

# Cardozo's Literary Precedents

Bernadette Meyler\*

## I. INTRODUCTION

Benjamin Cardozo penned his essay “Law and Literature” long before the field of law and literature took off in the 1970s.<sup>1</sup> The piece, which furnishes a typology of judicial styles, has become a classic early example of engagement with the intersection of the two areas.<sup>2</sup> “Law and Literature” fits squarely within what is now called the genre of “law as literature,” considering the literary attributes of legal writing.<sup>3</sup> Reading it, one might never imagine that Cardozo had also considered works of fiction in depth. Indeed, few know of his early study of literature, including his heretofore unpublished undergraduate paper on novelist George Eliot.<sup>4</sup> Although this earlier work does not touch on law explicitly, it demonstrates the emergence of Cardozo’s concerns with duty, causation, and responsibility even before he became a judge, presaging the account of morality furnished in *The Nature of the Judicial Process*. It also helps to flesh out the reasons why, as he claims in “Law and Literature,” style is so significant.

Delving into Cardozo’s essay on Eliot can also help us to understand one form of the relations between law and literature. This form derives from the concrete historical intersections between legal processes and the producers of literary materials or, as in the case of Cardozo, the generative encounters

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\* Carl and Sheila Spaeth Professor of Law at Stanford Law School.

1. BENJAMIN CARDOZO, *Law and Literature*, in *LAW AND LITERATURE AND OTHER ESSAYS* (1931). For a brief overview of the field of law and literature and its chronology, see Elizabeth S. Anker & Bernadette Meyler, Introduction, in *NEW DIRECTIONS IN LAW AND LITERATURE* (Elizabeth S. Anker & Bernadette Meyler eds., 2017).

2. Law and literature scholar Richard Weisberg recently engaged with Cardozo’s essay. Richard Weisberg, *Cardozo’s ‘Law and Literature’: A Guide to his Judicial Writing Style*, 34 *TOURO L. REV.* 349 (2018). Several decades ago, Richard Posner’s essay *Law and Literature: A Relation Reargued* cited the piece as an early and isolated example of analysis of the intersection between the areas. Richard Posner, *Law and Literature: A Relation Reargued*, 72 *VA. L. REV.* 1351, 1352 (1986).

3. For a discussion of the varieties law and literature, including “law as literature,” “literature as law” and the “law of literature” see Anker & Meyler, *supra* note 1.

4. The essay is published for the first time in this Symposium volume. See Benjamin Cardozo, “Some Notes on George Eliot,” 34 *YALE J.L. & HUMANS.* 226 (2023). Andrew Kaufman furnishes a summary of the essay, which he attributes to Cardozo’s senior year as an undergraduate, in ANDREW KAUFMAN, *CARDOZO* 33-35 (2000). Stanley Charles Brubaker diagnosed Cardozo’s emergent vision of morality in the piece’s reflections on sympathy and duty. Stanley Charles Brubaker, *The Moral Element in Cardozo’s Jurisprudence*, 1 *CARDOZO L. REV.* 229, 234-236 (1979). He also wrote about the essay in his dissertation. Stanley Charles Brubaker, Benjamin Nathan Cardozo: An Intellectual Biography 73-79 (1979) (Ph.D. dissertation, University of Virginia) (ProQuest).

of legal actors with literary objects.<sup>5</sup> Cardozo's engagement with Eliot demonstrates how his emerging intellectual preoccupations found ample material for their development within the novelist's oeuvre. Eliot's work certainly did not dictate Cardozo's conceptions of duty and responsibility but, like works of philosophy or legal treatises, furnished a powerful substrate through which Cardozo could refine his emerging ideas. The similarity between the themes—and even the writing—of his work on Eliot and his undergraduate essay on poet and critic Matthew Arnold demonstrates Cardozo's recurrent preoccupations at the time.<sup>6</sup> Cardozo's attention to Eliot's manner of composition further illuminates the significance of his later insistence in "Law and Literature" on the inseparability of form and substance and the crucial import of style for the matter conveyed. For Cardozo, the art of the judge and the art of the novelist were not as far apart as might be imagined; neither dealt in certainties but both instead navigated worlds in which judgments could be made based upon guiding principles adapted to the occasion of particular circumstances.

## II. THE SIGNIFICANCE OF STYLE

In "Law and Literature," Cardozo insisted on the inextricability of style and substance.<sup>7</sup> Responding to the critique familiar even today that "[w]e are merely wasting our time, so many will inform us, if we bother about form when only substance is important," Cardozo argued that "this might be true if any one could tell us where substance ends and form begins. . . . Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity."<sup>8</sup> Adducing support for this claim, Cardozo turns to the novelist Henry James, whom he discusses alongside Eliot several times in his undergraduate piece on the latter.

But what *is* style? "Law and Literature" supplies one answer by illustration, furnishing a typology of six varieties of judicial style, from the "magisterial or imperative" to the "tonorial or agglutinative."<sup>9</sup> These styles manifest on paper the authority—or uncertainty—of the judge. Chief Justice Marshall uttered his most important pronouncements about the

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5. I have treated this kind of connection between the audiences and actors of law and literature in *THEATERS OF PARDONING* (2019); *Law, Literature, and History: The Love Triangle*, 5 U.C. IRVINE L. REV. 365 (2015); and *Wilkie Collins's Law Books: Law, Literature, and Factual Precedent*, in *THE SECRETS OF LAW* (Austin Sarat ed., 2007).

