Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965 (1993)

*965

When Professor Michael S. Ariens of St. Mary's University School of Law invited me to give this lecture, I tried to beg off. I claimed that I had used up my best topics giving lectures at law schools in previous years.

Professor Ariens would not let me off that easily. He suggested that I talk about being a judge and about what judges do when they decide cases. More specifically, he suggested I revisit Benjamin Cardozo's 1921 lectures at Yale Law School, published in book form and entitled The Nature of the Judicial Process. [FN1]

Now let me tell you how Cardozo, Judge of the New York Court of Appeals, came to give the Yale lectures. According to Professor Corbin (of Corbin on Contracts fame), the Yale "faculty had the perennial problem of inducing a competent and attractive man to deliver the Storrs Lectures" at Yale Law School. [FN2] Through his opinions as a judge of the prestigious New York high court, several faculty members*966 were familiar with Cardozo. Many of you remember Judge Cardozo too, especially if I mention Mrs. Palsgraf. In any event, the faculty decided to invite Judge Cardozo to deliver the lectures.

Upon receipt of the invitation from the Dean of Yale, Judge Cardozo wrote that he was unable to accept the invitation to speak by explaining, "I have no message to deliver." [FN3] Nevertheless, he agreed to come to New Haven to meet the faculty. Sitting in a semi-circle around the Dean's desk, the men chatted. Judge Cardozo repeated his regret that he had no message to impart. At that point, someone asked whether Judge Cardozo could explain to the students the process by which he arrived at a decision in a case, including the sources to which he turned for assistance. With only a slight hesitation, according to Corbin, Cardozo replied: "I believe I could do that." [FN4] Yale acquired a lecturer.

I apparently fell for the same old faculty line. Judge Friendly observed that "the question how judges go about the business of judging continues to hold interest—although apparently more for lawyers and law professors than for judges." [FN5]

Judge Cardozo delivered four one-hour lectures at Yale. At the end of the fourth lecture, the faculty asked for his manuscript for publication by the Yale Press. Smiling, Judge Cardozo said that he did not "'dare to have it published.' Half seriously, he added: 'If it were published, I would be impeached."' [FN6]

The lectures were published, he was not impeached, and Yale University Press had a best seller on its hands. Within the first year, 3,000 copies of Cardozo's The Nature of the Judicial Process were sold in New York alone. [FN7] My 1975 copy of the paperback is from the thirty-sixth printing. It was a gift from a University of Wisconsin law-faculty friend who viewed the text as required reading for all new judges.

The Cardozo lectures, although now seventy years old, still have a significant influence. LEXIS shows 483 citations to the book in federal and state court opinions, and 277 citations in law journals, including numerous recent law-review writings.

In The Nature of the Judicial Process, described by Justice William Brennan as “a slim volume of near-lyric prose,” [FN8] Cardozo analyzed the factors that he believed motivate judges in deciding cases. Judge Cardozo spoke predominantly, but not exclusively, of a common-law appellate court deciding common-law cases. Today, the docket of a state-court justice spans the whole range of common, statutory, and federal and state constitutional law. [FN9] The Nature of the Judicial Process remains timeless, [FN10] even though the landscape of the law has changed significantly since 1921.

Cardozo begins The Nature of the Judicial Process by asking:

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? . . . If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking the logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? [FN11]

Cardozo, a judge engaged daily in decision-making, undertook to answer these questions and to uncover the nature of the judicial process. The judge's starting point, said Cardozo, is the extraction of principles from prior cases and the application of these principles to the new fact situation. Cardozo calls this the method of philosophy, a logical-reasoning process that will mandate a result in some cases, but not in all. He took as a given or, in other words, as reality, that in *969 many cases judges are confronted with disputes that are not readily resolved by looking to precedents or the words of the statutes. In these disputes, the result is not pre-ordained. Rather, judges must choose between alternative solutions. [FN12]

In 1921, a judge's public discussion of judicial discretion and choice was dramatic, sensational material. Cardozo went further than bringing the issues into the open. He took on the task of analyzing the forces that direct the judge's choices. [FN13]

When precedents and statutes are vague, or not clearly applicable to the case at hand, Cardozo said the judge turns to other methods of analysis. Using what Cardozo called the method of history, the judge examines the evolution of the rule to determine its contemporary scope and relevance. [FN14] Using the method of tradition, the judge searches for custom, the prevailing standards of conduct, or the accepted usages of a trade or profession. [FN15] And finally, using the method of sociology, the judge may be guided by the potential effect of the decision on society. [FN16] Cardozo believed that the rules of the common law must serve human needs, and that the soundness of a proposition of law is tested by its consequences: “There can be no wisdom in the choice of a path unless we know where it will lead.” [FN17]

Cardozo summarized the decision-making process as follows: “My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards for right conduct, are the forces which singly or in combination shape the process of the law.” [FN18]

How does the judge know which of these forces shall dominate in any case? Cardozo's response was: “Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired.” [FN19]

How does the judge know what these social interests are? Cardozo's reply was:

> One of the most fundamental social interests is that law shall be uniform and impartial. . . . Therefore in the main there shall be adherence to precedent. . . . But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. [FN20]

How does a judge know which of these social interests outweighs another? Cardozo's answer was: “I can only answer that [the judge] must get his knowledge . . . from experience and study and reflection; in brief, from life itself.” [FN21]

Cardozo's analysis obviously does not tell a judge how to decide a particular case. He gives no relative weights to the considerations that go into deciding each case. He provides no mathematical or scientific formula for decision-making. [FN22] Just as a judge cannot learn from Cardozo how to decide a particular case, the law student, the lawyer, or the lay person cannot use Cardozo's description to predict with certainty how a judge will respond to a particular fact situation.

Nevertheless, many find Cardozo's description of the nature of the judicial process “as good as any we have had since.” [FN23] Cardozo's lectures were the first serious effort by a sitting judge to articulate the sources a judge uses and the reasoning process a judge follows, whether consciously or not, in deciding a case. They provide a realistic description of the process. Although neither Cardozo nor any other judge or scholar can offer a coherent theory that frees a judge from the agony of judgment, [FN24] Cardozo makes the judges and those judged more comfortable with the uncertainty inherent in the judicial process. Although stability is a social interest, so is progress. Cardozo saw that the law calls for the balancing of stability and progress; liberty and constraint; promotion of individual rights and protection of the public interest; and “adherence to general rules and dispensation of individualized equity.” [FN25]

The upshot of Cardozo's analysis is an acknowledgment that fundamental requirements of justice and accepted principles of fairness are among the sources from which judges derive the law. Nevertheless, this acknowledgment must be kept in perspective. Cardozo and many other judges maintain that the majority of the cases on which they sit “could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain.” [FN26] It is only a minority of cases that the court must choose among competing legal principles and conflicting precedents. [FN27]

When Cardozo and others proclaimed that a judge must exercise judgment and make choices, they made the judiciary vulnerable to the charge that the judicial process is arbitrary, irrational, and personal. As Professor Karl Llewellyn wrote, people mistakenly assumed that because,

under Cardozo's analysis, the outcome of an appeal is not foredoomed in logic, it is the product of uncontrolled will. [FN28] Cardozo and Llewellyn, if alive today, would find the critical legal studies analysis of the indeterminacy of law too sweeping. [FN29]

I read Cardozo's lectures in law school and again in 1976, just before I became a judge. I read them a third time, after fifteen years on the bench, in my preparation for this talk. At each reading I have found new merit in Cardozo's description of decision-making.

During this most recent reading, I asked myself, “Do I, as a judge, follow the process Cardozo described?” To answer my own question I began to reread some of my opinions and reexamine their basis. I chose an opinion I wrote in 1982 [FN30] for analysis in this lecture because it is very similar to a hypothetical case posed in a symposium on the role of compassion in deciding cases. [FN31] I, thus, had the benefit of an opinion I wrote, as well as the reflections of judges and academics, while examining the impact of compassion upon the work of judges. [FN32]

Let me start with the facts. Steve Brown, sixteen years old, was driving on the interstate highway from Waukesha to Madison, Wisconsin, with his ten-year-old sister. They were delivering their father's legal brief to the Wisconsin Supreme Court for filing. According to Steve's testimony, which we accept as true for purposes of the appeal, Steve became very concerned about the car behind him that, he believed, was being driven in a wild and erratic manner. Steve was afraid of a physical confrontation with the other driver. Although the speed limit was fifty-five miles per hour, Steve accelerated to seventy-two miles per hour to get away from the other car. The vehicle, which had “harassed” Steve, then displayed flashing red lights and signaled Steve to pull over. The state patrol officer driving the unmarked car gave Steve a ticket for violating the speed limit. The statute provides that “no person shall drive a vehicle at a speed in excess of the” speed limit. The penalty is a civil forfeiture of not less than $20 nor more than $200.

The parties disagreed about the proper jury instructions. Steve asked the trial court to instruct the jury that he could be excused of any liability for speeding if his conduct was in defense of his sister and himself, if it occurred under circumstances of coercion or necessity, or if it was caused by improper law enforcement methods (entrapment). The state asked the trial court to instruct the jury that it should find Steve guilty if it found him driving in excess of the speed limit. [FN33] The trial court gave the instruction the state proposed. After thirty minutes of deliberations, the jury brought back a guilty verdict, and the trial court entered judgment on the verdict. The case came to the Wisconsin Supreme Court.

The statute neither spells out nor expressly precludes any defenses. To many, it would not be fair, right, or just to hold Steve liable under these facts. To many, ordinary common sense dictates that the legislature must have intended exceptions to the speeding statute and that a court should not enforce the law's literal command, but should follow the legislative intent, read in an exception, and exonerate Steve.

