

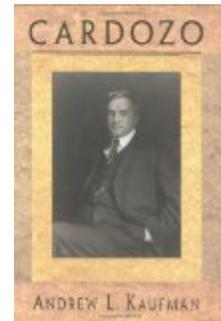
# H-Net Reviews

in the Humanities & Social Sciences

Andrew L. Kaufman. *Cardozo*. Cambridge, Mass: Harvard University Press, 1998. xii + 731 pp. \$55.00 (cloth), ISBN 978-0-674-09645-5.

Richard Polenberg. *The World of Benjamin Cardozo: Personal Values and the Judicial Process*. Cambridge, Mass.: Harvard University Press, 1997. xiv + 288 pp. \$29.95 (cloth), ISBN 978-0-674-96051-0.

Reviewed by I. Scott Messinger (New York University)  
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## Courting Cardozo: The Law Professor, the Historian and the Craft of Judicial Biography

In a lecture he delivered at Yale Law School in December, 1923, Benjamin Cardozo, then an associate judge of the New York Court of Appeals, offered some advice to those seeking to practice or understand the judicial craft. “Justice is not to be taken by storm,” he counseled, “it is to be wooed by slow advances.”[1] Whatever one thinks of this statement as a philosophy of law, it is clear that it worked as a formula for personal advancement within the judicial profession, as Cardozo’s cautiously innovative style of judging earned him a seat on the Supreme Court of the United States in 1932 at the age of 61. Of course, a number of factors led President Herbert Hoover, a Republican from Iowa, to appoint a Jewish Democrat from New York City to fill the vacancy created by the resignation of Justice Oliver Wendell Holmes, Jr. Among these factors were Cardozo’s widely lauded personal integrity, his popularity and collegiality as a member of the New York state bar and its judiciary, and his craftsmanship as a legal writer. However, it was Cardozo’s reputation as a moderate progressive, whose zeal for justice in the individual case was tempered by his reverence for the common law, that convinced Hoover that Cardozo was a safe choice for elevation to the nation’s highest tribunal.

The theme of “cautious innovation” drives the two recent biographies of Cardozo under review, one by Andrew Kaufman, a professor of law at Harvard Law School, and another by Richard Polenberg, a professor of history

at Cornell University.[2] Both authors explore how their subject challenged the oxymoronic implications of this term, and both go to great lengths to divorce Cardozo from the liberal/progressive reputation to which he has been wed since Joseph Pollard published his book about the Justice in the mid 1930s, and the New Republic began to market Cardozo as a progressive a few years later.[3] Kaufman is more explicit in his message that “Cardozo was not such a thoroughgoing progressive as his reputation suggests,” but Polenberg makes the same basic point, emphasizing Cardozo’s “ability to navigate the shoals of continuity and change.”[4]

Despite the similarity of their conclusions about Cardozo, Kaufman and Polenberg have written two very different kinds of biography. This is not surprising, given that Kaufman has a legal background and devoted over forty years to the project, whereas Polenberg is a historian who began researching Cardozo’s life in 1989. This difference in approach – the detailed study of a man and his jurisprudence, versus the thematic treatment of a judge and his times – offers a window through which we might reflect upon the relative virtues of wooing a justice by slow advances and taking him by storm.

In all likelihood, the gentlemanly Kaufman would recoil from the suggestion that he “seduced” Cardozo’s story from a historical record tragically winnowed by the

destructive acts of the Justice and his literary executor—yet this is precisely what Kaufman has done. He has reconstructed his subject’s life from the papers of his friends and colleagues, from interviews that he began conducting in the late 1950s, and from a sensitive reading of Cardozo’s judicial and non-judicial writings. He makes particularly good use of the Justice’s class notes as an undergraduate at Columbia, and of the internal memoranda that Cardozo and his colleagues wrote and circulated on the New York Court of Appeals.[5]

