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## Book Review: Cardozo. by Andrew L. Kaufman

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**CARDOZO.** By Andrew L. Kaufman.<sup>1</sup> Boston, MA: Harvard University Press. 1998. Pp. 731. \$55.00.

Lynn D. Wardle<sup>2</sup>

Andrew L. Kaufman's *Cardozo* is a magnificent new biography of Benjamin Nathan Cardozo. Cardozo was an influential judge for a quarter of a century—sitting on three courts in five different judicial positions, ultimately serving as an Associate Justice of the United States Supreme Court until his death in 1938. Today, more than 85 years after he began his judicial career and six decades after his death, Cardozo's judicial opinions and other legal writings are still frequently cited, marking him as one of the most influential jurists in the history of the American legal system.

The author of *Cardozo*, Andrew L. Kaufman, is the Charles Stebbins Fairchild Professor of Law and a former Associate Dean at Harvard Law School. For more than thirty years Kaufman has taught law at Harvard. He teaches and writes mostly in the fields of commercial law,<sup>3</sup> and professional responsibility.<sup>4</sup> Readers of *Cardozo* will wish that he published more in the field of biography.

Kaufman's biography of Cardozo is a substantial book by any measure. The book contains 731 dense (fact-filled, carefully written, closely analyzed) pages, including 578 pages of text, 123 pages of endnotes, an index of cases (9 pages), and a detailed general index (19 pages). It is the culmination of forty years of research and writing. (p. ix) Kaufman, who clerked for Cardozo's close friend and successor on the Supreme Court, Justice Felix Frankfurter, not only did exhaustive library research, but conducted "numerous interviews of people who had known Cardozo." (p. ix) In tone and quality, *Cardozo* brilliantly reflects the life-themes of its subject. Cardozo is convincingly presented as a careful, thorough, disciplined, pragmatic, principled, ra-

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1. Charles Stebbins Fairchild Professor of Law, Harvard Law School.

2. Professor of Law, J. Reuben Clark Law School, Brigham Young University

3. Vern Countryman, Andrew Kaufman, and Zipporah Batshaw Wiseman, *Commercial Law* (Little, Brown, 2d ed. 1982).

4. Andrew L. Kaufman, *Problems in Professional Responsibility* (Little, Brown, 3d ed. 1989).

tional, consummately professional judge, and a great writer, in a biography that reflects careful, disciplined, exhaustive research; reasonable, practical, persuasive analysis; and clear, professional, facile writing.

The book is very well organized with 28 chapters grouped in five sections. Four sections are largely biographical, telling the life story of the man, revealing glimpses of his private world of family, friends, religion, interests, daily activities, and worldly circumstances, and chronicling his public life of education, career, professional development, politics (judicial as well as partisan), and times. Professor Kaufman is a good storyteller; he writes cleanly, provides a lot of details that flesh out the character and life of Cardozo, and suggests relationships that add fascinating dimensions to the factual history. The biographical chapters are very readable, with introductory and concluding paragraphs that provide a useful preview and summary of the main themes presented. The chapters are woven together well, following the same critical story threads and conceptual themes through the various phases of Cardozo's life. The author relates and cross-references events in the life of Cardozo in a very perceptive way, so that the chapters fit together very nicely. (see, e.g., pp. 58, 77, 90, 102) The author provides occasional side-notes that add to the human interest of the story—for example, revealing that many years after Cardozo's famous *Palsgraf* decision, a relative of Cardozo married a relative of Helen Palsgraf (p. 303)—and describing Cardozo's warm relationship with various judges and justices and the difficulty he experienced with others. (Justice McReynolds, for example, apparently disliked his two Jewish colleagues, and once made a crude comment about "the son of a crook" in the presence of Justice Cardozo, (p. 480) a pointed reference to Cardozo's father, who resigned from his judgeship rather than face impeachment.) (pp. 16-20)

The fourth section of the book, entitled "Doing the Law's Work: 1914-1932," consisting of chapters 12-22, presents and analyzes Judge Cardozo's remarkable legacy of judicial opinions and other significant legal writings that he produced during the eighteen years that he sat on the New York Court of Appeals. Three chapters in the final section provide a similar doctrinal and thematic review and analysis of Cardozo's judicial opinions written during his five and one-half years of work as an Associate Justice of the Supreme Court of the United States. Together, these fourteen chapters present and measure the intellectual ability and judicial craftsmanship of one of America's

greatest jurists. They comprise an intellectual history more than a biography, though the life-story is interspersed. These chapters are not light reading, but they are enlightening, as they reveal the perceptions, principles, patterns, and powerfully persuasive writing that made Cardozo's opinions so influential in his day, and still influential today, more than 60 years after his death.

