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A RESPONSE ON CARDOZO TO PROFESSORS KAUFMAN AND SCHWARTZ

Richard H. Weisberg

COMMENTARY

In last year's Clifford Symposium Issue of this Review, a rich discussion of Benjamin Cardozo's opinions and jurisprudence emerged. Previously engaged most creatively, perhaps, in the first number of a law review named after the great judge,¹ this more recent discussion of Cardozo's craft was animated by the appearance of Professor Andrew Kaufman's book, *Cardozo*,² and included brief essays by Professor Kaufman himself, Judge Robert E. Keeton, and Professor Gary Schwartz. In his article, Professor Schwartz builds on Professor Kaufman's assessment of my earlier work on Cardozo.³ I thank the editors of this review for offering me space beyond my contribution elsewhere in this volume to respond on the perennially fascinating question of Cardozo's way of doing justice.

All my writing on Cardozo has been in the service of what I deem to be his own central jurisprudential vision, and this can be briefly rearticulated through a bifurcated aphorism: the judge must grapple constantly with an awareness of the inevitable subjectivity of adjudication;⁴ but, although no pre-existing rule inevitably dictates the outcome of any case, "a working knowledge of the business"⁵ usually points all judges to the same resolution of most cases. Vital for Cardozo, I believe, is that "the business" of judging involves considerable creativity. In fact, this concept can be brought to bear any time the judge feels that an outcome would be unjust if it simply followed from

1. See Paul A. Freund, *Foreword: Homage to Mr. Justice Cardozo*, 1 *CARDOZO L. REV.* 1, 1-3 (1979), and full symposium that follows.

2. ANDREW KAUFMAN, *CARDOZO* (1998).

3. See, e.g., Richard H. Weisberg, *Law, Literature and Cardozo's Judicial Poetics*, 1 *CARDOZO L. REV.* 283, 283 [hereinafter *Judicial Poetics*]; RICHARD H. WEISBERG, *WHEN LAWYERS WRITE* 7-12 (1987); Richard H. Weisberg, *Judicial Discretion, or the Self on the Shelf*, 10 *CARDOZO L. REV.* 105, 108-110 (1988) [hereinafter *Self on Shelf*].

4. See *Self on Shelf*, *supra* note 3, at 108 (citing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1924)); see also *Judicial Poetics*, *supra* note 3, at 296 (citing BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 127 (1928)).

5. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 98 (1924).

a formal rule; the craft of language will “liberate at times”⁶ from the bonds of formalism the just outcome pursued always by the adjudicator.

Professor Schwartz misunderstands me to be saying that Cardozo would usually “lean on or manipulate precedent somewhat in order to achieve the results he desired.”⁷ However, this comment misses my aphoristic point in two ways. First, justice for Cardozo often follows from the precedents, which thus resolve the great majority of cases. Second, however, any case can and should be rendered “hard” when the judge believes that the pre-existing rule alone would yield an unjust outcome. Nowhere do I make Judge Cardozo into a manipulative judge; he was, indeed, quite respectful of the norm of professionalism that is linked to precedent. Superceding that norm, however, is a feeling for justice, not purely subjective in nature, but rather emerging from what Cardozo consistently calls the “trained intuition” of the judge.⁸

There is never a pre-ordained outcome, for Cardozo, waiting either to be followed or “manipulated.” The adjudicator always has choices, and these must follow a trained but imperfect inner sense of justice. Even the most formalistic judge always instantiates that sense of justice, and it is fallacious in any case (for Cardozo) to assume that a “precedent-based” outcome is more objective than a “reach” towards a more just result. No judge, however traditional or “conservative” (or call it what you will), can escape his or her own trained intuitions. Thus, in one of only two cases exemplifying for Professor Schwartz Cardozo’s reach beyond the precedents, in *Hynes v. New York Central Railroad* Cardozo insists (to the contrary) that “the courts below” have rigidly sought to pursue their *own* intuition, one which subjectively and wrongly led them to formalism instead of justice.⁹ Cardozo insists, within this case, that his approach represents a “readjustment” of conflicting laws,¹⁰ a correction of the lower courts’ limited intuition.

Thus, I believe Professors Schwartz and Kaufman have missed Cardozo in two key respects, and Professor Kaufman on his own in one other, and these errors are far more important than any they have made about my work. First, Cardozo’s method as I describe it can be

6. See *Judicial Poetics*, *supra* note 3, at 314-15 (quoting CARDOZO, *supra* note 5, at 89).

7. Gary T. Schwartz, *Cardozo as Tort Lawmaker*, 49 DEPAUL L. REV. 305, 307 (1999).

8. See CARDOZO, *supra* note 5, at 93 (quoting Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 951 (1923)).

9. See *Self on Shelf*, *supra* note 3, at 108-110 (arguing that writing skills were important to Cardozo’s success as exemplified in *Hynes v. New York Central Railroad*, 131 N.E. 898, 900 (N.Y. 1921)).

10. *Hynes v. New York Central Railroad*, 131 N.E. 898, 900 (N.Y. 1921).

seen in many cases, not just in one or two. I cite at least a dozen cases in my earlier work,¹¹ cases in which Cardozo often makes explicit that the “rule” itself is to be followed usually, but that obedience to precedent itself is merely one judicial “intuition” among many that can be utilized by the adjudicator.¹² Second, as I have argued here, they have failed to see Cardozo’s consistent point about outcomes: that they are neither pre-determined nor frequently open to a legitimate challenge of “manipulat[ing] precedent.”¹³

Third, and I see this as a flaw in Professor Kaufman’s biography, not at all in Professor Schwartz’s brief assessment, Cardozo must be recalled primarily as a judge who wanted to empower his colleagues by reminding them that, willy-nilly, appellate adjudicators are word-smiths. The aspiration to justice dovetails perfectly with the requirement that judges rationalize their outcomes through language. Too many judges today denigrate, delegate, or dissipate their linguistic function. In paying scant attention to what was central in Cardozo’s adjudication, Professor Kaufman’s otherwise admirable book misses both the mark and the mission of his subject.

11. See *Judicial Poetics*, *supra* note 3, at 320-342.

12. See, e.g., *Judicial Poetics*, *supra* note 3, at 337-41 (illustrating Cardozo’s overt justification for ignoring New York’s time honored aversion to the doctrine of incorporation by reference in *In re Fowles*, 118 N.E. 611 (N.Y. 1918). My prior analysis of Cardozo’s jurisprudence, which is not of course limited to torts cases, has foregrounded *Palsgraf* and *MacPherson*, as well as *Hynes* and cases like *Fowles* and many others from his years on the New York Court of Appeals. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916); *Hynes v. New York Central R.R.*, 131 N.E. 898 (N.Y. 1921); *In re Fowles*, 118 N.E. 611 (N.Y. 1918).

13. See Schwartz, *supra* note 7 at 307.

