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REVIEWS

The Athlete as Judge

The Man Who Once Was Whizzer White. Dennis J. Hutchinson.
The Free Press, 1998. Pp 1, 577.

John C. Jeffries, Jr. †

Judicial biographers face a daunting challenge. Usually, their subjects warrant biographies because they are judges. There are exceptions—Thurgood Marshall would have commanded the attention of scholars and the gratitude of the nation even if he had never served on the Supreme Court¹—but for most judges, it is the wielding of power that draws our interest and the relationship between private individual and public act that preoccupies the biographer.

The trouble is that no exercise of power is so nearly devoid of narrative excitement as the business of judging. Once judges don the robes of office, dramatic activity all but stops. Judges do not campaign over vast terrain, have eyeball-to-eyeball confrontations with opponents, or hobnob with the great and powerful. They work mostly in writing, in comparative isolation, and behind closed doors. The public's only glimpse of the decisional process is oral argument, a sedate affair where the advocates take center stage. Judicial deliberations are private, and decisions, once reached, are published to the world in heavily referenced,

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¹ See, for example, Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (Oxford 1994); Juan Williams, *Thurgood Marshall: American Revolutionary* (Times Books 1998).

highly stylized opinions that rarely yield a clear window into the personality of the author. As material for a good story, the judicial life is singularly unpromising.

One solution to this problem is judicial biography as intellectual history. This approach has been practiced with brilliant success by recent biographers of Oliver Wendell Holmes and Learned Hand,² but is suitable only for works on intellectual luminaries. Another solution is to present the judge's life story as the central theme, around which are weaved political and legal histories of issues faced and controversies resolved.³ This "life and judicial times" approach broadens the focus from the cloistered life of a sitting judge to the rough and tumble world beyond, but, unless expertly done, it runs the risk of reducing the biographical subject to a bit player in his own drama. The reader may begin to wonder whether biography is the right vehicle for political history and just how much traction the author is able to gain by returning to the theme of the subject's life. A third strategy is more or less to disregard the problem. If the pre-judicial history is sufficiently interesting and its influence on decisions sufficiently plain, the biographer may concentrate on the subject's life before appointment without worrying too much about the business of judging.⁴

Dennis Hutchinson's *The Man Who Once Was Whizzer White* illustrates the last approach. Of the book's 457 pages (excluding appendices and endnotes), barely one-quarter are devoted to White's thirty-one years on the Supreme Court. Instead, Hutchinson concentrates on White's early life in Colorado; on the mental rigor, physical toughness, and boundless capacity for effort developed on the family beet farm; on his spectacular success as an all-American athlete and Rhodes Scholar from the University of Colorado; on the press hysteria over his decision whether to accept the Rhodes or to play in the National Football League ("NFL"); and on his eventual ability to do both by postponing Oxford until January 1939 and spending the fall of 1938 running, passing, and punting the football for the Pittsburgh Pirates (predecessor of the present-day Steelers). This is an exciting tale, and Hutchinson tells it superbly. White emerges as a man of action rather than words, interested in results rather than reasons, a man dedicated to achievement, intolerant of weakness, and

² G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford 1993); Gerald Gunther, *Learned Hand: The Man and the Judge* (Alfred A. Knopf 1994).

³ This is the approach I attempted in John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* (Charles Scribner's Sons 1994).

⁴ See, for example, Laura Kalman, *Abe Fortas: A Biography* (Yale 1990).

scornful of excuse. Hutchinson also shows how White was scalded by the hot glare of publicity and fought back against unwelcome intrusions with a sometimes prickly reserve.⁵ All these traits surface in White's later life and in his career on the Supreme Court.

The European war brought Americans home from Oxford in the fall of 1939, and White enrolled in Yale Law School, where he led his class after the first year. White left Yale in the fall of 1940 to play for the Detroit Lions (leading the NFL in rushing for a second time), then returned to law school in the spring of 1941. By the end of the fall football season, the United States was at war, and White headed to the U.S. Navy, eventually serving in the South Pacific with a young Jack Kennedy. Late in the war, kamikaze pilots struck the carrier *Bunker Hill*, on which White served as a staff officer. For four hours, White fought gasoline fires and exploding ammunition, "pull[ing] asphyxiating men from smoke-engulfed positions" with perfect composure and no thought for his own safety (p 191). After the war, White finished law school in the spring semester of 1946, then went to Washington as law clerk to Chief Justice Fred Vinson. Hutchinson fully captures the movement and drama of these years. The narrative is taut, the characterization convincing, and the result an eminently readable account of a life in action. Along the way, Hutchinson lays the groundwork for his later depiction of White as a Justice. At Yale, White's natural inclinations were reinforced by Wesley Sturges and Arthur Corbin, professors who brought a healthy skepticism to theoretical debate and taught their students to focus on the "practical reality" behind legal doctrines (p 155). Later, as law clerk to Vinson, White demonstrated impatience with the "Hugo Black technique" of "simple convictions in the service of predictable results" (p 210).

White then returned to Denver (because Washington, D.C. firms would not agree to consider him for partner in two years (p 219)), where he devoted himself to civic service and the practice of law until his involvement in the Kennedy campaign brought him back to Washington as Deputy Attorney General in 1961. Hutchinson provides a highly detailed account of White's time in the Department of Justice, where "Robert Kennedy and Byron White headed a corps of physically tough men . . . who enjoyed the square-jawed challenging decisiveness of the new leadership style" (p 270). In May 1961, when the Freedom Rides

⁵ The anecdote that begins the book and explains its ironic title comes from White's days as Deputy Attorney General, when he was asked by a waitress, "Say, aren't you Whizzer White?" and replied softly, "I was" (p 1).

tested the South's commitment to segregation, White went to Alabama as the Administration's point man, charged with organizing a force of U.S. Marshals to protect the Freedom Riders against the local authorities. The account of White's life prior to his time on the Court closes with a detailed retelling of this dramatic episode (pp 272-86) and an extensive account of White's role in Kennedy's judicial appointments (pp 287-309).

The most important of the Kennedy judicial appointments was White himself, who in April 1962 took the oath of office as Associate Justice of the Supreme Court. For the next thirty-one years, White baffled friends and confounded critics as he compiled a record that defies easy generalization. Hutchinson's depiction of Justice Byron R. White is in some sense the payoff for the detailed account of White's earlier life, as many aspects of a personality sketched in other contexts reappear on the Supreme Court. Faced with the need to account for more than three decades of judicial service, Hutchinson adopts an innovative strategy: one brief chapter on the Warren Court years, followed by in-depth treatment of the 1971, 1981, and 1991 October Terms. While this episodic chronology may sacrifice something in continuity, it allows a close look at the essential character of White's judging in a variety of contexts.

As Hutchinson points out, White's reputation as an enigmatic, unpredictable, "swing" vote⁶ stemmed partly from liberal chagrin that a Democratic appointee had not proved politically reliable. Yet as Hutchinson correctly notes, White "never was the kind of liberal that the Kennedy name has come to stand for" (p 445).⁷ As Hutchinson says, "Byron White and John Kennedy were tough on crime, tough on communists, friendly to organized labor, and shared a growing conviction that federal intervention was necessary if racial equality was to be more than a pious objective" (p 445). On these matters, White remained constant. In the words of Kate Stith, civil rights and federal power were the "salient issues" at the time of White's appointment: "Eventually, the Court changed, society changed, the issues changed. Byron White didn't change" (p 445).⁸

⁶ See, for example, the *New York Times* article at the end of the Court's October 1971 term, saying that White had "suddenly become the unpredictable 'swing' member of the Supreme Court" (p 380), quoting B. Drummond Ayres Jr., *The 'Swing' Justice: Byron Raymond White*, *NY Times* 16 (June 30, 1972).

⁷ Quoting Stuart Taylor, *Justice Byron White: The Consistent Curmudgeon*, *Legal Times of Wash* 1 (Mar 22, 1993).

⁸ Quoting Kate Stith (Cabranes), in Linda Greenhouse, *White Announces He'll Step Down from High Court*, *NY Times* 9 (Mar 20, 1993).

Hutchinson identifies other consistencies in White's judicial philosophy as well. From first to last, White supported congressional power to create innovative governmental structures, despite separation of powers concerns. He voted to sustain non-Article III bankruptcy courts; legislative veto schemes; the comptroller general's power to reduce budget deficits; independent counsels appointed by courts rather than by the President; and federal sentencing guidelines promulgated by a committee of presidential appointees (pp 396-97).⁹ In fact, White almost always supported federal legislative power, even under circumstances where analogous state and local laws would be struck down.¹⁰

Notwithstanding these themes and continuities, there is also discord and contradiction in White's career, and they are more pronounced, it seems to me, than Hutchinson's reader might infer. Take *Miranda v Arizona*,¹¹ for example. When the Supreme Court required the famous warnings prior to any custodial interrogation, White filed an angry dissent, including the following lines from a paragraph quoted by Hutchinson:

In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. . . . There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case (p 344).¹²

Given the vehemence of this dissent, it is surprising to find White later extending *Miranda* beyond its necessary scope. Of

⁹ *Northern Pipeline Construction Co v Marathon Pipe Line Co*, 458 US 50, 76 (1982) (holding that the Bankruptcy Act of 1978, which assigned jurisdiction granted under 28 USC § 1471 to bankruptcy judges, violated Article III); *INS v Chadha*, 462 US 919, 954-55 (1983) (striking down the one-House veto provision of the Immigration and Nationality Act); *Bowsher v Synar*, 478 US 714, 734 (1986) (holding that the assignment to the Comptroller General of certain functions under the Balanced Budget and Emergency Deficit Control Act of 1985 violated the doctrine of separation of powers); *Morrison v Olson*, 487 US 654, 677 (1988) (upholding judicial appointment of independent counsel); *Mistretta v United States*, 488 US 361, 396-97 (1989) (upholding Congress's delegation of powers to promulgate sentencing guidelines for federal criminal offenses to an independent Sentencing Commission).

