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## Foreword: What Books on Law Should Be

Richard A. Posner

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## FOREWORD

### WHAT BOOKS ON LAW SHOULD BE

*Richard A. Posner\**

I have thought it might be useful to our profession, and appropriate to a foreword to a collection of reviews of newly published books on law, to set forth some ideas on how books can best serve members of the different branches of the legal profession—specifically judges, practicing lawyers, law students, and academic lawyers—plus persons outside the legal profession who are interested in law. I am not interested in which already published books should be retained and which discarded, but in what type of book about law should be written from this day forward. I will mention a few existing books but only as examples of the sort of law-related book for which there is a current need.

I mentioned four legal audiences. I'll begin with judges because, as I'll explain, the best books for practicing lawyers, law students, and academic lawyers are books that judges should also read.

It might seem that a judge, time permitting, would or should be interested in reading any worthwhile book about law. But this is not correct. Judges are either generalists or specialists. In the American judicial system, they are mainly, though not exclusively, generalists. Specialists, of course, can benefit from books in their specialized field. But no generalist judge can read books about every field of law within his jurisdiction or if he reads them remember them. I will confine this discussion to books for generalist judges.

I'm a generalist judge, and (here speaking, I think, for most generalist judges) I can't say I've read a great many books for their bearing on my judicial work. Certainly not in their entirety. The books most likely to be of use to a judge are, for the most part, books that, like a dictionary or an encyclopedia, are not intended to be read through but rather to be dipped into, such as legal treatises and the American Law Institute's *Restatements*. These are valuable works, increasingly searchable online, and give judges and lawyers quick access to essential legal information, authorities, and materials. I'm sure that all judges would agree with me that they should continue to be produced and updated. Their format, however, will change. I am uncertain whether treatises should continue to be printed or just published online. It is much easier to search a book online; one is not tied to an index or table of contents but can search for a word or a name or phrase of one's

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\* Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School.

choice. But I will ignore the format issue and call a book a book whether it is printed or electronic.

There are books about judges or judging that new judges should read and that experienced judges should, if time permits, reread at some point in their careers. There are several distinct genres of such book. One is judicial biography. It is a genre of mixed quality, but there are some excellent judicial biographies, such as Andrew Kaufman's biography of Benjamin Cardozo,<sup>1</sup> Dennis Hutchinson's biography of Byron White,<sup>2</sup> and David Dorsen's recent biography of Henry Friendly.<sup>3</sup> Years ago I wrote a short (156 pages) critical study of Cardozo and suggested in it that a critical study of a judge might be a quite adequate, and efficient, substitute for a biography,<sup>4</sup> especially of so shy, secretive, and introverted a judge as Cardozo, who led such a dull life—but most judges, like most lawyers, live rather dull lives. (Holmes, Douglas, and White are notable exceptions,<sup>5</sup> and there are some others.) The reason I think such a substitute adequate is not that the details of a judge's life can't shed any light on his work or outlook, etc., as a judge, but that a judge reading a biography can't benefit in his own work from the details of someone else's life. But I'm not aware that anyone has been inspired by my suggestion for book-length critical studies of judges.

There are valuable collections of judicial opinions, and other published writings, including books, articles, and correspondence, by the great judges, such as Holmes, Hand, and Friendly.<sup>6</sup> I think one can learn a lot about writing a judicial opinion from reading judicial opinions by the handful of judges who have themselves been distinguished as opinion writers. Not that one would want to imitate the writing style of a Holmes or a Hand or a Cardozo; their styles are highly individual and, to a degree, archaic. One learns to write well both by practicing writing and by reading great writing, rather than by imitation. (Educated Englishmen learned to write beautifully mainly from immersion in Latin and Greek.)

The handful of classic books about the judicial process, notably by Holmes and Cardozo, are well worth reading, as are the classic books on the

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1. ANDREW L. KAUFMAN, *CARDOZO* (1998).

2. DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* (1998).

3. DAVID M. DORSEN, *HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA* (2012). Dorsen's biography is reviewed in this Issue. See Aaron P. Brecher, Book Notice, *Some Kind of Judge: Henry Friendly and the Law of Federal Courts*, 112 MICH. L. REV. 1179 (2014).

4. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 150 (1990).

5. See generally CATHERINE DRINKER BOWEN, *YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY* (1944); HUTCHINSON, *supra* note 2; JAMES F. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* (1980).

