Cardozo the \([\text{Small } r]\) realist

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Benjamin Cardozo was one of the towering figures of American law in the twentieth century. Among state court judges he had no peer.¹ His reputation stems principally from his eighteen years on the New York Court of Appeals; nearly seventy years after he left that court many of his opinions, as well as some of his nonjudicial writings, remain staples of legal education. He capped his career with a glittering tenure of six years on the United States Supreme Court during one of the most critical periods in its history. Though he was the junior justice during almost that entire time, he had a major and beneficent impact on its work.²

And yet, until recently, there has not been a full scholarly biography of Cardozo. Felix Frankfurter and Joseph L. Rauh — Cardozo's last law clerk and Joseph L. Rauh — Cardozo's last law clerk and Frankfurter's first — thought as long ago as 1957 that a biography was overdue, and so Frankfurter asked Andrew L. Kaufman, who was then his clerk, if he was interested in writing one. As Kaufman, now the Charles Stebbins Fairchild Professor of Law at Harvard Law School, has related, it took him "about fifteen seconds to answer Frankfurter's question with a 'yes' and another forty years to complete the project."³ The result is Cardozo, a beautifully crafted, thorough, perceptive, balanced, and eminently readable biography.

It is easy to sneer about the time that it took Kaufman to complete this volume.⁴ But that is the wrong attitude. I do not want to be un-

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1. See RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 143 (1990); Judith S. Kaye, Cardozo: A Law Classic, 112 HARV. L. REV. 1026, 1042-43 (1999) (reviewing Cardozo). At least this is true in terms of reputation, the subject of Judge Posner's study. It seems rather clear as well in terms of the extent of his contribution to legal discourse — that is, Cardozo's opinions are still widely read, discussed, cited, and quoted. As for quality of work, that is impossible to measure, at least by any metric that would gain common consent.


understood as advocating decades-long completion times for academic projects of this scope, but there are compensations. It is wonderfully encouraging that a young scholar can engage in such a daunting project and, even after putting it on hold to allow for other work, bring it to fruition in such estimable fashion many years later. To do so requires not only a measure of luck—continued life and good health—but extraordinary persistence, stamina, and continued enthusiasm for the project. The ultimate product is much better, and certainly more useful to us today, than it would have been had Kaufman completed it many years ago—not only because he has had time to put enormous work into it and because it speaks from the vantage point of today, but also because Kaufman lends it great maturity and perspective across the entire range of law. At the same time, the book benefits from the fact that Kaufman began his research so long ago, because he was able to interview many people who knew Cardozo—including, to take one striking example, the formidable Charles C. Burlingham, a titan of the

showrev.cgi?path=21803936036898> (reviewing Cardozo). Messinger claims that Cardozo “begs the question why forty years of research has produced such a lifeless portrait” and speaks of Kaufman’s “forty-year monopoly on many of the extant sources.” See id. As suggested by Part I of this Review, I believe that the portrait of Cardozo that emerges from Kaufman’s biography is anything but lifeless. The charge of monopolization strikes me as extremely unfair. This is not a book written principally on the basis of a large body of documentary material to which the author was given exclusive access. On the contrary, Cardozo’s collection of papers from his practice were apparently lost in the 1930s, and so Kaufman had to gather the copies of the papers—in the days before computerized research—in an excruciatingly painstaking manner. See Kaufman, Art of Biography, supra note 3, at 1250. Cardozo destroyed many of his personal papers before his death, and after his death his executors and Kate Tracy, the manager of his household, supposedly acting on his instructions, “destroyed not only Cardozo’s Supreme Court papers but also his remaining personal correspondence and other personal papers.” Pp. 621-22 n.5. Only a relatively small amount was left for Columbia University, Cardozo’s residuary legatee. See Kaufman, Art of Biography, supra note 3, at 1253. Kaufman has hunted down letters written by Cardozo in various sources. Most of these are in publicly available collections. So far as I can tell, in at most a very few cases of peripheral importance was he simply granted exclusive access to any body of papers. It appears that in some cases he gained enough confidence of a reluctant custodian to be given access that others would not be given, but this is hardly monopolization. He did gain access by special arrangement to an important set of memoranda written by Cardozo for the Court of Appeals—but that was only after persistent prodding and rebuffs by five chief judges. See id. at 1255. Moreover, he “interviewed everyone [he] could find.” Id. at 1253. This was not a “lock up” of a unique asset.

5. See, e.g., VERN COUNTRYMAN ET AL., COMMERCIAL LAW (2d ed. 1989); ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY (3d ed. 1989). After completing his clerkship, Professor Kaufman was a practicing lawyer for eight years before going into academics.

6. A few other examples come to mind, see, e.g., GERALD GUNThER, LEARNED HAND (1994); SELDEN SOCIETY, ENGLISH LAWSUITS FROM WILLIAM I TO RICHARD I (R.C. van Caenegem ed., 1990-91). Van Caenegem completed his work nearly forty years after he began the project. Id. at vii. See also Eric Page, Dumas Malone, Expert on Jefferson Is Dead at 94, N.Y. TIMES, Dec. 28, 1986, § 1, at 28 (mentioning Malone’s four-volume biography of Thomas Jefferson, begun in 1943 and completed in 1981, when Malone was nearly ninety). I admit to a particular sentiment in this regard myself, having a couple of long-term projects on the burner now.
New York Bar, who was born in 1858 and whom Kaufman interviewed in 1957. (Kaufman has, by the way, stated his “strong impression” that Burlingham was “not only all there but... remarkably all there” at the time of the interview.) If reading the book sometimes puts one in a time warp — Kaufman writing near the end of the century on the basis of interviews conducted in mid-century about events in the early years of the century — at least it brings a distant time one step closer.

In the time that Kaufman worked on this book, others completed projects of less imposing scope on Cardozo. But no future scholar will be able to duplicate Kaufman’s work, even if one were so inclined. Thus, even those who are not particularly enamored of the book recognize that this will be the standard Cardozo biography, not only for our time but presumably for all time.

One reason for this judgment is the fact that — apart from his sheer importance — Cardozo is not a natural subject for biography. Unlike some other Justices, such as John Marshall, Louis Brandeis, Charles Evans Hughes, and Thurgood Marshall, he did not have a historically significant career before ascending the bench. Unlike Oliver Wendell Holmes, Jr., or Learned Hand, he did not have a vibrant personality that lent itself to anecdote or to correspondence of enduring value. His historical significance lies almost entirely in his judicial opinions and in his other formal legal writings. About half of Kaufman’s volume is devoted to analyses of these writings. These discussions are for the most part thematic rather than chronological, especially with respect to the Court of Appeals years, and at times they are relatively unconnected to the strictly biographical narrative of Cardozo’s life. But it was probably wise to adopt this rather static structure. There was a static nature to Cardozo’s life, for he seems to have been unusually dedicated to routine, “most comfortable doing familiar things in familiar places.” And, with some key exceptions, such as the development of the fundamental tort concepts of duty and proximate cause, there was, perhaps surprisingly, relatively little development in Cardozo’s jurisprudence over time. At least so far as

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7. E-mail from Professor Kaufman to Stephen Hessler, Research Assistant to Professor Friedman (Jan. 27, 2000) (on file with the Michigan Law Review).


9. See Messinger, supra note 4.

10. POLENBERG, supra note 8, at 133.

11. Kaufman has indicated that the same is true with respect to Cardozo’s advocacy style: “[O]ne does not see a gradual development of the style of a master craftsman over the years. His brief writing ability appeared nearly full-blown at the outset of his career. It was really quite amazing.” Kaufman, Art of Biography, supra note 3, at 1251.
appears from Kaufman's analysis, many of his opinions could as easily have been written near the beginning or near the end of Cardozo's tenure on the Court of Appeals.

Therefore, while we clearly can hope to understand Cardozo's writings better from having them analyzed comprehensively by an able scholar like Kaufman, it is less apparent that we can understand them better from having them placed in biographical perspective. I believe, however, that, sometimes in subtle ways, we can. In Part I of this Review, I will discuss aspects of Cardozo's life and character. In Part II, I will discuss Cardozo's jurisprudential theory as revealed in his lectures and essays. In Part III, I will suggest how we gain a better perspective on his judicial opinions by understanding not only that theory but also the man and his life.