<sup>6</sup> For a transcription of that piece, see Benjamin Cardozo, *The Moral Element in Matthew Arnold*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 61 (Margaret E. Hall ed., 1947). As Cardozo himself writes both there and in "Some Notes on George Eliot," "in many cases, at least, a tendency toward repetition in an author is a token, not of sterility, but of strength." *Id.*

<sup>7</sup> Richard Weisberg has emphasized that the thesis of "Law and Literature" is that "every legal utterance we make needs to be judged according to the congruence of form and substance within it." Weisberg, *supra* note 2, at 353.

<sup>8</sup> Cardozo, *supra* note 1, at 4-5; *see also* Weisberg, *supra* note 2.

<sup>9</sup> Cardozo, *supra* note 1, at 10.

Constitution in the magisterial mode, as “the voice of the law speaking by its consecrated ministers with the calmness and assurance that are born of a sense of mastery and power.”<sup>10</sup> In writing about “Law and Literature,” contemporary scholar of law and literature Richard Weisberg contends that the magisterial is Cardozo’s favorite.<sup>11</sup>

The branch of law and literature scholarship called “law as literature” has built upon Cardozo’s insight that the mode of presentation—which includes not only turns of phrase but also the “architectonic” structure of opinions—is integral to the content of what is conveyed. James Boyd White’s preface to the abridged edition of his 1973 classic *The Legal Imagination* claims that “the greatest power of law lies not in particular rules or decisions but in its language, in the coercive aspect of its rhetoric—in the way it structures sensibility and vision.”<sup>12</sup> Following in the spirit of Cardozo’s project, Robert Ferguson’s “The Judicial Opinion as Literary Genre” similarly delves into the style of judicial writing but also insists upon its distinctiveness and differentiates it from literary works.<sup>13</sup>

In the manner of a lament, Cardozo appends some additional reflections on his contemporary moment to his comments on the magisterial style. Referring to the loss of faith in a law of nature, Cardozo explains that “[u]niversals will be handled more charily under the dominance of such a philosophy than in days when the law of nature supplied us with data that were supposed to be eternal and unyielding.”<sup>14</sup> Instead, “[m]ost of us are so uncertain of our strength, so beset with doubts and difficulties, that we feel oppressed with the need of justifying every holding by analogies and precedents and an exposure of the reasons.”<sup>15</sup>

We might see much of Cardozo’s classic book *The Nature of the Judicial Process* (1921) as furnishing a window onto how judgment may function in this post-lapsarian world, as Cardozo reviews a series of “methods” for approaching the judicial task, including the methods of philosophy, history, tradition, and sociology.<sup>16</sup> In reality, these methods may not be as distinct as Cardozo presents them; as Arthur Corbin once claimed, they are all part of “one method—the Cardozo Method.”<sup>17</sup>

Corbin’s use of the term “method” to describe Cardozo’s general approach to judging resonates with some of Cardozo’s own discussions of method, as well as his use of the term in “Some Notes on George Eliot.” The “method” of a particular thinker—whether novelist or judge—

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10. *Id.*

11. Weisberg, *supra* note 2, at 353-54.

12. JAMES BOYD WHITE, *THE LEGAL IMAGINATION* xiii (1985)

13. Robert Ferguson, *The Judicial Opinion as Literary Genre*, 2 *YALE J.L. & HUMANS*. 201 (1990).

14. Cardozo, *supra* note 1, at 16.

15. Cardozo, *supra* note 1, at 16.

16. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

17. Arthur Corbin, *The Judicial Process Revisited: Introduction*, 71 *YALE L.J.* 195, 199 (1961).

furnishes the imprint of their particular philosophy, loosely conceived, upon the subject matter at hand. As Cardozo's analysis of Eliot demonstrates, this kind of "method" is also a style, both of writing and of thought.

Hence Cardozo begins his essay on Eliot by stating that "[i]t will be found true, I think, of the works of every mastermind that there is in them some recurring note, some theme, some refrain, that stamps the author's personality upon them, and forms a principle of unity throughout them all."<sup>18</sup> Although he applies this view to the novelist in "Some Notes on George Eliot" and to the critic in his essay on Matthew Arnold, in his later writings, Cardozo makes similar statements about judges.<sup>19</sup> These later remarks, like his essay on Eliot, simultaneously demonstrate his attraction to a philosophical perspective and his substantial reservations about the pursuit of philosophical dogma—perhaps an outgrowth of his sympathy with philosophical pragmatism.<sup>20</sup>

Cardozo cites to William James's lectures on pragmatism for the following insight in his 1921 *Nature of the Judicial Process*:

[E]very one of us has in truth an underlying philosophy of life, even those of us to whom the names and the notions of philosophy are unknown and anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action.<sup>21</sup>

According to Cardozo's view,

Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice shall fall.<sup>22</sup>

The informal philosophy guiding the decisions of judges may not even be evident to the individuals themselves—as Cardozo opines, the tendencies expressed can derive from subconscious forces rather than intentional ratiocination.

