in the problems it attacks. I think it has clarified my thinking, but I know it has stimulated it. I have quarreled with parts of their thesis, but I nevertheless admire the elegant care the authors gave to its development.

CARDOZO: A STUDY IN REPUTATION. By Richard A. Posner[1]. Chicago: University of Chicago Press. 1990. Pp. xii, 156. Cloth, $20.00.

Michael E. Parrish[2]

He didn't write "hard cases make bad law," "the power to tax is the power to destroy," or "the best test of truth is the power of the thought to get itself accepted in the competition of the market." But he did pen other famous aphorisms such as:

> Danger invites rescue. The cry of distress is the summons to relief. . . . The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.[3]
>
> The criminal is to go free because the constable has blundered.[4]
>
> Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.[5]

He was, Richard Posner suggests, perhaps our most literary judge.

For those who have long felt that Benjamin Cardozo was a great judge—perhaps the greatest common law jurist to sit on an American court in the twentieth century—Posner offers some persuasive confirmation in this short, meaty book, based on his 1989 Cooley Lectures at the University of Michigan. And the book will also fortify the reputation of Judge Posner, a founder of the law and economics school, as perhaps the most prolific sitting jurist since Cardozo himself. He has produced at least three substantial books while carrying a full judicial load on the Seventh Circuit, a level of productivity seldom matched in the academic world—and one likely either to swell the judge's reputation in that world or engen-

1. Judge, U.S. Court of Appeals for the Seventh Circuit.
2. Professor of History, University of California, San Diego.
3. *Wagner v. International Ry.*, 232 N.Y. 176, 133 N.E. 437, 437 (1921).
4. *People v. Deford*, 242 N.Y. 13, 150 N.E. 585, 587 (1926).
5. *Berkey v. Third Avenue Ry.*, 244 N.Y. 84, 155 N.E. 58, 61 (1926).

der bitter envy when the time comes to assay his own jurisprudential and scholarly ore.

What is "reputation" anyway? How can we define it, weigh it, compare it? What does it mean to say that Ted Williams was a "great" baseball player, Beethoven a "great" composer, or Shakespeare a "great" writer? Is reputation something intrinsic to the individual, a quantity of objective merit that can be measured empirically? Or is reputation bestowed by others, usually a relevant peer group, for their own reasons, perhaps having little to do with intrinsic worth? And how much does reputation depend on luck, on being in the right place at the right time?

Reputation is a tricky concept. Take Ted Williams, a superb hitter, the last major league player to bat .400 or better in a single season. Among some contemporaries and later students of the game, however, he was also reputed to be a selfish player, unwilling to advance base runners by swinging now and then at bad pitches. And he was an indifferent fielder. Still we would say, based on a preponderance of testimony by players and sports writers, that Ted Williams was a "great" baseball player. Beethoven never wrote an opera to compare with Mozart's, but this does not diminish his stature as a composer, any more than Shakespeare's literary achievements are dimmed by the fact that he didn't write short stories.

Posner is aware of these complexities and discusses them intelligently in chapter four, "Reputation in General," where he examines the case of Shakespeare and his deconstructionist critics such as Gary Taylor. Posner holds no brief for this crowd, which he claims is about the job of "vigorously debunking canonical works of literature," as 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."

Reputation, Posner concludes, is conferred ultimately both by the intrinsic merit of a person's work and by those doing the reputing. And while conceding that no measure of intrinsic merit, aesthetic or political, has ever been or is ever likely to be devised, Posner holds that "comparative judgments that are broadly persuasive are often possible." On these grounds he would be prepared to argue the dramatic merits of the Bard of Avon over the likes of Thomas Kyd or the political sagacity of George Orwell over Harold Laski. So, too, in the case of jurists.

Unlike John Marshall, Roger Taney, Oliver Wendell Holmes, Louis Brandeis, or Earl Warren, Cardozo occupies the unique distinction of being the only person ever elevated to the United States

Supreme Court whose reputation was not enhanced as a result. Cardozo served six unhappy years on the nation's highest court, although he sympathized more with Roosevelt's New Deal than any other member of the Hughes Court. Along with Brandeis, he endured the anti-Semitic vitriol of Justice McReynolds. Usually joining Brandeis and Stone in dissent, he seldom drew choice assignments from Chief Justice Hughes until after the constitutional revolution of 1937. Despite a few notable opinions such as the *Social Security Cases*[6] and *Palko v. Connecticut*,[7] he did not leave much of a legacy in the U.S. Reports.