¹⁰ Compare White's votes in *Metro Broadcasting, Inc v FCC*, 497 US 547, 563 (1990) (joining majority to sustain minority preferences by the FCC under a standard of intermediate scrutiny and identifying various sources of congressional remedial power), with *City of Richmond v J.A. Croson Co*, 488 US 469, 490-91 (1989) (joining majority to strike down minority preferences by the city of Richmond under a standard of strict scrutiny and specifically joining the portion of the opinion reiterating the Congress's expansive remedial powers under Section Five of the Fourteenth Amendment).

¹¹ 384 US 436 (1966).

¹² Quoting *id* at 542-43 (White dissenting).

course, there are good reasons for White to have changed his mind about *Miranda*, and perhaps he did. From all that appears, however, he continued to think *Miranda* wrong, even as he applied it with a vengeance in doubtful cases. In *Edwards v Arizona*¹³ (discussed at p 390), a prisoner was given *Miranda* warnings, asked for a lawyer, and was then returned to his cell. The next morning he was questioned by different officers, given new *Miranda* warnings, and agreed to talk. The question was whether the confession given in the second interrogation could be used against him. On its facts, the case was easy. The prisoner initially had said that he did not want to talk to the officers but was told by a guard that he “had to.” This exchange rendered the confession involuntary (or at least not validated by a knowing and intelligent waiver of the right not to talk), and on that ground every Justice agreed.¹⁴ White went farther. His opinion for the Court extended the prophylactic rule of *Miranda* by adopting the additional prophylactic rule that an accused who has requested counsel cannot be questioned again (regardless of additional *Miranda* warnings or knowing and intelligent waiver) “unless the accused himself initiates further communication, exchanges, or conversations with the police.”¹⁵ Five years later, White joined in adapting and extending *Edwards* to Sixth Amendment claims.¹⁶

Hutchinson explains these votes as respect for precedent: “Those who recalled his stinging dissents from [the Warren Court era] failed to understand that he accepted decisions—even those in which he dissented—as time passed, all the more so when the precedent became a decade old” (p 390). Undoubtedly Hutchinson is right to identify *stare decisis* as an important theme in White’s work, but surely there is something more going on here. A judge who feels bound by an unfortunate precedent usually reads it narrowly. *Stare decisis* does not require that prior mistakes be extended to new ground. Perhaps White’s vote in *Edwards* reflects an unacknowledged conversion to *Miranda*’s prophylactic approach. More likely, he was driving home to his colleagues, several of whom disliked *Miranda* but refused to overrule it, the magnitude of their mistake. It was almost as if White was rebuking his fellow Justices by rubbing their noses in the mess they

¹³ 451 US 477 (1981).

¹⁴ For factual background, see *id* at 492; for unanimous agreement of the Court, see *id* at 487 (while there was no dissent in *Edwards*, Justice Burger concurred only in the judgment, while Justices Powell and Rehnquist concurred in the result).

¹⁵ *Id* at 485. See also *Minnick v Mississippi*, 498 US 146, 153 (1990) (reaffirming *Edwards*).

¹⁶ *Michigan v Jackson*, 475 US 625, 636 (1986).

had made. Whatever the explanation, it seems more complicated than straightforward respect for precedent.

The most notable example of White's refusal to acquiesce to precedent is abortion. White dissented in *Roe v Wade*¹⁷—many will recall his reference to women who want abortions for any reason “or for no reason at all”¹⁸—and thereafter held fast to that position, voting against abortion rights at every opportunity (p 369). Hutchinson examines White's refusal to accept *Roe*—saying that White thought that “[a]n illegitimate decision was entitled to no respect” (p 369)—but treats that case as highly exceptional. Indeed, after noting White's subsequent history on *Miranda*, Hutchinson describes *Roe* as the “only decision immune from precedential protection in White's jurisprudence” (p 390).

Of course, there is nothing unusual or discreditable in a Justice's refusal to accept unwelcome precedent. Other Justices have taken that position in abortion, obscenity, and death penalty cases, among others. But *stare decisis* is such a large theme in Hutchinson's analysis of White's judging that the matter assumes some importance. In fact, White's willingness to reject precedent on abortion was not all that exceptional. In other areas, as well, he demonstrated a free and easy attitude toward unwelcome prior decisions, including those he had joined. Two prominent examples are habeas corpus and defamation.

In 1963, White joined Brennan's opinion in *Fay v Noia*,¹⁹ which held (contrary to precedent²⁰) that a federal habeas petitioner could raise claims that had been lost because they were not timely raised in state court.²¹ In *Wainwright v Sykes*,²² a conservative majority overruled *Fay* and adopted a (then ill-defined) new standard that foreclosed federal habeas review of omitted claims unless the petitioner could show “cause” for the failure to raise the claim in state court and “prejudice” from the omission.²³ White concurred in the judgment in *Sykes*, but on grounds that brought him close to Brennan's dissent.²⁴ Yes, the petitioner had to show “cause” and “prejudice,” but “cause” would exist unless the defendant or his lawyer had “deliberately by-passed” state procedures as specified in *Fay*, and prejudice existed whenever

¹⁷ 410 US 113 (1973).

¹⁸ *Id.* at 221 (White dissenting).

¹⁹ 372 US 391 (1963).

²⁰ See, for example, *Brown v Allen*, 344 US 443, 485-87 (1953) (refusing to allow prisoners whose appeals were untimely to pursue federal habeas relief).

²¹ 372 US at 398-99.

²² 433 US 72 (1977).

²³ *Id.* at 87-88.

²⁴ *Id.* at 97 (White concurring).

the error was not harmless beyond a reasonable doubt.²⁵ Had these views prevailed, habeas would have remained largely intact. Instead, the Court (over the objections of two other members of the *Sykes* majority) later defined "cause" quite narrowly to require a showing of ineffective assistance of counsel²⁶ and extended that restrictive standard to capital cases.²⁷ "Prejudice" was also defined stringently to require that trial errors work to the petitioner's "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."²⁸ White joined these opinions without explanation. Most likely, he simply changed his mind on the desirability of expansive habeas review. If so, these cases chart the kind of conservative drift in White's views that Hutchinson downplays.²⁹ At no stage in this progression did White seem especially concerned with precedent.

Defamation also illustrates White's selectivity regarding precedent. In *New York Times Co v Sullivan*,³⁰ a unanimous Court (including White) began the constitutionalization of the law of defamation, holding that a public official could recover only on convincing proof of knowing or reckless falsity.³¹ Three years later, in *Curtis Publishing Co v Butts*³² and *Associated Press v Walker*,³³ the Court extended the knowing-or-reckless-falsity requirement to defamation actions by public figures.³⁴ White also supported that position.³⁵ In *Rosenbloom v Metromedia, Inc.*,³⁶ the Court applied the knowing-or-reckless-falsity standard to a defamation action brought by a private individual.³⁷ Speaking for himself and two others, Brennan urged that the *New York Times* rule be applied to all such cases.³⁸ Black reiterated his insistence on absolute press immunity.³⁹ (Douglas, who agreed with that po-

²⁵ *Id.* at 98-99 (White concurring).

²⁶ *Murray v Carrier*, 477 US 478, 488 (1986).

²⁷ *Smith v Murray*, 477 US 527, 535 (1986).

²⁸ *United States v Frady*, 456 US 152, 170 (1982).

²⁹ See, for example, p 445, quoting Taylor, *Consistent Curmudgeon*, *Legal Times* at 1 (cited in note 7) (White "is not really a full-dress Rehnquistian conservative now, except on a bunch of high-profile issues that have come to dominate the headlines.").

³⁰ 376 US 254 (1964).

³¹ *Id.* at 280.

³² 388 US 130 (1967).

³³ 388 US 130 (1967).

³⁴ *Id.* at 155.

³⁵ The effective majority consisted of Warren, Brennan, and White, who supported extension of the *New York Times* standard to defamation of public figures, plus Black and Douglas, who endorsed absolute press immunity from liability for defamation.

³⁶ 403 US 29 (1971).

³⁷ *Id.* at 52.

³⁸ *Id.* at 43-44.