18. Cardozo, *supra* note 4.

19. See *infra* notes 20-21 and accompanying text.

20. Dmitri N. Shalin notes that "Cardozo displayed the signature pragmatic skepticism about immutable principles, a respect for changing community mores, an appetite for fact-finding inquiry, and a willingness to support reform." DMITRI N. SHALIN, PRAGMATISM AND DEMOCRACY: STUDIES IN HISTORY, SOCIAL THEORY, AND PROGRESSIVE POLITICS 252 (2011).

21. In *The Growth of the Law*, Cardozo similarly states that, "In the opening pages of his book on pragmatism, William James quotes a remark of Chesterton's to the effect that the most important thing about a man is his philosophy. The more I reflect about a judge's work, the more I am impressed with the belief that this, if not true for everyone, is true at least for judges." BENJAMIN CARDOZO, THE GROWTH OF THE LAW 59 (1924).

22. CARDOZO, *supra* note 15, at 12.

A few years later, in the *Growth of the Law*, Cardozo likewise expresses the view that, at the margins, a guiding philosophy shapes judicial decision-making:

Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however veiled, is in truth the final arbiter. . . . Often the philosophy is ill coordinated and fragmentary. Its empire is not always suspected even by its subjects. Neither lawyer nor judge, pressing forward along one line or retreating along another, is conscious at all times that it is philosophy which is impelling him to the front or driving him to the rear. None the less, the goad is there.<sup>23</sup>

While crucial to the decision, the philosophy may not, as this passage suggests, be consciously invoked by the judge or even be fully coherent.

In the “Notes on George Eliot,” Cardozo illuminates the impact of such a “recurring note” or “principle of unity” that constitutes a variety of philosophy, but not one that is striving for systematicity.<sup>24</sup> Cardozo refers to “the determining feature of George Eliot’s philosophy.”<sup>25</sup> At the same time, while acknowledging Eliot’s indebtedness to Comte, he rejects the notion that her novels can be correlated point by point with a philosophical position: “Much has been written about the philosophy and especially about the ethics of George Eliot; and yet I question whether either her philosophy or her ethics presents so consistent and definite a body of doctrine as seems to be commonly supposed.”<sup>26</sup>

For Eliot, Cardozo discerns the recurring note in her “sense of the interdependence of human lives and destinies; this profound conception of the tremendous meaning and scope of the law of causation and of all that law implies; this vivid appreciation of what we may call the generative power of any, even the smallest act, in its effect both upon the agent himself and upon society at large.”<sup>27</sup> This philosophy of interdependence, with its insistence on the impact of individuals’ thoughts and deeds, resonates with Cardozo’s later legal interests, as I discuss in Part III. Yet it also results in what Cardozo describes as a “method of analysis.” Cardozo never defines the precise relation between the “uniform current of thought circulating through all the creations of any great mind” and Eliot’s “method of analysis.” The way they are conjoined in the “Notes,” however, suggests that the method of analysis constitutes the manner of expressing the novelist’s philosophy in literary or textual form. In other words, it resembles what Cardozo would later call “style” in “Law and Literature.”

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23. CARDOZO, *supra* note 19, at 25-26.

24. Cardozo, *supra* note 18, at 226.

25. *Id.* at 227.

26. *Id.* at 236.

27. *Id.*, at 227.

Cardozo helpfully furnishes a lengthy example of Eliot's method drawn from her novel *Romola*. A historical work set amidst the tumultuous politics of 1492 Florence, *Romola* begins with the arrival of stranger Tito Melema. The reader soon discovers that Tito is carrying his adoptive father, Baldassarre's, jewels. The two had become separated through a shipwreck, but Tito is inclined to pursue wealth, status, and pleasure in Florence rather than set out on an arduous quest to find his father. In Florence, he rationalizes keeping the jewels for himself, then exchanges them for money. While courting Romola, the beautiful daughter of scholar Bardo de' Bardi, he enters into a fake marriage with another woman, Tessa, of lesser position in Florence. Around the same time, Romola's estranged brother, who has become a monk, returns to Florence bearing a letter for Tito from Baldassarre, saying simply, "I am sold for a slave. I think they are going to take me to Antioch. The gems alone will serve to ransom me."<sup>28</sup> Tito fails to respond to this demand.

During much of the first part of the novel, the reader is brought into Tito's thought processes, witnessing his descent from casual concealment to active deception. At the same time, we are led to see how his own self-justifications compare with the moral values of his society. This mode of storytelling, in which the narrator does not simply represent a protagonist from outside but rather oscillates between that character's internal perspective and the third-person form, has been called "free indirect discourse" or "style indirect libre."<sup>29</sup> Its effect is to "present subjective standpoints in putatively objective discourse."<sup>30</sup>

As Michael McKeon explains in his *Theory of the Novel*, "free indirect discourse was consolidated in the later half of the eighteenth century but theorized (along with psychoanalysis . . . ) only in the first years of the twentieth."<sup>31</sup> Experimentation with and use of free indirect discourse abounded in the work of nineteenth-century novelists, George Eliot included.<sup>32</sup> Critic Rae Greiner has identified the technique as one of the

28. GEORGE ELIOT, *ROMOLA* 113 (1862).

29. See M.H. ABRAMS, *A GLOSSARY OF LITERARY TERMS* 169 (5<sup>th</sup> ed., 1993) ("[F]ree indirect discourse (equivalent to the French 'style indirect libre'), or 'represented speech and thought' . . . refer to the way, in many narratives, . . . the reports of what a character says and thinks shift in pronouns, adverbs, tense, and grammatical mode, as we move—or sometimes hover—between the direct narrated reproductions of these events as they occur to the character and the indirect representation of such events by the narrator."); see generally MONIKA FLUDERNIK, *THE FICTIONS OF LANGUAGE AND THE LANGUAGES OF FICTION* (1993) (providing a comprehensive account of free indirect discourse that integrates the German tradition of the form with the French and English); ANN BANFIELD, *UNSPEAKABLE SENTENCES* (1982) (furnishing a linguistic account of forms of represented speech); DORRIT COHN, *TRANSPARENT MINDS* (1978) (focusing on "narrated monologues," which is her translation for "style indirect libre").

