidence Against the “Formalist Age,”* 92 TEX. L. REV. 1667 (2014). For an example of the critique, see GRANT GILMORE, *THE AGES OF AMERICAN LAW* 12–13 (1977). According to the declaratory theory of the common law, judges do not make law but merely declare what the law is and has always been, thereby allowing them to effect legal change without any concern for the retroactivity of their modification. See Samuel Beswick, *Retroactive Adjudication*, 130 YALE L.J. 276, 294 (2020) (describing the origins of the theory and its early evolution).

57. See JUDICIAL PROCESS, *supra* note 8, at 147.

Growth is that the form of sham (as opposed to genuine) certainty is endemic to the judicial process, such that moving away from it requires an external agency such as the ALI. It is hard to see how it could be a sham and unproblematic both at once. Second, it is hardly in keeping with how Cardozo himself effected important and meaningful change in common law doctrine in decisions that he handed down as a judge, something that Edward Levi later vividly illustrated in his classic work.⁵⁸ In many of these cases, Cardozo refrained from explicitly overruling prior precedent and instead altered assumptions underlying those precedents to give their conceptual structure new meaning, and in the process arrived at a different result.⁵⁹ Again, this was traditionally how the common law has worked and how Cardozo himself understood it as working but a few years earlier in *Judicial Process*.

In his account of certainty and of the vices of “sham” certainty, Cardozo appears to be fairly cynical of the very *juricentrism* that characterized *Judicial Process*. It is almost as though relying on judges for lawmaking was always a second-best option, and indeed one less preferable to a private organization attempting to restate the law along the lines of a scholarly enterprise. Further, while he goes to some length to describe the sham certainty that is to be avoided, at the same time, he says surprisingly little about the *genuine* certainty that a Restatement should strive for and which he sees as potentially realizable. What he appears to have in mind is some kind of organization and synthesis of precedents using commonly accepted normative precepts. But if that is indeed what he has in mind, it demands a level of normative agreement around core values that is just as illusory.

Cardozo is quick to recognize that the certainty which he identifies as a virtue should not be overemphasized. He notes that fetishizing certainty even through the Restatements can result in an “intolerable rigidity” that could be counterproductive and undermine the very flexibility of the judicial process. The certainty must, in other words, allow for the very growth of the law in order for it to be meaningful.⁶⁰ Yet, that begs the very question of whether the certainty being sought is itself illusory given its fecundity.

In *Growth*, certainty as an analytical precept is therefore not playing the role that Cardozo seems to intend for it. While a justification for the Restatement initiative, it is undeniably detracting from the strengths of the judicial process that Cardozo identified, including its flexibility and sensitivity to new and emerging circumstances. In some ways, Cardozo’s discussion of certainty in *Growth* is a little too closely tied to the

58. See EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 21–24 (Rev. ed. 2013).

59. See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916). See also Balganesh & Parchomovsky, *supra* note 7, at 1297–98.

60. *GROWTH*, *supra* note 9, at 19.

justification offered by the ALI's founders for its initiative. Cardozo was of course at the time one of the most prominent members of the ALI.⁶¹ For the ALI, certainty was playing an important role in justifying the need for a private codification of the common law.⁶² The ALI cared very little about the judicial process or the growth of the law through that process. But to Cardozo in *Growth*, the Restatements were seemingly valuable as vehicles and devices of judicial stock-taking and law reform—as, in other words, aids in the judicial process. Yet, those virtues of the Restatements bear little connection to “certainty,” except in being the ALI's trope for the whole enterprise. And it is for this reason that Cardozo's discussion of certainty, its forms, and its benefits to the judicial process, appear analytically deficient and in stark contrast to much of his prior narrative in *Judicial Process*.

C. Contradiction or Noble Lie?

When one reads *Judicial Process* and *Growth* together, one is left wondering what analytical work (if any) the idea of certainty plays in Cardozo's overarching narrative. As should be obvious, the idea does little conceptual work in either book. In addition, it is deliberately ill-defined and when invoked, shrouded in the mysteries of Cardozo's rhetorical flourishes and metaphors. And yet, it rears its head in the account on an almost regular basis.