To others, another result would be clear: since the statute creates no exceptions, the judge should not supplement the statute by adding them. These persons might, thus, conclude that the judge ought not to ignore the law as written and substitute the law as she thinks it should be. She should enforce the law's literal command, refuse to read in an exception, and hold Steve liable. [FN34]

Let's think about the considerations that may have guided a judge's decision in this case. [FN35]

1. A judge would consider, of course, the elements of Cardozo's method of philosophy—the principles extracted from prior cases and their application to this set of facts. Neither the parties nor the court cited any prior Wisconsin case that had decided whether defenses are allowed in a speeding case. [FN36]

The statute in issue creates a strict liability offense, meaning that no proof of the offender's state of mind is required. The state argued, however, that the statute creates an absolute liability, meaning that every violation of the literal terms of the statute renders the offender guilty, without exception. While the speeding statute, a civil statute, is silent about defenses, the criminal statutes define the defenses of self-defense, [FN37] coercion, [FN38] necessity, [FN39] and entrapment to criminal conduct. [FN40] These criminal statutes do not pertain to this civil forfeiture action. [FN41] The common law, however, recognizes similar defenses in tort cases. [FN42] Although the statute is silent about these defenses, these defenses are generally accepted principles of law. Even though some judges might stop at the words of the speeding statute, many would not think this legal analysis is sufficient to reach a decision. There seems to be a need to explore the legislative gap and to form a cohesive structure from the statutes and common law. [FN43]

2. Next, a judge might look at the history of the defenses Steve asserts, to determine their relevance to the statute and the case at hand. The defenses came into the law because, in a situation in which two values cannot be preserved, the offender's conduct advances or has a tendency to preserve some greater social value at the expense of a lesser one. The privilege of self-defense rests upon the need to allow a person to protect himself or herself from harm when there is no time to resort to the law for protection. The public policy underlying the defense of entrapment is to deter reprehensible police conduct. The defenses, thus, represent important community interests. [FN44]

A utilitarian might conclude that the benefit resulting from the driver's acting to preserve life outweighs the social benefit derived from enforcing the statute literally. Or a utilitarian analysis might lead to the opposite result: Protecting all travelers on public highways (including Steve and his sister) may be deemed to outweigh the benefits of exceeding the speed limit to protect the occupants of one endangered car. [FN45] The history of the defenses, and the public policies underlying them, lend support to both Steve's and the State's interpretation of the statutes.

3. If a judge looks to custom, she might conclude that other drivers would behave just as Steve did. Custom favors Steve.

4. Finally, a judge might, according to Cardozo's analysis, look to the social values to be served by either outcome. Strict and absolute liability traffic laws assure public safety through the quick and efficient prosecution of large numbers of violators. Allowing the defenses Steve claimed would impair the ease of processing that the legislature had envisioned for traffic cases. Society and the individual might be better served if the trial court considered the defenses at the penalty stage, where the legislature has expressly provided discretion, rather than at the guilt stage, where the legislature has not provided for any choices. This analysis points to a victory for the State.

On the other hand, traffic laws are a citizen's primary exposure to law enforcement. Certainty about the law and its enforcement is important. It is also important that the public perceive law enforcement as even-handed and just. Will not government unfairness in dealing with its citizens engender citizens' disrespect for government? Would a reasonable legislature condone official misconduct by allowing the state to prevail in prosecuting speeding offenses brought about by its own agents? This analysis points to a victory for Steve.

Perhaps society and the individual would be better served if the prosecutor had exercised her discretion by not prosecuting under the circumstances presented in this case. Would not prosecutorial discretion be a better solution to the problem of police misconduct than the *979 court's interpreting the traffic statutes to permit defenses to liability or to penalty? But no precedent exists for the court to throw out the case on grounds that the prosecutor unwisely brought the case.

Strong considerations exist on both sides. [FN46] Cardozo says that judges do and should take into account all of these factors in reaching a decision. The Wisconsin Supreme Court did so in this case. But, having determined the factors, how does the judge choose among them? Does one factor clearly trump the others? If not, how should the judge weigh them?

In these circumstances, the court ruled that the public interest in allowing the violator to claim a defense outweighs the public interest in ease of prosecution of traffic offenses. [FN47] The Wisconsin Supreme Court unanimously held that the legislature intended the statute to *980 permit defenses when the violation of the speeding law is caused by the state itself through the actions of a law enforcement officer and the actor reasonably believes that violating the law is the only means of preventing bodily harm to the actor or another.

Given this decision, consider whether the court would have ruled differently if Steve had been speeding in order to get his very sick sister to the hospital. This fact situation was the hypothetical posed in the seminar to which I referred earlier. [FN48] Five justices of the Wisconsin Supreme Court refused to comment on this issue in the Brown case, writing that the question was not before the court; two justices wrote separately to say they would have ruled against Steve under *981 those circumstances. [FN49]

The decision in Steve's case represents a synthesis of statutory law, case law, custom, and public policy. The case raises the question of accommodation between legal certainty and flexibility. Cardozo was deeply concerned with this dilemma between the need for legal certainty and the task of reaching fair decisions for cases in which existing law does not clearly provide an answer. [FN50] Working on a book about Judge Cardozo, Professor Andrew Kaufman of Howard Law School has found that, for every case in which Cardozo voted for flexibility, one or more can be found in which he voted for certainty and stability. One wonders what factors set these cases apart for Cardozo.

Not all judges would have set out the considerations in Steve's case as I have. Nor would they have weighed the interests in the same manner as the Wisconsin Supreme Court. How could all judges reason alike, Judge Patricia Wald asks, “given their different backgrounds, experiences, perceptions, and former involvements, all of which are part of the intellectual capital they bring

to the bench. The cumulative knowledge, experience, and internal bents that are in us are bound to influence our notions of how a case should be decided." [FN51]

This is not to say, Judge Wald continues, that a judge decides a case any way he or she wants. Most judges embark on an honest search for what the precedents dictate, for what the legislature intended to do, and for the competing values. We judges feel constrained by our promise to decide cases according to the law. [FN52] The judge wants to earn and retain the respect of colleagues on the bench. [FN53] And, more importantly, the judge's integrity and credibility are at stake. The judge is also constrained by the facts. The facts set the boundaries for decisions. [FN54] Although we judges are frequently unhappy with the results we impose upon the litigants, we feel constrained to decide as we do. [FN55] Additional constraints are appellate review, along with critiques by scholars, law reviews, legislators, and the media. If a decision is not supported by strong legal arguments, the chances of reversal and valid criticism increase. [FN56]

According to Cardozo, judges are not to incorporate into the law their own aspirations, convictions, and philosophies but those of "the men and women of [their] time." [FN57] Yet, Cardozo understood that the distinction between the judge's personal predilection (the subjective view of decision-making) and the judge's view of the community's convictions (the objective view of decision-making) may be blurred. [FN58] He wrote that

> [t]he spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties. [FN59]

Cardozo recognized that judges may not be able to divorce themselves completely from their personal, subjective likes and dislikes, predilections and prejudices, instincts, emotions, and habits. But, according to Cardozo, the judge ought to "disengage himself, so far as possible, of every influence that is personal or that comes from the particular situation which is presented to him, and base his judicial decision on elements of an objective nature." [FN60] Nevertheless, Cardozo *985 concluded that judges "do not stand aloof on . . . chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by." [FN61]

Cardozo thought the best protection against judges' imposing their personal views in decision-making was that:

> [t]he eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements. [FN62]

This view implies support for diversity on the bench. One wonders whether Cardozo would be an advocate for having more women and minority judges. [FN63]

In addition to diversity of opinion among the judges, Cardozo relied on restrictions that are not easy to define but ones that nonetheless hold and circumscribe judges' actions. [FN64] Other judges and scholars have similarly described limitations or restraints. Judge Wald has said the real limits lie “in the institutional realities and dynamics of the judicial decision-making process itself.” [FN65]

Professor Llewellyn wrote that judges and the decision-making process are kept in check by what he called “steadying factors.” [FN66] A key “steadying factor” is the requirement that an appellate judge write an opinion explaining the outcome of the case. The writing process imposes a profound constraint on judicial discretion. [FN67] The act of stating*988 reasons that can be judged and evaluated, combined with the doctrine of stare decisis, can control judicial arbitrariness. [FN68] Written, published opinions tend to produce consistency within and among courts.

Opinion writing can be a restraining influence as long as the opinion reflects the court's true thinking and is not simply a cover-up for the judicially-mandated result. [FN69] I agree with those who urge judges *989 to produce a reasoned, forthright, written opinion in all cases. [FN70]

Academicians debate what judicial candor means and whether candor is possible or even desirable in an opinion. [FN71] When I talk about candor, I am talking about a judge's self-awareness in decision-making*990 and disclosure. Of course, neither full self-awareness nor full disclosure is possible. None of us is able to be fully introspective. The judge's mind which reaches the result sometimes works faster than the judge's fingers on the word processor's keyboard. Others may not have the ability to articulate a satisfactory account of that reasoning. [FN72] Judges, themselves, may disagree about the process through which decisions are reached. [FN73] But we can strive to the best of our abilities for self-awareness and disclosure of our reasoning process.

Candor in opinions is necessary if appellate opinions are to serve their primary purpose of guiding the public and lawyers in deciding future courses of conduct and guiding trial courts in deciding cases. The more clearly the factors influencing a decision are explained, the better guidance the decision will offer. Furthermore, in a democracy, the people should have the opportunity to judge the judges and their reasoning. [FN74] The judiciary loses credibility if the public does not know the reasons for decisions and cannot debate their validity.

When opinions lack candor, lawyers may fail to bring to the court's attention important value-related arguments. [FN75] Lawyers who have been trained in the law-is-found-in-precedent tradition may fail to see the value issues altogether. Others may see the value issues but may be unwilling to address them, fearing the court will see arguments about values as emotional, irrational pleas. Yet the courts need the lawyers' help in making choices among competing principles as much as they do on questions of fact or analysis of statutory and case law.

It takes a great deal of effort to examine and describe the judge's thought process. [FN76] But the task demands the effort.