30. John Plotz, *Two Flowers: George Eliot's Diagrams and the Modern Novel*, in *A COMPANION TO GEORGE ELIOT* 76 (Amanda Anderson & Harry Shaw eds., 2013).

31. MICHAEL MCKEON, *THEORY OF THE NOVEL* 485 (2000).

32. See, e.g., Monika Fludernik, *Eliot and Narrative*, in *A COMPANION TO GEORGE ELIOT* 21 (Amanda Anderson & Harry Shaw eds., 2013).

mechanisms by which the novel generates sympathy, while insisting upon some separation from the character.<sup>33</sup> Others have viewed Eliot as employing the device to produce an ironic distance from the protagonist or even condemn him or her.<sup>34</sup>

The passage from *Romola* that Cardozo quotes at length to exemplify Eliot's "method" employs free indirect discourse to get inside Tito's consciousness while also identifying the difference between Tito's thought process and that of an ordinarily moral person of his time. Of Tito, Eliot writes that "[h]e had convinced himself . . . that he was not bound to go in search of Baldassarre. He had once said that on a fair assurance of his father's existence and whereabouts, he would unhesitatingly go after him. But after all, why was he bound to go? What, looked at closely, was the end of all life, but to extract the utmost sum of pleasure?"<sup>35</sup> These sentences move from the outward description of Tito's thought process at the beginning to enacting that process through his internal questions.

The passage goes on to contrast Tito's views with society's, not from the narrator's own juxtaposition of social mores with Tito's consciousness but rather through the description of how those mores were internalized into Tito's own self-assessment. As Eliot explains, again from Tito's perspective:

Certainly the gems and therefore the florins were, in a sense, Baldassarre's, in the narrow sense by which the right of possession is determined in ordinary affairs; but in that large and more radically natural view by which the world belongs to youth and strength, they were rather his who could extract the most pleasure out of them. That, he was conscious, was not the sentiment which the complicated play of human feeling had engendered in society. The men around him would expect that he should immediately apply these florins to his benefactor's rescue. But what was the sentiment of society? —a mere tangle of anomalous traditions and opinions which no wise man would take as a guide except so far as his own comfort was concerned.<sup>36</sup>

The phrase "[t]hat, he was conscious" signals the reader that the subsequent account of society is not merely one imposed by the author but rather one internalized and recognized—if ignored—by the protagonist. This passage not only highlights the disparity between Tito's conduct and what most people would have believed he was required to do but also

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33. RAE GREINER, SYMPATHETIC REALISM IN NINETEENTH-CENTURY BRITISH FICTION 9, 40-41 (2012).

34. Robyn Warhol notes that in *Middlemarch*, the narrator "employs free indirect discourse both to exhibit and to inculcate Mr. Casaubon's character." Robyn Warhol, "It Is of Little Use for Me to Tell You": George Eliot's Narrative Refusals, in A COMPANION TO GEORGE ELIOT 105 (Amanda Anderson & Harry Shaw eds., 2013).

35. Cardozo, *supra* note 4, at 228.

36. ELIOT, *supra* note 28, at 117-18.

suggests that Tito retains a background awareness of the duties society would attribute to him.

Fleshing out the nature of Eliot's method, Cardozo contrasts her writing in part with that of Henry James, although he places them on a continuum. Whereas Eliot worked "directly by introspection of our varying states of consciousness," James operated "indirectly, by observation of the speech and actions of others, and hence, through a process of inference, to the thoughts and emotions they express."<sup>37</sup> Although he follows other critics in deeming the Jamesian approach technically superior, Cardozo nevertheless opines of Eliot that he "could not wish, I think, that the method had been other than it is."<sup>38</sup>

The figures whose consciousness Eliot explores are not, as Cardozo observes, generally exceptional individuals. Instead, Eliot directs her attention to the inner workings of the minds of ordinary people, displaying, in Cardozo's words, a deep interest in "the lives and thoughts and emotions of plain and humble men—of men who had thought no great thoughts and felt no great passions and suffered no great wrongs."<sup>39</sup> At the same time, her novels usually focused on scenes of ordinary life rather than world-historical incidents (*Romola* here representing an exception in part). Cardozo describes this characteristic of Eliot's work as emanating from her "love for the plain and dull and homely scenes of everyday humdrum existence."<sup>40</sup> It is to these tendencies of Eliot's that Cardozo attributes some misunderstandings of her work. He refers, for example, to those who lament that *Middlemarch* does not contain a tragedy, presumably because the characters are not sufficiently noble nor the catastrophes sufficiently profound. Responding to those critics, Cardozo writes that "The vain strivings of a high spiritual nature, the slow fading of hopes, the death of the ambitions of a life work, are, it seems to me, the most tragic of all facts that the life of man reveals."<sup>41</sup>

These aspects of Eliot's method arguably bring it in close proximity with the Cardozoan method of judging, both as described in *The Nature of the Judicial Process* and other theoretical writings and as exemplified in Cardozo's judicial decisions. Like Eliot, Cardozo refers the vantage point of the individual with moral obligations or duties back to what society would reasonably expect of that individual and requires him or her to internalize that social perspective in deciding upon the level of care or effort to devote to a particular situation. While this approach is oriented toward a community, it hones in on individual thoughts and actions rather than more

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37. Cardozo, *supra* note 4, at 230.

