The Man in the Mirror

David A. Logan

Wake Forest University

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Judges Commons, and the Legal Biography Commons

Recommended Citation

Available at: https://repository.law.umich.edu/mlr/vol90/iss6/42

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
A book often tells you as much about its author as it does about its subject. No better proof for this proposition can be found than Richard Posner’s Cardozo: A Study in Reputation.

In the course of considering why Cardozo remains a giant of the law more than three score years after his death, Posner offers some useful insights into the nature of reputation, jurisprudence, and rhetoric. But far more interesting is the light that Cardozo sheds on Posner himself. Now into his second decade on the federal bench, Posner has changed from a dogmatic academic champion of law and economics to a pragmatic judge, concerned with morals and rhetoric; in short, a judge much like the revered Cardozo. That this change has occurred is clear. Less certain are the reasons for it, but Posner’s study of Cardozo’s career provides important clues as to why he has embarked on such a fascinating personal and professional odyssey. In the end, I am convinced that Posner’s evolution is genuine, if to a degree tactically motivated. If he is to be considered his generation’s Cardozo, a slavish adherence to law and economics just would not do, and a more flexible jurisprudence and humane rhetoric had to be developed; exit Posner the economist, enter Posner the pragmatist.

I. THE MIRROR

Benjamin Cardozo is famous. Richard Posner tells us why in Cardozo: A Study in Reputation, a work based on Posner’s Cooley Lectures at the University of Michigan Law School. According to Posner, Cardozo is the first “full-length critical (not biographical) judicial study, employing tools of social science as well as of legal doctrine” (p. viii). It also is the first monograph-length study of an individual judge that aspires to be “evaluative,” “critical not pious,” and “systematic, nonpolitical, and nonpolemical” (p. viii). After briefly summarizing Cardozo’s life,1 Posner turns to Cardozo’s reputation, observing that

---

1. Pp. 1-6. Cardozo was born into and shaped by the values of a close-knit Sephardic Jewish community in New York City. His father was a trial judge who resigned from the bench in
while Cardozo generally is placed in the “highest rank” of American judges, there is a written and oral tradition that dissents from this view.\(^2\) Jerome Frank was harshly critical of Cardozo’s writing style, describing it as having an “alien grace,”\(^3\) and Grant Gilmore criticized both the style and substance of Cardozo’s work.\(^4\) Other critics point out that Cardozo was able to decide a case in an innovative way and yet make the outcome appear unexceptionable and, indeed, inevitable, resulting in the lingering image of a “tricky guy.”\(^5\) Posner concludes that these unflattering evaluations are inconsistent with his sense that Cardozo has a generally sound reputation; “[t]here is a mystery here which the subsequent chapters will try to unravel” (p. 19).

Posner first attempts to define what constitutes a good reputation. He concludes that it is the “practical\(\) equivalent” of fame: to be “widely regarded in a good light” (p. 58). But, as Posner recognizes, good reputation may not always be the same as merit, and in any event, the conclusion that someone has a good reputation must be scrutinized in “the present age of relativism” (p. 58). Reputation is “conferred by the people doing the reputing rather than produced by the reputed one — and is conferred for their purposes, not his” (p. 59). Posner further observes that posthumous reputation is facilitated by

---

response to allegations of impropriety arising out of his Tweed Ring connections. Cardozo never married and remained closest to his (also unmarried) older sister, Nell. He was tutored at home by the writer Horatio Alger and graduated from Columbia College at 19, having studied the humanities with an emphasis on philosophy. Cardozo left Columbia Law School before taking his degree, and entered the family’s law firm, where over two decades he established an outstanding reputation as a litigator. He was elected to the state trial bench in 1913 and, after only a month, was detailed to assist the Court of Appeals with its overburdened docket. He never returned to the trial bench, being elected to his own term on the state’s highest court in 1917. Ten years later, he was elected Chief Judge. He served in that capacity until 1932 when President Hoover appointed him to the U.S. Supreme Court. His years on the Court were neither particularly happy nor healthy, and he died in 1938. Id.

2. Pp. 9-12. For example, Posner recounts that Warren Seavey used to admonish his torts students to avoid using metaphors and aphorisms that pass for legal analysis. Building upon Cardozo’s famous “danger invites rescue” from Wagner v. International Ry., 133 N.E. 437, 437 (N.Y. 1921), Seavey would say “anyone who states on the exam ‘danger invites rescue’ invites an F.”

3. P. 10. Posner fails to mention some of the other highly unflattering descriptions in Frank’s anonymous piece, published several years after Cardozo’s death: his opinions were “obscurely worded pronouncement[s]” which “ape[d] the English” and represented a “living museum of departed English usages.” Anon Y. Mous, The Speech of Judges: A Dissenting Opinion, 29 VA. L. REV. 625, 639, 636 (1943).

4. P. 12. Gilmore wrote: “[his opinions were s] elliptical, convoluted, at times incomprehensible . . . that the less gifted lower court New York judges were frequently at a loss to understand what they were being told.” GRANT GILMORE, THE AGES OF AMERICAN LAW 75 (1977).

the generality, variety, and ambiguity of the reputee's work. Luck also plays a role — the knack for having one's vision meld with worldly events. Posner argues that an "attractive persona" and longevity tend to promote posthumous reputation (p. 65). Finally, reputation, once established, tends to feed on itself.

Having to his satisfaction defined, or at least described, reputation, Posner determines that there must be some way to measure it. Posner sets out to measure Cardozo's influence by counting citations. In Chapter Five, Posner traces the names of selected scholars and judges through law reviews. This data reveals that citation frequency is positively correlated with service on the U.S. Supreme Court, with recency, and with an atheoretical bent (pp. 74-80). It also shows that while Cardozo is the most cited state court judge, he is not as frequently cited in law reviews as many more contemporary, but generally less well-regarded Supreme Court Justices (Burger, Blackmun) or scholars, both practical (Tribe, Prosser) and theoretical (Dworkin, Michelman). Yet, when Cardozo's vintage — as well as his relatively brief tenure on the Supreme Court — is taken into account, Posner concludes that these numbers support the view that Cardozo has a good reputation.

Posner's count of how often Cardozo's judicial opinions are cited in other judicial opinions is also revealing. Cardozo's New York Court of Appeals opinions are cited by the courts of New York and other jurisdictions far more frequently than those written by his colleagues (pp. 80-86). Similarly, Posner's analysis of Cardozo's Supreme Court years shows that over time his opinions have come to be cited more often than those of his respected colleagues, Louis Brandeis and Harlan Stone (pp. 86-90).

Finally, Posner attempts to divine Cardozo's reputation among casebook editors. He surveys casebooks in torts, contracts, and several other common law areas and concludes that Cardozo opinions appear far more frequently than those of his state court colleagues (pp. 90-91). From all of this, Posner concludes that the empirical data tends to "confirm the high repute in which, by casual impression, Cardozo is held" (p. 91).

Posner devotes the remainder of the book to exploring just why Cardozo is held in such high regard. Of the qualities Posner offers up, three stand out: Cardozo's antiformalist pragmatism, an attractive

6. Pp. 60-62. Posner notes that diversification improves reputation only after the reputee has already established a baseline of good reputation; too much diffusion of point of view early in a career makes it initially harder to achieve fame.

7. P. 68. This occurs in part because a reputee can effectively and efficiently bolster her position by calling upon the name of the reputee in an effort to cast reflected glory upon her position.

8. Because of the length of his tenure on the New York Court of Appeals, Cardozo is generally thought of as a state court judge.
persona (including a concern with morals), and, perhaps most signifi­
cantly, rhetorical eloquence.

Cardozo's pragmatism was systematically articulated in The Na­
ture of the Judicial Process. Posner considers this to be the "classic,
full-blown exposition" of the "pragmatic" theory of adjudication (p.
21). Posner credits the book for being the seminal self-conscious por-
trait of the judge at work, written from "a distinctively or identifiably
judge's point of view" (p. 32). In its rejection of formalism — the
strict adherence to a settled set of abstract principles unrelated to ac-
tual human experience — the candor reflected in The Nature of the
Judicial Process led to the important and more radical critique of the
realists (p. 21).

Posner also surveys Cardozo's judicial opinions, with an eye to-
ward whether Cardozo was able to carry out his pragmatic jurispru-
dential agenda on the bench. Often, Posner concludes, Cardozo could
not. Posner considers Hymes v. New York Central Railroad to be a
paradigmatic Cardozo opinion, evidencing not only great judicial craft
(or, as Posner terms it, "rhetoric"), but also Cardozo's antiformalist
pragmatism. Cardozo refused to apply the strictures of the common
law rules involving trespassers to a claim brought by a "lad of sixteen"
who was injured by falling electrical wires while preparing to dive into
a public river from a plank protruding from a railroad's property.
Cardozo emphasized that "the rights of bathers do not depend upon
... nice distinctions [representative of] a jurisprudence of concep-
tions." Posner salutes Cardozo's effective personification of the
plaintiff and description of his denouement, as well as the skillful use
of geological and spatial metaphors — references to quicksand, planes,
concentric spheres, and the like — in an opinion that "sweeps to its
climax" (pp. 52, 55). Unfortunately, while embracing a realist's view
of the situation and calling up "considerations of analogy, of conven-
ience, of policy, and of justice," Cardozo never tells us exactly how
these ends are served by allowing the trespassing youth to recover.
Posner concludes, "[I]t is Cardozo the rhetorician, rather than Car-
do zo the pragmatic policy analyst ... whose hand is visible" (p. 53).

