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# How Judges Think

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# BOOK REVIEW

## *HOW JUDGES THINK*

BY RICHARD A. POSNER

CAMBRIDGE, MASS.: HARVARD UNIVERSITY PRESS, 2008

PP. 387, \$29.95

*Reviewed by Paul Brickner<sup>†</sup>*

*Cocooned in their marble palace, attended by sycophantic staff, and treated with extreme deference wherever they go, Supreme Court Justices are at risk of acquiring an exaggerated opinion of their ability and character.<sup>1</sup>*

Judge Richard A. Posner, one of the great legal scholars of this generation,<sup>2</sup> has produced a study that applies his vast scholarship and extraordinary analytical abilities to better our understanding of the

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<sup>†</sup> University of Richmond, B.A., 1962; Case Western Reserve University, J.D., 1966; Cleveland State University, LL.M., 1983. Retired U.S. Administrative Law Judge; former Appellate Judge, U.S. Army Court of Criminal Appeals; Past President, State Board of Education (Ohio); recipient, John R. Quine Adjunct Faculty Award, University of Akron School of Law.

<sup>1</sup> RICHARD A. POSNER, *HOW JUDGES THINK* 306 (2008).

<sup>2</sup> A University of Chicago web page lists more than fifty books that he has authored or co-authored and articles and book reviews too numerous to count. List of Publications, Presentations, and Works in Progress by Richard A. Posner, <http://www.law.uchicago.edu/faculty/posner-r/ppw.html> (last visited Feb. 25, 2009). Judge Posner is Chief Judge of the United States Court of Appeals for the Seventh Circuit, a Senior Lecturer at the University of Chicago Law School, and a former Stanford Law School Professor. Curriculum Vitae of Richard A. Posner, <http://www.law.uchicago.edu/faculty/posner-r/cv.html> (last visited Feb. 25, 2009). He has spoken widely, at the University of Michigan Law School, *see infra* note 7 and accompanying text, and has also spoken at Case Western Reserve University School of Law. *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986).

judicial process and judicial thinking, reasoning and behavior. At first, his book seems to be a more comprehensive version of then-Judge Benjamin N. Cardozo's enduring study, *The Nature of the Judicial Process*, which was published eleven years before Justice Cardozo joined the U.S. Supreme Court.<sup>3</sup> However, Judge Posner provides much more mental substance and detail than Cardozo's slender classic.

Benjamin N. Cardozo was elected in 1913 to a seat on the New York Supreme Court, a trial court.<sup>4</sup> In 1914 a few weeks after his term commenced, Governor Martin H. Glynn elevated him to the New York Court of Appeals, that state's highest court.<sup>5</sup> The new judge made quite a name for himself. By 1921 he was invited to speak at Yale Law School.<sup>6</sup> He told the Dean at first that "he had 'no message to deliver.'"<sup>7</sup> However, while he visited with the Dean and faculty, then-Judge Cardozo was asked if he could tell the students how he decided his cases and other questions that flowed naturally from the first question.<sup>8</sup>

Judge Cardozo repeated those questions in his introductory lecture,<sup>9</sup> the first of four that he delivered at Yale Law School before an enthusiastic audience that grew so large a more spacious venue was required to accommodate the crowd.<sup>10</sup> When he concluded, the audience gave the judge a standing ovation.<sup>11</sup> The lecture format required reasonable parameters and length. In turn, those factors helped focus the short work into a well read and frequently reprinted memorable classic.

The legal profession is interested not in how judges think in general, but how they think in deciding cases. We are concerned with those decisional thought processes that are the cornerstone of the judicial process at the trial and appellate levels. At the time of his study, Cardozo had been a Judge of the New York Court of Appeals; he did not become an Associate Justice of the U.S. Supreme Court until 1932. Although Judge Posner provides some discussion of how trial judges think, his study is largely one about the mental processes of federal appellate judges.

