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BOOKS AND JUDGES: BOOKS FOR JUDGES

SUGGESTIONS FOR AMERICAN JUDGES: TEN BOOKS THAT MERIT READING

Robert C. Berring*

Writing about books is pure joy for me. Little in life can match the experience of falling into a good book. The private space that the author and the reader occupy can be delicate and powerful. The totemic power of books is fading in our world, but that is all the more reason to celebrate the power that they retain. I come to praise books, not to bury them.

But taking on the task of recommending ten books for American judges to read is at once delightful, and deranged. How can one resist the opportunity to pontificate on what others should read, especially when those others occupy judicial office? When it comes to telling judges what they should read, the timorous should stay at home. (I, however, am still here.)

In a situation like this one, it is tempting to compile a list of guaranteed heavyweight titles. One of my friends advises that when working on a list such as this one, the safest course is to choose books that are so thick that no one has ever actually read

* Walter Perry Johnson Professor of Law, Berkeley Law School. Special thanks to Ian Washburn, Berkeley Law '10, for road testing most of these books for readability. I will eschew footnotes throughout except where *The Journal's* editor insisted that I include publication details for the works I mention in passing.

them. That way, no one can criticize. This fail-safe suggestion put me in mind of David Lodge's delightful novel *Changing Places*,¹ in which a group of graduate students and faculty in the English department of a great university, play a game requiring each to admit to a classic book that he or she has not actually read. It is a scary exercise. And yet most of it rings so true that I can't bring myself to follow my friend's advice. My resolution, then, is not to produce a list of books that is safe in pedigree, but that contains volumes one would read only under threat of punishment. To be sure, there are classic titles on this list, but I include only books that I find both edifying and readable. No ornamental shrubbery is allowed.

Each book that appears below is still in print, and easily purchased through the good offices of Amazon.com. All are surely in any good academic law library, and a few would be in general collections as well. (How sad that I do not send you to a local book store. The reader may be so fortunate as to live in a place where a fine used book store survives, but independent bookstores of all types are on the ropes. There is no point in failing to face the truth.)

A couple of last thoughts before the list begins: First, Frederick Hicks, a law professor and law librarian at Yale in the middle of the last century, wrote a charming book, *Men and Books Famous in the Law*.² Professor Hicks chose for it a few legal works that he judged to be classics, and then wrote about why each is important, where it fit into the legal universe, and who the author was. Many of those books are too old for this list, but if you want to see a master working the same territory as I cover in this piece, browse through his book. Second, a list like this is totally subjective. It is an expression of my experience and it reflects my intellectual life. Though I have asked others for thoughts and suggestions, and while I have debated these titles at length with friends, it is a very personal endeavor. If I leave off a title that you love, or include a title that you loathe, I at least take pleasure in the fact that the list made you think about books.

1. David Lodge, *Changing Places* (2d ed., Penguin 1979).

2. Frederick C. Hicks, *Men and Books Famous in the Law* (Lawyers Co-op. Pub. Co. 1921).

SERIOUS BUSINESS: THE BEGINNING

Oliver Wendell Holmes, *The Common Law*
(Little, Brown & Co. 1881)

The first entry on the list is the most challenging for the reader. This classic work by Justice Holmes is not an easy read, but it is still approachable, and it is the foundation stone for so much that follows. As Grant Gilmore noted, when Holmes wrote this book he probably knew more about legal history and the common law, to say nothing of his deep knowledge of other legal cultures, than any other living person.³ The book is still in print, and, though much of it has been assailed over time, it is the root from which much has come. Since I teach Contracts, I love the chapter on that subject best of all, but there are gems throughout. There is no need to read *The Common Law* from beginning to end. One can pick and choose chapters as one wishes. The fact that it is still in print speaks volumes. Indeed, a new edition appeared in 2009, with a forward by Professor G. Edward White.⁴ As Professor White is both a deft writer of prose, and the author of one of the most highly esteemed studies of Holmes, his comments are a welcome introduction to this classic work.

A NARRATIVE HISTORY: THE CONTEXT

Lawrence M. Friedman, *A History of American Law*
(Simon & Schuster 1973)

Where Justice Holmes writes about the full range of legal history, with roots running back to the Greeks and Romans, Professor Friedman centers his work on the history of American law. When Friedman wrote this book, it was a revolutionary effort. No one had possessed the temerity to take on such a wide topic. Trying to put everything in context, Friedman weaves a story of doctrines, economic interests, and personalities. Of course he made errors. Part of the beauty of his enterprise was

3. Grant Gilmore, *The Death of Contract* 22 (Ohio St. U. Press 1995).

4. Oliver Wendell Holmes, *The Common Law* (Belknap Press 2009).

that he took the risk of painting with a broad brush. But the work is sound, and it is a wonderful springboard. The law is always changing. How can one understand the process of change if one does not understand the roots from which that change springs? This is not a beach book, but it is a decent read. Professor Friedman recently released a third edition,⁵ which brings the discussion up to date. It contains the information that we should know in a palatable form.

