Ambivalence, Judicial Craftmanship, and the Development of the Law: Variations on a Theme of Benjamin Cardozo

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In The Nature of the Judicial Process, *Cardozo identifies the embrace of uncertainty as a mark of judicial expertise. Such uncertainty, he claims, provides an occasion for the exercise of creative energy and the judicial development of the law. This paper critically examines and extends, in light of contemporary work on the philosophy and psychology of ambivalence, Cardozo's views about the relevance of uncertainty in judicial decision making and its import for the evolution of the law. First, it provides an account of the benefits of ambivalence in judicial decision-making, with a special focus on the links that there are between ambivalence and judicial creativity. Second, it argues that there is a certain tension between Cardozo's views on the important role that ambivalence plays in judicial decision-making and his view of law's evolution as a streamlined, self-correcting, process. Two problems—the problem of hidden alternatives and the problem of unconceived alternatives—and the ever-present possibility of error vividly bring to light the extent to which law's progress may be hampered. Third, it argues that for judges to recognize and resolve ambivalence in ways that positively contribute to the development of the law, a certain kind of judicial temperament must be developed. This temperament is neither skeptic nor dogmatic, vindicates imagination as a critical capacity for excellence in judging, and fosters a judicial style (and, more broadly, a legal culture) that, in Cardozo's spirit, frees itself from the quest for certainty.*

I. INTRODUCTION

In *The Nature of the Judicial Process,* Cardozo depicts the nature of the judge's task as one that involves, exceptionally but significantly, creation rather than discovery. A mature judge has "grown up" to reconcile himself with "uncertainty," accepts "doubt" as part of the "travails of the mind,"

and fills in the gaps with "creative energy."[1] In Cardozo's view, expertise in judicial judgment critically includes the embracement of uncertainty and doubt.[2] The uncertainty that is inherent to judicial decision-making does not, however, erode Cardozo's faith in law's progress. Law's evolution is presented by Cardozo as a streamlined, self-correcting, process. Thus, there is a certain tension in Cardozo's views between the inevitability of uncertainty at the micro level, i.e., the level of the judicial process, and the inevitability of progress at the macro level, i.e., law's evolutionary process.[3] The ambivalence that, as Cardozo rightly saw, is central to the judicial process is also critical, I will claim, for law's development. Just as there are legal decisions in which the judge has to make a choice between different courses of action, so too does the law find itself sometimes at the cross-roads. Furthermore, law's progress importantly depends on judges' ability to recognize and resolve ambivalence in a satisfactory way. This makes it essential, as I will argue in this paper, that judges develop the traits of character and skills (most importantly, imagination) that help them properly deal with ambivalence. More broadly, it also suggests the need to rethink legal culture so that it properly registers, acknowledges, and embraces ambivalence as a central, productive, feature of the law.

The structure of the paper is as follows. First, I discuss Cardozo's views on the relevance of uncertainty to creativity in judicial decision-making in light of contemporary work on the philosophy and psychology of ambivalence. Second, I claim that law's evolution is less streamlined a process than Cardozo seems to convey. Progress in law is uncertain and fragile, and the way in which ambivalence is identified, recorded, and resolved is central to both preserving past successes and prompting innovation. Particularly, I focus on two main problems—the problem of unconceived alternatives and the problem of hidden alternatives—which stand in the way of properly identifying ambivalence. I also highlight the risk of employing strategies that lead to resolving it in ways that hinder, rather than promote, the judicial development of the law. Third, I argue that

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1. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (2010) at 105-06.

2. Throughout the paper, I use "judicial expertise" to refer to the "know-how" knowledge that is characteristic of those who are experts in a practical skill and thus as analogous to "craftmanship."

3. Cardozo thus seems to be, if I may say so, ambivalent about ambivalence, in that it is a distinguishing feature of his characterization of the judicial process, which contrasts with his view of the process of law's evolution in terms of a gradual, but decisive, progression. This ambivalence may also explain the apparent conflict that there is between Cardozo's account of the process of judicial decision as characterized by openness and his judicial practice, which is characterized by absence of doubt and as bearing a sense of closure. On this tension, *see* Dan Simon, *The Double Consciousness of Judging: The Problematic Legacy of Cardozo*, 79 ORE. L. REV. 1033-1080 (2000).

instilling certain character traits (the virtues of ambivalence) and cultivating some capacities (most importantly, the powers of imagination) in judges are central to mobilizing judicial creativity in ways that positively contribute to legal progress. More generally, as I conclude, these changes are necessary to transform legal culture so that, in Cardozo's spirit, it frees itself from the quest for certainty.

II. AMBIVALENCE AND JUDICIAL CREATIVITY

In Cardozo's view, the judicial process critically involves an element of choice. There is a small, but non-negligible, percentage of cases that might be decided either way. In these cases, in which "reasons plausible and fairly persuasive might be found for one conclusion as for another" the judge functions as a "lawgiver."[4] His legislative power is exercised only "between the gaps,"[5] but within these "interstitial limits,"[6] claims Cardozo, "choice moves with a freedom which stamps its action as creative."[7] With choice, comes "anxiety,"[8] but also the opportunity for "judicial innovation"[9] and for "shaping the progress of the law."[10] It is, interestingly, in Cardozo's view, a mark of judicial expertise that one understands that the judicial task requires facing uncertainty and, to a limited but significant extent, the exercise of "creative energy."[11] The following passage is worth quoting in full:

> 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 quest was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience, I found 'with the voyagers in Browning's 'Paracelsus' that the real heaven was always beyond'. As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process at its highest reaches is not discovery, but creation; and that the doubts and misgiving, the hopes and fears, are parts of the travail of the mind, the pangs of death and the pangs of birth, in which principles that have served their day expire and new

4. CARDOZO, *supra* note 1, at 106.
5. CARDOZO, *supra* note 1, at 71.
6. CARDOZO, *supra* note 1, at 45.
7. CARDOZO, *supra* note 1, at 73.
8. CARDOZO, *supra* note 1, at 23.
9. CARDOZO, *supra* note 1, at 82.
10. CARDOZO, *supra* note 1, at 110.
11. CARDOZO, *supra* note 1, at 23.

principles are born.[12]

As this passage, written in Cardozo's characteristically powerful and evocative style, states, expertise in the domain of adjudication involves the acceptance of doubt and its creative exploitation. In this, as in many other aspects, such as, for example, Cardozo's claim that the judicial process importantly involves both intuition and deliberation, or the relevance he accords to emotions, including, interestingly, epistemic emotions, Cardozo's psychology of legal decision-making is extremely advanced. [13] Indeed, contemporary work in psychology has recently brought to light the extent to which ambivalence—a situation in which one feels drawn to alternative options in a situation of choice—is characteristic of expert decision-making in different domains and associated with increased creativity.