I. THE MAN AND THE LIFE

The basic biographical facts of Cardozo's life are well known. Born in 1870, he and a twin sister were the youngest of six children, the descendants on both sides of aristocratic lines of Sephardic Jews. Though raised in an orthodox household and given a rigorous training through his Bar Mitzvah, he abandoned his religious practice and faith early in life.\(^{12}\) He did, however, retain a strong sense of affiliation with the Sephardic community and pride in its traditions and in his lineage.\(^{13}\) His father, Albert, an able judge\(^{14}\) affiliated with the Tammany organization, resigned to avoid impeachment in a corruption scandal when Ben was two years old. Though the affair stained the family name, Albert Cardozo was eventually able to reconstruct his legal practice and to continue to raise his family in considerable comfort. Ben's mother, Rebecca Nathan Cardozo, died in 1879 when he was nine, after a prolonged period of physical and mental disability. Thereafter the principal responsibility for raising him fell to his sister Ellen, known as Nellie, who was eleven years his senior. Ben and Nellie lived together, at first with their father and their other siblings, until she died in 1929. Ben was educated by private tutors, in part by Horatio Alger, who prepared him for the entrance examination to

\[^{12}\text{See pp. 23-24. In 1931, he referred to "the devastating years" as having "obliterated youthful faiths." Benjamin N. Cardozo, Values: The Choice of Tycho Brahe, Commencement Address Delivered at the Exercises of the Jewish Institute of Religion (May 24, 1931), in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 1, 1 (Margaret E. Hall ed., 1947).}\]

\[^{13}\text{See p. 88. In a speech on Disraeli, given in 1898, Cardozo said, "He had renounced his faith; but he could not renounce the memories or the spirit which had been bequeathed to him by ages of ancestors more loyal than himself." POLENBERG, supra note 8, at 182.}\]

\[^{14}\text{I have scanned some of his opinions, and they appear to reflect clear thinking and expression, a sense of confidence, directness, and authority, but without the mannerisms that characterized his son's writing.}\]
At age 19, Cardozo graduated from Columbia near the top of his class and then attended Columbia Law School for two years. By this time his father had died, but he joined his older brother, Albert, Jr., in the family law office, and they continued as partners until Albert's death in 1909. Cardozo maintained a successful practice in a series of small partnerships until he was elected to the New York Supreme Court - the trial court of general jurisdiction - in 1913. About five weeks after taking his seat, he was designated to sit on a temporary basis with the Court of Appeals, the highest court in the state. He was elected a full member of the court in 1917, and Chief Judge in 1927. By this time, in part because of his opinions on behalf of the highest court of the largest and most important state and in part because of his nonjudicial writings, particularly the series of lectures published as The Nature of the Judicial Process, he was the most renowned state court judge in the nation. When Justice Holmes retired in 1932, a strong movement arose among the legal elite for Cardozo to be named as his successor. When President Hoover selected Cardozo, the nomination was approved with virtually no opposition. Cardozo sat on the Supreme Court for about five and one-half years. Together with Justices Brandeis and Stone, he formed the liberal wing of the Court during the crisis years of the mid-1930s. He did not return to the bench after a heart attack in December 1937, and he died the following July.

Cardozo has often been called a "saint." In part this is because he was, as Kaufman emphasizes, a good man, a kindly and gentle person who was loved by many of those who knew him well (pp. 1, 166-67). But Kaufman is no hagiographer, and he does not hesitate to show Cardozo's flaws. Cardozo was vain and rather smug, he had an aristocratic sense of hauteur, and, more than some other members of

15. See pp. 25-26. Alger is, of course, famous as the author of juvenile literature, particularly of the "rags-to-riches" genre with which his name is associated. Recent scholarship, discussed by Kaufman, has revealed that he had a history of pedophilia some years before working in the Cardozo household. See p. 25.

16. P. 3. "By the unanimous testimony of his contemporaries, Cardozo was a saint." GRANT GILMORE, THE AGES OF AMERICAN LAW 75 (1977). See also Richard H. Weisberg, Law, Literature and Cardozo's Judicial Poetics, 1 CARDozo L. REV. 283, 284-92 (1979) (analyzing Cardozo's sainthood as akin to that of Flaubert). Kaufman reports that Mel Siegel, one of Cardozo's clerks, said that Cardozo "looked like a saint, acted like a saint, and really was a saint." P. 482. Joe Rauh, Cardozo's last and best known clerk, said that "at that time I thought he was a saint, and came as close to being a saint as I would ever in my lifetime meet." P. 483. Another clerk, Ambrose Doskow, took a hedged position on the saint question: "Cardozo had a saintly quality to him in that he didn't like to hurt people and was very gentle and very considerate. But he had his opinions of people too and sometimes spoke out...." P. 482. A fourth clerk, Alan Stroock, came out firmly in the negative. Asked about sainthood, he replied, "Not at all. He was a very vain and in some ways intolerant man." P. 483.
the elite classes, he shared the racial and gender-based prejudices of his times.\textsuperscript{17}

The sobriquet of “saint” picks up on something more than Cardozo’s goodness. There was an other-worldly air about him. He was a person of elaborate, old-fashioned manners.\textsuperscript{18} His celebrated prose style, featuring archaic expressions and unexpected inversions, seemed to come from another time and place.\textsuperscript{19} He was almost certainly celibate. Indeed, at least to outward appearances he was asexual.\textsuperscript{20} Whether this was a matter of arrested development or repression it may be hard to say\textsuperscript{21} (and Kaufman, one restrained and gentle

\textsuperscript{17} For example, commenting to his cousin Annie Nathan Meyer about a play she had just completed, he wrote:

\begin{quote}
The love of a white woman for a black man has in it something so revolting that many — I fear most — will not wish to hear of it. . . . So do many sex perversions that it is unpleasant to think of, and still more to discuss. . . . I am thinking of the crowd, not of the judgment of the elect; and I fear that I do not misread the reaction of the multitude.
\end{quote}

P. 155

\textsuperscript{18} See p. 67 (“Profuse thanks for service — whether a glass of water from [a clerk] or a useful precedent from a law clerk — characterized his dealings with others.”). One of Chief Justice Hughes’ law clerks, Francis Kirkham, told me that when he had to deliver papers to the Court’s conferences, Cardozo, as junior justice, would open the door, bow, and greet him with a flourish, “How do you do, Mr. Kirkham.” Interview with Francis Kirkham, in San Francisco, CA (Aug. 30, 1976).


\textsuperscript{20} Learned Hand told Kaufman that sex “not just in the carnal sense alone but all that goes with it . . . was as nearly absent from his [life] as it is from anybody I ever knew who wasn’t gaited the other way.” P. 68 (quoting interview with Learned Hand, 20 (Nov. 12, 1957)) (alteration and omission in original). (Though in an earlier letter to Felix Franklin Manuscript Hand had referred to Cardozo’s “somewhat feminine nature,” POLENBERG, \textit{supra} note 8, at 134, Hand told Kaufman that Cardozo had “no trace of homosexuality.” Pp. 68-69.) Some support for the assessment of asexuality — indeed, perhaps part of Hand’s basis for it — comes from this remarkable statement by Cardozo in a letter to Hand written shortly after Nellie’s death: “Often during her life she said to me that if anything befell her, I was to remember of our life together that it had been perfect. So I think it was.” P. 193 (quoting letter from Cardozo to Learned Hand (Nov. 30, 1929). Thus, Kaufman’s statement that “we know nothing at all about the force of his sexual drive,” p. 86, strikes me as too cautious. In any event, Cardozo appears never to have made any attempt in his life to develop a romantic attachment to another person. See pp. 85-86; POLENBERG, \textit{supra} note 8, at 134.

\textsuperscript{21} Among the few private papers that Cardozo retained was one, found in his desk when he died and addressed “To whom it may Concern . . . This is to certify that I love my Nunnie better than all the rest of the world combined. Dated, N.Y., Aug. 20, 1898.” P. 85 (citation omitted). “Nunnie” is almost certainly Nellie; as Kaufman surmises, it may be that this is what Cardozo called her when he was a child and the name stuck. Judge Noonan says that this is “a remarkably childlike profession of devotion for a 28-year-old man to write and for a 68-year-old man to have preserved.” John T. Noonan, Jr., \textit{Sitting in Judgment}, N.Y. TIMES, June 21, 1998 § 7 (Book Review), at 7 (reviewing CARDOZO). And so it is — but it is
man writing a biography of another, and in as restrained and gentle a manner as academic thoroughness will allow, does not dwell on the point, but it seems he found the whole concept of sex somewhat foreign and unsettling. His domestic life was quiet, unorthodox, and in some ways ascetic; a popular book on the Supreme Court published in 1936 referred to him as a "hermit philosopher" — a description that is incorrect as to the hermit part and arguably incorrect as to the philosopher part — and even today he is sometimes spoken of as being "not altogether of this world." Especially in his later years, when he was physically and, it appears, emotionally frail, he drew support from many friends who felt it was necessary to "protect this fragile little an-

hard to know to what extent writing the note reflected a private joke, or Cardozo's recognition of Nellie's own emotional needs. See John C.P. Goldberg, The Life of the Law, 51 STAN. L. REV. 1419, 1428 (1999) (reviewing CARDOZO), and to what extent keeping it was a matter of sentiment and nostalgia. I think it is going too far to conclude, as does Professor Goldberg, that Cardozo's relationship with Nellie "was conducted on emotional terms that might fairly be described as juvenile." id. at 1431.

Goldberg also suggests that "Cardozo's childlike understanding of relationships perhaps also explains why... he became obsessed (and not in a modern, ironic way) with the saga of King Edward and Wallis Simpson... to the point of rushing home from court so that he could listen in rapt attention to the King's abdication speech." id. at 1431 n.82. But the abdication affair was gripping theater. Many people all over the world paid close attention to it, and not in a modern, ironic way — as witnessed by the series of large headlines in the NEW YORK TIMES chronicling its developments. (And just how ironic, I wonder, was the very modern attention paid by billions of people to the death of Princess Diana?) Given the time differential, and the lack of modern technology, Cardozo would have missed one of the more dramatic moments of his era if he had not rushed home.

