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## AHEAD OF HIS TIME: CARDOZO AND THE CURRENT DEBATES ON PROFESSIONAL RESPONSIBILITY

*Alberto Bernabe*\*

### INTRODUCTION

It is not an exaggeration to affirm that Benjamin Cardozo is one of the most influential judges in American history.<sup>1</sup> He is certainly one of the most cited.<sup>2</sup> In fact, it has been said that students of the law could organize their whole life, philosophically, morally and imaginatively, by saturating themselves with the work of a few great jurists, including Cardozo.<sup>3</sup> Cardozo achieved fame, among other

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\*Professor of Law, The John Marshall Law School. The author would like to thank Professor Samuel Levine and the Jewish Law Institute at Touro College Law Center for the invitation to participate in the Conference “Benjamin Cardozo: Judge, Justice, Scholar” and The John Marshall Law School for its support in the preparation of this article.

<sup>1</sup> Richard Friedman, *On Cardozo and Reputation: Legendary Judge, Underrated Justice*, 12 CARDOZO L. REV. 1923, 1932 (1991) (describing Cardozo as “one of our greatest judicial icons” and stating that “Cardozo’s was one of the greatest short tenures on the [Supreme] Court.”); Bernard Shientag, *The Opinions and Writings of Judge Benjamin N. Cardozo*, 30 COLUM. L. REV. 597 (1930) (Benjamin N. Cardozo is “the name most commonly identified with legal scholarship and with the liberal and scientific development of the law in America.”). On the other hand, see RICHARD POSNER, *CARDOZO, A STUDY IN REPUTATION* vii (1990) (“Although the legal establishment canonized Cardozo during his lifetime and he is still widely considered not merely one of the greatest judges of all time but a judicial saint, there is considerable, perhaps an increasing, undercurrent of dubiety.”).

<sup>2</sup> In his book *CARDOZO, A STUDY IN REPUTATION*, Richard Posner discusses his attempt to measure Cardozo’s reputation and influence by quantifying information about Cardozo’s citations. Although he admits that the evidence is not conclusive, he states that “it tends to confirm the high repute in which . . . Cardozo is held.” POSNER, *supra* note 1, at 91. Among other things, Posner’s review of the evidence led him to conclude that Cardozo’s opinions for the New York Court of Appeals are cited substantially more often and have more staying power than those of his colleagues. POSNER, *supra* note 1, at 82-83. Commenting on Posner’s book, Richard Friedman wrote that “[a] detailed citation study was not necessary to demonstrate that Cardozo is well known.” Friedman, *supra* note 1, at 1928.

<sup>3</sup> JOHN POWYS, *THE MEANING OF CULTURE* 67, *cited in* Bernard Shientag, *supra* note 1, at 597.

reasons, because of his professionalism and his aptitude for careful legal analysis.<sup>4</sup> As his biographer Andrew Kaufman states, he “lived for the law, and the law made him famous.”<sup>5</sup> And, of course, that fame is mostly due to his influential opinions.

Much has been written about his famous opinions related to torts and contracts,<sup>6</sup> so I want to emphasize a different aspect of his jurisprudence: his opinions on the practice of law; or more specifically, the opinions in which he had the opportunity to evaluate the conduct of lawyers within the practice of law and the role of the profession in regulating that practice. I want to talk about Cardozo’s views on the practice of law itself, on the concept of professionalism and on the relation between those views and contemporary debates related to professional responsibility.

## I. THE CONCEPT OF PROFESSIONALISM

The concept of professionalism is usually found at the center of debates on whether the legal profession is adequately meeting its public purpose and following its core values and ideals.<sup>7</sup> Yet, although it is understood that it provides the underlying basis upon which the legal profession’s regulatory system is built,<sup>8</sup> it is interesting that there

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<sup>4</sup> John C. P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1474 (1999) (Cardozo was a great jurist because he self-consciously combined astute lawyerly analysis with a sensitivity to social conditions and social norms); Shientag, *supra* note 1, at 598 (Cardozo’s opinions “bear the marks of careful preparation, of patient and laborious research, of a profound understanding of legal principles interpreted in the light of their past history and their present ethical, social, and economic setting.”); Andrew Kaufman, *Benjamin Cardozo as a Paradigmatic Tort Lawmaker*, 49 DEPAUL L. REV. 281, 282 (1999) (“Cardozo considered the difficult legal issues at the intersection of his method of philosophy, emphasizing logical reasoning, and his method of sociology, emphasizing public policy, on an ad hoc basis that focused on the reasons for particular rules in the context of the facts of each case.”); *See also* Robert Keeton, *Andrew Kaufman’s Benjamin Cardozo as a Paradigmatic Tort Lawmaker*, 49 DEPAUL L. REV. 301 (1999).

<sup>5</sup> ANDREW KAUFMAN, *CARDOZO* 3 (1998).

<sup>6</sup> *Id.* at 416 (Cardozo was best known for his torts and contracts opinions).

<sup>7</sup> Neil Hamilton, *Professionalism Clearly Defined*, 18 PROF. LAWYER 4 (2008).

<sup>8</sup> As explained by Professor Neil Hamilton, “[t]he concept of “professionalism,” separated from any type of argument that an earlier golden-age existed when ethics were better . . . describes the important elements of an ethical professional identity into which the profession should socialize both law students and practicing lawyers. This approach to professionalism connects the public purpose, core values, and ideals of the profession with the goal of fostering an ethical professional identity within each lawyer.” *Id.* at 3.

is no consensus on how to define the concept of professionalism.<sup>9</sup> Sometimes the term is used as a synonym of civility.<sup>10</sup> Sometimes it is used as an antonym of engaging in a business.<sup>11</sup> Sometimes it is used to refer to a higher social calling.<sup>12</sup> Taking these and other elements often used to define a profession, however, different scholars have developed broad views on the meaning of the concept. For example, it has been argued that professionalism encompasses “the important elements of an ethical professional identity into which the profession should socialize both law students and practicing lawyers”<sup>13</sup> and that a professional is someone engaged

