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Cardozo: A Study in Reputation. By Richard A. Posner

Joseph E. Claxton

BOOK REVIEW

CARDOZO: A STUDY IN REPUTATION. By Richard A. Posner.† Chicago & London: University of Chicago Press, 1990. Pp. vii, 156. $18.95

Reviewed by Joseph E. Claxton*

Biography, wrote the great American historian Barbara Tuchman, is "a prism of history,"[1] useful as a genre of literature because of two factors. First, "biography attracts and holds the reader's interest in the larger subject."[2] Second, in its best form it provides a structure within which intellectual analysis may find parameters that, far from being restrictive, actually provide a necessary channel for bringing the larger subject matter (a subject matter that transcends the life and work of one individual) into perspective. In Tuchman's words:

> [B]iography is useful because it encompasses the universal in the particular. It is a focus that allows both the writer to narrow his field to manageable dimensions and the reader to more easily comprehend the [larger] subject. Given too wide a scope, the central theme wanders, becomes diffuse, and loses shape. One does not try for the whole but for what is truthfully *representative*.[3]

Judge Richard A. Posner's larger subject in *Cardozo: A Study in Reputation* is not a particular legal era or a certain trend of legal theory. Instead, Judge Posner makes use of Cardozo's life as a vehicle for testing and applying a rather unique form of analysis to one judicial reputation (that of Cardozo) and therefore, at least by implication, to prepare the

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† Judge, United States Court of Appeals for the Seventh Circuit.

* Professor of Law, Mercer University School of Law. Emory University (A.B., 1968); Duke University (J.D., 1972). Member, State Bar of Georgia.

1. B. TUCHMAN, PRACTICING HISTORY 80 (1981).
2. *Id.* at 81.
3. *Id.* (emphasis in original).

way for similar analyses of other major judicial figures. On the very first page of his introduction to the Cardozo study, Posner characterizes his effort as an "economic analysis of reputation."[4] Posner's well-known allegiance to the concepts of economic analysis is an underlying theme—not just a methodology—throughout his book. Posner subordinates both Cardozo's personal life and overall career in the law to the requirements, as he sees them, of a genuine "study in reputation." Posner gives every evidence, in fact, of intending to subordinate even his own instinctive sense of Cardozo as a jurist to an iron-willed adherence to a particular model of analysis and to a specific definition of reputation. When Posner's instinctive (or, more correctly, ideological) sense of Cardozo comes into conflict with some of the results of his own research processes, the reader will find himself negotiating some very treacherous scholarly terrain.

What, then, is the understanding of "reputation" to which Posner is committed, and how does he organize his "study in reputation" within the confines of his book? As Posner describes it:

> [R]eputation is not a "thing" which the person of repute might be said to possess. It is a pro-attitude by other people toward the person "whose" reputation is in issue. While the person is still alive, this pro-attitude facilitates his making advantageous transactions, commercial or otherwise, and thus invests him with the interest in reputation that the law of defamation protects. My ultimate concern is with posthumous reputation, which fosters not actual transactions with a person but influence, favorable mentions, or uses of the person's work. But in either case the point to be emphasized is that reputation is conferred by the people doing the reputing rather than produced by the reputed one—and it is conferred for their purposes, not his.[5]

In effect, Posner commits himself to the proposition that a reputation—especially a posthumous reputation, whether that of Cardozo or anyone else—is a creature that appropriately may be studied and reported upon, but never legitimately enhanced, debunked, or interpreted in any way by the reporter.

Lest this rendering of Posner's understanding of reputation seem too narrow, let us consider it in the light of Posner's statement that for him "the focus of inquiry moves from the intrinsic qualities of a person's work to the motives and interests of the people whose activities foster the pro-attitude that I am calling 'reputation.' "[6] Following a short opening

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4. R. POSNER, CARDOZO: A STUDY IN REPUTATION vii (1990).
5. *Id.* at 59 (footnotes omitted).
6. *Id.*

sketch of the key biographical facts and events of Cardozo's life,[7] the focus on reputation (including Posner's particular understanding of what reputation means and how it should be measured) dictates the composition of the book.

Four salient points constitute the highlights of Posner's book, and each of these points will be discussed briefly in this review. They are:

1. An assessment of Cardozo's nonjudicial writings. This assessment offers some praise for those writings while dismissing any possibility that they might be an enduring testament of a philosophy of law.

2. An assessment of Cardozo's judicial technique in which Posner acclaims the quality of rhetoric in Cardozo's literary style. At the same time, however, Posner appears to denigrate rhetoric as a judicial tool.