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<sup>3</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

<sup>4</sup> See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 2-3 (1990).

<sup>5</sup> See *id.* at 3; ANDREW L. KAUFMAN, *CARDOZO* 127-28 (1998).

<sup>6</sup> KAUFMAN, *supra* note 5, at 203.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 203-04.

<sup>9</sup> CARDOZO, *supra* note 3, at 10 ("What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions . . . ?").

<sup>10</sup> KAUFMAN, *supra* note 5, at 204.

<sup>11</sup> *Id.*

Judge Posner is no stranger to the life and work of Justice Cardozo. He delivered a series of lectures on Justice Cardozo at the University of Michigan Law School in 1989 that were published the following year by the University of Chicago Press.<sup>12</sup> As a result, we should not be surprised that many insights provided by Judge Cardozo in 1921 are given once again by Judge Posner in 2008. Both write from the perspective of the appellate judge—Cardozo of the state court system and Posner of the federal court system.

While Judge Cardozo's analysis provides four methods of deciding cases,<sup>13</sup> Judge Posner provides nine theories of judicial behavior.<sup>14</sup> Judge Posner's excellent work is always interesting, if at times unduly analytical and complex. He writes about the impact on the decision-making process of those few judges who harbor ambitions for higher office.<sup>15</sup> A politically savvy judge might want to curry favor with the appointing authority or might want to avoid disenchanting a governor who might be headed for the U.S. Senate.<sup>16</sup> But most judges, he states, often simply want to be regarded as good judges who decide their cases on a non-political basis.<sup>17</sup> Posner makes frequent references to judges wanting to be good judges.<sup>18</sup>

He begins by telling the readers that the fact that judges "do not deliberate (by which I mean deliberate *collectively*) very much is the real secret."<sup>19</sup> He does not venture an explanation. However, Posner's small information point provides readers with a major insight into the appellate judicial process. Outsiders who think that collective deliberation is a cornerstone of the judicial process at the appellate level will find Posner's revelation disquieting and even startling. He observes that collective deliberation among appellate judges in a case is less than that of jurors.<sup>20</sup>

Judge Posner discusses many issues that are tangential to or supplement the concept of judicial thinking. One such interesting topic that Judge Posner addresses is whether American courts, particularly the U.S. Supreme Court, should cite the decisions of foreign courts and opinions of legal officials of foreign nations.<sup>21</sup> This

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<sup>12</sup> POSNER, *supra* note 4, at vii.

<sup>13</sup> CARDOZO, *supra* note 3, at 30–31.

<sup>14</sup> POSNER, *supra* note 1, at 19.

<sup>15</sup> *Id.* at 30, 134, 142.

<sup>16</sup> *Id.* at 142.

<sup>17</sup> *Id.* at 73, 305.

<sup>18</sup> *Id.* at 12, 59–62, 65, 69–71, 282.

<sup>19</sup> *Id.* at 2; *cf. id.* at 302 (commenting on the deliberation preferences of brilliant (Frankfurter) versus duller colleagues on the court).

<sup>20</sup> *Id.* at 34.

<sup>21</sup> *Id.* at 347–53.

question, involving sources of authority, has stirred some public controversy. More than eighty years earlier, Cardozo had also addressed the issue.

Judge Posner in his introduction writes of “the quest for global judicial consensus” and “the Supreme Court’s increasing propensity to cite foreign judicial decisions as authorities in American constitutional cases.”<sup>22</sup> Judge Posner is somewhat critical of Justice Stephen Breyer for being “an enthusiastic citer of foreign constitutional decisions.”<sup>23</sup> He disparages those citations as “a form of elitism, for decisions by foreign courts are not events in American democracy.”<sup>24</sup> Continuing his discussion of the U.S. Supreme Court’s citations to decisions of “an international or other foreign court,”<sup>25</sup> Judge Posner’s accompanying footnote cites ten law review articles on point, all published in the last few years,<sup>26</sup> which indicate that the issue is a hot one. He criticizes of the use of a foreign decision

for its *precedential* effect by judges (more particularly Supreme Court Justices) searching for a global consensus on an issue of U.S. constitutional law. That search is the latest hopeless effort to ground controversial Supreme Court judgments in something more objective than the Justices’ political preferences. Earlier generations sought legal fixity in natural law . . . .<sup>27</sup>