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<sup>9</sup> Thomas Morgan, *The Fall and Rise of Professionalism*, 19 U. RICH. L. REV. 451 (1985) (professionalism is not a self-defining term); Neil Hamilton, *supra* note 7, at 5 (“Although professionalism is a highly useful term to describe the important elements of an ethical professional identity, legal scholarship currently does not provide a clear definition of the term.”); American Bar Association, *In the Spirit of Public Service, A Blueprint for the Rekindling of Lawyer Professionalism*, REPORT OF THE A.B.A. COMMISSION ON PROFESSIONALISM 10 (1986) (professionalism is an elastic concept the meaning and application of which are hard to pin down); Fred Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1307 (1995) (professionalism is an abused term); Timothy Terrell & James Wildman, *Rethinking Professionalism*, 41 EMORY L. J. 403, 406 (1992) (professionalism is an elusive concept); Burnele V. Powell, *Lawyer Professionalism as Ordinary Morality*, 35 S. TEXAS L. REV. 275, 277-78 (1994) (the concept of professionalism is little-defined); Deborah Rhode, *Opening Remarks: Professionalism*, 52 S.C. L. REV. 458, 459 (2001) (central part of the “professionalism problem” is lack of consensus about what exactly the problem is). *See also* Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1 (1993); Richard C. Baldwin, *Rethinking “Professionalism” and Then Living It!*, 41 EMORY L. J. 433 (1992); Susan Daicoff, *Asking Leopards to Change their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547 (1998); John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 VAL. U. L. REV. 563 (1994); Robert L. Nelson, *Professionalism from a Social Science Perspective*, S.C. L. REV. 473 (2001).

<sup>10</sup> Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657 (1994).

<sup>11</sup> Morgan, *supra* note 9; Thomas Morgan, *Inverted Thinking about Law as a Profession or Business*, THE JOURNAL OF THE PROFESSIONAL LAWYER 115, 116-18 (2016) (“There are probably an inexhaustible number of ways to contrast what it means to be in a profession with what it means to run a business.”).

<sup>12</sup> Hamilton, *supra* note 7, at 4 (arguing that because the early debates on professionalism were sidetracked, professionalism “for many lawyers has meant the bench and bar’s response to a perceived loss of both civility and a sense of calling in the profession.”). *See also*, Michael Ariens, *The Rise and Fall of Social Trustee Professionalism*, THE JOURNAL OF THE PROFESSIONAL 49 (2016). Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137 (2011); Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L. J. 470 (2008).

<sup>13</sup> Hamilton, *Professionalism Clearly Defined*, *supra* note 7, at 4.

in roles that require education substantially beyond that of most citizens, involve personal judgment that most who deal with them are not in a position to evaluate, and work that is so important to public health or personal freedom that their . . . clients need special assurance of the professional's integrity and reliability.<sup>14</sup>

As it relates to lawyering, this “special assurance” needed for the protection of the public is provided in the form of regulation and a comprehensive system of disciplinary enforcement of that regulation.<sup>15</sup> In fact, it can be said that professionalism provides the basis for the profession's rules of ethics, or, in other words, that the rules are an expression of the principles of professionalism.<sup>16</sup> And, one of the most important of these principles is the fact that lawyers owe fiduciary duties to their clients.

As with other subjects, on this topic Cardozo was ahead of his time.<sup>17</sup> His views on professionalism and on the regulation of the profession already reflected this modern approach.

## II. FIDUCIARY DUTY AS THE GUIDING PRINCIPLE

Much of the law of professional responsibility is derived from, or related to, the principle that lawyers are fiduciaries of their clients.<sup>18</sup> As such, lawyers owe their clients a duty to act with utmost good faith, candor and honesty, to protect their clients' confidential information and to always favor their clients' interests over those of others or of their own.<sup>19</sup> Cardozo understood this principle because his approach

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<sup>14</sup> Morgan, *Inverted Thinking*, *supra* note 11, at 116.

<sup>15</sup> Morgan, *Inverted Thinking*, *supra* note 11, at 115, 117, citing JULIUS HENRY COHEN, *THE LAW: BUSINESS OF PROFESSION* (1916), for the proposition that self-regulation is an inherent element to professional status. *See also* RONALD ROTUNDA & JOHN DZIENKOWSKI, *PROFESSIONAL RESPONSIBILITY, A STUDENT'S GUIDE* 33 (2012-13) (One cannot discuss the regulation of law without recognizing that it is a “profession”).

<sup>16</sup> *See* Hamilton, *Professionalism Clearly Defined*, *supra* note 7, at 12-13.

<sup>17</sup> Interestingly, according to his biographer, Cardozo was lionized in his day as a “progressive judge” who used his role as a judge to modernize legal doctrines. Andrew Kaufman, *Benjamin Cardozo as a Paradigmatic Tort Lawmaker*, *supra* note 4, at 282.

<sup>18</sup> ROTUNDA & DZIENKOWSKI, *supra* note 15, at 42.

<sup>19</sup> ROTUNDA & DZIENKOWSKI, *supra* note 15, at 42. As explained by Professor Neil Hamilton, “[a] lawyer owes a client the fiduciary duties of safeguarding confidences and property, avoiding impermissible conflicts of interest, dealing honestly with the client, adequately informing the client, following the instructions of the client, and not employing

in deciding cases was influenced greatly by his experience as a lawyer,<sup>20</sup> and it is quite possible that Cardozo's own practicing lawyer's perspective influenced, if not determined, the outcome of at least some cases.<sup>21</sup>

In *Moller v Pickard*,<sup>22</sup> for example, Cardozo wrote an opinion that exemplifies his view on this subject. In that case, a group of minority shareholders in a business entity sued the entity's lawyer because the lawyer had bought shares in the entity when the entity was failing.<sup>23</sup> The plaintiffs argued the attorney had taken advantage of the situation and betrayed their trust and his duty to the client.<sup>24</sup> In a short opinion finding in favor of the attorney-defendant, Cardozo explained that attorneys have a duty to make sure business transactions with clients are "fair and open,"<sup>25</sup> and that attorneys have a duty to make full disclosure to the clients, and to retain nothing without their knowledge and approval.<sup>26</sup> Applying these principles to the facts of the case, Cardozo found that the attorney did not violate his fiduciary duty, concluding the case was "not one of selfish or malign endeavor on the part of an attorney to gain title for himself to the injury of a client."<sup>27</sup> Rather it was an example of a case in which the attorney conducted himself according to his duty and acted in response to the client's request "with the fullest understanding and approval of every detail of the transaction."<sup>28</sup>

Cardozo's opinion in *Moller* is short and direct, providing essentially just the conclusion of the analysis rather than an explanation of the analysis that resulted in that conclusion. At the time, this was Cardozo's usual practice. He limited statements of principle

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adversely to the client powers arising from the attorney-client relationship. This body of law calls on the lawyer to restrain self-interest similar to what the law of fiduciary duty requires of other agents in fiduciary relationships." Hamilton, *Professionalism Clearly Defined*, *supra* note 7, at 12.

