How Judges Think

By Richard A. Posner

Harvard University Press, Cambridge, MA, 2008. 387 pages, $29.95.

Reviewed by Matthew J. Dowd

A review of a previous book by Richard Posner, *The Problematics of Moral and Legal Theory*, begins by quoting an 1880 book review by Oliver Wendell Holmes Jr.: "It is hard to know where to begin in dealing with this extraordinary production—equally extraordinary in its merits and its limitations." Surprisingly—or perhaps not—my reaction to Judge Posner's *How Judges Think* is similar. Posner's work is both impressive for what it accomplishes and limited by what it doesn't accomplish. *How Judges Think* is broad and insightful, yet at times uneven, as Posner explores some issues in more depth than necessary. Nevertheless, he comprehensively challenges conventional wisdom about what judges do—and should do—when deciding difficult legal issues.

How Judges Think opens with Posner's summary of nine theories that purport to describe judicial decision-making. For instance, the "attitudinal" theory hypothesizes that judges' rulings are best explained by political preferences, and Posner cites studies that support this theory. Other theories focus on how strategic, psychological, and organizational factors affect judges' thinking. These wide-ranging theories are not necessarily mutually exclusive. But Posner's main interest is in two particular theories: pragmatism and legalism. According to Posner, in legalism, "law is distinct from politics and policy; it is the realm of rules, rights, and principles." In pragmatism, by contrast, "law, at least insofar as the study of judges is concerned, is whatever judges do in their official capacity unless they go wild and court impeachment for being usurpative."

Posner views legalism as the "official" theory of judicial behavior. According to Posner, legalism "hypothesizes that judicial decisions are determined by 'the law,' conceived of as a body of preexisting rules found stated in canonical legal materials, such as constitutional and statutory texts and previous decisions of the same or a higher court, or derivable from those materials by logical operations." Thus, "[t]he legalist techniques give judicial decision making an appearance of intellectual rigor. But in many instances it is just an appearance." Posner further suggests that "[l]egalists could meet pragmatists halfway, as by accepting the legitimacy of purposive interpretation of rules."

According to Posner, pragmatism, which is on the other end of the spectrum from legalism, bases "judgments (legal or otherwise) on consequences, rather than on deduction from premises in the manner of a syllogism." Pragmatism is an old theme for Posner; at least six of his books—including *Overcoming Law*—examine the theory in detail, and *How Judges Think*, like the earlier books, defends and promotes the pragmatic approach.

Posner begins with a brief historical background of pragmatism and other legal theories, describing how natural law gave way to legal realism and then to economics and the law. Economics, Posner believes, "does well in explaining legal doctrines in a variety of commercial and noncommercial fields of law," even though few judges are well-versed in economics. "The significance of economics for the study of judicial behavior lies mainly in the consilience of economics with pragmatism. The economist, like the pragmatist, is interested in ferreting out practical consequences rather than engaging in a logical or semantic analysis of legal doctrines."

Building on this theme of practical consequences, Posner furnishes his view of pragmatic adjudication:

> The core of legal pragmatism is pragmatic adjudication, and its core is heightened judicial concern for consequences and thus a disposition to base policy judgments on them rather than on conceptualisms and generalities. But rather than being a synonym for ad hoc adjudication, in the sense of having regard only for the consequences to the parties to the immediate case, sensible legal pragmatism tells the judge to consider systemic, including institutional, consequences as well as consequences of the decision in the case at hand. He must thus consider the effects on commercial activity of disregarding the actual wording of a contract or failing to adhere to legal precedents on which the commercial community has come to rely.

Pragmatism, writes Posner, "is not *all* that is left after legalism, extreme attitudinalism, and the compulsion of comprehensive theory are rejected as being inadequately descriptive of judicial behavior. But it is a lot."