38. *Id.* at 235.

39. *Id.* at 238.

40. *Id.*

41. *Id.* at 234.

collective accounts of responsibility. Yet it does not allow the individual much latitude to deviate based on idiosyncratic characteristics or thought processes from the narrator's—or judge's—assessment of how a reasonable person should act. In these respects, Eliot's practice of free indirect discourse furnishes a paradigm for judging as well as novel writing.

Many of Cardozo's own reflections on judging—in addition to his judicial opinions, discussed in Part IV—confirm the resemblance between Eliot's method and Cardozo's conception of judging. In *The Nature of the Judicial Process*, Cardozo elaborates on his notion of the judge as a conduit for conventional social morality.<sup>42</sup> Cardozo rejects the notion that the judge would apply a subjective moral standard and instead insists that he look to an objective one.<sup>43</sup> This objectivity is supplied not by an abstract philosophical or legal principle but instead by contemplation of the custom of reasonable people. While it may not be fully possible for the judge to leave behind his own perspective, he must assiduously attempt to discern and apply this customary morality. Nor does the judge simply embody conventional morality unconsciously.<sup>44</sup> Cardozo instead insists that he must take an active role in consciously bringing this morality to bear on legal questions, finding “[t]he standards or patterns of unity and morals in the life of the community.”<sup>45</sup>

Cardozo further elaborates on this role of the judge in his later book *The Paradoxes of Legal Science* (1928), referring to judges as “the interpreters of the ‘social mind.’”<sup>46</sup> As such, they apply principles they derive from outside their own subjective set of priorities, whether those are encapsulated in legislation or not. As Cardozo puts it, “A judge is to give effect in general not to his own scale of values, but to the scale of values revealed to him in his readings of the social mind. . . . [H]e must put himself as best he can within the heart and mind of others, and frame his estimate of values by the

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42. Aditi Bagchi has elegantly demonstrated this point in her essay for this Symposium. Aditi Bagchi, *Conflict, Consistency, and the Role of Conventional Morality in Judicial Decision-Making*, 34 *YALE J.L. & HUMANS* 9 (2023). John C.P. Goldberg convincingly argued several decades ago that Cardozo believed that the common law and the common law judge “ought to articulate and enforce in legal rules the limited set of norms that citizens do hold in common” amidst the diversity of shared norms and their change over time. John C.P. Goldberg, *Community and the Common Law Judge*, 65 *N.Y.U. L. REV.* 1324, 1327 (1990).

43. CARDOZO, *supra* note 15, at 106 (“So far as the distinction has practical significance, the traditions of our jurisprudence commit us to the objective standard. I do not mean, of course, that this ideal of objective vision is ever perfectly attained. We cannot transcend the limitations of the *ego* and see anything as it really is. None the less, the ideal is one to be striven for within the limits of our capacity. This truth, when clearly perceived, tends to unify the judge’s function. His duty to declare the law in accordance with reason and justice is seen to be a phase of his duty to declare it in accordance with custom. It is the customary morality of right-minded men and women which he is to enforce by his decree.”)

44. *Id.* at 104.

45. *Id.*

46. BENJAMIN CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 49 (2000).

truth as thus revealed.”<sup>47</sup>

Returning to the comparison with Eliot, the judge, reading the social mind, simultaneously delves into the perspective of the person who would be held responsible in the case in question. In this respect, the judge, like the narrator of Eliot’s novels, is engaged in a form of free indirect discourse with implications for how a defendant or a character is judged.<sup>48</sup>

Reading some of Cardozo’s renowned opinions demonstrates this method of analysis at work. Richard Weisberg has defended the impersonality of Cardozo’s treatment of Mrs. Palsgraf and her injury from the explosion at issue in *Palsgraf v. Long Island R.R. Co.* (1928) on the ground that this style was required by the content of the opinion.<sup>49</sup> Yet he does not observe that, in the same opinion, Cardozo does guide the reader through the perspective of the guard who was alleged to have committed the tort by pushing the holder of the package containing fireworks into the train, causing it to fall and explode.

After explaining the facts of the case, Cardozo writes that “[t]he conduct of the defendant’s guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all.” Seeming to enter into the guard’s vantage point, Cardozo explains that “[n]othing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed” and concludes that, “[i]f no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to [Mrs. Palsgraf] did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else.”<sup>50</sup>

He then guides the reader through other possible scenarios from a perspective close to the guard’s:

A guard stumbles over a package which has been left upon a platform. It seems to be a bundle of newspapers. It turns out to be a can of dynamite. To the eye of ordinary vigilance, the bundle is abandoned waste, which may be kicked or trod on with impunity. Is a passenger at the other end of the platform protected by the law against the unsuspected hazard concealed beneath the waste?<sup>51</sup>

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47. *Id.* at 55.