3. The use of citation studies. Posner literally compares the number of citations referring to Cardozo's opinions to the number of citations to opinions written by other selected judges. The results of the various comparisons are then utilized to measure the magnitude of Cardozo's reputation. The comparisons are supplemented by Posner's interpretations of the raw data.

4. An overall conclusion that Cardozo's fame "is anchored in a solidly *professional* reputation,"[8] but a conclusion coupled with a very definite expression of doubt regarding the true extent of Cardozo's influence on the evolution of the law.

I. NONJUDICIAL WRITINGS

Posner's discussion of Cardozo's nonjudicial writings is based primarily on an analysis of the best-known of those writings, *The Nature of the Judicial Process*.[9] Nowhere in his analysis does Posner look seriously beyond that one text or give any credence to the possibility that Cardozo's nonjudicial writings might form a lasting philosophy of law. Posner does concede that Cardozo's nonjudicial writings *are* contributions to jurisprudence, as well as something more:

> . . . [Cardozo's nonjudicial writings] . . . are also a judge's effort to articulate his method of judging. In this they differ from Holmes's nonjudicial writings. Even the essays that Holmes wrote after becoming a judge, such as "The Path of the Law," are not written from a distinctively or identifiably judge's point of view. They say nothing directly about how Holmes judges cases, though much can be inferred. *The Nature of the Judicial*

7. Posner rather clearly has no interest in "psychobiography" and is quite suspicious of that approach when applied to judicial figures. He carefully avoids even dabbling in it. *See id.* at 5.

8. *Id.* at 125.

9. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

> *Process* is the first systematic effort by a judge to explain how judges reason. It is also the first serious effort by a judge to articulate a judicial philosophy—by "serious" I mean an effort going beyond the standard phony judicial disclaimer . . . of ever exercising discretion . . . . Cardozo was the first judge to attempt such a description and his attempt is as good as any we have had since. And here is a clue that we might indeed be dealing with an outstanding judge, or at least a judge outstanding for articulate self-consciousness about the judicial function.[10]

Posner exhibits a genuine discomfort with the *style* of Cardozo's nonjudicial writings, however, while generally ascribing that discomfort to other, unnamed critics. He states that "[t]he current depreciation of Cardozo's nonjudicial writings is due largely, I think, to their style, which both is more fluid than that of his opinions and has colored impressions of the style of the opinions."[11] Posner finally expresses his personal uneasiness—coupled with praise—in the following passage:

> 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 nonjudicial prose, and it is to the frequency of such passages that the widespread impression of Cardozo's nonjudicial writings as musty, unreadable classics is due. This is a pity, because (content aside) there is much fine, lean, "muscular" prose in those writings.[12]

Cardozo's writing style in his nonjudicial works can be, and perhaps should be, read simply as the natural product of an era that pre-dated the "less is better" style of legal writing that now is widely accepted (if not always utilized). Posner does not provide his readers with an analysis of Cardozo's nonjudicial writings which takes into account the special perspective provided by placing those writings into the context of their times. That lapse is an unfortunate one.

II. Rhetoric in Cardozo's Opinions

Posner concludes that the most important factor in explaining Cardozo's eminence is the skillful use of rhetoric in Cardozo's opinions. Somewhat amusingly, Posner summarizes this point with a flash of rhetoric (or wordiness) of his own.

> I include in this term [rhetoric] not only his [Cardozo's] writing style narrowly conceived but also the architecture of his opinions. The best of them are memorable for the drama and clarity of their statements of

10. R. Posner, *supra* note 4, at 32.
11. *Id.* at 21.
12. *Id.* at 22.

> fact, the brevity and verve of their legal discussion, the sparkle of their epigrams, the air of culture, the panache with which precedents are marshaled and dispatched, the idiosyncratic but effective departures from standard English prose style. The opinions have a charm that is literary, essayistic—at times theatrical and even musical. The charm owes nothing to the briefs; it is the product of Cardozo's own literary skills.[13]

Nevertheless, Posner is sharply critical of the *manner* in which he argues that Cardozo sometimes employed his skills.

