HOW JUDGES THINK[1]

REVIEWED BY MAJOR CASEY Z. THOMAS[2]

I. Opening Statement

For some lawyers, panic ensues at the mere thought of delving into *any* of the scores of books, legal opinions, or other works by the legendary Judge Richard A. Posner,[3] "one of the intellectual giants of the legal profession."[4] However, no terror should result from anticipating or reading Posner's newest comprehensive and aggressive work, *How Judges Think*. This book explores myriad internal and external factors and theories that "account [for] how judges actually arrive at their decisions in nonroutine cases"[5] when "a judge is a legislator."[6] The intriguingly scathing book, though not faultless, has significant educational value and usefulness to the litigator, academic, and Judge Advocate alike.[7]

This review briefly highlights the main tenets of Posner's ever-continuing "pragmatism"[8] crusade, the positives and relevance of the book, and a few evidentiary weaknesses. Those who dare to explore this robust, persuasive volume must somewhat "earn" the education contained therein, due primarily to Posner's particular writing style that can be challenging and tedious to navigate. In the end, however, the unique and enlightening journey is one well worth taking to better appreciate the complex and intriguing subject of judicial decision making and to reconcile "how unrealistic . . . the conceptions [are] of the judge held by most people, including practicing lawyers and eminent law professors . . . ."[9]

II. Posner's Case-in-Chief

The remarkably prolific[10] Richard A. Posner is no stranger to controversy,[11] "contentious opinions,"[12] or piercing intellectual wrestling matches. In his newest literary installment, he yet again invites a "firestorm of criticism"[13] and a good old-fashioned academic brawl. In this book, Posner presents his argument in three main phases, and although he generally limits his analysis of decision-making to federal appellate judges and Supreme Court Justices, his "pragmatism"[14] mantra is

---

[1] RICHARD A. POSNER, HOW JUDGES THINK (2008).

[2] U.S. Army. Student, 57th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[3] About Posner, http://home.uchicago.edu/~rposner/ (last visited Apr. 16, 2009) (information on Posner including curriculum vitae, biography, published works, etc.).

[4] Philip E. Johnson, *The Limits of Pragmatism*, FIRST THINGS: THE JOURNAL OF RELIGION, CULTURE, AND PUBLIC LIFE, Jan. 1996, at 52 (reviewing RICHARD A. POSNER, OVERCOMING LAW (1996)).

[5] POSNER, *supra* note 1, at 19.

[6] *Id.* at 15. Not everyone agrees with Posner or the celebrated Justice Benjamin N. Cardozo that "judge-made law [is] one of the existing realities of life." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921).

[7] Intriguing because Posner does not hesitate to sharply criticize other judges even though he is a sitting judge.

[8] Posner describes a pragmatic judge as one who "assesses the consequences of judicial decisions for their bearing on sound public policy as he conceives it." POSNER, *supra* note 1, at 13.

[9] *Id.* at 2.

[10] Posner has authored more than thirty books, over 300 articles, and over 1900 judicial opinions. Larissa Macfarquhar, *The Bench Burner*, NEW YORKER, Dec. 10, 2001, at 78. Fascinatingly, the range of book topics includes constitutional matters, sex, antitrust law, aging, the 2000 U.S. presidential elections, the impeachment of President Clinton, and intelligence law, among others. Posner is so captivating to some people that a special website was created in his honor that catalogues his thousands of legal opinions in searchable form. Program on Law & Techno., Columbia Sch. of Law, Project Posner, http://www.projectposner.org (last visited Dec. 11, 2008).

[11] For instance, according to one commentator, Posner intimates in his book *Sex and Reason* that "high heels were considered sexy because they suggested that a woman was incapable of running away from her spouse . . . [and] that normal men would rape women and seduce children if there were no laws against it." Macfarquhar, *supra* note 10, at 81.

[12] *Id.* at 78.

[13] Michael Johnson, Note, *Posner on the Uses and Disadvantages of Precedents for Law*, 22 REV. LITIG. 143, 143 (2003).