<sup>20</sup> Andrew Kaufman, *Response to Robert E. Keeton and Gary T. Schwartz*, 49 DEPAUL L. REV. 319 (1999).

<sup>21</sup> *Id.*; see also KAUFMAN, CARDOZO, *supra* note 5, at 416 (fiduciary duty was a key element in Cardozo's decisions in both corporate law and the law governing lawyers); Goldberg, *supra* note 4, at 1474 (Cardozo conceived of himself as a participant in the practice of law; he maintained the "internal point of view" of the legal practitioner).

<sup>22</sup> 232 N.Y. 271 (N.Y. App. 1922).

<sup>23</sup> *Id.* at 273.

<sup>24</sup> *Id.* at 274.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Moller*, 232 N.Y. at 275.

<sup>28</sup> *Id.* at 275.

to the particular factual setting of the case at hand.<sup>29</sup> However, a few years later he departed from this practice when he authored his most famous opinion on the subject of fiduciary duties: his decision in *Meinhard v. Salmon*.<sup>30</sup>

*Meinhard* involved an alleged usurpation of a business opportunity by a member of a joint venture.<sup>31</sup> In this case, the plaintiff and the defendant had agreed to a joint venture to lease, renovate and operate a hotel. Toward the end of the duration of the lease, the defendant negotiated a new deal with the owner of the property, which resulted in a new lease, without informing the plaintiff.<sup>32</sup> The plaintiff then sued, claiming the defendant had deprived him of participating in the new venture and demanded his share of the interest in the new agreement.<sup>33</sup> After the plaintiff prevailed in the lower courts, Cardozo wrote the opinion of the Court of Appeals affirming the judgment based on his understanding of the principles of fiduciary duties:

Many forms of conduct permissible in a workday world . . . are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but . . . an honor the most sensitive, is the standard of behavior. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by a judgment of this court.<sup>34</sup>

Cardozo did not base his conclusion on precedent cases but on his interpretation of a general principle that suggested a duty of undivided loyalty as the basis of a fiduciary relationship. And in deciding the case this way, Cardozo was ahead of his time. Even though the defendant had not violated an explicit rule at the time, Cardozo's opinion essentially stood for the proposition that the rules

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<sup>29</sup> KAUFMAN, CARDOZO, *supra* note 5, at 239.

<sup>30</sup> 249 N.Y. 458 (N.Y. App. 1928).

<sup>31</sup> *Id.* at 458-59.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 464. Interestingly, just as they had done in *Palsgraf v. Long Island Railroad*, 248 N.Y. 339 (N.Y. 1928), Cardozo wrote the majority opinion and Judge Andrews wrote a dissenting opinion. Andrews agreed on the principles related to fiduciary duties but disagreed on Cardozo's interpretation of the facts of the case. For Andrews, the new lease was not an extension of the original joint venture, but a new and different business transaction because it involved more properties and many new terms and conditions. *Meinhard*, 249 N.Y. at 473.

ought to be different going forward. For this reason, it has been said that the opinion showed “prophetic insight” and that “no judge has ever come up with a better formula for stating the fiduciary’s duty.”<sup>35</sup>

This principle of a “high fiduciary duty,” which was the culmination of Cardozo’s efforts to implant a sense of honorable conduct,<sup>36</sup> is what formed the basis of Cardozo’s opinions on the practice of law.<sup>37</sup> In *In the Matter of Rouss*,<sup>38</sup> for example, Cardozo emphasized that “membership in the bar is a privilege burdened with conditions”<sup>39</sup> including maintaining fitness of character that advances the dignity of the profession. Likewise, in *Andrewes v. Hass*,<sup>40</sup> a case in which a lawyer sued his own client, Cardozo criticized the lawyer for wanting to favor his own interest in a profit over the client’s right to terminate the representation.<sup>41</sup> For Cardozo, the notion that a lawyer could behave in such a way would betray “the function of the legal profession and of its duty to society.”<sup>42</sup>

### III. REGULATION OF THE PROFESSION

Cardozo’s principle of a “high fiduciary duty” also formed the basis of the American Bar Association’s efforts to draft and promulgate a code of legal ethics<sup>43</sup> and, therefore, of Cardozo’s understanding of the notion of, and the need for, regulation of the profession. He understood that the fiduciary duty owed by lawyers had to be regulated, that violations of the regulation had to be strictly

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<sup>35</sup> KAUFMAN, CARDOZO, *supra* note 5, at 241 (citing Russell Niles, *Contemporary View of Liability for Breach of Trust*, 29 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 574, 575-76, and POSNER, *supra* note 1, at 104-05).

<sup>36</sup> KAUFMAN, CARDOZO, *supra* note 5, at 241, 242. (Cardozo emphasized personal obligation which meant honorable conduct in fiduciary roles).

<sup>37</sup> KAUFMAN, CARDOZO, *supra* note 5, at 425 (Cardozo “was uncompromising in his pursuit of responsible behavior and a clean image for the profession.”).

<sup>38</sup> 221 N.Y. 81 (1917).

<sup>39</sup> *Id.* at 84.

<sup>40</sup> 214 N.Y. 255 (1915).

<sup>41</sup> *Id.* at 258 (“The employment of a lawyer to serve for a contingent fee does not make it the client’s duty to continue the lawsuit and thus increase the lawyer’s profit.”).

<sup>42</sup> *Id.* at 258-59.

<sup>43</sup> James M. Altman, *Considering the ABA’s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395 (2003) (Underlying the ABA’s efforts was the idea that it is possible to articulate and maintain a level of lawyer conduct that is something higher, something better, than the minimal normative standards imposed by the criminal law or, what Benjamin Cardozo called twenty years later, the “morals of the market place”) (citing *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)).



enforced and that violations of the regulation should have consequences.

In addition, if Cardozo's approach to proper ethical conduct was based on regulation without specific rules of professional conduct, there still would have to be a mechanism, or authority, for the implementation of the regulation. It would be odd to recognize a need for implementation and imposition of consequences if there was no agency with the authority to do so. Yet, for Cardozo this was a straightforward issue. Clearly, it was the courts which had direct authority over the regulation of the profession.