Ambivalence is a distinctive attitude consisting in the holding of two conflicting attitudes towards the same object, as in the situation described by Cardozo, in which one feels drawn towards to incompatible courses of action when deciding a legal case.[14] In these cases, one disagrees with oneself, as one is of two minds as to which decision should be taken.[15] Importantly, the source of intra-personal disagreement is not a scarcity of evidence. It is not, in this sense, *stricto sensu* a situation of uncertainty. Rorty's explanation of the distinctive features of ambivalence is useful here.[16] Whereas in ambivalence one is in a "both/and" epistemic condition, in which one endorses two incompatible options, uncertainty is a "neither/nor" epistemic condition, which arises when there is a lack of sufficient evidence. Ambivalence, in contrast to uncertainty, persists after all evidence is in. Even though Cardozo talks of "uncertainty," it is more specifically ambivalence that is apt to describe the situation that he has in mind in which a judge finds strong and persuasive reasons in support of conflicting decisions. The state of ambivalence is also related, but distinct from, "indecisiveness," which is a "maybe this/maybe that" epistemic condition. As opposed to indecisiveness, in which one is unclear about how

12. CARDOZO, *supra* note 1, at 107.

13. CARDOZO, *supra* note 1, at 74, 17ff. On epistemic emotions, see Adam Morton, *Epistemic Emotions*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY OF EMOTION 385-400 (Peter Goldie ed., 2009) [hereinafter OXFORD HANDBOOK].

14. See HILI RAZINSKY, AMBIVALENCE: A PHILOSOPHICAL EXPLORATION 5 (2017). *See also* KENNETH WEISBRODE, ON AMBIVALENCE: THE PROBLEMS AND PLEASURES OF HAVING IT BOTH WAYS 11 (1985). This attitude can be rationally justified. *See* Dario Cecchini, *Experiencing the Conflict: The Rationality of Ambivalence* J. OF VALUE INQUIRY (2021).

15. On ambivalence as a state of "double consciousness" that gives rise to inner conflict, *see* JENNIFER CHURCH, WHY ITS OK TO BE OF TWO MINDS (2021). On intra-personal disagreement, *see* Annalisa Coliva, *Disagreeing with Myself: Doxastic Commitments and Intrapersonal Disagreement*, 56 AM. PHIL. Q. 1–14 (2019); Patrick Bondy, *Deeply Disagreeing with Myself: Synchronical Intrapersonal Deep Disagreements*, 40 TOPOI 1225–36 (2020).

16. See Amelie Rorty, *A Plea for Ambivalence*, *in* OXFORD HANDBOOK, *supra* note 13, at 443; Amelie Rorty, *The Ethics of Collaborative Ambivalence*, 18 J. OF ETHICS 394 (2014).

to rank the alternative options and is therefore unable to commit to either alternative, the ambivalent agent is aware of the strong considerations in favor of conflicting decisions and thereby commits to both. Finally, "vacillation" involves a ´now this/now that' epistemic condition, which although connected to ambivalence (in fact, some have even suggested that ambivalence should be characterized as a rapid state of vacillation) is also distinguishable from it.[17] Indeed, vacillation may accompany a state of ambivalence, and it is telling that Cardozo should refer to a "vacillating mind," when discussing judge's choices, but whereas vacillation involves diachronic intra-personal disagreement, ambivalence involves, a more profound division of the self, a synchronic intra-personal disagreement.[18]

In complex decision-making, in which different and competing considerations are relevant to the decision task, ambivalence is likely to emerge. Ambivalence is a core part of the "phenomenology" of decision-making in these contexts, or, as Cardozo beautifully puts it, of the "travails of the mind."[19] A distinguishing feature of expertise in these domains is the capacity to valiantly endure ambivalence, appropriately detect it, and manage it in a productive way. Ambivalence is pregnant with emotion. More specifically, it is associated with negative emotions, such as anxiety and anguish. It is, moreover, particularly unpleasant when the decision-maker is confronted—as in the judicial process—with the necessity to make a choice.[20] A "grown up" judge would not shun away from choice in the face of the anxiety that, as Cardozo rightly saw, it is likely to generate, neither would he be paralyzed by it, but he will accept the doubts and fears as part of the affectively loaded cognitive task that the office demands.[21] Where the novice sees only one path, it will not escape the expert's eye that the situation is one in which a choice between paths should be made. What is the space within which the choice should be made, as Cardozo put it, "comes—as much as the recognition that the situation calls for choice—with years of habitude in the practice."[22] The expert —unlike the novice—will not mistake a hard case by an easy one. In hard cases in which there are no competing interpretations of either rules or facts, but in which deciding in accordance with the applicable rules would yield an absurd or terribly unjust result, the novice may see, even if regretfully, only one path forward,

17. On ambivalence and vacillation, *see* Patricia Greenspan, *A Case of Mixed Feelings: Ambivalence and the Logic of Emotion*, *in* EXPLAINING EMOTIONS (Amelie Rorty ed., 1980).

18. CARDOZO, *supra* note 1, at 107.

19. CARDOZO, *supra* note 1, at 107.

20. See Frenk van Harreveld, Hannah U. Nohlen & Iris K. Schneider, *The ABC of Ambivalence: Affective, Behavioral, and Cognitive Consequences of Attitudinal Conflict*, 52 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 7–8 (2015); Frenk van Harreveld, Joop van der Pligt & Yael N. de Liver, *The Agony of Ambivalence and Ways to Resolve it: Introducing the MAID Model*, 13 PSPR 45–61 (2009).

21. On paralyzing ambivalence, *see* J.S. Swindell, *Ambivalence*, 13 PHIL. EXPL. 23–34 (2010).

22. CARDOZO, *supra* note 1, at 71.

whereas the expert will see other options, if there are any. In the expert´s hands, the case will give rise, at the very least, to an ambivalent, rather than univalent, situation in which a choice between different paths—and values—should be made.