³⁹ *Id.* at 57 (Black concurring).

sition,⁴⁰ did not participate.) The fifth vote was provided by White, who concurred in the judgment on the narrow ground that the *New York Times* rule applied at least to defamation of a private individual whose reputation was caught up in criticism of public officials.⁴¹

In *Gertz v Robert Welch, Inc.*,⁴² the Court returned to the question of whether the knowing-or-reckless-falsity requirement should apply to other defamation actions by private individuals.⁴³ By a vote of five to four, the Court said no, holding that private individuals could recover actual damages on proof of mere negligence.⁴⁴ Brennan dissented in reliance on *Rosenbloom*.⁴⁵ White also dissented, but from the opposite direction, arguing that a no fault standard should be constitutionally required. In a bitter, often caustic opinion, White flayed the majority for riding roughshod over the traditional state law of libel: "[T]he Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States."⁴⁶ And later: "[Y]ielding to the apparently irresistible impulse to announce a new and different interpretation of the First Amendment, the Court disregards history and precedent in its rush to refashion defamation law in accordance with the inclinations of a perhaps evanescent majority of the Justices."⁴⁷ The violence done to the law of defamation was described chiefly by reference to the first Restatement of Torts, which summarized the law as it had been *before* the Supreme Court got into the act.⁴⁸ White's treatment of the Court's own precedents was cursory and opaque. *New York Times* itself could plausibly be distinguished as a branch of seditious libel, but *Butts* and *Walker* could not. Of his vote to extend the *New York Times* rule in those cases and his support for the outcome in *Rosenbloom*, White said nothing at all.

⁴⁰ See, for example, *Gertz v Robert Welch, Inc.*, 418 US 323, 355 (1974) (Douglas dissenting).

⁴¹ *Rosenbloom*, 403 US at 57, 62 (White concurring).

⁴² 418 US 323 (1974).

⁴³ *Id.* at 332.

⁴⁴ *Id.* at 345-47.

⁴⁵ *Id.* at 361 (Brennan dissenting). Douglas also dissented in continuing support of absolute press immunity. *Id.* at 355 (Douglas dissenting). Chief Justice Burger dissented on grounds that resist characterization. *Id.* (Burger dissenting) (noting that "I would prefer to allow this area of law to continue to evolve as it has up to now with respect to private citizens").

⁴⁶ *Id.* at 370 (White dissenting).

⁴⁷ *Id.* at 380 (White dissenting).

⁴⁸ *Id.* at 371-73 (White dissenting).

The *Gertz* dissent reveals White at his best and worst. He is confirmed as an independent thinker, ready to look beyond the debates that preoccupy his colleagues and strike out on his own. On the merits of the case, his arguments have undeniable force. His research was prodigious, detailed, and, in the account of what the lower courts had done after *Rosenbloom*, very informative. As always, White's views were grounded in practical reality ("[t]he press today is vigorous and robust"⁴⁹), rather than in breezy theorizing about press self-censorship and the chilling effect.

Notwithstanding these strengths, there is something unsettling about White's refusal to address his abrupt departure from prior decisions. The arguments advanced with skill and vehemence in *Gertz* applied with equal force to *Butts* and *Walker*. One might have expected an attempt to distinguish those cases if White thought they were different, or a confession of error if he thought they were not, or at least some sympathy for the views he had so recently shared; but White neither renounced his prior votes nor tried to explain them. Instead, he castigated his colleagues for walking a road that he himself had helped lay out. Later, White clarified his position by saying openly that he regretted *New York Times* and the doctrine it spawned (pp 421-22), but, at the time of *Gertz*, White's votes in these cases could only confirm his public reputation as irascible, unpredictable, and increasingly conservative.

Hutchinson takes a long step toward unlocking the mystery of Byron White when he examines White's style of opinion: "White's strength, which he barely muted as a judge, was adversarial: his opinions marshaled all of the arguments and all of the historical data and marched relentlessly forward" (pp 347-48). The Justice once told a clerk, "An opinion is just another argument" (p 364), and he often wrote in that vein, "having his say" in "rhetorically personalized statements" that sometimes lacked modulation and balance (p 374). While other Justices "weighed" opposing arguments, "White destroyed them" (p 348). The results were "relentless tours de force," impressive as argumentation but not as "enticing" or persuasive as more "evenly toned" opinions (p 348). Moreover, the fact that White used every available argument to make his case often left the reader unsure which ones mattered. Some contentions reflected concerns that had actually moved White toward decision; others did not. That the genuine and the opportunistic were all mixed up together helped make White's judicial record opaque.

⁴⁹ Id at 390 (White dissenting).

One observation that Hutchinson does not make, but that is richly supported by his account, is how closely White's strengths and weaknesses as a judge echoed his talents as an athlete. A keen sense of contest dominated both contexts. In both, White was tough, hard-driving, and utterly purposive. In both, he shunned doubt. The openness, unguardedness, and sympathy for opposing concerns that were missing from White the judge would have disadvantaged White the athlete. The frank admissions of uncertainty or indecision so rarely encountered in White's opinions would have been seen as weakness in football—or worse, as whining excuses for poor performance. If some of White's opinions are the intellectual equivalent of brute force, that was how he had triumphed on the field. He relied on power, not finesse, on the willingness to dish out punishment and the capacity to absorb it, on all the manly virtues of the athlete as warrior. The same traits that look uncomplicated and heroic on the football field or the deck of a burning aircraft carrier may seem obtuse and belligerent on the bench. Despite White's early fame, the Supreme Court was the main event of his public life and the source of the prominence that induces a leading scholar to write his biography. Ironically, the Supreme Court may also have been the one environment that could obscure White's enormous strengths. Appointment to the Supreme Court crowned White's professional career but at the same time isolated him from the arenas of contest in which he so consistently excelled and rewarded a style of intellectualization for which he had no taste.

Ultimately, it may be beyond the capacity of any biographer to resolve completely the "impenetrable enigma"⁵⁰ of Byron White, especially without the subject's cooperation or access to his private papers, but Dennis Hutchinson has made a splendid effort. His account is nuanced, detailed, often insightful, always intelligent, and beautifully written. Time and again, we see the traits and characteristics so finely etched in Hutchinson's rendition of White's early life surfacing in his decisions and opinions as a Justice. These kinds of coherences are a main aim of judicial biography, and Hutchinson has succeeded in bringing them to life in this fascinating portrait of a complex man.

⁵⁰ This phrase comes from Gerald Gunther's admiring blurb on the dust jacket.



Cloistered Cleric of the Law

Clyde Spillenger†

Cardozo. Andrew L. Kaufman. Harvard University Press, 1998.
Pp xii, 731.

The World of Benjamin Cardozo: Personal Values and the Judicial Process. Richard Polenberg. Harvard University Press, 1997.
Pp xiv, 288.

During the 1930s, when Robert H. Jackson was considered for an appointment to the New York Court of Appeals, he received this advice from Benjamin N. Cardozo, formerly Chief Judge of that Court and at the time an Associate Justice of the U.S. Supreme Court:

Jackson, if you have a chance to go on the New York Court of Appeals, go on the New York Court of Appeals. That's a lawyer's court. Those are the kind of problems that you'll enjoy. Over on this court there are two kinds of questions—statutory construction, which no one can make interesting, and politics.¹

Cardozo's observation underscores his own strengths and passions, for it was the lawyerly enterprise of common-law judging (updated for the twentieth century), rather than the contentiousness of constitutional politics, that most engaged Cardozo's creative energies. But Cardozo's remark also aptly reflects the divide that separates the insider's from the layperson's perception of what law is and what law does. Nonspecialists peering in from time to time on the world of celebrated appellate judges care little for the talmudic inquiries into fiduciary duty, promissory estoppel, privity, and causation that Cardozo was apt to recall wistfully during his six years of "imprisonment" on the U.S. Supreme Court. The laity is more likely to be transfixed by the constitutional politics that Cardozo professed to disdain. And it is more interested in results than in the niceties of judicial craft.

† Acting Professor of Law, University of California, Los Angeles. My thanks to Rick Abel for his insights.

¹ *The Reminiscences of Robert H. Jackson* 1109 (unpublished manuscript, Oral History Research Office, Columbia University 1955).

Andrew L. Kaufman's *Cardozo* and Richard Polenberg's *The World of Benjamin Cardozo* in many ways exemplify the different sides of this lawyer/nonlawyer divide. Not to leave busy readers in suspense: Both Kaufman and Polenberg have wrought well. Kaufman's *Cardozo* brings to triumphant completion a venerable biographical project (Kaufman's work on this book began during Eisenhower's second term). It is a pleasure to report that this cradle-to-grave account of nearly six hundred pages exhibits many of the virtues of its subject: a serene common sense, a lawyerly but lucid way with technical matters, a kindly humanity leavened with the faculty of gentle criticism, and an unwonted modesty. Thanks to Kaufman's labors, a conspicuous gap in American law and letters has been filled.

Polenberg's *The World of Benjamin Cardozo* is a different kind of book by a different kind of scholar. Polenberg, a distinguished social and political historian at Cornell University, previously displayed his facility with legal materials in his riveting social history of the *Abrams* case.² In that book, Polenberg probed questions that legal scholars, entranced by *Abrams* and Holmes's epic dissent, rarely think to ask: Who were the *Abrams* defendants and why were they persecuted? Polenberg is interested in similar questions in *The World of Benjamin Cardozo*: Who were the litigants in the cases that came before Cardozo and what lay behind their disputes? How do Cardozo's personal experiences illuminate some of his most famous decisions? Polenberg's book does not pretend to the comprehensiveness of Kaufman's biography, and it exhibits considerably less appreciation for Cardozo's judicial craft. But readers hoping to descend beneath the surface of the published appellate opinion will find Polenberg's discussion provocative and insightful.