Focusing on American precedents, Judge Posner reminds us that we have to distinguish between controlling authorities and those that are not controlling, such as decisions by another state supreme court or federal court of appeals. He emphasizes that citing to foreign precedents does not add to American jurisprudence:

Citing foreign decisions is an effort to further mystify the adjudicative process, as well as to disguise the political character of the decisions at the heart of the Supreme Court’s constitutional jurisprudence. The more political a court, the harder it tries to appear nonpolitical.<sup>28</sup>

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<sup>22</sup> *Id.* at 14.

<sup>23</sup> *Id.* at 340.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 347.

<sup>26</sup> *See id.* at 347 n.1.

<sup>27</sup> *Id.* at 348.

<sup>28</sup> *Id.* at 350.

Judge Posner continues to make clear his opposition to much of this modern judicial practice. He views our Supreme Court as a political court.

To cite foreign law as authority is to suppose fantastically that the world's judges constitute a single community of wisdom and conscience. That is the position the Justices are gesturing toward when they try to justify their citation of foreign decisions as authority by invoking a "decent respect to the opinions of mankind," a phrase in the Declaration of Independence that they have taken out of context and by doing so have inverted its meaning.<sup>29</sup>

He goes on to remind us that the Declaration of Independence's reference to "a decent respect to the opinions of mankind" in context meant that it "requires that they should declare the causes which impel them to the separation."<sup>30</sup> The phrase was not intended to suggest that we look to decisions of foreign courts for guidance or precedent.

Judge Posner tells us that those Justices who like to cite foreign courts are "sophisticated cosmopolitans."<sup>31</sup> He then asks, "[b]ut are they not arrogant, even usurpative, in trying to impose their cosmopolitan values on Americans in the name of our eighteenth-century Constitution?"<sup>32</sup>

As always, Judge Posner makes good sense. He references a case involving the death penalty where Justice Breyer, in dissenting from a denial of certiorari, cited legal authority from Jamaica, India, Canada, and Zimbabwe.<sup>33</sup>

In his earlier study, Cardozo similarly wrote of "borrowing from other systems."<sup>34</sup> His was an early twentieth century view based on a late nineteenth century legal education. He spoke of Roman law and said that Lord Mansfield, Chancellor Kent, and Justice Story "were never weary of supporting their judgments by citations from the Digest."<sup>35</sup> Cardozo's use of the phrase "never weary" implies that he did not agree with that usage. But, of Roman law, he wrote,

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<sup>29</sup> *Id.* at 351–52 (footnote omitted).

<sup>30</sup> *Id.* at 352 n.9 (quoting Eugene Kontorovich, *The Opinion of Mankind*, N.Y. SUN, July 1, 2005, at 9).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 352 n.8 (citing *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari)).

<sup>34</sup> CARDOZO, *supra* note 3, at 123.

<sup>35</sup> *Id.*

Authority it never had. The great historic movement of the Reception did not touch the British Isles. Analogies have been supplied. Lines of thought have been suggested. Wise solutions have been offered for problems otherwise insoluble. None the less, the function of the foreign system has been to advise rather than to command. . . . It is only one compartment in the great reservoir of social experience and truth and wisdom from which the judges of the common law must draw their inspiration and their knowledge.<sup>36</sup>

Judges Cardozo and Posner are on the same page when it comes to “other systems,” whether those systems are Roman law or decisions of modern-day foreign courts and legal officials.