[14] Macfarquhar defines Posner's "pragmatism" as focus by the judge on "what effects a law is likely to produce." Macfarquhar, *supra* note 10, at 87. Peter Blum avers that Posner's "pragmatism" mandates that "lawyers . . . be more concerned with whether the [legal] rule makes sense as a matter of public policy." Peter Blum, Posner's Overcoming Law: "Muddling Through" the Hard Cases, 61 BROOK L. REV. 129, 130 (1995) (reviewing RICHARD A. POSNER, OVERCOMING LAW (1996)).

nevertheless omnipresent: "[L]egal uncertainty, which creates an open area in which the orthodox (the legalist) methods of analysis yield unsatisfactory and sometimes no conclusions, thereby allowing or even dictating that emotion, personality, policy intuitions, ideology, politics, background, and experience will determine a judge's decision."[15]

In the first section of his book Posner attacks, with notable precision, nine prominent judicial behavior theories that he contends "are overstated and incomplete."[16] Thereafter, he tinkers with and redefines the deficient theories and then masterfully melds them together using his pragmatism glue, resulting in what he claims is a "cogent, unified, realistic, and appropriately eclectic account"[17] of judicial decision making. This section also includes a foray into how a judge is "a participant in [the] labor market"[18] and also how judges, when analyzing the factors in a case, "blend the two inquiries, the legalist and the legislative,"[19] yielding, according to Posner, an unavoidably consequence-and-policy-based decision from the bench in difficult cases.

In the second segment of the book, Posner explores a number of purported internal and external constraints on judges to support his argument that there are shortcomings in the "legalist"[20] theory and also to explain how those constraints[21] on judges coalesce to yield unavoidably pragmatic judging. We also witness Posner "write not to defend himself, but to be accused"[22] when he fiercely accuses law professors of "hav[ing] no clue as to how to help a court decide a case."[23] In this section, Posner endeavors to prove that a whole host of intangible factors affect the judgment process and that judges are not duty-bound to a predetermined decision based solely on black letter law and technical legal rules.[24]

In the last section of the book, with machete-like candor, Posner admonishes the Supreme Court and posits "that the Justices are interested in . . . mainly political consequences, though they are reluctant to acknowledge this, perhaps even to themselves."[25] He then scrutinizes a number of Supreme Court decisions to attempt to reconcile his beloved pragmatism with legal decision-making at the highest level. He also tackles broader constitutional theories that ostensibly operate in the Supreme Court, but nevertheless asserts that "politically like-minded judges usually vote the same way despite their different judicial philosophies."[26] Interestingly in this section he also critically attends to what he calls "judicial cosmopolitanism": citing foreign legal decisions in Supreme Court cases.[27] He forcefully declares that "[c]iting 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."[28]

---

[15] POSNER, *supra* note 1, at 11. Posner has been championing "Pragmatism" for quite some time: "For some years now . . . I have been arguing that pragmatism is the best description of the American judicial ethos." RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 1 (2003).

[16] POSNER, *supra* note 1, at 19.

[17] *Id.*

[18] *Id.* at 57. Posner is known as the father of the law and economics movement that caused "a general shift in much of the legal thought in the United States." Johnson, *supra* note 13, at 143.

[19] POSNER, *supra* note 1, at 84.

[20] Posner defines "the legalist tools . . . [as] those most hallowed ones of reasoning by analogy and strictly interpreting statutes and constitutions . . . ." *Id.* at 12.

[21] Constraints such as the electorate, judicial independence, rules and standards, tenure and salary, experience, ideology, the judicial appointment process, and dissent aversion, among others.

[22] Macfarquhar, *supra* note 10, at 78. Posner is also not afraid of a "real-time" fight because he partakes in debates on the web. Debate between Posner and Randy Kozel, *Are Law Reviews Really Rubbish?*, LEGAL AFFAIRS, Nov. 15, 2004, http://legalaffairs.org/webexclusive/debateclub_posner1104.msp.

[23] POSNER, *supra* note 1, at 227.