Throughout the book Posner extols the virtues of Cardozo's rhe-
torical style, emphasizing the careful word selection, distinctive sen-
tence structure, and facility at reworking the arguments of others.
In particular, Posner commends Cardozo's ability to coin successful

---

11. 131 N.E. at 899-900.
12. 131 N.E. at 900.
13. Pp. x, 95, 98, 126-27. Cardozo's opinions reflect "a master's touch as unmistakably as
Shakespeare's paraphrases of Sir Thomas North's translations of Plutarch." P. 112. Posner de-
scribes Cardozo's ability to provide "value added" to the opinions of lower court judges and to
the briefs of counsel as turning "dross into gold." P. 111.
epigrams. When Cardozo wrote "[t]he criminal is to go free because the constable blundered," 14 Cardozo was able to "pack[ ] into a simple sentence of eleven words the entire case against the exclusionary rule." 15

Posner also identifies Cardozo's concern with morals, not only in his opinions in equity (where such concerns are to be expected), but also those in law, in which Cardozo endeavored to make the common law more closely reflect the prevalent morality in the affected nonlegal community. 16 However, Posner also details how Cardozo often failed to follow through on his pragmatist manifesto, especially in the scope of liability opinions, 17 that Posner says "do not hang together," "lack thrust," and are "inconsistent[ ]" (pp. 113, 107, 113). Yet Posner views this inconsistency as ultimately contributing to Cardozo's reputation because it provides some grist for everybody's mill: these opinions "demonstrate[ ] the importance of generality, of omnisignificance" (p. 113).

Chapter Seven is Posner's wrap-up of the question of Cardozo's reputation. According to Posner, Cardozo's primary contribution was "pedagogical" in that he made the law "clearer, more interesting, more intelligible," and, at least modestly, more pragmatic (p. 126). When he made an innovation, it occurred without calling attention to that fact, a mark both of a reformer (but not a radical) and of a skilled rhetorician (pp. 127-28). Posner lists the following additional factors as contributing to Cardozo's "solidly professional reputation": appointment to the Supreme Court, the opportunity to serve on the most influential state court of his time, the extrajudicial writings, his attractive personal qualities, and his close relationship with academics (pp. 128-32). But when all is said and done, it is with Cardozo's rhetorical skills that Posner is most taken, and to which Posner primarily attributes Cardozo's reputation (p. 132-33).

II. THE REFLECTIONS

The task Posner chose here was not a daunting one. Posner sets

16. Posner cites Wood v. Duff-Gordon, 118 N.E. 214 (N.Y. 1917) (requirements contract has implied term requiring "best efforts"), as a case in which Cardozo tried to make the law follow the understanding of business people (pp. 92-97), and Wagner v. International Ry., 133 N.E. 437 (N.Y. 1921) (railroad owes duty to person trying to rescue injured passenger), as an example of Cardozo's effort to have the common law reflect the prevalent morality. Pp. 101-02.
out to prove that Benjamin Cardozo has a good reputation, surely as uncontroversial an assertion as one can make these days. But the process of looking closely at Cardozo must have suggested to Posner parallels between his own career and that of his subject. In fact, many of the aspects of Cardozo's life and work that Posner finds significant serve to cast reflections of Posner the scholar, judge, and man.

A. Posner the Jurisprudent on Cardozo the Jurisprudent

Posner introduces the book by observing that "Cardozo was also a distinguished contributor to jurisprudence — the philosophy of law — advocating a form of legal pragmatism that resembles the pragmatism advocated in my book on jurisprudence." Cardozo's extrajudicial writings are noteworthy because they represent "the first systematic effort by a judge to explain how judges reason," written with an "articulate self-consciousness about the judicial function" (p. 32). Cardozo acknowledged that judges must legislate because faithful consideration of precedent, history, or custom does not always provide the answer to difficult questions in individual cases. In such circumstances, Cardozo would apply the "method of sociology." By this Cardozo meant that he would attempt to identify and then implement the outcome that best suited the general social welfare, in light of considerations of justice and the mores of the community. While by no means clear about exactly how to divine this information or how to weigh it, or always successful in following through by applying it, Cardozo's judicial philosophy was candid and reflective, and, perhaps most importantly, it rejected the rigid formalist notions of law that had continued to influence, if not predominate, into the third decade of this century.

Perhaps because of the perceived press of time or an unwillingness to explore the profound implications of a system that gives judges the power to decide what is in the social welfare, Posner's discussion of Cardozo's jurisprudence is superficial. Cardozo tasked the judge with determining what is "moral." The judge must identify and fol-


19. See CARDOZO, supra note 9, at 66, 71-72, 106.


21. Posner averages a book and several articles a year while serving as a federal judge. This must make it difficult for him to give full attention to the mundane aspects of organization and editing. A number of his arguments in Cardozo are made in scatter-shot fashion. For example, in the midst of discussing the possible theoretical justifications for Cardozo's opinion in Ultramares, Posner digresses to point out how Cardozo's writing improves on the work of other lawyers, before returning to the subject at hand. Pp. 111-12.
low "the principle and practice of the men and women of the community whom the social mind would rank as intelligent and virtuous," and this enterprise is most critical in times of rapid social change. This analysis surely describes a process that is pregnant with political ramifications. A judge is elected by the majority (or appointed by government officials elected by majorities). To ask that cases be decided by reference to what is moral in light of the acquired wisdom of the community is surely to risk replicating the power arrangements with which the judge is familiar and comfortable (given the successful acquisition of high office). Other problems abound. Do these determinative values spring only from the majority of the community? Must they reflect actual practices or merely aspirations? In hard cases, how is the community consensus identified? Posner ignores these difficulties. Finally, the tension created by Cardozo's concern with utility (or "social welfare") on the one hand and notions of moral duty on the other is also glossed over. Posner is content to characterize Cardozo as a pragmatist and antiformalist, as if flexibility and relative candor are satisfactory descriptions of, let alone standards for, the exercise of judicial power.

Posner's admiration for Cardozo's pragmatism might at first blush seem puzzling to a reader only casually familiar with the Posner canon. For more than a decade, roughly 1972 to 1987, Richard Posner

---

22. BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 37 (1928).
23. CARDOZO, supra note 9, at 136-38.
26. See John C.P. Goldberg, Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings, 65 N.Y.U. L. Rev. 1324, 1326, 1335-36 (1990) (discussing the apparent contradiction between Cardozo's "puritanical" sense of moral absolutes and his pragmatic concerns); see, e.g., Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 891 (N.Y. 1921) (stating that building contractors who depart from contract specifications in bad faith cannot rely upon the doctrine of substantial performance: "The willful transgressor must accept the penalty of his transgression.").
27. At one point, Posner does offer a modest critique of the limitations of Cardozo's pragmatism. Pp. 116-17. Posner states that Cardozo would have displayed a better judicial philosophy had he been able to take advantage of the tools of "modern economic analysis." This would have provided "an incisive framework for, or technique of, policy analysis." P. 117. Posner claims that "intimations" of an economic approach to law can be found in Cardozo's opinion in Adams v. Bullock, 125 N.E. 93 (N.Y. 1919) (there is no negligence, and thus no liability, when the relationship between the seriousness and likelihood of danger is outweighed by the difficulty of avoiding the risk ab initio). Of course, Cardozo stated this more eloquently: "Chance of harm, though remote, may betoken negligence, if needless. Facility of protection may impose a duty to protect." 125 N.E. at 94.
28. Between the endpoints I employ — namely the first edition of RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1972) and WILLIAM M. LANDES & RICHARD A. POSNER, THE
offered an express, detailed, and all-encompassing view of the law: wealth maximization is and should be the goal of the law and a concern for the efficient distribution of assets was implicit in the common law.\(^{29}\) Posner the positivist, the formalist, described the world as it was (or could be) if only judges used the right analytical tools, to wit, the tools of the economist.\(^{30}\) The sophistication and sheer volume of his work, plus his hubris, made him the best known and most controversial proponent of law and economics.\(^{31}\) And law and economics certainly has had its day, figuring prominently in debates inside the academy, both in the pages of law reviews and in the discussions of curriculum and tenure review committees.\(^{32}\)

In recent years, however, Posner has announced that he is a pragmatist, an antiformalist. In *The Problems of Jurisprudence*,\(^{33}\) Posner disclaimed fealty to grand theory. He rejected law as a branch of exact inquiry based upon principles static over time and unrelated to the realities of social life.\(^{34}\) He rejected legal "metaphysics," "artificial reason," "formalism," and "overarching conceptions" such as "corrective justice," "natural law," and "wealth maximization."\(^{35}\) He acknowledged that wealth maximization cannot provide a complete

---


For that matter, a natural lawyer can be a positivist — Coke, and maybe Dworkin in his recent writings, which emphasize interpretation, fit this bill. And maybe a formalist can be a realist. Economic analysis of law is a formalist edifice erected on a realist base, so one is not surprised to find that it has been criticized as formalist by antiformalists and as realist by antirealists. And to the extent that the economic analyst seeks to shape law to conform to economic norms, economic analysis of law has a natural law flavor.

31. One of the great curiosities in all this is that Posner, an English major in college, had no formal training in economics. Perhaps his term at the Federal Trade Commission opened his eyes to the magic of markets. See David Ranii, *The Next Nominee?*, Natl. L.J., Nov. 26, 1984, at 1, 26.


34. *Id.* at 15-16, 26.

theory of distributive justice because it lacks a moral theory to explain the initial distribution of assets and further that market efficiencies cannot always be allowed to override moral or egalitarian principles. He told us that the philosophy of science provides judges with two approaches, "logical deduction" and "empirical observation," neither of which adequately explains the process actually used by judges to decide hard cases. Rather, judicial reasoning is primarily a branch of "practical reason," characterized by "anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, 'experience,' intuition, and induction." Posner cited Cardozo as reflective of (if not the source of) this pragmatism.

This melange of decisional tools is surely much more like the flexible, community-based, self-consciously imperfect jurisprudence Cardozo articulated. But from the pen of the great system-builder, Richard Posner? What are we to make of this apparently fundamental change? Although psychobiography is a perilous exercise, the apparently dramatic change in Posner's jurisprudence over a period of only a few years justifies consideration of whether the shift is real or only skin-deep, and why it occurred.

First, one can question how much of a change of mind (or of heart) Posner's recent work really represents. The Problems of Jurisprudence did not entirely abandon the view that economic analysis can make for better judicial decisions. Rather, it may represent only a reformulated claim, that because his law and economics is not "metaphysical" and not based upon only a "superficial examination of [the relation of immutable principles] to fact," Posner is not a formalist.

333, 340 (1988) (stating that economic analysis can rescue the law from the "horrors of indeterminacy").

