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BOOK REVIEWS

JUDGING BY REPUTATION

MARC M. ARKIN*

Cardozo: A Study in Reputation. By Richard A. Posner. *The University of Chicago Press*, 1990. Pp. 156. \$18.95.

There are two approaches to book reviews. The first is to ask whether this type of project is one that the author ought to have undertaken—what I will call the “is this trip really necessary” approach. The second is to take the book on its own terms and ask whether the project is “a good one of its kind.” The first approach is a very convenient dodge for avoiding the second when the reputation of the author—the reviewee, to paraphrase Judge Posner¹—is significantly greater than that of the reviewer.² In the case of Richard Posner’s most recent scholarly offering, *Cardozo: A Study in Reputation*, the reviewer faces a serious temptation to take advantage of that dodge. One might paraphrase the late philosopher W.D. Falk: The question is not whether this is a good one of its kind but, rather, whether there can *ever* be a good one of this kind.³ Unfortunately, the reviewer who ventures to apply both halves of Professor Falk’s formulation to Judge Posner’s book is likely to answer both in the negative.

The book is a slim volume,⁴ an expanded version of the Cooley Lectures given by Judge Posner at the University of Michigan Law School.⁵ In fairness, this origin probably explains the fact that the work lacks some of the indicia of a polished academic effort. Nevertheless, this rela-

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1. As part of Judge Posner’s effort to put the study of reputation on a quasi-scientific (and hence quantifiable) footing, he coins a remarkably infelicitous series of neologisms. For example, Judge Posner defines reputation as a “pro-attitude by other people toward the person ‘whose’ reputation is in issue” and then offers to call the “‘reputed one’” the “‘reputee.’” R. Posner, *Cardozo: A Study in Reputation* 59 (1990).

2. $R_a > R_r T_p$ where R_a stands for the Reputation of the Author, R_r stands for the Reputation of the Reviewer, and T_p stands for the Tenure Prospects of the Reviewer. See Posner, *supra* note 1, at 117 (discussing the “Learned Hand formula” $B < PL$, where B stands for the burden of precautions that would avoid the accident, P stands for the probability of the accident, and L stands for the magnitude of harm that would occur if the accident takes place).

3. Professor Falk, then chair of the Department of Philosophy at the University of North Carolina at Chapel Hill, delivered this remark in a seminar on value theory in 1974. If memory serves, Dr. Falk was, in fact, speaking of Pekingese dogs when he offered this formulation.

4. 150 pages.

5. See Posner, *supra* note 1, at vii. Judge Posner delivered the Cooley Lectures in November, 1989.

tively frail reed has spawned a virtual cottage industry in reviews⁶—a tribute, no doubt, to the eminent reputation of Judge Posner himself and an indication, possibly, that there may be more to “reputology” than meets the professionally jaundiced eye. However, this reader, for one, finds both the fundamental premise of the book—that the world is ready for a new genre of biography in the form of “critical judicial studies”—and its execution—compilation of the number of citations to a judge’s opinions in the legal literature over time—problematic in the extreme.

Why Reputology?

It seems a sign of the diminished times in which we live that a prominent thinker would devote an entire study—indeed, advocate devoting a new scholarly field—to the reputation of an historical figure rather than to her or his attainments. Reputology, so-called, represents the ultimate in academic solipsism, examining the subject’s life in order to understand what makes that person attractive to a present-day audience. In so doing, reputology inverts the values of traditional biography. It focuses on the esteem that succeeding generations hold for the subject in order to understand the constituents of a life well-lived. By contrast, the traditional biographer’s art conceives of the subject’s life as a window into other historical times and, perhaps more important, as a model to be emulated in the present.⁷

Innovation in biography is not necessarily a bad thing,⁸ but this inver-

6. See, e.g., Johnson, *Book Review*, 35 Am. J. Legal Hist. 323 (1991); Blake, Cardozo, Friedman, Powers, Richards, and Stiverson & Wishart, *Book Reviews*, 12 Cardozo L. Rev. 1915 (1991) (collection of six separate reviews).