In expounding on his views of the current judicial system, Judge Posner speaks highly of Justice Sandra Day O'Connor<sup>37</sup> and of some of our other great American jurists of earlier days: Holmes, Brandeis, Cardozo, and Hand.<sup>38</sup> But he has critical comments for Chief Justice John Roberts<sup>39</sup> and Justice Breyer.<sup>40</sup> He suggests that Chief Justice Roberts injured his reputation for candor by his testimony at his judicial confirmation hearings,<sup>41</sup> and he uses language like “a failed effort to theorize a political program”<sup>42</sup> in describing portions of Justice Breyer’s new book, *Active Liberty*.<sup>43</sup>

Judge Posner notes that appellate judges engage occasionally in legislating.<sup>44</sup> He writes that routine cases are ordinarily decided with legalistic reasoning and analysis, while others require more careful judicial scrutiny. In similar fashion, Judge Cardozo noted, “[o]f the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one.”<sup>45</sup>

Judge Posner is also critical of the modern-day academy. Professors at the elite law schools, he tells us, are unrealistic about the Supreme Court and are little interested in the judicial process of either lower federal courts or state courts.<sup>46</sup> He suggests “that the faculties

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<sup>36</sup> *Id.* at 123–24 (footnote omitted).

<sup>37</sup> POSNER, *supra* note 1, at 151.

<sup>38</sup> *Id.* at 63–64.

<sup>39</sup> *Id.* at 81.

<sup>40</sup> *Id.* at 322–42.

<sup>41</sup> *Id.* at 81.

<sup>42</sup> *Id.* at 327.

<sup>43</sup> STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

<sup>44</sup> POSNER, *supra* note 1, at 78–92.

<sup>45</sup> CARDOZO, *supra* note 3, at 164.

<sup>46</sup> *See* POSNER, *supra* note 1, at 12.

of the elite law schools are becoming alienated from the judiciary.”<sup>47</sup> His criticisms are carefully measured and are delivered with great authority.

Both Posner and Cardozo have much to say about precedent. Cardozo tells us that it is “when there is no decisive precedent, that the serious business of the judge begins.”<sup>48</sup> He explains that, “He must then fashion the law for the litigants before him. In fashioning it for them, he will be fashioning it for others. . . . The sentence of today will make the right and wrong of tomorrow.”<sup>49</sup> Judge Posner indexes a plethora of listings under precedent and notes that the work of trial judges is not precedential.

We can see from this distance in time that Cardozo wrote in a more optimistic vein because he wrote as a judge who was influenced by the enlightenment’s belief that the progress of mankind will continue to be enhanced by science and reason. He also wrote as someone influenced by the Darwinian concept of evolution, a concept that seemed to view evolution as creating improved species and a higher order of animal life.<sup>50</sup>

Judge Posner, a scholar of a different generation, knows that science and reason, although at a peak in Germany, did not prevent the horrors of Nazism. Although he speaks of judges wanting to be good judges, he seems to imply that there are bad judges who engage in conscious falsification and twisting of facts.<sup>51</sup> Although he does not emphasize these unsavory aspects of the judicial process, he at least recognizes that they exist, although they can be attributed often to error and mistake. He writes of Holocaust deniers as a type of irrational thinkers. Business school scholars have written about errors in management. We can learn from our mistakes, but error and mistake do not appear to mesh with the idea that legal reasoning and analysis lead to more perfect adjudicating.<sup>52</sup>

Posner, a modern day realist, can be considered a modern day Cardozo. Except for Justice Scalia, no member of the judiciary approaches his exceptional level of scholarly and judicial

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 21.

<sup>49</sup> *Id.*

<sup>50</sup> Cardozo suggested that THOMAS HUXLEY, *LAY SERMONS* (1870) was his Bible—Huxley was a Darwinian and agnostic. See BENJAMIN NATHAN CARDOZO, *Values: Commencement Address, in THE SELECTED WRITINGS OF BENJAMINE NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE* (Margaret E. Hall ed., 1947).