36. POSNER, JURISPRUDENCE, supra note 18, at 375-80; see also Bill Grady et al., Judicial Mating of Sex, Economics. Chi. Trib., May 14, 1991, § 3, at 3 (Posner observes that economic analysis "can't tell you whose economic welfare is to be maximized"); Theodore R. Roth, Law and Economics, U. Chi. Mag., Aug. 1991, at 28, 31 (Posner admits that "[e]conomists . . . tend to accept the unequal distribution of income as a given, rather than examine it critically.").

37. POSNER, JURISPRUDENCE, supra note 18, at 73.

38. Id. at 28-29 (citing CARDozo, supra note 9, at 66, 113 ("The final cause of law is the welfare of society"; "[the judge] must get his knowledge . . . from experience and study and reflection; in brief, from life itself.").) Similarly, Posner's more recent judicial opinions are characterized by a refreshing pragmatism. An excellent example of this is Market Street Assocs. v. Frey, 941 F.2d 588 (7th Cir. 1991), in which Posner glowingly endorses the contract doctrine of "good faith" performance, an approach more likely to reach fair rather than efficient outcomes. Contrast this with his colleague Frank Easterbrook's hyperformalist approach to the same issue in Kham & Nate's Shoes No. 2, Inc. v. First Bank, 908 F.2d 1351 (7th Cir. 1990).

Maybe it is but a short (but still significant) step from a strict adherence to law and economics to a law and behavioral science perspective, or even more generally, to a broadly interdisciplinary approach to the law. Posner urges that we jettison our concern for "semantic" and "metaphysical" goals (like the promotion of human dignity and the securing of justice) and instead concentrate on issues "factual and empirical." Toward this end "[i]nterdisciplinary legal theory is inescapable," and by being more receptive to the sciences we stand the best chance of understanding "the social behavior we call law." Thus, Posner's law and economics now may be only one aspect of a larger scientistic view of law.

Posner's pragmatism could also reflect a new modesty for his claims to the centrality of economic principles to legal analysis. For example, his 1988 book *Law and Literature: A Misunderstood Relation* may be considered an acknowledgment of the vitality of a decidedly nonscientific, reader-centered jurisprudence. This explanation is unlikely to explain matters, however, because although Posner honored "law and literature" by the attention he gave it, his approach to the topic was essentially nonliterary, his motives political (to marginalize it), and his conclusions about its limited utility highly debatable.

One may further hypothesize that Posner's pragmatism is part of a more general shift toward professional humility, that is, that Posner is now less willing to make grand claims for the importance of his work or for law and economics generally. Remember, this is a writer who has regularly articulated a "strong" vision of law and economics, and any concession to the inherent weaknesses of his theory will doubtless be pounced on with glee by the legions of Posner-bashers, and, more generally, critics of law and economics. Thus, even a modest mid-course correction could be viewed as the product of mature attitude, of healthy reflection and self-criticism.

40. POSNER, JURISPRUDENCE, supra note 18, at 387, 123. Elsewhere he hopes for "a method of social engineering . . . susceptible of objective evaluation, much like the projects of civil engineers." Id. at 122.

41. Id. at 439, 374; cf. Benjamin N. Cardozo, What Medicine Can Do For Law, in LAW AND LITERATURE AND OTHER ESSAYS 371 (1931).

42. POSNER, LAW AND LITERATURE, supra note 18.


44. Some evidence of this may be found in his writings beginning in the mid-1980s. See, e.g., Smith, supra note 39, at 426 & n.84 (noting Posner's cautionary language in his 1983 work The Economics of Justice).


46. Posner considers "mature" attitudes to be the only ones worth taking seriously. See POSNER, LAW AND LITERATURE, supra note 18, at 137-71 (describing his analysis as "mature," in contrast to other scholars' "romanticism").
Perhaps the most likely explanation is that Posner is more pragmatic because Posner is now an experienced judge. Cardozo’s pragmatism was rooted in his twenty years of practice as an appellate litigator and later in the enterprise of deciding real controversies involving real people whose lives were directly affected by the outcomes he selected (and, to an extent, by the rhetoric he chose to explain those outcomes). While the academic is free (indeed, encouraged) to build systems characterized by blazing originality and boldness of social vision (although few do), the judge is far more constrained. The need to tell the parties what the law is and what sources of authority support this conclusion mark the judge’s work. Similarly, the nature of the appellate court emphasizes collegiality and group decisionmaking, discourages intellectual autonomy, and tempers cold logic with untidy instincts such as fairness, compromise, and morality. Indeed, it was just this sense of the peculiar nature of the judge’s job that made Cardozo’s extrajudicial writings so valuable. Thus, Posner’s pragmatism is a completely understandable byproduct of the dynamics of his job.

Pragmatism also would be attractive to Posner for less flattering reasons. Read broadly, pragmatism is a jurisprudence that largely frees judges from the shackles that traditionally limit judicial power — history, precedent, custom, natural law — replacing them with a deeply personal process of introspection that hopes to identify the all-around best outcome in a given case. By insisting that the pragmatic judge is always reasonable and concerned with how the resolution of hard cases actually affects the real world, criticisms of judicial illegitimacy may be deflected. A pragmatic Judge Posner may thus be more free to decide cases according to his personal agenda by assuring observers that he is being reasonable, and that everything relevant is considered before anything important is decided.

47. See Benjamin N. Cardozo, Jurisprudence, Address to the New York State Bar Association Meeting (Jan. 22, 1932), in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 7, 28-29 (Margaret E. Hall ed., 1947).


51. See Posner, Jurisprudence, supra note 18, at 30 (noting that judges necessarily apply their own “policy, politics, social vision, ‘values,’ even ‘prejudice’” to answer difficult legal questions and that “[p]erhaps the highest aspiration of the judge is reasonableness in adjudication”).

52. As Grant Gilmore observed, Cardozo’s admission that judges made law was “widely regarded as a legal version of hardcore pornography.” Gilmore, supra note 4, at 77.

53. In particular, Posner is disdainful of the limiting hand of history. While discussing the
Posner’s embrace of pragmatism is also likely a reaction to the experiences of his fellow judge, Robert Bork. Bork, like Posner, is a prolific and controversial scholar, especially as a result of his vigorous articulation of an originalist theory of constitutional interpretation. As Bork moved to the more public arena of the U.S. Court of Appeals and to the brink of the Supreme Court in 1987, however, he discarded a number of the most extreme positions that he had taken while in the academy (for example, that *Brown v. Board of Education* was wrongly decided). In his review of Bork’s *Tempting of America*, Posner insightfully commented upon why Bork changed his views: “As a public man, and one who quite properly tried to conciliate critics and reassure doubters at his confirmation hearing, Bork may have disabled himself from pressing [his] originalism to its logical extreme. . . .”

With his own sights possibly set on the Supreme Court, and informed by how Bork’s jurisprudence failed in the confirmation process (the market of public opinion), Posner no doubt perceived the political virtues of the moderate-sounding jurisprudence of pragmatism. For an ambitious judge, reasonableness is more likely to play in Peoria than economic analysis, Cardozo more palatable than Pareto.

Additional clues as to why Posner is changing lurk in his examination of Cardozo’s reputation. Posner argues that “[p]osthumous reputation is facilitated by the generality, variety, and ambiguity of the reputee’s work, or in short by its adaptability to social, political, and cultural change” (pp. 60-61). Posner holds up Holmes as an example

---

54. See, e.g. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF LAW 144 (1990) (stating that a judge interpreting the Constitution should only consider “how the words used in the Constitution would have been understood at the time [of enactment]”). More broadly, Bork’s narrow view of the constitutional protection of individual liberties and his willingness to think in terms of maximizing society’s wealth helped his opponents successfully characterize him as “cold and uncaring.” Roth, *supra* note 36, at 36.


56. See generally Ranii, *supra* note 31, at 26; see also pp. 128-29 (appointment to Supreme Court enhanced Cardozo’s reputation).

57. A similar lesson can be drawn from the brief foray of Judge Douglas H. Ginsburg into the Supreme Court nomination process. Although he eventually withdrew as a nominee because of certain personal peccadillos, the nominee was initially the target of criticism because of his economic analysis of legal issues. In particular, Ginsburg, while serving as an official in the Office of Management and Budget, had torpedoed Environmental Protection Agency regulations intended to curtail the use of asbestos. Ginsburg concluded that the cost of the rule outweighed the benefits, based in part on his decision that a lost human life was worth $22,000. A congressional report characterized the methodology as “morally repugnant.” Ginsburg’s other law and economics writings were also widely criticized in conjunction with his short-lived nomination to the Court. See Robert Pear, *Court Choice in Focus: A Portrait of Ginsburg*, N.Y. TIMES, Nov. 1, 1987, at 1.
of a jurist whose reputation was enhanced by "the enigmatic, in a sense unfinished character of [his] work. . . . His vast and none too consistent output . . . provided aphorisms for every position in jurisprudence debates and has made the search for the 'true' Holmes a fascinating, if ultimately insoluble jigsaw puzzle" (p. 61). No one would characterize Richard Posner circa 1987 that way; indeed, many would dismiss him as the composer of one creative theme embroidered with a hundred variations. 58 But if Posner is to succeed in what he terms "the historical fame derby" (p. 61), he needs to be less predictable, less reducible to "Oh, I know where he comes out on this issue." So, by introducing a little elusiveness and ambiguity he can garner attention and interest on the part of reputers.