7. Plutarch, the great Greek biographer, enunciated this classical view of biography best when he said in the opening paragraphs of his *Life of Timoleon*, that biography is “a mirror, with the help of which I can adorn my own life by imitating the virtues of the men whose actions I have described. . . . [W]hat could do more to raise the standards by which we live?” Plutarch, *Life of Timoleon*, in *The Age of Alexander* 151 (I. Scott-Kilvert trans. 1973). If enduring interest is a criterion of reputation, then Plutarch, who was active during the first century, C.E., and is still read to this day, certainly has a reputation worthy of note. As Moses Hadas stated in his *Ancilla to Classical Reading*, Plutarch “has indubitably had more European readers than any other pagan Greek and has been the greatest single channel for communicating to Europe a general sense of the men and manners of antiquity.” M. Hadas, *Ancilla to Classical Reading* 310 (1954); cf. Einhard and Notker the Stammerer, *Two Lives of Charlemagne* (L. Thorpe trans. 1969) (both biographies of the great Frankish monarch—the former written sometime between 829 and 836 and the latter written sometime around 887—have the same hortatory purpose expressed in the works of Plutarch); Gaius Suetonius Tranquillus, *The Twelve Caesars* (R. Graves trans. 1957) (written sometime before 140, work effectively contrasts lives of the good Roman emperors with those of the depraved rulers such as Caligula and Nero). But see G. L. Strachey, *Eminent Victorians* (1917) (exploring personal weaknesses of Victorian personalities through biographical studies); P. Johnson, *Modern Times* 167-70 (1983) (suggesting that the crisis in British will between the World Wars was at least epitomized by and possibly traceable to the wicked tweaking of authority figures in the Strachey book).

8. See, e.g., K. Sklar, *Catharine Beecher: A Study in American Domesticity* (1973) (one of the most influential “cultural biographies” to appear in the 1970s); E. Erikson, *Young Man Luther* (1962) (influential application of psychoanalytic insights to biographical study).

sion raises some serious questions. All historians recognize the limitation that, whenever the present tries to understand the past, to some greater or lesser degree we look down a well at the bottom of which we see our own reflection.⁹ The perverseness of reputology is that at one and the same time, it fails to recognize this limitation and makes a virtue of it. Indeed, it falls prey to a stunningly presentist version of historicism.

Needless to say, a reputological analysis minimizes the subject's personal accomplishments and virtues. The living—or thinking—Cardozo is of little moment to the reputologist. For example, Judge Posner is always somewhat dismissive of the importance of Cardozo's "saintly" nature in creating both his reputation and, presumably, in making him a person worthy of emulation.¹⁰ How else could it be when Posner defines Cardozo's reputation during his lifetime as a "pro-attitude [that] facilitates his making advantageous transactions, commercial or otherwise, and thus invests him with the interest in reputation that the law of defamation protects"?¹¹ The implication is that Cardozo's goodness was not meritorious in itself, but enabled him to get his way in life—and in judicial conferences—more often than if he had been a cad.

This is a roundabout way of reaching the fundamental difficulty in a study focused on "reputation" rather than on "greatness" or "virtue," to use words—not to say concepts—now quaintly out of fashion. Judge Posner talks about reputation because the contingent values of the present are the only values his epistemology admits.¹² Moreover, he is too committed a presentist to hazard an emphasis on virtue anterior to repu-

9. See S. Ahlstrom, *A Religious History of the American People* 935 (1972) (citing A. Schweitzer, *Quest for the Historical Jesus* (1906)).

10. As Judge Posner stated,

[p]art of what attracts people to a person's writing is the character of the implied author, and although the actual and the implied author are rarely identical, the shorter the distance between them the more credible the implied author will be and so the more popular (other things being equal) his writings will be. Cardozo had an attractive persona because he was a nice man who worked hard, soldiered on uncomplainingly in the face of poor health, treated other people decently whether or not they could help his career, and died young. . . . He is valued as a figure of the law and not just for his isolated professional attainments and contributions.

Posner, *supra* note 1, at 65; see also *id.* at 7 n.15 ("By the unanimous testimony of his contemporaries, Cardozo was a saint.") (citing, *inter alia*, G. Gilmore, *The Ages of American Law* 75 (1977)).

