BOOK REVIEW

Reflections on a Judge

Reflections on Judging
Richard A. Posner (Harvard University Press 2013), 380 pages

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This book was published 10 years ago. It doesn't seem that long ago, 2013. But as I read this book in 2023, I couldn't help but think about how much has changed. A celebrated and oft-cited fixture on the United States Court of Appeals for the Seventh Circuit, Judge Richard A. Posner retired from the bench just four years after writing this book, at age 78. But in 2013, it was hard to remember a time when he wasn't on the court—he was appointed in 1981—or conceive of a time when he wouldn't be on it.

His retirement not many years later was strange, unpleasant, and sad. Posner said he suddenly realized in 2017 that courts weren't fair to pro se litigants, and that disagreements with his colleagues about the Seventh Circuit's treatment of pro se litigants caused him to step away.[1] He then self-published a book that purported to offer ways to improve the court's handling of pro se appeals.[2] But in the eyes of several critics, and in my own view, his criticism was misguided. And by disparaging the staff attorneys at the Seventh Circuit (who handle the court's cases involving pro se litigants) and airing disagreements he'd had with his colleagues on the bench, it may have been unethical.[3] (I worked at the Seventh Circuit

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1 Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. Times (Sept. 11, 2017), https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html; Patricia Manson, *Posner says friction on 7th Circuit bench led to his retirement*, Chicago Daily L. Bull. (Sept. 6, 2017), https://www.chicagolawbulletin.com/archives/2017/09/06/posner-bench-friction-9-6-17.

2 Richard A. Posner, Reforming the Federal Judiciary: My Former Court Needs to Overhaul Its Staff Attorney Program and Begin Televising Its Oral Arguments (2017).

3 *See, e.g.*, David Lat, *The Seventh Circuit Responds to Judge Richard Posner*, Above the L. (Sept. 15, 2017), https://abovethelaw.com/2017/09/the-seventh-circuit-responds-to-judge-richard-posner/; Matthew Stiegler, *Posner's new book is bananas, but you might want it anyway*, CA3blog (Sept. 18, 2017), http://ca3blog.com/judges/posners-new-book-is-bananas-but-you-might-want-it-anyway/; Zoran (Zoki) Tasić, *Reforming Richard Posner: The Former Federal Judge Needs to Overhaul His Assessment of the Seventh Circuit's Staff Attorney Program and Correct the Errors in His Book* (Oct. 9, 2017), available at https://drive.google.com/file/d/0B_yKMHMEBvcDLTdoOUI1dWxZeUU/view?resourcekey=0-gDifX3trg0gmX-VqdOCoTTg.

as a staff attorney from 2009 to 2011.) In 2022, it was reported that Posner was diagnosed with Alzheimer's disease six months after he retired.[4]

Ten years out, a reader of this book inclined to find fault may wonder at times if it contains hints of what was to come. On the first page of the first chapter, for example, Posner writes that he entered Yale College in 1959 at the age of 16.[5] Most sources, however, state that Posner was born in 1939 and *graduated* from Yale in 1959, before going on to Harvard Law School, where he finished first in his class.[6] (Posner himself writes a few pages later that he was a clerk at the Supreme Court during the 1962 term.[7]) And in the book's Conclusion, after arguing for a paragraph that academic lawyers are no longer very useful to the practical profession of law—an argument in service of a larger argument that judges need better judicial education—Posner devotes eight pages to criticizing civil recourse theory, a theory of tort law.[8] At least twice, he misspells it as civil *resource* theory. Posner's criticism also feels personal; he responds to a critique by two civil recourse theory professors of an opinion he wrote, and he concludes by pointing out how infrequently their articles on the subject have been cited in judicial opinions.[9] The age and spelling mistakes are minor, the type anyone could make at any time. But a reader will likely come away from this book concluding that Posner could have used more rigorous and challenging editing.

Editing aside, is this a book worth reading? Perhaps, but it's not a book in which Posner offers many opinions he hadn't offered elsewhere before. I liked, and would have liked even more of, Posner's personal story. I found his criticisms of judicial restraint and textualism engaging—the latter seeming especially relevant these days. Another reader's mileage may vary, depending on what the reader already knows about Posner and his views. There's probably something in here to interest everyone, but it requires the reader to do some sifting.

Posner's stated central concern in writing the book is the federal judiciary's ability to handle the increasing complexity of federal cases.[10] Judges don't keep up with advances in technology or in other fields—an example Posner gives is "knowledge about foreign cultures"—that make

4 Jenna Greene, *After Posner retired from 7th Circuit, a grim diagnosis and a brewing battle*, Reuters (Mar. 29, 2022), https://www.reuters.com/legal/litigation/after-posner-retired-7th-circuit-grim-diagnosis-brewing-battle-2022-03-29/.

5 Richard A. Posner, Reflections on Judging 18 (2013).

6 *E.g.*, *Posner, Richard Allen*, Fed. Jud. Ctr., https://www.fjc.gov/node/1386511 (last visited May 22, 2023).