I. KAUFMAN'S CARDOZO

Of the two books under review, Kaufman's is much more in the nature of a classic judicial biography, with virtually nothing from Cardozo's judicial record left uncovered. There is more here, however, than just an examination of Cardozo's opinions. Kaufman gives thoughtful attention to Cardozo's unusual childhood, including his place in New York's Sephardic Jewish community, a self-consciously elitist segment of American Jewry. Among the notable parts of Cardozo's upbringing was his tutoring by none other than Horatio Alger. Of course, the most significant devel-

² Richard Polenberg, *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech* (Viking 1987).

opment of Cardozo's childhood was the public disgrace of his able but somewhat distant father, Albert Cardozo, who was elected a justice of the New York Supreme Court in 1867 but who resigned in 1872 after the Judiciary Committee of the New York State Assembly recommended that he be impeached for several acts of corruption and malfeasance. Despite—or perhaps because of—this calamity, Benjamin Cardozo attended law school at Columbia and embarked upon a successful career as a New York practitioner, achieving his greatest notoriety as an appellate advocate.³ Cardozo's personal life, meanwhile, was one of unvarying routine and relative isolation. For much of his adult life, he shared a household with his beloved older sister Nellie, until her death in 1929. For all that appears, Cardozo never had a romantic or sexual relationship.⁴

Kaufman treats all of these matters with care and discernment, but the heart of his book, naturally, is his treatment of Cardozo's career of eighteen years on the New York Court of Appeals. It is an exploration of Cardozo's judicial record that, for scope and detail, is unlikely to be surpassed. Kaufman may not have discussed every opinion ever composed by Cardozo, but he has given careful attention to virtually every area of law considered in depth by the Court of Appeals during Cardozo's tenure there: equity, torts, contracts, property, criminal law, constitutional law, international law, and corporation law.⁵ Kaufman's tireless research into unpublished materials—briefs, records, and memoranda—deserves special praise. In addition to his consideration of the substance of the decisions themselves, Kaufman offers an engaging account of Cardozo's daily routine at the Court of Appeals in Albany and of his leadership while Chief Judge of that court. There is something vaguely poignant about Kaufman's portrait of the judges eating all their meals together at the Ten Eyck hotel in Albany, year after year, Cardozo eating the same lunch ("a cup of soup, rye toast, and milk" (Kaufman p 138)) nearly every day. In assessing Cardozo's judicial record, Kaufman slays no sacred cows, and anyone hoping to find provocative or willfully revisionist judgments will be disappointed. Kaufman has

³ Much of this story is recounted by Polenberg as well, although in far less detail.

⁴ One of Kaufman's early interviews is too tart to leave unquoted. According to the eighty-five year old Learned Hand, 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 that wasn't gaited the other way" (Kaufman p 68).

⁵ Kaufman's discussion of Cardozo's six years on the U.S. Supreme Court is also thorough and insightful, but the distinctive and enduring parts of Cardozo's record lie principally in his work as a state court judge.

not altered our vague stereotypes of Cardozo so much as provided many of them with documentation. Cardozo "practiced [his] vocation supremely well" (Kaufman p 5), but he was not perfect. He was candid about the elements that enter, and ought to enter, the judicial decisionmaking process. He was creative, but not capricious. He was "progressive," but in a pragmatic way. His willingness to render decisions that comported with social realities was tempered by deference to legislative choice.⁶ He was not, as has sometimes been claimed, manipulative or less than candid in explaining himself (Kaufman p 446). He was, Kaufman concludes after 575 pages, "a great judge" (Kaufman p 577). If these conclusions appear almost stifling in their judiciousness, and perhaps a shade on the celebratory side, they are well-justified by the record that Kaufman has examined. We may quarrel with some of Cardozo's judgments, but on the whole they were both cautious and well-considered. The same can be said for Kaufman's judgments. In Kaufman, Cardozo has found a sympathetic and respectful chronicler and something of a kindred spirit; only Kaufman's rather undemonstrative style constitutes a strong contrast with that of his subject. The book is full of memorable passages, but most of them are from Cardozo's pen.

Kaufman's *Cardozo* does, to be sure, contribute to our understanding of his jurisprudence. Among the most illuminating portions of the book, and an apt illustration of its themes and strengths, are Kaufman's three chapters on Cardozo's torts opinions while on the New York Court of Appeals.⁷ In no other area of the law is Cardozo's judicial output better known. *MacPherson v Buick Co*,⁸ *Palsgraf v Long Island Railroad Co*,⁹ *Murphy v Steeplechase Amusement Co* (the "Flopper" case),¹⁰ *Glanzer v Shepard*,¹¹ *Ultramares Corp v Touche*,¹² and other of his opinions

⁶ Kaufman points out that Cardozo deferred to legislative decisions regarding both social values and resource allocation (Kaufman p 572).

⁷ Kaufman appropriately includes in his discussion Cardozo's opinion for the U.S. Supreme Court in *Pokora v Wabash Railway Co*, 292 US 98 (1934), in which the Court essentially overruled (or limited to its facts) the "stop, look, and listen" rule that Holmes had imperiously announced for the Court in *Baltimore & Ohio Railroad Co v Goodman*, 275 US 66 (1927) (Kaufman p 263).

⁸ 217 NY 382 (1916) (imposing liability on automobile manufacturer for injuries sustained by ultimate purchaser on the theory that it was foreseeable that "the car, if negligently inspected, would become 'imminently dangerous'").

⁹ 248 NY 339 (1928) (holding that railroad was not negligent as it bore no duty of care to the plaintiff).

¹⁰ 250 NY 479 (1929) (refusing to impose liability on amusement park for injuries sustained on moving belt ride, as visitor had assumed an "invited and foreseen" risk).

¹¹ 233 NY 236 (1922) (holding that where defendants had contracted with merchants to weigh certain goods and knew that the goods would be sold on the basis of their represented weight, defendants had assumed "a duty to weigh carefully for the benefit of all

are still prominent in most torts casebooks, and if they are no longer at the cutting edge of theories of liability, they are by now staples of legal history. It is a natural assumption that Cardozo crafted his opinions in at least some of these cases with prescient, or at least purposeful, understanding of the need to adapt tort principles to a changing network of economic relations. The inference is all the more compelling when one considers that Cardozo was throughout the 1920s offering in extrajudicial writings and speeches a spirited defense of the judge's duty to apply at times the "method of sociology," rather than simply spinning out formally consistent doctrine.¹³

But, as Kaufman's discussion demonstrates, Cardozo was almost always engaged in a process of rationalizing or consolidating preexisting (if sometimes inchoate) trends in New York case law, not in self-consciously altering the direction of that law.

[An important] feature of Cardozo's approach to negligence law was the balance he struck between creativity and continuity. . . . He was, and only aimed to be, a modest innovator. He was most willing to modernize law when social conditions had already changed in the same direction or when the doctrinal step to be taken was relatively small and the effect on other parts of government was also relatively small. He had a strong respect for the roles of other agencies of government and was reluctant to make large changes in doctrines that involved issues that were best sifted by other branches of government, especially the legislature. He was more ready to innovate when the legislature had already taken some action to point the way (Kaufman pp 247-48).¹⁴

These are not earth-shattering conclusions, but they form a useful corrective to the views that Cardozo can be summed up as a "progressive" judge or that he surreptitiously manipulated doctrine to attain desired ends.¹⁵

whose conduct was to be governed").

¹² 255 NY 170 (1931) (confining accountants' liability for negligence to those to whom they owed a contractual duty of care, "even if other parties detrimentally relied on such representations").

¹³ See, for example, Benjamin N. Cardozo, *The Nature of the Judicial Process* 65 (Yale 1921).

¹⁴ As Kaufman points out, an excellent example is Cardozo's opinion in *Altv v Lieber-son*, 233 NY 16 (1922), in which Cardozo "created a right of action for tenants by inference from a statutory requirement that property be kept in good repair" (Kaufman p 248). Although the statute provided only for criminal liability, Cardozo had no difficulty inferring from it a private right of action.

¹⁵ A strong version of the "manipulation" theme has been given by G. Edward White, who cites *MacPherson* as a principal example:

Even in *MacPherson*, sometimes regarded as a harbinger of latter-day product liability principles,¹⁶ Cardozo's gestures in the direction of a more realistic (we might, ahistorically, call it more "modern") liability regime were modest. True, he did offer the following, oft-quoted, call to arms:

Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.¹⁷

This casual endorsement of an evolutionary approach to law is, to be sure, far removed from the approach taken by the same court just a few years earlier in *Ives v South Buffalo Railway Co.*,¹⁸ whose invalidation of New York's "plainly revolutionary" workmen's compensation statute galvanized the progressive upsurge in New York that resulted in a constitutional overhaul and helped Cardozo win a place first on the New York Supreme Court and then on the Court of Appeals.¹⁹ At the same time, Cardozo's opinion does little to suggest that an increasingly sprawling network of product distribution required substantial modification or even elimination of the privity principle and that end-users must be able to shift the costs of accidents to manufacturers or other consumers. It certainly was not an augury of modern product liability doctrine. In doctrinal terms, Cardozo's innovation was deft but slight—expanding the list of items outside the privity principle under New York law from "inherently dangerous" products to

A strong interest of Cardozo as a judge was the preservation of his creative opportunities. He sought to further this interest surreptitiously, by making his exercises of power inconspicuous and by giving his innovations in common law subjects the appearance of doctrinal continuity.

