Book Review of "How Judges Think" by Richard Posner

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BOOK REVIEW


Reviewed by Charles D. Kelso ** & R. Randall Kelso***

I. Introduction

In 1921, New York Court of Appeals Justice Benjamin Cardozo told us in a short, concise book how judges think.¹ Cardozo told us that judges tend to follow the logic of existing precedents where that is reasonably possible, but after that they consider custom and the welfare of society. Holmes said much the same thing in 1881, although he did it in a single paragraph.²

¹ Benjamin Cardozo, The Nature of the Judicial Process (1921).
² Oliver Wendell Holmes, Jr., The Common Law 1 (1881) (“The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”).
Judge Posner addresses the same topic in his 2008 book.\(^3\) However, at 377 pages, Posner identifies in detail more external and internal influences than were pointed out by Holmes or Cardozo. As with other topics he has addressed, Judge Posner's twenty-five years on the bench have produced many creative and useful contributions in a wide variety of legal fields.\(^4\)

Some of Judge Posner's insights in this book probably cannot be used directly in guiding judicial advocacy or deciding cases. Unlike the recent book by Justice Scalia and Bryan Garner,\(^5\) which gives many useful tips on brief writing and oral argument, Posner's book is not a how-to-do-it. As a result, it is not as succinct a read on the topic as is Holmes, Cardozo, or Scalia/Gardner. But the book probably reveals quite accurately what goes on in the mind of Judge Posner as he decides cases. Whether most other judges are as self-aware or complex as Posner seems doubtful, but his book is a useful addition to the literature of judges (like Holmes, Cardozo, and Scalia) describing how judges think.

II. Summary of the Book

Judge Posner makes clear in this book how complex is his thinking when deciding cases. At a minimum, Posner advises that if a case is not controlled by precedent, the advocate should identify the purpose behind the relevant legal principle, and then show that the purpose would be fulfilled by

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\(^4\) See generally Symposium, Commemorating Twenty-Five Years of Judge Richard Posner, 74 U. Chi. L. Rev. 1641 (2007) (with detailed analysis of cases on Bankruptcy, Civil Liberties, Criminal law, Torts, and other topics).

a decision in favor of the advocate's position. More broadly, he suggests from his study of the literature and observing the behavior of other judges that many of them think in a similar way, which he calls “pragmatism.” This approach to deciding cases goes beyond rules, purpose, principles, and precedent to emphasize the consequences of deciding a case one way or another. Judge Posner concedes that there are some misguided judges that he identifies as “legalists.” They behave in errant ways by giving too much weight to rules and precedents and they fail to give enough weight to the consequences of alternative decisions, which is the most important consideration for pragmatists, other than possibly a soundly reasoned case directly on point.

Along the way, Judge Posner recognizes two other groups of judges. First, there is Justice Kennedy, who reasons, as did Justice Powell and Chief Justice John Marshall, that there are some overriding general principles to which current decisions should be related. And then there are judges who agree with legalists that law should be clear and certain, but who are willing to look behind rules to their reasons, as did Justice Holmes, and who, like him, frequently defer to decisions

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6 Posner, supra note 3, at 220.
7 Id. at 40. Posner there explains that “the word refers to basing judgments (legal or otherwise) on consequences, rather than on deduction from premises in the manner of syllogism.”
8 Id. at 238. “The core of legal pragmatism is pragmatic adjudication, and its core is heightened judicial concern for consequences and thus a disposition to base policy judgments on them rather than on conceptualisms and generalities.”
9 Id. at 239.
10 Id. at 239-40.
11 Id. at 310-11.
of other branches or the states, as did Chief Justice Rehnquist, and currently is done by Chief Justice Roberts.\footnote{Id. at \_\_.}

In addition, Judge Posner tells us that most judging is “political,” in the sense that it is not simply the logical application of rules and precedents. That is especially true in the Supreme Court, he says, where arguments about the consequences of alternative decisions are far more important than arguments based on rehearsing precedents.\footnote{Id. at 269.} While discussing the Supreme Court as a political institution, Posner submits that the Justices probably would not do a better job if they decided fewer cases. He says that deciding cases is not a protracted process unless the judge has difficulty making up his mind, “which is a psychological trait rather than an index of conscientiousness.”\footnote{Id. at 299.} He goes on to comment that the decline in cases decided by the Court from 129 in 1958 to 68 in 2006 has coincided with an increase in the quality and number of the Justices’ law clerks and “is a disturbing commentary on the effect of bureaucratization on productivity.”\footnote{Id. at 299.}

