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DePaul Law Review

Volume 49
Issue 2 *Winter 1999: Symposium - Judges as Tort Lawmakers*

Article 4

Andrew Kaufman's Benjamin Cardozo as a Paradigmatic Tort Lawmaker

The Hon. Robert E. Keeton

ANDREW KAUFMAN'S *BENJAMIN CARDOZO AS PARADIGMATIC TORT LAWMAKER**

*The Hon. Robert E. Keeton***

Professor Kaufman's book on Benjamin Cardozo is a stellar, strikingly creative, and original contribution to American law and literature. He has captured for us in the short and readable paper he prepared for this Symposium, and in his still shorter oral presentation today, the principal themes developed and supported with extraordinary professional and literary skill in the book.

In all three of these versions of Kaufman on Cardozo, Kaufman perceives and portrays Cardozo, and I believe correctly, as experiencing a struggle within himself and participating actively in the professional colloquies of his time over the judicial role in the American legal system. The shorter these statements of the theme of internal and external tensions become, the more unease I have about the likelihood of misunderstanding both Cardozo and his extraordinary biographer, Kaufman. Indeed, my warm friend Andy Kaufman may tell me in a few minutes that I have myself misunderstood both him and Cardozo.

Here is the problem as I see it. Andy Kaufman identifies a "major-key message" and a "minor-key message" in Cardozo's Yale Lectures entitled *The Nature of the Judicial Process*. The "major-key message" was "Cardozo's acknowledgment that judges made law."[1] The "minor-key message" was that "in making law, judges were restrained by history, by precedent, and by the powers and responsibilities of the other branches of government."[2] I did not recall that identification of these two messages as "major" and "minor" respectively before reading it in the paper Andy prepared for this conference, and I have been puzzled and uneasy that this description steers us away from a more incisive perception of Cardozo that I recall from conversations I have had with Andy, and through him with Cardozo (if you will permit me that figure of speech).

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* These are Robert E. Keeton's comments on Andrew Kaufman's presentation.

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1. *See* Andrew Kaufman, *Cardozo as Paradigmatic Tort Lawmaker*, 49 DEPAUL L. REV. 281, 281 (1999).

2. *See id.*

That other more incisive perception is that these two themes of lawmaking and doing so under restraints of history, precedent, and sensitivity to the powers and responsibilities of the other branches of government, are not major and minor themes but coordinate and complementary themes. Each both depends upon and strengthens the other. A judge, to be faithful to the judicial role in the American legal system, must accept both the inevitable need for lawmaking to decide some cases and the professional restraints of the role of judge in this legal system. A judge, at her or his best, is ready to accept the responsibility for lawmaking and at the same time ever mindful of the historical, constitutional, statutory, and precedential restraints. In role, a judge decides always judiciously, not as an advocate for one policy or another, one political position or another, one sociological position or another. At her or his best, a judge, whether embracing or dreading a necessity of lawmaking, is always especially sensitive to the powers and responsibilities of other governments as well as the government within which the judge serves, to other branches of each of the governments, and to powers reserved to the people. Only in this way are the tensions between one's authority and the limits of one's authority resolved constructively. Only in this way are the objectives of a government of law realized.

With this perspective, which I hold, and which I credit Andy Kaufman for helping me develop over the years of professional life in the different kinds of professional roles I have undertaken, I am able to think of Cardozo as exemplary or paradigmatic regularly in method only if I think of him as exemplary and paradigmatic also in results reached. Method and outcome are no more "major" and "minor" than are the two themes. Method and outcome are coordinate and complementary.

This is not to say that I have always agreed with a particular position Cardozo took, either in his lecturing or in his deciding. I did and do admire and respect Cardozo's professional performance as lecturer, teacher, writer, and judge, talented always in turning phrases. In most instances, I did and do applaud his performance. In most instances, I evaluated, when I first encountered them, and still evaluate his particular professional contributions to American tort law as creditable and sometimes extraordinarily so. And on the occasions when I was not persuaded, I still evaluated his performance as worthy of careful consideration.

Perhaps my perspective is better understood after I tell you that I stopped being depressed about an occasional flaw in an otherwise he-

roic figure about the same time I stopped reading fairy tales except for fun.

Cardozo was a major contributor to our casting off mechanical jurisprudence and casting off excessive formalism. It is true that his reluctance to impose crushing liability may be interpreted as some kind of strong inherent commitment to negligence or to a fault principle, or even a commitment to vested interests of his time. His reluctance about imposing crushing liability may also be seen as a recognition that a cogent argument of principle for strict accountability or liability without negligence must be tested by probing for similarly cogent principles of limitation. Tort law avoids crushing liability because tort law is sensitive to the need for finding some accommodation of opposing broadly-stated principles, rather than holding that one totally overrides and crushes the other.

It does not trouble me that we cannot find formulas in Cardozo's opinions and lectures. Formulas are likely to be out-of-place in law. Concepts such as risk and foreseeability do not lend themselves to formulaic treatment. Purported formulas are likely to be metaphors rather than tools for mathematical implementation. A metaphor may serve as a guide, however, and may be helpful if we understand and use it that way.

I agree with Andy Kaufman's comment that Cardozo's conclusions in individual cases were based on his judgment about the importance of the relevant guides to decision in each particular factual setting. Weighing relevant considerations, including public policy considerations, and making a pragmatic choice among them in order to decide a case is often the essence of reaching a sound judgment. Judgment implies choice. Reasoned choice, candidly explained, is the essence of good judging.

Cardozo was a major contributor to more open and candid recognition of the lawmaking aspect of the judge's role in the common law system and to discarding the fiction that judges only find law and never make it. Open and candid recognition of this aspect of judging makes judges more accountable, not less accountable, because it encourages open and candid reasoning about legal reasoning itself.

Cardozo's approach to judging encourages recognition that good judging in hard cases is driven more by analogy than by logic, and more by recognition of the value-based nature of all decisionmaking than by a stance of purported neutrality about values and policy arguments. I agree, incidentally, with what I understand to be Andy Kaufman's view that Cardozo was reluctant to appear to be engaging in sociological policy reasoning. It was probably best that he maintained

that reluctance, lest as much candor about policy reasoning as I would urge today would have impaired his ability to participate effectively along with others in leading the profession away from mechanical jurisprudence as much as he and they succeeded in doing.

I will close my Comment with the thought that the standard by which we judge the performance of a judge of Cardozo's time may appropriately be different from the standard by which we judge tort lawmaking today and in the future. We can continue to celebrate a giant of another generation even after times and needs of the day have changed. And we can learn by doing our best to understand his work in the sociological, political, and cultural context in which it occurred.