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## CITATION STUDIES— MEASURING RODS OF JUDICIAL REPUTATION?

*Review by Keith Ann Stiverson\* and Lynn Wishart\*\**

In his latest work<sup>1</sup>—the third in three years—the prolific Richard A. Posner suggests that judicial performance and reputation provide fertile ground for critical study, then proves the point in a provocative examination of the judicial career and pronouncements of Benjamin N. Cardozo. But how can a judge's reputation be measured? This slim volume raises more questions than it answers and one wishes that Posner had taken the time to write a weightier tome that truly tested new evaluative methods rather than simply stimulating thought about them, as he does in this expanded version of lectures he delivered at the University of Michigan in 1989. What might have been a pioneering work on judicial reputation is little more than a collection of interesting random impressions.

Posner begins with a brief summary of Cardozo's life, occasionally indulging in a bit of the psychobiography he claims to deplore: "Scholars of psychiatric bent might . . . want to explore the possible significance of the fact that Cardozo's mother died when he was a child and his father when Cardozo was an adolescent, and that Cardozo's twin was a girl" (p. 6). Posner quotes medical authorities to point out that these factors might have "feminiz[ed]" (p. 6) Cardozo and/or made it difficult for him to form stable adult relationships. Luckily for the reader, however, Posner does not dwell on this sort of thing, which might have been a fatal distraction from the more interesting matters at hand.

In reviewing the assessments of Cardozo written over the years by doubters as well as admirers, Posner's overstatements that are not sufficiently documented invite the reader's skepticism. For example, Posner calls Jerome Frank's opinion that Cardozo's writing has only an "alien grace" to be "widely shared," a criticism of substance as well as form (p. 10). However, the footnote accompanying this conclusion does not give a list of detractors but rather cites an admirer of Cardozo who holds the opposite view.

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<sup>1</sup> RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990).

A chapter is devoted to Cardozo's judicial philosophy as expressed in *The Nature of the Judicial Process*,<sup>2</sup> with Posner concluding that Cardozo was the "authentic legal pragmatist" (p. viii). Posner is at his best in exploring how that pragmatism is voiced in Cardozo's judicial opinions. In a close examination of two opinions Cardozo wrote while chief judge of the New York Court of Appeals, Posner's analysis reads like that of an engaging literary critic whose enthusiasm for good writing makes the reader want to get hold of the author's work and read the full piece rather than an excerpt. Posner concentrates most of his attention on Cardozo's most famous opinion, and it is rather like finding an old friend to revisit the *Palsgraf* case.<sup>3</sup> The lesser-known *Hynes v. New York Cent. Ry. Co.*<sup>4</sup> is a delightful discovery for those who are unacquainted with it.

Posner's enthusiasm, however, is not without its limits. He argues convincingly that in both opinions the selection and misstatement of facts, while brilliantly written, help engineer minority rules that are not entirely satisfactory. Posner's point is that Cardozo's pragmatism did not always find complete expression in his judicial opinions. Many examples are given to illustrate that Cardozo's confidence, vivid turns of phrase and the emphasis of key words won over the reader even as he failed to deal with the practical policy issues raised by his result in the case.

Posner points out the inconsistency between Cardozo's judicial technique and his pragmatism but does not really condemn it. Although slanting the facts in favor of the outcome is a questionable practice for judges, Posner acknowledges that it is a common one, and adds:

[t]he aesthetic perspective, or one much like it, may be a proper one for judging appellate opinions after all. Maybe the principal function of such opinions is to state a rule clearly, memorably, rather than to state facts accurately, and maybe there is tension between the two functions—as Cardozo himself thought. I myself would think it better to resolve the tension in favor of accuracy, but perhaps there is a case for giving priority to the aesthetic (p. 55).