> [Cardozo's] technique is quintessentially rhetorical in a sense that cannot be taken as wholly complimentary in evaluating a judicial opinion, for one element of the technique is the selection of facts with a freedom bordering on that of a novelist or a short-story writer, and another is outright fictionalizing . . . .[14]

A basic question that must be asked regarding Posner's criticism arises from the extent to which he is quintessentially *non*-rhetorical in his own approach to legal analysis. Posner's personal dubiousness about the use of rhetoric in legal analysis is evident throughout the text of his book. As in the case of his criticism of the style of Cardozo's nonjudicial writings, however, Posner tends to attribute the criticism of rhetoric to others rather than directly to himself. For example:

> I suspect that the disquiet that many academic lawyers feel about Cardozo comes from a reluctance to acknowledge that so "unprofessional" a skill as literary writing ability could make a judge great. The academic—the lawyer generally—may admit that law may sometimes be poetry but is unlikely to admit that poetry may sometimes be law.[15]

Posner emphasizes that "[i]n stressing the rhetorical side of Cardozo's opinions I may seem to be belittling him. That is not my intention."[16] Notwithstanding his acknowledgement, as noted previously, of the high level of Cardozo's rhetorical skill, Posner's treatment of rhetoric in Cardozo's work gives every appearance of *being* belittling. His disclaimer that such a result is unintended rings hollow. In any case, it does not even seem to occur to Posner that the stressing of high-quality rhetoric need not, in itself, even seem to have a belittling effect. Indeed, the opposite consequence is as much or more likely.

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13. *Id.* at 126-27.

14. *Id.* at 47. This statement is included in Posner's lengthy critique of one of Cardozo's most famous opinions, that in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). Other well-known cases from Cardozo's tenure on the New York Court of Appeals that Posner considers at length are MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), and Hynes v. New York Central R.R., 231 N.Y. 229, 131 N.E. 898 (1921).

15. R. POSNER, *supra* note 4, at 134.

16. *Id.* at 136.

III. The Use of Citation Studies

Posner's use of citation studies (with the results shown in tables and graphs dealing with scholarly articles and appellate court opinions) to measure the magnitude of Cardozo's reputation is the most novel portion of the book and undoubtedly will be the most discussed. He finds that the evidence "is not conclusive, but it tends to confirm the high repute in which, by casual impression, Cardozo is held."[17] Posner's transparent uneasiness with Cardozo's use of rhetoric suggests the existence of a comparable uneasiness directed toward academicians and judges who have lionized Cardozo simply by their frequent reference to his opinions. Posner is so committed to his particular abstract concept of reputation, however, that he never quite brings himself to admit openly what his own views of Cardozo's opinions so obviously seem to suggest, *at least to Posner*: Cardozo is overrated.[18]

Posner makes a single, very subtle reference to unspecified limitations of citation analysis,[19] but undertakes no real attempt to explore those limitations. That omission is an odd one because a more in-depth consideration of the strengths and weaknesses of citation studies would be a natural component of Posner's book. It also could help clarify what might be described (only a bit uncharitably, if at all) as the book's severe inconsistencies.

IV. Posner on Cardozo

The Cardozo for whom Posner acknowledges an outstanding reputation is also the Cardozo who is portrayed by Posner as a gifted but undisciplined judicial rhetorician. For Posner, Cardozo is eminent in his field, whether he is "[i]nfluential or not . . . ."[20] Posner's most detailed description of Cardozo's overall work product is also the best example in the book of the author's proclivity for according back-handed praise.

> Cardozo was an incrementalist working primarily in an incremental medium, the common law; we do not expect or find in his work seismic changes in existing law. We do find considerable clarification and highlighting of principles, rationalizing of results, general tidying of legal doctrine: arts of exposition and synthesis rather than of intellectual creativity. The primary impact of Cardozo's work, both judicial and nonjudicial, may well have been pedagogical in the best sense, and is reflected in his

17. *Id.* at 91.

18. *See infra* text accompanying notes 20-23.

19. *See* R. Posner, *supra* note 4, at 89.

20. *Id.* at 126. If anything, this phrase proves that two very small words ("or not") can carry a very loud (though implicit) message.

> deserved popularity among authors of legal teaching materials. He made law clearer, more interesting, more intelligible. As far as changing the law is concerned, he nudged the law a little closer to the pragmatic goal of making law a fully effective, fully rational instrument of social welfare; yet, consistent with his essential moderateness, only a little.[21]

Posner never seems to recognize that incrementalism was almost surely Cardozo's exact goal. Furthermore, he never calls attention to what arguably may have been Cardozo's most meaningful statement of both his judicial philosophy and (dare one say it) his philosophy of life. The statement was first used as a graduation speech, of all things, and later was included in a collection of essays by Cardozo that appeared in 1931 under the title of *Law and Literature: And Other Essays and Addresses*.[22]