22. See Kaufman, Art of Biography, supra note 3, at 1252-55 ("Cardozo kept a large central core hidden... Fairness to one's readers does require the biographer to search for the whole story, but that does not mean that the biographer, at least this biographer, does not feel some unease at the task.").

23. See supra note 17 (Cardozo speaking of "many sex perversions that it is unpleasant to think of, and still more to discuss"); infra note 115 (Carey, Hoadley, and Minizio cases). Kaufman comments, "Even in his later years, when he had a few friendships with some women, mostly married women, he was still noticeably shy and ill at ease until he knew them well." p. 86. In one striking episode when he was twenty-five, Cardozo — who had essentially given up religious practices shortly after his Bar Mitzvah (though he and Nellie refused to serve pork or shellfish in their home, p. 69) and who had played no role in the governance of his synagogue, Shearith Israel — organized a group of women to oppose a proposal to end the practice of seating men and women separately at religious services. Eventually, he got all the women of his family to sign a petition opposing the change, and at a meeting to discuss the change he spoke forcefully against it, in opposition to one of his uncles and several of his cousins. pp. 69-70. The incident demonstrates, as Kaufman says, that Cardozo "had become a self-confident man with a strong public presence." p. 70. But the fact that Cardozo was motivated to pour so much energy into keeping men and women separate at religious services that he did not attend suggests to me far more than that.


25. Goldberg, supra note 21, at 1422.
Kaufman, while saying that Cardozo's life was "neither a cold nor an empty one," characterizes it as "sheltered." In a sense that is true, of course, for Cardozo never knew genuine material hardship. But I think it might be more accurate to say that Cardozo was battered early and clung to shelter. His father's disgrace created considerable financial pressure, and beginning when Ben was three the family moved three times over a period of four years. Two years later, at a cruelly early age, he suffered the greatest grief a child can know: the death of his mother, and after considerable periods of separation. It may well be that this trauma — "the loss of the necessary and indispensable," as he later characterized the death of a mother — caused Ben to withdraw into the family. Illness always hovered around the family; a sister, Grace, died when Ben was fifteen, and Ben and Nellie were the only siblings to survive past middle age. One of Ben's many first cousins later "reported that in his family the Albert Cardozo house was known as 'the morgue'" (p. 22). And at least in later life — after the death of Nellie, a grievous blow that left him virtually a widower, for their relationship was spousal in virtually every respect but the physical — Benjamin Cardozo seems to have suffered, speaking very non-clinically, from some form of depression. He never adjusted very well to Washington, which he had to endure not only without Nellie but also without the continuing com-

26. P. 482 (quoting Mel Siegel); see also POLENBERG, supra note 8, at 132 (Kate Tracy referring to him as "more angel than mortal").

27. P. 568. See also Goldberg, supra note 21, at 1461 ("his sheltered existence").

28. This perspective casts a rather poignant light on Cardozo's assertion — which Kaufman indicates was very disputable (p. 396) — that it is not now, and never has been the law that a man assailed in his own dwelling, is bound to retreat. If assailed there, he may stand his ground, and resist the attack. He is under no duty to take to the fields and the highway, a fugitive from his own home.

People v. Tomlins, 213 N.Y. 240, 243 (1914).

29. See pp. 12, 22. The family had to move to a less elegant residence when Ben was three, and they moved again when he was four and seven; the last move "appears to have marked a return to former comfort." P. 19.

30. Letter from Cardozo to Learned Hand (Apr. 10, 1921), on the death of Hand's mother, quoted in POLENBERG, supra note 8, at 7.

31. In 1916, in the only letter that he wrote to Nellie that survives, he said that he would not want to keep living if anything happened to her. See p. 147. For her part, she had earlier said that she would die if he married. See p. 85.

32. From 1891, when Ben began his professional career, until 1929, when Nellie died, she was always home when he came home. Except for the last years, when she was ill, she was there to share intelligent conversation, books, chess, the piano, gossip, humor, worries, and the intimacies of family life.

Pp. 86-87. See also supra notes 20-21.

Cardozo, of course, had no children. In this respect, as Judge Noonan has pointed out, he was no different from Justices Holmes and Frankfurter — two extremely worldly jurists. See NOONAN, supra note 8, at 143. (Judge Noonan also says that Brandeis was childless. In fact, Brandeis had a daughter, Elizabeth Brandeis Raushenbush, a well-known economist.)
fort of the large and supportive body of friends he had in New York and Albany.\textsuperscript{33} Kaufman reports that at one point during Cardozo's first year in Washington he told his long-time housekeeper that he wished he were dead (p. 475). Kaufman characterizes this comment as being the product of a "moment of despair" produced by loneliness and dislocation. But it seems to have been something more. Professor John Goldberg has revealed a letter that Kaufman apparently did not find, in which Cardozo told a doctor acquaintance that he had not learned "the supreme art..., the art of living," for it was "not within [his] ken."\textsuperscript{34} "The whole business of living," he wrote, "is for me a disappointment and a bore — at least that is the way it seems during a goodly portion of my waking hours."\textsuperscript{35} When Cardozo spoke of "the battle of life,"\textsuperscript{36} he was not referring, as Holmes might have, to the lot of a soldier, who might endure danger in an attempt to scale "the snowy heights of honor."\textsuperscript{37} For Cardozo, it appears, the battle was much more quotidian, a matter of taking care of one's needs and passing safely through time.\textsuperscript{38}

Indeed, Cardozo seems to have taken a largely passive attitude towards life. Even before he took the bench, he never seems to have been part of any social, political, religious, or academic movement, or of any sustained attempt at law reform.\textsuperscript{39} He handled his cases, occasionally gave lectures, and went home. Kaufman endorses — and it appears that Cardozo himself endorsed — "the observations of others that Cardozo was not a man of passionate convictions, or at least he did not let those that he had show very often" (p. 154). Learned Hand

\textsuperscript{33} See pp. 138-39 (describing camaraderie on the Court of Appeals and Cardozo's other friendships during his Albany years).

\textsuperscript{34} Letter from Cardozo to Iago Galdston, 2-3 (Aug. 25, 1934), quoted in Goldberg, supra note 21, at 1433.

\textsuperscript{35} Id.

\textsuperscript{36} Letter from Cardozo to Arthur Corbin (Jan. 17, 1918), quoted at p. 328 (discussing DeCicco v. Schweizer, 117 N.E. 807 (N.Y. 1917) (citations omitted).

\textsuperscript{37} Through our great good fortune, in our youth our hearts were touched with fire. It was given to us to learn at the outset that life is a profound and passionate thing. While we are permitted to scorn nothing but indifference, and do not pretend to undervalue the worldly rewards of ambition, we have seen with our own eyes, beyond and above the gold fields, the snowy heights of honor, and it is for us to bear the report to those who come after us. Oliver Wendell Holmes, Jr., Memorial Day, Address at Keene, N.H., before John Sedgwick Post. No. 4, Grand Army of the Republic (May 30, 1884), in THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 80, 86 (Richard A. Posner ed., 1992).

\textsuperscript{38} "The implication [of the promise in question] is that the father appreciated the fact that husband and wife would need some aid in the battle of life, and that he promised this aid to them to induce them to proceed." Letter from Cardozo to Arthur Corbin, supra note 36.

\textsuperscript{39} Cardozo's support for continued separate seating at his synagogue, see supra note 23, might be deemed a counter example, but his (uncharacteristic) involvement appears to have been too brief and unsustained to characterize him as part of a movement.
told Kaufman that "very few have ever known what went on behind those blue eyes" (p. 568). "Although Cardozo respected and admired Brandeis," Kaufman says, "he realized that Brandeis's passionate attachment to causes set them apart" (p. 478). Unlike Brandeis — referred to as "Isaiah" by Franklin Roosevelt, among others, because he had the apocalyptic vision as well as the mien of a prophet — Cardozo had an ironic nature (p. 212) and "a tendency to treat weighty matters lightly."\(^{40}\) Kaufman says that "it was never clear whether that was a way of keeping his feelings private or a way of distancing himself from troubling subjects" (p. 478). Whichever it was — and of course it may well have been much of both — this tendency may well have stemmed in large part from the early traumas he suffered.

Cardozo, then, was not sheltered from the hurts that life can offer. More than that, for about half of his adult life he was not sheltered in the way that, say, a tenured university professor is sheltered. (Now \textit{that} is shelter!) Until he was in his mid-forties, Cardozo had no form of job security: He had to \textit{earn} his living. For more than twenty-two years, he was a practicing lawyer, a litigator, one without the insulation of a big firm to ensure a steady flow of business. Moreover, during much of this time, he was principally responsible for the financial support of one or more of his sisters; indeed, when during his years in practice he was approached about the possibility of an appointment to the federal bench,\(^{41}\) he turned the offer down on the basis familiar to

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\(^{40}\) P. 478 (reporting that Cardozo joked that Brandeis ought to pay for a statue of Hitler because Hitler had done so much for Zionism).