A weakness of pragmatism, as Posner describes it, is its malleability: it can encompass significant aspects of all other legal theories, making it seem self-contradictory at times. Although Posner rails against legalist approaches, which focus on the text of a legal document, he also urges judges to consider the consequences of disregarding the text. Indeed, he writes that, "[j]ust as legal pragmatism incorporates economic analysis of law as one of its methods, so, we must not forget, it incorporates legalism as another." He instructs the pragmatist judge to "consider the effects on commercial activity of disregarding the actual wording" of a legal document. But this is precisely why a legalist puts so much emphasis on the text. According to the legalist, the text defines the legal obligations involved and puts people on notice of those obligations as objectively and fairly as possible. The inherent understanding of the legalist (or textualist) approach is that, if the court disregards the wording of documents (contracts or statutes, for example), then people will no longer rely on such documents as embodying legal obligations.

Pragmatism's malleability can make it palatable to a wide audience. "The pragmatic judge," Posner writes, "is less interested in whether the facts of a case bring it within the semantic scope" of a relevant rule "than in what the purpose

of the rule is—what consequences it seeks to induce or block—and how that purpose, those consequences, would be affected by deciding the case one way or the other." It's not enough for a judge to be a pragmatist, according to Posner. One must be a "good pragmatist judge," that is, one who is "not a shortsighted pragmatist. He is not a philosophical pragmatist. But he is a *constrained* pragmatist." But constrained by what? "The pragmatist judge must play by the rules of the judicial game, just like other judges." But what defines the rules? Some may argue that the rules and constraints are little more than what Posner earlier called the "official" theory of the judiciary—namely, legalism. In the end, most readers will not necessarily disagree with the concept of a pragmatist judge, but may find Posner's description somewhat elusive.

Posner confronts the issue of whether judges act as legislators or merely as objective deciders of the law. He believes the former. "Appellate judges are *occasional legislators*," he writes. He exposes the analogy that Chief Justice Roberts used during his confirmation hearings: that judging is simply what baseball umpires do when they call balls and strikes. According to Posner, "Roberts knows that when legalist methods of judicial decision making fall short, judges draw on beliefs and intuitions that may have a political hue, though usually it is not a partisan one. ..." Interspersing references to obviously pragmatic, nonlegalist, decisions, such as *Miranda v. Arizona* and *Roe v. Wade*, Posner contends that "[t]he combination of legalist and legislative elements in many cases further blunts the judge's sense that he wears two hats—that sometimes he is a 'real' judge and sometimes really a legislator—and so helps show why few judges think of themselves as occasional or any other kind of legislators."

Posner also examines the role of intuition and unconscious decision-making. His thoughts here are intriguing, as he's correct that "[i]ntuition plays a major role in judicial as in most decision making." Given judges' workloads, the complexity of issues, and time constraints, judges necessarily make many decisions with less than perfect information. Posner calls it intuition; another apt description is "wisdom based on experience." Posner may go too far, however, with his assertion that "[t]he judicial opinion can best be understood as an attempt to explain how the decision, even if (as is most likely) arrived at on the basis of intuition, could have been arrived at on the basis of logical, step-by-step reasoning." He also believes that "[t]he published opinion often conceals the true reasons for a judicial decision by leaving them buried in the judicial unconscious." Posner's characterization downplays the amount of thought that goes into the opinion-writing process; his view of it as ex post facto rationalization seems too dismissive.

Posner also doesn't express high regard for standards of appellate review or canons of statutory construction, which seems ironic, because Posner, as one of the nation's most respected appellate judges, likely spends much of his day construing statutes and applying standards of appellate review. Posner writes that "[t]he 'canons' of statutory interpretation belong to the ex post rationalizing function of the judicial opinion," and that appellate review is "intuitive, though judges pretend otherwise." He adds:

> So what is involved in appellate review is, at bottom, simply confidence or lack thereof in another person's decision. That is an intuitive response informed by experience with similar decisions. It is not rule- or even standard-driven, except in the clearest cases, but it is not mindless guesswork either.

Posner's characterizations here are probably close to the mark, yet many lawyers and litigants would like to think otherwise. Posner also reasons that "[g]reater recognition of the role of the personal, the emotional, and the intuitive in judicial decisions would not weaken the force of these factors in judicial decision making, because there are no adequate alternatives and judges have to decide their cases with the tools at hand."