G. Edward White, *Tort Law in America: An Intellectual History* 120 (Oxford 1980).

¹⁶ Lawrence M. Friedman, *A History of American Law* 684-85 (Touchstone 2d ed 1985).

¹⁷ *MacPherson*, 217 NY at 391. Cardozo's candid reference to the unsuitability of outmoded precedents suggests that White's reference to Cardozo's "surreptitious[ness]" in *MacPherson* is overdrawn just a little.

¹⁸ 201 NY 271 (1911). Kaufman notes the sea change that occurred on the New York Court of Appeals starting in 1914, in part because of the outcry over the *Ives* case (Kaufman p 366).

¹⁹ *Ives* and *MacPherson*, of course, raised legal questions of different orders. Whereas in *MacPherson* Cardozo was reshaping the "privity" principle under New York's common law, *Ives* involved a constitutional challenge to New York's newly enacted workmen's compensation scheme. And in *MacPherson*, Cardozo did nothing to disapprove the *Ives* court's evident belief that liability without fault was an "abhorrent innovation." *Ives*, 201 NY at 315. It remains the case, however, that Cardozo's untroubled assertion of judicial flexibility in recognizing the realities of a "developing civilization" would have been quite out of place in the *Ives* opinion.

those that were “reasonably certain” to be dangerous when negligently made. While the decision in *MacPherson* was hardly compelled by precedent, neither was it a sharp break. Kaufman persuasively demonstrates that, at the time *MacPherson* was decided, “in New York the [earlier] line of cases had broadened the exception for dangerous articles to the point where it seemed about to swallow the general rule of nonliability” (Kaufman p 271). Throughout the book, Kaufman carefully and comprehensively resituates Cardozo’s epochal opinions within the stream of prior doctrine with which Cardozo was confronted.

The same can be said of Kaufman’s discussion of *Palsgraf*, probably Cardozo’s best-known opinion. One would have thought it unlikely that anything new could be said about *Palsgraf*, but Kaufman provides a fascinating bit of historical embellishment to the story of that famous case.²⁰ Only a few months before the argument and decision in *Palsgraf*, Cardozo, a member of the American Law Institute’s advisory group drafting the Restatement of Torts,²¹ participated in a lively discussion of hypotheticals raising questions of duty and foreseeability of risk virtually identical to those that would appear in his *Palsgraf* opinion. The colloquy among Cardozo, Learned Hand, Francis Bohlen, and others seems clearly to have focused Cardozo’s thinking and shaped his central pronouncement in *Palsgraf*: “The risk reasonably to be perceived defines the duty to be obeyed.”²² It may also help explain why the opinions of Cardozo and of dissenting judge William Andrews, who emphasized causation rather than duty and foreseeability of risk, appear to pass one another like ships in the night. In any event, Cardozo’s emphasis on duty rather than causation (an emphasis which, incidentally, seems strangely misapplied in *Palsgraf*²³) was, as Kaufman points out, consistent with Cardozo’s general focus “on the conduct and responsibilities of individuals to other individuals” (Kaufman p 301). If there is a distinctive element running throughout much of his jurisprudence,

²⁰ Kaufman also notes that Cardozo’s first cousin, four times removed, married Helen Palsgraf’s great-grandson in 1991 (Kaufman p 303).

²¹ Cardozo evidently disavowed the title of “Adviser” held by the other participants, but his participation in the discussion was as active as theirs (Kaufman p 288).

²² 248 NY at 344.

²³ If Cardozo wished to establish a “zone of risk” principle for the “duty” prong of negligence, *Palsgraf* seems far from the ideal case. As a passenger on the platform standing not all that far from the careless act, Helen Palsgraf seems to have been within a reasonably defined “zone of risk.” The hypotheticals considered by the ALI group posited a clearer case of nonliability under a foreseeability theory: A man negligently leaves a loaded revolver in a hallway, whereupon a child picks it up and drops it on a person’s foot, injuring her. The Restatement contended that the latter person should not recover (Kaufman p 289).

it is that Cardozo set great store by the concepts of honor and duty.²⁴ Like Weber's Protestants, Cardozo in fashioning common-law principles seems to have had both the rationalizing and the moralizing instinct.

What I have said concerning Kaufman's discussion of Cardozo's torts opinions could be repeated for any number of legal vineyards in which Cardozo labored while on the New York Court of Appeals—including not only the classic common-law subjects, but also important and difficult questions of public law, such as New York's Home Rule Amendment (Kaufman pp 375-81). Kaufman's comprehensive description and judicious assessment of this corpus of opinions makes this book a *tour de force* of "internal" legal history. This relentless exploration, subject by subject, of Cardozo's opinions also constitutes the book's principal, if minor, limitation—its relative inattention to the world outside Cardozo's chambers. At bottom, this may be a matter of disciplinary taste. Lawyers will likely find this book's focus to be just where it should be. Historians, in contrast, may find themselves wondering what else was going on during Cardozo's sixty-eight years.

Cardozo, it must be said, led a strangely unvaried life for most of those years, and so leaves a biographer little opportunity to focus on anything but the cases he decided. It's a dilemma frequently encountered in the field of "judicial biography": In most (though not all) cases, what makes a judge's life worth chronicling are the decisions she rendered, not what she had for breakfast (unless the one influenced the other). In contrast to, say, Brandeis, Cardozo's life outside the law bears little critical attention. Moreover, Cardozo's surviving papers are notoriously unrevealing.²⁵ It would have been futile if not reckless to construct a biography on any foundation other than that of Cardozo's opinions and the internal memoranda that Kaufman has so ably mined. Yet there is more than one way of "thickening" the narrative of a person's life. It does not follow that because Cardozo experienced his life within a narrow compass, our understanding of his life must retrace that same circle. While every biography need not (and should not) be a "life and times" account, important legal

²⁴ This trait is most famously exhibited in *Meinhard v Salmon*, 249 NY 458, 464 (1928) ("A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."). However, as Kaufman shows, an emphasis on elevated moral standards appears in his opinions in torts, contracts, and criminal law as well.

²⁵ Before his death, Cardozo purged his files of much of his correspondence. After his death, his executor and house manager destroyed, reportedly on Cardozo's instruction, most of his remaining papers and letters (Kaufman p 621 n 5).

developments do find their meaning in social and political context; Cardozo himself helped enshrine that insight in our understanding.²⁶ Even if Cardozo was in some ways a nonparticipant in the culture and politics of his time, the meaning for us of that withdrawal depends to some degree on knowledge of what he was avoiding.²⁷ Moreover, if Cardozo's opinions were both moralistic and distinctively attuned to practical realities—whether the realities of commercial practice, economic relations, or the deeds of habitual criminals—then we would like to know something about the contemporary world and how well Cardozo was reading it. Were endorsement agreements a new but expanding phenomenon when Cardozo ruled in 1917 that Lady Duff Gordon must keep her promise?²⁸ Was there something about contemporary commercial practice that would ratify Cardozo's conviction in 1928 that joint venturers owe each other "the duty of the finest loyalty"?²⁹ Assessment of Cardozo's judgments, and not just his literary flair, might benefit from answers to these questions. Kaufman is not insensitive to the importance of contemporary politics; he makes occasional gestures in its direction. But on the whole the reader is nearly as insulated from these developments as Cardozo seems to have been.

One example emerges in a portion of the book that is otherwise notable for Kaufman's careful and original research—the period of Cardozo's law practice (Kaufman pp 54-64, 71-84, 93-113). Although it was Cardozo's great prestige as a lawyer (rather than any political connections) that facilitated his judicial appointment, Cardozo's law practice has received little attention from scholars. Working from a somewhat delphic surviving record, composed principally of Cardozo's legal briefs, Kaufman has demonstrated that Cardozo (though working mostly as appellate counsel) was a superb and hard-hitting advocate, possessed of the compelling writing style he would later employ as a judge. Interestingly, Cardozo, for all that appears, took little interest in pro-

²⁶ "Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all." Cardozo, *The Nature of the Judicial Process* at 66 (cited in note 13).

²⁷ Compare the discussion by Yosaf Rogat of the detached perspectives assumed by Henry Adams, Henry James, and Oliver Wendell Holmes, Jr., in his article *The Judge as Spectator*, 31 U Chi L Rev 213 (1964).

²⁸ *Wood v Lucy, Lady Duff Gordon*, 222 NY 88 (1917).

