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A Review of *How Judges Think* by Richard A Posner (Harvard University Press, Cambridge MA 2008), 400pp Hbk £22.95, ISBN 978-0674028203.

Richard Posner has written a book called *How Judges Think*, and it does purport, at least in part, to be a book about the behaviour of judges. In fact, given Posner's emphasis on how judges are influenced not only by legal reasons but also by ideology and politics as well as market forces, *How Judges Behave* might well have been the better title. But it is also, if only subterraneously, a brief for Posner's favoured normative theory, pragmatism, as well as a polemic against what he sees as pragmatism's chief rival, 'legalism'. Unfortunately, throughout the book, the relationship between Posner's avowedly descriptive project and his more or less implicit normative aims is never entirely clarified. Nor is legalism ever given a fair or workable definition. Legalists are instead characterised early on as those (rubes?) who speak in 'the loftiest Law Day rhetoric' (p 1) and hold 'unrealistic ... conceptions' of what judges do (p 2). My short review focuses on these two points.

Posner's book is not terribly well organised. It has a tone rather than a method or a theme—and that tone is relentlessly dismissive of the legalistic take on judging. It also has the air of someone saying that the emperor has no clothes. Early on, Posner compares his approach in *How Judges Think* to his no-nonsense, demystifying approach to sex in *Sex and Reason*. There are frequent digressions, to allow Posner to chastise this group of starry-eyed law professors or that misguided judge. But despite this, it is a serious book, and deserves to be taken seriously. People, including judges, listen when Posner speaks. And Posner, despite his quasi-scientific aspirations in this book, is himself a brilliant and humanistic judge and man of letters—well and widely read (see especially his classic work *Law and Literature*), and madly prolific. Indeed, we may in the end wonder whether Posner's own predictive theory of judging has a place for a judge so deep, careful and creative as Posner is.

I.

Posner first presents legalism as a 'descriptive theory' of how judges behave in Chapter 1, along with other theories which he lists: the strategic, the sociological, the psychological, etc (p 19). Although Chapter 1 is largely expository, it also has as its subordinate aim to show—by contrasting it with the other, more plausible theories of how judges behave—how unlikely it is that legalism could be a correct description of what judges do. He writes that legalism sees judging as a matter of 'logical operations' and that the 'ideal legalist decision' is one that is

the product of a syllogism in which a rule of law supplies the major premise, the facts of the case supply the minor one, and the decision is the conclusion. The rule might have to be extracted from a statute or a constitutional provision, but the legalist model comes complete with a set of rules of interpretation (the 'canons of construction'), so that interpretation too becomes a rule-bound activity, purging judicial discretion. (p 41)

Legalism, in other words, describes judges as going through a mechanical process of deriving conclusions from clear rules, purged of any discretion. Posner even sometimes makes the legalist's ideal of judging sound almost mystical—as if the legalist judge were in thrall to a larger power called The Law, of which the judge is merely a pawn.

It is clear that there is something wrong with Posner's caricature of legalism as a *descriptive* theory of judicial behaviour, but it is at first hard to figure out what it is. A clue comes in seeing that Posner, in categorising legalism as in some sense descriptive, has only told us what the '*ideal* legalist decision' would be (p 41, emphasis added). But the other descriptive theories Posner sets out are not about characterising the ideal way of deciding a case: they only look at what judges actually do when they decide a case (they might set out '*ideals*', but only in the Weberian ideal-typical sense). Certainly a legalist can and should admit that many times judges will as a matter of fact fall short of the legalist ideal: they do not always follow the '*legalist slogan*' of the rule of law (p 41) in a given case, and they sometimes will let themselves be influenced by politics or by ideology, or by psychology—in short, by all those factors that the *other* descriptive models provide for. But this influence is a fault not in legalism itself, as a prescriptive theory, but in the judges who fall short of the ideal. So we might think here that Posner has simply made a category mistake, treating the legalist '*ideal*' as the legalist '*description*' of '*how judges think*'. It's not—it's a theory of how judges *should* think.