Posner takes aim at a frequent target of his: reasoning by analogy. According to Posner, "[a]nalogies can be suggestive, like metaphors, similes, and parallel plots in literature. ... But analogies cannot resolve legal disputes intelligently." He distinguishes relying on precedent from reasoning by analogy, but he doesn't sufficiently explain how or why the former is different or better than the latter. Similarly, he claims that "[r]easoning by analogy belongs to legal rhetoric rather than legal thought." But he goes too far in disregarding the intellectual, as opposed to the suggestive, value of reasoning by analogy.

Not surprisingly, the Supreme Court also comes within Posner's crosshairs, and he dubs the Supreme Court a "political court." That assessment is probably accurate for many—but not all—cases, and is certainly an assessment that few judges would be bold enough to publish. When one reads cases such as *Griswold v. Connecticut*, *Bush v. Gore*, and *Roper v. Simmons*, one strains to discern in them any doctrinally consistent rationale divorced from political underpinnings. Yet the term "political" here should be understood broadly and should not imply, as Finley Peter Dunne had Mr. Dooley say, that the Supreme Court follows the election returns. Posner's point is that "[t]he more the Court is seen as preoccupied with 'hot-button' constitutional cases, the more it looks like a political body exercising discretion comparable in breadth to that of a legislature," which is not far from an opinion that Justice Scalia expressed in a speech: "It is blindingly clear that judges have no greater capacity than the rest of us to determine what is moral."

Posner also takes on the legal academy. Recognizing academic criticism as a potential influence on judicial decisions, Posner ultimately concludes that such criticism is a weak constraint on judicial activity. Judges, according to Posner, generally don't care what law professors think, probably because of the divergence between what judges consider when making decisions and the type of scholarship that law professors produce. (*See* Judge Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Michigan Law Review 34

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(1992)). Posner rightly takes to task the "elite legal professoriat" that challenged the Solomon Amendment in *Rumsfeld v. Forum for Academic & Institutional Rights Inc.*, 547 U.S. 47 (2006), in which the Court unanimously upheld the government's right to withhold federal funds from colleges that deny access to military recruiters. Posner fairly dismantles the legal positions taken by the law professors and law schools in this litigation: "If the Yale hospital treats a homophobe who has cancer, is the Yale medical faculty signaling its approval of homophobia? That is the logic of the brief [of the faculty of Yale Law School]."

As if the above topics weren't enough, Posner tackles other, less theoretical issues relating to the judiciary. For instance, he examines differences between judges in civil law systems, such as in continental Europe, and judges in the United States, as well as differences between elected state judges and appointed federal judges. Whether federal judges need raises or should be subject to term limits is yet another topic Posner addresses. Furthermore, he objects to U.S. courts' citing foreign law, which he views as little more than a judicial fig leaf that obscures the real basis of judges' decisions. Moreover, Posner notes that "it is easier in most other countries to nullify by constitutional amendment the ruling of a constitutional court. … The easier it is to overrule a constitutional decision by amending the constitution, the less cautious, the less respectful of public opinion and strong disagreement a constitutional court can afford to be."

A few sections of *How Judges Think* are based on Posner's law review articles. For example, much of the chapter devoted to the Supreme Court as a political court appears quite similar to Posner's 2005 foreword in the *Harvard Law Review*, and the chapter devoted to comprehensive constitutional theories appears to draw heavily from his detailed review of Justice Breyer's *Active Liberty: Interpreting Our Democratic Constitution*.

How Judges Think is a thoughtful, expansive inquiry into various facets of the judiciary, exposing genuine difficulties with both pragmatic and legalist approaches. It will be of most interest to those with an academic bent; readers should not expect a book that provides tips on making their case stronger. For that, try Antonin Scalia and Bryan A. Garner's *Making Your Case: The Art of Persuading Judges* (reviewed in the February 2009 issue of *The Federal Lawyer*). Even so, practitioners who grasp the concept of pragmatic adjudication will better appreciate what pragmatic judges focus on when they decide cases. The bigger question is whether all or most judges are pragmatic, as Posner claims. **TFL**

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Supreme Court Justice Tom C. Clark: A Life of Service

By Mimi Clark Gronlund

University of Texas Press, Austin, TX, 2009. 328 pages, $45.00.