On the one hand, there is an obvious structural contradiction in the two books' use of the idea. In *Judicial Process*, Cardozo tells us that the uncertainty of the law is inevitable and the rational judge must come to terms with it by deploying the strategies that he individually identifies.⁶³ The uncertainty here forms the *raison d'être* for the methodical judicial process.⁶⁴ All the same, if the inevitable uncertainty is what motivates the methods of the judicial process, then why seek to eliminate it in the manner that *Growth* suggests, especially since it risks undermining the utility of the judicial process altogether in the name of a false uncertainty? If uncertainty is indeed inevitable, then the Restatement initiative was doomed from its very inception.

But of course, there is a flipside to this. If the ALI did indeed manage to solve the intractable problem of uncertainty in the law, what would that do to creative aspects of the judicial process? Since Cardozo acknowledged in *Judicial Process* that where the rule was clear, certain, or uncomplicated,

61. See Arthur Corbin, *The Judicial Process Revisited: An Introduction*, 71 YALE L.J. 195, 198 (1961) (noting that Cardozo was the Vice-President of the ALI).

62. *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 A.L.I. PROCS. 1, 8 (1923).

63. JUDICIAL PROCESS, *supra* note 8, at 166.

64. See *id.*

the judicial function was relatively straightforward, this implied that the success of the ALI in some ways rendered the need for judicial creativity somewhat (even if not entirely) unnecessary.

There is an alternative explanation. Perhaps Cardozo's treatment of the idea isn't as contradictory as it first appears. Putting the two books together, we can see them both as juricentric accounts that collectively mount a defense of the judicial role in law development. *Judicial Process* valorizes the methods used by courts in rule development, while *Growth* attempts to offer a vision for how the law might evolve incrementally in that process. Indeed in *Growth*, Cardozo goes to some length to assert the superiority of judge made law over statutory enactments, often considered the "sufficient agency of growth."⁶⁵ Cardozo posits that regardless of how clear a statute is, judicial creativity will remain. He observes that

[t]he adaptation of rule or principle to changing combinations of events demands the creative action of the judge. You may praise our work or criticize it. You may leave us with the name we have, or tag us with some other label, arbitrators or assessors. The process is here to stay.⁶⁶

Put simply, judge-made law was to Cardozo far superior to other forms of law, even though he recognized that the era had arrived where judges were understood as merely applying the law (delineated in statutes) rather than making it. Defending this idea, however, required a level of pragmatism and political acumen that a purely principled account in the form of *Judicial Process* would not provide. On the one hand, the continued viability of the judicial process was closely tied to the inevitability of uncertainty in the rules of the common law, and on the other, the primacy of the judicial process as a mechanism of lawmaking was being challenged by other institutional forces. Reconciling the two required a noble lie: that certainty in the law was both desirable and attainable, even without the legislature, even if uncertainty was in actuality inevitable. As Cardozo put it, "[t]he delusive hope of certainty satisfies the conscience," and in the process of seeking it allow the process of judicial creativity to continue unabated.⁶⁷

This explanation may seem somewhat far-fetched in that it suggests that Cardozo was being disingenuous in one part of the narrative (*Growth*), partly in service of the other (*Judicial Process*). Yet that may well have been the only way for him to give full realization to two different parts of his stature in the legal profession, which, here, seemed to pull in opposite directions.

65. GROWTH, *supra* note 9, at 133.

66. *Id.* at 135.

67. *Id.* at 139.

III. CARDOZO AND THE CERTAINTY OF THE RESTATEMENTS

The contradiction underlying Cardozo's account of certainty in the law becomes most obvious when one examines his engagement with the Restatements in his judicial role. Recall that in his non-judicial role, as a member of the reformist Founding Council of the ALI, he championed the view that Restatements would contribute to reducing the substantive uncertainty of the law while preserving the judicial process.⁶⁸ The contradiction, as we have seen, emanated from the epistemic reality that much of that judicial process is parasitic on the flexibility of the common law, which might be mistaken for its uncertainty. Cardozo sought to minimize this contradiction by suggesting—with little additional analytical explanation—that the content of the Restatements would encourage courts to be more creative, and thus rejuvenate the judicial process which he had valorized.⁶⁹ In other words, he predicted that the Restatements would themselves contribute to the strengths of the judicial process by adding extra energy into the mechanisms which he had described. We might call this his theory of the Restatement-driven judicial process.