²⁹ *Meinhard*, 249 NY at 463-64. Kaufman quotes Russell Niles's praise for Cardozo's "prophetic insight" that although "Salmon had not violated the code that formerly existed in the business community, . . . the commercial ethics of the 19th century would not suffice for the 20th," but he does not indicate why this is true (Kaufman p 241, quoting Russell Niles, *A Contemporary View of Liability for Breach of Trust*, 29 The Record of the Association of the Bar of the City of New York 573, 574 (October 1974)).

fessional matters lying outside his practice itself—law reform, municipal politics, etc. A reader may find significance in Cardozo's apparent noninvolvement, as these were not quiescent years either for local politics or for the New York City bar.³⁰ The demographics of urban law practice were changing, and Tammany Hall was engaged in a prolonged struggle with various reformist blocs for control of government in New York City.³¹ It seems improbable that Cardozo was not importuned from time to time to lend his talents and growing lawyerly prestige to political initiatives; at any rate, that is not where he chose to direct his energies. (Again, the comparison with Brandeis is illuminating.³²) Obviously the fact that Cardozo seemed largely aloof from these developments (although his own judicial nomination owed much to reform sentiment) is not a reason to suspect or condemn him. Probably he had drawn from his father's downfall a desire to steer clear of politics. But it might add a bit to Kaufman's portrait to know more of what choices confronted Cardozo during his years of practice.³³

These are modest points in comparison with what Kaufman has achieved in this *magnum opus*. Kaufman can now claim the rare distinction of standing alone as the biographer of our most celebrated common-law judge. *Cardozo* will take its place alongside a handful of other works as one of the epic judicial biographies.

II. POLENBERG'S CARDOZO

Polenberg's *The World of Benjamin Cardozo* aspires to different truths. Whereas Kaufman's book is an all-but-definitive *Life*, addressed to an audience with a taste for its subject's lawyerly virtues, Polenberg's book is an extended essay purporting to connect Cardozo's judicial pronouncements with their sources in his set of personal values—a topic eminently understandable to those with no particular investment in technical mastery of the law.

³⁰ See, for example, Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (Oxford 1976); Robert W. Gordon, "The Ideal and the Actual in the Law": *Fantasies and Practices of New York City Lawyers, 1870-1910*, in Gorard W. Galt, ed, *The New High Priests: Lawyers in Post-Civil War America* 51 (Greenwood 1984).

³¹ Kaufman discusses some of these political developments in connection with Cardozo's initial nomination to the New York Supreme Court (Kaufman pp 117-26).

³² Brandeis, while still maintaining a lucrative private practice, spent an increasing amount of time in the 1890s and 1900s battling utilities, railroads, and insurance companies in the state and municipal political arenas. See Alpheus T. Mason, *Brandeis: A Free Man's Life* 99-241 (Viking 1946).

³³ Kaufman does briefly contrast Cardozo's lawyering activities with those of Charles Evans Hughes, Louis Brandeis, Morris Hillquit, and Julius Henry Cohen (Kaufman p 99).

The reader who has encountered Cardozo principally in the classic cases taught in the first year of law school may be surprised by the exclusions Polenberg casually mentions in his preface: "I have omitted his decisions in such areas as torts and contracts, partnerships and real property, wills and estates, and insurance and workmen's compensation" (Polenberg p xii). This modest disclaimer might seem to leave precious little of the historical Cardozo. Few of us have thought of him principally in terms of the "cases involving morality, scholarship, sexuality, religion, and criminality" (Polenberg p xii) on which Polenberg focuses. But Polenberg regards Cardozo's opinions in these areas as particularly relevant to his project:

As an historian interested in social aspects of the law, I wished to explore the context in which those controversies arose, to understand, that is, the relationship between the individuals, issues, and interests involved in the cases and the ways Cardozo resolved them. In drafting opinions Cardozo naturally emphasized certain aspects of a case and played down or even ignored others. His choices become understandable only when viewed as an expression of a deeply rooted system of personal values (Polenberg p xii).

That a judge, even a Cardozo, might decide cases with reference to "a deeply rooted system of personal values" would not be regarded as a shocking discovery today. Yet it is true that Cardozo, celebrated though he is, has largely evaded this kind of scrutiny. There is a staidness to Cardozo's persona that somehow inhibits our exploration of these depths. That staidness diminishes rapidly in the course of Polenberg's account of *People v Schmidt*,³⁴ one of Cardozo's earliest criminal law opinions and the first case that Polenberg explores (Polenberg pp 52-81).³⁵ The case involved the grisly murder (involving bodily dismemberment and apparent sexual assault) of Anna Aumuller, a twenty-one-year-old émigré to the United States from Hungary who worked as a cook and cleaning woman at St. Boniface's Church in New York. The accused was Hans Schmidt, a charismatic but unscrupulous and utterly unstable priest who had emigrated from Germany to the United States in 1909. At his widely publicized trial, Schmidt, evidently hoping to establish an insanity defense, confessed to every atrocity and perversion for which a salacious press and a nativist public could hope: fornicating with Anna before the altar

³⁴ 216 NY 324 (1915).

³⁵ Kaufman also discusses the *Schmidt* case, although more briefly (Kaufman pp 393-95).

of a church, drinking her blood, penetrating her after decapitating her. Schmidt's tale set off an epic battle of the psychiatrists or "alienists": the defense's medical experts opined on Schmidt's insanity while the prosecution's experts contemptuously dismissed the notion. After the first jury hung, the second convicted Schmidt of first degree murder, and the judge sentenced him to death.

Schmidt's ghoulish story, it seems clear, was an ill-conceived fabrication designed to procure an acquittal on grounds of insanity. According to his revised testimony, which he sought to introduce by way of a motion for a new trial, Anna Aumuller's death resulted from a botched abortion, the third she had endured since meeting Schmidt at the age of nineteen. Two acquaintances of Schmidt, Muret and Zech, tried in vain at his request to complete the abortion that Anna had in desperation attempted upon herself; a third person, a medical doctor, was aware of the goings-on. In a panic—participation in the procuring of an abortion subjected them all to imprisonment for manslaughter—Schmidt resolved to shoulder all of the blame for Anna's death, although it was Muret who completed the fatal abortion and dismembered Anna's body, which Schmidt later futilely disposed of. Only after his conviction did Schmidt attest to all of this.

The problem for Cardozo in considering this lurid tale on appeal (the trial court had denied Schmidt's motion for a new trial on the basis of his revised story) was twofold: First, he had to determine whether a new trial ought to be ordered on the basis of Schmidt's new and patently more plausible account (which his alleged confederates had, not surprisingly, denied). Second, if a new trial on the grounds of the "new" evidence were denied, Cardozo would have to determine whether the trial court had acted erroneously when it instructed the jury that the insanity defense required showing that the defendant lacked the understanding that his acts were *legally* (as opposed to *morally*) wrong. In a complicated opinion, Cardozo managed to rule that (1) there could be no new trial for a defendant who chose to tell one story and later thought better of it when the verdict went against him; (2) the trial court *had* erred in its charge upon the insanity defense, because it was the moral wrong of the act that the defendant must be incapable of understanding in order to make out the defense; but (3) Schmidt's new account (notwithstanding its inadmissibility as a basis for a new trial) essentially admitted his sanity and amply justified the jury's determination to that effect,

even if it had been erroneously instructed on that point.³⁶ In regarding Schmidt's recantation as insufficient to qualify as "new" evidence that would justify a new trial, Cardozo was on solid ground, and yet the moral fervor with which he announced this ruling was striking:

A criminal [!] may not experiment with one defense, and then when it fails him, invoke the aid of the law which he has flouted, to experiment with another defense, held in reserve for that emergency. . . . There is no power in any court to grant a new trial upon that ground. . . . The principle is fundamental that no man shall be permitted to profit by his own wrong (Polenberg pp 74-75).

As Polenberg points out, Cardozo must have been aware of the strong probability "that a man who was guilty of many crimes but in all likelihood not murder had been executed" (Polenberg p 81).³⁷ There is a strong suggestion in his opinion that even if Schmidt's revised account were true, the courts must not suffer this kind of strategizing by criminal defendants.³⁸ In Polenberg's view, Cardozo's opinion and his later comments on the case used "the language of a man whose deeply ingrained moral sensibilities were outraged by everything about Hans Schmidt" (Polenberg p 81). Polenberg's narrative of the *Schmidt* case and his concluding observation are fairly characteristic of his approach throughout the book—to describe cases whose facts are dramatic enough to capture any reader's attention; to set forth a Cardozo opinion in the case that seems troubling to the reader's sense of justice; and to posit an explanation for Cardozo's opinion in terms of his unarticulated beliefs or biases.

There are strong merits and some demerits to this approach. The very selection of *Schmidt* and other cases dealing with what

³⁶ In Kaufman's view, "The logic of Cardozo's opinion was impeccable" (Kaufman p 394). I don't share this conclusion, because I find it troubling that Cardozo would accept Schmidt's affidavit in support of his motion for a new trial only for the purpose of establishing his sanity but not for the purpose of crediting his revised account of the facts.

³⁷ Polenberg makes this observation in connection with his discussion of Cardozo's retrospective discussion of the *Schmidt* case in a 1928 lecture, which is why Polenberg speaks here of the execution in the past tense. Polenberg notes that Cardozo's 1928 discussion emphasized his holding on the "moral" component of the insanity defense while downplaying the more troubling aspects of the denial of a new trial. Under the circumstances, it does seem remarkable that Cardozo would have regarded *Schmidt* as standing principally for a humane and expanded vision of the insanity defense.