\(^{41}\) P. 100. Kaufman, relying on his interview with Burlingham, reports that the approach was made in 1908 or 1909 at the behest of Attorney General George Wickersham. Stephen Hessler has raised reasons to doubt the date. Wickersham did not become Attorney General until the inauguration of William H. Taft as President in 1909. Between 1907 and 1911, inclusive, there was only one open seat on the court in question, the District Court for the Southern District of New York, and it was filled by the appointment of Learned Hand in 1909. Gerald Gunther has investigated carefully the considerable evidence documenting the choice of Hand, and reports no evidence suggesting that Cardozo was a candidate at that time. \textit{See} GUNThER, \textit{supra} note 6, at 127-28; Letter from Gerald Gunther to Stephen Hessler (Jan. 26, 2000) (on file with the \textit{Michigan Law Review}). Hand himself recalled to Kaufman that he approached Cardozo about the possibility of Cardozo's taking an appointment to the federal bench; Hand was uncertain about the date, except that he said it was before 1913 (by which he probably meant it was before Cardozo's election to the state supreme court). It seems probable that Hand would make this approach only when he was already on the court — and that would mean that it concerned a subsequent vacancy. The first vacancy after the one filled by Hand, and the only other one that occurred before Cardozo was elected to the state court, occurred in 1912 and was filled with the appointment of Julius M. Mayer, who like Cardozo was Jewish. It appears to me that, although the near-century Burlingham was remarkably clear-headed when Kaufman interviewed him four and a half decades later, the probable explanation is that he got his dates wrong, and that the approach he had in mind was made with respect to that later vacancy; it appears that the federal selectors, like the state selectors who settled on Cardozo the following year, were looking for, or at least favorably disposed to the choice of, a Jewish judge. \textit{Cf.} Letter from Gunther to Hessler, \textit{supra} (saying that "the explanation I would least accept is that Burlingham remembered his dates incorrectly. I interviewed Burlingham when he was about to turn 100, and I have never seen anyone, certainly anyone of advanced age, who was
generations of judicial recruiters that he “was supporting an expensive household” (p. 101).

Cardozo’s practice has been largely overlooked — indeed, Kaufman reports that one of his colleagues advised him not to waste time trying to reconstruct it42 — for in itself it was of rather little significance. But, though Kaufman perhaps gives us less of a feel than might be wished of the dynamics of the New York Jewish bar around the turn of the twentieth century, his description of Cardozo’s years in practice is one of the most effective portions of the book. Cardozo, he makes clear, was very successful as a litigator. From an early age, he was known as a “lawyer’s lawyer,” and so he earned much of his income and most of his reputation on appeals. But, though he did write a book on the Court of Appeals while he was still in practice, he was not an academic. No doubt he was most comfortable behind the insulation of paper, but he did not hide behind it. So far as the relatively thin evidence indicates, “he was equally skilled at the trial level,” in oral practice — including cross-examination — as well as in writing (pp. 58, 80-81, 604 n.38). Repeatedly, Kaufman characterizes Cardozo as “tough,”43 and he offers ample evidence that Cardozo was a zealous, aggressive advocate, a fighter when the occasion demanded it.44 A successful litigator must marshal the evidence and mount the argu-

42. See Kaufman, Art of Biography, supra note 3, at 1249-50.

43. See pp. 3 (“[H]is life included the toughness of his many years as an ambitious lawyer.”); p. 4 (Cardozo was “a self-confident, ambitious, and tough-minded man who looked out for himself and those he loved in a conscientious pursuit of success”); p. 75 (“Cardozo’s willingness to go all out demonstrates his zeal as an advocate. He was tough.”); cf. p. 408 (“[H]e was neither a ‘hanging judge’ nor a ‘bleeding heart,’ but he was tough on the guilty.”).

44. See, e.g., pp. 71-77.
ments that are likely to win the case at bar — not to win an academic debate — and Cardozo, it turns out, was excellent at both.

That Cardozo the working lawyer preceded Cardozo the judge is a point Kaufman has emphasized in choosing a photograph for the dust jacket of the book. It is not one of the more familiar images of Cardozo, white-maned, in later life. Rather, it is a photograph from 1913, when he was running for justice of the New York Supreme Court. He looks self confident, even haughty, and more than a touch smug. Indeed, though Cardozo was shy in personal manner (though not, apparently, when he spoke in public), Kaufman makes clear that he had a strong sense of self-worth, which sometimes spilled into vanity — a product, perhaps, of his aristocratic heritage but also presumably of the fact that he always succeeded in his major activities: studies, law practice, and judging. Some years ago, the redoubtable Judge Charles E. Wyzanski, Jr., told me a story that nicely captures this side of Cardozo’s nature and also his graciousness. Wyzanski, then a young lawyer for the Government, had argued his first case before the Supreme Court, but the Government case fell apart at argument; contrary to the ruling by the court of appeals, it appeared that an order by the trial judge had extended the time for the opposing party to appeal. Cardozo wrote a very brief opinion for a unanimous Court.

Some time later, Wyzanski visited Cardozo for tea, and the conversation turned to the case. “I never thought,” said the justice, “that case was worthy of an argument by you or an opinion by me.”

This degree of self-confidence appears to have affected his contribution as a justice of the Supreme Court. Even though he was the junior justice, and even though he was dissatisfied with the assignments given to him by Chief Justice Hughes, an intimidating figure, he made his presence felt in striking ways apart from his votes. His first opinion on the Court — unlike that of any previous justice since before the time of John Marshall — was a dissent.

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45. “Aristocratic ideals fit comfortably in a man who took pride in his heritage and in his own talents.” P. 214.


47. Before Marshall became Chief Justice, the justices gave opinions seriatim. He put a prompt end to the practice. See Percival E. Jackson, Dissent in the Supreme Court 21 (1969).

48. See Coombes v. Getz, 285 U.S. 434, 448 (1932) (Cardozo, J., dissenting); see also pp. 494-95 (discussing Coombes). During Marshall’s tenure, two justices wrote their first opinions concurring in cases in which Marshall — who hogged most of the important cases — wrote the lead opinion. See Rose v. Himely, 8 U.S. (4 Cranch) 241, 281 (1808) (Livingston, J., concurring); Huidekoper’s Lessee v. Douglass, 7 U.S. (3 Cranch) 1, 72 (1805) (Johnson, J., concurring). Apart from these two justices, Cardozo was the first since the accession of Marshall whose first opinion as a justice was other than a majority opinion. (There have been several more since Cardozo, in part because this has been an era of fragmentation on the Supreme Court.) See Memorandum from Nancy Vettorello, Research Attorney, University of Michigan Law Library, to the author (Apr. 13, 2000) (on file with author). My thanks to Ms. Vettorello for tenacious research in checking out this point.
Refining Co. v. Ryan, the first case to consider the constitutionality of a New Deal program, he dissented alone — a rare event in that era — from Hughes' holding that an aspect of the National Industrial Recovery Act was unconstitutional on delegation grounds. Several months later, in Schechter Poultry Corp. v. United States, the famed "Sick Chicken" case, a broad attack on the NIRA, he again declined to join Hughes' opinion for the Court. This time, with Justice Stone joining him, he concurred separately — also a rare occurrence on the Hughes Court — and articulated the same basic grounds of decision as had Hughes but with a substantially different spin. And in three notable cases, Cardozo had an unusually significant impact behind the scenes. Unlike the next most junior justice, Owen Roberts, whom I have suggested suffered from a form of judicial timidity, Cardozo did not hesitate to make his views known.

49. 293 U.S. 388 (1935).

50. 295 U.S. 495 (1935).

51. In Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), Cardozo wrote a draft concurrence that he eventually withdrew after Hughes, writing the majority opinion, added a passage incorporating much of its substance. See pp. 500-02. As Kaufman says, this draft "was a forceful and candid justification for reinterpreting constitutional provisions in light of their purposes and in light of changing conditions of society." P. 502. Cardozo's emphasis on the importance of growing social interaction (speaking of the state "furthering its own good by maintaining the economic structure on which the good of all depends," p. 500-501 (citations omitted)), had been foreshadowed as long ago as 1921. See BENJAMIN N. CARDOZO, Introduction. The Method of Philosophy, in THE NATURE OF THE JUDICIAL PROCESS 9, at 24 (1931) (speaking of "the growing complexity of social relations" as having revealed the inadequacy of the earlier rule "that A. may conduct his business as he pleases, even though the purpose is to cause loss to B., unless the act involves the creation of a nuisance").

In Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935), in which the Court held unconstitutional a federal statute requiring railroads subject to the Interstate Commerce Act to establish retirement and pension plans, Cardozo helped Hughes craft his fine dissent. Cardozo suggested the analogy between a pension law and workmen's compensation laws. "What is the distinction between compensating men who have been incapacitated by accident (though without fault of the employer), and compensating men who have been injured by the wear and tear of time, the slow attrition of the years?" Pp. 519-20 (citations omitted). Hughes adopted the argument and much of the language. See 295 U.S. at 384.

In Grosjean v. American Press Co., 297 U.S. 233 (1936), Cardozo turned the Court around. Louisiana, under Huey Long, had passed a statute taxing the advertising receipts of newspapers and other periodicals. Justice Sutherland originally wrote an opinion of the Court holding the tax invalid as a denial of equal protection because it made the size of the tax depend on the publication's circulation. Cardozo drafted a concurrence that rejected this basis and concluded that the tax was a violation of freedom of the press because it discriminated against newspapers in favor of other forms of business. Sutherland rewrote his opinion, adopting a rationale much like Cardozo's. See pp. 539-41.