To his credit, Kaufman avoids speculating from the scant evidence that exists about Cardozo’s personal life. He resists, for example, the temptation to sensationalize Cardozo’s relationship with his older sister, with whom he lived for most of his adult life, or his experience as a student of Horatio Alger, the famous author and tutor who, it has been discovered, engaged in inappropriate sexual activity with many of his young male pupils.[6] Kaufman keeps his readers focused on the details of Cardozo’s life that bear directly on the source of his fame – his status as both a proto-Realist legal philosopher and a great American judge who sought to balance the imperatives of the common-law tradition against the demands of a society increasingly dependent upon legislative innovation and experimentation. Kaufman has been clear about his conception of the biographer’s function, remarking in his recent talk at Cardozo Law School that “the claims of history seem stronger in connection with the history of the court than with [Cardozo’s] private life.”[7]

Driven by this respect for his subject’s privacy, however, Kaufman serves up a rather bland account of Cardozo’s progression from young advocate for New York’s commercial interests, to hesitant and doubt-filled author of *The Nature of the Judicial Process*, to common law judge-turned-Supreme Court Justice whose decisions were guided by “a respect for the democratically elected legislature as a major source of social values.”[8] Kaufman argues that Cardozo should be understood not as a trailblazing jurist, but, instead, as a “facilitator” of the common law’s evolution. Focusing primarily, but not exclusively, on his tort and contract decisions, Kaufman recharacterizes Cardozo’s role in the development of legal doctrine – from the towering figure that his prominence in the pages of today’s law school casebooks suggests, to that of a man who gave eloquent voice to nascent jurisprudential developments. This is not to say that this particular biographer doesn’t admire his subject, for it is clear that Kaufman appreciates the kind of craftsmanship that enabled Cardozo to adhere to the doctrine of *stare decisis* while adapting the law to modern conditions. Un-

fortunately, in his zeal to make Cardozo seem like a transitional figure between nineteenth-century formalist and twentieth-century realist judges, Kaufman portrays his protagonist as a man “without passionate convictions.”[9]

Cardozo does seem to have been a private man, and one who rejected the more radical agendas of his progressive and realist contemporaries. Kaufman reveals as much in his compelling account of the Justice’s increasingly tense relationship with Jerome Frank, which he concludes by announcing that “Frank was simply too ethereal for Benjamin Cardozo.”[10] Nevertheless, it is questionable whether a cloistered lifestyle and an unwillingness to free oneself from the constraints under which common-law judges have traditionally labored are qualities that can be characterized accurately as “passionless.” Indeed, Cardozo was passionate about many things in his life, such as his family (to whom he was devoted), the jurisprudential notion that duty precedes rights (a conviction that both Kaufman and Polenberg perceive as animating his approach to common-law decision-making), and about fostering and maintaining his reputation as a man of unimpeachable integrity. Kaufman gives the latter concern short shrift; he mentions Cardozo’s instructions to his executors to destroy his personal correspondence after his death but dismisses his determination to keep his private life from public view as the unremarkable behavior of a man whose private life was not that interesting to begin with.[11] This approach is unfortunate, not because the public wants or deserves more intimate details about Cardozo, but because a great deal can be learned about the judicial figure if one treats a degree of disengagement from the world as a reputation-enhancing posture or strategy rather than as a simple character trait or (non)ideology.

The shortcoming of Kaufman’s *Cardozo* is not that it lacks a sufficient level of detail about Cardozo’s life (there seems to be very little that is discoverable that Kaufman has not found), but that it fails to interrogate its own premises. That is, it begs the question why forty years of research has produced such a lifeless portrait. Although Kaufman pays lip service to the notion that “Cardozo was not a bloodless, idealized essence,” his description of him as “a hardworking man who lived well and was a little obsessive in his personal life” does little to add color or humanity to the quiet hero of George Hellman’s sentimental biography published in 1940.[12] It is a curious brand of hagiography that produces, on the one hand, a convincing response to Cardozo’s critics who have accused him of sacrificing candor to a progressive/liberal

agenda, and, on the other hand, a portrait of a man who is so disengaged that he lacks the very human qualities that make someone a worthy subject of biography in the first place. Kaufman's forty-year monopoly on many of the extant sources about Cardozo has ensured that he would have few, if any, rival suitors in the effort to court the true Cardozo into the pages of a definitive biography, and it is unlikely that any more comprehensive work will emerge.[13] Nevertheless, Kaufman's book reveals the problem of treading too gingerly with a biographical subject, as we are left with a sanitized portrait of a man whose passion for privacy was, in all likelihood, more than "a little obsessive."