Kaufman presents an appealing picture of Cardozo as a man who was, above all, dedicated—devoted, committed, persistent, and constant in his pursuit of excellence. Indeed, the dedicated pursuit of noble ideals was Cardozo's true religion.<sup>5</sup> Cardozo was dedicated to his family, to his profession, to honor, duty and to individual responsibility. (p. 567) "His life centered on self, family, and work." (p. 161) He also was a kind person—not without his personal faults but basically considerate of others.

#### FAMILY

Benjamin Nathan Cardozo was born May 24, 1870 in New York City. His mother, Rebecca Washington Nathan, belonged to a well-to-do, distinguished Sephardic family whose earliest national ancestor had come to America a generation before the War of Independence. (p. 9) Albert Cardozo, Benjamin's father, also came from a respectable Sephardic family that had come to New York in 1752. By the time Benjamin was born (with his twin sister, the last of six surviving children), Albert was a prosperous lawyer who held the prestigious position of Supreme Court (trial) justice in New York County. Benjamin had a twin sister, Emily; an older sister, Elizabeth, who was born three years before Ben with a spinal ailment; another sister, Grace, ten years older than Ben; his oldest sister, Ellen, called Nell or Nellie, eleven years older than Ben; and his brother, Albert, Jr., who was thirteen years old when Ben was born.<sup>6</sup> (pp. 21-22) He also had many cousins who lived nearby and with whom Benjamin and his siblings spent a lot of time on Sunday and on many other occasions. (In later life, Ben referred to "the

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5. Cardozo once delivered a commencement address in which he stated: "The submergence of self in the pursuit of an ideal, the readiness to spend oneself without measure, prodigally, almost ecstatically, for something intuitively apprehended as great and noble, spend oneself one knows not why—some of us like to believe that is what religion means." (p. 190)

6. Rebecca also gave birth to two other children who were stillborn or died soon after birth. (p. 10)

hundred first cousins whom he always had to invite to birthday parties, so that he never got to invite anyone else.”) (p. 22)

Cardozo's religious identity was intertwined with his family identity. (p. 69) He was raised in a family that observed orthodox Jewish customs and was bar mitzvahed when he was thirteen. Soon thereafter, however, he ceased attending worship services, and as an adult he was rarely an active participant in the life of his family's prestigious Congregation Shearith Israel, though he remained a member of the congregation all of his life. On rare occasions he became involved in significant crises in the congregation (once helping to block a movement to end the practice of gender-segregated seating), (p. 69) and he later served on the boards of many Jewish organizations. (pp. 171, 175, 176) He appreciated his Jewish heritage, but worship and substantial religious observances apparently were not matters of his personal religious faith.<sup>7</sup> Though Cardozo sometimes privately referred to himself as a “heathen,” (p. 24) and one of his cousins said of him in midlife that “he has never been a Jew in any sense but that of having been born one, nor has ever taken the slightest interest in any of our people,” (p. 124) Kaufman presents Cardozo as proud and protective of his Jewish identity, and as personally encountering and overcoming anti-semitism; (pp. 170, 188, 478-79, 488, 563-64) he notes that Cardozo got his opportunity to become a judge (was selected to run for the New York Supreme Court) in part because the political powers “were looking for a very high class Jew to nominate . . . .” (p. 118) Cardozo was the first Jewish judge to sit on the New York Court of Appeals and the second to sit on the Supreme Court of the United States. Kaufman explores Cardozo's Jewish identity from many perspectives, which is one of the strong and fascinating elements of the biography.<sup>8</sup>

When Ben was only two, his father faced impeachment and was forced to resign from the bench in disgrace, having been charged by civic and judicial reform elements with misconduct ranging from nepotism and kickbacks, to abuse of his power in holding persons unlawfully, to misusing his judicial powers in several cases to promote partisan (Tammany Hall) political

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7. Cardozo did have religious beliefs, however. As he expressed them: “Religion is worthless if it is not translated into conduct. Creeds are snares and hypocrisies if they are not adapted to the needs of life.” (p. 190). He further resonated to the notion of religion as the dedicated pursuit of noble ideals. See note 5.

8. See, e.g., the entries in the General Index under “Cardozo, Benjamin Nathan, - Judaism.”

ends. (pp. 11-20) While Albert escaped disbarment, and he continued to practice law until his death in 1885, the family honor was stained by his highly public impeachment, and they suffered at least a temporary financial setback. (p. 19)

When Ben was only nine, his mother died after suffering for years from mental illness, a stroke, and subsequent paralysis. (p. 21) He was raised in large part by his oldest sister, Nellie. The two siblings became very close; (pp. 146-47) neither married, and they shared a home for their entire lives. (pp. 21, 67-68, 84-87, 146-50, 160-61) In his turn, Ben cared for Nellie after she suffered a stroke, and he was deeply distraught when she died. (pp. 160-61, 192-96)