Situations of choice in which one feels the pull of conflicting sets of reasons have been shown to be, as Cardozo clearly articulated, importantly associated with "creativity."[23] A variety of antecedents to creativity (in other words, conditions, practices and traits that foster creativity) have been identified in the literature and claimed to be effective primarily because they evoke ambivalent emotional states.[24] Creativity often results from identifying novel relationships or associations: a new use for an existing product, the potential to bring an old idea to a new audience, or a new combination of familiar ideas.[25] Emotional ambivalence is perceived as unusual, and people interpret the atypicality associated with it as an indication that they are in an unusual environment, where other unusual relationships might also exist. Ambivalent individuals thus show a heightened sensitivity to recognize unusual associations, which may lead to increased creative performance.[26] Ambivalence also generates creativity as an avoidance mechanism: the discomfort associated with ambivalence motivates creative thinking in searching for ways that may enable to overcome it.[27] It is the mature judge—who has the resources to identify and resolve ambivalence appropriately—who is able to take advantage of the heightened creativity that is linked to ambivalence.

Besides enhancing creativity, ambivalence has other important benefits in decision-making: it is associated with more elaborate processing of relevant information, increased receptivity, and more balanced and accurate judgment and decision-making.[28] When properly identified, it triggers deliberation of relevant contextual information and mitigates cognitive biases, thereby leading to more effective decision-making as well.[29] There

23. C. T. Fong, The Effects of Emotional Ambivalence on Creativity, 49 ACAD. OF MGMT. J. 1016–30 (2006). *See also* Simon A. Moss & Samuel G. Wilson, *Ambivalent Emotional States: The Underlying Source of all Creativity?*, 24 INT'L J. OF CREATIVITY AND PROBLEM SOLVING, 75–99 (2014); and Yan Zhang, Ying Zhang, Kenneth S. Law & Jing Zhou, *Paradoxical Leadership, Subjective Ambivalence, and Employee Creativity: Effects of Employee Holistic Thinking*, 59 J. OF MANAGERIAL STUD. 695–723 (2022).

24. *See* Moss & Wilson, *supra* note 23. The linkage between creativity and ambivalence has been claimed to be contingent on holistic thinking. See Yang et al., *supra* note 23.

25. Fong, *supra* note 23, at 1018.

26. *See* Fong, *supra* note 23.

27. *See* Zhang et al. *supra* note 23.

28. *See* van Harreveld, Nohlen & Schneider, *supra* note 20, at 19; Iris K. Schneider, Sheida Novin, Frenk van Harreveld & Oliver Genschow, *Benefits of Being Ambivalent: The Relationship between Trait Ambivalence and Attribution Biases*, 60 BRIT. J. OF SOC. PSYCH. 570–586 (2020); Laura Rees, Naomi B. Rothman, Reuven Lehavy & Jeffrey Sanchez-Burks, *The Ambivalent Mind Can Ce a Wise Mind: Emotional Ambivalence Increases Judgment Accuracy*, 49 J. OF EXPERIMENTAL SOC. PSYCH. 360–67 (2013).

29. C. L. Guarana & M. Hernández, *Identified Ambivalence: When Cognitive Conflicts Can Help*

is also a negative relationship between a disposition to be ambivalent and attribution biases (more specifically, correspondence bias and self-serving bias) in personal perception.[30] In addition, ambivalence increases cognitive flexibility, which results in more adaptative decision-making.[31] Thus, psychological research provides support for Cardozo's view that the kind of openness that is characteristic of ambivalent decision-making harbors creativity and, moreover, enhances judicial decision-making in various ways.

So Cardozo was ahead of his times in vindicating ambivalence as an important part of the phenomenology of good and expert judging. At the micro level, there is indeed, as Cardozo acknowledges, openness in that judges are called to make a choice and contribute creatively to the development of the law. However, when Cardozo moves from the micro level of the judicial process to the macro level of the process of legal evolution, ambivalence fades away, and is replaced by a wholehearted confidence in linear progress. In contrast to a picture of the judicial process as one in which, sometimes, several paths may be taken, Cardozo depicts a story of law´s evolution as one of sure growth. But the law, like the judicial decision, also encounters forking paths. The next section examines this tension in Cardozo's thinking and argues that the plurality of options that characterizes the judicial process is also a central feature of law's evolution. Furthermore, I will argue, a proper acknowledgment and management of law's ambivalence at the micro level of the judicial decision is critical for promoting a diversity of options at the macro level of law's development.

III. LAW AND ITS PROGRESS

In the *Judicial Process*, Cardozo asserts that he is "not writing a history of the evolution of the law, but a sketch of the judicial process applied to law full grown."[32] Despite the disclaimer, he does provide important insights into how the law evolves and grows through the judicial process. Judges, says Cardozo, "have a duty of shaping the progress of the law."[33] In the common law system, the judicial decision is a critical site for the development of the law. The judge, when deciding a case, not only extracts from the precedents the underlying principle, but she must also determine "the path or direction along which the principle is to move or develop, if it is not to wither and die."[34] The law develops through the judicial process

Individuals Overcome Cognitive Traps, 101 J. OF APPLIED PSYCH. 1013–29 (2016).

30. Schneider et al., *supra* note 28.

31. *See* N. B. Rothman, *Feeling Mixed, Ambivalent, and in Flux: The Social Functions of Emotional Complexity for Leaders*, 42 ACAD. OF MGMT. REV. 259–82 (2017).

32. CARDOZO, *supra* note 1, at 26.

33. CARDOZO, *supra* note 1, at 110.

34. CARDOZO, *supra* note 1, at 14.

gradually but steadily.[35] Cardozo writes:

> This work of modification is gradual. It goes inch by inch. Its effects must be measured by decades or even centuries. Thus measured they are seen to have behind them the power and the pressure of the moving glacier.[36]

However gradually it may do so, ultimately, judicial decision-making, says Cardozo, has the potential to radically transform the law. As he put it: "The changes, as they were made in this case or that, may not have seem momentous in the making. The result, however, when the process was prolonged throughout the years, has been not merely to supplement or modify; it has been to revolutionize and transform."[37] According to Cardozo, although the power of judicial innovation is limited in scope, and its effects may be less than self-evident at first, "judicial innovation" results, over time, in a deep transformation of the law.[38]