Yet when one examines what happened in the common law after the Restatements came into existence, the opposite seems to have flourished. As I have explored elsewhere, the language of the Restatements certainly contributed to greater substantive certainty in the law. All the same, this has come at significant cost to the flexibility, vitality, and incrementalism of the common law method, which Cardozo's account of the judicial process extolled.⁷⁰

What makes Cardozo's claim of a Restatement-driven judicial process particularly suspect—and perhaps revelatory of Cardozo's lack of commitment to it—is the simple reality that in his own judicial role, Cardozo does not appear to have once embraced it. After setting out the theory in the early stages of the ALI, Cardozo never really countenanced its implications or modalities when engaging the specific content of the Restatements in his own judicial decision making. On the contrary, he rejected, at least on certain occasions, the very premise of the Restatements contributing to the growth of the common law.

A review of Cardozo's engagement with the Restatements in his majority opinions while on the New York Court of Appeals reveals a few interesting things.⁷¹ Cardozo began citing to the Restatements fairly soon after their

68. *Id.* at 1–10.

69. *Id.* at 10, 16–18.

70. See Shyamkrishna Balganesh, *Relying on Restatements*, 122 COLUM. L. REV. 2119 (2022).

71. The list includes sixteen cases: *De Haen v. Rockwood Sprinkler Co. of Massachusetts*, 258 N.Y. 350, 179 N.E. 764 (1932); *Hudson v. Yonkers Fruit Co.*, 258 N.Y. 168, 179 N.E. 373 (1932); *Wikoff v. Hirschel*, 258 N.Y. 28, 179 N.E. 249 (1932); *Ebsary Gypsum Co. v. Ruby*, 256 N.Y. 406, 176 N.E. 820 (1931); *Cullings v. Goetz*, 256 N.Y. 287, 176 N.E. 397 (1931); *Marr v. Tumulty*, 256 N.Y. 15, 175 N.E. 356 (1931); *In re People, by Beha*, 255 N.Y. 428, 175 N.E. 118 (1931); *Ryan v. Progressive Grocery*

initial adoption. Indeed, he even began citing to a few of them when in draft form.⁷² This was perhaps part of his effort to popularize their use and allow lawyers and other courts to develop a level of comfort with citing to them, something that as a founder of the ALI he might have felt obligated to do. But beyond bare citation, his opinions did surprisingly little with them. The citations often appeared at the end of a string of other citations, which usually included directly applicable precedent and relevant treatises on the topic.⁷³ Indeed, his opinions sometimes engaged more directly and substantively with those other sources than they did the Restatements. One scholar who closely examined Cardozo's citation practices concludes that he cited to treatises more often than he did to Restatements, thus giving them no greater (and indeed, possibly less) importance than other secondary sources.⁷⁴

This bare engagement with the Restatements by merely citing to them hardly vindicates his account of their integration into the mode of common law rule development. Instead, they appear to do no more or less work than an ordinary treatise would. It is doubly surprising that in all of the citations, Cardozo did not once engage the specific content of a Restatement rule. Nor indeed did he ever describe the process through which it was developed. Relevant Restatement rules were simply thrown into the mix of authorities in his citation practice.

Further, when actually presented with an opportunity to use a Restatement and mold the common law in a particular direction, Cardozo famously declined. Lest there be any ambiguity, Cardozo was well-known as a reformist judge, indeed one who deployed the common law method with subtlety and nuance to effect legal change in incremental fashion.⁷⁵ The legal theorist Edward Levi's famed account of legal reasoning is built almost entirely around Cardozo's famous opinions (specifically in the field of tort law), where he is credited with moving the law away from its rigidity and allowing it to embrace the felt needs of society.⁷⁶ But the Restatements

Stores, 255 N.Y. 388, 175 N.E. 105 (1931); *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931); *Burke v. Bonat*, 255 N.Y. 226, 174 N.E. 635 (1931); *Guerin Mills v. Barrett*, 254 N.Y. 380, 173 N.E. 553 (1930); *Outlet Embroidery Co. v. Derwent Mills*, 254 N.Y. 179, 172 N.E. 462 (1930); *Hooley v. Airport Const. Co.*, 253 N.Y. 486, 171 N.E. 752 (1930); *Irvmor Corp. v. Rodewald*, 253 N.Y. 472, 171 N.E. 747 (1930); *Bosak v. Parrish*, 252 N.Y. 212, 169 N.E. 280 (1929); *Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 250 N.Y. 304, 165 N.E. 456 (1929).