When he was thirteen, Cardozo was tutored for a time by Horatio Alger, still remembered as the author of stories of rags-to-riches heroes. Kaufman reveals that nearly twenty years earlier, minister Alger was found guilty by a committee of his church of having sexually abused several young boys. (p. 25) But no further trace of Alger's pedophilia is evident. Kaufman disappoints those who would add Cardozo to the pantheon of putative homosexual icons, for he provides evidence from many sources that Cardozo was traditional and chaste in matters sexual. (pp. 68-69, 86, 154-56)

Cardozo was admitted to Columbia University (just eighteen blocks from the family home) when he was only 15 years old, the youngest in his class. His father died when he was a freshman. Cardozo graduated in four years, at or near the top of his class, having won several prizes along the way. He was remembered as a bright, hard-working, but socially shy student. (pp. 26-39) He then attended Columbia Law School for two years, dropping out when the disruption associated with switching to a new method of legal education (the case method) outweighed in his mind the benefits of another nonrequired year of schooling. (pp. 40-50) Though he ended his formal education in 1891, Cardozo had a lifelong thirst for learning. He was a practical "polymath." (p. 158)

When he began practicing law, shortly after leaving law school, Cardozo continued to live with his brother (who was his law partner) and his older sisters, Nellie and Elizabeth (who was afflicted with a spinal disease and mental illness), and, until she married, with his twin sister, Emily. While Emily, the family extrovert, was the "only one of the six brothers and sisters to

marry," she had no children; "thus the Albert-Rebecca branch of the Cardozo family died out." (p. 65)

During his twenty-three years of practice and his eighteen years on the New York Court of Appeals, Cardozo maintained his family home, with Nellie and household help, in New York City. While on the Court of Appeals he commuted to Albany (where he lived in a room in the Ten Eyck hotel) to hear arguments and for consultation with his colleagues. His heart, however, always remained with Nellie, and with their home in New York City. When he was appointed to the Supreme Court of the United States and had to move his residence (including some of his faithful household help) (p. 475) to the District of Columbia, he was homesick and miserable. (pp. 472-73) Even though Nellie was then dead, his heart yearned for the familiar rooms of his home in New York City that were saturated with family memories. He never felt at home in Washington, D.C. (p. 486), and he raced "home" to New York and to his extended family and friends there as soon as the term ended. (pp. 473, 485-86) He kept the family home in New York City for nearly five years after taking up residence in Washington, D.C. After his final stroke in Washington, when he finally was taken back to New York City, he said, "This is the place I love. I feel better." (p. 567) He died nearby in the home of his friends on July 9, 1938.

Cardozo's failure to marry is examined by Kaufman thoughtfully and with discretion. Kaufman suggests that Cardozo never married because he "could not bear to leave Nellie" and "Nellie's love for Ben was too possessive." (p. 85) Perhaps it also had something to do with the traumatic effect of his mother's prolonged illness and death when he was young, or some other trauma during his formative years, or with his own youthful shyness, (pp. 37, 68) or with the responsibility he felt of providing for his sisters, or with the very comfortable life he had as a bachelor, or with his satisfaction with the sibling and familial love he received within his birth family, or with his devotion to excellence in his professional pursuits. The responsibility of caring for a wife and children of his own undoubtedly would have rounded out Cardozo's human experience and matured his understanding of some things,<sup>9</sup> but it also would have limited the time and resources he could devote to his legal and judicial career. Kaufman has identified a number of life-themes relating to

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9. See John T. Noonan, *Persons and Masks of the Law passim* (Farrar, Straus and Giroux, 1976).

duty that may have influenced or supported Cardozo's decision (or nondecision) to live as a bachelor, including his honor-bound dedication to fulfilling his responsibilities to (of supporting) his birth family (his siblings), then his duty-bound dedication to fulfilling with excellence the responsibilities he had assumed as a judge, combined with his love of privacy, (pp. 168, 178) and his own mild vanity. Moreover, it was not unusual in Cardozo's extended family to not marry. Kaufman observes that "[h]alf of Ben's first cousins who lived to adulthood never married." (p. 86) He had a comfortable family life with his birth family; with the warm support of his family and friends, "Cardozo led a sheltered life, but neither a cold nor an empty one." (p. 568)

Based on his own family experiences, Cardozo seems to have idealized women and families. Thus, while he was generally progressive as a judge, his "personal values in family matters were traditional and old-fashioned." (p. 70) In several cases, his opinions reflect stereotypes about women that influenced his evaluation of their claims.<sup>10</sup> (pp. 232-34) Kaufman calls Cardozo's attitude about women's place in society "Victorian." (p. 404) Clearly, Cardozo honored the family-roles of women to a degree that seems quite anachronistic to many today.