³⁸ "[W]e will not aid the defendant in his effort to gain the benefit of a fraudulent defense." *Schmidt*, 216 NY at 343. If, as seems apparent from the context, Cardozo meant by "fraudulent defense" the original story concocted by Schmidt, he seems here to be countenancing the execution of a man for a crime he did not commit as preferable to encouraging such litigation arbitrage by criminal defendants.

Cardozo himself called “the sordid controversies of litigants” (Polenberg p xi) calls our attention to a Benjamin Cardozo very different from the one of whom we are accustomed to think. Somehow Cardozo’s judicial essence tends to be distilled from his opinions on the duties owed by joint venturers, the abstractions of privity, and the impossibility of “negligence in the air.”³⁹ Polenberg, unentranced by these legalisms, enriches our portrait of Cardozo by focusing our attention elsewhere. In so doing, he expands considerably upon a theme introduced over twenty years ago by John Noonan—that Cardozo’s striking isolation led him to some conclusions about the world that a more socially engaged judge almost certainly would have questioned.⁴⁰ Like the “timorous” upon whom he magisterially conferred the privilege of assuming no risks, Cardozo stayed at home.⁴¹ He was unlikely to have encountered there the likes of Hans Schmidt. Both Schmidt’s fantastic tale and his recantation must have seemed to Cardozo to have issued from a world utterly alien to his own. It is not surprising that he would have found repellent the thought of “aid[ing] the defendant in his effort to gain the benefit of a fraudulent defense.”⁴²

One of Noonan’s observations in 1976 was that Cardozo could not have dismissed the claim of Helen Palsgraf so casually and impersonally had he not been unmarried and childless.⁴³ Some of Polenberg’s most telling explorations of Cardozo’s opinions expand, explicitly or implicitly, on this theme. In *People v Carey*,⁴⁴ the New York Court of Appeals reversed the rape conviction of a nineteen year old male on the ground that the trial judge, in instructing the jury, had failed to comply with a New York statute regarding the need for corroborating evidence in rape cases. Polenberg, however, points out that in an unpublished memorandum to his colleagues Cardozo advocated reversal on a different ground—the trial court’s exclusion of evidence (whether the victim’s clothing revealed “the marks of gonorrhoea”) suggesting that

³⁹ *Palsgraf*, 248 NY at 341, quoting Sir Frederick Pollock, *Torts* 455 (Stevens & Sons 11th ed 1920).

⁴⁰ “Cardozo never married and never had any children. He lacked the experience of conjugality and the experience of fatherhood. . . . The childless and *a fortiori* the unmarried will have an approach to a chain of calamities like *Palsgraf* different in outlook and emotional context from that of the reflective spouse and parent.” John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* 143 (Farrar, Strauss 1976).

⁴¹ “The timorous may stay at home.” *Murphy*, 250 NY at 483. As Kaufman points out, Cardozo no doubt counted himself among the timorous (Kaufman p 261).

⁴² *Schmidt*, 216 NY at 343.

⁴³ Noonan, *Persons and Masks of the Law* at 143 n 40 (cited in note 40).

⁴⁴ 223 NY 519 (1918).

the victim, Lillian Tate, was “unchaste” (Polenberg p 127).⁴⁵ This evidence, thought Cardozo, could properly have operated at trial to rebut the inference that the victim had offered the “resistance” required under the law of rape. Cardozo noted in his memorandum:

The truth remains that chastity has once been yielded, that honor has been lost, and that the great motive which inspired resistance even unto death, has gone. To deny this is to ignore a truth which all history and all literature and all experience proclaim. . . . We are dealing now with a single element of character which has had a meaning and importance all its own in the status of womankind and in the civilization of the race. Almost invariably, its loss tends to weaken, at least in some degree, the motive for resistance (Polenberg p 127).⁴⁶

This vehement assertion came from a man who apparently never consummated a relationship with a woman and who lived for much of his adult life with his beloved sister Nellie, also apparently a lifelong celibate. Of course, it is not in itself startling that a man so isolated might indulge such assumptions. As Polenberg points out, those assumptions were consistent with Cardozo’s tendency to view women in terms of a “‘virgin/whore’ polarity” (Polenberg p 124) (itself but another example of Cardozo’s rather moralistic perspective on society). The very polarity that may have structured and reinforced Cardozo’s retreat from human intimacy appears in the articulation of views his isolation made possible. What is astounding about this passage is not the substance of its sentiment—no doubt many have held it—but, rather, its certitude. There is no hint here of the Cardozo who in a celebrated passage from his 1921 Storrs lectures, *The Nature of the Judicial Process*, noted, “We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.”⁴⁷ It is as if the need for skepticism concerning both self and the old pieties, supposedly a hallmark of Cardozo’s jurisprudence, could find no place in a case raising what he believed to be the essence of womanly honor.⁴⁸

⁴⁵ Kaufman discusses this case as well, and is similarly critical of Cardozo’s memorandum (Kaufman pp 403-04, 573-74).

⁴⁶ Quoting Cardozo memorandum from *People v Carey*, Internal Records of the Court of Appeals, Box 1.

⁴⁷ Cardozo, *The Nature of the Judicial Process* at 13 (cited in note 13).

⁴⁸ Polenberg suggests that in other instances Cardozo rendered decisions that were sympathetic to victims in rape cases (Polenberg p 129). Both Polenberg and Kaufman regard Cardozo as captive to Victorian notions about sex (Polenberg p 131, Kaufman p 404).

Polenberg's reference to the connection between Cardozo's life and his law in cases like *Schmidt* and *Carey* is provocative and illuminating. It is one thing, however, to point to the more discomfiting parts of a judge's written record, and another persuasively to link those parts with a "deeply rooted system of personal values." And, although I am uncomfortable making this criticism, Polenberg's discussion at times invites the lawyer's complaint that the nonlawyer insufficiently appreciates all the factors that inform a judicial opinion. Take, for example, the chapter entitled "Law and Order." On the one hand, it seems fair to say, as Polenberg does, that in his opinions Cardozo exhibited a "strong law-and-order stand" and a "lack of sympathy for criminal defendants" (Polenberg p 203). Cardozo's famously dismissive response to the suggestion that New York should employ an "exclusionary rule" for illegally obtained evidence in criminal cases—"The criminal is to go free because the constable has blundered"⁴⁹—sufficiently indicates that Cardozo was not a die-hard civil libertarian where matters of criminal justice were concerned. Likewise, Cardozo's opinion for the U.S. Supreme Court in *Palko v Connecticut*,⁵⁰ the *locus classicus* of "selective incorporation," seems strangely untroubled about a fairly clear instance of double jeopardy in the retrial and ultimate execution of Frank Palka.⁵¹ As has often been said of Holmes, Cardozo seemed in such opinions to substitute alluring aphorism for analysis. Not the least of the virtues of Polenberg's book lies in his painstaking accounts of the facts of these cases, suggesting how inadequate Cardozo's disembodied abstractions can appear when placed alongside the facts.

On the other hand, it's hard to say precisely what these cases tell us about the connection between Cardozo's judicial utterances and his life-informed personal values, beyond the commonplace that . . . judicial utterances reflect personal values. As Polenberg ruefully acknowledges, Cardozo's papers (both because of his own

⁴⁹ *People v Defore*, 242 NY 13, 21 (1926) (holding that while police officer's unwarranted search and seizure of evidence was illegal and constituted a trespass, evidence improperly obtained could still be admitted). In criticizing this passage, Polenberg echoes Richard Posner's observation that Cardozo's phrase "makes the abuse of power by the police seem trivial, almost comical." Richard A. Posner, *Cardozo: A Study in Reputation* 56 (Chicago 1990). Unlike Polenberg, however, Posner lauds Cardozo for his rhetorical flourish: "[I]t is remarkable, because it packs into a simple sentence of eleven words the entire case against the exclusionary rule. The power to compress a tradition of legal thought into a sentence is given to few judges. . . . Cardozo's prose occasionally, as in *Defore*, rises to greatness." *Id.* at 56-57.

⁵⁰ 302 US 319 (1937).

⁵¹ The courts in *Palko* misspelled the defendant's name (Polenberg p 217).

“fastidious reticence” and because of the ill-conceived destruction of much of his correspondence by his judicial colleague Irving Lehman) leave us little extrinsic evidence of his motivations and beliefs (Polenberg pp 3-5). It is commonly supposed that Cardozo derived a kind of determined moral purity from the agony of his father’s judicial disgrace, and that this exerted a formative influence on his world-view, but neither Kaufman nor Polenberg sees this as much more than a legend nurtured by the lack of anything else to say about Cardozo’s beginnings (Kaufman pp 40-41, 88, 119, 448, 470-71, Polenberg p 33). In the end, we may be able to say no more than that Cardozo had no particular sympathy for criminal defendants as a judge because he had no particular sympathy for criminal defendants as a person. And *why* he lacked such sympathy must remain something of a mystery.