72. See, e.g., *Hudson*, 258 N.Y. at 171 (citing to the *Restatement of Contracts* draft).

73. As an illustration, consider the following: "One is where there is a true assent to the acceptance of a payment in compromise of a dispute, or in extinguishment of a liability uncertain in amount. 1 Williston on Contracts, § 135; 3 *Id.* § 1851; Am. L. Inst., *Restatement of Contracts*, draft No. 9, § 36-A; *Fuller v. Kemp*, 138 N. Y. 231, 237, 33 N. E. 1034, 20 L. R. A. 785; *Wahl v. Barnum*, 116 N. Y. 87, 22 N. E. 280, 5 L. R. A. 623." *Id.* at 171.

74. William H. Manz, *Cardozo's Use of Authority: An Empirical Study*, 32 CAL. WES. L. REV. 31, 43-44 (1995).

75. For an excellent account within tort law, see EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 114 (1985).

76. EDWARD LEVI, *AN INTRODUCTION TO LEGAL REASONING* 21-24 (rev. ed. 2013).

played no role in fueling that change.

Cullings v. Goetz provides a good example.⁷⁷ In that case, a plaintiff-tenant brought an action against a landlord for a defective garage door that had resulted in personal injury.⁷⁸ The basis of the claim was an oral promise that the landlord had made to the tenant committing to carry out any necessary repairs.⁷⁹ Relying on controlling New York Law, the lower court had found for the defendant and concluded that a covenant to repair did not result in tortious liability since it was not a reservation of occupation and control.⁸⁰ This view, which had emerged from the English case of *Cavalier v. Pope*,⁸¹ derived from the principle that liability for premises was predicated on occupation and control. Consequently, unless the landlord was shown to have held on to some control over the property and the entry of individuals onto it, courts were initially reluctant to impose liability for any harm arising from disrepair, even when there was an oral promise to repair the premises.⁸² At the time, New York—and most other states in the country—had adopted the English rule and thus refused to recognize a landlord’s oral promise as producing a duty on its own.⁸³

Despite the common law rule, the *First Restatement of Torts* had attempted to effect a change in the law by adopting the view that a landlord’s covenant to repair the premises was equivalent to a reservation of control, in turn sufficient to generate a duty of care.⁸⁴ The *Restatement* nevertheless overtly recognized that its view was a minority position.⁸⁵ Accordingly, the plaintiffs in *Cullings* relied on the *Restatement* to advance an interpretation of the precedents that supported their position. Surprisingly, Cardozo declined to embrace this view.⁸⁶ In his opinion for the court, Cardozo noted:

The minority doctrine as to the liability of owners who have made a covenant to repair has won a notable adherent in the American Law Institute. The view is expressed by the institute in its restatement of the law of torts (§ 227) that the covenant is equivalent to a reservation of occupation or control. There is frank concession, however, in the explanatory notes that in New York and elsewhere the law is settled to the contrary.⁸⁷

77. *Cullings v. Goetz*, 256 N.Y. 287 (1931).

78. *Id.*

79. *Id.* at 289.

80. *Cullings v. Goetz*, 231 A.D. 266, 268, 247 N.Y.S. 109, 111 (App. Div. 1931)

81. [1906] A. C. 428 (U.K.).

82. *Cullings*, 256 N.Y. at 290.

83. *See, e.g.*, *Kushes v. Ginsberg*, 188 N.Y. 630, 81 N.E. 1168 (1907).

84. *Cullings v. Goetz*, 256 N.Y. 287, 293 (1931) (discussing the position in § 227 of the *Restatement*).