But this criticism, which is valid as far as it goes, does not yet quite get at what Posner is saying about legalism's fault as a descriptive theory. Posner's more interesting and important point is that '[l]egalists acknowledge that their methods cannot close the deal every time' (p 47). Posner adds: 'This is an understatement' (p 47). Now, this concession from the legalists is importantly different from the concession I made for them above—that sometimes legalist judges fall short of the legalist ideal. Posner's claim now, which he says the legalists also concede, is that sometimes the legalist ideal will be impossible to achieve. Why? Posner explains: 'There are too many vague statutes and even vaguer constitutional provisions, statutory gaps and inconsistencies, professedly discretionary domains, obsolete and conflicting precedents, and factual aporias' (p 47).

Posner here is saying that legalism does not work based on an understanding of what the law is. He is saying that legalism cannot describe what judges do, because *the law isn't like that*—in other words, the law is not like a system of rules, from which judges can mechanically deduce the outcomes of cases based on a deductive syllogism. Posner's argument itself almost serves as a deductive proof of legalism's descriptive impossibility: (1) legalism presupposes a view of law in which there are no gaps in statutes, or vague constitutional provisions; (2) there are, in fact, gappy statutes and vague provisions; (3) legalism must fail to describe the working of the law. Judges could not possibly decide based on legalism, because legalism is simply a false view of the law. In fact, there are gappy statutes and vague provisions, and when judges fill in these gaps and clarify the vagaries, they are no longer '*doing law*' in the legalist sense.

Of course, a thinker such as Ronald Dworkin would dispute this view of the law, because he or she would say that 'law' involves precisely the moral reasoning (ie principles) that would fill the gaps and clear up the vagaries, so one might make the concession that law-on-the-books runs out without thereby conceding that 'the law' has run out. But I do not want to contrast Dworkin and Posner yet again. What I want to ask is whether Posner's criticism of legalism is equally plausible against a more sophisticated version of legalism, one which he only alludes to in a footnote quoting Thomas Grey and does not take up directly anywhere else in the book. Grey, in the article cited by Posner, says there are two types of legal formalist, or legalist: the first type 'place ... value on determinacy, emphasizing the importance of clear rules and strict interpretation', while a second kind, whom Grey calls 'concept-formalists', 'emphasize the importance of system and principled coherence throughout the law' (p 8, n 16).

Posner makes the easy claim against the straw-person textualist-legalist that the law is not seamless and precise, and so judges cannot act according to that conception of the law; descriptively, textualist-legalism of the mechanistic sort simply cannot be correct. Fair enough. But no such easy mark can be made against Grey's conceptual-legalist, who will simply deny that 'the law' is limited to law-at-the-books, and will accordingly deny that the 'open area' of the law Posner describes (p 15) is truly *that* open. In those cases where text and rules of statutory construction do not provide a determinate answer, the conceptual-legalist judge will still be able to appeal to the formal values of 'system and principled coherence through the law'. What Posner cannot say, without begging the question against the conceptual legalist, is that those formal values on which the conceptual legalist relies do not themselves also constitute the law, so that the conceptual legalist is also a stripe of 'pragmatist'—going outside the confines of resources of the law to render his decision. Indeed, Posner wisely, and early on, admits that to make such an argument would be 'facile' (p 13) (he does occasionally, however, make exactly this facile argument, for example at p 230).

But the battle between the formalist of this sort and Posner's pragmatism is never joined. It is our loss.

II.

If legalism is itself poorly defined in *How Judges Think*, can the same be said of pragmatism? Sadly, the answer to this appears to be 'yes'. Pragmatism as a descriptive matter is never as fully fleshed out in the book as one would have wished. Posner says that 'the word that best describes the average American judge at all levels of our judicial hierarchies and yields the greatest insight into his behaviour is "pragmatist"' (p 230). But Posner's real evidence for this is mostly—if not entirely—anecdotal, from 'writing by judges on judging' (pp 256ff). It is an open question whether we should believe what judges say about what they do in their less candid moments—any more than we should

take authors as the best interpreters of their own books. But clearly the merely anecdotal cannot be sufficient evidence for Posner's bold and striking claim that the best description of the American judge is 'pragmatist'.