In *The World of Benjamin Cardozo*, Richard Polenberg turns a slightly more critical eye upon one of America's judicial icons, and, by titling his first chapter "A Man of Fastidious Reticence," he highlights the importance of privacy to his subject. Before we learn anything significant about Cardozo's life, in fact, we are told that he "politely but firmly discouraged aspiring biographers," and treated to a detailed account of Irving Lehman's burning of Cardozo's personal correspondence, a "calculated act of destruction" designed to "protect his friend's privacy – not to mention his reputation, memory, and posthumous fame." [14] This chapter ends abruptly, however, and one is left wondering whether Cardozo really disliked the attention he was receiving or simply realized that his stature as a judicial figure could be enhanced if he appeared to have devoted himself exclusively to thinking and writing about the law. The possibility that Cardozo was as capable of strategic behavior with respect to cultivating his reputation as he was in fostering judicial coalitions and drafting legal opinions, is a subject for further scholarly inquiry, but the notion that he was not merely a "facilitator" of the common law's evolution, but a shrewd strategist with a "deeply rooted system of personal values" is the major theme of Polenberg's book.

As a self-described social historian, Polenberg is interested in the context of the controversies that confronted Cardozo as judge and Justice, as well as the details of his biography that prepared him to face these controversies. Unlike Kaufman, who treats Cardozo's life in strict chronological fashion, Polenberg organizes his book thematically, examining Cardozo's attitudes towards, and influence upon, some of the more controversial social issues of the early twentieth century. Polenberg's account lacks many of the interesting details about "Master Ben's" upbringing that appear in Kaufman's *Cardozo* (such as the precise Torah passage that he read at his bar mitzvah in 1883), and is not a very good source

for scholars interested in reconstructing Cardozo's daily life. Yet, in a certain sense, Polenberg's account is more revealing of his subject than Kaufman's, as Polenberg places Cardozo in the context of late-nineteenth and early-twentieth century culture. For this reason, as well as his willingness to engage in some basic psychological analysis of his subject, Polenberg has taken the measure of Cardozo in ways that the more timid Kaufman has not. Of course, because Polenberg has unabashedly "omitted [discussion of] his decisions in such areas as torts and contracts" and focused, instead, "on cases involving morality, scholarship, sexuality, religion and criminality," it is little wonder that his subject emerges as somewhat more interesting than Kaufman's.

In seeking to understand Cardozo's attitudes towards a number of social issues, Polenberg looks beyond the opinions that the judge wrote, and even beyond the arguments of counsel that he observed. Adopting a novel approach to judicial biography, Polenberg takes the time to introduce the reader to the litigants themselves, and to the details of the controversies in which they were embroiled. The beauty of this approach, and its promise as a mode of writing judicial biography, is that it humanizes the process of judging and enables the reader to view the world through the eyes of any but the most record-bound appellate judge, and not simply through his or her finished work product.

The virtue of Polenberg's approach to his subject, as compared to Kaufman's, is most apparent in the treatment that each biographer gives to Cardozo's cases involving gender and sexuality. Consider, for example, how the two authors discuss Cardozo's opinion in *Hoadley v. Hoadley*, a 1927 case in which the New York Court of Appeals refused to annul a marriage at the request of a person married to a "lunatic." [16] Whereas Kaufman explains Cardozo's refusal to apply an old common-law rule that such marriages were "void" as a simple matter of statutory construction, Polenberg makes a convincing case that what lay behind Cardozo's decision to adopt an expansive reading of an ambiguous statute that purported to modify that rule, was his intuition that Hoadley may have exploited his wife's infirmity for sexual purposes during the first six years of their marriage. Polenberg notes that the record in this case did not support such an inference, but illustrates, with a revealing quotation from Cardozo's opinion, the moral indignation animating Cardozo's refusal to allow a husband to cast off a woman whom he had previously exploited. Cardozo's comment that "[t]here is instinctive revolt against the notion that infirmity of the mind

shall be used as a pretense for relief against satiety of the body” leads Polenberg to the conclusion that “fears of male concupiscence” dictated the result in this case.[17] This reading offers more insight into the character of his subject than does Kaufman’s thesis that the Justice was simply “reluctant to engage in creative use of public policy arguments in the face of opposing statutory policy.”[18]