> The tests of character come to us silently, unawares, by slow and inaudible approaches. We hardly know that they are there, till lo! the hour has struck, and the choice has been made, well or ill, but whether well or ill, a choice. The heroic hours of life do not announce their presence by drum and trumpet, challenging us to be true to ourselves by appeals to the martial spirit that keeps the blood at heat. Some little, unassuming, unobtrusive choice presents itself before us slyly and craftily, glib and insinuating, in the modest garb of innocence. To yield to its blandishments is so easy. The wrong, it seems, is venial. Only hyper-sensitiveness, we assure ourselves, would call it a wrong at all. These are the moments when you will need to remember the game that you are playing. Then it is that you will be summoned to show the courage of adventurous youth. There are some unquenchable spirits who never lose it, though the calendar may say that they have left youth behind and reached manhood or old age. "Be inspired with the belief," said Gladstone, "that life is a great and noble calling; not a mean and grovelling thing that we are to shuffle through as we can, but an elevated and lofty destiny."[23]

Attorneys and judges, trained as they are in the natural skepticism (cynicism?) of the law, are likely to have difficulty taking such lofty words with complete seriousness—especially when the statement is made initially in a graduation speech! Cardozo, by Posner's own analysis, probably did mean the statement exactly as he delivered it.

V. Conclusion: Posner as Legal Historian

In writing *Cardozo: A Study in Reputation*, Judge Posner has accepted the task (although it is unclear whether he knows that he has done so) of being both a legal scholar and a legal historian. That combination of en-

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21. *Id.*
22. B. Cardozo, Law and Literature: And Other Essays and Addresses (1931).
23. *Id.* at 170-71.

deavors is very difficult. It demands, as the well-known legal historian G. Edward White has noted, that one "walk an intellectual tightrope."[24] The problem, of course, is that the roles of legal scholar and legal historian simply are not the same, because in the phrase "legal historian" the key word is the noun, not the adjective. As White explained it:

> The orthodox method of scholarly criticism of appellate opinions by lawyers consists of a rigorous dissection of the internal logic of the opinion in order to expose (and perhaps question) its tacit assumptions. In this task, the critic is admittedly interested in determining whether the starting premises of the judge are valid; should he find them invalid, his role resembles that of a lobbyist. But the legal historian, if he takes this tack, has a rather different function, that of showing that there is a historical explanation for the premises on which the opinion rests: for example, prevailing beliefs concerning the sanctity of private property against encroachments by the State. Ideally, the fact that such beliefs may presently be in disrepute plays no part in the analysis, but it is a difficult task to employ the analytical methods of an argumentative mode of discourse to arrive at a "detached" result.[25]

The challenge that Posner faces is compounded many times over because he has embarked on the task of being not just legal scholar and legal historian, but also (in a very special manner) legal biographer as well. The obstacle course that must be run in matching the skills of historian and biographer is a demanding one.[26] The three-fold challenge of historian, biographer, and legal scholar assumed by Posner is even more daunting.

In the end Posner fails, but, like a brave explorer who does not reach his goal, he should be commended for the effort. Posner fails for two reasons. First, he is guilty of what for the historian/biographer is the cardinal sin: A demonstrable inability (actually closer to an unwillingness) to take Cardozo as he finds him. Posner is absolutely incapable of escaping the law-and-economics school of analysis with which he is so closely identified. Even so, he admits that applying the social science techniques of economic analysis to Cardozo's work embodies an inherent weakness:

> . . . [W]hat Cardozo principally lacked in wrestling with cases in which intuitions of substantive justice ran out was an incisive framework for, or technique of, policy analysis such as modern economic analysis provides.

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24. G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 83 (1978).

25. *Id.* at 83-84.

26. One of the foremost British historians of this century, A.J.P. Taylor, has provided us with a fascinating discussion of the challenges facing the historian who takes the role of biographer. *See* A. TAYLOR, POLITICIANS, SOCIALISM AND HISTORIANS 22-31 (United States ed., 1982).

> He can hardly be blamed for failing to use tools developed long after his death, however . . . .[27]

Posner obviously does not like the playing field on which Cardozo functioned, yet he seems to find no limits to his own playing field. The historian/biographer does not enjoy that luxury. Posner's failure is exacerbated by the fact that his legal ideology transcends, in an almost emotional way, even his methodology. Anyone who can say, in evaluating judicial opinions, that "[c]ommercial morality is perhaps the same thing as efficiency"[28] has made himself a virtual ideological prisoner. Perhaps not surprisingly, Posner exhibits great difficulty in accepting some of the conclusions about Cardozo that his own research methodology—rather than the legal ideology which ordinarily undergirds that methodology—seems to produce. When ideology is not fully supported by research processes, ideology wins—or at least fights to a draw.