Reviewed by Vincent R. Johnson

Notable figures sometimes inexplicably fade from public memory. However, if they are lucky, they are rescued from the mists of history. This was certainly true of John Adams, who until recently was one of the least clearly remembered of the Founding Fathers. Then David McCullough's biography, published in 2001, and the related HBO miniseries, which came out in 2008, breathed such color and vitality back into Adams that he is once again at the front ranks of the nation's beginning.

The story may turn out to be similar for Tom C. Clark (1899–1977). For nearly a quarter century, Clark served at the highest levels of the American legal profession. President Truman appointed him twice, first to be attorney general (1945–1949) and then to be associate justice of the U.S. Supreme Court (1949–1967). In those capacities, Clark played a key role in the biggest issues of his time, including resistance to communism, advancement of civil rights, school desegregation, separation of church and state, enforcement of voting rights, protection of the criminally accused, and maintenance of law and order.

Clark was a man of character. He was not afraid to do what he believed was right, even if he disappointed or angered people who thought that they could count on him to do something different. Truman, for one, was greatly aggrieved by Clark's vote in the *Youngstown* steel seizure case of 1952, which limited the powers of the President. It is refreshing to read Clark's story at a time when too many government and corporate lawyers are willing to say "yes" to Presidents and clients when they should say "no" and recommend different courses of action.

Perhaps because Clark served with titans on the Supreme Court, such as Earl Warren, William J. Brennan Jr., Hugo Black, Felix Frankfurter, William O. Douglas, and Robert Jackson, he has slipped into the shadows. Clark is the only member of the Warren Court who has not been a previous subject of a full-length biography. But that is certainly not for lack of good material.

This new biography of Clark, which was written by his daughter, Mimi Clark Gronlund, a retired reference librarian, is a superb step toward reviving the memory of Clark as a significant historical figure. Gronlund's book, written over three decades, is a loving portrait, but it is also balanced and scholarly. The author has gathered together into an engaging narrative a rich mix of social history, family memories, political events, and legal analysis. Gronlund makes a compelling case for why some scholars and historians have concluded that Clark was the most underrated justice of his time.

Life Before the Supreme Court

Clark was one of the first boys to earn the rank of Eagle Scout in the United States. He seems to have been true to that form for the rest of his life—an honest and able high achiever who showed a remarkable capacity for growth. When one considers Clark's Boy Scout training and the ideal of duty

to country that it includes, it is not at all surprising that he later championed the interests of the United States by prosecuting American companies that committed fraud relating to World War II military contracts. Those efforts proved to be a pivotal step in Clark's career, because they allowed him to work closely with then Sen. Truman, whose committee was investigating the same kind of wrongdoing.

Gronlund's biography is peppered with delightful facts. For example, Clark, the only Texan to serve on the Supreme Court during its first 220 years, was called into the law school dean's office at the University of Texas and told that he might not graduate because of absenteeism. Fortunately, Clark escaped that sanction because of his superior performance on the exams. However, he then found himself in the same fix that confronts many law students today. There was no plum job awaiting Clark after earning his law degree, so he returned to Dallas to work with his father and older brother for several years in an arrangement he described as a "hand-to-mouth [law] practice that was neither lucrative nor satisfying."

Occasional payments in kind for legal services meant that the Clark household came to include miscellaneous pieces of furniture, including a few rugs that became family treasures. On one occasion, a client paid a bill for legal services by doing the Clark family's laundry for several months.

The best parts of the book are the vignettes that could be recounted only by a family member who probably had enjoyed hearing the stories more than once. Many law students will empathize with the tale of how Clark, as a student, was saved from embarrassment when he was unprepared in class. Though Clark had been called upon, his only female classmate fortuitously insisted to the professor that it was her turn to recite. On another occasion, Clark and an enterprising classmate set up an official-looking table at the end of the school registration line to gather contact information from students. They compiled the information into booklets, which they sold to local businesses to earn money to make ends meet.