It is important to remember that Posner is still concerned with markets, and in the Cardozo book expressly with how one prevails in the market of reputations. Despite turning out scholarship at a breakneck pace, Posner must have sensed that he had painted himself into an intellectual corner, with adverse consequences for his reputation. While the decade 1975-1985 saw the emergence of law and economics as perhaps the most provocative voice in the academy, the sun has since begun to set on the Chicago school. One reason is the faddishness of intellectual thought (although evolution would be the more flattering term), which by the late 1980s made the central observations of law and economics seem less threatening and (this is the true indictment) largely old hat. 59 The dominant theme in the new legal scholarship became a self-consciously personal and nonscientific perspective, whether feminist, 60 literary, 61 or communitarian, 62 to name a few of the contenders. In addition, "pragmatism" is now the rallying cry for a broad range of essentially flexible, but ultimately conservative schol-

---

58. As a rock critic once asked rhetorically when discussing the Moody Blues' album Seventh Sojourn, "[h]ave they made seven albums one time or one album seven times?"


ars. Posner needed to join the battle on their terms and at least appear to be sensitive to the new arguments being made. *Law and Literature: A Misunderstood Relation* and *The Problems of Jurisprudence* were most directly responsive to these concerns, but so also is *Cardozo: A Study in Reputation*, in which Posner cleaves himself to the works of the consummate common law judge and skeptic about the utility of grand systems. Richard Posner surely is on the move, but to where we cannot be sure, and this may well improve Posner's ability to stay on the agenda with reputers, present and future.

Similarly, Posner's methodology of cite-counting as a proxy for reputation may have been prompted by an interest in shoring up his reputation. A central thesis of *Law and Literature* was that great literature is that which stands the test of time as measured by an enduring concern with reading and understanding the work. This market-oriented, Darwinist view of literature is replayed in the context of citations to legal authority in the Cardozo study. If frequency of citation is a proxy for Cardozo's good reputation then one surely would like to know how Richard Posner measures up. Posner modestly does not tell us, although a methodology similar to that which he used to evaluate Cardozo places Posner in third place on the list of frequency of citation in law reviews. Similarly, Posner appears very frequently in casebooks. Both of these measures put the greatest weight on the view from the academy, because writers in scholarly journals and editors of casebooks constitute the vast bulk of authors and editors in these venues. But Posner is also frequently cited by other judges. Assuming that cite counting represents an accurate indicator of reputation, Posner is undoubtedly a leading figure in the law, especially considering that he is only in his early fifties. It is clear from *Cardozo* and the books that immediately preceded it that Posner has attempted to enhance his reputation by providing an increasingly broad, accessi-

63. See Feinman, supra note 24, at 728-30.
64. This enterprise was at the heart of *Law and Literature*. The main chapters are Posner's responses to law and literature critiques of his work offered by Robin West and Richard Weisberg. See Ayer, supra note 43, at 1600-02.
67. Although not nearly as often for his judicial opinions as for his extrajudicial writings. One exception is his opinion in Lake River Corp. v. Carborundum, 769 F.2d 1284 (7th Cir. 1985), which appears in at least eight contracts casebooks. See Collins & O'Brien, supra note 66, at 14, n.7.
69. Posner acknowledges that the methodology is not foolproof. Pp. 70-71, 75. For example, the citation count cannot distinguish between critical and flattering references, between a cite to a work as merely a global summary and one that is a specific discussion of a proposition, nor distinguish the word *black* from a reference to (Hugo) Black.
ble, and topical mix of themes and by identifying a methodology of measurement that, for the time being at least, conveniently reinforces his predominant stature in contemporary American jurisprudence.

B. Posner the Rhetorician on Cardozo the Rhetorician

Posner has written before on the question of Cardozo’s rhetorical skills. He asserted in 1986 that Cardozo was not a master of judicial style, and in 1988 that Cardozo suffered from “an ornateness that at times lends an unserious quality to his prose and to his thought.” He also more generally criticized judicial craft (a concern of Cardozo’s) as adding nothing of real value to opinions. In essence, rhetoric was a bag of tricks that enabled a judge to make an opinion more persuasive than its merits warranted.

In this book Posner is far more charitable, especially to Cardozo’s judicial opinions. Cardozo now writes with “striking freshness, clarity, and vividness,” with “[t]he power to compress a tradition of legal thought into a sentence” (pp. 45, 56). Posner salutes both Cardozo’s “writing style” and the “architecture of his opinions,” which together result in “cumulative and mass effect” (pp. 126, 55). A master rhetorician like Cardozo makes it more likely that a judicial opinion will not be so chained to the immediate context of its creation. It can be pulled out and made exemplary of law’s durable concerns. That is, it is literature; literature is the body of texts that survive the context in which they were created because they speak to us today. The literary judge wears best over time. [p. 143; footnote omitted]

The way in which Posner discusses the moral language and concerns that frequently crop up in Cardozo opinions represents more than a grudging appreciation of the work of the nonscientist judge. Posner points out that Cardozo would strive to reach moral outcomes and effectively to use the language of moral discourse to reach them. For example, in Jacob & Youngs, Inc. v. Kent, although ignoring the fact that a contract called for a specific brand of pipe and required that


71. Posner, Law and Literature, supra note 18, at 293. Support for this was found in Cardozo’s opinion in Palko v. Connecticut, 302 U.S. 319 (1937), which led Posner to conclude that “Cardozo has Brutus’ problem: his rhetoric draws attention to itself.” Posner, Law and Literature, supra note 18, at 294.

72. This was the conclusion in chapter 6 of Law and Literature. See Richard Weisberg, Entering with a Vengeance: Posner on Law and Literature, 41 STAN. L. REV. 1597, 1606 n.34 (1989) (book review); White, supra note 43, at 2037.

73. Posner remains generally unimpressed by Cardozo’s extrajudicial writing: “Extended — indeed extravagant — metaphor, a tone arch and coy, and staccato sentences lending a dramatic air to the proceedings — these are hallmarks of the overdone style that is common in Cardozo’s non-judicial prose . . . .” P. 22.

74. 129 N.E. 889 (N.Y. 1921).
all defective work would be corrected, Cardozo wrote that “[t]he willful transgressor must accept the penalty of his transgression. For him there is no occasion to mitigate the rigor of implied conditions. The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong.”

Later, when defining the duties that arise out of a fiduciary relationship, Cardozo wrote that “[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.” The young Richard Posner surely would have found such moralizing unattractive, and Cardozo’s distaste for the morals of the marketplace would have seemed to be naive if not wrong-headed. But today’s Posner treats this aspect of Cardozo’s writing with respect.

What might explain Posner’s changed evaluation? The most plausible explanation is that Posner now has systematically read all of Cardozo’s work, rather than isolated parts. However, the new Posner may in fact be more drawn to Cardozo’s rhetorical craft for reasons not expressly discussed in the book. Posner has been harshly criticized for his attempt to suppress the ethically complex language that so characterized the common law and to replace it with the more precise but morally empty language of the social scientist and economist. Perhaps the flap over his advocating “baby buying” (deregulation of the market in adoption) has alerted him to the impact that choice of language can have on perceptions of the legitimacy of an

75. 129 N.E. at 891 (citations omitted). Posner also points out how the statement of facts in this case strikes a populist note, Cardozo implying that the breach of contract action was being pursued by a “rich man” attempting to harness the law to serve “mandarin” needs. Pp. 106-07. Cardozo’s moral vision and its impact on his judicial decisions is further discussed in Stanley C. Brubaker, The Moral Element in Cardozo’s Jurisprudence, 1 CARDOZO L. REV. 229 (1979).

76. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). Note how the nontraditional sentence structure enhances the impact of the legal rule announced.

77. Posner concludes that “[n]o judge seems ever to have come up with a better formula with which to express the concept of fiduciary duty.” P. 105. Posner also gives attention to less morally charged aspects of Cardozo’s rhetoric. Posner says it is acceptable for Cardozo to present facts selectively, and to an extent misleadingly. Pp. 43, 137. A breezy, dramatic flair for facts, an air of culture, and idiosyncratic though effective departures from English prose style are all identified as admirable traits (pp. 126-27) as is the skill at coining epigrams. P. 56. Finally, Posner salutes the tempered (and to some extent oblique) manner in which Cardozo presented his conclusions: Cardozo’s reformist jurisprudence was cloaked so as to be “the quietest of revolutionary manifestos.” P. 109.

78. In Law and Literature Posner discussed but one opinion, and it was from Cardozo’s tenure on the Supreme Court. The new book is concerned almost exclusively with the state court years, which were rhetorically more successful. See Michael L. Richmond, In Defense of Poesie, 57 FORDHAM L. REV. 901, 926-27 (1989) (book review); Richard H. Welsberg, Law, Literature and Cardozo’s Judicial Poetics, 1 CARDOZO L. REV. 283 (1979).

underlying premise. A newfound linguistic sensitivity is particularly likely because this debate seeped out of academic literature and into the broader political arena.

Posner's own rhetoric in *Cardozo* is far more tame than that which used to characterize his extrajudicial writing. There are no slips into the ad hominem, little parading of erudition for its own sake, and relatively few suggestions of the distant scientist-observer prevalent in his law and economics tracts. And when it comes to a glistening style, Posner provides some of his own. It is almost as if Posner was inspired to write like Cardozo by virtue of spending time immersed in Cardozo. Felicitous sentences and epigrams abound. At one point, Posner discusses Cardozo's "elliptical and slanted" (p. 38) presenta-

80. See Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 328, 326, 327, 339, 341 (1978) ("suppliers" (the natural parents); "demanders" (prospective adoptive parents); "unsold inventory stored in a warehouse" (children in foster care); "prices for children of equivalent quality"; "the marginal costs of producing . . . babies of a given quality"; "market involving a complex and durable good"). Even Posner's cautionary expressions in this piece are shocking in their dehumanization. "Further, we are speaking only of sales of newborn infants, and do not suggest that parents should have a right to sell older children." *Id.* at 344. "Moreover, it is incorrect to equate the possession of property rights with the abuse of property, even if the property is a human being." *Id.*. However, so long as the market for eugenically bred babies did not extend beyond infertile couples and those with serious genetic disorders, the impact of a free baby market on the genetic composition and distribution of the human race at large would be small." *Id.* at 345. See also *Forum: Adoption and Market Theory*, 67 B.U. L. REV. 59-175 (1987), which devotes 117 pages to Posner's defense of "baby buying" and three responses thereto. The rhetoric of Posner's defense, here appearing in a mainstream legal journal, is far more conventional than that found in his original Swiftian (immodest) proposal. This is most noticeable when he insists on referring to the proposal as "deregulation" of adoption rather than "baby selling." Richard A. Posner, *The Regulation of the Market in Adoption*, 67 B.U. L. REV. 59, 70-71 (1987). For a spirited general attack on Posner's rhetoric, see Peter R. Teachout, *Chicago Exposition: The New American Jurisprudential Writing As a Cultural Literature*, 39 MERCER L. REV. 767, 791-99 (1988). But see Donald N. McCloskey, *The Rhetoric of Law and Economics*, 86 MICH. L. REV. 752, 761-62 (1988), for a more charitable view of Posner's use of the economic vocabulary.