48. This judicial capacity to adopt another’s perspective resembles the activity of the “poetic judges” Martha Nussbaum characterizes in *Poetic Justice*, including “the ability to think of people’s lives in a novelist’s way.” MARTHA NUSSBAUM, *POETIC JUSTICE* 99 (1995). As Nussbaum describes Justice Stevens’ approach in an opinion that she takes as demonstrating “some of the most important traits of the literary ‘judicious spectator,’” “He is able to enter into the existence of one who is (rightly) feared and loathed by society, seeing the interests and rights of the prisoner, and his special circumstances, without fully sharing his emotions and motives.” *Id.* at 102-103.

49. Weisberg, *supra* note 2, at 255-256.

50. *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 341-42 (1928).

51. 248 N.Y. 339, at 342.

The guard's perhaps hardly conscious train of thought moves, under Cardozo's account, from perceiving what appears to be a bundle of abandoned materials to understandably treating this litter without especial care.

Although the narrative perspective focuses in on the claimed tort-feasor in *Palsgraf*, Cardozo sometimes enters the point of view of the injured person. He does so in a pair of cases in which it was disputed whether or not an individual had died while performing his job and whether his family could therefore be compensated. In *Babington v. Yellow Taxi Corp.*,<sup>52</sup> a taxi driver was fatally injured in an accident after a police officer commandeered him and his vehicle into pursuit of a criminal. In *Heidemann v. American District Telegraph Co.*,<sup>53</sup> a night watchman was accidentally shot by a police officer pursuing a burglar. In both of these instances, Cardozo dwells on how the victim would have perceived his duties in order to show that he had not exceeded the scope of his employment.

Examining Carl Heidemann's activities, he wrote that:

It was not only in repelling attack upon the property of his employer's patrons that Heidemann had to face the perils of his calling. He faced them at all times while abroad upon his duties. His employment put him upon the street at night, and put him there in search of trouble. If shots were heard, or cries of distress, or the sounds of an affray, others might run to shelter. His duty was to search the cause. The disturbance might have its origin in the homes and stores and offices intrusted to his care. He could not know unless he looked.<sup>54</sup>

Through hypothesizing Heidemann's and Babington's vantage points, Cardozo demonstrated that activities and events that might have seemed incidental to their employment were, in actuality, connected to legal and moral duties that bound them. Notably, however, unlike Eliot, Cardozo fills in the thought processes of the characters in his cases not with an individual psychological profile but instead with the reflections that a so-called "reasonable person" might have had about their activities.

### III. DUTY, CAUSATION, AND MORALITY

While Eliot's "method of analysis" suggests a particular style of judging, her "central preoccupation" with causation and interconnection may have furnished material for Cardozo's nascent deliberations about duty. Strikingly, Cardozo's account of *Palsgraf* rejects the view that causation has anything to do with the case and instead insists, *contra* Judge Andrews in dissent, that an assessment of duty must precede—and can cut off—any

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52. 250 N.Y. 14 (1928).

53. 230 N.Y. 305 (1921).

54. 230 N.Y. at 307-08.

account of causation. Yet Eliot's expansive view of human interconnection rhymes with Cardozo's broad vision of duty, one that, as John Goldberg and Ben Zipursky have argued, extends "to all persons within a broad class of persons" while yet remaining "*relational*—always owed to the members of a particular class of potential injury victims."<sup>55</sup>

After first articulating Eliot's "sense of the interdependence of human lives and destinies," "profound conception of the tremendous meaning and scope of the law of causation and of all that law implies," and "vivid appreciation of what we may call the generative power of any, even the smallest act, in its effect both upon the agent himself and upon society at large," Cardozo elaborates upon these characteristics of her writing throughout his "Notes."<sup>56</sup>

His account of Eliot's *Silas Marner* partially explicates how causation operates within her novels. Marner had been a victim of a false accusation that drove him from the community of his youth; he ended up in the village of Raveloe isolated and dejected. Although he devotes himself to weaving and accumulates some money through this pursuit, it is then stolen. An unrelated sequence of misdeeds leads a little girl to his cottage after her mother has been killed, and his connection with her restores his "purpose . . . and . . . hopes."<sup>57</sup> This novel is full of incident and accidents with profound effects. As Cardozo concludes, "All the author's powers of analysis, all her sense of the presence and reality of causation as an ever immanent fact, all her wide and generous and human sympathy, are here."<sup>58</sup> In this causal chain, outward circumstances affect inner feelings and produce as well as destroy human relations.

At the same time, Cardozo refers to a form of causation operating within the individual himself, through which prior thoughts and deeds accumulate force and produce subsequent bad acts. This is how he views the character of Tito in *Romola*, whose internal sophistries and their effects were discussed in Part II, *supra*. As he explains, "[a]ll the successive events by which Tito is led from weakness to crime and from crime to calamity are set before us with the fatal nexus of cause and effect binding them

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55. John C.P. Goldberg & Benjamin C. Zipursky, *The Myths of Macpherson*, 9 J. TORT L. 91, 102-103 (2016); see also John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of Macpherson*, 146 U. PA. L. REV. 1733, 1825-1839 (1998) (elaborating upon the relational conception of duty).