When Clark was a lowly special assistant in the Justice Department, he effectively impeached a veteran claiming disability benefits based on back injuries by cross-examining the veteran about the man's recent defense of a strenuous bowling-on-the-green championship, which Clark had witnessed firsthand.

Some of the stories in this book illustrate how much government and its role have changed. When Clark became attorney general in 1945, he instructed his assistant attorneys general to answer all letters, if possible, within 24 hours, and, if that was not feasible, to send an immediate acknowledgment followed by a final reply within five days. It is hard to picture such governmental promptness today. Clark also promoted government efficiency and ethical conduct by prohibiting federal attorneys from maintaining private law practices, which is now taken for granted.

Gronlund also explores Clark's role in compiling a list of subversive organizations as part of Truman's loyalty program in the late 1940s. During the era of anti-communist fear-mongering, it was difficult to serve in government. Clark was shocked to discover, while still attorney general, that the FBI had compiled a file on him.

Clark engaged in some missteps during his career, and Gronlund neither minimizes nor camouflages them. She devotes a chapter to his involvement with the Japanese internment during World War II as coordinator of the Alien Enemy Control Program, which Gronlund calls her father's "greatest mistake." Gronlund describes her father's role as that of "implementer rather than decision-maker," which seems accurate. She notes that, as attorney general, Clark later supported the Japanese-Americans who lobbied Congress for restitution of property they had lost during the internment. Ultimately, Clark recognized and publicly acknowledged that the internment was "entirely unnecessary."

A Progressive on Race

From the beginning, Clark had the makings of a progressive on race issues. He gave a speech in high school entitled "Modern Slavery," though the topic could hardly have pleased the Dallas crowd; he had a Jewish roommate at the University of Texas, which resulted in his being blackballed by fraternities for a year; and he refused to join the Ku Klux Klan, even though that would definitely have boosted his career as a young lawyer.

The contrasts between Tom Clark and his father, Judge William H. Clark, are eye-opening and show how far the apple can fall from the tree. In 1925, Judge William Clark, once the youngest president of the Texas Bar Association, delivered a courthouse dedication address in which he praised segregation and condemned miscegenation. Later, in *Brown v. Board of Education* (1954), his son Tom voted to abolish segregation in public schools. And, in a decision issued on his last day on the bench, Tom Clark joined the opinion of the Court in *Loving v. Virginia* (1967), holding that anti-miscegenation laws are unconstitutional.

As attorney general, Clark filed the first amicus curiae brief for the United States in a civil rights case. It was a courageous action long remembered by civil rights pioneer Thurgood Marshall, the man who succeeded Clark on the Supreme Court. A memo that Clark wrote in 1950 to his Supreme Court colleagues shows that, although he would not approve "in any manner" the "separate but equal" doctrine of *Plessy v. Ferguson* (1896), he was struggling with how to attack it in cases outside the graduate school context. When *Brown v. Board of Education* was pending before the Court, Clark indicated that he was willing to overturn *Plessy* but argued that it "must be done carefully or it will do more harm than good." Clark objected to the use of the phrase "all deliberate speed" and later said that those words delayed integration for at least 15 years.

On the Supreme Court and Afterward

Clark's nomination to the Supreme Court in 1949 was controversial, as some claimed that he had communist tendencies, while others charged that he was a Truman crony. Nevertheless, Clark was confirmed by a Senate vote of 73-8. Clark's most famous opinion

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for the Court was *Mapp v. Ohio* (1961), which held that the exclusionary rule prohibits states from using illegally obtained evidence in court. He also wrote the Court's opinion in *Abington School District v. Schempp (*1963), which ruled that constitutionally mandated neutrality on religion prohibited Bible reading at the start of every school day.

During his time on the Supreme Court, Clark became a roving ambassador to the legal profession and legal education. He spoke to groups far and wide at a time when that was not the norm for Supreme Court justices. Clark had come a long way from the day when, as a youth, he became so nervous before giving a speech that he fainted.