### PROFESSION

"Benjamin Nathan Cardozo lived for the law, and the law made him famous." (p. 3) He was admitted to the bar and began practicing law in 1891. He began practicing in the family law firm with his brother Albert in a partnership that lasted until Albert's death in 1909. "In his first year at the bar, he argued and won four cases on appeal in New York's intermediate appellate court, the General Term of the Supreme Court. He also won one and lost one case in New York's highest court, the Court of Appeals." (p. 55) He was a very dedicated, hard-working lawyer. "During his first five years at the bar, he set a pattern of work and family life that was to last until his sister Nellie's death. He continued to live at home, with his family as the principal

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10. Kaufman mentions a note written by Cardozo to the Court of Appeals recommending denial of leave to appeal a trial court's denial of wife's petition for separation; the note portrayed two hostile women: a wife and her mother-in-law who egged on her son to slap his wife, which Cardozo apparently concurred was "a trifling physical encounter," unworthy of legal separation. (pp. 232-33) In another case he described "the typical woman client, who leaves everything to her lawyer, and then forgets her own acts or misconceives their significance." (p. 233)

part of his social life. He worked hard to learn his craft, but his mentor was the profession." (p. 53)

Kaufman examines in detail several of the major cases in which Cardozo was involved as a lawyer, including his defense of a theatre owner on appeal from a conviction for violating state anti-segregation laws (he lost 3-2). (pp. 104-07) Kaufman also excerpts and analyzes some of the briefs Cardozo filed in some of the cases he had as a lawyer. (pp. 59-64, 71-84, 89-96, 98-112) The elements of thorough preparation, active, disciplined analysis, and good, persuasive writing are evident even in the early days of his career. During his years in practice, Cardozo gained a great lawyer's appreciation for the facts (and for succinctly stating facts) that enhanced his skill as a judicial opinion writer. (pp. 112, 135, 571)

Benjamin Cardozo began his judicial career in 1914 when he was elected to the New York Supreme Court—a trial court. (pp. 117-27) He was supported by an anti-Tammany reform faction. After only five weeks on that court Cardozo was appointed to sit temporarily on the New York Court of Appeals (the highest court in the state) to help clear the backlog of appeals. (pp. 127-29) Three years later, in 1917, he was elected as a regular member of the New York Court of Appeals. (pp. 163-64) Eight years later, he was elected Chief Judge of the same court. (pp. 178-82) And seven years later, in 1932, he was appointed to the Supreme Court of the United States, where he served until his death on July 9, 1938. (pp. 455-71, 566-67) A lifelong Democrat, (pp. 119, 487) and a crucial supporter of Roosevelt's controversial New Deal legislation, Cardozo was appointed to his first non-temporary seat on the New York Court of Appeals by a Republican Governor (Whitman), was appointed to the Supreme Court of the United States by a Republican President (Hoover), and enjoyed the support of Republican party apparatus when he stood for election to the state Supreme Court and when he successfully sought election as Chief Judge of the New York Court of Appeals. (pp. 117-25, 178-82)

On the New York Court of Appeals, Cardozo participated in 8,415 cases (excluding motions); 2,822 were decided with full opinions, and Cardozo wrote 566 of those opinions. (p. 166) He did his own research (pp. 143-44), and wrote his own scintillating opinions, filled with some very quotable passages. Kaufman repeats many of Cardozo's memorable lines, including: "Danger

invites rescue,"<sup>11</sup> "The timorous may stay at home,"<sup>12</sup> and "The criminal is to go free because the constable has blundered."<sup>13</sup> Cardozo had the writing ability to interest, to captivate, and to persuade.

Cardozo was politically progressive, morally conservative, and judicially restrained. He believed in and defended judicial lawmaking, but he also "believed that the major role in guiding social change in a democracy belonged to the legislature and the executive" and "he innovated the most when the step to be taken was modest and when the innovation did not violate the prerogatives of other institutions of government." (p. 5) Throughout his career, "Cardozo reminded the public and the profession that although judges make law, they are different from legislators." (p. 574) He believed in advancing and changing the law but also believed in the importance of respecting precedent, history and the powers of the other branches of the government.

Kaufman devotes considerable effort to reviewing and analyzing Cardozo's approach to judging. It is effort that pays great dividends for the reader. Cardozo was "the first modern judge to tell us how he decided cases, how he made law, and, by implication, how others should do so." (p. 199) He presented his views in a series of lectures at Yale Law School that were edited and published as *The Nature of the Judicial Process* in 1921.<sup>14</sup> Two years later, he delivered another series of lectures at Yale on the science and philosophy of law, which were published under the title of *The Growth of the Law*.<sup>15</sup> Four years later, he delivered a series of lectures at Columbia Law School, which were also published, entitled *The Paradoxes of Legal Science*.<sup>16</sup>

Cardozo was a realist in that he recognized that judges make law, not just "find" it. (p. 200) He believed that judges must "adapt the law case by case to the changing circumstances of society." (p. 211) While he was a strict, rigorous judge, who believed in enforcing the law even if it caused hardship for a party, Cardozo rejected the stultifying formalism of his and previous generations that sometimes put legal fiction about truth

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11. *Wagner v. International R. Co.*, 133 N.E. 437, 437 (1921).