III. Analysis of the Book

The main pleasure in reading this book is not from learning its lessons about pragmatism. That could be accomplished in several well-written pages. Instead, the real satisfaction obtainable from the book for the reader is to be placed in touch with a brilliant, broadly-read scholar who has an immense working vocabulary, a knack for pithy phrases, and an insider’s view on academia, the practicing profession, and an important branch of the legal system. The book is also entertaining and

\begin{footnotes}
\item[12] Id. at \_\_.
\item[13] Id. at 269.
\item[14] Id. at 299.
\item[15] Id. at 299.
\end{footnotes}
thought-provoking because Judge Posner has expressed an opinion on nearly every subject he touches upon.

A reader who, like a legalist, is looking for an organized presentation of principles and supporting evidence, will be disappointed. However, on each topic that occurs to Judge Posner, he has the energy and insight to tell us most or all that he knows about the topic. He seems too absorbed with the fun of writing to worry about such values as succinctness or conciseness. On the other hand, he is quite attentive to clarity, accuracy, comprehensiveness, and vivid imagery. And with extensive footnotes he relates his observations and views to the mainstream of scholarship in America.

As noted, Judge Posner uses his central focus on how judges think as a springboard to provide information and views on a wide variety of topics which, in one way or another, bear some relation to judicial thought. For example, we learn that judges are busy, but that most opinions are drafted by law clerks who are more legalistic than the judges who decide the cases. We also learn his view that law professors are not currently teaching what is most useful for lawyers to know about persuading judges. This may be explained by the fact, he says, that law professors are tending more and more to be subject matter specialists and, in the process, are not teaching the kind of information and skills needed to persuade judges.

Similar insightful conclusions are sprinkled throughout the book. It would detract from some readers' enjoyment of the book to attempt to list them all. But here is a sample, drawn from a Chapter on the Supreme Court:

16 Id. at 221.
17 Id. at 216-221.
“Against the decision in Brown it could be argued, first, that if instead of forbidding public school segregation the Court had insisted that states practicing segregation spend as much money per black as per white pupil, the expense of maintaining parallel public school systems might have forced integration more rapidly than the Court's actual decision, which was not fully implemented for decades.”

“If the Justices acknowledged to themselves the essentially personal, subjective, political, and, from a legalist standpoint, arbitrary character of most of their constitutional decisions, then – deprived of 'the law made me do it' rationalization for their exercise of power – they might be less aggressive upsetters of political applecarts than they are.”

“Maybe when all the characteristics of the Court as an institution are considered – especially the fact that the Justices try to justify their decisions in reasoned opinions, which, even when they are advocacy products largely drafted by law clerks wet behind the ears, reflect a degree of deliberation and a commitment to minimal coherence that are not demanded of legislative bodies – the correct conclusion is that the Justices' legislative discretion is really rather narrowly channeled.”

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18 Id. at 280.
19 Id. at 289.
20 Id. at 303.
* Speaking of Justice Breyer's book Active Liberty (2005), Judge Posner says that "A Supreme Court Justice writing about constitutional law theory is like a dog walking on his hind legs; the wonder is not that it is done well but that it is done at all."^{21}

* "What reins in the Justices is . . . an awareness, conscious or unconscious, that they cannot go 'too far' without inviting reprisals by the other branches of government spurred on by an indignant public. So they pull their punches, giving just enough obeisance to precedent to be able to present themselves as 'real' judges, rather than as the more than occasional legislators that they really are."^{22}

IV. Evaluation of the Book

This book is a valuable addition to a long line of scholarly efforts to describe how American judges think. Its length will prevent it from becoming a classic because, unlike Cardozo's The Nature of the Judicial Process or Karl Llewellyn's short book, The Bramble Bush, it cannot or will not be assigned, or even enthusiastically recommended, to every student in law school. Perhaps excerpts or Chapters will find their way into materials on Jurisprudence or into courses on Appellate Advocacy. More likely, some of its ideas will find their way into the thinking of teachers, judges, or practitioners who manage to find time to read the book. If so, their time will have been well spent.{^23

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^{21} * Id. at 324.

^{22} * Id. at 375.