Scholars dispute whether Cardozo and other highly regarded appellate court judges were forthright in their opinions. Professor and Justice Leflar argues that Cardozo's opinions follow the traditional mode of formal opinion writing; they are grounded on legal considerations; and his application of social and economic values to the decision-making process appears only in his books, not his opinions. [FN77] Professor G. Edward White writes that Cardozo's style was to lay bare the competing elements in a case and then make it appear as if their clash were resolved by someone other than himself, either by principles of law previously laid down by his predecessors or by the actions of a legislature. [FN78] Perhaps Cardozo's arsenal of craft techniques make him appear absolute once he arrived at a decision, although he may have agonized in the process of reaching it.

Candor in opinions is helped by the collegiality of the appellate process. Either privately in conference or publicly through their dissenting and concurring opinions, judicial colleagues bring to the fore matters which the majority has failed to address. Published dissents and concurrences are also helpful when a decision is applied in a subsequent case. These writings increase the likelihood that the court will now explain its reasoning more clearly or take an approach different from the one used in the original action.

As I have stated previously, judges face restraints and limitations other than the writing process. Cardozo's approach awards a high place to the research scholar, law reviews, and treatise writers for their critical labors. [FN79] Opinions are subject to scholarly criticism inside the classroom and in bar publications. The prospect of well-reasoned, scholarly criticism restrains the judge.

Indeed, I would like to see the academy and the bar pay even more attention to state courts and their opinions. But, in enlightened self-interest, I would urge gentleness and kindness. [FN80] An opinion writer soon learns that wisdom and effort cannot totally eliminate the ambiguity of words. Moreover, unlike a faculty member who can work on a single article for several months or several years, conduct seminars on it, and obtain comments from numerous students and scholars across the country, a judge works on many cases, each for only a short time. She has only a recent law graduate, her colleagues, and briefs of uneven quality to assist her. These conditions make good opinion writing difficult. Time for thoughtful consideration and reconsideration is hard to come by.

I do not want to over-emphasize our time constraints. As far as I can tell, the New York Court of Appeals had a heavy case load in Cardozo's time. Judge Cardozo also had only one law clerk, whose main responsibilities were typing drafts, doing errands, and looking only occasionally for a case or statute to fill out an opinion. Still, I humbly suggest that scholars might occasionally try their hand at drafting a better opinion, in addition to dismembering the one that exists. Their criticism might benefit from the exercise.

As we have seen, numerous intangible but, nevertheless, strongly-felt limitations constrain the judges of today. Judges and commentators describe judges as checked by institutional realities; the dynamics of the judicial decision-making process; judicial collegiality including “unremitting criticism” by one judge of another's perceptions, premises, logic, and values; the judges' own commitment, professionalism, and integrity; the judges' desire to earn the respect of sibling judges, the bar, and the public; and the authority of appellate courts to reverse our decisions. [FN81] Whether you believe that judges are subject to constraints is not so important as the fact

that the judges I know perceive themselves as subject to constraints. Indeed, the judge's perception that constraints exist may be the most powerful factor constraining the individual judge. And, since self-imposed constraints may be the most significant factors in limiting judicial discretion, perhaps the most important element for sound judicial process is selection of the right person to be judge. But that's another topic for another speaker.

In closing, I turn again to Cardozo. He wrote that "[t]he work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth." [FN82]

My talk has focused on Judge Cardozo. But my title, "Judging in the Quiet of the Storm," comes from the observations of Aldric Revell, a Wisconsin journalist, and from Cardozo's mentor, Justice Oliver Wendell Holmes, Jr. Many years ago, the journalist quipped that the Wisconsin Supreme Court is so quiet that if you listen carefully you can hear the justices' arteries harden. In a 1913 speech at the Harvard Law School, Holmes better captured the quiet of a court. Holmes spoke of society's rampant skepticism. He lamented that science has made it legitimate to put everything to the test of proof, even the Supreme Court. Indeed the Court, as well as other institutions, was the object of suspicion and criticism. Speaking of the Court, Holmes said, "We are very quiet there, but it is the quiet of a storm centre. . . ." [FN83]

## ENDNOTES

[FNa1]. This essay is an edited, annotated, and slightly expanded version of the Rosenfield Family Lecture delivered at St. Mary's University School of Law on January 29, 1992. The Rosenfield Family Lecture, given each year at St. Mary's University School of Law, was established to honor Mark J. Rosenfield.

I want to thank Susan M. Fieber, David Jacobs, and Gabrielle M. Lessard for their assistance in preparing the manuscript for publication, and Wisconsin State Law Librarian Marcia Koslov and the library staff for their help and patience.

[FNaa1]. B.A., New York University; J.D., Indiana University-Bloomington; S.J.D., University of Wisconsin-Madison. Justice, Wisconsin Supreme Court.

[FN1]. Benjamin N. Cardozo, The Nature of the Judicial Process (1921).

[FN2]. Arthur L. Corbin, The Judicial Process Revisited: Introduction, 71 Yale L.J. 195, 196 (1961).

[FN3]. Id. at 197.

[FN4]. Id.

[FN5]. Henry J. Friendly, Reactions of a Lawyer—Newly Become Judge, 71 Yale L.J. 218, 229 (1961). Professor Martha Minow had this comment on judges' talking about judging:

For the most part, people who engage in judging do not theorize about it, or when they do, they join the project of external theorizing already established by scholars. In this respect, I think we lack theories of the practice of judging much the same way that we are relatively short on theories of other kinds of practices . . . [T]he actual practices and experiences involved in judgment remain largely unexamined. At least, that is, by scholars and theorists. Judges have a better track record. . . . But it is a mistake to think that judges have easy access to language to describe the inner experience of judging. Having the experience does not mean having the language to describe it. . . . To understand the practice of judgment, we need accounts from those who judge and accounts from those affected by those judgments.

Martha L. Minow, Judging Inside Out, 61 U.Colo.L.Rev. 795-99 (1990).

For judges' accounts of judging, see Shirley S. Abrahamson, Susan M. Fieber & Gabrielle M. Lessard, Bibliography: Judges on Judging, 24 St. Mary's L.J. 995 (1993) (listing judges' commentaries on the judicial decision-making process). For scholars' descriptions of judicial decision-making, see generally Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals (1960) (reviewing judicial discretion in appellate decisions); A. Morgan Cloud III, Introduction: Compassion and Judging, 22 Ariz.St.L.J. 13 (1980) (suggesting traditional jurisprudence exercises compassion); John W. Cooley, How Decisions Are Made in Appellate Courts, Judges' J., Spring 1987, at 2 (examining decision process in appellate cases); Richard A. Epstein, Compassion and Compulsion, 22 Ariz.St.L.J. 25 (1990) (using compassion as decision technique); Marc Galanter, Frank S. Palen & John M. Thomas, The Crusading Judge: Judicial Activism in Trial Courts, 52 S.Cal.L.Rev. 699 (1979) (studying judge's role in decision-making); James L. Gibson, The Role Concept in Judicial Research, 3 Law & Pol'y Q. 291 (1981) (using role concepts to explain decision process); Kent Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges, 75 Colum.L.Rev. 359 (1975) (discussing discretion of judges); J. Woodford Howard, Jr., Role Perceptions and Behavior in Three U.S. Courts of Appeal, 39 J.Pol. 916 (1977) (exploring relationship between judicial perceptions and voting behavior); Harry W. Jones, Multitude of Counselors: Appellate Adjudication as Group Decision-Making, 54 Tul.L.Rev. 541 (1980) (examining collaboration effort in appellate courts); Roscoe Pound, The Theory of Judicial Decision, 36 Harv.L.Rev. 940 (1923) (explaining order of steps in decision-making process); Max Radin, The Theory of Judicial Decision: Or How Judges Think, 11 A.B.A.J. 357 (1925) (illustrating how decision-making process in cases develops into unclear precedent); Judith Resnik, Feminism and the Language of Judging, 22 Ariz.St.L.J. 31 (1990) (suggesting aspirations for judges include judicial independence and compassion); Austin Sarat, Judging in Trial Courts: An Exploratory Study, 39 J.Pol. 368 (1977) (discussing role of trial judges in the court system); Frederick Schauer, Judicial Self-Understanding and the Internalization of Constitutional Rules, 61 U.Colo.L.Rev. 749 (1990) (viewing judging through hermeneutics inquiry); David E. Van Zandt, An Alternative Theory of Practical Reason in Judicial Decisions, 65 Tul.L.Rev. 775 (1991) (using common sense as alternative theory); Kathleen Waits, Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction, 1983 U.Ill.L.Rev. 917 (explaining elements of appellate-judicial process); Charles M. Yablon, Justifying the Judge's Hunch: An Essay on Discretion, 41 Hastings L.J. 231 (1990) (analyzing discretionary decision making).

For additional scholars' works, see generally Alvin B. Rubin, Book Review, 130 U.Pa.L.Rev. 220, 220, n.2 (1981) (reviewing Frank M. Coffin, The Ways of a Judge: Reflections from the Federal Appellate Bench (1980)) (commenting on court as collegial body); J. Woodford Howard, Jr., Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth and District of Columbia Circuits (1981) (noting judges' voting records more consistent with role orientation than political attitudes).

[FN6]. Arthur L. Corbin, The Judicial Process Revisited: Introduction, 71 Yale L.J. 195, 198 (1961).

[FN7]. Id.

[FN8]. William J. Brennan, Jr., Reason, Passion, and "The Progress of the Law", 42 Rec. Ass'n B. City N.Y. 948, 950 (1987). Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit called the text "important as a clear, concise, and sensitive manifesto of legal pragmatism and harbinger of the realist movement." Richard A. Posner, What Has Pragmatism To Offer Law?, 63 S.Cal.L.Rev. 1653, 1656 (1990).