56. The following passages are some of the most relevant: "The generative power of conduct, the dreadful vitality of wrongdoing, speak here with human voices and in concrete forms. All the successive events by which Tito is led from weakness to crime and from crime to calamity are set before us with the fatal nexus of cause and effect binding them mercilessly together"; "The truth that our thoughts and deeds live in their effects, and are thus in fact immortal, was, as I have tried to indicate, a doctrine that lay at the very basis of her being. This doctrine she carried to its uttermost conclusion; and the immortality of thought and deed—the only immortality she knew—became to her the stimulus and the sanction that mankind instinctively [desired?]." Cardozo, *supra* note 4, at 227.

57. *Id.* at 233.

58. *Id.*

mercilessly together.”<sup>59</sup>

This account of causation seems to contrast with Cardozo’s later positions in his torts cases, which emphasized the extent to which an alleged tortfeasor owed a duty to plaintiffs over a more expansive view that damages should be recoverable for all injuries that that tortfeasor had caused. Hence he famously stated in *Palsgraf* that “[t]he law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability.”<sup>60</sup> Indeed, his discussion of Eliot seems to resonate more with Judge Andrews’s dissent in that case, which insisted on a broader view of liability as long as an act was negligent and a cause could be traced. For Andrews, “we cannot trace the effect of an act to the end, if end there is. . . . [H]owever, we may trace it part of the way. A murder at Serajevo may be the necessary antecedent to an assassination in London twenty years hence. An overturned lantern may burn all Chicago. We may follow the fire from the shed to the last building. We rightly say the fire started by the lantern caused its destruction.”<sup>61</sup>

Scholars have often interpreted Cardozo’s approach in the case of *MacPherson v. Buick Motor Co.*<sup>62</sup> as contrasting with *Palsgraf* and setting the stage for a move beyond negligence into strict liability as well as for a vision of duties owed to the public at large rather than specific individuals or groups.<sup>63</sup> Yet I find John Goldberg and Ben Zipursky’s contrary account of *Macpherson* more convincing as a reading not only of the case but of his surrounding jurisprudential theory. In brief, Goldberg and Zipursky argue that, while Cardozo expanded the conception of duty beyond contractual privity, he retained a sense of the importance of a relational basis for duties. Hence, they contend, he embraced the ideas of relationality—“that duties of care are owed to persons or members of classes of persons”—and relationship-sensitivity—“that the scope, and in some circumstances, the existence, of a duty of care will turn on the relationship between the persons

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59. *Id.* at 228.

60. *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (1928). Cardozo also devotes a section of *The Paradoxes of Legal Science* (1928) to a discussion of “cause and effect.” There he writes:

The complete cause, if it could be found, would extend to the entire ground of the phenomenon that had to be explained, and this ground would reach, not only to the whole of the world, but the entirety of the universe. More than this: if the ground could be completely stated it would be indistinguishable from the effect itself, including, as it would do, the whole of the conditions of existence. Thus we see that when we speak of the cause of an event we are only picking out what is relevant to the standpoint of a special inquiry, and is determined in its scope by the particular concept which our purpose makes us have in view. CARDOZO, *supra* note 35, at 82-83.

61. *Palsgraf*, 248 N.Y. 339 (Andrews, J., dissenting).

62. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916).

63. See the discussion of this narrative in John C.P. Goldberg & Benjamin C. Zipursky, *The Myths of Macpherson*, 9 J. Tort L. 91 (2016) (hereinafter *Myths*); and, John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of Macpherson*, 146 U. PA. L. REV. 1733 (1998).

in question.”<sup>64</sup> While Cardozo believed that “tort duties are owed to all persons within a broad class of persons,” he did not consider them “owed to the world at large.”<sup>65</sup>

This account of Cardozo’s vision of duty—one based on a broad view of relation beyond privity—has overtones of Eliot’s vision of interconnection. Delving into Eliot’s views on interconnection, Cardozo finds them rooted in an idea of human sympathy. As he writes:

The dominant note in her morality is the obligation of sympathy. Sympathy is the ever recurring term that seems to sum up to her mind the full measure of human duty—sympathy and love alike for those who are with us now and for those who are to follow and whose lives it is given us to shape. No effort is made to explain the grounds of obligation; the gap between the what and the why of morality, she makes, so far as I can find, no endeavor in any way to bridge. A simple direct appeal is made to the altruistic impulses of the race, and her system of morality stands or falls according as that appeal finds a responsive throb in “the great heart of mankind.”<sup>66</sup>

Sympathy here is not restricted to those within a particular circle of concern and instead encompasses even future generations. The world of Eliot’s novels thus furnishes an example of what an expanded and expansive perspective on human relationships as a source of duties would look like.

In “Some Notes on Eliot,” Cardozo speaks in the same breath of human interdependence and the law of causation. His later approach in the tort context tended to distinguish the former from the latter, focusing on expanded relational duties rather than causal chains. Yet it is worth emphasizing that he honed in on both of these concerns in Eliot’s writings before even embarking on a legal career.