The foreword to this book, by Gronlund's famous brother Ramsey Clark, offers a fascinating account of how Ramsey came to be appointed attorney general by President Lyndon B. Johnson—an appointment that forced Ramsey's father to retire from the Supreme Court. But "retirement" is actually not an accurate description of Tom Clark's life after he left the Court. From 1967 through 1977, Clark sat as an appellate judge on every federal circuit and even tried cases as a federal trial judge. More important, he devoted his abundant energies to his long-standing interest in improving the mechanisms that undergird the administration of justice. He served as the first director of the Federal Judicial Center, the think tank and training center for improving the federal courts; headed the implementation of the American Bar Association's Standards for Criminal Justice; chaired the newly created Judicial Fellows Program (now the Supreme Court Fellows Program); and assisted the National Judicial College, which he co-founded.

One of Clark's post-Court activities involved chairing an ABA committee on lawyer discipline. The Clark Committee Report, which decried the "scandalous" deficiencies in enforcement of standards set for attorneys and called for immediate action, catalyzed the next four decades of reform in dealing with the professional responsibilities of attorneys. Even today, virtually every law professor who teaches in the field mentions the Clark Report as a pivotal moment in the history of the American legal profession.

It is hard to characterize Clark's judicial record as liberal or conservative. He stood by precedent when it was sound and overruled it when it was not. He affirmed the powers of the government when that was appropriate and limited those powers when there was a serious risk of abuse. The unifying thread in Clark's judicial decisions was not ideology but the honest exercise of independent professional judgment. This is what makes Clark such an intriguing figure today, at a time when judicial independence is frequently attacked by partisan interests.

Supreme Court Justice Tom C. Clark tells a great story—engaging, edifying, and worth studying. It seems likely that the book will open the door for scholars and historians to do further research on Clark. There is an extensive collection of Clark's papers at the University of Texas in Austin and additional resources at the Truman Library in Independence, Mo. **TFL**

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Let's Get Free: A Hip-Hop Theory of Justice

By Paul Butler

The New Press, New York, NY, 2009. 214 pages, $25.95.

Reviewed by Harvey Gee

Let's Get Free: A Hip-Hop Theory of Justice, by Paul Butler, a professor at the George Washington University Law School, intriguingly explores the major ailments of the American criminal justice system. Butler begins by recalling his early days in the U.S. attorney's office in the District of Columbia, where he prosecuted a variety of defendants, from a prostitute to a U.S. senator. He then went to work in the Public Integrity Section of the U.S. Department of Justice, when the most unexpected thing happened to him: he was arrested for simple assault over a dispute about a parking space, based on a false accusation by a neighbor holding a grudge. This was an unlikely occurrence for a graduate of Yale University and Harvard Law School who had been a clerk to a federal judge and an associate at Williams & Connolly. The experience was a turning point for Butler, as it expanded his appreciation of injustice and helped him to see that our criminal justice system has gone awry.

Butler offers some examples of how the system has gone awry:

- In May 2008, the police stopped every vehicle in a high-crime neighborhood in Washington, D.C., and asked each driver if he or she had a "legitimate purpose" for being in the neighborhood. "Those purposes, according to police regulations, include going to church, seeing a doctor, or visiting family. If the police officer decides that you do not have a legitimate purpose, you are ordered to leave the neighborhood. If you refuse, you are arrested for the crime of 'failure to obey a police officer.'"
- A police officer decides to stop a car—any car. To make it legal, he first follows the car for three or four blocks, which is all it takes to catch the driver breaking the law, because "[t]here are so many potential traffic infractions that it is impossible to drive without committing one." A driver may be stopped for waiting too long at a stop sign or for having an air freshener dangling from the rearview mirror. This enables the police to conduct a search for evidence of more serious crimes.
- For the last 30 years, the justice system has locked up more and more people each year, whether the crime rate has gone up or down. The United States has five percent of the world's population and 25 percent of its pris-

oners. In Baltimore, Md., which has a population of 615,000, 115,000 people were arrested in one year.