<sup>51</sup> POSNER, *supra* note 1, at 69–70.

<sup>52</sup> See SYDNEY FINKELSTEIN, JO WHITEHEAD & ANDREW CAMPBELL, *THINK AGAIN: WHY GOOD LEADERS MAKE BAD DECISIONS AND HOW TO KEEP IT FROM HAPPENING TO YOU* (2009).

achievement. “Posner the Prolific” he was called once by the Journal of Legal Education.<sup>53</sup> His vast range of scholarship is incorporated into this volume: law and economics, anti-trust law, law and literature, Bayesian analysis, labor market analysis, sociology, psychology and plain old human nature.

Judge Posner leaves almost no stone unturned. He even brings up the use of doublets in the law.<sup>54</sup> Doublets in our language of the law often are not redundancies but rather the result of the merger of the Anglo-Saxon and Norman French strands of modern day legal English. The most discernable example is “last will and testament.” “Will” is Germanic or Anglo-Saxon and testament is obviously derived from the Latin or Norman French. Members of both linguistic families were brought into the fold.<sup>55</sup>

Judge Posner’s work measures up to his own extraordinary standards of scholarship. He is no sophisticated cosmopolitan, but a regular guy and a brilliant and outspoken scholar who reminds us that judges are not law professors. This study is both fascinating and important. His primary message—how judges think—is often matched with fascinating sidebar discussions of other issues, as noted above, including the “rightness” or correctness of *Brown v. Board of Education*.<sup>56</sup> Never timid, he also reminds us that Justices are humans, too, as well as “workers.”

Cocooned in their marble palace, attended by sycophantic staff, and treated with extreme deference wherever they go, Supreme Court Justices are at risk of acquiring an exaggerated opinion of their ability and character. In a democratic society of great size and complexity, it is difficult to justify giving a committee of lawyer aristocrats the power not just to find or apply the law and make up enough law to fill in the many gaps in the law that is given to them, but also to create out of whole cloth, or out of their guts, large swatches of law that as a practical matter they alone can alter.<sup>57</sup>

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<sup>53</sup> Joseph P. Tomain, *Augustine in Chicago*, 51 J. LEGAL EDUC. 610 (2001) (reviewing MARK LILLA, *THE RECKLESS MIND: INTELLECTUALS IN POLITICS* (2001) and RICHARD A. POSNER, *PUBLIC INTELLECTUALS: A STUDY OF DECLINE* (2001)).

<sup>54</sup> POSNER, *supra* note 1, at 248.

<sup>55</sup> See Dennis McKenna, *And the Verdict Is . . . Many Legal Doublets Are Superfluous and Unnecessary*, PROTEUS, Vol. 18, Summer 2009, at 24.

<sup>56</sup> POSNER, *supra* note 1, at 279, 345 (discussing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

<sup>57</sup> *Id.* at 306.

His book is important because it provides readers with insight into the many factors that enter into the thought processes of judges. The legalistic manner of deciding cases may be satisfactory for those cases that can be decided only one way, but aside from those judges must engage in serious consideration of many factors. It is here that Posner leaves his mark.

Judge Posner has written a forceful and highly readable study of judicial thinking, judicial reasoning, and the judicial process. He weaves into the book his great wealth of knowledge of the social sciences, political science, psychology, and economics. His remarkable erudition is evidenced by innumerable footnoted sources and authorities. He may have overindulged in intellectual gymnastics by describing the judge's evaluation of the truthfulness of witnesses in terms of the Bayesian decision theory. But his comments are thought provoking. The reader will come away from the book understanding that the hunch as a form of decisionmaking has its shortcomings. Judge Posner offers sound insights into varying topics: the judge as a labor-market participant and as a legislator; judicial salaries and tenure; and internal and external constraints on judges. He stresses that judges are not law professors. Judges decide cases; they do not engage in academic discussions of issues.