[FN9]. In revisiting the Cardozo text, Federal Court of Appeals Judge Ruggero Aldisert concluded that the federal judges of our time do not enjoy the common-law jurisprudential experience that excited Cardozo. Contemporary federal courts primarily construe statutes, regulations and clauses of the Constitution. Nevertheless, although the sources of law have changed, decision-making tradition endures. Ruggero J. Aldisert. The Nature of the Judicial Process: Revisited, 49 U.Cin.L.Rev. 1, 2, 48 (1980).

[FN10]. Sol Wachtler, Judicial Lawmaking, 65 N.Y.U.L.Rev. 1, 16 (1990).

[FN11]. Benjamin N. Cardozo, The Nature of the Judicial Process 10 (1921).

[FN12]. See id. at 115 (declaring that rule of law resulting from judge's decision "is not found, but made"). As Cardozo recognized, however, the incremental decision-making of a court is far different from the legislative law-making function. Id.

[FN13]. See generally Patricia M. Wald, Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books, 100 Harv.L.Rev. 887, 895 (1987) (writing that debate over judicial discretion extends to "whether to acknowledge that it exists, how to justify it, how to use it, and how to restrain it").

[FN14]. Benjamin N. Cardozo, The Nature of the Judicial Process 51-58 (1921). For a discussion of judges' use of history, see generally Dennis P. Boyle, Jr., Note, Philosophy, History, and Judging, 30 Wm. & Mary L.Rev. 181 (1988).

[FN15]. Benjamin N. Cardozo, The Nature of the Judicial Process 58-64 (1921).

[FN16]. Id. at 65-97. See generally John C.P. Goldberg, Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings, 65 N.Y.U.L.Rev. 1324 (1990) (discussing application of Cardozo's four directive forces); Benjamin Andrew Zellermyer, Benjamin N. Cardozo: A Directive Force in Legal Science, 69 B.U.L.Rev. 213 (1989) (discussing Cardozo's forces in development of law).

[FN17]. Benjamin N. Cardozo, The Nature of the Judicial Process 102 (1921). Cardozo writes: "The final cause of law is the welfare of society." Id. at 66. Judge Patricia Wald writes that the law-and-economics movement offers a new theory of how judges ought to exercise discretion: Judges should make social welfare decisions designed to achieve the greatest good for the greatest number, engaging in a balancing of social cost versus social benefit and subordinating the immediate impact on the parties to the predicated effect of the ruling on the behavior of others in the future and at the margin. Patricia M. Wald, Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books, 100 Harv.L.Rev. 887, 903 (1987).

[FN18]. Benjamin N. Cardozo, The Nature of the Judicial Process 112 (1921); see Joseph C. Hutcheson, Jr., The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision, 14 Cornell L. Q. 274, 278 (1929) (describing judge's decision-making in terms of "intuition"). Hutcheson wrote:
I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.
Id. See generally Joseph C. Hutcheson, Jr., Epilogue, 71 Yale L.J. 277 (1961) (discussing his later insights). Judge Friendly was critical of judges' statements that cases are decided by intuition if that means an intuitive sense of what is right or wrong for that cause. Henry J. Friendly, Reactions of a Lawyer—Newly Become Judge, 71 Yale L.J. 218, 229-30 (1961).

[FN19]. Benjamin N. Cardozo, The Nature of the Judicial Process 112 (1921).

[FN20]. Id. at 112-13.

[FN21]. Id. at 113. Cardozo explained, "[T]he juristic philosophy of the common law is at bottom the philosophy of pragmatism. . . . The rule that functions well produces a title deed to recognition." Id. at 102-103.

[FN22]. See Frank M. Coffin, The Ways of a Judge: Reflections from the Federal Appellate Bench 245-46 (1980) (describing the nonsystematic nature of judicial decision-making). Federal Court of Appeals Judge Frank Coffin wrote:
Judging is most certainly not a matter of mystical revelation. Neither is it all logic or science. Nor is it all a matter of institutional competence or a search for neutral principles. Finally it is not the systematic application of a comprehensive theory of social utility or moral values.
Judging is a mixture of all of these, the formula for the wisest and most just mixture remaining as yet unrevealed. . . . [T]he judge strives, in cases that allow him that freedom, to come to terms

with the crossing currents of society and, consistent with his craft and the limitations of his institution, to contribute to a just future. . . . “[T]he process of judging [is] one of temporarily choosing among competing principles more than one of declaring the law for all time.” Id.

[FN23]. Richard A. Posner, Cardozo: A Study in Reputation 32 (1990).

[FN24]. For a judge's more recent inquiry into the process of judging, see Frank M. Coffin, The Ways of a Judge: Reflections from the Federal Appellate Bench 245-46 (1980) (footnotes omitted) (elaborating on lack of precise formula for deciding cases). See generally Edwina L. Rissland, Artificial Intelligence and Law: Stepping Stones to a Model of Legal Reasoning, 99 Yale L.J. 1957 (1990) (providing discussion about machines doing things that would require intelligence if done by humans).

[FN25]. Edgar Bodenheimer, Cardozo's Views on Law and Adjudication Revisited, 22 U.C. Davis L.Rev. 1095, 1122 (1989).

[FN26]. Benjamin N. Cardozo, The Nature of the Judicial Process 164-65 (1921).

[FN27]. Benjamin N. Cardozo, The Growth of the Law 60 (1924). Judge Cardozo divided cases into three categories: 1) cases in which the law and its application are plain; 2) cases in which the rule of law is certain and its application alone is doubtful; and 3) cases in which both the rule of law and the application are doubtful. Judge Cardozo estimated that at least 90% of the cases decided by appellate courts fall into the first two categories. Id.
This “tripartite topology of appellate cases” has been restated by other federal courts of appeals judges. See Henry J. Friendly, Reactions of a Lawyer—Newly Become Judge, 71 Yale L.J. 218, 222 (1961) (considering Cardozo's estimate accurate); see also Harry T. Edwards, The Judicial Function and the Elusive Goal of Principled Decisionmaking, 1991 Wis.L.Rev. 837, 857 (explaining three categories of cases as “easy,” “hard,” and “very hard” and percentages applicable to each). Judge Edwards estimates that about 50% of the cases are easy—the pertinent legal rules are readily identified and applied to the facts, revealing a single right answer. Id. at 856. Judge Edwards next classifies about 35-45% of the cases as hard in the sense that each party is able to advance at least one plausible legal argument in its favor. Id. at 857. In these cases, a judge must choose among competing legal principles and precedents, analyze the purposes of various statutory and constitutional provisions, evaluate complex agency records and perform “other similarly sophisticated decision-making tasks.” Id. At the conclusion of the judge's research, the arguments of one party to a hard case appear to be demonstrably stronger to the judge than the other party's Harry T. Edwards, The Judicial Function and the Elusive Goal of Principled Decisionmaking, 1991 Wis.L.Rev. 837, 857. In these cases, writes Edwards, judges feel bound by their view of the law; they identify the sounder arguments without recourse to their own political opinions. Id. To Edwards, the very hard cases constitute 5-15% of the total. Id. In this narrow set of cases, he says, careful research and reflection fail to yield conclusive answers; the competing arguments are equally strong. Id. Disposition of this small number of cases, then, requires judges to exercise a measure of discretion, drawing to some degree on their own social and moral beliefs. Id. See generally Harry T. Edwards, The Role of a Judge in Modern Society:

Some Reflections on Current Practice in Federal Appellate Adjudication, 32 Clev.St.L.Rev. 385, 395-403 (1983-84) (discussing easy, hard, and very hard cases).
In contrast, Professor Melvin A. Eisenberg seems to say that no cases can be decided by appeal to doctrinal propositions alone:
Contrary to the conventional wisdom (the general positivist understanding) that social propositions are relevant only in "hard cases," Eisenberg sees the distinction between "hard" and "easy" cases as irrelevant in determining the role of social propositions in legal decisionmaking. A case is "easy," Eisenberg argues, not because a specific and unambiguous doctrinal rule addresses the factual situation so that social propositions need not be consulted, but rather because the relevant doctrinal rule is well supported by the applicable social proposition. . . . According to this account, "hard cases," or "marginal cases," are those in which congruence between the relevant doctrine and the applicable social proposition is either weak or has ceased to exist. No case is easy, however, if "easy" means that doctrinal propositions alone could decide the case.
Adeno Addis, Adjudication and Institutional Legitimacy, 71 B.U.L.Rev. 161, 172 (1991) (reviewing Melvin A. Eisenberg, The Nature of the Common Law (1988)) (footnotes omitted); see also Arthur D. Hellman, Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court, 56 U.Chi.L.Rev. 541, 553-54 (1989) (discussing pattern of "easy" cases); Joseph R. Grodin, Book Review, 41 Hastings L.J. 1457, 1458 (1990) (reviewing Melvin Eisenberg, The Nature of the Common Law (1988)); Richard A. Posner, The Jurisprudence of Skepticism, 86 Mich.L.Rev. 827, 827-28 (1988) (discussing tiny fraction of cases not decided by legal reasoning).

[FN28]. See Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 4-5 (1960) (discussing uncertainty of un-"foredoomed" cases).

[FN29]. See Benjamin N. Cardozo, The Nature of the Judicial Process 126-28 (1921) (arguing law is clear in majority of cases, leaving judges little discretion). Cardozo wrote:
A definition of law which in effect denies the possibility of law since it denies the possibility of rules of general operation must contain within itself the seeds of fallacy and error. . . . Law and obedience to law are facts confirmed every day to us all in our experience of life. . . . The quality of law is not withdrawn from all precedents, however well established, because courts sometimes exercise the privilege of overruling their own decisions.
Id. (footnote omitted).
Alvin Rubin further explained, "The subconscious may mask its work, but it is difficult for one who has attempted to discern the factors affecting his own decisions to accept the idea that legal doctrine, professional standards of craftsmanship, and the formulation of a rationale for the decision are all delusions, or worse, charades." Alvin B. Rubin, Book Review, 130 U.Pa.L.Rev. 220, 224 (1981) (reviewing Frank M. Coffin, The Ways of a Judge: Reflections from the Federal Appellate Bench, & J. Woodford Howard, Jr., Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth and District of Columbia Circuits).