7 Posner, *supra* note 5, at 21.

8 *Id.* at 358–66.

9 *Id.* at 366.

10 *Id.* at 3.

cases complex.[11] Questions are complex, he explains, if they involve "complicated interactions," or "a system rather than a monad"—economic, political, ecological or technological systems, to name a few examples.[12] Some complexity is external to the legal system, but some is internal, attributable to increased caseloads and bureaucratic pressures, which Posner says are illustrated "both by the overstaffing of the Supreme Court and by the growth in the length of the *Bluebook* and other citation manuals."[13]

The thesis of the book, however, seems to have been conjured to justify the contents, and to advocate for realism as the antidote to complexity. I can accept that federal cases are getting more complex and am open to an argument that bureaucratic pressures in the legal system contribute to the problem. But are the *Bluebook* and staffing at the Supreme Court the best examples of this phenomenon? Are they really such serious problems, in the same way that heavier caseloads and technological illiteracy are? Are they the same type of problem at all? My sense is that they're simply things Posner dislikes and wanted to write about. That description applies to the book as a whole. And some of the subjects he writes about here—the *Bluebook*, formalism, judicial restraint, methods of interpretation, Justice Antonin Scalia, opinion writing—are things he'd already written about elsewhere.

Then again, so what? Get past that, and there's a lot in here to like, even if they're greatest hits rather than new songs. Yes, Posner has a tendency to make broad, categorical statements and sound remarkably sure of himself, in a way that's incomprehensible to anyone who's ever struggled with self-esteem or impostor syndrome: Yale Law School "did and does" baby its students;[14] having a career law clerk is a mistake (except for "very weak" judges);[15] a hot dog is "generally regarded" as a sandwich.[16] In fact, as I've established, he did get things wrong—he was human. But he was undeniably a really smart human, and I think he was right more than most of the rest of us. He's certainly right, for instance, that the *Bluebook*

11 *Id.*

12 *Id.* at 3–4.

13 *Id.* at 96. In an "Appendix" to the Introduction, Posner lists 45 "Sources of Complexity That Are External to the Judicial System" (random examples include "Bite-Mark Evidence," "Energy," "Neuroscience," "Physics," and "Statistics, including Multiple Regression Analysis"), and six "Sources of Complexity That Are Internal to the Federal Judicial System" (including "Delegation of Opinion Drafting to Law Clerks;" "Formalism, Including Canons of Construction;" and "Verbose, Overly Complex, Vague, Poorly Written Judicial Opinions"). *Id.* at 14–17.

14 *Id.* at 20.

15 *Id.* at 34.

16 *Id.* at 200.

is too complicated for the simple purposes of citation, even if spending nine pages criticizing it in Chapter 3 is overkill.[17]

The first chapter of this book is lively, recounting Posner's career and path to his appointment to the Seventh Circuit. It could be from a different book—an engaging memoir, full of stories and flashes of dry humor. Recounting a seminar for newly appointed judges, he writes that he can only remember an argument about how to designate sections and subsections of opinions, and that "I have avoided having to grapple with this profound issue by never dividing my opinions into sections."[18]

The humor still peeks through occasionally after that,[19] but the remaining chapters shift in tone from storytelling to criticism. If the problems Posner addresses all fall under the banner of complexity, his goal is simplicity: "I shall be urging throughout this book that law should be simple, regardless of the complexity of the issues it grapples with, and judicial opinions simple, and the judicial focus not on solving technical problems, which is for the real techies, but on managing complexity—not adding to it."[20]

Posner's criticism of judicial restraint is interesting and original to my eyes, although he doesn't appear to bring it to a convincing resolution. He characterizes judicial restraint as a passive response that allows judges to avoid complexity rather than confront and grapple with it.[21] He focuses his discussion of judicial restraint primarily on what he calls "constitutional restraint," meaning a reluctance to hold that legislation is unconstitutional, and makes the point that although courts are less likely to strike down legislation pursuant to this doctrine, it infringes on the power of legislatures by interpreting enacted laws narrowly.[22] Posner observes that both conservatives and liberals have abandoned this form of judicial restraint on occasion in pursuit of their constitutional agendas: Conservatives have practiced judicial activism since taking control of the Supreme Court in the 1980s, while liberals have instead searched in vain for a theory of judicial review that would uphold the activist decisions of

17 "A system of citation form has two valid functions: to provide enough information about a reference to give the reader a general idea of its significance and whether it's worth looking up, and to enable the reader to find the reference if he wants to look it up." *Id.* at 97.

18 *Id.* at 32.

19 In a footnote, Posner writes about his own weary acceptance of attorneys' habit during oral argument of seeking permission to answer a question thrown at them just before their time expires: "When lawyers ask me that at argument, I used to tell them peevishly that I would not have asked the question had I not wanted it answered. Failing to break their habit (it is *so* hard to change lawyers' habits), I gave up and now answer their question with 'yes' or 'please.'" *Id.* at 109 n.1.