12. *Murphy v. Steplechase Amusement Co.*, 166 N.E. 173, 174 (1929).

13. *People v. Defore*, 150 N.E. 585, 587 (1926).

14. Benjamin Cardozo, *The Nature of the Judicial Process* (Yale U. Press, 1921).

15. Benjamin Cardozo, *The Growth of the Law* (Yale U. Press, 1924).

16. Benjamin Cardozo, *The Paradoxes of Legal Science* (Columbia U. Press, 1928).

and reality. He once wrote: “[W]e are not to close our eyes as judges to what we must perceive as men.”<sup>17</sup>

However, Cardozo also believed that the scope and method of lawmaking appropriate for the judiciary was more modest and disciplined than it was for the legislature. He identified four methods of legitimate decision-making available to judges: “the rule of analogy or the method of philosophy; . . . of historical development [or] the method of evolution; . . . of the customs of the community [or] the method of tradition; . . . of justice, morals and social welfare, the *mores* of the day [or] the method of sociology.”<sup>18</sup> These disciplines were not only sources of judicial decision-making, they also were limits on judicial law-making. Cardozo followed his own advice; Kaufman shows that Cardozo regularly resorted to history, tradition, analogy and sociological analysis in making his judicial decisions. (pp. 61, 90, 265-312, 418, 421, 537, 570, 576) Cardozo was dedicated to rationality, to reason in the judicial process.<sup>19</sup> “Cardozo saw logic as a key to the very idea of law.” (p. 206) He was a lover of ideas, and an avid student. His writings about the “science and philosophy” of law,<sup>20</sup> and of legal “science,”<sup>21</sup> reveal an active faith in the saving potential of human reason.

One of the themes that Kaufman develops with great skill and effect is that Cardozo rejected the making of judicial decisions that would revolutionize the law; rather, he favored small, sure steps that moved the law carefully, one case at a time, in a direction that he believed society considered progressive and just. (pp. 46, 48, 60, 221, 243-46, 536, 576-77) In this, Cardozo was truly a master common law lawyer in the highest and finest sense of the term.

He believed that judges should be disciplined and moderate in their ongoing creative work of moderning law. [He counseled] that a judge should be respectful of precedents, other institutions, and the work of the trial court and jury; should be well informed about social conditions and trends; and should be . . . neither liberal nor conservative. (p. 576)

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17. *People ex rel. Alpha Portland Cement Co. v. Knapp*, 129 N.E. 202, 208 (1920).

18. Cardozo, *The Nature of the Judicial Process* at 30-31 (cited in note 14).

19. This commitment to reason is related to the idea of individual responsibility, for without rationality, capacity to reason, to make responsible decisions, accountability would be unjust. (p. 257)

20. Cardozo, *The Growth of the Law* (cited in note 15).

21. Cardozo, *The Paradoxes of Legal Science* (cited in note 16).

He believed that the "goal of juridical effort is not logical synthesis, but compromise."<sup>22</sup> (p. 221) Judges are to make law to fill "only between gaps." (p. 213) Cardozo summarized this facet of his philosophy of judging well when he wrote: "Justice is not to be taken by storm. She is to be wooed by slow advances."<sup>23</sup>

Cardozo took his progressive-but-restrained approach to judging with him to the Supreme Court of the United States. Although there arguably may be more latitude for justices to make larger leaps in applying constitutional law than in statutory interpretation or common law development, Cardozo "habitually looked for some constraint on the exercise of the Court's discretion." (p. 536) One of the most important constraints that Cardozo emphasized was deference to the role and responsibilities of the legislative and the executive branches. (pp. 338, 340, 345, 368, 390, 416, 430-35) "As a judge in a democracy, Cardozo respected the legislature's power . . . over policy-making." (p. 429) Often, he referred to the failure of the legislature to change a rule adopted by the court, (pp. 438, 439, 443) or declined to make new law and referred the claimant to the legislature for a "remedy . . . if there [were] gaps in the statute that leave open the possibility of hardship or injustice." (p. 432) Kaufman discusses at some length a "puzzle" presented by three family law tort cases, which he explains illustrate the importance to Cardozo of deference to the legislature—whether Cardozo would extend the law depended in part upon his perception of whether the legislature had taken or should take responsibility for the policy choice. (pp. 436-44)

This principle, of course, was particularly significant in Cardozo's brief tenure on the Supreme Court of the United States, as a major constitutional crisis erupted regarding the Court's consistent invalidation of social and economic welfare legislation. Cardozo was part of the minority-turned-majority that turned the Court away from judicially-supreme substantive due process and toward deference to the authority of state legislatures and Congress to enact progressive laws to respond to the economic and social crises of the day. (pp. 506-07, 524-26) Cardozo's position was completely consistent with the position he had taken for nearly two decades as a judge on the highest state court in New York. (p. 564)

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22. Quoting René Domoque, *Analysis of Fundamental Nations* 570 (1911).