82. Indeed, Peter Teachout views Posner as a prime instigator of the "new scholarship," which, inter alia, is characterized by hyper-aggression and a tendency to elevate one's own ideas through active denigration of competing ideas in the academic marketplace. See Teachout, *supra* note 80, at 771-75. Others have noted Posner's rhetorical slipperiness. See Ernest J. Weinreb, *Adjudication and Public Values: Fiss's Critique of Corrective Justice*, 39 U. TORONTO L.J. 1, 2 n.3 (1989); White, *supra* note 43, at 2030. But while *Cardozo* overall reflects a change, there is still some zip in Posner's fastball; he takes a gratuitous swipe at unnamed "feminists" who criticized Cardozo's opinion in *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928), for displaying a lack of empathy for Mrs. Palsgraf. See *id.* p. 47; see also Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157, 1161.

83. Compare *Posner, Jurisprudence*, *supra* note 18, at 9, in which Posner, who taught himself Greek as an adult, provides his own translations of classical texts.

84. In *Cardozo*, Posner generally resists seeing all the world through the eyes of an economist, although there are exceptions. At one point he opines that "[c]ommercial morality is perhaps the same thing as efficiency." *P. 101. Note that even this proposition is stated in tentative language. Elsewhere, Posner calls trespassers on land "low-cost accident avoider[s]" (p. 50 n.26) and property owners "superior loss avoiders" vis-à-vis water companies. *P. 114. 
tion of the facts in *Palsgraf v. Long Island R.R.*<sup>85</sup> and how it served to make the opinion more effective. Posner writes, "mention that [plaintiff's only injury] was a stammer would have made the accident seem not only freakish but silly, a put-on, a fraud. The scale fell on Mrs. Palsgraf and made her stammer. Tell us another. Great cases are not silly."<sup>86</sup> The book has a loose, conversational feel that makes it easily the most readable Posner book yet, and Posner's fondness for his subject is apparent throughout.<sup>87</sup>

### C. Posner the Judge on Cardozo the Judge

The bulk of *Cardozo* is devoted to a discussion of a number of Cardozo's court of appeals decisions. As might be expected, *Palsgraf*<sup>88</sup> is at center stage. Posner provides an abundance of detail about the actual facts of *Palsgraf*, which he contrasts with Cardozo's "elliptical and slanted" presentation (pp. 33-36, 38-39). Posner salutes Cardozo not just for how he used the facts that he included, but also those he left out, viewing this as the mark of a “self-consciously literary judge.”<sup>89</sup> Posner also points out that Cardozo's deviations from stan-

---

<sup>85.</sup> 162 N.E. 99 (N.Y. 1928).

<sup>86.</sup> P. 42. Another example is the pun Posner includes in his discussion of Wood v. Duff-Gordon, 118 N.E. 214 (N.Y. 1917), in which Cardozo held that a contract implies that the recipient of exclusive sales rights must use best efforts; Posner observes that the recipient cannot "just sit on his duff." P. 93. Later, Posner compliments Cardozo for not using the opinion to make "[a] frontal assault [on the doctrine of consideration that] almost certainly would have failed. Cardozo was not Quixote." P. 95.

<sup>87.</sup> This change in tone is also reflected in Posner's judicial opinions. For example, in *Lossman v. Pekarske*, 707 F.2d 288, 290 (7th Cir. 1983), Posner wrote that children had little or no liberty interest in staying with their natural parents because when the state intervened, the children were merely going from "one form of bondage to another." The parents had no liberty interest because "[p]eace of mind is not liberty." 707 F.2d at 292. Compare this to *Wyletal v. United States*, 907 F.2d 49 (7th Cir. 1990), where the majority summarily upheld a trial judge's award of $25,000 to an octogenarian seriously injured in a collision with a postal truck. Posner, dissenting, wrote:

It is natural to want to give short shrift to a small case. The district judge succumbed to the temptation, embodying the findings of fact that Rule 52(a) of the Federal Rules of Civil Procedure required him to make in an unedited oral opinion that neither demonstrates that he performed his proper function as the trier of fact nor provides an adequate predicate for our performance of the appellate function.

[...]

[Furthermore], the $10,000 that the judge awarded for pain and suffering was shockingly small. An 85 year old woman broke her hip and as a result must use a walker to walk, and a bar in the bathroom to lift herself from the toilet seat, and she has suffered pain and the aggravation of a bladder condition. As the old saying goes old age is not for sissies [...].

She deserves a better shot from the federal courts. I would reverse the judgment and remand to the district court for further findings.

907 F.2d at 51-53 (Posner, J., dissenting); see also *In re Sanderfoot*, 899 F.2d 598, 607 (7th Cir. 1990) (Posner, J., dissenting) (“I am at a loss to understand why we should strain the language and ignore the purpose of the lien-avoidance statute in order to achieve a result that does not promote, but instead denies, simple justice — layman's justice.”).

<sup>88.</sup> 162 N.E. 99 (N.Y. 1928).

<sup>89.</sup> P. 43. For example, Cardozo placed Mrs. Palsgraf at the far end of the railroad platform "many feet away" from the explosion. The record does not support this characterization. P. 39.
standard prose made for an effective "brevity and vividness" (p. 44). Unfortunately, this lively discussion of rhetoric is accompanied by a rather dispirited analysis of the legal issues involved. Cardozo held that a negligent defendant is not liable to an unforeseeable plaintiff because it owes her no duty. Posner concludes: "So Cardozo engineered a minority solution, not markedly superior to the unsatisfactory majority [proximate cause] solution" (p. 41).

Posner is on to something, however, when he recognizes that Cardozo's handling of the facts and the "eloquently pedagogic character" of Palsgraf contribute to its reputation (pp. 43-45). Sketchy facts do make it more likely that an opinion will come to stand for a general principle, and the fame of Judge Andrews' equally theoretical dissent is noted (pp. 45-46). But Posner fails to follow through on the implications of these observations. Indeed, perhaps more was afoot in 1927 than Posner realizes.

Shortly after the intermediate court affirmed the jury award to Mrs. Palsgraf, the American Law Institute met in Philadelphia to draft the Restatement of Torts. On the table was the question of a negligent defendant's duty to an unforeseeable plaintiff. Cardozo, a member of the ALI, was, along with the others, provided with a summary of the facts from the intermediate court opinion. Even though he knew it was quite likely that he would be called upon to actually decide the appeal, Cardozo listened to the lively discussion that ensued. One group argued for a duty analysis and no recovery; the others proximate cause. By a very narrow margin, the advocates of

90. Posner observes that liability for less than the full consequences of the railroad's negligence may result in under-deterrence. See p. 37. Later, he criticizes Cardozo for failing to consider the specific ramifications of the foreseeability analysis, and he runs through a stock series of hypotheticals to prove that Cardozo never came to grips with what really happened to Helen Palsgraf. See pp. 40-41. Dean Prosser traveled this same ground many years ago, and Posner's rendition offers no new insights. See William F. Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1, 7, 19-32 (1953).

91. Posner is correct when he points to Judge Andrews' dissent as contributing to the fame of Cardozo's majority opinion, but wrong as to why this is so. Posner says the dissent is "much praised [but] inept." P. 45. Posner primarily faults Andrews for failing to give specific content to the operative notion of proximate cause, thus ceding the "legal high ground" to Cardozo's universal test of "foreseeability." P. 46. But it is just this context-specific, malleable quality that has made Andrews' approach the majority rule (and thus the "best" rule, at least as measured by Darwinist notions of the marketplace). Andrews observed that proximate cause is, at base, a matter "of convenience, of public policy, of a rough sense of justice, [in which] the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." Palsgraf, 162 N.E. at 103. He explained that "[w]e draw an uncertain and wavering line, but draw it we must as best we can." 162 N.E. at 104. Not only is Andrews describing what in fact judges do when deciding difficult negligence cases, but he is sounding the clarion call of the pragmatist. On the other hand, Cardozo announced a universal rule, ostensibly built on a neutral principle, that fails to capture the complexity of the problem. Also, even on his own terms, Cardozo failed to do justice to Helen Palsgraf, who, as a patron of the railroad, was certainly a foreseeable plaintiff while standing on the platform in defendant's station.

92. The following discussion of Cardozo, Palsgraf, and the ALI is drawn from Prosser, supra note 90, at 4-5.
duty prevailed. When Cardozo returned to Albany, he was assigned the majority opinion. He adopted the duty analysis and denied recovery to Mrs. Palsgraf. Andrews' dissent would have affirmed the jury award based on proximate cause. Shortly thereafter, the duty analysis became the ALI's official position and Cardozo's Palsgraf opinion was prominently raised in support of this conclusion.93

In light of these facts, one might consider Palsgraf in a different light. Might Cardozo and Andrews have agreed, formally or otherwise, to debate the general question of the nature of negligence law and the subsidiary question of the relationship between duty and proximate cause (and thus, judges and juries) in the pages of the New York Reports? Perhaps this explains both the factual barrenness and the theoretical forays that characterized the opinions. This also might explain why Cardozo's opinion seems uncharacteristically insensitive to Helen Palsgraf and her injuries.94 Posner recognizes that Cardozo "set out to teach us some basic truths about the law of torts" (pp. 43-44), but instead of inspecting the historical record and using it as a vehicle for a more creative reflection on the case, Posner concludes his analysis of Palsgraf by swerving back into one of his many paeans to Cardozo's rhetoric.95

Another example of Posner's stunted analysis of Cardozo's judicial opinions arises in his consideration of Palsgraf and the other scope of liability cases, MacPherson,96 Wagner,97 Glanzer,98 Moch,99 and Ultramares.100 Posner tells us that all six deal with essentially the same question: To whom does a negligent defendant owe a duty? Scattered throughout the book, each is given some attention. MacPherson (decided in 1916) "inaugurated fundamental changes in American tort law" because it "change[d] profoundly the climate of opinion regarding privity of contract."101 Wagner (1921) imposed a duty on a rail-

93. Id. at 8. As Dean Prosser observed, "[i]t is not likely that any other case in all history ever elevated itself by its own bootstraps in so remarkable a manner." Id.