11. Posner, *supra* note 1, at 59.

12. See generally R. Posner, *The Problems of Jurisprudence* (1990) (espousing strongly skeptical epistemology in the utilitarian and pragmatist vein); see also Barber, *Stanley Fish and the Future of Pragmatism in Legal Theory*, 58 U. Chi. L. Rev. 1033, 1033-36 (1991) (discussing Fish's views of Posner's pragmatist analysis of legal phenomena); Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. Chi. L. Rev. 1447, 1449 (1990) (describing Posner's position as holding that all forms of objectivity, scientific as well as legal and moral, are "just a matter of how much homogeneity the powers that be have managed to achieve"); cf. Bator, *The Judicial Universe of Judge Richard Posner*, 52 U. Chi. L. Rev. 1146, 1161 (1985) (describing Posner as the "captive of a thin and unsatisfactory epistemology").

tation because he has little sense of what those virtues might be. Because the only values that Judge Posner recognizes are those drawn from social consensus¹³—and there is precious little of that to go around these days—modern reputation becomes the measure of all things.¹⁴

There is more than a latent inconsistency in Judge Posner's position. Posner himself, for example, regrets at length the prevalence of the critical viewpoint that literary works have no intrinsic merit or meaning, and that all literary achievements are contingent, a function of mere chance and social context.¹⁵ If this position is a failing, however, reputological studies fall short on Posner's own terms. Reputology shares the historical perspective of the debunking literary critics, reading the past in terms which are explicitly socially conditioned and contingent. If anything, Judge Posner's biographical methodology shows the truth in the observation that utilitarian pragmatism has more in common with the methods of the Critical Legal Studies movement¹⁶—or deconstructionism—than is altogether comfortable for either.

To understand the significance of this point, one need only read Professor Douglass Adair's justly famous essay, "Fame and the Founding Fathers."¹⁷ In this essay, Adair was at pains to distinguish between fame

13. See, e.g., Posner, *supra* note 12, at 113-23 (pragmatist view is that truth is a "process of belief formation that unfolds over time"); *id.* at 125-29 ("consensus is a necessary condition for legal objectivity"); *id.* at 428-29 (shattering of political consensus affects legal activity, showing "contingency of legal doctrines").

14. See Posner, *supra* note 1, at 58-73.

15. See Posner, *supra* note 1, at 63-64. In this regard, Posner discusses the works of Gary Taylor, among others, and remarks that Taylor's book, *Reinventing Shakespeare: A Cultural History, from the Restoration to the Present*, while a "tour de force," is less than convincing in its attempt to "debunk" Shakespeare's reputation. Posner suggests that Taylor's book is part of a

radical-left project of making culture, and more broadly all our social and economic arrangements and in particular the distribution of income and wealth, seem utterly contingent, infinitely plastic, endlessly mutable. Everything in history could have come out differently. . . . Nothing is fated, nothing is natural, there is no objective hierarchy of merit, achievement, or desert; white male Western culture has no intrinsic superiority; the world is at every moment ours to refashion in the image of our dreams. I do not accept the vision of radical contingency, either generally or in matters of reputation, although it has a grain of truth. Luck does play a role in reputation (as it does in history), and maybe an unearned or inflated reputation could persist forever. But the process by which an Orwell or a Shakespeare—or, more modestly, a Cardozo—accretes reputation is not independent of merit. Even though no measure of intrinsic merit, aesthetic or political, has ever been or is ever likely to be devised that could rationally compel consensus, comparative judgments that are broadly persuasive are often possible.

Id.