This process of growth is, interestingly, described by Cardozo as the result of both conscious and unconscious forces. Insofar as the law is an expression of customary morality, it evolves "silently and unconsciously."[39] In addition, forces below consciousness, such as "the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions" play a role in the process of judicial decision-making and thereby leave an imprint on the content of the law.[40] However, the law is also the product of a "conscious or purposed growth," which results from the judge's conscious efforts.[41] The progress of the law, in Cardozo's view, is also a collective endeavor.[42] Each judge is to lay his "own course of bricks on the secure foundation of the courses laid by others who had gone before him."[43] The judicial decision of each new case marks "a point of departure from which others who come after him will set out upon their journey."[44] There is a vivid sense in Cardozo's writing of the extent to which the law is a social, collective construction. Nothing is less alien to the judicial office than the "knight-errant"[45] who is left to his own devices and whose deeds are exclusively of his own making. The growth of the law, according to Cardozo, is the product of diverse minds, out of the

35. On Cardozo's incrementalism, *see* Richard D. Friedman, *Cardozo on the Supreme Court: Meeting High Expectations*, 34 TOURO L. REV. 741–56 (2018).

36. CARDOZO, *supra* note 1, at 12.

37. CARDOZO , *supra* note 1, at 13.

38. See Cardozo, *supra* note 1, at 87. *See also id.* at 114 ("Often the encroachments are so gradual that their significance is at first obscured").

39. *See* CARDOZO , *supra* note 1, at 65.

40. *See* CARDOZO, *supra* note 1, at 107.

41. *Id.*

42. CARDOZO, *supra* note 1, at 67.

43. CARDOZO , *supra* note 1, at 97.

44. CARDOZO, *supra* note 1, at 71.

45. CARDOZO, *supra* note 1, at 90.

attrition of which there emerges something more valuable than its components elements. Critically, the collective nature of law's development is, in Cardozo's view, a central mechanism for self-correction. He writes:

> The work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years.[46]

As the law develops over time, "mistakes" and "eccentricities" are "silently and steadily" effaced.[47] Future generations take care of previous mistakes, so that we can have "faith" that they will be corrected.[48] Law's development, slowly but progressively, moves in one firm direction.

Cardozo's view of the growth of the law as a gradual, collective process, which is driven by both conscious and unconscious forces, strongly resonates with contemporary views—developed a century later—on the evolution of human culture. Human culture is unique in that it evolves cumulatively through a process that relies on both inventiveness and faithful transmission. It is distinctively characterized by a "ratchet effect" in which modifications and improvements remain in the population fairly readily until further changes ratchet things up. [49] The ratchet—the faithful transmission—is enabled by processes of both overt and covert, or unconscious, imitation.[50] Legal culture, as a specific kind of human culture, similarly evolves, as Cardozo rightly perceived, cumulatively, through a process in which judicial innovations are preserved and reproduced collectively by conscious and unconscious mechanisms. His views on law's progress also interestingly fit with contemporary approaches to the progress of science and the role of revolutions within it. As some philosophers of science have recently claimed, scientific revolutions are not always Kuhnean-style wholesale changes that lead to the replacement of a previous paradigm. Instead, at least in some scientific domains, revolutions are by emplacement rather than replacement. Emplacement revolutions work piecemeal and superpose innovations on the accepted body of knowledge in a way that largely preserves it, but, nevertheless, revises it and improves upon it.[51] Legal revolutions, as Cardozo depicted them, may be viewed as

46. CARDOZO, *supra* note 1 at 115.

47. *Id.*

48. CARDOZO, *supra* note 1, at 113.

49. *See* C. Tennie, J. Call & M. Tomasello, *Ratching Up the Ratchet: On the Evolution of Cumulative Culture*, 364 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y BIOLOGICAL SCI. 245 (2009).

50. Susan Hurley & Nick Chater, *Introduction: The Importance of Imitation*, *in* PERSPECTIVES ON IMITATION: FROM NEUROSCIENCE TO SOCIAL SCIENCE 37 (Hurley & Chater eds., 2005); A.J. Dijksterhuis, *Why We Are Social Animals: The High Road to Imitation as a Social Glue*, *in* Hurley & Chater, PERSPECTIVES ON IMITATION: FROM NEUROSCIENCE TO SOCIAL SCIENCE, *supra*, at 207–21; Rob Compaijen, *Recognizing and Emulating Exemplars*, 24 ETHICAL PERSP. 569–70 (2017).

51. *See* Ian Hacking, *Was There a Probabilistic Revolution, 1800–1930?*, *in* THE PROBABILISTIC

"emplacement revolutions," as they preserve continuity while enabling change.

The analogy with science is apposite. As Cardozo put it, one could see every new case as an "experiment," rules and principles of case law as "working hypotheses," and the courts of justice as "great laboratories." From this perspective, it is less than surprising that the law should evolve like science, in at least some scientific domains.[52] A look at the history and philosophy of science, however, also reveals the sense in which Cardozo's picture of the evolution of the law is excessively optimistic. Progress there is—in science and in law—but perhaps in a less streamlined and unidirectional fashion than Cardozo seems to assume. The glacier—to pick on Cardozo's powerful metaphor—moves, but it also hits dead ends, it also recedes, and it may spill over different valleys. Scientific progress is hindered by the existence of unconceived alternatives—paths that could have been taken, but never were—and by hidden alternatives—paths that were discovered, but subsequently neglected and forgotten.[53] There are also mistakes that remain for long periods of time uncorrected and thereby put an obstacle to scientific progress.

Similarly, the story of law's evolution is more convoluted and uncertain than Cardozo—much in the spirit of his time- seems to convey. Just as there are different ways in which a decision may go—as Cardozo acknowledges, so may the law evolve along different paths. Cardozo does recognize that legal decisions may be mistaken and that in cases in which a decision could go one way or another, the decision may "advance or retard" the development of the law.[54] Nonetheless, despite the acknowledgment of the openness that is inherent to the judicial process and its potential impact on law's development, he has an unwavering faith in the collective hand which will correct mistakes and lead the law alive and moving in one clear direction.[55] The ambivalence that is a feature of judicial decision-making, however, also characterizes the growth of the law. Like in science, the law

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REVOLUTION 45 (Lorenz Krüger, Lorraine Daston & Michael Heidelberger eds., 1987); Ian Hacking, *Language, Truth and Reason: 30 Years Later*, 43 STUD. IN HIST. AND PHIL. OF SCI. 599 (2012); Silvan S. Schweber, *On Kuhnian and Hacking-Type Revolutions*, *in* SHIFTING PARADIGMS: THOMAS S. KUHN AND THE HISTORY OF SCIENCE (Alexander Blum, Kostas Gavroglu, Christian Joas & Jürgen Renn eds., 2016); Paul Humpreys, *Computational Science and Its Effects*, *in* SCIENCE IN THE CONTEXT OF APPLICATION (Martin Carrier & Alfred Nordmann eds., 2011); José Chamizo, *About Continuity and Rupture in the History of Chemistry: The Fourth Chemical Revolution*, 21 FOUND. OF CHEMISTRY 11 (2019). For a discussion of the relevance of emplacement revolutions to law, *see* Amalia Amaya, *The Explanationist Revolution in Evidence Law*, 23 INT'L J. OF EVIDENCE AND PROOF 60 (2019).