52. I made this suggestion in a previous article. See Richard D. Friedman, Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation, 142 U. PA. L. REV. 1891, 1944 (1994) [hereinafter Switching Time]. Professor Barry Cushman has challenged the characterization, properly pointing out that some of Roberts' decisions for the Court were anything but timid. See BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 262-63 n.58.
In short, Cardozo was a man with pride in his heritage and pride in himself, who had achieved considerable success before he took the bench. He was a practical lawyer with a good understanding of commercial relations, but usually a dispassionate person, not committed to particular causes, who lived a personal life for most of his adulthood that most people would find unfulfilling and that perhaps ultimately he did as well, but that apparently satisfied his need for security.

II. THE JURISPRUDENTIAL THEORY

At the outset of Kaufman's account of Cardozo's juristic work — by which I mean Cardozo's opinions and his writings about the law — Kaufman asserts that "Cardozo's enduring importance arises out of his approach to judging" (p. 199). This may seem a rather bland basis on which to build such a great reputation. But I think there is a large measure of truth in it. Cardozo had a keen understanding of how the law both persists and evolves and of the role of a judge both in implementing and in altering it. He expressed this understanding with great lucidity and flair in *The Nature of the Judicial Process* and other writings. For this reason, Kaufman is justified in making what might appear to be the unusual step of beginning his analysis of Cardozo's juristic work with an exposition of these writings. I will do the same.

Cardozo took an organic, Darwinian, and very optimistic view of the development of law. "In the life of the mind as in life elsewhere," he wrote, "there is a tendency toward the reproduction of kind. Every judgment has a generative power. It begets its own image." But begetting is not limited to replication, because the judgment becomes "the source from which new principles or norms may spring .... Not all the progeny of principles begotten of a judgment survive, however, to maturity. Those that cannot prove their worth and strength by the test of experience, are sacrificed mercilessly and thrown into the

53. See CARDozo, supra note 51, at 21.
While bad judicial work — as measured by that test, "the laboratory of the years" — is "pretty sure to perish," perhaps after "work[ing] a little confusion for a time," good work endures, and becomes "the foundation on which new structures will be built." Thus, "[n]othing is stable. Nothing absolute. All is fluid and changeable. There is an endless 'becoming.'" In this process, "[t]he common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars." Thus, the underlying process of change is usually gradual, "inch by inch" but with "the power and the pressure of the moving glacier." Recognition of the change, however, may come suddenly with a shift of paradigm:

Little by little the old doctrine is undermined. Often the encroachments are so gradual that their significance is at first obscured. Finally we discover that the contour of the landscape has been changed, that the old maps must be cast aside, and the ground charted anew.

This transformation may yield "a new generalization which, applied to new particulars, yields results more in harmony with past particulars, and, what is still more important, more consistent with the social welfare." This perspective led to what Kaufman calls "a model for judging that emphasized both its creative possibilities and its limits." Cardozo's experience in practice and on the bench gave him a good, realistic — small "r" — understanding both that to a substantial degree judges are constrained by doctrine and that to a substantial degree they are not.

54. See id. at 22.
55. See BENJAMIN N. CARDOZO, Adherence to Precedent. The Subconscious Element in the Judicial Process, in The Nature of the Judicial Process, supra note 51, at 142, 178-79. See also id. at 179 ("In the endless process of testing and retesting, there is a constant rejection of the dross, and a constant retention of whatever is pure and sound and fine.").
56. See CARDOZO, supra note 51, at 28.
57. Id. at 22-23.
58. Id. at 25.
59. See CARDOZO, supra note 55, at 178.
60. See CARDOZO, supra note 51, at 25.
61. P. 199. See, e.g., BENJAMIN N. CARDOZO, Functions and Ends (Continued). Conclusion, in The Growth of the Law 109, 143 (1924) ("The victory is not for the partisans of an inflexible logic nor yet for the levelers of all rule and all precedent, but the victory is for those who shall know how to fuse these two tendencies together in adaptation to an end as yet imperfectly discerned.").
62. Of course, he was not alone in this dual recognition. Consider this famous passage by Justice Holmes:

I recognize without hesitation that judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not
In most cases, Cardozo stressed, the judge's job is essentially to determine the law as it has been ordained in prior cases and to apply it to the facts at hand — "a process of search, comparison, and little more." A majority of cases in the Court of Appeals, he wrote in *The Nature of the Judicial Process*, "could not, with any semblance of reason, be decided in any way but one." And "[i]n another and considerable percentage, the rule of law is certain, and the application alone doubtful," requiring analysis "to determine whether a given situation comes within one district or another upon the chart of rights and wrongs." Though such cases might "provoke difference of opinion among judges," "jurisprudence remains untouched... regardless of the outcome." Cardozo believed that "adherence to precedent should be the rule and not the exception" as a matter of both practicality — "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case" — and principle, offering litigants "faith in the even-handed administration of justice in the courts." And similar factors explained "the tendency of precedent to extend itself along the lines of logical development." Thus, Cardozo perceived a presumption in favor of what he called the "method of philosophy," or the application of rules of logic and analogy, in determining judicial outcomes. Although he recognized that judges had sometimes spoken as if principles of logical development "meant little or nothing in our law," he denied the practicality of such a proposition: "Probably none of them in conduct was ever true to such a faith." In response to Karl Llewellyn, Jerome Frank, and others whom he pointedly called "neo-realists," he em-

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63. Cardozo, supra note 51, at 20.
64. Cardozo, supra note 55, at 164.
65. Id.
66. Id. at 165.
67. Id. at 149.
68. Cardozo, supra note 51, at 34.
69. Id.
70. Id. at 30.
71. Id. at 32.
72. "There were brave men before Agamemnon; and before the dawn of the last decade there were those in jurisprudence who strove to see the truth in the workings of the judicial process, to see it steadily and whole, and to report what they had seen with sincerity and candor." Benjamin N. Cardozo, Jurisprudence, Address Before the New York State Bar Association Meeting, Hotel Astor (Jan. 22, 1932), in Selected Writings of Benjamin Nathan Cardozo, supra note 12, at 7, 10-11.
phasized that "order and certainty and [rational] coherence" retained value in the law, even though not conclusive value, and that adherence to precedent advanced these values.\textsuperscript{73} What is more, especially in workaday cases, he accorded significance to the language of the law — the judges' articulation of principles — and not merely the outcomes they reached: "If I consult my own experience, and ask what judges do in building law from day to day, I find that for the average run of cases what our predecessors have said is a generative force quite as much as what they have done."\textsuperscript{74}

Cardozo recognized that while this description — judges being constrained by logical application of precedents, and in particular by their language — fit the usual case, it did not fit all. Sometimes logical application of precedent would not carry far enough to resolve a case;\textsuperscript{75} sometimes principles and precedents appear to be in conflict;\textsuperscript{76} and sometimes they lead in directions so unattractive that a judge is disinclined to follow. In such cases, other forces come into play. Cardozo spoke of the "method of evolution," understanding a principle or area of law in light of its historical evolution,\textsuperscript{77} and the "method of tradition," understanding and applying a principle according to the customs of the community.\textsuperscript{78} But he was principally interested in what he called the "method of sociology," which emphasized social welfare. Cardozo regarded this factor not only as

\begin{itemize}
\item \textsuperscript{73} Id. at 14-16; see also id. at 30 ("[T]here must always be remembrance of the truth that of the ends to be achieved definiteness and order are themselves among the greatest and most obvious.").
\item \textsuperscript{74} Id. at 19. Cardozo cautioned that he was referring not to dicta — though he recognized that even they "have been propagating forces and have borne a fruitful progeny" — but to "the professed and declared principle dictating the conclusion." See id. at 19-20.
\item This essay generated a heated private response from Jerome Frank. See pp. 458-60. Professor Goldberg takes Kaufman to task for concluding that "Jerome Frank was simply too ethereal for Benjamin Cardozo." P. 461. According to Goldberg, "Cardozo did not reject Frank's Realism because he found it 'too ethereal.' He rejected it because he thought it was wrong! And he thought it was wrong because of its reductionist claim that legal concepts and principles must be reduced to statements about observable causes and consequences." Goldberg, \textit{supra} note 21, at 1453. Goldberg is surely right that Cardozo thought Frank was wrong, and for the reason he says — and I do not think that Kaufman meant to suggest otherwise. But it also seems clear that at least one reason why Cardozo thought Frank was wrong was that this "reductionist claim" ignored the reality that Cardozo confronted every day, that doctrine has generative and constraining force. (I find quite mystifying Goldberg's assertion that "Posner and Kaufman ... do[] their best to ignore Jurisprudence." See Goldberg, \textit{supra} note 21, at 1453. In fact, Posner describes it as "neglected" and as a fitting capstone to Cardozo's writing on jurisprudence. See \textit{POSNER, supra} note 1, at 21, 31. Kaufman gives a full and fair description of the lecture, its background, and its aftermath.)
\item \textsuperscript{75} See \textit{CARDozo, supra} note 51, at 49.
\item \textsuperscript{76} See id. at 40.
\item \textsuperscript{77} See id. at 30-31; \textit{CARDozo, supra} note 62, at 51-58.
\item \textsuperscript{78} See \textit{CARDozo, supra} note 51, at 31; \textit{CARDozo, supra} note 62, at 58-64.
\end{itemize}
ascendant but also as ultimately determinative: "The final cause of law is the welfare of society." 79

Definite as he was about the significance of social welfare, Cardozo was vague about its content. It was, he acknowledged, an amorphous concept, meant to include "public policy, the good of the collective body," and "adherence to the standards of right conduct, which find expression in the mores of the community" — in short, the social consequences of a decision. 80 Of course, vagueness and indeterminacy are pervasive in this analysis, and to a large extent Cardozo knew it. At least in part to limit subjectivism, Cardozo spoke of community mores, 81 but how is one to determine them? Fundamentally an elitist, Cardozo said that one must find "the customary morality of right-minded men and women." 82 Ah, thank you very much. 83 And more broadly, how could one ascertain to what degree each of the "forces and methods" Cardozo identified should determine the result in a given case? Cardozo acknowledged that he offered "[n]o recipe for the mingling of the ingredients," and he doubted whether one could be developed, "unless it be as a hint, an illustration, a suggestion." 84

Inevitably, then, Cardozo recognized a substantial degree of indeterminacy in the law — and more than that, a law-making function for judges. Once again, that realization stemmed from his practical experience. "I was much troubled in spirit, in my first years upon the bench," he wrote,

to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules . . . . As the years have gone by . . . I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I

79. CARDozo, supra note 62, at 66. This passage is presented prominently on the wall of the lobby of the Benjamin N. Cardozo School of Law in New York City.