20 *Id.* at 95.

21 *Id.* at 149–50.

22 *Id.* at 150–51.

the Warren Court but invalidate the modern Court's activism that moves in the other direction.[23] Posner closes Chapter 6 with the suggestion that because constitutional law is not objective—"because that law remains to an alarming degree political and ad hoc"—despite the efforts of constitutional theorists on both sides, there is a place for constitutional restraint in "indeterminate" cases, such as *Parents Involved in Community Schools v. Seattle School District No. 1*,[24] where it's uncertain what the relevant constitutional text means or that the legislation in question violates it.[25] But it's not clear how exercising this form of constitutional restraint would address the problem of complexity, given Posner's assertion that passivity and judicial restraint result in increased complexity.

His dismantling of textualism (which he describes as "literalism"), originalism ("historicism") and textual originalism (which he says purports to look to text and give it the meaning it had at inception, without considering the consequences of that meaning or the drafters' purposes) is clearer and more effectively sets up his call for realism.[26] It's also prescient, in retrospect, given the current prominence of textualism, originalism, and textual originalism. Textual originalists—and Posner focuses in particular on two of its proponents, Justice Scalia and Bryan Garner—maintain that judges interpreting statutory or constitutional text need only apply the text to the facts.[27] "The escape from empirical reality is then complete," Posner writes.[28] He criticizes it in form, as "a celebration of judicial passivity," and in application, as "a rhetorical mask of political conservatism."[29] Along the way, Posner takes down the use of dictionaries to determine meaning;[30] "law office history" done to find just enough historical support for a judge's or attorney's position, as seen, he says, in Scalia's majority opinion in *District of Columbia v. Heller*;[31] the canons of construction (57 of which, out of 70, Scalia and Garner endorsed);[32] and, pointedly, Scalia himself, whom Posner calls a "complexifier" who makes

23 *Id.* at 173–74.

24 551 U.S. 701 (2007).

25 Posner, *supra* note 5, at 176–77.

26 *Id.* at 178.

27 Posner also criticizes "liberal democrat" Yale Law professor Akhil Amar's argument for "unwritten" but authoritative Constitutions that coexist with the written version, but he directs most of his words and energy at Scalia and Garner. *Id.* at 179, 219–31.

28 *Id.* at 179.

29 *Id.*

30 *Id.* at 179–82.

31 *Id.* at 185–91 (citing 544 U.S. 570 (2008)).

32 *Id.* at 217–18.

judging too difficult by "telling judges to master and apply a baffling and ultimately fruitless system for avoiding engagement with reality."[33]

Posner insists instead on what he calls a "realistic" approach to interpretation, and he manages to make it sound appealingly simple and sensible: If the statute's not clear, figure out what the legislature's general purpose was—using legislative history, if it helps—and interpret the statute to serve that purpose.[34] If neither the statute nor its purpose is clear, "we'll have no alternative but to assume the role of pro tem legislators and impose some reasonable reading on the statute."[35]

It should be no surprise that Posner calls for a realistic approach to interpreting text because the solution he offers to *all* of the complexity threatening the federal courts is realism. In addition to focusing on the purpose of statutory text, a realist judge, he writes, recognizes the limitations of legal formalism, doesn't have a "judicial philosophy" that generates outcomes, and wants decisions to make sense to laypeople.[36]

> The realist judge has a distaste for legal jargon and wants judicial opinions, as far as possible, to be readable by nonlawyers, wants to get as good a handle as possible on the likely consequences of a decision one way or the other, has an acute sense of the plasticity of American law, is acutely conscious too of the manifold weaknesses of the American judicial system and wants to do what he can to improve it. He does not draw a sharp line between law and policy, between judging and legislating, and between legal reasoning and common sense.[37]

None of that will be new to anyone already familiar with Posner. Although I mostly feared him during my two years at the Seventh Circuit (despite rarely interacting with him), I've since realized how much he and his realism—inherently inhospitable to complexity—influenced me. His writing, which was bracingly original to someone just out of law school and pulled readers along with clarity and concision, set a standard to aim for. At oral argument he could pose a simple, pragmatic question that stripped away everything else, got at the essence of a case, and made the correct disposition seem obvious. He showed me there's usually a right result in a case, or at least a better, more sensible result; figure that out, and the law will usually support it.

33 *Id.* at 235.

34 *Id.* at 234–35.

35 *Id.* at 235.

36 *Id.* at 120.

37 *Id.*

Could realism by itself even begin to solve those motley problems he ties together and blames for swelling the complexity beast? I don't know. But I think his definition of realism near the end of this uneven book is still worth reading and thinking about 10 years later:

> All that legal realism ought to mean—all that it means to me—is making law serviceable by bringing it closer, in point of intelligibility and practical utility, to the people it's supposed to serve, which is the population as a whole. It ought to be possible to decide most cases in a way that can be explained in ordinary language and justified as consistent with the expectations of normal people.[38]

38 *Id.* at 354.