An early example of Cardozo's approach to the notion of regulation of the profession can be found in *In the Matter of Rouss*.<sup>44</sup> In that case, writing for a unanimous court, Cardozo found that the state had the authority to disbar a lawyer for having confessed to misconduct even though the testimony was offered under statutory immunity protection.<sup>45</sup> He reasoned that the immunity provided by a state statute did not apply to the authority of the courts to regulate the profession:

Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. . . . Whenever the condition is broken, the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied.<sup>46</sup>

A decade later, in *People ex rel. Karlin v. Culkin*,<sup>47</sup> Cardozo expanded on his view on the regulation of the practice of the profession finding that courts had the authority to compel testimony, and to impose penalties for contempt on those who refused to testify, as part

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<sup>44</sup> 221 N.Y. 81 (1917).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 84-85.

<sup>47</sup> 248 N.Y. 465 (1928).

of an investigation into generalized misconduct within the profession.<sup>48</sup> Based on his interpretation of English law and the state Constitutions, and citing *Rouss* for the proposition that “[m]embership in the bar is a privilege burdened with conditions,” Cardozo concluded that attorneys had a professional duty to cooperate with the courts in order to protect the honor of the profession.<sup>49</sup> More importantly, he specifically held that there was “little room for doubt” that attorneys might be regulated by rules and orders of the courts, including the authority to compel testimony as part of an investigation into misconduct.<sup>50</sup> Thus, in *Rouss*, Cardozo subordinated the individual rights of an attorney to the standards of the profession, and in *Culkin* he placed the authority to administer those standards in the courts.

#### IV. THE CURRENT DEBATES ON PROFESSIONAL RESPONSIBILITY

Grounded on this framework, during his tenure in the New York Court of Appeals, Cardozo participated in a number of cases that addressed issues regarding the practice of law that we are still debating today, including the difficulty of defining what constitutes “the practice of law,” and, for that reason, the limits of statutes banning the unauthorized practice of law. As explained by Cardozo’s biographer Andrew Kaufman, “Cardozo attempted to translate his views about the professional obligations of attorneys to their clients into a broad right of lawyers and the public to protection from competition by persons and organizations who were not lawyers and hence were not similarly regulated.”<sup>51</sup> That concern is similar to the current debate over whether entities like Quicken Loans or LegalZoom are engaged in the practice of law,<sup>52</sup> and over whether it would be a good idea to allow non-lawyers to provide some legal services.<sup>53</sup>

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<sup>48</sup> *Id.* at 479-80.

<sup>49</sup> *Id.* at 470-71.

<sup>50</sup> *Id.* at 477.

<sup>51</sup> KAUFMAN, *CARDOZO*, *supra* note 5, at 427.

<sup>52</sup> For a discussion of some of the issues related to this topic see, among others, Alberto Bernabe, *Justice Gap vs. Core Values: The Common Themes in the Innovation Debate*, 41 *THE JOURNAL OF THE LEGAL PROFESSION* 1 (2016); Andrew M. Perlman, *Towards the Law of Legal Services*, 37 *CARDOZO L. REV.* 49, 58 (2015); Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 *FLORIDA L. REV.* 977 (2003); Raymond H. Brescia, *Uber for Lawyers: The Transformative Potential of a Sharing Economy Approach to the Delivery of Legal Services*, 64 *BUFF. L. REV.* 745 (2016).

<sup>53</sup> *See supra* note 52.

Cardozo would probably not have been a fan of Quicken Loans or LegalZoom. Actually, to say that is unfair. Cardozo probably would not have liked Quicken Loans and LegalZoom in the 1920s or 1930s, but a lot has changed since then, and it is impossible to know whether Cardozo's views would have changed over time. For that reason, ironically, the most interesting aspect of Cardozo's opinions is not how they show that things have changed but how they seem to have remained the same. The fact is the legal profession is still debating some of the same issues today.

Compare, for example, *People v Title Guarantee & Trust Co.*,<sup>54</sup> decided in 1919 and *Boone v. Quicken Loans, Inc.*,<sup>55</sup> decided by the Supreme Court of South Carolina in July 2017. In *People v Title Guarantee & Trust Co.*, Cardozo wrote a short dissenting opinion in a case involving facts that raised similar questions as those raised by the debate regarding Quicken Loans and LegalZoom. The case involved a corporation in the business of guaranteeing bonds, mortgages and titles to real estate charged with a violation of a statute that banned corporations from holding themselves out to the public as being entitled to practice law, or to render legal services.<sup>56</sup> The Court of Appeals reversed the conviction, but Cardozo dissented.<sup>57</sup>

The question presented by the case, and still debated today, relates to the definition of the practice of law.<sup>58</sup> At what point does the provision of legal forms, or even legal advice, become the practice of law? In his concurring opinion, Judge Pound addressed the question as follows:

Doubtless many individuals, unlearned in the law, occasionally draw deeds, wills, mortgages and other instruments without rendering legal services in the common acceptance of the term who would be startled to learn that they had criminally engaged in the practice of law. The test of the legislative intent is to be found, however, in the present day evil which the legislation aims to correct. The evil addressed seems to be, both in the case of the individual and the corporation, the practice of rendering, with some continuity, services of

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<sup>54</sup> 227 N.Y. 366 (1919).

<sup>55</sup> *Boone v. Quicken Loans, Inc.*, 803 S.E.2d 707 (S.C. 2017).

<sup>56</sup> *Title Guarantee & Trust Co.*, 227 N.Y. at 369.

<sup>57</sup> *Id.* at 381.

<sup>58</sup> *See generally People v Title Guarantee & Trust Co.*, 227 N.Y. 366 (1919).

the character now generally performed by lawyers as a part of their ordinary routine. . . . The legislation is in aid of the lawyers, and for the protection of the public, and is antagonistic to the policy which would permit any one to act habitually as a scrivener or conveyancer. . . . This does not imply that a real estate broker may not prepare leases, mortgages and deeds, or that an installment house may not prepare conditional bills of sale, in connection with the business and as a part thereof. The preparation of the legal papers may be ancillary to the daily business of the actor or it may be the business itself. The emphasis may be upon the services of the broker or the business of the trader or it may be upon the practice of law.<sup>59</sup>

In other words, for Judge Pound the key is whether providing legal services is the main business of the entity in question, or whether it is simply a part of, or ancillary to, the main business. Cardozo agreed with this approach to the issue, but reached a different conclusion when applied to the facts of the case. Pound concluded that the corporation did not make it a business to prepare legal forms “for all who apply, independently of its chartered powers.”<sup>60</sup> In other words, he did not think the corporation was in the business of providing and filling out legal documents; it was in a business that incidentally required it to help its customers fill out the documents. As he concluded, the corporation “does not hold itself out as preparing legal instruments generally but only in connection with its legitimate business.”<sup>61</sup> Cardozo disagreed. He opined that the conviction should have been affirmed because filling out legal forms should be considered to be practicing law.<sup>62</sup>

It is fascinating that this debate is essentially the same we are still having as part of the discussion of the modern concept of “innovation” and the new contours of the legal marketplace.<sup>63</sup> Take, for example, the recent decision in *Boone v. Quicken Loans, Inc.*, decided by the Supreme Court of South Carolina in July 2017, the facts

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<sup>59</sup> *Id.* at 378-79.