80. CARDozo, supra note 62, at 72; see id. at 65-66.

81. In a letter to Learned Hand, Cardozo expressed the hope that in his judicial work he was "interpreting the common will," the fear that this was "a sham," and the sense that he was "expressing thoughts and convictions not found in the books and yet not totally [his] own." P. 215.

82. BENJAMIN N. CARDozO, The Method Sociology. The Judge as a Legislator, in THE NATURE OF THE JUDICIAL PROCESS, supra note 51, at 98, 106. Kaufman discusses criticisms of this passage — that it is vague, that it is elitist, and that it is a euphemism for the judge's own values. See pp. 214-16.

83. Moreover, as Kaufman points out, "Cardozo espoused the dominance of community standards, both as actually practiced and in their normative or ideal sense, without advertising the problem that these two standards, actual and normative values, might often conflict with one another." P. 211.

have grown to see that the process in its highest reaches is not discovery, but creation.  

Perhaps to a modern — or post-modern — eye this whole analysis seems totally trite, a statement of the obvious without an attempt to answer hard questions, particularly questions of degree.  

But however trite Cardozo's analysis may appear now, clearly it did not when he offered it. Moreover, even today there are those who would say from one side or the other that it is wrong — either that it overstates the determinacy of the law or that it overstates the freedom of judges to craft law. And yet it seems to me, along with some notable judges, that Cardozo not only got it basically right but that his perspective continues to offer a useful guide to judging.  

What I find most interesting about Cardozo's approach is his confidence in non-absolutes. "We are tending more and more," he wrote, "toward an appreciation of the truth that, after all, there are few rules; there are chiefly standards and degrees." Composed to "days when the law of nature supplied us with data that were supposed to be eternal and unyielding," the modern era — in which Cardozo like many others had lost the faith of his ancestors — required that "[u]niversals . . . be handled more charily."  

But he did not fear that as a result law would collapse into a state of indeterminacy. The principal reason for this confidence was that he had a strong sense of proportion, a recognition that even given disruptive forces a structure can retain its integrity if the forces tending to hold it together are strong enough. "The form and structure of the organism are fixed," he wrote. "The cells in which there is motion do not change the proportions of the mass. Insignificant is the power of innovation of any judge, when compared with the bulk and pressure of the rules that hedge him on every side."  

85. CARDozo, supra note 55, at 166.  

86. Grant Gilmore said that The Nature of the Judicial Process "has almost no intellectual content." GILMORE, supra note 16, at 76.  


88. See POSNER, supra note 1, at 31-32 ("I believe . . . that little that has survived of legal realism cannot be found, more articulately as well as more temperamently expressed, in Cardozo's jurisprudential writings. The limitations of his jurisprudence are the limitations of pragmatic jurisprudence generally."); Kaye, supra note 1, at 1041 ("[D]espite my own wide reading about my beloved craft, I have yet to find a better articulation of what appellate judges do."); Noonan, supra note 21, at 7 (calling The Nature of the Judicial Process "still the best account of the judge's job").  

89. CARDozo, supra note 55, at 161.  


91. CARDozo, supra note 82, at 136-37.
And a corresponding reason was that judges generally recognized the limitations on them. He admired the "magisterial" or "imperious" style characterized by the opinions of John Marshall. But he believed that with growing recognition that the development of the law was "a process of adaptation and adjustment" came increased use of styles "more conciliatory and modest," marked by statements that were "timid and tentative approximations, to be judged through their workings, by some pragmatic test of truth."

Kaufman concludes that Cardozo "exemplified... in his judicial opinions" the perspective he articulated in The Nature of the Judicial Process and other jurisprudential writings (p. 199). I believe he is right, and now I will turn to the opinions.

III. THE JUDICIAL OPINIONS

Cardozo has been called — with appreciation in each case — "perhaps the premier Realist judge" and "one of the most sophisticated and accomplished anti-Realist judges of this century." And Cardozo himself probably would have regarded the difference as a fine illustration of what he termed, in one of his many memorable phrases, "the tyranny of labels."

On the one hand, it is clear, as Kaufman shows, that Cardozo gave force to concepts in the law such as consideration and duty. He considered himself constrained by the force of precedent and doctrine,

92. Cardozo, supra note 90, at 15.
94. Goldberg, supra note 21, at 1423.
95. Snyder v. Massachusetts, 291 U.S. 97, 114 (1934).
96. Despite Gilmore's characterization of Cardozo as a judge who "could, when he was so inclined, find consideration anywhere," GRANT GILMORE, THE DEATH OF CONTRACT 69 (Ronald K.L. Collins ed., 2d ed. 1995) (1974), Kaufman shows that Cardozo "was not always so inclined,... holding fast to traditional doctrine" when the alternative seemed to be destruction of the basic doctrine, p. 324 (discussing Dougherty v. Salt, 227 N.Y. 200 (1919)).
97. Cardozo's general attitude toward the law of accidents derived from his acceptance of the central fault-based principle of negligence doctrine. That acceptance took him a long way toward the decision of most negligence cases, for he did not constantly have to revisit first principles.... He sought to apply doctrine impartially, in line with its purposes.

P. 264. See also p. 265 ("A major theme of Cardozo's negligence decisions was his effort to develop a coherent explanation of two troublesome concepts, duty of care and proximate cause, that helped define the extent of a defendant's liability to an injured party."); pp. 345-46 ("The field [of the statute of frauds] is one where the law should hold fast to fundamental conceptions of contract and duty, and follow them with loyalty to logical conclusions.") (quoting Imperator Realty Co. v. Tull, 228 N.Y. 447, 455 (1920)). That Cardozo was a conceptualist is the major thrust of Professor Goldberg's review. See, e.g., Goldberg, supra note 21, at 1463 (Macpherson, Hynes, and Palsgraf "each posed problems in the application of the concept of duty, problems that he thought had to be resolved by a careful and sensitive analysis of precedents and the concepts contained within them.").
even on constitutional matters and even when it led to results that he found unattractive. 98

Indeed, Cardozo's opinions taken as a whole are marked by the lack of passion that seems to have characterized him personally. On the bench, as before, he carried on no crusades. At least excluding his Supreme Court tenure, in virtually no area of the law does he appear to have been ahead of his time, 99 and — though he was not inhibited about dissenting — he built his reputation on opinions he wrote for his court, not on separate opinions in which he wrote for himself. 100 He does not appear to have had any agenda, except at the most general level. 101 Often an opinion that appeared to advance a doctrine but stated limitations on it was followed by another that applied the limitations. As Kaufman repeatedly emphasizes, when Cardozo articulated a doctrine, he meant what he said, and he took the limitations seriously. 102 He frequently demonstrated "consistency . . . in the face of sympathetic facts for an opposite conclusion." 103

98. Usually, when Cardozo did not think that the rule should be altered, he followed it and accepted the consequences, as in the teachers' pension cases [O'Brien v. N.Y. State Teachers' Retirement Board, 155 N.E. 884 (N.Y. 1926), and others discussed at pp. 430-32] in which the strict enforcement of procedural rules deprived the beneficiaries of benefits. Sometimes, especially in his private memoranda to his colleagues on the Court of Appeals, Cardozo was explicit that the result called for by applicable legal principles was harsh, but that the court had no power to alter it. His eventual refusal to recognize a remedy for the wife in Allen v. Allen [159 N.E. 656 (N.Y. 1927)], whose husband had jailed her without cause, was just such a case.

P. 573; cf. p. 488 (Cardozo writing to a friend: "What is the use of striving for standards of judicial propriety" if "lapses" such as a magistrate's inflammatory opinion in dismissing charges against anti-Nazi demonstrators are condoned?) (citations omitted); p. 514 (to the same friend: "The difficulty is that most people fancy it to be the business of a court to condemn as 'unconstitutional' everything that is unfair. Nothing of the kind! There is room for a lot of immorality within the confines of the constitution and of constitutional law.") (citations omitted).