85. *Id.*

86. *Id.*

87. *Id.*

Cardozo's opinion in *Cullings* has drawn quite some attention, mostly due to the fact that he rather openly disregarded a potential change in the law that could have been realized by a reading of the precedent, and which the opinion initially seemed inclined to adopt.⁸⁸ Indeed, he might have even drawn support for his reading from other courts (the "minority doctrine") that had done just the same. Yet, he rejected that—progressive—approach for a more formalist reading of the law, suggesting that the issue had been "settled" in the state. What accounts for Cardozo's reluctance here?

In his detailed biography of Cardozo, Andrew Kaufman recognizes Cardozo's apparent conservativeness in *Cullings* as standing out from the judge's otherwise progressive approach to the common law.⁸⁹ He attempts to explain the anomaly as deriving either from Cardozo's unwillingness to "tinker with real property rules" or from Cardozo's recognition that he had eroded the exemption from liability afforded to lessors sufficiently in *MacPherson*.⁹⁰ Neither explanation makes much sense. Nothing in Cardozo's prior opinions suggests a reluctance to treat real property doctrine any differently from other parts of the common law based on "community[] reliance".⁹¹ And *MacPherson* dealt with a different issue (products liability) altogether, a fact that is evidenced by its complete omission from the *Cullings* opinion, which readily cites to various other efforts to relax the rule of *Cavalier*.⁹²

In his own review of Cardozo's oeuvre, Richard Posner also recognizes the oddity of the *Cullings* opinion, but downplays its demerits by suggesting that it represents Cardozo's open embrace of pragmatism.⁹³ According to Posner, Cardozo's unwillingness to embrace a more expansive approach to the question at issue was driven by his desire to avoid losing his colleagues' votes in the case, and thus to project a unanimous front.⁹⁴ This may have well been true, since *Cullings* was in the end a unanimous decision.

Nonetheless, both the opinion and Posner's justification for it sit rather oddly with what we know of Cardozo, who did not shy away from controversy while on the bench. His prior celebrated decisions had each generated vigorous dissents from his colleagues, which he appeared to not mind one bit.⁹⁵ To suggest that somehow Cardozo was more conscious of

88. See, e.g., Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 406 (1939) ("Judgment for the plaintiff was reversed in spite of what we may assume to be a strong desire by the court to make the defendant liable in accordance with considerable authority in the United States and with the statement in the Restatement of Torts, but contrary to the pre-existing New York rule.").

89. ANDREW L. KAUFMAN, *CARDOZO* 249 (1998).

90. *Id.*

91. *Id.*

92. *Cullings v. Goetz*, 256 N.Y. 287, 176 N.E. 397 (1931).

93. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 120 (1993).

94. *Id.* at 120–21.

95. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916); *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88 (1917); *Jacobs & Youngs, Inc. v. Kent*, 230 N.Y. 239 (1921).

dissents from his opinion in *Cullings* does not therefore seem particularly convincing. A better explanation might be provided by the role that the Restatement played in the domain he was operating in; indeed one that *invalidates* Cardozo's own theory of how Restatements would enable the common law to thrive and grow in the hands of judges.

By crystallizing the applicable rule into a majority position and a minority one, in clear and unambiguous terms, the Restatement was doing much more than just categorizing the law. It was also making clear the existence of two openly contradictory positions in the law on the issue. In other words, the classification that it had embarked on had rejected the possibility of the two positions lying along a continuum with subtle differences. Even a rudimentary examination of the law since *Cavalier* reveals that the account of two binary positions on the issue was hardly representative of the incremental manner in which courts had sought to qualify and work around the original rule.⁹⁶ Indeed, when Cardozo had been most effective at introducing change into the common law, he had done so by deploying the declaratory theory of law and in that process utilizing the ambiguity and open-endedness of the common law's language.⁹⁷ That open-ended language had allowed him to inject new meaning and normative content into the law without appearing to effect a radical departure from the precedent that he had been presented with in a case.⁹⁸ His deployment of that declaratory approach was in fact the strength of his judicial reasoning, and one that had produced critical acclaim in legal circles.

In rendering the opposing positions clear—and thus *more certain*—the Restatement had taken away a central element in Cardozo's toolkit for effecting common law change. Cardozo could not now come and reinterpret the controlling precedent to suggest that he was declaring what had always been present but latent in the language of those precedents. Put simply, the certainty (and certitude) of the Restatement destroyed any recourse to the declaratory theory since Cardozo would have now had to reread the precedents to find his view in them, and then concede that the reading of the ALI in the Restatement was erroneous and needed to be disregarded. In other words, even if the Restatement was not a statute, its claim of certainty and rule-like precision was an impediment to the common law process of rule development, which relied on the declaratory approach.