[24] Posner contends "that judges are not moral or intellectual giants (alas), prophets, oracles, mouthpieces, or calculating machines." *Id.* at 7.

[25] *Id.* at 375.

[26] *Id.* at 346. The Justices' political bents and their judicial mentalities thus trump legal theory, Posner argues.

[27] *Id.* at 353.

[28] *Id.* at 350. Thus, even those of the international law persuasion can enter the fray, who may take issue with Posner's contention that "[t]here are grave objections to citing foreign decisions as authority even in the weak sense of the word." *Id.* at 349.

III. The Merit & Relevance of Posner's Case

Notwithstanding the raging academic battle over divergent legal theories of judicial behavior and Posner's "uproarious pugilism and desire to shock,"[29] there are tangible educational and practical lessons to be gleaned from the book for the practitioner, academic, and military lawyer.

For the litigator and Judge Advocate, Posner supplies useful insights regarding argument to a court, including the contention that "[r]arely is it effective advocacy to try to convince the judges that the case law compels them to rule in one's favor."[30] He also cautions lawyers not "to think that they can win by rubbing the judges' noses in the precedents."[31] This sage advocacy advice is quite profound, given that our entire legal system is largely built on the acute application of precedent that Posner now contends does not mandate a particular result but is merely a *factor* in a court's decision. Litigators armed with this knowledge may decide to reconsider how they approach a case, or to refine a particular argument, because they now understand—or at least consider—that if "a judge does bend a rule to avoid an awful result, he does not feel that he is engaging in civil disobedience; he thinks the *rule does not really compel* the awful result."[32] Thus, heeding Posner's cues, counsel should cautiously consider to what degree precedent should be employed in order to best influence the judiciary.

Posner further urges practitioners to "understand what makes judges tick,"[33] and that the "most effective method [of argument] . . . is to identify the purpose behind the relevant legal principle and then show how that purpose would be furthered by a decision in favor of the advocate's position."[34] To analyze this concept by borrowing war-fighter analysis from the military: counsel must "maintain[] focus on fighting the enemy and not the plan."[35] Stated another way, if judges' decisions are truly "influenced by temperament, emotion, experience, personal background, and ideology"[36] then a litigator is most likely to be successful by decisively identifying, considering and addressing those influence factors that impact the judge's (the "enemy's") decision—which transcends the rote application of precedent (the "plan"). In other words, counsel should "fight" the legal battle using *all* factors that affect the judge and not be unduly wedded solely to precedent. In summation, litigators should read this book to obtain the valuable practice pointers for courtroom "combat"[37] contained therein.

How Judges Think is also relevant to the academic, historian, constitutional scholar, law student or any potential reader that has even a scintilla of curiosity about the judicial mentality. The scholarly reader or theorist may be compelled to action—or *at least* compelled to thought—in response to the vigorous contents of the book, including innumerable philosophies, wide-ranging contentions, pointed arguments, various theoretic nuances, and even provocative claims.[38] Those readers who are strictly rule or precedent minded may find themselves particularly fueled by fervent disagreement with

---

[29] Macfarquhar, *supra* note 10, at 80.

[30] POSNER, *supra* note 1, at 220. Even though Posner limits his analysis to appellate judges, it logically follows that his advice to argue more than just precedent is also appropriate at the trial court level. Accordingly, trial attorneys could safely argue more than just precedent at trial because the trial judge is unlikely to be overturned for considering the same factors that Posner contends the appellate courts consider.

[31] *Id.*

[32] *Id.* at 213 (emphasis added).

[33] *Id.* at 218. Also, "[judges] want to understand the real stakes in a case . . . . They want the lawyers to help them dig below the semantic surface." *Id.* at 228.

[34] *Id.* at 220.

[35] U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP para 11-14 (12 Oct. 2006). This necessary analysis of the judge is akin to developing the "battlespace—[an] analytical methodology employed to reduce uncertainties concerning the enemy [and] environment." JOINT ARMY REG. 115-10, AIR FORCE JOINT INSTR. 15-157, WEATHER SUPPORT FOR THE U.S. ARMY, SECTION II (TERMS) (31 July 1996). Consider also the Military Decision Making Process (MDMP): "develop[ing] a personal and in-depth understanding of the enemy operational environment." U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS para 5-13 (27 Feb. 2008).