99. For example:

Cardozo . . . stood by the assumption of risk defense. He believed that life was risky and that risks had to be accepted. . . . [He] simply followed the rule that denied recovery when the risk was obvious without any consideration whatsoever of the economic pressures that might cause a worker to take a chance with his own life.

Pp. 258-59; see also, e.g., p. 310 ("Cardozo approached negligence law with a fundamental acceptance of its central premises, even when some of its principal features, including the dominance of the fault principle over strict liability and the persistence of some of the defenses to the negligence action, were coming under strong attack.").

100. Dissent presumably plays a comparatively larger role in Cardozo's contribution on the Supreme Court than on the Court of Appeals because of the very different institutional and ideological climates on those courts during his tenures, not because of any changing personal orientation on the part of Cardozo.

101. Cf. Posner, supra note 1, at 127 ("The second most important factor in Cardozo's eminence may well be his judicial program . . . of bringing law closer to the (informed) non-lawyer's sense of justice.").

102. See, e.g., pp. 309, 556-57.

103. P. 430. See also p. 318 (discussing the suggestion that Cardozo's decision for the plaintiff in Wood v. Duff Gordon, 222 N.Y. 88 (1917), was motivated by sympathy for the
On the other hand, as Chief Justice Hughes said in his glistening memorial tribute, for Cardozo "the distrust of a concept was the beginning of wisdom." This distrust was related to his disinclination to see a world of absolutes, a disinclination reflected notably in his flexible conception of due process, and also to a reluctance to make syllogistic reasoning and so too intermediate conclusions — determinative. That is what I think he meant by speaking disparagingly about "the tyranny of labels" and, in Hynes v. New York Central R.R. Co., about "a jurisprudence of conceptions... the extension of a maxim or definition with relentless disregard of consequences to a dryly logical extreme."

In Hynes, a young boy was standing on a plank that extended from the railway's right of way and was preparing to dive into the river below, as a companion had just done, when electrical wires of the railway struck him, causing his death. According to the railway and the courts below, the plank was a fixture, and therefore constructively an extension of the railway's land, and therefore Hynes was a trespasser in standing on the plank, and therefore the railway could be liable to him only for its willful or wanton conduct. The railway, noted Cardozo, insisted on this conclusion "as a merely inevitable deduction." But Cardozo showed how, according to this chain of logic, the result could depend upon narrow factual distinctions that seemed to bear no rational relation to the question of whether the railway should be held liable. "We may be permitted," he said, "to distrust the logic that leads to such conclusions."

It was important, he said, not to treat

worker plaintiff). As noted by Kaufman, "The judge who took verdicts away from children in Perry [v. Rochester Lime Co., 219 N.Y. 60 (1916)] and Adams [v. Bullock, 227 N.Y. 208 (1919)] and from a poor widow in Palsgraf would not have been troubled about holding a salesman to his contract." P. 318. Judge Noonan makes a point of the fact that Cardozo imposed costs on the losing plaintiff in Palsgraf. See NOONAN, supra note 8, at 144. Judge Posner offers reasons to doubt the significance of this fact. See POSNER, supra note 1, at 16-17, 36-37; see also p. 656 n.43.

104. 305 U.S. at xxvi (1938) (Hughes, C.J., memorial tribute in memory of Mr. Justice Cardozo).

105. See Snyder v. Massachusetts, 291 U.S. 97, 115 (1934) (making the test "whether in the particular conditions [of the case, the alleged violation] is so flagrantly unjust that the Constitution of the United States steps in to forbid it"); Palko v. Connecticut, 302 U.S. 319, 325 (1937) (listing liberties that "might be lost, and justice still be done"); but cf id. at 326-27 (regarding freedom of thought and speech as "the matrix, the indispensable condition, of nearly every other form of freedom").

106. 131 N.E. 898, 900 (N.Y. 1921) (quoting in part Roscoe Pound, Mechanical Jurisprudence, 8 COLUM. L. REV. 605, 610 (1908), and Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911) (Holmes, J.). See also Schubert v. August Schubert Wagon Co., 164 N.E. 42, 42 (N.Y. 1928) (also referring to "a jurisprudence of conceptions" and saying, "Few formulas are meant to serve as universals. A progeny deformed or vicious may be known as illegitimate.").


108. Id.
“[t]he approximate and relative” as “the definite and absolute.” In this case, unlike the usual case of trespass on a private structure, “structures and ways” were “so united and commingled, superimposed upon each other,” that there was “little help in pursuing general maxims to ultimate conclusions.” Young Hynes might be viewed as a trespasser, but the more realistic view was that he was “still on public waters in the exercise of public rights.” The bottom line, therefore, was that the case should be placed “in the field of liability and duty” rather than in that of “immunity and exemption.”

As Hynes suggests, Cardozo emphasized the need to make legal results conform to a practical, realistic understanding of a situation. Kaufman repeatedly emphasizes that, largely because of his extensive experience in practice, Cardozo had a good understanding of commercial affairs, and he worked hard to make the law reflect these realities. But even apart from commercial matters, Cardozo usually had a knowing way about him, except in matters related to sex, his opinions virtually always seem based on good comprehension of the

109. Id. at 900.
110. Id.
111. Id.
112. Id.
113. See, e.g., p. 315.
114. Kaufman emphasizes that Cardozo was “confident in his ability to read case records and decide when a factual issue was sufficiently clear that it should be decided by the court and not by a jury,” p. 257, because he “brought from his own legal practice a confidence in his own ability to grasp particular factual settings,” p. 254.
115. In Mirizio v. Mirizio, 161 N.E. 461 (N.Y. 1928), the plaintiff sued her husband for separation on grounds of nonsupport. The defendant, an auto mechanic, defended on the basis that she had refused to live with him as his wife. The plaintiff eventually testified that she had been willing to live with him but not to have sexual intercourse until they had been married in a religious ceremony. Cardozo responded that this would not have been a bona fide offer: “For people in their social station, dwelling in one or two rooms, such an offer, if made, would have the aspect of a subterfuge.” See id. at 462. As Kaufman says, the gratuitous reference to social station “suggests considerable lack of knowledge on Cardozo’s part about the sexual proclivities of people of his own social station.” P. 231. In Hoadley v. Hoadley, 155 N.E. 728 (N.Y. 1927), Cardozo wrote an opinion denying a husband’s plea for annulment of the marriage on the ground of the wife’s insanity. As Professor Polenberg has shown, Cardozo was affected by “fears of male concupiscence,” POLENBERG, supra note 8, at 145, which he expressed in the overripe line, “There is instinctive revolt against the notion that infirmity of the mind shall be used as a pretense for relief against satiety of the body,” 155 N.E. at 732. According to Polenberg, however, there was nothing in the record suggesting that the husband sought the annulment because he had tired of the wife sexually. See POLENBERG, supra note 8, at 146-47. In People v. Carey, 119 N.E. 83 (N.Y. 1918), the court reversed a rape conviction because the corroboration requirement had not been met, but Cardozo was among a minority that would have held additionally that the trial court had erred in refusing to admit evidence that the victim was unchaste. “The truth remains,” he wrote in an unpublished draft opinion, “that chastity has once been yielded, that honor has been lost, and that great motive which inspires resistance even unto death has gone. To deny this is to ignore a truth which all history and all literature and all experience proclaim.” P. 404 (citations omitted). As Kaufman says, it was doubtful that this view “was derived from experience, certainly not his own.” P. 404.
states of mind — desires, intentions, motivations, fears, and the like — of the people who play significant roles in his cases.\textsuperscript{116}

\textit{Hynes} also illustrates Cardozo's emphasis on matters of degree; in \textit{Hynes}, as in many cases, a little more or less of one ingredient might alter the result. Therefore, language — or at least the amount of language that could practically be used in a judicial opinion — was frequently inadequate to convey to future readers the full texture of a doctrine. He put the point pungently in his notable dissent on the Supreme Court in \textit{Carter v. Carter Coal Co.}, objecting to the Court's use of a direct-indirect distinction to determine the scope of Congress's commerce power: "[A] great principle of constitutional law is not susceptible of comprehensive statement in an adjective. The underlying thought is merely this, that 'the law is not indifferent to considerations of degree.'"\textsuperscript{117} Because statement of doctrine is often so difficult — an opinion could not always hope to articulate and delimit all the factors that led to the decision — Cardozo believed that a judge must allow himself "a certain margin of misstatement."\textsuperscript{118}

Thus, while clarity was an important goal of language in a judicial opinion, it was not the exclusive value that language could serve.\textsuperscript{119} An opinion might be a tentative foray in a general direction; precisely how the law would move then would have to be left to the future.\textsuperscript{120} In a Darwinian world, something more than mere clarity, such as an aphoristic touch, would be necessary to help the opinion "win its way."\textsuperscript{121}

\textsuperscript{116} Kaufman suggests an exception with respect to the assumption of risk defense:

Cardozo had no personal experience that would have taught him how workers often had to accept dangerous conditions in order to make a living. While he was willing to protect train passengers like himself who were in a hurry to leave the train, he had never had a job like washing windows.