[FN30]. State v. Brown, 318 N.W.2d 370 (Wis. 1982). The Brown case involves statutory interpretation. In 1921, the New York Court of Appeals was more involved with common law than statutes. Cardozo recognized, however, that "codes and statutes do not render the judge

superfluous, nor his work perfunctory and mechanical." Benjamin N. Cardozo, The Nature of the Judicial Process 14 (1921). There are gaps to be filled. In Cardozo's view, the problems and difficulties encountered by a judge in interpreting statutory and constitutional law are not significantly different from those besetting a common-law judge. Id. at 18. In the last two decades, academicians and judges have written increasingly about the modes of statutory and constitutional interpretation. They are probing the differences in interpreting and applying common-law rules, constitutions, and statutes. I have cast my discussion largely in Cardozo's mode of analysis. It could also be cast in the mode of analysis used in statutory interpretation—textualism, contextualism, legislative intent, legislative purpose, and canons of construction. See Shirley S. Abrahamson & Robert L. Hughes, Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation, 75 Minn.L.Rev. 1045, 1050-1053 nn.14-17 (1991) (citing sources that discuss statutory interpretation).

[FN31]. A. Morgan Cloud III, Introduction: Compassion and Judging, 22 Ariz.St.L.J. 13, 14 (1980). Professor Cloud uses a dictionary definition of compassion: "sympathetic consciousness of others' distress together with a desire to alleviate it." He poses the following hypothetical:
A statute enacted by the state legislature provides that "no person shall operate a motor vehicle at a speed exceeding 55 miles per hour on the public highways of this state," and establishes mandatory penalties for violations of this law. The statute also specifies that its purpose is to "promote public safety." . . . Assuming that the government can establish that a person was driving a motor vehicle on a public highway at a speed exceeding 55 miles per hour, this "on-off," "either-or" rule should be easy to apply in every case.
Now assume that a state highway patrol officer using radar determines that an automobile is traveling 75 miles per hour on a public highway in a remote rural area. The radar is in perfect working condition, and the officer is trained in its use. The officer immediately pulls the speeding motorist off the road to issue the driver a citation (or in everyday language, to write him a ticket). The offending driver jumps out of the car, points to a man covered with blood who is lying on the back seat, then excitedly explains that the passenger has been injured in a farming accident and the driver is rushing him to the hospital in the nearest town.
. . . . I submit that even if the state's positive law contains no exception to the speed limit law, virtually everyone would expect the officer not to enforce the letter of the law, but instead act to help the victim obtain emergency medical care.
But imagine a different result. The officer might be an absolute rule formalist who never shirks the duty to enforce state law. Instead of joining in the high speed race to the hospital this officer would issue the driver a speeding ticket along with an admonition to obey the speed limit.
If the officer chooses to enforce the rule, the traffic court judge assigned the driver's case now must face the officer's dilemma. . . .
Id. at 14-15. For a discussion of the roles of reason and passion in judging, see generally Martha L. Minow & Elizabeth V. Spelman, Passion for Justice, 10 Cardozo L.Rev. 37 (1988) (defending Justice Brennan's use of passion in decision-making).

[FN32]. For discussions of judicial decision-making by academicians role-playing judges with views about how the case should come out, see generally Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. Legal Educ. 518 (1986) (attempting to describe process of legal reasoning in judicial opinions); Mark Tushnet, The Dilemmas of

Liberal Constitutionalism, 42 Ohio St. L.J. 412 (1981) (evaluating liberal constitutionalism). Professor Minow suggests the following questions for judges (insiders) and everyone else (outsiders) explaining the practice of judging:

I would like to promote attention to the practice of judging, not just the rationales for given judgments. I would also like to encourage the exchange of perspectives between insiders [judges] and outsiders [everyone else] to that practice. Towards these ends, let me pose three clusters of questions:

1) How does the landscape of a particular case affect a judge's experiences of choice and experiences of constraint? What does it take for a question to feel open rather than closed? What does it mean when a judge says, "but the opinion for that side just won't write?"

2) Do judges feel less powerful than observers think they are, or more powerful than observers think, and in either case, why? How reliable are the internal perceptions and how reliable the external ones on this issue of power? . . .

3) Do judges feel lonely while judging? Or is this an experience that confirms solidarity with others and that unlocks stored up memories and triggers imagined conversations with other people who could have a view on the issue? An emerging theory of judging emphasizes just this sense of community or dialogue. But who are those others whose unimagined views matter to the judge: the colleagues on a multi-judge panel, the reviewing court, the press, the protestors in the street? Whose silences are noticed by the judge; before whom does the judge anticipate having to justify the actions to be taken?

Martha L. Minow, Judging Inside Out, 61 U.Colo.L.Rev. 795, 800 (1990). For a judge's response to some of Professor Minow's questions, see generally Stephen F. Williams, Rule and Purpose in Legal Interpretation, 61 U.Colo.L.Rev. 809 (1990) (answering "yes" to Minow's questions whether judges feel lonely and experience lack of power).

[FN33]. At this point in the lecture I asked the members of the audience to act as trial court judges in ruling on the instructions. The vast majority voted to instruct the jury as Steve Brown requested.

[FN34]. A. Morgan Cloud III, Introduction: Compassion and Judging, 22 Ariz.St.L.J. 13, 17 (1990). At this point in the lecture I asked the members of the audience to act as members of the Wisconsin Supreme Court in deciding whether to affirm or reverse the judgment of the trial court. The vast majority voted to reverse the judgment against Steve Brown.

[FN35]. The considerations set forth in the text were discussed in the written opinion. Brown, 318 N.W.2d at 374-77.

[FN36]. Both the Wisconsin Court of Appeals (unpublished opinion) and the Wisconsin Supreme Court referred to several cases from other states. In some cases the courts had intimated that the claim of legal justification was available as a defense in prosecution for strict liability traffic offenses. Other courts had rejected this defense. See Brown, 318 N.W.2d at 378 n.10.

[FN37]. Wis.Stat.Ann. § 939.48 (West Supp.1992).

[FN38]. Wis.Stat.Ann. § 939.46 (West Supp.1992).

[FN39]. Wis.Stat.Ann. § 939.47 (West Supp.1992).

[FN40]. Brown, 318 N.W.2d at 374-75 n.8 (stating entrapment is judicially-established defense to criminal conduct).

[FN41]. Wis.Stat.Ann. § 939.20 (West 1982).

[FN42]. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 19, at 124, § 24, at 145 (5th ed. 1984).

[FN43]. Benjamin N. Cardozo, The Nature of the Judicial Process 16-17, 113-15, 129-30 (1921).

[FN44]. Brown, 318 N.W.2d 370, 375 n.13. The court of appeals reasoned that the legislature did not intend to make the defenses of legal justification available to a speeding offender. Id. The court reached this conclusion 1) because the defenses advanced by the defendant in this case are traditionally applicable only to crimes and 2) because the legislature has accorded law enforcement officers in authorized emergency vehicles narrow privileges to violate traffic laws. Id.

[FN45]. A. Morgan Cloud III, Introduction: Compassion and Judging, 22 Ariz.St.L.J. 13, 16-17 (1980).

[FN46]. See Brown, 318 N.W.2d at 373 (recognizing difficulty of deciding case). The case described the availability of a claim of legal justification as a "troublesome question." Id.

[FN47]. Id. at 376-77. After reviewing an earlier draft of this essay, Professor Scott Altman commented about decision-making as follows:
. . . in both speech and opinion, the reader confronts a list of clearly stated considerations that seem to support both sides to some degree, followed by an outcome that is supported by the claim that one interest outweighs another. I certainly cannot dispute this metaphor as describing the sensation of decision. After considering as many ideas as one has time to consider, one just decides. At least this matches my own experience of decision-making in normal life. The difficulty for me in thinking about candor in opinions is that we seem to lack a way of explaining very much about how we balance. The moment of insight seems almost as much a black box after we explain ourselves as before.
. . . [W]hat seems to me the most natural answer to this difficulty creates a new dilemma. When I look at . . . two points . . . —that ultimately judges, though constrained, decide based in part on personal experience, and that ultimately the moment of decision is very difficult to discuss—I wonder if there is not some connection between them. In particular, although I think decision will remain somewhat mysterious, I suspect that one could say more about why one set of concerns seems more weighty than another set of concerns if one were able as a judge to write more personally. Perhaps you have confronted authority unfairly exercised at some important point in your life. Perhaps another judge has had an important experience in which trying to accommodate fairness led to undue delay and some abuse by those who deserved punishment.

Perhaps you have met young people who have been alienated by exposure to unfairness in government, and wondered whether many young people alter their lives for the worse out of cynicism learned in such encounters. Stories of this sort I imagine could be told by many judges as a way to understand why they are moved in certain cases.
The dilemma for me arises when I ask myself whether I really would have preferred that you and the other Justices in the Brown case tell stories of this sort to help the reader understand not only the relevant policy concerns, but also why you found some more weighty than others. On the one hand, such an opinion I believe might have been more introspective—offering both Judge and audience insight into the decision. And exchange of such stories might heighten the benefit of a diverse bench. We learn from each other most when we hear not only what the other values, but why he or she value it. On the other hand, part of legal constraint and the virtue of the rule of law seems undermined by such disclosure. . . .
Letter from Scott Altman, Professor, University of Southern California Law Center, to the author (Apr. 6, 1992) (quoted with permission) (on file with St. Mary's Law Journal).
A vast body of literature discusses storytelling as a form of consciousness-raising and storytelling's importance to the development of the law. See generally Kathryn Abrams, Hearing the Call of Stories, 79 Cal.L.Rev. 971 (1991) (commenting on stories and courts); Katharine T. Bartlett, Feminist Legal Methods, 103 Harv.L.Rev. 829 (1990) (discussing stories and their significance); James R. Elkins, A Bibliography of Narrative, 40 J. Legal Educ. 203 (1990) (providing bibliography of writings on narrative); Anthony M. Kennedy, The Voice of Thurgood Marshall, 44 Stan.L.Rev. 1221 (1992) (discussing influence of Justice Marshall's storytelling); Mark Tushnet, The Degradation of Constitutional Discourse, 81 Geo.L.J. 251 (1992) (elaborating on storytelling and its influence).
These writings demonstrate storytelling's effectiveness in illuminating the human dimensions of law and legal process. Nonetheless, I doubt that judges' narratives explain the decision-making process. Fundamental to stories are unstated assumptions. These assumptions lie at the core of the story, yet they are rarely explicated because authors see them as realities. See generally Howard Lesnick, The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives, 1991 Duke L.J. 413 (1991) (discussing unstated assumptions involved in storytelling). Because of these unstated assumptions, people who have had similar experiences tell very different stories, and people reading the same story can draw very different conclusions.