Before he took Holmes's seat in 1932, however, Cardozo had already become a celebrated state judge in his eighteen years on the New York Court of Appeals. On that court he wrote on average thirty majority opinions a year, including the most notable ones dealing with contracts and torts. These New York opinions and his non-judicial writings, especially *The Nature of the Judicial Process*,[8] *The Growth of the Law*,[9] and *The Paradoxes of Legal Science*,[10] are the foundation of Cardozo's reputation and the object of Posner's study.

Posner the economist cannot resist offering some quantitative data in order to lift his discussion above the subjective level. Not all of it is earthshaking. Drawing upon a computerized index to principal law reviews published between 1982 and 1989, for example, Posner finds that Cardozo was mentioned far less often in scholarly articles than William Brennan, William Rehnquist, Holmes, Hugo Black, and John Marshall, but more frequently than Earl Warren or two recent giants of state law, Roger Traynor of California and Walter Schaefer of Illinois. Again with respect to law review citations, Cardozo could not hold a candle during the 80's to Laurence Tribe, Ronald Dworkin, or John Rawls, but he still bested old-timers such as Bentham, Kant, and Aristotle.

Posner's tables also seek to measure the professional impact of Cardozo's opinions compared to those of his colleagues on the Court of Appeals. In his first year on that court (1914), Cardozo wrote thirty-one majority opinions. Over the next seventy-five years they were cited substantially more often than thirty-one "non-Cardozo" opinions written by his colleagues in that year. The same

6. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

7. 302 U.S. 319 (1937).

8. Yale U. Press, 1921.

9. Yale U. Press, 1924.

10. Columbia U. Press, 1928.

holds true for a larger sample of 142 opinions Cardozo wrote between 1914 and 1932.

Whether one considers New York citations or those from other states, Posner demonstrates that Cardozo's opinions "have more staying power than those of his colleagues—they depreciate less rapidly." Since 1945, even his Supreme Court opinions have been cited more heavily by federal judges than opinions by either Brandeis or Harlan Stone, both of whom served longer and one of whom was chief justice. Finally, Cardozo's torts and contracts opinions from the Court of Appeals are thirteen times more likely to appear in eight leading law school casebooks this year than those of his average New York colleague.

Original and interesting as these statistical comparisons are, they do not constitute the heart of Posner's analysis of Cardozo's reputation. In the end, that analysis rests on a good, old-fashioned law professor's dissection of the most celebrated opinions Cardozo wrote, especially *Palsgraf*,[11] *Hynes v. New York Central R. Co.*,[12] *Wood v. Duff-Gordon*,[13] and *MacPherson*.[14] From these and other cases, Posner extracts three principal reasons for Cardozo's enduring and largely positive reputation.

First, next to Holmes, he was our greatest legal rhetorician—a poet—with an unparalleled ability both to structure an opinion for maximum dramatic impact and to formulate conclusions in exquisite prose. As Posner observes:

> The best of them are memorable for the drama and clarity of their statements of fact, the brevity and verve of their legal discussion, the sparkle of their epigrams, the air of culture, the panache with which precedents are marshalled and dispatched, the idiosyncratic but effective departures from standard English prose style. The opinions have a charm that is literary, essayistic—at times theatrical and even musical. The charm owes nothing to the briefs; it is the product of Cardozo's own literary skill.

Second, in both his major contracts and torts decisions, Cardozo strove to bring formal legal rules closer to the lay community's evolving sense of justice and fairness. The legal system ought to serve human needs, not mandarin preferences. He saw law, Posner argues, "as facilitative rather than as constitutive; as a service to lay communities in the achievement of those communities' self-chosen

11. *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).
12. 231 N.Y. 229, 131 N.E. 898 (1921).
13. 222 N.Y. 88, 118 N.E. 214 (1917).
14. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

ends rather than as a norm imposed on those communities in the service of a higher end."