I am fairly confident that this is not true if we take a pragmatic judge to be, as Posner says, one who 'assesses the consequence of judicial decisions for their bearing on sound public policy as he conceives it.' (p 13). It is probably not true of most judges that they will *explicitly* be pragmatic in this way, basing decisions on 'sound public policy as [they] conceive it', rather than on the correct interpretation of the law 'as they conceive it'. Very few judges do this, and I would be surprised if Judge Posner does it very often, *explicitly*. And indeed, Posner admits that pragmatism has only recently become 'self-conscious' as a philosophy of judicial decision-making. But if judges are subconsciously deciding based on their family history, or even on ideology or politics, then they are not basing their judicial decisions on 'sound public policy' as they conceive of it. If I may hazard my own unempirical hunch, the best description of how judges behave may be that they try their best to be legalist, and often fail—perhaps because legalism may in many cases be impossible, or perhaps because they are simply not judging well. I would even guess that more judges try (and sometimes fail) to be legalists than try to be pragmatists. As Posner well knows, even the self-consciously pragmatic judge is 'boxed in, as other judges are, by norms that require of judges impartiality, awareness of the importance of the law's being predictable enough to guide the behaviour of those subject to it (including judges!), and a due regard for the integrity of the written word in contracts and statutes' (p 13).

What of pragmatism as a normative strategy? The first thing to note is how much pragmatism, as Posner portrays it, owes to legalism. As the passage just quoted makes clear, Posner's pragmatism finds itself limited by the strictures of legalism. Posner's pragmatist is a 'constrained pragmatist': 'the pragmatic judge must play by the rules of the judicial game, just like other judges. The rules permit the consideration of certain types of consequence but forbid the consideration of other types' (p 254). The rules Posner refers to here are of course *legalistic* rules, and his statement that most judges play by these rules leads one not only to question the distinction between pragmatism and legalism in most cases (especially if the good pragmatist judge is what Posner calls a 'rule-pragmatist'), but also again to reassess Posner's conclusion that pragmatism rather than legalism best describes how judges act. After all, if in most cases judges play by the legalistic rules of the judicial game (or try to), legalism may better describe judicial behaviour.

For Posner's normative pragmatism to have bite, there must be some cases where judges are free (not 'boxed in') to base their decisions on 'sound public policy' as they conceive of it. This is rather vague—and makes one wonder whether pragmatism can give any more guidance in hard cases than legalism. Posner, unhelpfully, says that 'what counts as an acceptably pragmatic resolution of a dispute is relative to the prevailing

norms of particular societies' (p 241). A better name for this would be conventionalism, not pragmatism—but this is by the by. The larger, and more problematic point is that 'prevailing norms' give little or no guidance, *especially* in the hard cases. If the cases are hard from a legalistic standpoint (because the rules do not point clearly in one way or another), how much harder will they be from a substantive (or public policy) standpoint?! Posner, again unhelpfully, references opposition to murder as one of the basic moral values we share—but surely this is the easy case if ever there was one. What about abortion? Or same-sex marriage?¹ Is there any substantive agreement on *these* issues? Moreover, in the key chapter of his book (on whether pragmatic adjudication is 'inescapable') he does not pause at any length to consider the justifiability of pragmatism as an institutional matter. Is it a good thing to make judges the ones who determine what our 'local' substantive values are? Or should judges defer to the policy preferences of the other branches of government in close cases?

In one of the more striking passages of his book, Posner says that '[j]udges are less likely to be drunk with power if they realize they are exercising discretion than if they think they are just a transmission belt for decision made elsewhere and so bear no responsibility for any ugly consequences of those decisions' (p 252). Of course, we have no real way of testing this because, as Posner says, judges now feel that they are hedged about by constraints, by the rules of the judicial game (and some judges may not only play by these rules, but actually believe in them). Would judges who thought that they were no longer bound by those rules in any strong sense, but only thought them pragmatically useful—free to be discarded when sound public policy counseled it—be more restrained than those who thought that the rules of legalism were simply the rules of the game? And is it really the case that text, history and precedent now offer *more* cover for wanton judicial preferences than the catch-all and vaguely defined (by Posner) 'sound public policy'? I am sceptical.

Legalism may not be perfect, and certainly in the hands of fallible judges the legalist ideal will not always be fulfilled. It is an aspiration. But it is an aspiration that Posner in his recent book has not given us any solid reason to abandon.

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¹ In his discussion of *Lawrence v Texas* 539 US 558 (2003), for instance, Posner says that the US Supreme Court did not pay careful attention to consequences. But of course it did: it worried about the expressive consequences of sodomy laws. Posner simply disagrees that these are important consequences (p 339).