<sup>60</sup> *Id.* at 380.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 381; see also KAUFMAN, CARDOZO, *supra* note 5, at 427.

<sup>63</sup> See *supra* note 52.

of which are eerily similar to those of *People v Title Guarantee & Trust Co.* and which perfectly illustrates the point.

In *Boone*, a group of homeowners filed a request for a declaratory judgment arguing that Quicken Loans, a nationwide online mortgage lender, was engaging in the unauthorized practice of law in South Carolina when refinancing the homeowners' mortgage loans.<sup>64</sup> In deciding that Quicken Loans was not engaged in the practice of law, the court reiterated its position that "it is neither practicable nor wise to attempt a comprehensive definition [of the practice of law] by way of a set of rules."<sup>65</sup> The court explained it is preferable "to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy rather than through an abstract set of guidelines,"<sup>66</sup> keeping in mind that the policy of prohibiting laymen from practicing law exists for the purpose of protecting the public by preventing the intrusion of incompetent and unlearned persons in the practice of law, rather than for the purpose of creating a monopoly in the legal profession, a proposition for which it cited a precedent from 1939.<sup>67</sup>

Although it is difficult to point to a specific moment when the debate regarding "innovation" began, it is safe to say that LegalZoom's "do it yourself" approach to legal services had something to do with it. Although LegalZoom provides access to services that might otherwise be unavailable to many people, its new approach to the provision of legal services was not necessarily well received. Just like the corporation involved in *People v Title Guarantee & Trust Co.*, LegalZoom faced opposition from the bar and the courts in many states.<sup>68</sup> At the end of 2009, LegalZoom was sued in Missouri for engaging in unauthorized practice of law.<sup>69</sup> Also, in November 2010,

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<sup>64</sup> *Boone*, 803 S.E.2d at 455.

<sup>65</sup> *Id.* at 461 (quoting *In re Unauthorized Practice of Law Rules*, 422 S.E.2d 123, 124-25 (S.C. 1992)). The court also pointed out that other jurisdictions have adopted the same approach. *Id.* at 460 n.6 (citing *In re Shoe Mfrs. Protective Ass'n*, 3 N.E.2d 746, 748 (Mass. 1936)) (reaffirmed by *Real Estate Bar Ass'n for Massachusetts, Inc. v. Nat'l Real Estate Info. Servs.*, 946 N.E.2d 665, 674 (Mass. 2011)).

<sup>66</sup> *Id.* at 461 (quoting *In re Unauthorized Practice of Law Rules*, 422 S.E.2d 123, 124-25 (1992)).

<sup>67</sup> *Boone*, at 459-60, (citing *State ex rel. Daniel v. Wells*, 5 S.E.2d 181, 186 (S.C. 1939)).

<sup>68</sup> See Gene Quinn, *LegalZoom Continues Unauthorized Practice of Law*, IPWATCHDOG, February 3, 2009 available at <http://www.ipwatchdog.com/2009/02/03/legalzoom-continues-unauthorized-practice-of-law/id=1899/>.

<sup>69</sup> Nathan Koppel, *Class Action Claims Online Legal Forms Pose Threat To Consumers*, THE WALL STREET JOURNAL BLOG, (July 27, 2011), available at <https://blogs.wsj.com/law>

the Pennsylvania Bar issued an opinion concluding that many online legal document preparation services, including many of the services provided by LegalZoom, constituted the unauthorized practice of law.<sup>70</sup> Then, perhaps tired of being on the defensive, in 2011, LegalZoom sued the North Carolina Bar challenging its application of the rules regarding unauthorized practice.<sup>71</sup>

Over time, LegalZoom's battles helped the discussion evolve from a debate on finding ways to practice law more efficiently to a debate on finding different ways in which to provide legal services, including debates as to who should be allowed to practice law to begin with. In other words, the discussion of innovation in the practice of law has become a discussion about the regulation of the practice of law.<sup>72</sup> The title of a Canadian document on the subject provides a great illustration of this point. The document is titled "Innovative Regulation." In it, the Bar Associations of three Canadian provinces discuss possible new regulatory approaches in light of changes in the

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/2011/07/27/class-action-claims-online-legal-forms-pose-threat-toconsumers/?mod=WSJBlog; Gene Quinn, *LegalZoom Sued in Class Action for Unauthorized Law Practice*, IPWATCHDOG, (Feb. 9, 2010), available at <http://www.ipwatchdog.com/2010/02/09/legalzoom-sued-in-class-action-for-unauthorized-law-practice/id=8816/>. That claim eventually settled. Alberto Bernabe, *Legal Zoom settles claim of unauthorized practice of law*, PROFESSIONAL RESPONSIBILITY BLOG, August 23, 2011, available at <http://bernabepr.blogspot.com/2011/08/legal-zoom-settles-claim-of-unauthorized.html>.

<sup>70</sup> Penn. Bar Assoc., *Unauthorized Practice of Law Committee Formal Op. 2010-01* (Mar. 10, 2010), available at <http://www.pabar.org/public/committees/unautpra/Opinions/2010-01LglDocumentPreparation.pdf>

<sup>71</sup> Nathan Koppel, *LegalZoom Sues North Carolina Bar*, THE WALL STREET JOURNAL LAW BLOG, (Oct. 7, 2011), available at <https://blogs.wsj.com/law/2011/10/07/legalzoom-sues-north-carolina-bar/?mod=WSJBlog>. Eventually, the parties agreed to suspend the litigation to give the state legislature a chance to amend the definition of the practice of law. The amendment was approved in 2015 to redefine the term "practice of law" by exempting services that provide blank legal documents. See Alberto Bernabe, *Legal Zoom Settles Case vs North Carolina Bar*, PROFESSIONAL RESPONSIBILITY BLOG, (Dec. 9, 2015), <http://bernabepr.blogspot.com/2015/10/legal-zoom-settles-case-vs-north.html>.