THE LEGAL REALISTS

Jerome Frank, *Law and the Modern Mind*
(Anchor Books 1963)

I suspect every judge in the country, to say nothing of every law professor, is, wittingly or not, working under the influence of last century's Legal Realist movement. The myth of the Common Law as an intricate, pre-existing system deducible from timeless axioms, never recovered from the assault of these new thinkers. Sociological Jurisprudence, the Process School, Critical Legal Studies, Critical Race Theory, Feminist Jurisprudence, the Originalist Movement, Law and Economics, and perhaps now the academic love of empiricism, have all followed on the Legal Realists, but no one has ever really answered the basic questions of the movement. Can a judge ever escape her own mind and experience when making a decision? Can a judge truly function like an umpire in baseball, as Chief Justice Roberts put it, calling balls and strikes, divorced from anything but the application of the rules?

Finding a book that would express the full energy of the legal realists was no simple task. My mind turned to Llewellyn's, *The Common Law Tradition*,⁶ but though I love his crystalline thought, Llewellyn's prose can lead one down wayward paths. And though Gilmore's *The Ages of American Law*,⁷ paints the picture of what happened, it is caught up in a

5. Lawrence M. Friedman, *A History of American Law* (3d ed., Simon & Schuster 2005).

6. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown 1960).

7. Grant Gilmore, *The Ages of American Law* (Yale U. Press 1977).

larger story. Therefore, I chose this work by Judge Frank. It is a canonical work in Legal Realism, written by a skilled judge, and it still reads well. Who better to set out the case for Legal Realism than one who was there at the beginning?

THE WORDS OF THE MASTER

Benjamin N. Cardozo, *The Nature of the Judicial Process*
(Yale U. Press 1921)

Justice Cardozo was a giant of twentieth century jurisprudence. Someone suggested that rather than choosing this book, I should list a few of his most notable opinions. And there is, of course, merit to that suggestion: The man who gave us *Wood v. Lucy, Lady Duff Gordon*,⁸ and the saga of Mrs. Palsgraf⁹ might deserve a list of greatest opinions. To this day, I savor working over a Cardozo opinion in my Contracts class. But this book, which grew out of Cardozo's 1921 Storrs Lectures at Yale Law School, deserves our attention too. Cardozo, as thoughtful and reflective a jurist as we have known, considers here what a judge does and how he does it.

Justice Cardozo himself was the very exemplar of the judge as pillar of rectitude. His words are on the wall over the entrance to the Berkeley Law School,¹⁰ as I assume they sit over many other doorways as well, and there is, of course, a law school named in his honor. But in the end it is the richness and glitter of his prose that wins me. I recognize that not everyone is caught up in the lyric acrobatics of Justice Cardozo's style, but those folks are simply wrong.

8. 118 N.E.214 (N.Y. 1917).

9. See *Palsgraf v. L.I. R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

10. In high relief against the dark stone of Boalt Hall's facade are these words:

You will study the wisdom of the past, for in a wilderness of conflicting counsels, a trail has there been blazed. You will study the life of mankind, for this is the life you must order, and to order with wisdom, must know. You will study the precepts of justice, for these are the truth that through you shall come to their hour of triumph. Here is the high emprise, the fine endeavor, the splendid possibility of achievement, to which I summon and bid you welcome.

Benjamin N. Cardozo, *The Game of the Law and Its Prizes*, in *Law and Literature and Other Essays and Addresses* 175 (Harcourt, Brace & Co. 1930).

LAW AS INTEGRITY

Ronald Dworkin, *Law's Empire*
(Belknap Press 1986)

This book can be heavy sledding, but Professor Dworkin writes good prose. Specifically directed to judges, this is Professor Dworkin's case for normative values. Viewed as a direct response to H.L.A. Hart, the book is a richly complex distillation of Professor Dworkin's anti-positivist view of law as integrity. For the latter half of the twentieth century, Dworkin was probably the leading intellectual proponent of values-driven legal scholarship. This book, and his work in general, have spawned a universe of scholarly comment.

I note, in passing, that one of my colleagues urged me to include John Rawls's *A Theory of Justice*¹¹ on this list, but that book defeats me each time I take a run at it. I nonetheless find it fun to think of both Dworkin and Rawls as students of Hart.

THE PRAGMATIST AT WORK

Frederick F. Schauer, *Playing by the Rules*
(Oxford U. Press 1991)

I am a great fan of Professor Schauer. He has staked out a position as the great pragmatist of contemporary legal thought, and he has written and contributed to a series of provocative and thoughtful books. His prose is also direct and pellucid. Though there are legal philosophers of equal, if not greater reputation, Schauer is the most fun for me to read. Choosing one title to recommend was a challenge, but *Playing by the Rules* won out, for it examines rules both in law, and in life. I gave serious consideration to including Hart's *The Concept of Law*¹² in this part of the list, but in the end I chose Professor Schauer's as a more current and readable exposition of the same issues, though I am not contending that the two would agree with one another.

