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.

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. 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-

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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. 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.

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. 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

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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] voca-
tion 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 capri-
cious. He was “progressive,” but in a pragmatic way. His willing-
lessness 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 ex-
plaining himself (Kaufman p 446). He was, Kaufman concludes
after 575 pages, “a great judge” (Kaufman p 577). If these conclu-
sions 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 Car-
do zo’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 under-
standing of his jurisprudence. Among the most illuminating por-
tions of the book, and an apt illustration of its themes and
strengths, are Kaufman’s three chapters on Cardozo’s torts opin-
ions while on the New York Court of Appeals.\(^7\) In no other area of
the law is Cardozo’s judicial output better known. \textit{MacPherson v
Buick Co},\(^8\) \textit{Palsgraf v Long Island Railroad Co},\(^9\) \textit{Murphy v Stee-
plechase Amusement Co} (the “Flopper” case),\(^10\) \textit{Glanzer v
Shepard},\(^11\) \textit{Ultramares Corp v Touche},\(^12\) and other of his opinions

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\(^6\) Kaufman points out that Cardozo deferred to legislative decisions regarding both so-
cial values and resource allocation (Kaufman p 572).

\(^7\) Kaufman appropriately includes in his discussion Cardozo’s opinion for the U.S. Su-
preme Court in \textit{Pokora v Wabash Railway Co}, 292 US 98 (1934), in which the Court essen-
tially overruled (or limited to its facts) the “stop, look, and listen” rule that Holmes had
imperiously announced for the Court in \textit{Baltimore & Ohio Railroad Co v Goodman}, 275

\(^8\) 217 NY 382 (1916) (imposing liability on automobile manufacturer for injuries sus-
tained by ultimate purchaser on the theory that it was foreseeable that “the car, if neglig-
gently 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 sus-
tained on moving belt ride, as visitor had assumed an “invited and foreseen” risk).

\(^11\) 233 NY 238 (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 repre-
sented 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 (Kaufinan 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.\(^{15}\)

\(^{12}\) 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 Altz 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" (Kaufinan 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, 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.\(^7\)

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*\(^8\), 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.\(^9\) 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

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\(^7\) *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.

\(^8\) *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. 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, 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.” 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*) 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,

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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. 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. 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. 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. 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? 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”? 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. 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. 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.) 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.

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.

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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*, one of Cardozo's earliest criminal law opinions and the first case that Polenberg explores (Polenberg pp 52-81). 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

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24. 216 NY 324 (1915).
25. 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. In re-
garding 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 re-
serve 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). 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. In Polenberg's 
view, Cardozo's opinion and his later comments on the case used 
"the language of a man whose deeply ingrained moral sensibili-
ties were outraged by everything about Hans Schmidt" (Polen-
berg p 81). Polenberg's narrative of the Schmidt case and his con-
cluding 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 estab-
lishing 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 ret-
rospective 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 dis-
cussion 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 circum-
stances, 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 de-
ense." 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 counte-
nancing 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." 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. Like the "timorous" upon whom he magisterially conferred the privilege of assuming no risks, Cardozo stayed at home. 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."

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. Some of Polenberg's most telling explorations of Cardozo's opinions expand, explicitly or implicitly, on this theme. In People v Carey, 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 gonorrhea") suggesting that

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223 NY 519 (1918).

216 NY at 343.

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

"Cardozo never married and never had any children. He lacked the experience of conjugal life 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).

"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).
the victim, Lillian Tate, was “unchaste” (Polenberg p 127). 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).

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.” 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.

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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.
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"—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, 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. 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

43 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: "It 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.\footnote{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).} 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 incorpor-
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 dislodge 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

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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”—still charm and entice, 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, 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—not 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
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) insufficiently appreciated Frank's brand of legal realism. When Cardozo published a lecture in 1931 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" 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 courts—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, 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," one whose devotion was the law itself.

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* 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.
* Benjamin N. Cardozo, Jurisprudence, in Margaret E. Hall, ed, Selected Writings of Benjamin Nathan Cardozo 7-46 (Fallon 1947).
* Frank's rather fawning term for Oliver Wendell Holmes, Jr. Frank, Law and the Modern Mind at 253 (cited in note 60).
* See Frank's "Preface to the Sixth Printing" of Law and the Modern Mind. Id at xii.
* Murphy, 250 NY at 483 ("The antics of the clown are not the paces of the cloistered cleric.").