[FN48]. At this point I asked the members of the audience to decide on the “sick sister” scenario. The vast majority voted in favor of acquitting Steve. Professor Cloud, discussing his hypothetical, reached the same conclusion:
. . .[W]e would expect the rule interpreter, now a judge, to avoid the literal dictates of the statute. We would expect the judge to exhibit a sympathetic consciousness of the distress of others—both the injured man and the driver—and employ means to alleviate that distress. In other words, in this case we would expect the judge to reach a compassionate decision.
Virtually all of us would reach this conclusion no matter what general theory of law we advocate.
A. Morgan Cloud III, Introduction: Compassion and Judging, 22 Ariz.St.L.J. 13, 15-16 (1980).

[FN49]. Brown, 318 N.W.2d at 377 (Beilfuss, C.J., & Callow, J. concurring).

In June of 1992, a variant of the Steve Brown case was decided by the Wisconsin Court of Appeals. Steven Peterson was prosecuted for operating a motor vehicle while under the influence of intoxicants and operating a motor vehicle with a blood alcohol content in excess of 0.10%. Both citations were issued as first offense civil forfeitures.

At the jury trial, Steven Peterson requested a jury instruction that legal justification was a defense to both charges. He asserted that he had violated the statute because of a reasonable belief that violating the statute was the only means of preventing bodily harm to himself; he had used his car to flee from "friends" who intended to harm him. The trial court refused to give the requested instruction. The jury returned a verdict finding the defendant guilty of operating a motor vehicle with a blood alcohol content in excess of 0.10%

The Wisconsin Court of Appeals, characterizing itself as an error-correcting court, affirmed the judgment of the trial court and interpreted Brown as limited to the defense of entrapment. In view of the concurring opinion in Brown, which suggested that the legal justification defense not be extended to situations other than those involving law enforcement personnel, the court of appeals concluded that "(t)he [Wisconsin] Supreme Court is the appropriate body to make the decision that Peterson seeks. Town of Beloit v. Peterson, No. 91-2303, slip op. at 8 (Wis.Ct.App. Apr. 23, 1992). The Wisconsin Supreme Court denied Peterson's petition to review the decision of the Court of Appeals, and an unpublished opinion of the court of appeals cannot be cited as precedent or authority. Wis.Stats.Ann. § 809.23(3) (West Supp.1992).

For a fact situation similar to the Peterson case, see State v. Riedl, 807 P.2d 697, 699 (Kan.Ct.App. 1991) (stating facts of case considering defense of compulsion). In that case, relying on a statute describing the defense of compulsion and on cases from other states, the Kansas Court of Appeals held that the defense of "compulsion" is available to a defendant charged with the "absolute liability" traffic offense. Id. at 701. A number of other jurisdictions have recognized the applicability of similar defenses to similar charges. See Clucas v. State, 814 P.2d 384, 388 (Alaska Ct.App. 1991) (concluding that "the better-reasoned cases accept defenses in strict liability cases when the defense is unrelated to culpable mental state"); Gilbreath v. Municipality of Anchorage, 773 P.2d 218, 223 (Alaska Ct.App. 1989) (driving under direction of police officer valid defense to charge of driving while intoxicated); State v. Messler, 562 A.2d 1138, 1139 (1989) (necessity defense applicable to speeding charges); State v. Lichti, 367 N.W.2d 138, 141 (Neb. 1985) (obeying order of police officer is valid defense to charge of driving while intoxicated); People v. Pena, 197 Cal.Rptr. 264, 269 (Cal.App. Dep't Super.Ct. 1983) (duress defense applicable to charge of driving under influence).

[FN50]. Edgar Bodenheimer, Cardozo's Views on Law and Adjudication Revisited, 22 U.C. Davis L.Rev. 1095, 1122-23 (1989).

[FN51]. Patricia M. Wald, Thoughts on Decisionmaking, 87 W.Va.L.Rev. 1, 12 (1984) (noting judicial decision-making process). New York Court of Appeals Judge Judith Kaye writes:

Over the years that it has been my good fortune to serve on the Court of Appeals, I have come to appreciate how as a court of law, deciding only issues of law, within a government of law, we can and do and must also bring the full measure of every human capacity to bear in resolving the cases before us. . . . The value judgments of appellate judges can hardly be alien to the development of the common law; they are essential to it. Choices among the precedents of another day—which to bring forward, which to leave behind, which to extend to meet some new

condition, which to limit or overrule—mark the progress of the law. . . . May concluding thought from all of this is that the danger is not that judges will bring the full measure of their experience, their moral core, their every human capacity to bear in the difficult process of resolving the cases before them. It seems to me that a far greater danger exists if they do not.
Judith S. Kaye, The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern, 73 Cornell L.Rev. 1004, 1006, 1009-10, 1015 (1988).
The way to guard against the risk of personal subjective judgments is not to deny the limits of one's starting point, but to acknowledge them, and to then seek to glimpse the points of view of others. This at least protects against self-delusion about the impact of personal perspective. . . . Increasing the self-consciousness of the judge in the act of judgment may also enlarge the judge's ability to understand other human beings. . . . Advocates before the court can help by trying to imbue the briefs and oral arguments with narratives of the parties' experiences, perspectives, needs, and hopes.
Martha L. Minow & Elizabeth V. Spelman, Passion for Justice, 10 Cardozo L.Rev. 37, 52-53 (1988).

[FN52]. Alvin B. Rubin, Doctrine in Decision-Making: Rational or Rationalization, 1987 Utah L.Rev. 357, 371. One commentator noted, “Despite the centrality of the practice of following precedent to the common law legal systems . . . I think it is fair to say that our theoretical understanding of the practice is still at a very primitive stage.” Larry Alexander, Constrained by Precedent, 63 S.Cal.L.Rev. 1, 3 (1989). For discussions of formulating a comprehensive general theory about precedent and stare decisis, see generally Richard A. Posner, The Problems of Jurisprudence (1990) (discussing author's concept of precedent); Ruggero J. Aldisert, Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?, 17 Pepp.L.Rev. 605 (1990) (examining dilemma of adhering to precedent); Frank H. Easterbrook, Stability and Reliability in Judicial Decisions, 73 Cornell L.Rev. 422 (1988) (expounding value of following precedent); David Luban, Legal Traditionalism, 43 Stan.L.Rev. 1035 (1991) (reviewing traditionalism); John Paul Stevens, The Life Span of a Judge-Made Rule, 58 N.Y.U.L.Rev. 1 (1983) (discussing “present state of health” of stare decisis rule); Robert S. Summers, Judge Richard Posner's Jurisprudence, 89 Mich.L.Rev. 1302, 1325-27, 1329-30 (1991) (reviewing Richard A. Posner, The Problems of Jurisprudence (1990)) (analyzing Posner's conception of precedent).

[FN53]. Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. Legal Educ. 518, 544 (1986); Patricia M. Wald, Thoughts on Decisionmaking, 87 W.Va.L.Rev. 1, 10 (1984) (noting judicial decision-making process).

[FN54]. Sol Wachtler, Judicial Lawmaking, 65 N.Y.U.L.Rev. 1, 20-21 (1990).

[FN55]. See State v. Mitchell, 485 N.W.2d 807, 818 (Wis. 1992) (Shirley S. Abrahamson, J., dissenting) (stating “[h]ad I been in the legislature, I do not believe I would have supported this statute. . . . As a judge, however, after much vacillation, I conclude that this law should be construed narrowly and should be held constitutional”); see also Patricia M. Wald, Thoughts on Decisionmaking, 87 W.Va.L.Rev. 1, 11 (1984) (noting judicial decision-making process) (stating

“sometimes I cringe at the results for the people involved in cases I decide. I uphold agency policies which I personally disapprove, occasionally even abhor”).

[FN56]. See Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. Legal Educ. 518, 527 (1986) (arguing that community expects decisions to be made on legal principles); Patricia M. Wald, Thoughts on Decisionmaking, 87 W.Va.L.Rev. 1, 10 (1984) (noting judicial decision-making process) (decisionmaking subject to internal checks).

[FN57]. Benjamin N. Cardozo, The Nature of the Judicial Process 173 (1921). The test of social welfare is not a subjective test; it is an objective test. “In such matters, the thing that counts is not what I believe to be right,” writes Cardozo, “[i]t is what I may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right.” Id. at 89.

[FN58]. Id. at 110, 121. For a discussion of this aspect of Cardozo's writings, see Carl A. Auerbach, A Revival of Some Ancient Learning: A Critique of Eisenberg's The Nature of the Common Law, 75 Minn.L.Rev. 539, 546, 553 (1991) (analyzing criticisms of Cardozo's views).