P. 259. But neither have most judges had such experience, and Cardozo, as Kaufman points out, p. 645 n.46, had cases in practice that could have sensitized him to the issue. Certainly Cardozo understood the concept of economic pressure. \textit{See}, e.g., Letter from Cardozo to Arthur Corbin, \textit{supra} note 36 ("Husband and wife would need some aid in the battle of life."); Coler v. Corn Exchange Bank, 164 N.E. 882, 885 (N.Y. 1928) ("The law does not stand upon punctilios if there is a starving wife at home."). And it seems highly improbable that Cardozo had ever jumped off a railroad plank into a river — but that was a situation he understood well enough.

\textsuperscript{117} 298 U.S. 238, 327 (1936) (quoting Schechter Poultry Corporation v. United States, 295 U.S. 495, 554 (1935)).

\textsuperscript{118} Cardozo, \textit{supra} note 90, at 7.

\textsuperscript{119} \textit{See id. at 9}. A related point is that Cardozo had a tendency to include in his opinions all reasons supporting his conclusion. Kaufman is probably correct in attributing this tendency to the lawyer's habit of including in an argument all significant supporting points. \textit{See} p. 446. But I think there is something more as well: If a judge finds it difficult to articulate just why a given result should be reached, then the natural tendency is to offer all significant supporting reasons, leaving the case incompletely theorized.

\textsuperscript{120} \textit{See supra} note 61 (quoting Cardozo's statement on "adaptation to an end as yet imperfectly discerned").

\textsuperscript{121} Cardozo, \textit{supra} note 90, at 9.
Cardozo therefore saw a two-sided aspect to legal metaphor, expressed beautifully in the famous passage in *Berkey v. Third Avenue Railway*: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." On the one hand, metaphors may liberate thought — and Cardozo used them freely; note how many are floating around in the sentence just quoted — because they may capture the essence of an idea difficult to articulate with precision. I suspect this helps explain why so many of Cardozo's metaphors express matters of degree, often in spatial terms, or refer to matters from the natural world that are subjected to an interplay of forces closely analogous to that perceived by Cardozo in development of the law, or do both. On the other hand, good analysis would be impaired if a problem became so "enveloped in the mists of metaphor" — there he goes again! — that the aphoristic resolution became an intermediate doctrinal proposition with a life of its own.

It seems clear that Cardozo's use of language helps explain why so many of his opinions have won their way — they are remarkable Darwinian survivors, still contributing to legal discourse. In part, this is because of Cardozo's ability to phrase a point in arresting and memorable terms. And in part it may have been because, as Professor William Powers, Jr., has written, sometimes "Cardozo's rhetoric papers over rather than solves or even elucidates the real analytic prob-

123. For example, Cardozo wrote that:

Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Where the line is to be drawn between the important and the trivial cannot be settled by a formula.

124. *Carter v. Carter Coal Co.*, 298 U.S. 238, 327 (1936) ("At times . . . the waves of causation will have radiated so far that their undulatory motion, if discernible at all, will be too faint or obscure, too broken by cross-currents, to be heeded by the law."); Weisberg, *supra* note 16, at 325 ("Seizing upon the dramatic visual aspects of [Hynes] . . . Cardozo thrice prepared his audience for the ultimate outcome by enveloping crucial legal points in metaphors of geometry and nature."); see also Richard H. Weisberg, *Poethics* 19-20 (1992).
127. Thus, in *Berkey*, Cardozo wrote:

We say at times that the corporate entity will be ignored when the parent corporation operates a business through a subsidiary which is characterized as an 'alias' or a 'dummy.' All this is well enough if the picturesqueness of the epithets does not lead us to forget that the essential term to be defined is the act of operation.

*Id.*
If metaphor makes an opinion so flexible that it becomes (to mix metaphors) a "litigant's wishing well, into which . . . one may peer and find nearly anything he wishes," the opinion's chance of survivorship may increase even if its prescriptive usefulness decreases. But the role of language in the durability of Cardozo's opinions is also attributable to the fact that he was able to place matters in an altered light. As Arthur Corbin said, "When Cardozo is through, the law is not exactly as it was before; but there has been no sudden shift or revolutionary change."

In some of his most famous opinions, then, Cardozo made modest claims as to what he was doing. This is a common enough judicial tendency though one that exposes him to charges of sleight of hand. Kaufman, strikingly but appropriately, makes similarly modest claims as to what Cardozo accomplished. Cardozo readjusted the law, and perhaps recognized changes that had occurred but had not yet been well articulated, but he did not make startling leaps. Cumulatively, though, these "small but important" changes amount to a very substantial contribution for one judge to make to the evolution of the law.


130. Pp. 358-59 (quoting Arthur L. Corbin, Mr. Justice Cardozo and the Law of Contracts, 52 HARV. L. REV. 408, 409 (1939)).

131. With respect to MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916), Kaufman writes that Cardozo's opinion "virtually completed the process" established by a line of New York cases that "had broadened the exception [to the privity requirement] for dangerous articles to the point where it seemed about to swallow the general rule of non-liability." P. 271. Cardozo's opinion "did not acknowledge that any important principle was at stake.... Cardozo presented the new rule in the most modest terms. This style of argument would become typical of Cardozo's writing—the attempt to narrow differences of principle or to turn apparent differences of principle into differences of application." P. 273. Kaufman shows that Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928), "did not represent a radical shift from traditional negligence doctrine. It was traditional doctrine, newly formulated." P. 303. It is, of course, "a legal landmark," because of "[t]he bizarre facts, Cardozo's spin on the legal issue, the case's timing in relation to the Restatement project, its adaptability for law-school teaching, the policy-oriented dissent by Andrews, Cardozo's rhetoric, and Cardozo's name." Id. In Allegheny College v. National Chautauqua County, 159 N.E. 173 (N.Y. 1927), Kaufman writes, Cardozo "demonstrate[d] how the case could be fitted within the traditional view of consideration without recourse to 'the innovation of promissory estoppel.' " P. 333 (quoting Allegheny College, 159 N.E. at 175). He also points out the strain in doing so. See p. 662 n.74 (noting that Alfred Konefsky, How to Read, or at Least Not Misread, Cardozo in the Allegheny College Case, 36 BUFFALO L. REV. 645 (1987), contends that "Cardozo expanded consideration while purporting to respect conventional doctrine").

132. "When he was done, he had clarified and changed New York contract law in small but important ways." P. 313.
CONCLUSION

Drawing conclusions about a judge's judicial work from knowledge about his life is a tricky business. One can point to some set of experiences as leading to a given orientation, but another judge with rather similar experiences may have a significantly different orientation. The "infinite processes" that make a person who he is133 are not subject to full understanding even after massive amounts of research. Nevertheless, understanding Cardozo the man may enrich our understanding of Cardozo the jurist. Cardozo sought to play an important part in the world, even as he sought protection from it. The roles of a lawyer — particularly an appellate lawyer — and of a judge suited him well, not only because his most important companions were books and papers, but also because he did not need to be a crusader, an initiator, or a promoter to succeed. Rather, Cardozo's role, one that suited his largely dispassionate and passive personality, was to do the best he could analyzing the cases that came before him, dealing principally with the consequences of factual settings already largely formed. That role required a sensitive understanding of those settings. As Jerome Frank said, "[h]is observations of the contemporary scene were keen" — though we should exclude matters relating to sex from that generalization — "but they were not quite the observations of a contemporary. He wanted, at one and the same time, to be in and yet out of what was happening in the America of his time."134 And yet, within his judicial role, there was nothing passive about his performance. He had immense talent and a high sense of intellectual self-esteem, fostered not only by his aristocratic background but also by his lifelong record of success and accomplishment within the confines he set for himself. And so he performed his judicial function with gusto, with a refreshing understanding, sharpened by his years in practice, of both the degree to which he was constrained by the law and of the degree to which he was free to shape it. His characteristic use of language served his jurisprudential ends — making his opinions memorable, altering perceptions, and sometimes leaving, for better or worse, a broad and uncertain channel in which future law could develop. But his language also fit the model, and perhaps his self-image, of a person from another time and place.135


134. Mous, supra note 19, at 39.

135. See id. (Cardozo "withdrew from the manner of living followed by most of his fellow men. Yet he did not seek refuge in morbid introspection or in an ivory tower... [H]e reentered [twentieth century living] disguised as an eighteenth-century scholar and gentleman... [His style] is neither twentieth century nor American.").
Writers on Cardozo often contend with the problem of why he is considered great. Kaufman has no doubt that Cardozo was a great judge, and I think he has shown why. Cardozo possessed, expressed, and implemented with rare skill an unusually clear vision of what judging requires. Cardozo will continue to fascinate legal readers, perhaps for centuries, and those who want to learn more about why will continue to turn to Kaufman’s elegant and judicious biography.

136. See, e.g., pp. 126-38 (listing several factors that contributed to Cardozo’s eminence, chief among them his rhetorical skill and his pragmatism); Posner, supra note 1, at 19 (noting that “virtually all the critics of Cardozo, even Frank, dutifully acknowledge his greatness en route to delivering their criticisms,” that critics and admirers are spare in details, and that therefore a mystery remains); Goldberg, supra note 21, at 1474 (“Cardozo was a great jurist because he self-consciously combined astute lawyerly analysis with a sensitivity to social conditions and social norms. . . . But legal academics will understand fully why Cardozo was a great judge and jurist only when they are willing to question realist orthodoxy.”); Powers, supra note 128, at 1334 (acknowledging that Kaufman has persuaded him that Cardozo was a great judge).