6. See, e.g., HENRY FRIENDLY, *BENCHMARKS* (1967); RICHARD A. POSNER, *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* (1992); *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* (Irving Dillard ed., 3d ed. 1960).

judicial process by Hart and Wechsler, H.L.A. Hart, and distinguished academics such as Karl Llewellyn and other legal realists.<sup>7</sup> But the entire literature on the judicial process is too vast for any judge to read and remember, including as it does books on legal formalism and legal realism; on other topics in jurisprudence and the legal process; on “law and . . .” (law and economics, law and feminism, critical race theory, etc.); on interpreting constitutions and statutes, and on constitutional theory more broadly;<sup>8</sup> and books dealing with judges’ motivations, incentives, and constraints. What judges especially need are books that summarize the literature on the judicial process and guide them to the few gems, such as Marvin Schick’s neglected book on the interactions among judges on the Second Circuit in the Learned Hand era.<sup>9</sup> There is a particular need for books that are *realistic* about judicial behavior, a genre to which my coauthors Lee Epstein and William Landes contributed in our recent book, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (2013), and to which I added in my even-more-recent *Reflections on Judging* (2013).<sup>10</sup>

There is a distinct, and distinctly underdeveloped, genre of judicial-training books. For the most part, judges learn by judging; of course they need some instruction in the rules and practices of whatever court they are appointed to, but such instruction is adequately conveyed informally. There are four areas, however, in which they (we) can benefit from more systematic training, some of which might efficiently be conveyed by book-length manuals. One is opinion writing. Most of the existing manuals strike me as pretty pedestrian,<sup>11</sup> although this may be because the actual intended audience consists of law clerks, as very few judges nowadays write their own opinions, though a number do edit their law clerks’ drafts heavily.

One weakness of the manuals on opinion writing is that they tend to be general, and generalities about good writing tend to be ineffectual. Invariably, the reader is told not to use jargon. But what is jargon and what is a useful technical term? Or told to write simply and clearly. I’d like to see

7. See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

8. As in the recent Scalia–Garner and Amar books on statutory and constitutional interpretation, respectively, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012), and AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012), discussed in chapter 7 of my book RICHARD A. POSNER, *REFLECTIONS ON JUDGING* (2013).

9. MARVIN SCHICK, *LEARNED HAND’S COURT* (1970).

10. See also RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

11. See, for example, FEDERAL JUDICIAL CENTER, *JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES* (2d ed. 2013), and books and articles cited therein. For a notable exception, however, see WILLIAM D. POPKIN, *EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES* (2007).

opinion-writing manuals that are concrete, that identify and denounce particular, recurrent barbarities of judicial and other legal prose—denunciations of, for example,

Latinisms (such as “ambit,” “*de minimis*,” “*eiusdem generis*,” “*sub silentio*”); legal clichés (such as “plain meaning,” “strict scrutiny,” “instant case,” “totality of circumstances,” “abuse of discretion,” “facial adequacy,” “facial challenge,” “chilling effect,” “canons of construction,” “gravamen,” and “implicates” in such expressions as “the statute implicates First Amendment concerns”); legal terms that have an ambulatory rather than a fixed meaning (such as “rational basis” and “proximate cause”); incurably vague “feel good” terms such as “justice” and “fairness”; pomposities such as “it is axiomatic that”; insincere verbal curtsies (“with all due respect,” or “I respectfully dissent”); and gruesome juxtapositions (such as “*Roe* and its progeny,” meaning *Roe v. Wade* and the subsequent abortion-rights cases). To this add: timid obeisance to clumsy norms of politically correct speech; unintelligible abbreviations gleaned from the *Bluebook*; archaic grammatical rules (for example, don’t begin a sentence with “However” or “Moreover”—these words are “postpositives”—and never say “on the other hand” without having first said “on the one hand”); archaic rules of punctuation, especially placement of commas; and offenses against good English (“choate” for “not inchoate,” “pled” for “pleaded” when referring to a complaint or other pleading, “proven” as a verb instead of “proved,” “absent” and “due to” as adverbs, “habeas claim” for “habeas corpus claim,” “he breached his contract” for “he broke his contract”) or against good Latin (“*de minimus*” for “*de minimis*” and “*ejusdem generis*” for “*eiusdem generis*”).<sup>12</sup>

The second need for judicial-training manuals—and it is related to the first because of the regrettable but entrenched and, it seems, irreversible propensity of judges to delegate opinion writing to their law clerks—is for manuals instructing in management of staff, consisting mainly of law clerks. It’s remarkable what poor managers so many judges are, even though their tiny staffs should be manageable even by judges who have no management experience.

The third need, closely related to the second, is for instruction in coping with the judge’s docket—in avoiding delay and procrastination. And the fourth need is for instruction in mastering the increased complexity of modern adjudication, owing to the breathtaking contemporary advances in technology and globalization.<sup>13</sup> There is a distinct dearth of manuals in this last field in particular.