16. See Posner, *supra* note 12, at 153-57, 441-42 (discussing Critical Legal Studies and comparing it with pragmatism).

17. D. Adair, *Fame and the Founding Fathers*, in *Fame and the Founding Fathers* 3-26 (T. Colbourn ed. 1974). Coincidentally for this review, Professor Adair's essay was also first delivered as an oral presentation at the 1965 spring meeting of the Organization of American Historians.

and reputation,¹⁸ and to show the constructive force of the former in creating the Republic.¹⁹ As Adair pointed out, after the American Revolution, the Founders became obsessed with the notion of achieving fame and glory.²⁰ Fame, however, was something different from and less transient than reputation: "The audience that men who desire Fame are incited to act before is the audience of the wise and the good in the future—that part of posterity that can discriminate between virtue and vice—that audience that can recognize egotism transmuted gloriously into public service."²¹ And, as Adair astutely recognized, the Founders looked to the models of classical antiquity as their examples of heroism and virtue.²²

In fact, the Founders looked to the personal models provided in Plutarch's *Lives of the Noble Greeks and Romans* as well as to a rich tradition of Renaissance meditations on the hierarchies of fame and glory, based largely on classical lives.²³ While the Renaissance sources may have disagreed on whether the philosopher or the person of action should occupy the highest rung of fame, they evidenced a shared understanding of virtue rooted in public service to the commonweal.²⁴ The aim of the Founders' reading of these materials was not to learn which characteristics of Caesar²⁵ or Socrates²⁶ recommended them to their posterity. Presumably the Founders would have thought that question either fantastic or trivial because the answer was—to the Founding generation at least—

18. See *id.* at 10-12. Professor Adair discusses how an early observer of the American scene, the Frenchman Alexis de Tocqueville, noted that Americans were driven by ambition, but that their reigning passion was for success and not for greatness:

No Americans are devoid of a yearning desire to rise; but hardly any appear to entertain hopes of *great* magnitude, or to pursue very *lofty* aims. All are constantly seeking to acquire property, power, reputation; few contemplate these things on a great scale. . . . Ambitious men in democracies are [little] . . . [sic] engrossed . . . with the interests and judgments of posterity; the present moment alone engages and absorbs them.

Id. at 6. According to Adair, the Revolution was the transformative moment for the American leaders, re-defining their goals and their heroes. See *id.* at 7.

19. Adair stated: "It is my argument that the lust for the psychic reward of fame, honor, glory, after 1776 becomes a key ingredient in the behavior of Washington and his greatest contemporaries." *Id.* at 8.

20. See *id.* at 7-8. Adair quotes Hamilton as speaking of "that love of fame which is the ruling passion of the noblest minds." *Id.* at 7.

21. *Id.* at 11-12.

22. See *infra* note 23 and accompanying text.

23. See Adair, *supra* note 17, at 11-15.

24. See *id.* at 14-17.

25. Thomas Jefferson wrote to Benjamin Rush, January 16, 1811, about a dinner held in his Philadelphia lodgings on April 11, 1791. John Adams and Alexander Hamilton attended. As Jefferson wrote, "The room being hung around with a collection of the portraits of remarkable men, among them those of Bacon, Newton, and Locke. Hamilton asked me who they were. I told him that they were my *trinity* of the *three greatest men* the world had ever produced, naming them. He paused for some time. 'The greatest man' he said, 'that ever lived, was Julius Caesar.'" *Id.* at 13 (quoting Thomas Jefferson).

26. Benjamin Franklin, as a young man, included among the rules by which he tried to govern his life: "Imitate Jesus and Socrates." See *id.* at 7.

self-evident. The issue, as in the religious tradition of *imitatio Christi*,²⁷ was how to make one's life more like theirs. It is the absence of this sense of objective values that makes reputology both an ephemeral enterprise and one which is all too emblematic of present culture.

How Reputology?

The preceding discussion addresses only half of the question—whether reputology makes a worthy contribution to the scholarly canon. This is not the end of the matter. It is, after all, possible that there might be some interest in the question of how one judge, a member of a retiring and studiously colorless profession on the whole, should vault to pre-eminence over her peers.²⁸ How to go about the study of the development of such a reputation would then itself be a question of interest. Fallen human nature being what it is, this discussion requires a substantial caveat in that, having already suggested that reputology is a misplaced enterprise, it is rather difficult for this reviewer now to assert that *Cardozo* is, nevertheless, a good one of its kind. It is fair to say, however, that even if one were to commit oneself to a study of reputation, Judge Posner's book does not seem to be the way to go about doing it.