95. P. 47. Posner's lack of interest in the history of Palsgraf is fully consistent with his other writings. See supra note 53. Posner also fails to note the connection between the "pedagogic" nature of the opinion and its uniform appearance in torts casebooks. Palsgraf is a favorite of torts teachers precisely because it is not tethered to the particular facts of Helen Palsgraf's claim. When Cardozo contrasts tort law to the law of crimes, cites leading British cases, and offers hypotheticals (and Andrews responds more or less in kind), the essential disputes of tort law are laid bare. This is the stuff of great Socratic dialogues and it explains why the case remains relevant today, far more so than Cardozo's writing style or the "rule" that purports to come out of the case.

100. IBtramares Corp. v. Touche, 174 N.E. 441 (N.Y. 1931).
101. Pp. 42, 109. Before MacPherson, the general rule was that the consumer of a product
road to use reasonable care to protect a person trying to rescue another who had been injured by the negligent operation of its trains. Posner cites this opinion as a key illustration of a Cardozo "master principle": "a person should be presumptively liable for the injuries he inflicts if the relevant lay community would think the injurer seriously in the wrong" (p. 101). In Glanzer (1922), Cardozo held that weighers who were hired by sellers owed a duty to buyers who relied upon their (the weighers') representations. Posner describes this decision as exemplary of Cardozo's moral concern with extending liability beyond the formalities of the law of contracts and to deserving plaintiffs (pp. 100-01). In contrast, the remaining scope of liability cases, decided 1928-1931, all result in no liability for culpable defendants, even when the consequences of the negligence were foreseeable. At the penultimate point in the book, Posner compares only four of these opinions (MacPherson, Glanzer, Moch, and Ultramares), and pronounces the mixed bag of outcomes "puzzling."103

Here again, Posner fails to garner valuable information from the historical record. There is a clear trend in the six cases. The early Cardozo opinions were willing to break with precedent and ignore the strictures of contract and other impediments to creating symmetry between negligence and liability. The later opinions reversed field. By considering together only four of the opinions and by failing to note the chronology, Posner missed a chance to think more critically about his subject. Why might Cardozo, after becoming Chief Judge in 1927, begin to write opinions denying liability? Cardozo could well have been responding to the larger economic forces at work: while expansive tort liability was justified in the context of the vigorous capitalism practiced in pre-Depression New York, the advent of the Depression might well counsel a changed course. This is certainly possible, but it is not mentioned in the opinions (or in Posner's book). Posner comes tantalizingly close to what is likely the explanation when he observes that the inconsistency in these opinions actually added to Cardozo's reputation (p. 113). But he does not suggest that the change might have occurred because Cardozo hoped to impress others with his balance and flexibility. G. Edward White has tried to glean from the

---

102. Moch, 159 N.E. at 896 (water works owes no duty to owner of house that burned down as a result of defendant's water mains lacking adequate pressure); Falsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928) (negligent railroad owes no duty to patron injured by explosion while standing on its platform); Ultramares, 174 N.E. at 441 (negligent accounting firm owes no duty to a nonclient recipient of its audit report).

103. P. 109. Posner does try to reconcile these decisions by considering whether they can be justified by identification of the "superior loss avoiders." Posner concludes that even on that basis Ultramares was wrongly decided. Pp. 113-15.
historical record evidence of Cardozo's crass ambition and longstanding desire to be elevated to the U.S. Supreme Court. After years of being the bridesmaid, Cardozo could well have been positioning himself for such an appointment, knowing that a Republican president was unlikely to elevate an unswerving reformer, no matter how well regarded by the bench and bar.

This historical understanding of Cardozo may also shed light on Posner's performance as a judge. Richard Posner has now completed a decade on the U.S. Court of Appeals for the Seventh Circuit. Posner came to the bench with a long record of academic writing. His view was that economic concepts were relevant not just to legal problems like antitrust that are understandably susceptible to economic analysis, but also to nonmarket issues, including torts, family law, civil procedure, and constitutional law. In his early years as a judge, he set to the task of incorporating economic analysis into a broad range of decisional law. The best known of his efforts at this enterprise have been unsuccessful.

For example, in *Merritt v. Faulkner*, the question presented was whether a trial judge abused discretion by denying appointment of counsel to an indigent prisoner who had alleged that his blindness was the result of deliberate indifference to his medical needs. The panel reversed. Posner dissented, arguing, inter alia, that the inability of the prisoner to obtain counsel on his own proved that the claim was without merit: "a prisoner who has a good damages suit should be able to hire a competent lawyer and . . . by making the prisoner go this route we subject the probable merit of his case to the test of the market." Thus, in lieu of analyzing the factors traditionally weighed by the Sev-

104. See White, supra note 5, at 255-56.
105. Cardozo's name had been floated for a Supreme Court appointment as early as 1916, and it came up again, and more seriously, in conjunction with several vacancies in the 1920s. Staunch Republicans Warren G. Harding, Calvin Coolidge, and Herbert Hoover served as President from 1921 to 1932. Hoover finally nominated Cardozo in the waning months of his presidency. See Carmen, supra note 5, at 616-44. Another possible explanation for Cardozo's change was that it resulted from his becoming Chief Judge in 1927. His view of that job may have prompted him to seek to build consensus by accommodating the views of others. Some sensed this phenomenon in William Rehnquist after he became Chief Justice. See David O. Stewart, Reconsidering Rehnquist, A.B.A. J., Apr. 1, 1988, at 40.
108. 697 F.2d 761 (7th Cir. 1983).
109. 697 F.2d at 769 (Posner, J., concurring in part and dissenting in part).
enth Circuit to guide the trial judge’s exercise of discretion, Posner would “consign to the verdict of the marketplace the issue of prisoner representation.”110 Posner’s position was rejected by the court that day, and it has not prevailed since.111

Similarly, in 1986 Posner was asked to consider the appropriate standard for a trial judge to use when ruling on a request for a preliminary injunction. Posner responded, “P \times H_p > (1-P) \times H_d.”112 For readers who were not up to the task of translating this algebraic formula, he explained that an injunction should issue:

only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error.113

This, according to Posner, is the “procedural counterpart” to Learned Hand’s “famous negligence formula” that is now a conventional short-hand for the economic approach to determining whether a defendant acted negligently.114 Posner emphasized that his approach was “not offered as a new legal standard,” but represented “just a distillation of the familiar . . . test that courts use in deciding whether to grant a preliminary injunction.”115 It was “intended not to force [judges] into

110. 697 F.2d at 769 (Cudahy, J., concurring).
111. Market analysis was mentioned, but not made dispositive, in a later concurring opinion by fellow judge and kindred economist Frank Easterbrook. See Darden v. Illinois Bell Tel. Co., 797 F.2d 497, 505 (7th Cir. 1989). The Second Circuit flatly rejected Posner’s economic analysis of indigent litigation. In re Epps, 888 F.2d 964, 968 (2d Cir. 1989).
113. American Hosp., 780 F.2d at 593.
114. American Hosp., 780 F.2d at 593; see United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) (stating that a defendant is negligent when the burden of avoiding an accident (B) is less than the likelihood of the accident occurring (P) multiplied by the seriousness of the accident if it were to occur (L)). Judge Hand’s approach has found acceptance in tort law because it captures the balancing enterprise that is central to the context-specific determination of reasonable care in the circumstances. But the theory offers little improvement on the more conventional balancing of factors prescribed by the RESTATEMENT (SECOND) OF TORTS §§ 291-293 (1965), and its persistence owes much to Posner’s insistent championing of the formula as a paradigm example of how economics can inform the analysis of nonmarket issues. See, e.g., David v. Consolidated Rail Corp., 788 F.2d 1260, 1263-64 (7th Cir. 1986); Llaguno v. Mingeys, 763 F.2d 1560, 1564 (7th Cir. 1985); United States Fidelity & Guar. Co. v. Jadranstka Slobodna Plovidba, 683 F.2d 1022, 1026 (7th Cir. 1982); Evra Corp. v. Swiss Bank Corp., 673 F.2d 951, 958 (7th Cir. 1982); Richard A. Posner, TORT LAW: CASES AND ECONOMIC ANALYSIS 1-9 (1982) (chapter 1 is entitled “The Learned Hand Formula for Determining Liability,” and includes a frontispiece picture of Judge Hand); Richard A. Posner, A Theory of Negligence, 1 J. LEGAL STUD. 29, 32-33 (1972). More recently, Posner’s cheerleading for the Hand formula has become somewhat less insistent. See Mccarty v. Pheasant Run, Inc. 826 F.2d 1554, 1557 (7th Cir. 1987) (“Conceptual as well as practical difficulties in monetizing personal injuries may continue to frustrate efforts to measure expected accident costs with . . . precision . . . . [J]uries may be forced to make rough judgments of reasonableness, intuiting rather than measuring the factors in the Hand Formula.”).
115. American Hosp., 780 F.2d at 593.
a quantitative straitjacket" but rather to direct attention to the relationship among factors relevant to the central question: the risk of error. The dissenting judge rejected Posner's modest characterization and emphasized the importance of the flexibility traditionally exercised when a judge considers whether to grant a preliminary injunction. Subsequent panels of the Seventh Circuit damned the algebraic formula with faint praise, emphasized its substantive and procedural links to traditional doctrine, and criticized the supposed precision that it offered as being an inappropriate substitute for the trial judge's "intuitive sense about the nature of the case." No appellate judge, including Posner, has attempted actually to implement the formula mathematically. After an initial flurry of interest, this attempt to interject "science" into the law has passed into the mist of the Seventh Circuit, and, with one modest exception, it has never been followed outside of Posner's court.