Third, he wrote opinions that broadened liability such as *MacPherson* and *Glanzer*[15] as well as ones that restricted it, notably *H.R. Moch Co. v. Rensselaer Water Co.*[16] and *Ultramares Corp. v. Touche*.[17] He can be claimed, therefore, by judicial liberals and activists as well as by traditional or neo-conservatives. "Such were his narrative and casuistical skills," Posner observes, "that each set of opinions is a powerful support for one of the opposing positions, while the apparent (and I think real) inconsistency between the two sets provides a challenge to the imaginative powers of law professors, students, trial lawyers, and judges."

Cardozo has always attracted his fair share of reverent admirers and harsh critics, but most appraisals have finally come down somewhere in between these extremes. Posner's study falls into this third category. He takes several of Cardozo's leading critics to task—Jerome Frank, G. Edward White, and John Noonan—but it is often difficult to distinguish their critiques from some of his own. Posner, for example, faults Cardozo's suppression and manipulation of key facts in cases such as *Palsgraf*; his habit of employing aesthetics and rhetoric in place of careful policy analysis; and his tendency to lapse into moralism instead of discussing candidly the practical considerations bearing on a decision. These complaints we have heard before.

In his discussion of the *Palsgraf* case, however, Posner suppresses key criticisms of Cardozo, especially those offered by Noonan.[18] By awarding the railroad its costs of the suit, despite a favorable judgment in two lower courts, Cardozo intended not to punish poor Mrs. Palsgraf so much as to discourage contingent-fee lawyers from taking such cases in the first place. He may have wished to bring legal science down from the clouds, but Cardozo remained something of an elitist, who looked down on the hoi polloi of the bar. Second, at the time of the *Palsgraf* case, the judge was helping the American Law Institute draft Section 165 of the famous *Restatement of Torts* which concerned the duty owed to "an unforeseeable plaintiff." This may not be quite as self-interested as Marshall sitting in *Marbury*, but it comes pretty close.

But these, too, are quibbles. There will be longer books on

15. *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922).

16. 247 N.Y. 160, 159 N.E. 896 (1928).

17. 255 N.Y. 170, 174 N.E. 441 (1931).

18. John T. Noonan, *Persons and Masks of the Law* 111-151 (Farrar, Straus & Giroux, 1976).

Cardozo and some that examine facets of his career in greater depth, but probably none as consistently stimulating as this one.

THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION. By Bernard Schwartz.[1] Reading, Ma.: Addison-Wesley. 1990. Pp. x, 413. $24.95.

Herbert Hovenkamp[2]

This well organized, instructive volume is sure to be an important addition to anyone's collection of Supreme Court history. Professor Bernard Schwartz seeks to capture the entire constitutional jurisprudence of the Burger Court (1969-1986). In addition to the published record, the book is based on numerous oral interviews with both Justices and former law clerks, conference notes and docket books, correspondence, and earlier drafts of opinions. The result is a great deal of information about the workings of the Supreme Court by a lawyer who has a keen understanding of the Court as an institution, and of the meaning and significance of its internal disputes. This book gives a much more balanced view than earlier books (such as *The Brethren*) based on similar material. It reveals a bitterly divided Court, an ineffectual Chief Justice who inadvertently transferred great power to ideological opponents, such as Justice Brennan, and a gradual change from a cohesive Bench to a group of nine quite independent Justices, working alone to a greater degree than ever before, at least in the twentieth century.

Except for the first two chapters and the last, Professor Schwartz's study is organized entirely by subject matter, with a disproportionately large percentage devoted to the Bill of Rights. For example, there are three chapters, totalling nearly one hundred pages, on the first amendment; but only one chapter of thirty pages on the combined subjects of the new federalism and the commerce clause. Equal protection claims three chapters and criminal procedure two. Separation of powers and presidential power are combined in a single chapter.

President Nixon's appointment of Burger was part of an effort to unravel the jurisprudence of the Warren Court. A theme that runs throughout this book is that Nixon picked the wrong man for the job. Perhaps because of his disdain for the federal judiciary in

1. Edwin D. Webb Professor of Law, New York University Law School.
2. Ben V. and Dorothy Willie Professor of Law, University of Iowa.