This explanation is more convincing than Posner's, which as noted does not seem consistent with Cardozo's other opinions. On the other hand, the presence of the Restatement—which Cardozo cared deeply about—was a significant hurdle to his ability to effect change. It also explains why in *Cullings*, he sets out the position taken by the Restatement in clear and

96. The opinion in *Cullings* identified these intermediate positions. See *Cullings*, 256 N.Y. at 290.

97. See LEVI, *supra* note 76, at 22–24.

98. *Id.*

unambiguous terms, highlighting the terrain that he was working in.⁹⁹ The presence of the Restatement undoubtedly played a less than salutary role, which neither Posner nor Kaufman countenance. It would take another four decades for the law in New York to change, despite several other states doing so before and the Restatement continuing to push for the minority position!¹⁰⁰

Cardozo's opinion in *Cullings* showcases the impossibility of the Restatement-driven theory of the judicial process that he set out in *Growth*. Instead of allowing the common law method to flourish with additional creativity and zeal, the certainty supposedly introduced by the Restatements simply served to impede judicial incrementalism, the hallmark of the common law method that Cardozo had so effectively disaggregated in *Judicial Process*. Coupled with his unremarkable use of the Restatements in other opinions, it goes to lay bare the contradiction underlying Cardozo's embrace of substantive certainty in the common law as a valuable goal, driven by his role in the founding and working of the ALI.

CONCLUSION: CARDOZO'S TWO PERSONAS

The noble lie of certainty in the law was to Cardozo a likely reflection of two independent personas that he embodied within the legal profession. The first, obviously, was his role as an academically-minded judicial statesman: a celebrated jurist whose common law decisions were extolled and revered not just for their substantive content but also for their method and approach. Much of this acclaim was apparent during Cardozo's own lifetime, culminating in his invitations to deliver multiple lectures explaining his method and his eventual appointment to the Supreme Court. *Judicial Process* highlights this dimension of Cardozo's personality. In some sense, it is appropriately understood as an *ex post* rationalization of Cardozo's judicial career.

Yet, *Growth* and several of Cardozo's other pieces of writing reflect a different side of his persona. And while this side was symbiotic with his profile as a judicial statesman, it was nonetheless distinct and often produced anomalies. This side of his persona emerged from his stature in the broader legal profession and bar where he embraced the position of a reformist. Not a radical nor an iconoclast, but instead a pragmatic and judicious thinker committed to bettering the state of the country's political and legal apparatus incrementally from within. This aspect of Cardozo's stature within legal circles is best captured by Justice Frankfurter's observation upon Cardozo's death that it was "not merely the premature termination of a distinguished judicial career, but the end of the living

99. *Cullings*, 256 N.Y. at 293.

100. *Putnam v. Stout*, 38 N.Y.2d 607, 610 (1976).

energy of one of the most powerful moral resources of the nation.”¹⁰¹

For the most part these two personas remained perfectly compatible. Yet it was in Cardozo’s engagement with the question of certainty in the common law that they tugged in opposite directions, especially around his involvement with the ALI. As we have seen, this forced him to equivocate on substantive and procedural uncertainty in the common law. In the process, he developed a somewhat naïve account of how the Restatements might contribute to both substantive and process-based certainty, an account that he appears to have paid insufficient analytical attention to and indeed altogether disregarded (perhaps even consciously) in his own judicial role, and been confounded by when presented with an opportunity for common law change.

Judicial Process is rightly celebrated as a stellar and unparalleled effort to advance the claim that the search for certainty in the common law is illusory, because the key to the vitality of the system lies in the method adopted and embraced by its followers and purveyors. All the same, it should not be viewed in isolation as a principled analytical position on the subject since it was but a portion of Cardozo’s overall view on the matter—which was more layered, complex, and much like other aspects of Cardozo, heavily pragmatic.

101. Felix Frankfurter, *Mr. Justice Cardozo and Public Law*, 48 *YALE L.J.* 458, 459 (1939).