The second reason that Posner fails is at least as serious as the first, and embodies a distressing tripartite failure as historian, biographer, and legal scholar. In evaluating Cardozo's work as a member of the United States Supreme Court, Posner praises Cardozo (as usual) but then (once again according to pattern) promptly dismisses his work as "mainly of historical interest . . . ."[29] Aside from the fact that any historian would blanch at such a gross misuse of the term "historical interest," the obvious implication of Posner's description simply is wrong. On the topic of the commerce clause alone, Cardozo left a sufficient mark with one *dissenting* opinion to justify careful study of his Supreme Court record. In *Carter v. Carter Coal Co.*,[30] Cardozo wrote a strong dissent from the majority's conclusion that statutory provisions enacted by Congress against price-fixing were unconstitutional. For Cardozo, it was clear that even local sales of coal had a direct effect on interstate commerce, and Congress was regulating interstate commerce. Cardozo's specific position, however, was far less significant than the careful explanation he provided. As Felix Frankfurter later noted, in an article prepared almost on the eve of his own appointment to the Supreme Court, Cardozo provided an "exposition . . . of the ramifications of modern industry [which] has become part of the established corpus of the law of the commerce clause."[31] Cardozo

27. R. POSNER, *supra* note 4, at 117.

28. *Id.* at 101.

29. *Id.* at 122.

30. 298 U.S. 238 (1936).

31. Frankfurter, *Mr. Justice Cardozo and Public Law*, 52 HARV. L. REV. 440, 468 (1939). This article was included in a series of articles published as a tribute to the memory of Justice Cardozo. The series begins at 52 HARV. L. REV. 353. The same tribute was printed in 34 COL. L. REV. 1 (1939) and 48 YALE L.J. 371 (1939). For the key language in Cardozo's *Carter Coal* dissent, see 298 U.S. at 326-28.

made it clear that even commercial transactions which were superficially local in nature actually could directly affect interstate commerce.

Cardozo's dissenting opinion in *Carter Coal* became the basis for much of Chief Justice Hughes' reasoning in adopting a broad interpretation of the powers of Congress under the commerce clause in *N.L.R.B. v. Jones & Laughlin Steel Corp.*[32] There can be little doubt that Cardozo's long service on the New York Court of Appeals left a more definitive imprint than his subsequent work on the United States Supreme Court. Posner's treatment of the latter period, however, borders on being politely cavalier.

Posner not only seriously understates Cardozo's role on the Supreme Court, he also distorts it. With reference to the *Carter Coal* dissenting opinion, Posner states:

> . . . Cardozo recognized that to infer . . . that Congress could regulate all local activity would wreck the balance between state and federal regulatory power that the Constitution had struck in empowering Congress to regulate interstate and foreign—not all—commerce. He thought a line should be drawn that would, however crudely, balance the competing values of nationalism and localism.[33]

That summary of Cardozo's position is accurate as far as it goes, but it falls far short of delineating the huge gulf between Cardozo's position and that of the majority in *Carter Coal*—a majority that defined the power of Congress in the regulation of commerce through the most restrictive filter possible.

Cardozo: A Study in Reputation deserves to be read. Judge Posner has brought to it an unusual research approach, an erudite style, and an impressive intellectual commitment. Ironically, however, a principal reason that the book deserves a careful reading is to facilitate the recognition of the internal contradictions and flawed approach to legal history by which the little volume is so seriously burdened. A careful study of the book leaves one wallowing in ambiguity. Ambiguity in scholarly conclusions can be, and often is, a natural reflection of the complexity of the subject matter under consideration. Unfortunately, in the case of *Cardozo: A Study in Reputation* ambiguity would appear to be the strongest evidence of Posner's inability as an author—at least in this instance—to come to grips with the direction in which his own analysis is taking him. At times, this ambiguity reaches a level that only can be described as intellectual schizophrenia.

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32. 301 U.S. 1 (1937).

33. R. POSNER, *supra* note 4, at 122. One cannot help but wonder whether Posner has fallen into the very type of distortion for which, rightly or wrongly, he so vigorously castigates Cardozo in his discussion of the latter's use of rhetoric. *See supra* text accompanying notes 14-16.

The book certainly will not move Posner to the front rank of legal historians. It *will* raise some interesting questions about where the law-and-economics apostles might attempt to take us next. As indicated at the beginning of this Review, Posner's analysis of Cardozo's reputation very well may prepare the way for similar analyses of other judicial figures. If so, that intellectual pathway is likely to be as bumpy as it is interesting.