[FN59]. Benjamin N. Cardozo, The Nature of the Judicial Process 174-75 (1921). Cardozo does concede, however, that the “training of the judge, if coupled with what is styled the judicial temperament, will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions.” Id. at 176. Earnest Nagel argues that although Cardozo's method of sociology operates with “objective” community values, Cardozo does not show that the values are anything more than personal preferences. Earnest Nagel, Reflections on “The Nature of the Judicial Process,” 1 Cardozo L.Rev. 55, 60 (1979); see Carl A. Auerbach, A Revival of Some Ancient Learning: A Critique of Eisenberg's The Nature of the Common Law, 75 Minn.L.Rev. 539, 546-47 (1991) (discussing Nagel's criticism of Cardozo).

[FN60]. Benjamin N. Cardozo, The Nature of the Judicial Process 121 (1921); see James L. Oakes, On the Craft and Philosophy of Judging, 80 Mich.L.Rev. 579, 588 (reviewing Frank M. Coffin, The Ways of a Judge: Reflections from the Federal Appellate Bench (1980)) (explaining that identification and excision of judge's moral values are needed). Two commentators explained:

. . . [I]f she [the judge] can simply dial-a-decision, anybody else could do her job just as well as she could. But that does not mean that she can perform well if she assumes that anything goes, that any decision she comes up with will be as good (because as equally uncertain) as the next. The prestige and dignity of the position and of the profession cannot be maintained if judicial discretion is understood to be simply personal whim. What makes a judge's job so important and so deserving of respect is that no person in that role can escape uncertainty—that her skills are especially needed precisely where the law does not tell her exactly what to do.

Martha L. Minow & Elizabeth V. Spelman, Passion for Justice, 10 Cardozo L.Rev. 37, 53 (1988). Judge Posner also discussed judicial decision-making:

A summary of my own judicial credo may help orient the reader to the type and degree of skepticism that the article will defend. Many—though certainly not most, and perhaps only a tiny fraction—of the legal questions in our system, and I suspect in most others as well, are not

merely difficult, but impossible, to answer by the methods of legal reasoning. As a result, the answers—the Fourteenth Amendment guarantees certain rights to fathers of illegitimate children, the right of sexual privacy does not include sodomy, a social host owes a duty of care to persons injured by a drunken guest, laws against selling babies make contracts of surrogate motherhood, and so on ad infinitum—depend on the policy judgments, political preferences, and ethical values of the judges, or (what is not clearly distinct) on dominant public opinion acting through the judges, rather than on legal reasoning regarded as something different from policy, or politics, or values, or public opinion. Sometimes these sources of belief will enable a judge to come to a demonstrably correct result, but often not; and, when not, the judge's decision will be indeterminate in the sense that a decision the other way would be equally likely to be pronounced correct by an informed, impartial observer.

Richard A. Posner, The Jurisprudence of Skepticism, 86 Mich.L.Rev. 827, 827-28 (1988).

[FN61]. Benjamin N. Cardozo, The Nature of the Judicial Process 168 (1921).

[FN62]. Id. at 177.

[FN63]. See Joseph R. Grodin, In Pursuit of Justice: Reflections of a Supreme Court Justice 58 (1989) (discussing significance of gender and racial diversity on courts).
The diversity within our court gave collegiality a special dimension, and it made me realize that the significance of including women and minorities on a tribunal is much more than symbolic. Bird, Broussard, and Reynoso brought to our discussions perspectives that went beyond my own experience; but even apart from anything they said, their very presence tended to heighten my own sensitivity toward those perspectives, and I believe the same was true for other judges as well.
Id.
How can gender make a difference when judges are supposed to be neutral and impartial? For discussions of women on the bench and judicial impartiality and gender, see generally Shirley S. Abrahamson, The Woman Has Robes: Four Questions, 14 Golden Gate U.L.Rev. 489, 492-94 (1984) (discussing impact of women judges in administration of justice); David W. Allen & Diane E. Wall, The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?, 12 Just.Sys.J. 232 (1987) (evaluating voting behavior of state supreme court judges who are women); Susan P. Graber, Looking at Feminist Legal Theory from the Bench, The Advocate (Northwestern School of Law, Lewis & Clark College) Summer 1992, at 35 (reacting to the emerging feminist theory from an appellate judge's point of view); Joan Dempsey Klein, Woman Justice: Does She View the Law Differently?, 26 Ct.Rev., Fall 1989, at 18 (exploring effect of female judges); Elaine Martin, Men and Women on the Bench: Vive la Différence, 73 Judicature 204 (1990) (analyzing different experiences and attitudes of men and women appointed to federal bench by President Carter); Martha Minow, Beyond Universality, 1989 U.Chi. Legal F. 115, 118-128 (describing feminist perspective on law and jurisprudence); Panel, Different Voices, Different Choices? The Impact of More Women Lawyers and Judges on the Justice System, 74 Judicature 138, 138-46 (1990) (elaborating on changes in legal system since the increase in number of women lawyers); Judith Resnik, On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges, 61 S.Cal.L.Rev. 1877 (1988) (analyzing

feminist-theory challenges on judicial aspirations); Suzanna Sherry, The Gender of Judges, 4 Law & Ineq.J. 159 (1986) (evaluating need for association of women judges); Rosalie E. Wahl, Some Reflections on Women in the Judiciary, 4 Law & Ineq.J. 153, 154 (1986) (commenting on women's struggle in the legal profession); Patricia M. Wald, The Role of Morality in Judging: A Woman Judge's Perspective, 4 Law & Ineq.J. 3 (1986) (reviewing female judge's perspective of morality); Patricia M. Wald, Women in the Law: Stage Two, 52 U.M.K.C.L.Rev. 45 (1983) (noting women's roles in legal profession of 1990s); Bertha Wilson, Will Women Judges Really Make a Difference?, 28 Osgoode Hall L.J. 507 (1990) (discussing role of women judges).
For an analysis of "the feminine perspective" of Justice Sandra Day O'Connor, see generally Suzanna Sherry, Civic Virtue and the Feminine Voice on Constitutional Adjudication, 72 Va.L.Rev. 543 (1986) (contending men and women have distinctly different perspectives).
Some argue that a woman judge's special commitment to fairness comes not from gender per se but from personal experiences of suffering from unfair treatment. Federal District Court Judge Fern Smith expressed this idea when she said that women do not see fairness, justice, right, and wrong differently because of their gender, but that "ethnicity and race and socioeconomic status change people's perceptions of fairness and justice . . . [T]he presence of women expands the areas in which justice and fairness are now applied." Panel, Different Voices, Different Choices? The Impact of More Women Lawyers and Judges on the Judicial System, 74 Judicature 138, 145 (1990). When Judge Smith asserted that women are more apt than men to make people comfortable in the courtroom because women are more willing to acknowledge emotions and fears, are more open and do not equate informality with incompetence or loss of dignity, Judge J. Brendan Ryan asserted that these qualities were matters of common sense and experience, not gender. Id. at 146. And Judge Posner wrote, "I question whether there is a distinctive feminine outlook on law, as distinct from an outlook that men and women share, though perhaps in different proportions." Richard A. Posner, Conservative Feminism, 1989 U.Chi. Legal F. 191, 213 (advancing his own alternative, "conservative feminism").

[FN64]. Benjamin N. Cardozo, The Nature of the Judicial Process 114 (1921). Cardozo wrote:
Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action. The restrictions on the judge are established by the traditions of the centuries, by the example of other judges, his predecessors and colleagues, by the collective judgment of the profession, by the duty of adherence to the pervading spirit of the law.
Id.; see Charles D. Breitel, The Lawmakers, 65 Colum.L.Rev. 750, 772-76 (1965) (describing restraints on judges).

[FN65]. Patricia M. Wald, Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books, 100 Harv.L.Rev. 887, 903 (1987).

[FN66]. Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 19-51 (1960). Professor Llwellyn described the following "steadying factors": law-conditioned officials; legal doctrine; known doctrinal techniques; responsibility for justice; the tradition of one single right answer; an opinion of the court; a frozen record from below; issues limited, sharpened and phrased in advance; adversary argument by counsel; group decision; judicial security and

honesty; a known bench; a general period-style and its promise; and professional judicial office. Id.

[FN67]. David L. Shapiro, In Defense of Judicial Candor, 100 Harv.L.Rev. 731, 737-38 (1987); Patricia M. Wald, Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books, 100 Harv.L.Rev. 887, 904 (1987).
See also Frank M. Coffin, The Ways of a Judge: Reflections from the Federal Appellate Bench 57-58 (1980) (reducing opinions to writing is strength of American judicial system); James L. Oakes, On the Craft and Philosophy of Judging, 80 Mich.L.Rev. 579, 588 (1982) (reviewing Frank M. Coffin, The Ways of a Judge: Reflections from the Federal Appellate Bench (1980)) (advocating identification and excision of judge's moral values); Kathleen Waits, Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction, 1983 U.Ill.L.Rev. 917, 931-36 (rationalizing value of formal, written opinions). One commentator explained, "The 'grand style' opinion in which policy issues and value choices are more openly discussed has replaced the formal style with too much emphasis on formal logic and prior opinion." Robert S. Summers, Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use, 66 Cornell L.Rev. 861, 911 (1981); Robert A. Leflar, Honest Judicial Opinions, 74 Nw.U.L.Rev. 721, 741 (1979).
Court of Appeals Judge Charles Merrill recognizes that "the very act of writing opinions reinforces the decisional process [and] misconceptions or oversights may come to light in the course of articulation." Charles M. Merrill, Query: Could Judges Deliver More Justice If They Wrote More Opinions?, 64 Judicature 435, 435 (1981). He concludes that this reason for writing does not impose a rigid requirement for writing an opinion in each case but does present "the need for a reasoned judgment as to whether engaging in the process of writing an opinion is, on balance, desirable." Id.
The discipline of writing an opinion to persuade the readers and a higher court may no longer apply in about half of all federal appellate cases. About one half of the cases are decided by unpublished (and uncitable) opinions. A frequent criticism is that many unpublished opinions fail to state reasons for the outcome and that unpublished opinions reduce judicial accountability. Federal Courts Study Committee, I Working Papers & Subcommittee Reports 83-87 (1990); William L. Reynolds & William M. Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U.Chi.L.Rev. 573, 598-604 (1981); William L. Reynolds & William M. Richman, The Non-Precedential Precedent—Limited Publication and No-citation Rules in the United States Courts of Appeals, 78 Colum L.Rev. 1167, 1203 (1978); William M. Richman & William L. Reynolds, Appellate Justice Bureaucracy and Scholarship, U.Mich.J.L.Ref. 623, 635 (1988); Lauren F. Robel, Caseload and Judging: Judicial Adaptations to Caseload, 1990 B.Y.U.L.Rev. 3, 51-54, 56-57; Lauren F. Robel, The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals, 87 Mich.L.Rev. 940, 948-49 (1989).