Judge Posner has chosen to measure Justice Cardozo's reputation by what can only be described as the strangest index of all—the number of times that Cardozo's opinions have been cited in the legal literature over time as revealed by a search through Mead Data Central's Lexis computer data base.²⁹ This is simply bizarre. Now, in the interests of candor, this reviewer must admit that as a faculty member living in the reign of terror introduced by the Chicago-Kent study ranking law reviews (not to mention law schools and their faculties) by means of a similar expedient,³⁰ my reaction may be somewhat stronger than that of other members of the scholarly community. Aside from the sheer strangeness of the enterprise,³¹ however, it also appears to be beside the main point of Judge

27. See Thomas à Kempis, *The Imitation of Christ* (A. Hyma trans. 1927) (original written during first quarter of the fifteenth century).

28. Moreover, the ebb and flow of a judicial—or any other—reputation can provide a substantial insight into the values of an historical period. To use an example drawn from the arts and suggested by my late colleague Professor Edward Yorio, Mozart's musical reputation was in eclipse during the Romantic era and particularly during the time of Wagner. Today, on the other hand, Mozart is virtually deified, as evidenced by the ubiquitous celebration of the bicentennial of his birth. A study that focused on the historical or cultural reasons behind the vagaries of Mozart's reputation would greatly illuminate the musical and other values of the eras involved. This type of inquiry advances beyond Judge Posner's version of reputology, which only asks why this person is attractive to us, to ask the question, what does this say about our time.

29. See Posner, *supra* note 1, at 74-91. Posner also points out that, in an examination of current law school casebooks, Cardozo's opinions appear in a ratio of almost 13:1 in comparison to opinions written by his colleagues on the New York Court of Appeals at the time that Cardozo served on that court. See *id.* at 90-91. At the end of the chapter, Judge Posner suggests that citation frequency is "not conclusive" but, rather, "tends to confirm the high repute in which, by casual impression, Cardozo is held." *Id.*

30. See 65 *Chi-Kent L. Rev.* 195 (1989).

31. See *infra* note 39.

Posner's discussion.

Posner's reasoning goes as follows: Cardozo's life is of some moment and authorities uniformly acknowledge that he was a very nice man. More interesting, however, is why he has a reputation as a great judge. In part his reputation rests on his non-judicial writings, which, while not terribly interesting or systematic, do set forth a consistent pragmatism. But since these are insufficient in themselves to explain the favor enjoyed by Cardozo, his reputation must rest on his legal opinions. These Judge Posner discusses in what may be the most engaging part of the book, perceptively illuminating the logical flaws and difficulties in a variety of Cardozo opinions.³² For example, Posner suggests that the reasoning of *McPherson v. Buick Motor Co.*³³ and *Ultramares Corp. v. Touche*³⁴ is inconsistent,³⁵ laying to rest some nagging doubts this reviewer had been carrying around since first-year torts class.³⁶

Having undercut the doctrinal side of Cardozo's judicial writings, however, Posner is left with very little to explain the high esteem in which Cardozo is held by all but a handful of contemporary observers.³⁷ What Posner falls back on is the fact that the justice wrote well,³⁸ a con-

32. See, e.g., Posner, *supra* note 1, at 107. ("Cardozo's project of making law serve human rather than mandarin needs, however worthy a project, often lacks thrust, as we can see in Cardozo's most famous line of opinions—those on scope of liability . . .").

33. 217 N.Y. 382, 111 N.E. 1050 (1916) (holding that manufacturer of defective automobile was liable to injured consumer despite fact that there was no contract between manufacturer and consumer).

34. 255 N.Y. 170, 174 N.E. 441 (1931) (holding that accountant was not liable in tort to those who lost money making loans in reliance on accountant's audit of company).

35. Posner states:

Cardozo is unable to explain why the greater the potential harm from a defendant's negligence, the more circumscribed liability should be. . . . That Cardozo's opinion . . . in *Macpherson* [does] not hang together with [that in] *Ultramares* may seem a serious defect in . . . Cardozo's judicial performance; I think it is. Yet it has served rather to magnify than to diminish his reputation, thus illustrating the normative ambiguity of the concept.

Posner, *supra* note 1, at 112-13.