Butler notes that the prison system is overcrowded and out of control and that most inmates are locked up for nonviolent offenses. He argues that mass incarceration, rather than deterring crime, increases it by adding to the number of unemployed young men and by interfering with the social organization of neighborhoods (parents taking care of their children and neighbors looking out for other neighbors, which translates into safer environments). Butler states that money is leaving the public universities and going directly into prison expenditures.

Butler firmly believes in rehabilitation. Sounding almost like a passionate criminal defense attorney arguing at sentencing that his client should be sent to a rehabilitation program rather than to prison, Butler notes that criminal policy experts recognize the importance of rehabilitation and urges us to pay attention to them when crafting criminal justice policy. As it stands, Butler writes, "Our criminal justice policy is often inefficient, sometimes counterproductive. It is frequently driven by emotion rather than logic."

The subtitle of *Let's Get Free* is *A Hip-Hop Theory of Justice*, and, although Butler relegates his discussion of this theory to a single chapter, the theme runs implicitly throughout the book. Hip-hop is one of the best-selling genres of music and has had an impact on television, movies, fashion, and the visual arts. Butler's theory is actually a collection of observations on the overlap between hip-hop and existing theories of punishment and retribution. He notes that many people associated with hip-hop have been incarcerated or know someone who has, and hip-hop artists do not glorify lawbreakers in their music. Members of minority groups, after all, not only are frequently arrested, but also are often the victim of crimes. But hip-hop music does not view all criminals with disgust. The lyrics of hip-hop music tell of an unfair American justice system that locks up too many people, and of the unintended consequences this has for the entire community, such as disrupting family units and intimate relationships. Hip-hop songs passionately express the problems of the criminal justice system and also eloquently articulate possible solutions. The music also encourages greater political participation. Butler claims, in fact, that the hip-hop "culture provides a blueprint for a [criminal justice] system that would enhance public safety and treat all people with respect."

Let's Get Free offers "seven ways to take back justice":

1. by paying kids to finish high school (a Rand Corporation study found that this approach prevented crime far better than get-tough criminal justice policies);
2. by educating citizens, especially potential jurors, about the social and economic costs of mass incarceration;
3. by reducing the amount of lead consumption, because lead is harmful to the development of the nervous systems of young children ("lead poisoning results in higher aggression and a reduction in impulse control");
4. by not arresting first-time youthful offenders; instead, getting parents and the community involved in the youth's efforts to right his or her wrongs and to get a fresh start;
5. by ending racial profiling;
6. by making the punishment fit the crime; and
7. by releasing 500,000 inmates convicted of nonviolent, victimless crimes.

Let's Get Free, of course, does not address all the problems of our criminal justice system. One issue that Butler misses the opportunity to address is cross-racial eyewitness identification. Although there are difficulties inherent in all eyewitness identifications, they are significantly magnified when a witness identifies a defendant who is of a different race. During the last 30 years, psychologists have compiled empirical evidence that demonstrates a substantially greater rate of error in cross-racial recognition of faces. In recent years, courts have had to decide whether a special jury instruction or expert testimony should be required in cross-racial identification cases.

Let's Get Free should serve as a building block for future scholarship and conversations about racial issues and criminal justice. It should help the dialogue on these subjects get free. **TFL**

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Carving Out the Rule of Law: The History of the United States Attorney's Office in Eastern Michigan, 1815–2008

By Ross Parker

AuthorHouse, Bloomington, IN, 2009. 431 pages, $17.80 (cloth), $12.80 (paper).

Reviewed by Avern Cohn and Kimberly G. Altman

The Judiciary Act of 1789 directed the President to appoint in each federal district "a person learned in the law, to act as an attorney for the United States," whose task was "to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned." In the series of essays that make up his book, *Carving Out the Rule of Law*, Ross Parker, an assistant U.S. attorney in the Eastern District of Michigan for more than 35 years and a skilled amateur historian, tells us how the Judiciary Act's direction has been carried out, first in Michigan as a territory from 1815 to 1835, then in Michigan as a single federal district from 1835 to 1863, and finally in the Eastern District of Michigan up to 2008.