52. CARDOZO, *supra* note 1, at 11.

53. On the problem of unconceived alternatives, see P. KYLE. STANFORD, EXCEEDING OUR GRASP (2006) and Sindhuja Bhakthavatsalam & Ian James Kidd, eds., Science, Realism, and Unconceived Alternatives: Introduction to the Special Issue on Unconceived Alternatives,196 SYNTHESE 3911 (2019). For a discussion of hidden alternatives, *see* HIDDEN HISTORIES OF SCIENCE (Robert B. Silvers ed., 1995).

54. CARDOZO, *supra* note 1, at 106.

55. CARDOZO, *supra* note 1, at 113–14.

faces a number of problems that bring to light the extent to which law's development is less than secure.

First, as in science, there are also in law "unconceived alternatives." Cardozo is concerned with those situations in which the judge sees that there are several ways in which a decision would go. There are, however, undiscovered ways, alternative decisions that could have been taken and that were not even considered at the time. There is historical evidence that scientists often fail to conceive theories the possibility of which was indicated by the evidence they had.[56] Similarly, jurists may fail to conceive alternative courses of action or theories of the case, and thereby mistakenly take the case to be one that does not admit of different solutions, or restrict the potential decisions that may be taken, thereby losing an important opportunity for the law to develop in some directions rather than others. The problem of unconceived alternatives has also been seen to affect other objects beyond theories, such as values, methods, or objections.[57] These versions of the problem further complicate the way in which judges may fail to contribute to the development of the law. Cardozo considers the different paths that the use of four methods (those of philosophy, history, tradition, and sociology) would open in some cases. But there may be, as in science, other methods that could have employed, which would have differently advanced law's progress. Unconceived objections to one's position may also prevent judges from discarding their proposed legal solutions or hinder the exploration of alternative lines of argument.

Second, open courses of action may have been conceived by previous judges or legal scholars which may nevertheless fail to be considered in later cases because they have been long forgotten. There are important episodes of neglect in the history of science, in which scientific discoveries and innovations were obliterated, pushed aside, or discarded for long periods of time, only to be rediscovered much later. "Each science—as the psychologist Wolfgang Köhler wrote— has a sort of attic into which things are almost automatically pushed that cannot be used at the moment, that do not quite fit . . . We are constantly putting aside, unused, a wealth of valuable material [which leads to] the blocking of scientific progress."[58] Law, like science, also has "a sort of attic," in which materials are less than ready for judges to use. Hidden alternatives, as much in law as in science, hinder progress. Sometimes precedents may be, as Cardozo suggested,

56. *See* STANFORD, *supra* note 53.

57. *See* Moti Mizrahi, *The Problem of Unconceived Objections*, 29 ARGUMENTATION 425 (2014); Darrell P. Rowbottom, *Extending the Argument from Unconceived Alternatives: Observations, Models, Predictions, Explanations, Methods, Instruments, Experiments, and Values*, 196 SYNTHESE 3947 (2019).

58. Oliver Sacks, *Scotoma: Forgetting and Neglect in Science*, *in* HIDDEN HISTORIES, *supra* note 53, at 161 (quoting Wolfgang Köhler, "On Unnoticed Sensations and Errors of Judgment").

"hidden"[59] in the books, and even if they do not have the presence in the judge's mind that other more visible precedents that have made it into the canon have, they are still somewhat accessible. In more serious cases, legal materials—values, interpretations, etcetera—may sunk without hardly leaving a trace. Too premature or too novel ideas about the law and how to interpret it, which could have shaped the development of the law in a different direction by providing grounds for alternative judicial decisions, may thereby fail to inform the judicial process.

Finally, law, no less than science, has its own share of mistakes, which, *pace* Cardozo, remain uncorrected for extended periods of time. Even if alternative decisions are conceived or retrievable from the law's repository, still judges may simplify the decision task and discard alternative course of actions, transforming it into one that admits of only one solution. There is ample evidence that shows that, when facing decision-tasks that admit of a plurality of solutions which seem, from the perspective of the agent, well-supported, agents employ a variety of heuristics (such as conforming to the majority or taking the same stance of an expert) and engage in biased processing.[60] Agents, as it were, suppress alternatives in their mind, to ease the decision task and put an end to the discomfort that ambivalence generates. As a result, the outcome of the decision is not the one that is best supported by the relevant reasons. Even in the absence of biased reasoning or dubitable deployments of heuristics, errors may be made, when making a choice among alternative decisions, which hinder law's progress. To be sure, there are in law, as in science, mechanisms in place to correct errors, among which is the reliance on the communal aspects of legal decision-making. However, as social epistemologists have shown, the capacity for groups to correct individual mistakes and, more generally, of collective wisdom to be greater than its component parts, is limited and dependent upon a number of factors. Cardozo is to some extent aware of the difficulties involved in relying too much on the collective as a mechanism for correcting mistakes when he says that the collective products (of the judiciary, of juries) betray the flaws inherent to their origin. Ultimately, however, he has faith that they will be corrected, visible as these flaws are.[61]

The mistakes, however, may be less visible—as the problem of unconceived and hidden alternatives show—than Cardozo thought. Law, like science, is a multigenerational collective enterprise, with the result that

59. CARDOZO, *supra* note 1, at 7.

60. See Harreveld, van der Pliegt & de Liver, *supra* note 20, at 53–54; Harreveld, Nohlen & Schneider, *supra* note 20 at 19-21; Loran F. Nordgren, Frenk van Harreveld & Joop van der Pligt, *Ambivalence, Discomfort, and Motivated Information Processing*, 42 J. OF EXPERIMENTAL SOC. PSYCH. 252 (2006); Jason K. Clark, Duane T. Wegener, & Leandre R. Fabrigar, *Attitudinal Ambivalence and Message-Based Persuasion: Motivated Processing of Pro-Attitudinal Information and Avoidance of Counterattitudinal Information*, 34 PERSONALITY AND SOC. PSYCH. BULL. 565 (2008).