Learned Hand once famously advised judges to read the great philosophical, literary, and historical works in the Western intellectual tradition. He said,

I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance

12. POSNER, *supra* note 8, at 250 (footnote omitted).

13. For a discussion of these problems, see *id.* at 71–77.

with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject.<sup>14</sup>

Forget it! Modern judges are the product of modern American culture, which is philistine. And time alters classic status. Today Hand's list would be different; it would be unlikely to include Acton, Maitland, Carlyle, or Bacon, all of whom are distinctly dated; they would make way for Mill and Nietzsche, Wittgenstein and Kafka, among many others. But that's not my criticism. It's that the authors in Hand's list are authors one reads, or starts to read, in one's youth, as he did. They leave a residue and may be reread at successive stages in one's life. But if one hasn't become familiar with such works in college (or before), one isn't going to read them, for the first time, in middle age. And fewer and fewer Americans are receiving a traditional humanistic education.

Conceivably, the MOOCs (massive open online courses)<sup>15</sup> will provide a partial cure, for increasingly they include humanistic courses, although the bulk of the courses are technical. MOOCs are ideal for judges and other busy people because they don't require travel or setting aside regular blocks of time, but can be fitted easily into a busy schedule. But I do have a strong feeling that humanistic culture is something one acquires at an early age or not at all.

It should be obvious that what judges should read, the other members of the legal profession should read as well. The American legal system is case-centric. Realistically, American judges are legislators (and not just in common law fields) as well as adjudicators in a narrow sense. They possess enormous discretionary authority in both capacities. They are shy about acknowledging their possession of these powers, for rather obvious reasons of politics and public relations, and they fool a lot of practicing lawyers, academic lawyers, and students—some of whom upon graduation will become judicial law clerks and write judicial opinions, including at the highest levels of the judiciary.

The briefs, oral arguments, and other submissions by trial and appellate lawyers are rarely imaginative and frequently obtuse. Most lawyers, including many law professors, have a stunted idea of where judges "are coming from"—that is, what judges know (doctrinally, factually) about the cases presented to them for decision and what matters to them about the cases. The portrayals of judges are not the only important books about judges for lawyers to read. Whatever judges read, lawyers should read to give them insight into the judicial process.

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14. Learned Hand, *Sources of Tolerance*, 79 U. PA. L. REV. 1, 12 (1930).

15. See generally SALMAN KHAN, *THE ONE WORLD SCHOOL HOUSE: EDUCATION REIMAGINED* (2012); Tamar Lewin, *College of Future Could Be Come One, Come All*, N.Y. TIMES, Nov. 20, 2012, at A1, available at <http://www.nytimes.com/2012/11/20/education/colleges-turn-to-crowd-sourcing-courses.html>.

I can't think of many books of professional value to practicing lawyers, apart from treatises, books dealing with their particular field of practice and the commercial or technological character of the legal issues that arise in that field, and, for managing partners, books on management. Of particular value (to law students as well as to practicing lawyers) would be books on the structure, economics, and varieties of legal practice and legal careers. There is a dearth of these books. In this category, only the treatises are law books, and I have suggested that treatises are likely to diminish in significance with continued improvement in and expansion of online research sources.

Most practicing lawyers who do not merely dispense legal advice to their clients are either litigators or deal negotiators (and litigators are negotiators too—with their clients, with other lawyers involved in a case either as allies or opponents, with judges, and in settlement negotiations), and they may benefit from books on writing, trial methods, oral argument, negotiation, and cognate skills. But for the most part, these skills are most effectively imparted by practice, imitation, mock trials, and actual negotiations, rather than by books. There are, however, some good books on legal writing, by Bryan Garner and others,<sup>16</sup> that practicing lawyers can read with profit.

Academic books on law are written primarily for academics and secondarily for law students; they rarely attract a significant readership of practicing lawyers. That is an aspect of the growing gap between the practicing and academic branches of the profession to which I'll return at the end of this Foreword.

Regarding books for law students, the casebook is and deserves to be salient. Its importance, its utility cannot be denied. But it needs to be improved. The modern casebook is too long and contains too much background and interstitial material. That would be fine if a casebook were, or could realistically be intended to be, a means of conveying expert knowledge of a field of law, so that a student taught by a good teacher with the aid of a good casebook would be prepared upon graduation to practice in that field. But that is not a realistic expectation. Law is too specialized a profession for mastery of a field to be obtained from a casebook, and anyway, the student is unlikely when he becomes a lawyer to be practicing in more than one field.

The realistic objective of a law school course is to acquaint the student with basic legal concepts, policies, terminology, and methods of reasoning and argument, and to force him to make sense of these things and make

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16. BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* (2d ed. 2002); BRYAN A. GARNER, *GARNER ON LANGUAGE AND WRITING* (2009); BRYAN A. GARNER, *GARNER'S DICTIONARY OF LEGAL USAGE* (3d ed. 2011); BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES* (2d ed. 2013); BRYAN A. GARNER WITH JEFF NEWMAN & TIGER JACKSON, *THE REDBOOK: A MANUAL ON LEGAL STYLE* (3d ed. 2013); TOM GOLDSTEIN & JETHRO K. LIEBERMAN, *THE LAWYER'S GUIDE TO WRITING WELL* (2d ed. 2002); ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (2008); RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (5th ed. 2005).

them cohere in his mind; and for this purpose, a relative handful of interesting and important cases, legislative provisions, and regulations will usually suffice. Casebooks should be short (and therefore far less expensive than they are) and uncluttered—especially since the internet offers the student easy access to additional materials bearing on the subject of the course.