<sup>72</sup> The amendment to the North Carolina rules which redefined the practice of law in order to allow LegalZoom to conduct business in the state also imposed new regulation on the company. For example, anyone seeking to provide the types of services at issue must register with the State Bar every year, and each type of document must be reviewed and approved by a licensed North Carolina attorney before it is available online. The services also must include a disclaimer that the online documents are not a substitute for seeking legal advice, and any customer satisfaction disputes must be referred to the State Bar. See Alberto Bernabe, *Legal Zoom Settles Case vs North Carolina Bar*, PROFESSIONAL RESPONSIBILITY BLOG, (Dec. 9, 2015), <http://bernabepr.blogspot.com/2015/10/legal-zoom-settles-case-vs-north.html>. For a good discussion of some of the issues involved on whether LegalZoom should be regulated by the legal profession see the discussion of some members of the Legal Ethics Forum blog at *Legal Zoom Redux*, LEGAL ETHICS FORUM, (May 5, 2014), available at <http://www.legaethicsforum.com/blog/2014/05/legal-zoom-redux.html>.

practice of the profession, including the controversial notion of alternative business structures which allow attorneys to partner with non-attorneys to provide legal services.<sup>73</sup> Likewise, Washington State, for example, has approved regulation to administer a program that allows non-lawyer professionals to be certified to provide certain services previously provided by lawyers in divorce cases.<sup>74</sup> Other states have, or are working toward establishing, similar programs.<sup>75</sup>

Yet, as stated above, these new developments are controversial and the debate continues, mostly dominated by two distinct themes: the “Justice Gap” and the “Core Values” themes.<sup>76</sup> The Justice Gap theme focuses on the need to develop ways to improve the way the profession serves the legal needs of people who need them.<sup>77</sup> The Core Values theme focuses on the need to oppose some types of innovation because of the need to protect principles upon which the practice of the profession is based.<sup>78</sup> How these themes are addressed by regulatory agencies in the near future will determine the fate of the discussion on innovation in the practice of law in the United States.

If all of this sounds familiar to fans of Cardozo’s opinions it is because, again, the underlying themes within that debate<sup>79</sup> can be

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<sup>73</sup> See *Innovative Regulation*, A Collaboration of the Prairie Law Societies, (Nov. 2015), available at <http://www.lawsociety.sk.ca/media/127107/INNOVATINGREGULATION.pdf>. See also Barbra Bailey, *Innovating Regulation*, LEGAL SOURCERY, December 21, 2015, <https://lsslib.wordpress.com/2015/12/21/innovating-regulation>.

<sup>74</sup> Thea Jennings, *An Access to Justice First: Washington State’s Limited Licensing Program for Nonlawyers*, @Law, Fall 2014 at 28, 29. Elizabeth Chambliss, *Law School Training for Licensed “Legal Technicians”?* *Implications for the Consumer Market*, 65 S.C. L. REV. 579, 580 (2014); Robert Ambrogi, *Unauthorized Practice*, ABA JOURNAL, Jan. 2015, at 72, 74.

<sup>75</sup> Commissions in California and Oregon have proposed programs similar to the one in Washington. See Chambliss, *supra* note 74, at 590. The report of the California commission is available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000013003.pdf>. The report of the Oregon commission is available at [http://bog11.homestead.com/LegalTechTF/Jan2015/Report\\_22Jan2015.pdf](http://bog11.homestead.com/LegalTechTF/Jan2015/Report_22Jan2015.pdf). Vermont and New York have created commissions to study the issue. Chambliss, *supra* note 74, at 592; Ambrogi, *supra* note 74, at 78. For a good discussion of the benefits of a program of non-lawyer legal services see Perlman, *supra* note 52, in which he argues that Washington State’s LLLT program is creating a new, and likely lower cost, option for consumers by allowing appropriately trained and regulated professionals to engage in some kinds of law practice without a law degree. Perlman concludes that “[i]n the end, the LLLT program serves the public interest and advances the regulatory objectives that should form the core of the law of legal services.” Perlman, *supra* note 52, at 112.

<sup>76</sup> See Bernabe, *supra* note 52.

<sup>77</sup> See *supra* note 52.

<sup>78</sup> Bernabe, *supra* note 52.

<sup>79</sup> For a discussion of these themes, see Bernabe, *supra* note 52.

found in them. For Cardozo, the main theme relates to the need to preserve, or protect, the core values of the profession. For those who promote innovation and access to legal services, the main theme relates to the need to close the “justice gap” in our society.<sup>80</sup> The continuing debate over the definition of the practice of law, and of who can provide legal services, is just one example of the consequences of efforts to modify the legal marketplace in order to confront the justice gap.

Just like some current authors do, Cardozo would probably argue that the trend in innovation based on technology enabled delivery of legal services in an effort to make the practice of law less expensive and more efficient reduces what used to be a profession focusing on providing services to clients to the sale of a commodity to consumers.<sup>81</sup> This “commoditization” of the profession, which some