Posner has been more successful promoting economic analysis in cases involving market-oriented issues, such as antitrust, and in nonmarket cases, such as torts, in which a balancing of costs and benefits is understandable, if not always discussed in an explicitly economic way. But when economics is an unlikely tool, Posner has failed to

---

116. 780 F.2d at 593-94. The cost of erroneously denying an injunction increases with the magnitude of the harm the plaintiff will incur from denial and the probability that the plaintiff will eventually win at trial, and the cost of erroneously granting an injunction increases with the harm the defendant will incur from the grant and defendant's probability of eventually prevailing.

117. Judge Swygert described Posner's formula as a "Homeric Siren," a "seductive but deceptive security," that was ultimately antithetical to the flexible, imprecise nature of equitable decisionmaking. American Hosp., 780 F.2d at 610 (Swygert, J., dissenting).

118. See, e.g., Lawson Prods., Inc. v. Arnet, Inc., 782 F.2d 1429, 1434-35 (7th Cir. 1986) (Posner's formula is "effective shorthand" but, in analyzing preliminary injunctions, it is "impossible to think in terms of a single correct result").

119. See, e.g., Brunswick Corp. v. Jones, 784 F.2d 271, 274 n.1 (7th Cir. 1986).

120. Lawson, 782 F.2d at 1436.


Issues of procedural due process have also provided those so inclined with an opportunity to view legal problems through an economist's lens. See Matthews v. Eldridge, 424 U.S. 319, 332-49 (1976); Sutton v. City of Milwaukee, 672 F.2d 644, 645 (7th Cir. 1982) (Posner, J.) (advocating "a simple cost-benefit test of general applicability").
convince others of the wisdom of his all-encompassing world view. This is not to say that Posner has been uninfluential on the bench. To the contrary, his judicial opinions are cited by other judges very frequently, and his analyses and outcomes are more or less consistent with the rightward tilt of the federal courts as a result of Ronald Reagan's and George Bush's appointments.123

Posner has been decidedly more effective when he hews to more traditional methods of deciding cases. A good example of this is the line of Posner opinions in civil rights cases beginning with *Bowers v. DeVito.*124 In *Bowers,* one Vanda had been found not guilty of murder by reason of insanity and was committed to a public mental health facility. Vanda was released from custody and one year later he killed a young woman. Her administrator filed a wrongful death action against the various public defendants, alleging that the reckless release violated section 1983 of title 42 of the United States Code. The district court granted summary judgment for the defendants, relying upon a recent Supreme Court decision, *Martinez v. California,*125 that had held that because five months had passed between the negligent release and the murder, notions of proximate cause precluded government liability.126 After *Martinez,* it would seem that the one-year gap in *Bowers* would have made a per curiam affirmance of the trial judge the almost certain outcome. Posner, however, saw in the case something more, and, out of the clay of a relatively straightforward damages action, he molded a global theory of the Constitution.

There is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of


Frank Easterbrook has argued that the Supreme Court's decisions increasingly reflect an economist's ex ante perspective. Frank H. Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System,* 98 HARV. L. REV. 4, 10-14, 19-42 (1984). If this is to say that the Court is unwilling to yield reflexively to claims based upon justice and other inefficient normative notions, he surely is right. See Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?* 98 HARV. L. REV. 592, 598 (1985) (stating that Court opinions "insensitive to constitutional concerns bearing on the distribution of wealth and power" may be based on "substantive judgments" that are merely masked by a "cost-benefit patina").

124. 686 F.2d 616 (7th Cir. 1982).


126. 444 U.S. at 285 ("[W]e do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law.").
negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.127

This notion of "negative liberties" is not entirely new; the reluctance of the Supreme Court to impose upon government an affirmative constitutional obligation to provide services dates back at least to San Antonio Independent School District v. Rodriguez.128 The Bowers opinion, however, represented a bold foray into constitutional theorizing by a relatively new federal judge.129

Posner's constitutional theory was thereafter discussed by noted scholars,130 and ultimately given the imprimatur of the Supreme Court in DeShaney v. Winnebago County Department of Social Services.131 Chief Justice Rehnquist adopted the negative rights analysis in toto.132 The Rehnquist-Posner view is that the Bill of Rights is only a charter of negative liberties, and thus the Fourteenth Amendment imposes no affirmative obligations upon the states. This negative liberties approach may well misread the history of the amendment, which was intended to interpose the federal government into the process by

127. Bowers, 686 F.2d at 618. Judge Wood dissented on the grounds that Bower's appeal had been decided without benefit of oral argument and without considering the possibility that Martinez could be limited to claims against parole officials, as opposed to medical defendants. 686 F.2d at 619 (Wood, J., dissenting).

128. 411 U.S. 1 (1973). In Rodriguez, a narrow majority of the Court, including all of Richard Nixon's appointees, effectively killed "fundamental rights" analysis under the Fourteenth Amendment, which had previously been read to require governments to provide certain minimal services to all citizens. See generally Laurence H. Tribe, American Constitutional Law §§ 16-35, 16-40 (1988).

129. Less than a year after Bowers, Posner expanded upon his constitutional theory. In Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), cert. denied, 465 U.S. 1049 (1984), he observed:

[T]he Constitution is a charter of negative rather than positive liberties. The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services. Of course, even in the laissez-faire era only anarchists thought the state should not provide the type of protective services at issue in this case. But no one thought federal constitutional guarantees or federal tort remedies necessary to prod the states to provide the services that everyone wanted provided.

715 F.2d at 1203-04.


132. See DeShaney, 489 U.S. at 195. Interestingly, Posner wrote the lower court opinion in DeShaney. See DeShaney v. Winnebago County Dept. of Social Servs., 812 F.2d 298 (7th Cir. 1987). His opinion there summarizes the negative rights arguments he had previously made in Jackson and Bowers. See DeShaney, 812 F.2d at 301.
which states determined how to spend their resources;\textsuperscript{133} worse, such an interpretation may provide a temptingly talismanic answer to complex questions.\textsuperscript{134} But bad law or not, this is now the law of the land.

Why was Posner able to prevail in the marketplace of legal ideas with a fresh articulation of constitutional theory while failing, even in his own circuit, to revise the rules controlling appointment of counsel for indigents or the granting of preliminary injunctions? There are several possible explanations. First, in his early years on the bench, while still full of an academic’s sense of invincibility, Posner proposed law and economics solutions to problems perfectly addressable by familiar legal tools, such as the factors that courts have looked to for generations when deciding whether to grant injunctive relief. Judges would not accept Posner’s proposals because they believed that what Posner added was wrong (if it was intended to change the law) and superfluous (if it was not).\textsuperscript{135} Second, his proposals were dressed in unfamiliar terms, especially the algebraic formula, and the resistance from judges not trained in economics was predictable.\textsuperscript{136} Both of these phenomena reflect Posner’s naiveté about the nature of the judiciary as he began his service in the early 1980s. The reluctance of judges to embrace high theory, let alone numeric reductionism, no doubt came as a surprise to Posner after a decade of helping set the agenda in the academy. On the other hand, his negative rights approach to the Constitution was supported by (one version of) history, required no “insider’s” expertise to evaluate or implement, and was timed perfectly to fit with a narrowing vision of the role of the federal courts vis-à-vis the states that had come into full flower in the 1980s.

D. Posner the Persona on Cardozo the Persona

Posner tells us that Cardozo has been termed a “saint,” a status derived from the “gentleness, modesty, tact, considerateness, mildness, circumspection, judiciousness, and moderation of the Cardozo persona.”\textsuperscript{137} Cardozo was generous in his praise of others and worked


\textsuperscript{134} Currie, supra note 130, at 887.

\textsuperscript{135} See American Hosp. Supply Corp. v. Hospital Prods. Ltd., 780 F.2d 589, 609-10 (7th Cir. 1986) (Swygert, J., dissenting).

\textsuperscript{136} 780 F.2d at 610 (Swygert, J., dissenting) (“[Posner’s] formula invites members of the Bar to dust off their calculators and dress their arguments in quantitative clothing. The resulting spectacle will perhaps be entertaining, but I do not envy the district courts of this circuit and I am not proud of the task we have given them.”).

\textsuperscript{137} P. 8. One of Cardozo’s former law clerks, Paul Freund, has recounted a good example of Cardozo’s humility. Cardozo was allergic to super-sophistication or pretentiousness. The law clerk, imbued with the brave new insights of sociological jurisprudence, saw his chance to have those insights confirmed. “When you voted as you did in the Palsgraf case,” he inquired of the Justice, “you did so, didn’t you, because you thought that was a sound allocation of social costs?”
effectively with his fellow judges, only rarely offering dissent to their opinions (pp. 8, 120-21, 130). He had no strong political agenda and recognized the advantages of moderation in a judge: "Cardozo was an incrementalist working primarily in an incremental medium, the common law" (p. 126). Cardozo took pains to avoid appearing the "ostentatious liberal" (p. 121).

Also contributing to Cardozo's reputation was the close relationship he cultivated with academics. His relatives served on the board of Columbia University, and, after serving on the state bench for only eight years, he was asked to give the Storrs Lectures at Yale Law School. This series of four speeches on his judicial philosophy later became The Nature of the Judicial Process. The success of these lectures paved the way for additional appearances in the academy and resulting extrajudicial writings. Cardozo peppered these works and his judicial opinions with frequent and flattering references to the work of legal academics (p. 132), paying close attention to those who could enhance his reputation. And yet, he attempted to make his writing, and especially his judicial opinions, convey to the larger community the norms that animated the common law.

Cardozo was lucky, and this, too, made a difference. He was able to serve on the high court of the most populous state when both the court and the state were at the zenith of their influence. His antiformalist philosophy coincided with the realist positions that were beginning to gain favor, and the common law issues that were the staple of this court's caseload were perfectly suited to his judicial approach. His colleagues on the New York Court of Appeals were generally of like mind. While his Washington years were not his best, the opportunity to serve on the Supreme Court was, at least professionally, a matter of good fortune.

Finally, Cardozo was a very hard worker. He had few outside in-
terests and his dedication to his work was remarkable. Despite a random assignment system, Cardozo actually wrote more opinions than his state court colleagues and, despite poor health, continued to outpace the productivity of his colleagues on the Supreme Court.