23. Cardozo, *The Growth of the Law* at 133 (cited in note 15).

Cardozo believed that “[j]udges’ notions of right and wrong were to be guided by community, not personal, standards.” (p. 211) The judge must not mold the law to conform to his or her “individual sense of justice. . . . That might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law.” (pp. 213-14) A good judge must be impartial, he believed.<sup>24</sup> (p. 221) Kaufman suggests that Cardozo espoused this view because he “was not a man of passionate convictions,” (p. 154) but he may be more relevant when he notes that “he did not let those [passionate convictions] that he had show very often.” (p. 154) A good judge is not one who is without real convictions—for example, we all hope that all judges will be passionately committed to the rule of law, to honesty, to the Constitution, to equal justice, to impartiality, and to fidelity to their oath of office. However, Cardozo emphasized that good judges believe in subordinating and do subordinate their private convictions to their high judicial duty to be objective, impartial, honest, self-disciplined, and to judge according to the law. (p. 576) Thus, while he personally opposed capital punishment, Cardozo upheld execution sentences which were lawfully and fairly imposed. (pp. 395, 572-74)

Cardozo was an important, albeit junior, justice of the Supreme Court of the United States during a critical time in the history of the Court, and he played an important role in changing the course of the Court in a way that helped fit it for the times and circumstances of the mid-twentieth century. While Cardozo authored some important opinions, Kaufman convincingly shows that his greatest contributions may have been in convincing other justices in the conferences and in unpublished notes and memoranda, to adopt judicial doctrines more deferential to legislatures in general, and to the national government in general. He was one of the dependable progressives or “liberals” that moved the Court during the Court-packing crisis of 1937, when President Roosevelt proposed to expand the Court in a way that would allow him to appoint enough new justices to override the conservative majority that continually struck down economic regulations such as minimum wage laws, working condition laws, and the like.

Significantly, Cardozo’s greatest contributions to the law and to the judicial process were made while he was sitting on a state court, as a state judge in Albany, rather than as a justice of

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24. See note 22.

the United States Supreme Court. Kaufman's lengthy, legalistic, and doctrinal part four provides overwhelming evidence of that. The significance of that fact for American federalism and for the American legal system may not yet be fully appreciated, but Kaufman's book should be a large step in the direction of correcting that oversight.

Cardozo was one of the finest American judges in history and his strengths, including his breadth, were beautifully suited to his position on the New York Court of Appeals. He had the practical sense of an experienced, capable trial lawyer, which he had been, the writing ability of a well-educated, well-read, fluent intellectual, which he was, the work ethic of a successful, responsible professional, which he was, and the personal collegiality of an intimate friend, which he became with the other members of the Court of Appeals.

#### HONOR, DUTY AND INDIVIDUAL RESPONSIBILITY

Although Cardozo was too young to remember personally the impeachment of his father, the shadow of that affair loomed over his personal and professional life. Even when he was on the Supreme Court, the shade of his father's disgrace was mentioned in a disparaging way.<sup>25</sup> "Cardozo once mentioned [his] desire to 'work away' his father's disgrace." (p. 40) Throughout his career, Cardozo was sensitive to *honor*, and worked to infuse real meaning and substance to the legal standard of honor. For example, Cardozo's stirring statement about the standard of honor to which a trustee must be held is still oft-quoted. "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 the standard of behavior."<sup>26</sup> He viewed honor to be an implicit element of other relations of trust. A husband would be held in his court to do "what a man of honor and a gentlemen should have been prompt and glad to do." (p. 231) A church erecting a place of worship had a duty to act honorably with regard to other landowners, perhaps more honorably than other builders. (pp. 233-34) Reliance was a significant consideration with Cardozo because it created a duty of honor. (pp. 313-15) "Acting with honor, fulfilling a duty, accepting responsibility, and keeping promises were important themes in Cardozo's eq-

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25. Justice McReynolds once made a stinging comment about "the son of a crook" getting appointed to the bench in the presence of Justice Cardozo. (p. 480)

26. *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928).

uity, torts, and contracts opinions.” (p. 359) Similarly, in cases involving international law he believed “that governments, like individuals, ought to behave honorably.” (p. 388) Cardozo believed in these values, and he also found them in (or imputed them to) society as a whole because of their importance to society. (p. 574)