11. John Rawls, *A Theory of Justice* (Belknap Press 1971).

12. H.L.A. Hart, *The Concept of Law* (Clarendon Press 1961).

CONSIDERING VALUES

Marcus Aurelius, *Meditations*
(Gregory Hays trans., Modern Lib. 2002)

Why include the writing of a Roman Emperor who died millenia in the past? At the outset I had determined to omit the foundation texts of any religion. Though there is great wisdom in each of them, the political baggage and disputatious interpretations run beyond my horizon. But I wanted to include a book that set out a powerful, moral system, and so I settled on *The Meditations*.

The thoughts of Marcus Aurelius, one of the Five Good Emperors of Rome, have stood the test of time. This Stoic thinker sets out rules by which one should live one's life. His principles are idealistic and oriented towards public service. The deeply moral attitude of self-discipline and courage sings. Could anyone live up to the strictures in this book? No matter, it is still invigorating for the mind to read it. It can be consumed in bits, and many of the translations are eminently readable.

WHAT DOES THE PUBLIC THINK COURTS DO?

Jeffrey Toobin, *The Nine*
(Doubleday 2007)

At least once each generation, an author writes a book that attempts to capture what the Supreme Court of the United States is really doing. While there are several fine books to choose from for the era in which we find ourselves, Toobin's *The Nine* is the most popular, and the most readable. From his perch at *The New Yorker*, and on television as a commentator, Toobin humanizes the Court. Like Nina Totenberg on National Public Radio or, until recently, Linda Greenhouse in the *New York Times*, Toobin is a conduit to the mass of citizenry about the inner workings of courts. Given his *New Yorker* pedigree, it is no surprise that the prose is elegant. Some may find his views too mired in the world of liberal thought, but he tries to maintain balance. Besides, I include this book because I want you to know what the public thinks courts do. Toobin writes only about

the Supreme Court, but the legion who reads this book will doubtless project it onto all courts.

THE FUTURE: UNDERSTANDING THOSE UNDER 25

John Palfrey & Urs Gasser, *Born Digital*
(Basic Books 2008)

I have devoted my working life to studying legal information and how it is used. Most semesters, I am part of a team that teaches sixty or seventy second- and third-year law students in a course on Advanced Legal Research. The perspective of having done this for almost three decades provides me with an understanding of how greatly the thinking of modern students truly has changed. It is not just the conveniences offered by the advances in telecommunications that matter; the change in the world of information has altered the way in which young people think. They are not growing up in a world of paper, and it makes a substantial difference in how they conceptualize and communicate. And these are law students.

The generations now in college and high school—the law students of a few years from now—live in a world where information and its use has gone through a complete sea change. We, on the other side of the divide, cannot truly understand these folks, but we can try. I work to keep up, but I feel as if I am studying French in preparation for a trip to Paris, phrasebook in hand, while these students are growing up bilingual. It makes a big difference.

Palfrey, Professor and Law Librarian at Harvard Law School, and Gasser, a Professor at the University of St. Gallen in Switzerland, wrote this book for a general audience to explain how those on our side of the age gap can begin to understand the new generation. It is an easy read, and it may help we, who sprang from the world of paper, understand the ways in which the world is evolving. Much of it is about dealing with the very young, but those young people are the lawyers and judges of the future. It is best to be prepared.

THE JUDGE POSNER CATEGORY

Richard A. Posner, *How Judges Think*
(Harvard U. Press 2008)

Judge Richard Posner deserves a category of his own. He is a unique voice in American law. The progenitor of the law and economics movement, a commentator on issues large and small, Judge Posner is one who has written brilliant judicial opinions, and who produces a staggering string of books. Whether one approves of Posnerian thinking or prefers to stand back in horror, one is affected by the breadth and depth of his work. But which of his books to choose? My personal favorite is his small volume, *The Little Book of Plagiarism*,¹³ but that will not serve. The reader needs a strong taste of Judge Posner, yet one that is focused to the task at hand. Given the fact that this is a list of suggested books for judges to read, I chose this recent work in which Judge Posner tells judges how they should think. With his nine approaches, and his grasp of the chasm between the thinking in the pages of law reviews and the reality of the legal world, the book is especially relevant for us.

A FINAL INDULGENCE

Stendahl, *The Charterhouse of Parma*
(John Sturrock trans., Penguin Classics 2007)

I cannot help adding an eleventh entry, this one a personal indulgence. Stendahl's *The Charterhouse of Parma* is my favorite work of fiction. (Actually it is tied with the works of Raymond Chandler, but enough is enough.) This book is about loyalty, politics, and service in an imperfect state. While it does not really belong on a list like this one, it is a great book for anyone in a position of power to read. It is not the erstwhile naïve hero Fabrice del Dongo, who captures me, but instead it is Count Musca, caught in the service of a dangerous prince, who fascinates. The prose in this recent translation is old-fashioned, but stay with it, and you will be richly rewarded. The story is

13. Richard A. Posner, *The Little Book of Plagiarism* (Pantheon 2007).

written in the grand style, and it takes a while to get to the best parts, but hold on: The book is worth it. I commend it to you.

I hope that all of you find on this list—or perhaps in one of the essays that follow—something that helps you in your work. Happy reading.