[36] POSNER, *supra* note 1, at 174. Additionally, if counsel can successfully identify the individual judge's "zone of reasonableness," which is "the area within which [the judge] has discretion to decide a case either way without disgracing himself," then counsel is more likely to be victorious, according to Posner. *Id.* at 86.

[37] Posner proclaims that law schools bear primary responsibility to prepare lawyers for courtroom "battle." *Id.* at 377. He argues that "[law] students are not taught how to present a case to a judge in a way that will strike a responsive chord." *Id*.

[38] See for example Chapter 11, where Posner assails Supreme Court Justice Breyer regarding Breyer's book, *Active Liberty*. *Id.* at 324–46.

Posner and his assertions, among others, that "judicial deliberation is overrated"[39] and that "[b]ecause behavior is motivated by desire, we must consider what judges want."[40]

Posner's weighty and enormously comprehensive arguments[41] are not flawless. Because Posner "is not, in the end, very interested in the sort of prudent rigor that produces water-tight logic,"[42] immense opportunity exists for further intellectual scrimmage with Posner for those academics so inclined.[43] Consider as well that he "is so influential, his description of the law [and economics] has become self-fulfilling: these days, many judges think like economists because Posner told them to."[44] Posner's unabashed success with his previous hard-fought crusade, that of connecting law and economics, raises the question whether his pragmatism campaign will ultimately receive the same high glory.

IV. Opposing Arguments

Setting any trial practice wisdom to be gained or academic spark to be lit aside, the book has notable weaknesses.

First, Posner's writing style can be tremendously intricate. Arguably, it is an impossible task to convert lackluster legal theory into exhilarating and enjoyable prose, but Posner's sentence construction appears only to exacerbate the difficulty. Take, for example, the following passage:

> Both the most able and the least able appellate judges are likely to stretch the zone—the most able because they will be quick to see, behind the general statement of a rule, the rule's purpose and context, which limit the extent to which the general statement should control a new case; the least able because of difficulty in understanding the orthodox materials and a resulting susceptibility to emotional appeals by counsel, or, what is closely related, difficulty in grasping the abstract virtues of the systemic considerations that limit idiosyncratic judging, such as the value of the law's being predictable.[45]

While a reader can eventually parse through this language to glean Posner's valuable point, it is an affirmative, deliberate, and time-consuming process that requires focused thought and energy. Thankfully, a reader does not need to labor in this manner throughout the entire book because his prose is this arduous only in certain places; however, any prospective reader must recognize, understand and appreciate that such "challenges" are simply inherent in earning the Posner education.[46]

Second, Posner appears to simply decree certain "truths" that he thereafter fails to sufficiently support. For instance, Posner claims that judges are internally restrained in their "legislative" behavior because being "regarded as politicians in robes . . . would deny them a major satisfaction of a judgeship."[47] This is a seemingly logical premise; however, he offers no tangible evidence or analysis to show how desire to be "good judges" actually impacted decisions in real cases.[48] Moreover,

---

[39] *Id.* at 2.

[40] *Id.* at 11.

[41] One could reasonably argue that Posner's nearly 400 pages of excruciatingly detailed analysis are overly comprehensive. Alas, those readers yearning to actually engage Posner better be prepared!

[42] Macfarquhar, *supra* note 10, at 78.

[43] There are already "critics, who claim that [Posner's] adjudicative methods are not in fact as pragmatic as he claims they are." Johnson, *supra* note 13, at 143. Others "have criticized Judge Posner's everyday pragmatism as too lacking in content to guide meaningful decision making." John F. Manning, Comment, *Twenty-Five Years of Richard Posner, The Judge: Statutory Pragmatism and Constitutional Structure*, 120 HARV. L. REV. 1161, 1169 (2007).

[44] Macfarquhar, *supra* note 10, at 87.

[45] POSNER, *supra* note 1, at 86–87.