Cardozo also, of course, considered duties that had been consciously assumed by the parties. If, in the tort context, he advocated for a broader vision of the class of individuals to whom duties were owed, in the area of contracts, his cases expanded the kind of conduct that would be thought to support an obligation and, in the field of fiduciary duty, he enhanced the level of conduct expected on the basis of that duty. As Andrew Kaufman writes of his contract cases, Cardozo “often found that a contract existed even if the technicalities required to make a contract seemed at first glance not to have been met.”<sup>67</sup> Cardozo’s account of fiduciary duty has also led at least one scholar to wonder if fiduciaries must love each other.<sup>68</sup>

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64. Goldberg & Zipursky, *Myths*, *supra* note 47, at 101-02.

65. *Id.* at 102.

66. Cardozo, *supra* note 4, at 237.

67. Kaufman, *supra* note 4, at 315. Kaufman discusses Cardozo’s jurisprudence in contract more generally from 313-37.

68. Stephen M. Bainbridge, *Must Salmon Love Meinhard? Agape and Partnership Fiduciary Duties*, 17 GREEN BAG 2D 257 (2014). For additional discussion of Cardozo’s approach to fiduciary

His landmark opinion in *Meinhard v. Salmon* insists that the joint adventurers at issue in the case, “like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty” and that “[n]ot honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”<sup>69</sup> The case turned on the fact that Salmon, the face of the business, had failed to disclose that he was actually working with Meinhard when approached with an offer of a new lease, thereby depriving Meinhard of any part in the new enterprise.<sup>70</sup> This conduct, Cardozo held, constituted a breach of fiduciary duty.<sup>71</sup>

Cardozo’s treatment of Salmon’s omission echoes both Eliot’s use of free indirect discourse and her substantive description of Tito’s character in *Romola*, whose increasingly destructive course of conduct began by failing to disclose the source of the gems he was selling—his adoptive father, Baldassarre. In a striking passage, Cardozo writes:

We have no thought to hold that Salmon was guilty of a conscious purpose to defraud. Very likely he assumed in all good faith that with the approaching end of the venture he might ignore his coadventurer and take the extension for himself. He had given to the enterprise time and labor as well as money. He had made it a success. Meinhard, who had given money, but neither time nor labor, had already been richly paid. There might seem to be something grasping in his insistence upon more. Such recriminations are not unusual when coadventurers fall out. They are not without their force if conduct is to be judged by the common standards of competitors. That is not to say that they have pertinency here. Salmon had put himself in a position in which thought of self was to be renounced, however hard the abnegation.<sup>72</sup>

Here we see a slip from Cardozo’s perspective as judge—“Very likely he assumed”—to Salmon’s own vantage point—“He had given. . . . He had made it a success. . . . There might seem to be something grasping. . . .” Like Eliot, however, Cardozo enters into Salmon’s possible cogitations only to reject them in light of the obligations that the judge, as the mouthpiece of a social mind, deems owed.

#### IV. CONCLUSION: CARDOZO, LAW, AND LITERATURE

Judge Posner attributed to Cardozo “an essentially literary skill” that rendered him great by making his opinions a “memorable exemplar of an

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duty, see also Lawrence E. Mitchell, *The Importance of Being Trusted*, 81 B.U. L. REV. 591 (2001); Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1692-1699 (1990); and, Kaufman, *supra* note 4, 238-242.

69. *Meinhard v. Salmon*, 249 N.Y. 458, 463-64 (1928).

70. *Meinhard*, 249 N.Y. 458.

71. *Id.*

72. *Meinhard*, 249 N.Y. at 467-468.

issue, problem, or approach.”<sup>73</sup> Cardozo himself focused his essay “Law and Literature” on judicial style. Cardozo’s work has, accordingly, hitherto seemed most relevant to the contemplation of “law as literature,” rather than delving into the legal implications of literature itself. Posner’s own *Law and Literature* or other writings on the topic do not consider the formative role of literary works upon particular legal figures—except perhaps himself.<sup>74</sup>

Cardozo’s “Notes on Eliot” furnishes a view into how someone who became one of the most prominent American jurists engaged with literature at an early stage of his education and intellectual life. Did what he discerned in Eliot dictate his later legal style or understanding of duty? No. But, I would argue, Eliot’s novels may have prompted greater reflection about what kinds of narrative techniques could be used for which purposes and provided Cardozo with a valuable resource for thinking through relationships of duty and causation. In her book *Thinking with Shakespeare*, Julia Lupton refers to a “concern with constellations that *persist*, that appear in, before, and after Shakespeare.”<sup>75</sup> We can similarly trace a constellation of methods and concerns that characterize both Eliot’s and Cardozo’s work. While it can never be known how much of Cardozo’s approach in these areas preceded his encounter with Eliot and how much grew out of it or grew despite it, his “Notes on George Eliot” give us a window onto how he thought with Eliot and, more broadly, the role that literature could play in the development of a jurist’s style and philosophical preoccupations.

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73. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 134 (1990).

74. See generally Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1986); RICHARD A. POSNER, *LAW AND LITERATURE: THIRD EDITION* (2009). For an intriguing suggestion of how the first edition of Posner’s book furnished insight into his own jurisprudence and relation to literature, see Richard H. Weisberg, *Entering with a Vengeance: Posner on Law and Literature*, 41 STAN. L. REV. 1597 (1989).

75. JULIA LUPTON, *THINKING WITH SHAKESPEARE* 18 (2011).