61. CARDOZO, *supra* note 1 at 113.

error may be not readily identifiable. As Karl R. Popper wrote "[a]ll work in science is directed towards the growth of objective knowledge. We are workers who are adding to the growth of objective knowledge as masons to a cathedral"[62] Like masons working on a cathedral, who will not live to see it complete, jurists will not live to see the way in which the law will develop. Cardozo was acutely aware of the multigenerational aspects of law, as he beautifully expressed in the end of his lectures:

> The future, gentlemen, is yours. We have called to do our part in an ageless process. Long after I am dead and gone, and my little part in it is forgotten, you will be here to do your share, and to carry the torch forward. I know that the flame will burn bright while the torch is in your keeping.[63]

This intergenerational collective dimension of law, however, should give us pause as to the capacity to stir the law in the direction of progress. Rumhkorff has argued that science faces what he calls "the cathedral problem": "what should we believe of our best scientific theories if their validation against the possibility of plausible unconceived alternatives—if any such validation is in the offing- will come after we are gone?"[64] Similarly, in law, evidence for the accuracy of judgment can lag generations behind: mistakes may turn out to be visible, and perhaps corrected, but only far down the road.

Thus, the law looks more like a "garden of forking paths" with unexplored roads, abandoned paths, dubious shortcuts and unfortunate deviations, than a moving glacier. By no means, however, do I want to replace Cardozo's enlivening optimism with a defeating pessimism. Trust in the collective nature of law's enterprise does not seem enough to secure that the law progresses steadily along one clear path. Legal decisions could be otherwise, and so could the law. It is critical that judges be aware of possible decisions (and avoid the problem of the unconceived), that they be knowledgeable of what has been achieved (and avoid the problem of hidden alternatives), and that errors (including those resulting from suppressed alternatives) be corrected, rather than repeated. There are, as I argue in the next section, steps that may be taken to promote in judges the capacities necessary to successfully exploit ambivalence in decision-making in ways that positively contribute to the development of the law. In addition, there are broader changes, as I will suggest, which could be introduced in legal organizations and culture with a view to turning ambivalence into a productive feature of the law.

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62. KARL R. POPPER, OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH 121 (1972)

63. CARDOZO, *supra* note 1, at 115.

64. See Samuel Ruhmkorff, *Unconceived Alternatives and the Cathedral Problem* 196 SYNTHESE 875 (2019).

IV. CULTIVATING THE VIRTUES OF AMBIVALENCE

Thus far I have argued that ambivalence is a central feature of the judicial process and this has an important impact on the potential developments of the law. There is a plurality of decisions that may be taken in some small, yet significant, number of cases, which would advance, or block, the progress of the law in some directions, rather than others. Cardozo fully appreciates the degree of openness present in judicial decision-making, but this does not prevent him from endorsing wholeheartedly a view of law's evolution as a multi-generational enterprise that firmly advances in the direction of progress. This optimistic picture, as argued, underestimates the extent to which the evolution of the law is also marked by uncertainty. Cardozo focuses on situations in which the judge is faced with a number of alternative decisions among which he may choose. Judicial expertise comes, in his view, with the acceptance of the fact that the business of judging requires sometimes that one finds oneself in doubt and obliged to choose among different options. However, just as rules are not there to be picked, as he put it, "full-blossomed from the trees,"[65] the set of alternative decisions is not ready-made to be used. Some alternatives are unconceived, others remain hidden, with the result that the best option available may be beyond the judge's reach. In addition, even if present to the judge's mind, there is always the possibility of mistakes, which may loom long after they were made. Judicial expertise, thus, seems to require not only an acceptance of ambivalence, but also an enhanced capacity to identify it and resolve it appropriately. Given that, as Cardozo clearly saw, ambivalence triggers creativity, these capacities are essential for the judicial process to effectively contribute to law's progress.

What steps may then be taken with a view to making it likely that ambivalence in judicial decision-making contributes positively to the growth of the law? An important way in which one may do so is by instilling in judges a certain type of character.[66] There is, indeed, in *The Nature of the Judicial Process*, important insights into the type of character traits that are constitutive of the "judicial temperament."[67] Judges ought to possess, says Cardozo, a sense of justice,[68] patience, intelligence, reasonable discernment,[69] and (the legislator´s) wisdom,[70] which he compellingly describes as the wisdom of the pharmacist, who from a general recipe, is

65. CARDOZO, *supra* note 1, at 65.

66. For a more detailed discussion of some of the virtues mentioned in the main text and its relevance to reasoning through ambivalence, see Amalia Amaya, *Epistemic Ambivalence in Law*, 31 PHIL. TOPICS 7 (2021).

67. CARDOZO, *supra* note 1, at 112.

68. CARDOZO, *supra* note 1, at 22-24.

69. CARDOZO, *supra* note 1, at 105.

70. CARDOZO, *supra* note 1, at 73.

able to mix different ingredients and compound a fitting remedy.[71] To these, I would add, judicial craftmanship requires the "virtues of ambivalence," that is to say, the traits of character that help exploit ambivalence in a way that enhances the decision-making process. First, some traits of character are helpful for judges to be able to detect the various ways in which a legal case may be decided and to avoid facile simplifications that would lead them to classify the case as one that admits only of one solution. The first barrier to the acknowledgment of ambivalence is one's mind: judges need to allow themselves to encounter new ways of approaching a legal problem, novel viewpoints, even if they contradict deeply entrenched beliefs. To do so, they need the virtues of *open-mindedness*, to be genuinely open to alternative perspectives, including the views of other judges sitting in the same court. The *virtue of courage* is also pivotal to question one's beliefs and face the possibility that they may end up being undermined as well as to endure the pain and anxiety that ambivalence is likely to bring about.