36. It can be suggested that the two cases are reconcilable on the theory that the lender in *Ultramares* was in a better position to protect itself by performing an independent investigation than the individual consumer of an automobile in *MacPherson*. In any event, since Cardozo surely must have seen the connection between the two cases, the more interesting question is how Cardozo reconciled the two results in his own mind.

37. See *supra* note 29; *infra* note 38. One factor in Cardozo's eminent reputation may be related to the doctrinal issues that Posner minimizes. Cardozo's opinions grapple with the types of problems faced by modern courts and seem to anticipate the direction of the law. Cardozo displayed a fine instinct for the direction in which the legal landscape was evolving without oversimplifying the difficulties of the issues before him.

38. See Posner, *supra* note 1, at 111-12. This conclusion is open to some dispute, particularly among first-year students who, as Judge Posner points out, are exposed more frequently to Cardozo's opinions than to those of other members of the judiciary. Cardozo's literary style has received criticism from other quarters as well, particularly Jerome Frank, whose article, under the pseudonym Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion*, 29 Va. L. Rev. 625 (1943) [hereinafter *Dissenting Opinion*], is cited at length by Judge Posner. See Posner, *supra* note 1, at 10-11. As Professor Frank wrote, comparing Cardozo to Black, Douglas, and Jackson, all of whom "write in their native

clusion that bears little relation either to the workings of Mead Data Central or to any of the other more exotic aspects of reputology. Most of Judge Posner's analysis of Cardozo's rhetorical skill is, appropriately enough, devoted to standard literary concerns—"lucid presentation of arresting particulars," a sense of the relation of these particulars to larger themes, a point of view that "transcends the litigants' parochial concerns," and a sensitivity to audience expectations.³⁹ In the end, Judge Posner concludes that the competent—even brilliant—analysis of legal problems will not bestow lasting reputation on the "reputee." Rather, the

sparkling, vivid, memorable opinion is not 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.⁴⁰

Thus, by a backhanded route, Judge Posner returns to the paradigm of the Founders, that greatness is an enduring value that is recognizable in all times. The irony is that this most pragmatic of all legal writers, this personification of the school that quantifies all the values of human life,⁴¹

tongue. Of Cardozo, one might say this: He admitted that, at times, he wrote with his tongue in his cheek. And, frequently, it was not even his native tongue." *Dissenting Opinion, supra*, at 641. Even Professor Frank's compliments were backhanded, as when he remarked of Cardozo: "His writings have grace. But it is an alien grace." *Id.* at 630.

39. Posner, *supra* note 1, at 133-34. Even in this discussion, however, Judge Posner's penchant for quantification makes itself felt. Comparing a random sample of sixty of Cardozo's opinions with an equal number of opinions by his colleagues on the New York Court of Appeals, Judge Posner develops the following table:

	Cardozo	Non-Cardozo
Average words per sentence	21.5	27.8
Average words per opinion	1,923.3	1,785.0
Number of cases cited	20.8	7.3
Number of scholarly citations	2.3	0.6

Id. at 135. Judge Posner concludes that this table demonstrates that Cardozo was a better writer than his colleagues because his sentences were shorter and his opinions were more compact, since, despite their greater length, they contained more citations than those of his contemporaries. *See id.*

40. *Id.* at 143.

41. *See, e.g.*, R. Posner, *Economic Analysis of Law* 242-44 (3d ed. 1986) (suggesting that "it may be possible to deduce the basic formal characteristics of law itself from economic theory" and then proceeding to do so in a two-page analysis). *Economic Analysis of Law* also contains one version of Professor Posner's justifiably famous explanation of the shortage of babies available for adoption as "an artifact of government regulation" and his suggestion that this situation could be ameliorated by a free market in babies:

The fact that there are many people who are capable of bearing children but who do not want to raise them and many other people who cannot produce their own children but want to raise children, and that the costs of production to natural parents are much lower than the value that many childless people attach to children, suggests the possibility of a market in babies.

is ultimately reduced to aesthetics—that least quantifiable of all qualities—to explain the enduring greatness of another member of the judiciary.

Id. at 139.