*Duty* also was a major, frequent concern of Cardozo’s opinions. A fiduciary has a “constant duty” to act in no way that disadvantages the trust he has been given. (p. 423) Attorneys were held to the highest standards of fiduciary duty. Cardozo “was uncompromising in his pursuit of responsible behavior and a clean image for the profession.” (p. 425)

He held strong views about the importance of *individual responsibility*. Parties who came before him (as in the famous “Flopper” case)<sup>27</sup> could expect no pass or sympathy if they were seeking to escape or transfer responsibility for choices they had knowingly made. (pp. 257-60) This was linked to concepts of “foreseeability” and legal liability. (pp. 243-85) In criminal cases, too, his views of individual responsibility were dominant. (p. 392) Indeed, his most important criminal law opinions “dealt with issues of moral fault.” (p. 408) He interpreted criminal laws in light of his belief that “individual moral fault was required in criminal statutes,” (p. 411) and viewed the entire penal system as based on the concept of individual responsibility and punishment for fault. (p. 415)

## KINDNESS

“Nice guys finish last” is how the famous Durocher saying goes.<sup>28</sup> But that is not how Andrew L. Kaufman’s biography of Cardozo goes. Rather, one of the points made repeatedly and well by Kaufman is that Judge Benjamin Cardozo, who rose to the top of the legal and judicial profession, *really* was a *very* nice guy. Perhaps that is because by the time he became a judge, Cardozo was mature and experienced.

Cardozo had been a very tough, competitive trial lawyer for more than twenty years, and as a judge he did not hesitate to be very strict and to uphold harsh judgments if he believed the law

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27. *Murphy v. Steeplechase Amusement Co.*, 160 N.E. 173 (1929).

28. Leo Durocher, *Quotez* (site now closed) (referring to the 1948 New York Giants) <<http://www.campus.bt.com/CampusWorld/orgs/org6641/quotez/781.htm>>; see also *Quotes* <<http://www.people.memphis.edu/~kwelch/quotes.htm>>.

required it. (pp. 73, 112, 161, 223-30, 269-75, 281, 345-47, 356, 392, 535-37, 548) He 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. 4) As a judge, he was tough on crime, and unsympathetic to moral wrong-doers in civil cases. (pp. 345-47, 392, 445-46) Nor was he ahead of his times on moral issues regarding race, free exercise of religion, or other civil rights issues.<sup>29</sup> (pp. 362-65, 534-65)

Cardozo also had "a strain of aristocratic elitism, some arrogance, and some prejudices," as well as "his share of petty foibles." (p. 183) He "had a strain of vanity" and was very sensitive to criticism. (p. 184) One of his clerks noted Cardozo's "extraordinary self-esteem" and his intolerance. (p. 483) And to Kaufman, he seemed to have "an aristocratic sense of entitlement to the service and deference of others." (p. 568)

Nevertheless, Judge Cardozo usually was very "courteous, and over time he revealed qualities of devotion and serenity." (p. 4) His dedication to caring for Nellie, especially at the end of her life, "was extraordinary, combining gentleness, kindness, and self-sacrifice, for he gave up many things to be with her." (p. 183) He was perceived by many who knew him to be a

gentle, considerate person who did not take or give offense. . . . He was a hero to those who worked for him because he was constantly appreciative of their efforts on his behalf and because he took care to talk with them at their level of interests and conversation. Also, he was understanding when things went wrong."<sup>30</sup> (p. 183)

Thus, "he was no saint. He was simply a good man, with ordinary human failings that included some prejudices." (p. 161) But he managed to control his failings and rise above his imperfections well enough to help his loved ones and to inspire many others with the hope of goodness, honor, kindness, and the pursuit of excellence in humanity.

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29. "Cardozo's record in civil liberties cases on the Supreme Court was . . . mixed." (p. 536) For instance, Cardozo early in his career defended a theatre which was prosecuted under a New York Civil Rights law for refusing to seat an African-American patron in the orchestra section. (pp. 104-07) He also lightly rejected the claim of a conscientious objector for exemption from mandatory military science classes at a state university during peace time. (pp. 536-37).

30. Kate Tracey, one of his domestic helpers who knew him for forty-six years said of Cardozo, "He was the most unique and lovable soul I have ever known, more like a Heavenly Being than a human." (p. 183)

## CONCLUSION

Andrew L. Kaufman's *Cardozo* is a timely and relevant biography for several reasons. First, the opinions and other writings of Cardozo are still very influential in American courts. For example, Cardozo has been cited by name over 1,000 times in state court cases in the 1990s,<sup>31</sup> and over 1,000 times in federal court cases in the 1990s.<sup>32</sup> He was cited by name in opinions in seven different cases in the United States Supreme Court in 1998 alone.<sup>33</sup>

Second, Cardozo's approach to judging is worth reconsidering. He had a rational, principled-but-not-inflexible, disciplined, approach to deciding cases. After more than three decades of the cheap thrills of the unprincipled, outcome-driven, egoistically subjective, (revived) substantive due process, the integrity and modest moderation of Cardozo's principled, rule-of-law approach to deciding cases seems especially appealing today. Cardozo's basic understanding of the judicial process, involving realistic-but-restrained, principled-but-incremental, judicial law-making, has much to offer the American legal system as it faces the challenges of a new century.