I don't think law students need to spend much time with legal treatises. If they need to fill gaps in casebook coverage or obtain details for a moot-court argument or a law review note, they can easily find what they need online. But they can benefit from reading books for background. One can't, for example, understand criminal law, and particularly criminal procedure (including sentencing), without some grasp of the crime problem in America (such as the unfortunate "war on drugs" or efforts to control child pornography and other forms of sexual abuse of children), racial issues in crime control, and prison administration—the kind of background one can obtain from William Stuntz's book on the criminal justice system<sup>17</sup> or the Kendall–Funk treatise on child sexual abuse.<sup>18</sup> It would be useful for law schools to compile reading lists for students that would emphasize not books about law as such but books about the activities that law regulates, such as crime, finance, discrimination, real estate development, labor relations, medical care, technological innovation, environmental problems, religion, education, terrorism, and political campaigns. It is a major failing of lawyers (including judges and, notably, professors of constitutional law) that they tend to know little about the real-world context of the legal issues they encounter.

Next, what do academic lawyers need in the way of books (besides the same books that judges need because most academic lawyers teach case-laden courses and often write about the judicial process)? Increasingly, the principal, and often the exclusive, audience for academic books on law consists of academics. As law schools have multiplied and law school faculties have grown, the number of law professors has increased to a point at which the legal professoriat has become an autonomous profession, the members of which write for each other. They still churn out casebooks and treatises, but no longer can a legal academic build a national reputation exclusively on such works, as was once the case (think of Austin Scott's treatise on trust law<sup>19</sup> or the Hart and Sacks legal-process text<sup>20</sup>). An academic lawyer must concentrate on writing primarily for other legal academics. He will doubtless want to be read by judges, law clerks, law students, and practitioners, but these will be in the nature of welcome eavesdroppers on a conversation between the author and his fellow academics in the author's field. Constitutional scholars write for other constitutional scholars, economic analysts of

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17. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

18. VIRGINIA M. KENDALL & T. MARKUS FUNK, *CHILD EXPLOITATION AND TRAFFICKING* (2012).

19. AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. ASCHER, *SCOTT AND ASCHER ON TRUSTS* (5th ed. 2006).

20. HART & SACKS, *supra* note 7.



law for other economic analysts of law, legal historians for other legal historians, and so on.

Increasingly, this writing takes the form of articles rather than books. Scholars make a reputation by saying something new, and a new insight can be conveyed earlier and more perspicuously in an article devoted to that insight than in a book, because a book will take longer to write and publish, and new insights will be likely to be buried amidst familiar material necessary to bulk out the book to book length. This is one reason why books are a diminishing vehicle for conveying the results of academic research in law. Another may be the influence of economics, a field in which scholarship is published almost entirely in articles rather than in books. Another reason may be the declining prestige of the book in general. A fourth may be the rapid pace of legal change, which makes books on law likely to obsolesce quickly.

Last, I consider the market for books on law among nonlawyers. For there is widespread popular interest in law. To cater to that interest, there is a large body of fictional literature on law, a literature that is intended for and read mainly by nonlawyers, that originated with the Greek tragedians, that includes works by Shakespeare, Dickens, Melville, Kafka, and other notables, and that is still being produced. It may deserve more attention from the legal profession than it receives.<sup>21</sup> But the existing stock is adequate; in this philistine age, new, high-quality fiction dealing with the law is bound to be rare.

As for nonfiction books about law, I don't see much of a market among nonlawyers. Some Supreme Court Justices, such as William Douglas and, most recently, Sonia Sotomayor have written popular books—but not about law. Some judicial biographies of notable figures such as Holmes and Hand have aimed at an audience beyond the legal profession, but my impression is that they have not hit the target. (Catherine Drinker Bowen's *Yankee from Olympus: Justice Holmes and His Family* (1944), is a rare exception.) The nonprofessional interest in law appears to be sated by television, movies, and the internet.

To conclude, the book remains an important tool of legal research, analysis, and dissemination—and so the *Michigan Law Review* can breathe easy; it need not discontinue its annual Book Review issue. I have merely suggested some possible changes in the character of legal books that may enhance their value to the legal profession.

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21. See, e.g., RICHARD A. POSNER, *LAW AND LITERATURE* (3d ed. 2009).