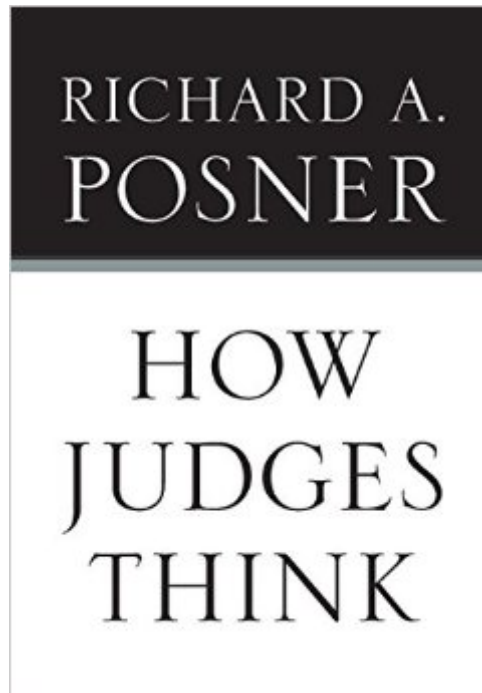


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# How Judges Think (Pims - Polity Immigration And Society Series)



## Synopsis

A distinguished and experienced appellate court judge, Posner offers in this new book a unique and, to orthodox legal thinkers, a startling perspective on how judges and justices decide cases.

## Book Information

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## Customer Reviews

Richard Posner, one of America's leading Legal Scholars, has breathtaking range: from Aging (Aging and Old Age) and Intelligence (Uncertain Shield: The U.S. Intelligence System in the Throes of Reform (Hoover Studies in Politics, Economics, and Society)) to Sex (Sex and Reason) and Terrorism (Countering Terrorism: Blurred Focus, Halting Steps). In this book Posner returns to one of the main themes of his scholarship - the failure of Formalist judging and the possibility of Pragmatism as an alternative. This is a recurring theme for Posner (see my reviews of "Sex and Reason" and Overcoming Law, and especially Posner's The Problematics of Moral and Legal Theory) and one on which he can speak from experience: He's a Judge of the US Court of Appeal for the 7th Circuit.

This man is \*cold\*. Fortunately for the reader, it is this icy wit that makes reading Posner's books such a joy. Watch how he rips into inconsistencies: 'In discussing a case that invalidated the exclusion of homosexuals from the military, Beatty approvingly remarks that the court "noted the lack of `concrete' and `actual or significant' evidence that allowing gay men to enlist in the armed forces would prejudice its morale, fighting power, or operational effectiveness in any way." He does not require that there be "concrete" and "actual or significant" evidence that homosexuals are harmed by the exclusion. Nor is he bothered by a lack of concreteness when he says that "laws that establish a broadcasting spectrum [must] guarantee that the full spectrum of opinion in the community will be heard." What is "the full spectrum" of opinion, and who is to decide? Must every lunatic have access to a broadcast studio? Beatty contends that government has a constitutional duty to subsidize religious schools but "may make funding conditional on religious schools agreeing to teach the same curriculum that is used in state-run schools." If the curriculum is identical, in what sense are they religious schools?' (internal footnotes omitted) The point, here as throughout *How Judges Think*, is to drive a spear into the side of judicial and scholarly hypocrisy. The particular target here, Beatty, is no more or less hypocritical than the rest of us: judges and legal scholars, as much as anyone, pretend that their opinions are more than just opinions. Judges -- especially Supreme Court Justices -- have a fancy term for this, which we as Americans have come to sanctify as *The One True Way Of Judging*. The fancy term is `textualism' or `originalism' or (as Posner calls it) `legalism.

I found this to be a very significant volume by Judge Posner, since he is writing on several of his strongest areas--legal philosophy, American judges, and theories of judicial decision-making. As the title indicates, this is an enormous topic and even to cover all of Posner's topics in a brief review is impossible. But this is what he is up to: First, he wants to review existing explanatory theories of judicial behavior: the attitudinal; sociological; economic; organizational; pragmatic; legalistic; and policy choice. Posner here seeks to demonstrate that no one of these theories can wholly explain judicial behavior, and that some other approach he suggests is better suited to do the job. Posner is quite a creative fellow, extremely well versed in a variety of literatures in addition to the legal. For example, he discusses judges as workers in the judicial system, quite an innovative approach. Next he focuses on judges as "occasional legislators" and what ideology a legislating judge employs. Unconscious preconceptions and intuitions are major topics in this discussion. Posner then shifts to what external and internal constraints limit judicial freedom of decisional action, including precedent, tenure and salary issues, and internal constraints (what we political scientists refer to as "role

theory" and small group analysis). Along the way he takes some effective potshots at folks such as Lloyd Weinreb (who argues analogy as the key to legal analysis), the legal process school, "neutral principles" and the Scalia approach to constitutional interpretation. Interestingly enough, law professors are not a major constraint, because they have segregated themselves out of studying and interacting with judges. This is one of the most perceptive chapters in the book.

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