The role of the U.S. attorney in "prosecut[ing] ... delinquents for crimes" has been particularly well described by James Eisenstein of the University of Pennsylvania in his seminal study,

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Counsel for the United States: U.S. Attorneys in the Political and Legal Systems (1978):

> U.S. Attorneys have a unique competence because they typically possess an intimate understanding of their local communities, including the nature of social and economic problems. They also know many influential people, such as criminal justice system personnel, business and labor leaders, political officials, and other well-connected individuals. Furthermore, U.S. Attorneys have access to the impressive resources of the federal government, including federal law enforcement agencies, when addressing local crime problems. As such, only the local U.S. Attorney has a complete picture of all the crime problems each local district faces. U.S. Attorneys are generalists, responsible for the enforcement of the full range of federal criminal statutes.

Carving Out the Rule of Law begins with an in-depth prologue that gives the reader a brief history of the role of the U.S. attorney and the creation of the Department of Justice in 1870. In addition to nicely setting the stage for the discussion ahead, the book shows the evolution of the U.S. attorney's office from its modest inception under George Washington. Prior to the establishment of the Department of Justice, the attorney general represented the interests of the United States and had no contact with local U.S. attorneys. The U.S. attorney's office, however, evolved from having almost complete autonomy until today when the Department of Justice exercises significant supervisory control over it.

Each of the essays in *Carving Out the Rule of Law* is a biographical sketch of the series of men (to date, no woman has been a U.S. attorney in the Eastern District of Michigan) who have held the position of U.S. attorney. The list begins with Solomon Sibley, who served as U.S. attorney for the Territory of Michigan from 1815 to 1824, and ends with Stephen J. Murphy III, who served from 2005 to 2008 and is now a U.S. district judge. All but two of the essays include a portrait or a photograph of the officeholder. The essays discuss U.S. attorneys' important trials, and sometimes the tribulations they faced during their time of service. Of particular note is the prosecution of Mormon leader "King" Strang of Beaver Island under George C. Bates in the 1840s. Also of interest are two prosecutions that occurred during the tenure of John C. Lehr: the prosecution of the only person ever sentenced to death (and executed) in the Eastern District of Michigan, Anthony Chebatoris, in 1937, and the prosecution for treason of Max Stephan in 1942.

Many of the essays include descriptions—in a statistical format—of the civil and criminal caseloads of the U.S. attorney's office as well as other information illuminating the nature of the work of the office at the time under consideration.

In an epilogue, Parker gives his assessment of the balancing of responsibility of authority between the Department of Justice (often called Main Justice) and the 93 local U.S. attorneys' offices spread from Guam and the Mariana Islands in the far Pacific to Puerto Rico and the Virgin Islands in the Caribbean. Parker also explains why many of the assistant U.S. attorneys spend their entire legal careers in this position and looks at the legal careers pursued by assistants who leave the office.

Carving Out the Rule of Law is an important contribution not only to the legal history of Michigan, but also to the legal history of the United States, and particularly the manner in which legal services are provided to the federal government throughout the 50 states. Today there are 45 separate federal court history programs across the country. This effort at documentation began in 1988, when Congress expanded the statutory authority of the Federal Judicial Center, which is the federal courts' think tank that coordinates and encourages programs relating to the history of the judicial branch of the United States government.

Parker's work also stands as one of the few chronicles of the history of a U.S. attorney's office for a particular district. The histories of the U.S attorneys' offices for the Northern District of Texas and the Northern District of Ohio were published in 1989 in honor of their bicentennial observances. In 1987, the U.S. attorney's office for the Southern District of New York published a history of its first 100 years. In 2004, the history of the U.S. attorney's office for the District of Colorado was detailed in *That Justice Shall Be Done*, by John Suthers and Melba Deuprey.

Although the U.S. attorney's office is in the executive branch, it is the home of the federal government where lawyers appear in court on behalf of the government. The office thus lives in a symbiotic relationship with the federal courts, and their histories are intimately related. The history of the federal courts cannot be told without telling the history of the U.S. attorneys' offices and vice versa. In this sense, *Carving Out the Rule of Law* transcends simply the story of the U.S. attorney's office for the Eastern District of Michigan. **TFL**

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