[FN68]. American legal historian Calvin Woodard wrote:
[f]rom an early date in this country, unlike England, a jealous public developed two major means of controlling the virtually unlimited powers of the judiciary: (1) requiring the judges to publish written opinions justifying their decisions, and (2) freezing the English doctrine (or really guild

custom) of precedent into an ironclad rule of stare decisis, binding the judges absolutely to follow the holdings of earlier cases.
Calvin Woodard, Justice Through Law—Historical Dimensions of the American Law School, 34 J. Legal Educ. 345, 353 (1984).
Federal Court of Appeals Judge Arlin Adams concluded that "[d]ispensing with written opinions, like dispensing with oral argument, removes safeguards against facile but questionable results, and deprives judges of valuable opportunities to reflect on the issues they must resolve." Arlin M. Adams, 26 Vill.L.Rev. 939, 948 (1980-81) (reviewing Frank M. Coffin, The Ways of a Judge: Reflections from the Federal Appellate Bench (1980)); see Kathleen Waits, Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction, 1983 U.Ill.L.Rev. 917, 931 (deciding that writing opinions controls judicial arbitrariness); Patricia M. Wald, Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books, 100 Harv.L.Rev. 887, 904 (1987) (arguing that explaining outcome of case by written opinion limits judicial discretion).

[FN69]. See Joel Levin, The Concept of the Judicial Decision, 33 Case W.Res.L.Rev. 208, 221-22 (1983) (stating that opinions do not always represent the court's true thinking). Levin wrote:
A judge lists reasons in his judgment, but these reasons are not necessarily the ones that brought him to the conclusion. He may not know or remember these and others may not have the ability to offer a satisfactory account of his reasons. The judge does not look at his own psychological reasons as relevant for inclusion in his decision. Rather, he looks to reasons that are appropriate and justify a decision. In this important sense, judicial decisions are reconstructions. Once the judge arrives at a decision, he employs an analogue yielded by his judicial view and reconstructs his decision on a rational basis. The actual reasons for his decision are outside the purview of any propositional set, as are the reasons that consciously or unconsciously motivated his decision. The reasons stated are evidence of his judicial view.
To understand what a judge meant by his stated reasoning, one must have some notion of his judicial view. This will tell why he put forth some stated reasons. But it is one's own view that determines how one assesses the meaning of judicial decisions. . . .In this sense when one speaks of a case standing for some proposition or holding some position, the case is a reconstructed reconstruction, what one might call a "rereconstruction." One's own judicial view tells one how to read the case (whether one looks to reasons or conclusions, whether one takes questions as actually raised, whether one looks at the judge's intention as central, and how one treats the individual style of reasoning in past cases), puts in an orderly basis the disparate elements of individual cases, and allows classification of the variety of cases.
Id.

[FN70]. See Martha L. Minow & Elizabeth V. Spelman, Passion for Justice, 10 Cardozo L.Rev. 37, 54-56 (1988) (urging judges to explain their decisions). Minow and Spelman argued:
Some might worry that fulfilling a demand for explaining what lies behind the judge's decision would lead judges to give too much weight to intuitions formed before considering the case. We believe that the risk that such prior intuitions carry significant weight persists in either case, but that exposing preconceptions enables scrutiny and reduces subterranean damage. Others may fear that judicial explanations that refer to the judge's initial hunches and hypotheses in a particular situation will prompt more arbitrary and less predictable judicial action, or invite the

appearance of such arbitrariness. Yet, the real danger of arbitrary judicial action is greatest when the announced reasons for judicial action bear little relationship to their actual sources in the judge's thinking process.
Id.

For discussions of candor in judicial decisions, see generally Robert E. Keeton, Judging 112-13 (1990) (suggesting that analysis in opinion can never be complete); Scott Altman, Beyond Candor, 89 Mich.L.Rev. 296, 296-99 (1990) (questioning whether candor is good idea); John J. Kircher, Judicial Candor: Do As We Say, Not As We Do, 73 Marq.L.Rev. 421, 433 (1990) (urging judges to follow rules they apply to lawyers); Calvert Magruder, The Trials and Tribulations of an Intermediate Appellate Court, 44 Cornell L.Q. 1, 2-3 (1958) (counseling judges not to “let down their hair” in public, because institutional mystique aids public acceptance of judicial decisions); Richard A. Posner, The Meaning of Judicial Self-Restraint, 59 Ind.L.J. 1, 8 (1983) (maintaining that decision is principled if grounds for decision can be stated truthfully); Robert Weisberg, The Calabresian Judicial Artist: Statutes and the New Legal Process, 35 Stan.L.Rev. 213, 249-57 (1983) (discussing Calabresi's ideas about candor in statutory interpretation); see also David L. Shapiro, In Defense of Judicial Candor, 100 Harv.L.Rev. 731, 750 (1987) (observing that “the fidelity of judges to law can be fairly measured only if they believe what they say in their opinions and orders, and thus a good case can be made that the obligation to candor is absolute”); Nicholas S. Zeppos, Judicial Candor and Statutory Interpretation, 78 Geo.L.J. 353, 360 (1989) (discussing candor or its absence in statutory interpretation).

[FN71]. Scholars and judges have written about judges' sacrificing candor for the sake of other goals. See David L. Shapiro, In Defense of Judicial Candor, 100 Harv.L.Rev. 731, 731 n.4. (1987) (citing articles that comment on candor).

[FN72]. See Walter V. Schaefer, Precedent and Policy, 34 U.Chi.L.Rev. 3, 22 (1966) (stating one problem causing inability to articulate reasoning process may be lack of vocabulary to describe judges' thought patterns).

[FN73]. David L. Shapiro, In Defense of Judicial Candor, 100 Harv.L.Rev. 731, 738 (1987).

[FN74]. Martha L. Minow, Judging Inside Out, 61 U.Colo.L.Rev. 795, 801 (1990). Minow explained.
In a democracy, judges work under a special demand. Their actions should be susceptible to understanding and evaluation by the people. The people should be able to judge the judges, not just so as to better persuade judges next time around, but also to criticize them and join in the extraordinary possibility of judging from inside and out.
Id.

[FN75]. Kathleen Waits, Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction, 1983 U.Ill.L.Rev. 917, 927.

[FN76]. Id. at 931.

[FN77]. Robert A. Leflar, Honest Judicial Opinions, 74 Nw.U.L.Rev. 721, 723 (1979).

[FN78]. G. Edward White, The American Judicial Tradition: Profiles of Leading American Judges 258 (1976). Professor White concluded that Cardozo was "candid in revealing the problems he faced" but that "in solving them he retreated behind conventional techniques of judicial subterfuge—of which he was a master." Id. at 260. In contrast, Professor Karl Llewellyn described Cardozo as a judge who "within the limits of possibility came close to making a fetish of judicial candor." Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 358 (1960); see Richard A. Posner, Cardozo: A Study in Reputation 32 (1990) (discussing Cardozo's implementation of philosophy in opinions). Commentators differ about whether Cardozo played loose with the facts. See William Powers, Jr., Reputology, 12 Cardozo L.Rev. 1941, 1944 (1991) (reviewing Richard A. Posner, Cardozo: A Study in Reputation (1990)) (stating there is opinion that Cardozo played "fast and loose" with facts).

[FN79]. Arthur L. Corbin, The Judicial Process Revisited: Introduction, 71 Yale L.J. 195, 200 (1961).

[FN80]. "Don't be too hard on us, young gentlemen. Remember, if you will, we are the only courts you have." Stanley H. Fuld, A Judge Looks at the Law Review, 28 N.Y.U.L.Rev. 915, 921 (1953) (quoting Chief Justice Taft's address to law review editors). For other judges' advice to law reviews about criticism of opinions, see Richard A. Posner, The Jurisprudence of Skepticism, 86 Mich.L.Rev. 827, 865-66 (1988); and Collins J. Seitz, Introduction: Third Circuit Review, 28 Vill.L.Rev. 651 (1982-83).

[FN81]. See Frank M. Coffin, The Ways of a Judge: Reflections from the Federal Appellate Bench 58-60, 171-75 (1980) (elaborating on collegial checks over judicial opinions); Robert E. Keeton, Judging 1-3, 10-17 (1990) (suggesting that analysis in opinion can never be complete); Richard A. Posner, The Meaning of Judicial Self-Restraint, 59 Ind.L.J. 1, 9-10 (1983) (maintaining that decision is principled if grounds for decision can be stated truthfully); Kathleen Waits, Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction, 1983 U.Ill.L.Rev. 917, 919-36 (discussing various elements of judicial process); Patricia M. Wald, Thoughts on Decisionmaking, 87 W.Va.L.Rev. 10 (1984) (noting judicial decision-making process); Patricia M. Wald, Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books, 100 Harv.L.Rev. 895, 908 (1987) (analyzing judicial decision-making process).

[FN82]. Benjamin N. Cardozo, The Nature of the Judicial Process 9 (1921).

[FN83]. Oliver W. Holmes, Law and the Court, Collected Legal Papers 292 (1920) (speech at a dinner of the Harvard Law School Association of New York on Feb. 15, 1913).