^{23} For a contrary opinion, see Edward Whalen, How Judge Posner Thinks Judges Should Think: An unpersuasive case for pragmatism (April 17, 2008) (http://article.nationalreview.com) (search using words in the article's title). Whelan concludes that the book "is at least one thorough redraft short of being ready for publication." He describes it as "rank and conclusory hyperbole," "wishful thinking," "vacuous" conclusions, and "abstract, dogmatic, and sloppy."
The major drawback of the book is the failure fully to acknowledge that many judges may not decide cases exactly as does Judge Posner. As noted, Posner does acknowledge four different judicial decisionmaking perspectives, but his attention is focused predominantly on his style of decisionmaking, “pragmatism.” “Pragmatism” is a form of judicial decisionmaking more often called “instrumentalism.” For such judges, the formulation and application of each rule is tested by its purpose and effects. These judges are willing to engage in a broad-based historical investigation to help determine overall context and purposes. They believe that courts should seek to advance sound social policies where leeways exist in the law, and give less regard to precedent than to reaching sound results. Justice Stevens inclines to this view, as does Justice Ginsburg and Justice Breyer. Past champions of this view include Justices Douglas, Brennan, Marshall, and Blackmun. While such instrumentalists on the Supreme Court have all been more or less liberal in their approach to policy questions, Judge Posner provides a good reminder of the possibility of a conservative law-and-economics approach being a version of pragmatic instrumentalism as well.

“Legalists,” as described by Posner, are more commonly described as “formalists.” Such judges emphasis the literal, plain meaning of words. They prefer clear, bright-line rules which are

24 See supra text accompanying notes 7-12.


26 Id. at 11-13, 47-54, 325-53.

27 Id. at 325-53.

28 Id. at 341-43. See generally Conservative Judicial Activism, 73 U. Colo. L. Rev. 1139-1416 (2002).

29 See generally Kelso & Kelso, supra note 25, at 12.
capable of formal, logical, and predictable application. When using history as an aid, they search for the specific historical views of the framers and ratifiers on specific issues, and refuse to speculate on what history may suggest about broader concepts. Justices Scalia, Thomas, and Alito tend to approach constitutional and statutory interpretation cases from this perspective.

There are two other styles of interpretation which Posner acknowledges, but does not develop in his book: Holmesian decisionmaking and natural law decisionmaking. One set of judges, following Justice Holmes, agree with formalists that the law should be clear and predictable. But they emphasize the need for judicial restraint and deference to the legislature and the executive, as well as deference to states. Although they consider the literal meaning of words, as do formalists, they are willing to look beyond the words to their general purposes because, as Holmes said, “The life of the law has not been logic; it has been experience.” Chief Justice Rehnquist’s opinions embodied this Holmesian style, as do the opinions of current Chief Justice Roberts.

The judicial decisionmaking style with the oldest pedigree is that of natural law. These judges endeavor to connect specific decisions and doctrines with general principles of law, in what is called reasoned elaboration of the law. Words in the Constitution that are judged to reflect the adoption of broad principles, such as federalism or the separation of powers, are interpreted in light of those principles. There is an effort to develop a reasoned elaboration of law in light of its purposes and history. In doing so, such judges pay great respect to prior precedents of earlier judges,"

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30 Id. at 35-41, 278-302.
31 Id. at 278-302, 1626-28.
32 See id. at 41-46, 303-24, citing, Oliver W. Holmes, Jr., The Common Law 1 (1881).
33 Id. at 303-24, 1621-26.
particularly those engaged in the same interpretive enterprise.\textsuperscript{34} Chief Justice John Marshall so reasoned. In recent times, his major heirs have been Justice Kennedy and Justice O'Connor.\textsuperscript{35}

A more complete book on the nature of the judicial process would have to account fully for all four of these judicial decisionmaking styles, and how they differ in terms of their approach to common-law decisionmaking, such as in contracts and torts cases; statutory interpretation; and constitutional law decisionmaking. While a good account of a pragmatic approach to judicial decisionmaking, Judge Posner's book does not meet this broader goal.\textsuperscript{36}

\begin{itemize}
\item \textsuperscript{34} See generally id. at 54-62, 354-93.
\item \textsuperscript{35} See generally id. at 354-56, 393-404.
\item \textsuperscript{36} On this broader topic, see generally Kelso & Kelso, supra note 25, at 35-62 (summarizing common-law, statutory, and constitutional decisionmaking from formalist, Holmesian, natural law, and instrumentalist perspectives); R. Randall Kelso & Charles D. Kelso, Studying Law: An Introduction (1984) (discussing common-law, statutory, and constitutional decisionmaking from formalist, Holmesian, natural law, and instrumentalist perspectives).
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