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<sup>80</sup> The phrase “justice gap” is often used in reference to the fact that even though there are enough lawyers available, the legal needs of most Americans are not being met. This reality has created a demand for programs that provide access to solutions to legal issues, which in turn has resulted in calls for more “innovation” in the way in which legal services are provided. Selina Thomas, *Rethinking Unauthorized Practice of Law in Light of the Access to Justice Crisis*, 23 *THE PROFESSIONAL LAWYER* 1, 3 (2016), [http://www.americanbar.org/publications/professional\\_lawyer/2015/volume-23-number-3/rethinking\\_unauthorized\\_practice\\_law\\_light\\_the\\_access\\_justice\\_crisis.html](http://www.americanbar.org/publications/professional_lawyer/2015/volume-23-number-3/rethinking_unauthorized_practice_law_light_the_access_justice_crisis.html) (referring to the “daunting justice gap” and pointing out that 80 to 85 percent of the US population who is need of civil legal services is underserved); Ambrogi, *supra* note 74 at 72, 74 (Multiple state and federal studies show that 80 to 90 percent of low and moderate income Americans with legal problems are unable to obtain or afford legal representation.). Thea Jennings, *supra* note 74, at 28, 29 (discussing a study by the Supreme Court of Washington which found that 88% of people of lower means attempted to resolve their legal issues without legal representation); Milan Markovic, *Juking Access to Justice to Deregulate the Legal Market*, 29 *GEO. J. OF LEGAL ETHICS* 63, 65 (2016); American Bar Association Commission on the Future of Legal Services, *Issues Paper Concerning New Categories of Legal Service Providers*, October 16, 2015, at 2 (Numerous studies over many decades reveal that cost is a significant impediment to accessing legal services for most low and moderate income Americans, especially when they face significant civil legal problems.). See Ronald C. Minkoff, *Access to Justice and a New Definition of Professionalism*, *N.Y. LEGAL ETHICS REPORTER*, (Sep. 1, 2015) available at <http://www.newyorklegalethics.com/access-to-justice-and-a-new-definition-of-professionalism>; ABA Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States* 5, 10-18 (2016), available at [http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport\\_FNL\\_WEB.pdf](http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf) (finding that despite sustained efforts to expand the public’s access to legal services, significant unmet needs persist).

<sup>81</sup> See Lisa H. Nicholson, *Access to Justice Requires Access to Attorneys: Restrictions on the Practice of Law Serve a Societal Purpose*, 82 *FORDHAM L. REV.* 2761 (2014) (unauthorized practice of law restrictions are necessary to preserve the “core values” of the legal profession—i.e., that clients should receive ethically competent legal services from their attorneys, including the requirement that attorneys are independent and loyal, maintain client confidences, and eschew conflicts of interest. These core values are what consumers of legal services have come to expect, whether they retain an attorney or purchase legal services from



trace to the business models of companies like LegalZoom,<sup>82</sup> can be seen as compromising the profession's core value of owing a fiduciary duty to clients and as a threat to the duties owed to clients. According to this view, commoditization is the result of an effort to cut costs, and cutting costs can lead to cutting corners at the expense of fiduciary duties to clients.<sup>83</sup>

These themes are the same regardless of the prevailing debates within the profession, including whether American jurisdictions should allow lawyers to partner with non-lawyers or to share fees with non-lawyers, or whether non-lawyers should be allowed to provide limited legal services, or whether lawyers should be allowed to practice law anywhere in the country regardless of where they passed the bar exam.<sup>84</sup>

Facing these issues, Cardozo might have reached different conclusions in his day than we might be heading for today, but he clearly would have approached the questions from what we can consider a current or contemporary view. He understood then what we are arguing now. In the end, the question that needs to be addressed is the same question that needs to be addressed when considering any changes to the regulation of the profession: Will the change benefit clients and prospective clients in need of access to legal services? Yet, for now at least, the debates continue.

## V. LOOKING AHEAD TO THE FUTURE

In 2014, the American Bar Association created a Commission on the Future of Legal Services and charged it with the task of recommending innovations that would improve the delivery of, and the public's access to, legal services in the United States.<sup>85</sup> Unfortunately, the Commission's work was quickly affected by the prevalent debate

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non-attorney providers. These core values are also what have continually maintained our civil society).

<sup>82</sup> See, for example, Raymond Brescia, *What We Know and Need to Know About Disruptive Innovation*, 67 S.C. L. REV. 203, 212 (2016).

<sup>83</sup> *Id.*

<sup>84</sup> For a good discussion of the contemporary debates on many of these issues, see *supra* note 52.

<sup>85</sup> The Commission's final report is available at [http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport\\_FNL\\_WEB.pdf](http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf). Alberto Bernabe, *ABA Commission on Future of Legal Services issues its final report; I am not particularly impressed*, PROFESSIONAL RESPONSIBILITY BLOG, (Aug. 11, 2016), available at <http://bernabepr.blogspot.com/2016/08/aba-commission-on-future-of-legal.html>.

on the justice gap and core values. Eventually, and perhaps not surprisingly, while the ABA encouraged jurisdictions to explore innovative changes, its initiatives seem to be limited by what Cardozo would argue is the need to protect the profession's core values. For that reason, ironically, the end result is that in an effort to open the doors, or "liberalize," the delivery of legal services, the likely result will be more regulation.<sup>86</sup>

The fact the debates have not been settled yet is not necessarily a bad thing, though. In fact, there is a movement afoot that encourages jurisdictions to adopt specific "regulatory objectives" based on the premise that "without knowing the underlying objectives of lawyer regulation, one cannot meaningfully measure whether the regulation succeeds, or is overbroad, too lenient, or too restrictive."<sup>87</sup> And, Cardozo would be happy with the objectives that have been recommended which include: protection of clients, protection of the public interest, promoting public understanding of the legal system and respect for the rule of law, supporting the rule of law and ensuring lawyer independence sufficient to allow for a robust rule-of-law culture, increasing access to justice, promoting lawyers' compliance with professional principles, and ensuring that lawyer regulation is consistent with principles of "good regulation."<sup>88</sup> Not only do these reflect the values of the profession that Cardozo emphasized in his opinions, they are also based on the notion that the regulation of the profession should be administered by the profession itself.

This, however, opens the door to another current concern within the profession: if the legal profession's regulators do not adopt regulatory objectives, someone else may do so for them (and the results may be less satisfactory).<sup>89</sup> And this brings the discussion full circle back to *People ex rel. Karlin v. Culkin*, in which Cardozo explained the importance of placing the authority to regulate the legal profession on the profession itself. As he eloquently put it, the profession's power to regulate itself "will make for the health and honor of the profession and for the protection of the public. If the house is to be cleaned, it is

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<sup>86</sup> For a very good discussion on what that new approach to regulation might, and perhaps should, look like see Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLORIDA L. REV. 977 (2003).

<sup>87</sup> Laurel Terry, *Why Your Jurisdiction Should Consider Jumping on the Regulatory Objectives Bandwagon*, 22 THE PROFESSIONAL LAWYER 1 (2013).

<sup>88</sup> Laurel S. Terry, Steve Mark & Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685, 2734-42 (2012).