At the same time, criticism of opinions like *Defore* and *Palko* requires at least an acknowledgment of some of the institutional considerations Cardozo faced in formulating his rulings. As Polenberg must well understand, the undeniable gravity and wrongfulness of illegal searches do not lead inexorably to the conclusion that an exclusionary rule is the necessary remedy for such lawlessness. Although it was eventually submerged by the Fourth Amendment jurisprudence of a later generation, Cardozo’s answer in 1926 was supported by ample authority in New York and other states. Polenberg’s conclusion that Cardozo in his “blundering constable” comment had inaptly “transformed the issue from one of protecting the innocent from official lawlessness to one of permitting the guilty to escape because a ‘constable’ had ‘blundered’” (Polenberg p 206) itself borders on the inapt; for, however one resolves the issue as a matter of policy, Cardozo’s comment does “pack[] into a simple sentence of eleven words the entire case against the exclusionary rule,” as Richard Posner has said.⁵² Similarly, Polenberg’s concluding remark concerning Cardozo’s opinion in *Palko*—“A later generation of jurists would have a keener appreciation of the creative possibilities implicit in [the Fourteenth Amendment’s] texture and design” (Polenberg p 233)—begs some of the more important questions that have engaged legal scholars concerning criminal procedure, incorporation, and the Fourteenth Amendment. I think I agree with Polenberg on the merits of both the exclusionary rule and the incorpo-

⁵² Posner, *Cardozo: A Study in Reputation* at 56 (cited in note 49). Kaufman, whose assessment of *Defore* is more neutral than Polenberg’s, notes, “The holding [by the U.S. Supreme Court in *Mapp v Ohio*, 367 US 643 (1961)] that the federal exclusionary rule was binding on the states did not end the debate. . . . Cardozo’s . . . pithy warning . . . captures the strong sentiment that still weighs against the exclusionary rule” (Kaufman p 407).

ration doctrine, but I doubt that many on the other side will be persuaded by Polenberg's critique of *Defore* and *Palko*.⁵³

It may be a bit facile to attribute Polenberg's particular judgments (at least where they differ from Kaufman's) to the fact that he is a nonlawyer. (After all, one might even suppose that it is the *proponents* of the exclusionary rule who are more "legalistic" in their conception, and that the lay public is more likely to regard it as an effete technicality.⁵⁴) As I have suggested, Polenberg is a well-informed historian of law. But his *modus operandi*—the selection of a handful of cases drawn disproportionately from criminal and constitutional law, the detailed description of the litigants and their disputes, the perception that many of the results Cardozo reached were questionable from the perspective of justice—makes clear that he is less concerned than Kaufman with judicial craft and the internal workings of legal argument. While I find his judgments occasionally peremptory, Polenberg's account is an indispensable complement to Kaufman's more balanced, complete, lawyerly discussion. It matters who Hans Schmidt, Anna Aumuller, David Carey, Lillian Tate, and Frank Palka were and what Cardozo confronted when their cases came before him.⁵⁵ It is no disparagement of Kaufman's achievement to observe that Polenberg, in his more episodic and unconventional discussion, may have done more partially to disclose what John Noonan called Cardozo's judicial "mask."⁵⁶

III. WHITHER CARDOZO?

It will be some time before Cardozo's life and work again are made the subject of such intensive exploration. Whether Cardozo is one of those "great" judicial figures who warrants renewed investigation by each new generation is a debatable question. Unlike Holmes, Cardozo did not produce an enduring body of law touching the most fundamental constitutional issues, nor did he leave us a cache of compelling personal correspondence. Unlike Brandeis or Frankfurter, Cardozo did not have an influential or

⁵³ To the extent that Polenberg's critique is of the *rhetorical* sleight of hand that Cardozo at times employed in reaching his results, I am in agreement. However, it is clear that Polenberg also regards the *holdings* in *Defore* and *Palko* to have been mistaken.

⁵⁴ As Posner suggests, "[T]o a nonlawyer, the exclusionary rule is an artificial barrier to convicting criminals." Posner, *Cardozo: A Study in Reputation* at 127 (cited in note 49) (footnote omitted).

⁵⁵ As I have noted, Kaufman does discuss both *Schmidt* and *Carey*. It is emblematic, however, of the different goals of these two books that Polenberg gives us the names, words, and stories of Anna Aumuller and Lillian Tate, while Kaufman does not identify them.

⁵⁶ Noonan, *Persons and Masks of the Law* (cited in note 40).

even an active life outside the law. Personally, I think that rather more of Cardozo's renown is attributable to his rhetorical skills than to his juristic vision. Those syntactic "inversions" to which Kaufman calls our attention—"Not lightly vacated is the verdict of quiescent years"⁵⁷—still charm and entice,⁵⁸ but the holdings beneath the words seem on the whole to be prudent and sensible, rather than visionary. Cardozo's contemporary Learned Hand, another judge whose most enduring decisions lay in the common-law and statutory fields resting below the surface of constitutional questions,⁵⁹ seems to have left a firmer imprint on modern American law. If bold and candid incorporation of policy considerations into judicial decisionmaking is your criterion for "greatness," Roger Traynor may cut a more impressive figure. What Kaufman's epic biography in particular makes clear is that Cardozo successfully charted a judicial *media via* in his years on the New York Court of Appeals—neither stubbornly resistant to change nor brashly inviting it, willing to bring the law into conformity with contemporary realities (as he perceived them) but never disrespecting what he saw as legislative prerogative. The durability of Cardozo's halo is thus understandable. The bugaboos of modern legal scholarship—undisciplined judicial activism, hidebound judicial restraint, subordination of justice to legal forms—rarely arise in his opinions. It is not surprising that, as his comment to Robert H. Jackson suggests, Cardozo was palpably less comfortable with the questions he had to face while on the U.S. Supreme Court, and that his imprint on that Court was not a strong one. Had Cardozo's judicial corpus been defined more by questions of race and civil liberties than by the common-law questions he loved, his legacy would be a more contested one. As it is, his happiest years were as a "lawyer's judge" on a "lawyer's court," a vanishing breed. Kaufman exhibits a sincere respect for those traditional arts; Polenberg is interrogating Cardozo from the 1990s.

If there is a larger theme with which these two admirable works leave the reader, it is a venerable one—the problem of isolation in the appellate judge. This theme is underscored by one of

⁵⁷ *Coler v Corn Exchange Bank*, 250 NY 136, 141 (1928).

⁵⁸ Kaufman has an interesting excursus on Cardozo's writing style, which has many admirers but which has not met with universal acclaim (Kaufman pp 447-51).

⁵⁹ Richard Posner has suggested that Gerald Gunther's biography of Hand slights some of Hand's achievements in these subconstitutional fields. Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 Yale L J 511, 514-15 (1994).

the vignettes to which both Kaufman and Polenberg call attention, Cardozo's odd run-in with Jerome Frank in the 1930s (Kaufman pp 456-61, Polenberg pp 157-67). Frank, ever defensive and self-involved, came to feel that Cardozo (who had come in for some qualified praise in Frank's 1930 book *Law and the Modern Mind*⁶⁰) insufficiently appreciated Frank's brand of legal realism. When Cardozo published a lecture in 1931⁶¹ that, typically, sought to establish a middle path between some of the basic insights of Realism (which Cardozo had more or less anticipated in *The Nature of the Judicial Process*) and Frank's harder-hitting psychological skepticism, there ensued an amusing exchange of letters between the perplexed, conflict-avoiding Cardozo and the more pugnacious Frank.

Frank may have acted far from the "Completely Adult Jurist"⁶² in this exchange, but his emphasis on what he later called "fact-skepticism"—the notion that the perception of facts by judges and juries may be an even more pervasive source of legal irrationality than the normative principles announced by courts⁶³—serves as an apt reminder of what is most perplexing about Cardozo. Cardozo spent all but a few months of his judicial career as an appellate judge, but even an appellate judge must read the facts of the world in framing appropriate decisions in those cases that test the limits and interstices of legal rules. In his description of the facts in *Palsgraf*,⁶⁴ his revulsion at the world of Hans Schmidt, and his certainty in *Carey* about what "all experience proclaim[s]," Cardozo illustrated his own teaching that one is unable to see the world through any eyes but one's own. No doubt he saw the world as clearly as his own carefully channeled life experiences would allow. Cardozo's self-assured *bons mots* were the residue from the life of a "cloistered cleric,"⁶⁵ one whose devotion was the law itself.

⁶⁰ Jerome Frank, *Law and the Modern Mind* 252-55 (Coward-McCann 1949). Frank's generous accolade: "Cardozo, it would seem, has reached adult emotional stature." *Id.* at 237.

⁶¹ Benjamin N. Cardozo, *Jurisprudence*, in Margaret E. Hall, ed, *Selected Writings of Benjamin Nathan Cardozo* 7-46 (Fallon 1947).

⁶² Frank's rather fawning term for Oliver Wendell Holmes, Jr. Frank, *Law and the Modern Mind* at 253 (cited in note 60).

⁶³ See Frank's "Preface to the Sixth Printing" of *Law and the Modern Mind*. *Id.* at xii.

⁶⁴ Kaufman is mildly critical of Cardozo's statement of the facts in *Palsgraf* (Kaufman pp 297-99). Noonan has a more profound quarrel with the impersonal quality of Cardozo's opinion. Noonan, *Persons and Masks of the Law* at 111-51 (cited in note 40).

⁶⁵ *Murphy*, 250 NY at 483 ("The antics of the clown are not the paces of the cloistered cleric.").