The so-called "virtues of the will" are central not to foreclose the set of alternative decisions or to narrow it down, perhaps to the point that there remains only one live alternative, prematurely.[72] Judges need to have *intellectual patience* and *intellectual sobriety* to conscientiously engage in the process of depicting the choice scenario in ways that do no leave out relevant alternatives—including those that are not easily accessible—either because of cognitive reasons, as is the case of unconceived alternatives, or because of socio-institutional reasons—as in the case of hidden alternatives. The way in which legal knowledge is structured and stored—in both the judge's mind and the legal community—makes some alternatives salient, which is necessary for effective decision-making, but also may occlude access to what are, sometimes, important alternatives. Intellectual patience and sobriety would help judges not to cancel out the search for different ways of approaching a case too quickly. Critically, a judge may fail to possess these virtues not only but defect, but also by excess. Ambivalence may also lead, as it has been empirically shown, to paralysis and stultification—which would result in unnecessary delays in the process.[73] A judge who possesses the virtues of intellectual patience and sobriety would be better positioned to avoid the extremes of both hastiness and dilatoriness. In addition, when one intimates that the case is such that could be decided in more than one-way, *intellectual perseverance* is needed not to abandon

71. CARDOZO, *supra* note 1, at 105. There is an important affinity, which cannot be explored here, between Cardozo's views on the judicial process and some central tenets of virtue jurisprudence, such as mistrust in theory, no codifiability, the relevance of the judge's subjective features to judicial decision-making, or the importance of emotions and perception in adjudication.

72. On the virtues of the will, *see* Natasha Szutta, *The Virtues of Will Power – from a Philosophical & Psychological Perspective*, 23 ETHICAL THEORY AND MORAL PRAC. 1 (2020).

73. Attitudinal ambivalence has been shown to be positively correlated with procrastination, see Hareveld, Noheln & Schneider, *supra* note 20, at 17–18.

the inquiry too early, to follow the lead with constancy, and carefully develop the alternative theories of the case.

Last, the virtue of *intellectual vitality* is also helpful for ensuring that one does not fail to see that the case is such that could be decided in more than one way. Indeed, laziness can hinder ambivalence from arising in the first place and lead one to place the case at stake into the category of cases the resolution of which does not require either to problematize the identification of the relevant rule, its interpretation, or its application to the particular facts of the case. An "eye" for the exception is unlikely to develop unless one acquires habits of the mind that would dispose one to avoid following the easier cognitive path. A willingness to question the obvious, to be inquisitive about one's first impression, a readiness to conduct a thorough inquiry to ensure that one is not neglecting possible interpretations of the facts or the law that could ground alternative decisions, and a willingness to engage into the effortful (and, oftentimes, emotionally challenging) cognitive process that reasoning in complex situations of choice requires are central not to suppress ambivalence. Importantly, intellectual vitality is not only opposed to idleness and intellectual lethargy but also to obsessiveness and compulsion. While it is critical that judges avoid the intellectual sloth that prevents them from embracing uncertainty, intellectual vitality is also of service to prevent excessive intellectual zeal, which may lead, paradoxically, to procrastinating choice.

In the context of judicial decision-making, ambivalence, once properly identified, needs to be resolved.[74] *Resoluteness*—as a mean between indecisiveness and impulsiveness—is needed for judges to take the burdens of judgment and bring the decision-process to an end. As mentioned above, biased and heuristic reasoning has been shown to be common strategies for coping with ambivalence in different decisional settings. The need to come to a decision is a distinctive feature of the context of judicial decision-making, in contrast to other situations of complex decision-making which are also likely to give rise to ambivalence. This need increases the risk of deploying heuristics and biased systematic processing to expedite the decision process. Both biased and heuristic processing are less effortful a route to univalence than unbiased systematic processing. It is thus vital that judges possess the virtues of the will, mentioned above, as well as the virtue of intellectual vitality to counteract the tendency to use forms of reasoning that are cognitively less demanding and to ensure that ambivalence improves, rather than impairs, legal decision-making. Although biased and heuristic processing are similar in that they are both strategies for minimizing cognitive effort when reasoning through ambivalence, they

74. There may be good reasons to maintain ambivalence, rather than resolve it, in other contexts of decision-making. *See* Church, *supra* note 15; Simon D. Feldman & Allan Hazlett, *In Defense of Ambivalence*, forthcoming.

involve distinct kinds of failings. Thus, different virtues are particularly apposite to correct them: the virtue of *intellectual impartiality* is critical to prevent judges from falling prey to biases that would dissolve the ambivalence by selectively focusing on evidence that supports one alternative, to the detriment of the others, and the virtue of *intellectual autonomy* is much needed to ensure that judges do not resolve ambivalence by straightforwardly deferring judgment to the majority (within the court) or by assigning a disproportionate weight to the testimony of experts.

Last, the instillment of an intense alertness to "perceive and seize" whatever one can use also prepares the mind to resolve ambivalence in innovative ways.[75] The virtue of *resourcefulness*, a disposition to avail oneself of the resources afforded by one's environment and to combine them and use them in novel ways to achieve one's goals, is extremely valuable when facing ambivalence in the course of legal decision-making. Situations in which a choice must be made between well-supported alternatives may be resolved through different unbiased reasoning strategies. Critically, the judge is not stuck with a pre-determined binary choice between two options, but may, as Cardozo puts it, strike "upon a third, which will be the resultant of the two forces in combination, or will represent the mean between the extremes."[76] The judge may address the ambivalence by innovatively combining both alternatives into one integrated solution, compromising between competing courses of action, revising one's conception of the values, concepts, and categories involved thereby reconciling the alternative options, and reframing choice, in ways that enable new values and goals to play a role in the process.[77] To successfully carry out these strategies, resourcefulness to spot opportunities, identify useful materials, envision novel combinations, and think out of the box, is a vitally important virtue.

In sum, judicial craftmanship, in its "highest reaches," involves the proper recognition and resolution of ambivalence. Some traits of character, as argued, are particularly helpful for ambivalent decision-making. Hence, the cultivation of these virtues in legal education and judicial professional training is an important means for securing that ambivalence in judicial decision-making is exploited in ways that positively contribute to the development of the law. Ultimately, it is the acquisition of a distinct epistemic outlook —one that hits the mean between skepticism and dogmatism, constant doubt, and unwavering confidence—that is needed for judges to navigate ambivalence in a productive way.

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75. *See* Sacks, *supra* note 53, at 168 (describing Einstein as someone who was "intensely alert, primed to perceive and seize whatever he could use").