[46] One reader was possibly unaware of Posner's style before she read the book: "[W]hat a boring book this was . . . . It was like a lecture on paper." Posting of Robin H. Rasmussen to Amazon.com, http://www.amazon.com/review/product/0674028201/ref=cm_cr_pr_viewpnt_sr_2?%5Fencoding=UTF8&filterBy=addTwoStar (May 28, 2008).

[47] POSNER, *supra* note 1, at 61. "[J]udges care about their reputation . . . and about being good judges." *Id.* at 204. The notable lack of evidence regarding the professed restraints on judges' decisions severely undercuts Posner's ultimate (but tempered) argument that judges are not overt pragmatists, but are "*constrained* pragmatist[s]." *Id.* at 13. If desire to be a "good judge" truly has a dampening effect on the degree of pragmatism a judge may employ, then Posner should fully substantiate his claim via analysis of real cases. Posner merely declares that judges are "boxed in . . . by norms" but thereafter wholly fails to support this and other forceful edicts with tangible, relevant, "admissible" evidence, as it were. *Id.*

[48] And Posner meticulously analyzes or references approximately forty-eight cases.

Posner declares that he "draws heavily . . . on the *psychology* of cognition and emotion" to prove that pragmatism is a valid, comprehensive theory.[49] Nevertheless, Posner goes to great lengths, particularly during his contemptuous assault on the Supreme Court, to attack the technical logic and rationale of the judicial decisions, not the psychology, cognition or emotion that he claims may have influenced the Court's conclusions.[50] It would be a difficult task to gather the empirical proof of the impact of Posner's intangibles, but the proof is nonetheless necessary to properly buttress his claims.[51]

These weaknesses, however, do not detract greatly from the overall effectiveness and usefulness of the book and a brave reader has much to gain by tackling it.

VI. Closing Argument

How Judges Think is a realistic, remarkable, persuasive and praiseworthy installment in the enduring pragmatism campaign championed by the "freakish[ly] productiv[e]"[52] Judge Richard A. Posner. Any Posner-induced panic should be muscled-through because this book is acutely useful to the practitioner and also exhilarating to the academic. Moreover, readers get to personally observe the spitfire judge preserve his status as one of the "most mercilessly seditious legal theorists of his generation,"[53] making for an interesting read with the added benefit of gaining some wisdom during the journey. Posner's writing style makes the book difficult at points, but the difficulty can and should be overcome by those who dare. Additionally, although the empirical support for Posner's claims is not pristine, those resultant evidentiary gaps provide opportunity for critics to continue to engage Posner in worthwhile intellectual skirmishes that eventually lead to increased knowledge.

Ultimately, Posner contends that judges, in the real world, must weigh consequences:

> The weighting is the result of a complicated interaction—mysterious, personal to every judge—of modes of reasoning (analysis, intuition, emotion, common sense, judgment), political and ideological inclinations, personality traits, other personal characteristics, personal and professional experiences, and the constraints implicit in the rules of the judicial "game."[54]

There is a reason that "Posner naturally occupies a position at the forefront of legal debates."[55] In this circumstance, courageous readers ought to be at the forefront *with* Posner to better appreciate and possibly demystify judicial decision-making.

---

[49] POSNER, *supra* note 1, at 7 (emphasis added).

[50] Despite significant analysis of many judicial opinions, Posner never points to specific cases where the judge's purported psychology, cognition, or emotion tangibly influenced the outcome.

[51] Interestingly, Posner blames law professors for the lack of empirical data on judicial decision-making. POSNER, *supra* note 1, at 218.

[52] Macfarquhar, *supra* note 10, at 78.

[53] *Id.* Posner attacks, among others, Harvard and Yale law professors, the "cream of the current crop" whose "amicus curiae briefs are conventional in approach, poorly reasoned, and devoid of constructive content." POSNER, *supra* note 1, at 227. "Can't a law professor at Harvard or Yale write a brief?" *Id.* at 229.

[54] *Id.* at 376.

[55] Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 688 (2003) (reviewing RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003)).