Third, Cardozo's high moral standards, his commitment to honor and duty, are a welcome contrast to the sleazy, scandal-ridden lives of public figures whose "private" immoralities dominate the public media reports of today. It is refreshing to read of a public figure whose private life was so significantly in harmony with the high principles he publicly espoused; whose desire for personal privacy was not driven by the need to conceal the skeletons of past, undiscovered immoralities; who genuinely believed in some high moral standards, and who actually adhered to those idealistic standards, even though he was by personality, intellect and profession very skeptical and pragmatic. At this time in our nation's history, we need to be reminded of the high character and morality of some of the heroes who helped lead our nation safely and wisely through some of the tight places and crises that resulted from the mistakes and improprieties of other, lesser leaders and generations.

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31. A Westlaw search conducted on February 1, 1999—"Cardozo and da(aft 1/1/1990)")—in the Allstates directory produced 1083 hits.

32. A Westlaw search conducted on February 1, 1999—"Cardozo and da(aft 1/1/1990)")—in the Allstates directory produced 1038 hits.

33. *Id.*

Fourth, Cardozo's life provides a great example of how one may rise above the apparent limitations of family failures. Cardozo did not run from or try to hide from the taint of family disgrace; he chose to pursue the same occupation in which his father had been publicly embarrassed, in the same town in which his father was humiliated, working daily with people who would personally remember the scandal and associate it with his family. Cardozo lived above the shame because he tried to live above error. He overcame the taint of his father's professional disgrace so successfully that he became the model of integrity for the entire profession and his name—his family's name—is now associated indelibly with the highest standards of judicial honor.

Fifth, Cardozo's life shows that "nice guys" do not always finish last; rather, sometimes, very nice people succeed spectacularly. Grace, courtesy, consideration and similar virtues are not only their own rewards, but they unquestionably facilitated and burnished the success of Judge Cardozo.

Sixth, Cardozo shows that on the path to greatness mistakes are made but they need not be failures; that imperfections do not necessarily prevent success if one has integrity and dedication to principles. Kaufman's biography shows that by striving to do the best, by trying to live by high ideals, even flawed, imperfect human beings are capable of making perfectly wonderful, very important contributions to family, friends, profession, and society.

Kaufman's biography is also timely because Cardozo's life may provide a model in some important ways for a generation that wants to separate itself—without abandoning the persons, values and institutions from which it is separating. It is encouraging to read of a man who remained proud of his religious heritage, maintained his religious identity, protected his religious community, and sometimes openly served his religious community, even though he declined to engage in organized religious worship and withdrew from the active life of his congregation. It is heartening to learn of a man who was deeply, devotedly committed to his family and to "traditional" family values, even though he never married, never started a family of his own.

Kaufman's biography also may be appreciated as much for what it does not have as for what it has. It is lacking in pretention of omniscience, though it is extremely thorough. It is lacking in pseudo-sophisticated psycho-biographical speculation, though the author reveals many intriguing details about the life upon which less responsible writers might have based tantalizing, gossipy conjectures. It lacks the immature demand for perfec-

tion and certainty that reduces complex characters and lives into cardboard caricatures and unidimensional posters.

Andrew Kaufman's *Cardozo* is a very good biography. Of course, it does not exhaust the subject. Because it is so thorough it raises some new questions about the life and career of Benjamin Nathan Cardozo. For example, more might be written about how and to what ends Cardozo used his formidable writing skills; Kaufman has begun consideration of the subject, (pp. 445-46) but perhaps more can be said. It would be nice to know more about the social history of the ages in which Cardozo lived, and to have that social history linked to the cases he was deciding at particular times. The personality and politics behind more of the cases would be interesting to know. A vague impression has come through this biography that Cardozo was rather establishmentarian in his decisions; an analysis of how the powerful and well-rooted in power, wealth, prestige and political importance (and the poor and insignificant) fared in his decisions would be welcome. The fact that Cardozo had a great influence upon American law while sitting as a judge on the appellate court for just one of the then-48 states might be explored in terms of its significance for American federalism and for the American legal system.

Thus, Kaufman, like a good law teacher, lets us know that there is even more to learn and to think about than he has told us. In short, Kaufman has done a masterful job in writing this biography of Benjamin N. Cardozo.