Parallels between Cardozo and Posner are instructive. Both were sons of lawyers, born in New York City to politically active Jewish parents; both attended Ivy League Schools. Both were brilliant and bookish, pursuing intellectual interests (including the Greek classics) outside of the technical confines of the law, while attending to their professional responsibilities with great vigor. Both were well-connected to influential reuters in the academy, and were skilled, if not always subtle, self-promoters. And, of course, both were prolific writers.

Posner, like Cardozo, has been lucky. His market-oriented approach to the law coincided neatly with the supply side economics

---


146. P. 86. Posner identifies Cardozo's writing of full rather than per curiam opinions as the reason for Cardozo's greater output on the Court of Appeals. P. 86.


148. Posner's Yale A.B. was granted summa cum laude and his Harvard LL.B. magna cum laude. Justice William Brennan characterized Posner as one of only two "authentic geniuses" he had met in his lifetime. (The other was William O. Douglas.) Ranii, supra note 31, at 26. On his part, Cardozo graduated from Columbia College with the highest scholastic record in its history, SIDNEY H. ASCH, THE SUPREME COURT AND ITS GREAT JUDGES 147 (1971), and one of his clerks likened his job to being "clerk to an encyclopedia." Freund, supra note 137, at 3.

149. See POSNER, JURISPRUDENCE, supra note 18, at 9; POSNER, LAW AND LITERATURE, supra note 18, at 110-12 (exemplifying Posner's interest in the classics); DREW PEARSON & ROBERT S. ALLEN, THE NINE OLD MEN 220 (1936) (noting that Cardozo would often wake up before 6 a.m. and read Greek). Posner's recent opinion in Miller v. South Bend, 904 F.2d 1081, 1089-104 (7th Cir. 1990) (Posner, J., concurring) is a tour de force of displayed erudition. En route to striking down an ordinance that criminalized nude dancing, Posner discussed, inter alia, the history and psychology of erotic dance, bullfighting, cabarets, tone poems, Eliot, Shakespeare, Titian, Holst, Strauss, Manet, Balthus, Balanchine, and Beardsley.

150. Pp. 86-89. Posner has averaged 90 opinions a year while on the bench. In comparison, in 1990 Judge Easterbrook authored 73, while other high visibility Reagan appointees Ralph Winter, Roger Miner, Alex Kozinski, and Edith Jones authored 36, 27, 22, and 50, respectively.

151. It has been reported that Posner provides his former Chicago colleagues with copies of his opinions, see Ranii, supra note 31, at 1, and on his own initiative provides the same service to other academics. See Weisberg, supra note 72, at 1605 n.31. A call to Judge Posner's chambers on January 21, 1992, yielded a copy of a 59-page curriculum vitae, updated to December 23, 1991. Included are cites to every judicial opinion he has authored, including per curiam opinions.

Posner's concern with reuters is further exemplified by his frequent citations to authorities especially likely to impress an academic reader. In Market Street Assocs. v. Frey, 941 F.2d 588 (7th Cir. 1991), a nine-page opinion, Posner provided ten cites to five law review articles, seven cites to four treatises, two to the Restatement; two to Cardozo, and one each to Judges Friendly and Hand.

152. Cardozo did not rely heavily upon law clerks to draft opinions; neither does Posner. See Freund, supra note 137, at 3; Ranii, supra note 31, at 26.
embraced by the Reagan Administration. This helped make him one of the new president's first nominees to the federal bench. During his first decade of service the Supreme Court became increasingly conservative. In large measure because of his efforts, and due to the receptivity of the high court to conservative outcomes, the Seventh Circuit's reputation has grown markedly.\footnote{153}

Unlike Cardozo, however, Posner's luck may have begun to run out. Within a very short time after his appointment to the federal bench in 1981, Posner's name was being prominently discussed as Reagan's next nominee to the Supreme Court.\footnote{154} By 1986, Posner was still "regularly mentioned,"\footnote{155} but the failed nomination of Robert Bork in 1987 appears to have derailed the Posner express. Bork presented an easy target for opponents because of his extensive writings on a broad range of controversial subjects, including race and abortion.\footnote{156} The crucifixion of Bork in the political process convinced the White House to select a nominee "less controversial or doctrinaire than Bork."\footnote{157} In this changed environment, Posner was viewed as too risky.\footnote{158} Similar concerns afflicted George Bush's consideration of replacements for William Brennan and Thurgood Marshall; less ideology was needed — or at least less of a paper trail — and Posner's prospects were dashed.\footnote{159}

\begin{flushright}
154. Rani, supra note 31, at 1 (Posner "at the top of most lists"); Kathleen Sylvester, Fertile Ground for the Supreme Court, NATL. L.J., May 9, 1983, at 24 (Posner the most likely candidate).
158. Id.; see also Roth, supra note 36, at 32 (Posner is "Bork in spades").
159. See Fred Barnes, Weirdo Alert, NEW REPUBLIC, Aug. 5, 1991, at 7 (Clarence Thomas is confirmable because he lacks a significant paper trail while Posner is not confirmable because he has one). Interestingly, in the years since Bork's defeat, Posner's intellectual independence has led him to take positions, both on and off the bench, that undoubtedly have damaged his prospects with the conservatives in the White House who screen candidates for the Supreme Court. For example, in Miller v. South Bend, 904 F.2d 1081, 1089 (7th Cir. 1990) (Posner, J., concurring), Posner voted to strike down an ordinance that criminalized nude dancing. His separate opinion explained why, contrary to the view of many blue noses, "low art" (like striptease) is just as expressive, and thus, just as deserving of protection under the First Amendment, as ballet or classical painting, adding for good measure that "[c]ensorship of erotica is pretty ridiculous." 904 F.2d at 1100.

Another example of Posner's intellectual independence comes from his recent review of a book describing the role of lawyers in Nazi Germany. Toward the end of the piece Posner writes:

Our retention, indeed our expanding use, of capital punishment, our other exceptionally severe criminal punishments (many for intrinsically minor, esoteric, or archaic offenses), our adoption of pretrial detention (as a result of which some criminal defendants languish in jail for two years or more while awaiting trial), and our enormous prison and jail population (almost 1 million — close to one-half of one percent of the American population), mark us as the most penal of the civilized nations today.
Posner is different from Cardozo in one other important way. Cardozo was revered. His personal qualities of humility, compassion, and moderation are the stuff of legends. His leadership of his court earned the respect of his colleagues, lawyers, and academics. Upon his death, the law reviews at Columbia, Harvard, and Yale all published identical tributes provided by Harlan Stone, Learned Hand, Irving Lehman, Warren Seavey, Arthur Corbin, and Felix Frankfurter. 160 A law school has been named after him, as have secondary schools. Cardozo was loved as well as respected in a way perhaps unmatched by any other figure in American law. Although he is far from having decided his last case or written his last book, Posner has no such favorable persona. 161

CONCLUSION

Although by nature a very private person, Benjamin Cardozo lived a very public life. 162 More than half a century after his death, his career and works are still considered significant. Because of his pragmatic jurisprudence, the breadth and depth of his writing, the sheen of his rhetoric, his solicitous relationship with reputers, his good luck, and his impeccable personal qualities, Cardozo’s reputation is secure, as Posner’s book shows.

But what of Richard Posner himself? Many of these same qualities can be found in Posner, but a few critical ones cannot. The Richard Posner who came to the federal bench was the product of the academy. He thrived in the abstract and increasingly rough-and-tumble pages of academic journals, on occasion collaborating with others, but

Posner continues:

Perhaps in the fullness of time the growing of marijuana plants, the “manipulation” of financial markets, the sale of dirty magazines, the bribery of foreign government officials, the facilitating of suicide by the terminally ill, and the violation of arcane regulations governing the financing of political campaigns will come to be seen no more appropriate objects of criminal punishment than “dishonoring the race.” Perhaps not; but Müller’s book can in any event help us to see that judges should not be eager enlisters in popular movements of the day . . . .


Posner has recently commented that the judicial selection process would be “extremely repulsive . . . . [Furthermore], I don’t think there’s a machinery for processing [all of my] writing through the Congressional intellect.” Roth, supra note 36, at 32.


161. See, e.g., Marcus, supra note 153, at 40 (noting that Posner does not have “the interpersonal skills to be [a] leader”); Martha Middleton, Shaping a Circuit in the Chicago School Image, NATL. L.J., July 20, 1987, at 1, 35 (characterizing Posner as “intellectually aggressive—some go so far as to say arrogant”); Ranii, supra note 31, at 26 (stating that it is not easy for some people to get along with Posner because “he [doesn’t] know how to make his intellectual inferiors . . . feel comfortable”).

162. WHITE, supra note 5, at 255.
by and large walking the intellectual highwire by himself. With virtually no law practice under his belt, he was unprepared for the more collegial nature of the appellate bench and unfamiliar with the common sense, intuitions, and sense of moderation that inform the experienced lawyer and the pragmatic judge. At one point in Cardozo, Posner observes:

[Holmes, Brandeis, Jackson, and Hand] are stronger judicial personalities than Cardozo: more opinionated, more aggressive intellectually, more programmatic. Of all the great judges of his (approximate time) Cardozo is perhaps the most neutral, the most even, the most at home in the legal profession, the most comfortable insider: the most professional judge. [pp. 142-43]

This surely does not describe the aggressive, doctrinaire Richard Posner of the early 1980s.

But Posner wants to live the inspected life,163 and there is evidence that he is changing, both in his judicial opinions and his extrajudicial writings, including Cardozo. The evolution of such a powerful intellect bodes well for the bench and bar, the academy, and citizens alike. At one point, when extolling Cardozo's instinct for the pragmatic, Posner observes that "Cardozo was no Quixote" (p. 95). Perhaps a decade from now we will be able to say the same thing about Richard Posner.

163. See, e.g., POSNER, JURISPRUDENCE, supra note 18:
My last acknowledgment is to the late Paul Bator, who in a review of an earlier book of mine called me "a captive of a thin and unsatisfactory epistemology." I found this an arresting accusation and one with considerable merit, and it stimulated me to examine the problems of jurisprudence in greater depth than I had ever expected to.

Id. at xiv (citation omitted).