But what does all of this have to do with reputation? "Reputation" is used by Posner as a synonym for "fame," and he is concerned only with posthumous reputation, by which he means the attitudes of others toward Cardozo which are not muddled by face-to-face trans-

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<sup>2</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

<sup>3</sup> *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

<sup>4</sup> 231 N.Y. 229, 131 N.E. 898 (1921).

actions that might have been affected by the force of Cardozo's personality. Posner uses literary figures as disparate as Shakespeare and George Orwell to illustrate general factors that influence reputation but is not satisfied with inexact measurements. The question of how a judge's reputation can be gauged more precisely remains. Citation studies are suggested as one way to measure reputation. Such studies are widely used by scientists to measure the recognition of scientific works, under the assumption that the number of citations to a work signifies its importance. The fact that citations may be negative as well as positive is not considered a problem in the scientific community, where it is assumed that important work also generates negative responses, while only an unimportant work will not be cited at all.<sup>5</sup> Posner admits that the use of citation counts is an inexact assessment of reputation because such tallies may include the effects of luck and other accidental qualities:

Citations are thus an imperfect proxy for reputation, and reputation an imperfect proxy for quality. Yet most empirical studies of the use of citation counts to estimate the quality of scientists confirm the reliability of citations as an index of quality and rebut the principal criticisms (p. 71).

Does it follow, therefore, that citation studies are as reliable a measure of judicial reputation? The possibilities are intriguing, although Posner's particular studies are sometimes puzzling and do not prove that what is a useful measurement in science can be transferred to law with a comparable degree of reliability.

The main problem with Posner's citation studies is that his methodology is unknown. He begins by searching the law review library in the LEXIS data base and searches for a number of judges' names. One immediately questions his choice. Why the LEXIS law review library rather than the much larger Westlaw texts and periodicals data base? Perhaps Posner wanted to avoid the extra "hits" that a search for "Cardozo" would produce on the Westlaw data base, which contains two journals published by the Cardozo School of Law.

Although tables and figures abound, curious readers (especially those who search data bases) would like to know more about Posner's search strategies. He may be on to something, but there is no way to judge by the evidence provided. Table 1 (p. 76), for example, lists nine well-known judges, seven of whom are current or former United

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<sup>5</sup> An early study of federal appellate judges concludes that they generally refer to colleagues in an approving manner, obviating the need to distinguish between positive and negative citations. See Stuart S. Nagel, *Sociometric Relations Among American Courts*, 43 Sw. Soc. Sci. Q. 136, 141 (1962).

States Supreme Court Justices and the number of law review articles that mention each judge. Not surprisingly, Justices Brennan and Rehnquist top the list with 3,132 and 2,450 "hits," respectively, while Cardozo is mentioned in only 748 articles. What conclusions can be drawn from this count? The results only raise more questions, such as why Posner chose these nine judges and not others. Brennan and Rehnquist also top the list in Table 2 (p. 76), which shows fifteen judges and the number of times they are mentioned by name and title in law review articles. Brennan has 2,201 hits, Rehnquist 1,742, and Cardozo is far down the list with 412. And so on. But what searches were used to obtain the results? Posner does not say and the reader can only speculate.<sup>6</sup>

In Table 3 (p. 77), Posner claims to adjust the citation count to discount the hits that attach to common names like "black," but his method of adjustment is questionable. He examined what he claims is a random sample of 30 hits for "black" and found that 8 (27%) were actually mentions of Justice Black. Posner thereafter scaled down the total number of hits from 5,010 to 1,336 (27%) for Table 3. One instinctively questions whether a sample size of 30 is sufficient to make the adjustment factor valid, but Posner does not even mention it or make any statement about the percentage of error in such a small sample size. Table 4 (p. 78) adds well-known scholars to the list of judges, a total of 32 names as varied as Aristotle, Wigmore, and Calabresi. Again, Brennan and Rehnquist top the list. As Posner acknowledges, given the time period of the law review library (1982-89) and the prominence of the two judges, surely the result is expected. Is it really useful to compare the number of articles that mention Cardozo (who died in 1938) with the number mentioning justices now sitting on the United States Supreme Court? One wonders why Posner did not choose to avoid Brennan and Rehnquist altogether, and the "noise" their names would cause in a data base search.

Searching on-line data bases may indeed prove to be fruitful in the search for a measuring rod of judicial reputation. Legal writing is more tied to the citation of authorities than that of any other profession, and given the availability of full-text data bases to the legal community, it is a wonder that citation studies are not more prevalent.<sup>7</sup>

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<sup>6</sup> For example, did Posner search only the name and title combinations that he lists in Table 2 (p. 76)? If so, Cardozo's name is the only one combined with both "Judge" and "Justice," while Traynor and Schaefer are combined only with "Justice". These choices are too limited for searching a data base of articles such as the law review library, because authors are not uniform in designating titles. The computer retrieves only the precise language that is requested.