Although Kaufman relies as much as Polenberg on the concept of “duty” in attempting to distill the essence of Cardozo’s attitude and approach to deciding cases, the historian’s understanding of the term is much broader than that of the law professor, who treats it largely as a means by which to discuss the technicalities of fiduciary responsibility and proximate cause. Polenberg is not equipped, by background or disposition, to engage in an internalist discussion of legal doctrine and its development, and that is precisely why he is able to paint a portrait of a man and his very human failings in ways that Kaufman cannot. To acknowledge and appreciate what the historian can contribute to judicial biography, however, is not to disparage what Kaufman has wrought. His book is laudable not only for its wealth of biographical detail, but for its comprehensive and readable discussion of Cardozo’s work in a number of technical legal areas. Despite its superiority as a critical study, Polenberg’s book could not, on its own, have filled the gap in scholarship about Cardozo that existed before the publication of these two volumes. Thanks to the complementary efforts of two very different kinds of scholars, that gap has now been filled.

#### NOTES

[1]. Benjamin Nathan Cardozo, *The Growth of the Law* (New Haven: Yale University Press, 1924), 133.

[2]. Andrew Kaufman, *Cardozo* (Cambridge, Mass.: Harvard University Press, 1998) [hereafter cited as Kaufman, with page number]; Richard Polenberg, *The World of Benjamin Cardozo: Personal Values and the Judicial Process* (Cambridge, Mass.: Harvard University Press, 1997) [hereafter cited as Polenberg, with page number].

[3]. Joseph Pollard, *Mr. Justice Cardozo: A Liberal Mind in Action* (New York: Yorktown Press, 1935), Walton Hamilton, “Justice Cardozo: The Great Tradition,” *The New Republic*, 328 (July 27, 1938).

[4]. Kaufman, p. 248; Polenberg, p. 91.

[5]. Kaufman was granted access to these previously confidential documents under a special arrangement with the Court of Appeals. Polenberg was eventually given similar access.

[6]. Details about Alger’s life, including the charges brought against him for pederasty are contained in Gary Scharnhorst, with Jack Bales, *The Lost Life of Horatio Alger Jr.* (Bloomington: Indiana University Press, 1985). See also Michael Moon, “‘The Gentle Boy From the Dangerous Classes’: Pederasty, Domesticity, and Capitalism in Horatio Alger,” *Representations* 19 (Summer, 1987): 87.

[7]. The text of this speech is published in Andrew Kaufman, “Cardozo and the Art of Biography,” *Cardozo Law Review* 20 (March 1999): 1245.

[8]. Kaufman, pp. 571-72.

[9]. Kaufman, p. 154

[10]. Kaufman, p. 461.

[11]. Kaufman relegates this revealing fact to a footnote which appears on page 622.

[12]. Kaufman, p.161. See George S. Hellman, *Benjamin N. Cardozo: American Judge* (New York: Whittlesey House/McGraw-Hill, 1940).

[13]. Kaufman was urged to undertake the task of writing this biography by Felix Frankfurter, a close friend of Cardozo’s as well as the successor to his seat on the Supreme Court, and by Joseph Rauh (Cardozo’s last law clerk and Frankfurter’s first). To convince Kaufman, the two men gave him their “personal Cardozo files, as well as regular help and encouragement during their lifetimes.” Kaufman, p. ix.

[14]. Polenberg, pp. 3-5.

[15]. Polenberg, p. xii.

[16]. 244 N.Y. 424 (1927).

[17]. Polenberg, p. 146.

[18]. Polenberg, p. 145; Kaufman, p. 430.

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