76. CARDOZO, *supra* note 1, at 21.

77. For a discussion of these strategies, see Rorty, *supra* note 16, at 436–37.

V. CONCLUSIONS

Cardozo's insightful description of the judicial process as open in a small but significant proportion of cases, in which there is space for the judge's creative energy to flow, anticipates contemporary work on the relevance of ambivalence for creative decision-making. Ambivalence—a situation in which the decision-maker is drawn towards different decision alternatives, both of which are supported by relevant reasons, provides an opportunity for the exercise of creativity. Furthermore, as claimed, it has additional benefits as well, which make it a phenomenon that is not only inevitable, but also one that should be welcome as a productive feature of the law. Cardozo was a forerunner, but also a man of his times. Like his contemporaries, he had a deep faith in progress and defended a view of the law as a multi-generational, self-corrective, process that unimpededly advances in one direction. However, the ambivalence that is characteristic of judicial decision-making also permeates law´s progress. Furthermore, the fact that some judicial decisions involve a choice among alternatives is an important factor that makes law's story less than certain. Judges, as argued, may not have access to alternative paths, should they remain hidden or unconceived. This contrastive indeterminacy transfers to the law, which could have, but did not, developed in different (perhaps better) directions. Judges may also wrongly resolve ambivalence, and we cannot rest assured that collective wisdom will always provide an effective corrective device. Thus, it seems necessary, as argued, to proactively nurture a number of traits of character in judges, which enable judges to properly identify and reason through ambivalence.

Virtue education is not, however, the only way in which one can foster the management of ambivalence in the judicial process in ways that are beneficial for law's development. In addition to the cultivation of the virtues of ambivalence, there are other measures that could be taken to make it the case that ambivalence in judicial decision-making positively contributes to the growth of the law. First, imagination is a central asset in complex contexts of decision-making in which ambivalence is likely to emerge. Imaginative capacities are particularly needed to overcome the problem of unconceived alternatives. A judge with the powers of imagination will be less likely to fail to conceive potential ways of solving the case and is thereby less likely to miss what may be precious opportunities for developing the law in promising directions.[78]

Second, ambivalence could also be primed through organizational design. Exposure to alternative viewpoints and open debate enable the analysis of a case in ways that minimize the chances that relevant alternatives fail to be

78. On the value of imagination in judicial reasoning in common law systems, *see* MAKSYMILIAN DEL MAR, ARTEFACTS OF LEGAL INQUIRY: THE VALUE OF IMAGINATION IN ADJUDICATION (2020).

considered, remain unconceived, or are wrongly discarded.[79] Indeed, multi-member courts, in so far as they provide a forum for collective deliberation, are a valuable venue for fostering ambivalence. But one could think of other mechanisms whereby one could develop in judges the abilities necessary to recognize and resolve ambivalence, which, as stated above, are a mark of judicial expertise. As work on deliberative practice has shown, feedback is critical for developing expert skills and different measures could be put in place to ensure that such feedback improves judicial practice, so that options are not neglected and errors are not repeated.[80] Indeed, the appeals system is one central mechanism that serves this purpose, but this does not prevent the introduction of other tools, such as structured peer case-discussions, at a post-decisional stage, which have proved useful in other complex decision-making contexts (such as medical diagnosis).

Finally, it would be important to think of ways in which one could ensure that ambivalence is registered and preserved appropriately. One could explore different forms in which knowledge of the law could be structured and stored with a view to minimizing the possibilities that alternatives are ignored and securing that there is as little slippage as possible. Of course, there is a lot the law already does which helps recording ambivalence. The publication of judgments, and most importantly, the publication of dissenting judgments, is central for making the whole pool of arguments available for future courts. Nonetheless, other measures could be taken. As Stanford has shown, some features of contemporary scientific culture are inimical to scientific progress, in that they promote conservatism within the community and thereby exacerbate the problem of the unconceived.[81] Similarly, we could examine contemporary legal culture to determine whether there are some features which may be rethought with a view to promoting a responsiveness within the legal community to the different, and oftentimes, contrastive values that are relevant in legal decision-making. A certain acknowledgment of the doubts faced by the court, for example, in the judicial opinions, could foster openness in legal culture and leave traces of argument, which may be valuable resources for the future.[82] To be sure, law, unlike science, is a conservative enterprise. Nevertheless, as Cardozo

79. On collective deliberation as a source of ambivalence, see Rorty, *supra* note 16.

80. See K. Anders Ericsson, Ralph T. Krampe & Clemens Tesch-Römer, *The Role of Deliberate Practice in the Acquisition of Expert Performance*, 100 PSYCH. REV. 363 (1993); K. Anders Ericksson & Kyle W. Hardwell, *Deliberate Practice and Proposed Limits on the Effects of Practice in the Acquisition of Expert Performance*, 10 FRONTIERS IN PSYCH. 2396 (2019).

81. See P. Kyle Stanford, *Unconceived Alternatives and Conservatism in Science: The Impact of Professionalization, Peer-Review, and Big Science*, 196 SYNTHESE 3915–32 (2019).

82. For the claim that signaling doubts in legal judgment may be an important resource for the development of the law, *see* Maksymilian Del Mar, *Review of Douglas E. Edlin*, Common Law Judging: Subjectivity, Impartiality and the Making of Law, 80 MOD. L. REV. 540 (2017); Del Mar, *supra* note 78. For some suggestions about how legal culture could be changed view a view to acknowledging openness, *see* Dan Simon, *A Psychological Model of Judicial Decision-Making*, 30 RUTGERS L.J. 1 (1998).

persuasively showed, the judicial process also provides room for creativity and innovation. Thus, it does not seem otiose to envision ways in which it may be possible to promote a legal culture that recognizes the important sense in which ambivalence may be a fertile source for the judicial development of the law.

Hence, it is critical, following in Cardozo's footsteps, to appease the futile yearning for certainty and to experiment with diverse strategies for fostering the virtues of ambivalence in legal education, priming them through institutional design, and preserving ambivalence in legal culture. Ambivalence may be, as Bauman has argued, the condition of our times.[83] If attunement with the "spirit of the age," rather than sympathy with a time that is past, is—as Cardozo suggested[84]—a major juristic virtue, then, it seems that the times are ripe to be reconciled with ambivalence and embrace it as an inescapable and fruitful condition of the life of the law.

83. See ZYGMUNT BAUMAN, MODERNITY AND AMBIVALENCE (1991).

84. *See* CARDOZO, *supra* note 1, at 111–112.