<sup>7</sup> Posner provides a list on page 72 at note 21. Some of the more interesting recent studies

Posner's tantalizing study, however, does not give readers more tools to work with because his methodology is never explained.

Posner's study makes more sense when he compares the citations to Cardozo's signed opinions with citations to the opinions of his contemporary colleagues on the New York Court of Appeals. The results are given in bar graphs (pp. 80, 82, 87-89) that compare the number of citations over a long period of time. Cardozo's United States Supreme Court opinions are treated separately and compared with the opinions of Justices Brandeis and Stone written during Cardozo's time at the Court. One feels more confident of such comparisons after the bare names and numbers listed in Posner's first tables, and the author is careful throughout this part of the analysis to note how the data might be skewed by various factors (for example, Cardozo wrote more majority opinions than any of his colleagues). Once again, however, Posner does not explain his data-gathering techniques and the reader cannot even tell whether Posner is Shepardizing or searching a full-text data base.<sup>8</sup>

Posner also examines how often Cardozo's opinions are reprinted in a selection of current casebooks to gauge his subject's reputation among the editors (table 7, p. 90); not surprisingly, Cardozo ranks very high. Posner is not content with the numbers, however; he wants to know *why* Cardozo is held in such high esteem. Posner's readers would also like an explanation of Cardozo's enduring magic, but citation studies alone cannot measure magic.<sup>9</sup>

The chapter entitled "Cardozo's Judicial Contribution" (pp. 92-124) seems out of place after the quantitative exercises. One assumes that the original lecture format enabled Posner to present his ideas effectively, but many of his points stay flat on the printed page. Posner returns to an analysis of Cardozo's opinions, but this time he is less than persuasive, at least in part because his writing is so ponderous, e.g.,

. . . the approach that animates Cardozo's contract opinions and many of his tort opinions as well—sees law as facilitative rather than as constitutive; as a service to lay communities in the achieve-

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include: Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83 (1983); Peter Harris, *Ecology and Culture in the Communication of Precedent Among State Supreme Courts*, 19 LAW & SOC. REV. 449 (1985); Comment, *Citation Sources and the New York Court of Appeals*, 34 BUFFALO L. REV. 965 (1985).

<sup>8</sup> See, e.g., pages 80-81 for Posner's explanation of his citation counts.

<sup>9</sup> Without the subjective judgments of knowledgeable people, citation studies are of little use. Posner, of course, is a knowledgeable person whose subjective judgments should help the reader. The problem is that Posner mixes both "objective" numbers and subjective judgments in a confusing way. Note that Posner cites himself at least 20 times in this work, evidencing his own belief in the authority of his opinions.

ment of those communities' self-chosen ends rather than a norm imposed . . . in the service of a higher end. Today, with the markets and private ordering controversial in Western intellectual circles, the facilitative conception of law has itself become controversial, although it remains clearly dominant in contract law. Its instrumental cast marks it as pragmatic, although some versions of pragmatism are associated with a transformative conception of human activity to which a constitutive conception of law would be more congenial (p. 94).

One longs for more tables and less verbiage.

In Posner's view, the opinions Cardozo wrote while a United States Supreme Court Justice are inferior to those written while he served on the New York Court of Appeals because they lack the "verve and punch" (p. 122) that animated the earlier opinions. Posner even makes the rather astonishing statement that Cardozo's performance on the nation's high court was an "anticlimax" (p. 123).

Posner's final conclusions about Cardozo's reputation are a series of equivocations. Cardozo's opinions are more heavily cited than even the most distinguished judges he served with, both on the New York Court of Appeals and the United States Supreme Court. "It appears that in the opinion of the legal profession, Cardozo is an outstanding American common law judge—alternatively—though not quite equivalently, the outstanding state judge—of the twentieth century" (p. 125). Despite this, Posner will not equate such eminence with influence, believing that Cardozo did very little to break new ground, even in his best known contracts and torts opinions. Posner's explanation for Cardozo's eminence is simple: he singles out rhetorical skill as the most important factor, then is a bit uneasy in the knowledge that rhetoric might help to account for high marks. One begins to believe that Posner's personal feelings about Cardozo's eminence are hopelessly tangled, causing him to reject the quantitative evidence that he purports to champion in the study.