<sup>89</sup> Terry, *Why Your Jurisdiction*, *supra* note 87, at 8.

for those who occupy and govern it, rather than for strangers, to do the noisome work.”<sup>90</sup> In other words, as explained in Kaufman’s biography of Cardozo:

Cardozo cared greatly about the honor of the profession and the role of judges as traditional guardians of that honor. If the judiciary was to exert control over the profession, it needed to punish violation of its rules; otherwise ‘strangers,’ that is, the legislature or an administrative board, would end up doing the task.<sup>91</sup>

Interestingly, given that the more things change, the more they stay the same, eighty-nine years later, the same concern is receiving a lot of attention. In June, 2017, one of the main speakers at the ABA National Conference on Professional Responsibility raised that exact same concern when discussing the alarming picture of how much state rules vary on what constitutes practicing law in a jurisdiction in violation of rules regarding unauthorized practice.<sup>92</sup> Accepting the 2017 Michael Franck Professional Responsibility Award, Robert Creamer warned that the legal profession “needs to come up with uniform ethics rules or else Congress may act on its own to regulate lawyers.”<sup>93</sup> He argued that if the changes are done to us rather than by us, the result will not likely be something with which we will be happy.<sup>94</sup>

It is striking how this debate sounds so familiar when reviewing Cardozo’s approach to the concept of professionalism. As explained by Professor Neil Hamilton, one of the defining characteristics of a profession is that society recognizes the profession’s autonomy to regulate itself, “expecting the profession’s members to control entry into and continued membership in the profession, to set standards for how individual professionals perform their work so that it serves the public good in the area of the profession’s responsibility, and to foster

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<sup>90</sup> *People ex rel. Karlin v. Culkan*, 248 N.Y. 465, 481 (1928).

<sup>91</sup> KAUFMAN, CARDOZO, *supra* note 5, at 429.

<sup>92</sup> Joan Rogers, *Lawyers Urged to Fix ‘Crazy Quilt’ of State Ethics Rules*, 33 ABA/BNA LAW. MAN. PROF. CONDUCT 336 (2017) (discussing speech by Robert Creamer, the 2017 Michael Franck Professional Responsibility Award winner); Robert A. Creamer, *Ethics Rules Uniformity: “The Vision Thing,”* 24 THE PROFESSIONAL LAWYER NO. 3.

<sup>93</sup> *Id.* In fact, a proposal for Congress to adopt a statute that mandates mutual recognition of rights of practice by lawyers across state borders has already been suggested. See James Jones, Anthony Davis, Simon Chester and Caroline Hart, *Reforming Lawyer Mobility – Protecting Turf or Serving Clients?*, 30 GEO. J. OF L. ETHICS 125, 189 (2017).

<sup>94</sup> *Id.*

the core values and ideals of the profession,”<sup>95</sup> all of which is consistent with Cardozo’s expressed views in *People ex rel. Karlin v. Culin*.<sup>96</sup>

## VI. CONCLUSION

Benjamin Cardozo’s opinions on the legal profession reflect the modern debate on innovation and the future of the legal profession and the two modern themes upon which that debate is based. He understood the notion of the profession as a calling that owed duties to society in general, but he also emphasized the need to preserve the “honor” of the profession through a strict understanding of the fiduciary duty owed to clients.

Much of the debate regarding innovation revolves around the question of whether the current professional regulatory framework should be redesigned in order to allow new ways to provide legal services including the delivery of legal services across state borders and in association with, or even by, non-lawyers. Yet, although the seeds of the debate can already be detected in some of Cardozo’s opinions, the discussion does not seem to be ready for resolution. While the ABA’s Commission on the Future of the Legal Profession has taken steps to open the door to innovative approaches to the delivery of legal services, even considering allowing alternative business structures<sup>97</sup> and non-lawyer service providers,<sup>98</sup> the ABA itself continues to avoid embracing some of those approaches.<sup>99</sup>

While the ABA is encouraging jurisdictions to specifically address the innovative changes that seem to be disrupting the legal

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<sup>95</sup> Hamilton, *Professionalism Clearly Defined*, *supra* note 7, at 4-5; *see also* ROTUNDA AND DZIENKOWSKI, *supra* note 15, at 34.

<sup>96</sup> 248 N.Y. 465, 481 (1928).

<sup>97</sup> ABA Commission on the Future of Legal Services, *Issues Paper Concerning Alternative Business Structures*, 1 (April 8, 2016), [http://www.americanbar.org/content/dam/aba/images/office\\_president/alternative\\_business\\_issues\\_paper.pdf](http://www.americanbar.org/content/dam/aba/images/office_president/alternative_business_issues_paper.pdf) (“The Commission believes that any consideration of possible regulatory reforms should include an examination of Alternative Business Structures (ABS).”).

<sup>98</sup> *Id.*

<sup>99</sup> Bernabe, *supra* note 52. The institutional reaction of the ABA is not new. Morgan, *Inverted Thinking*, *supra* note 11, at 121, (even though a 1986 ABA Commission on Professionalism report concluded that resistance to allowing non-lawyers to provide some form of legal services “for selfish reasons only brings discredit on the profession, at the ABA House of Delegates, core values of the legal profession have dominated professionalism rhetoric.”).

marketplace, its initiatives seem to be limited by what many argue is the need to protect the profession's core values.<sup>100</sup> For that reason, as stated above, ironically, the end result is that in an effort to open the doors, or "liberalize," the delivery of legal services, regardless of how the ABA or individual states decide to address the surge of innovation, the likely result will be more regulation.<sup>101</sup> Thus, how to balance, and regulate, professional values against the need to meet the legal needs of the public will continue to be the key to the debate about innovation in the practice of law.

In the end, sadly, although Cardozo at times may have been ahead of his time, the passage of time does not seem to have resulted in a lot of change. In praising Cardozo, Professor Robert Keeton once wrote that "[w]e continue to celebrate a giant of another generation even after times and needs of the day have changed."<sup>102</sup> Yet, ironically it now seems that, at least in matters related to the regulation of the legal profession, we should continue to celebrate his work because some of the issues of the times and needs of the day have *not* changed.

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<sup>100</sup> *Id.* It has been argued that this type of limitation is a systemic problem within the American Bar Association. See James Moliterno, *Ethics 20/20 Successfully Achieved its Mission: It "Protected, Preserved, and Maintained,"* 47 AKRON L. REV. 149, 159 (2014) (the lesson is clear: ABA commissions that remain modest with proposals will pass through the House of Delegates' gauntlet; ABA commissions that propose actual reform will fail.).

<sup>101</sup> See Perlman, *Toward a Unified Theory of Professional Regulation*, *supra* note 52.

<sup>102</sup> Keeton, *supra* note 4, at 3.