



A SHORT REVIEW OF BAD JUDGES, AND GOOD

Douglas R. Cox

Reviewing

GRAEME WILLIAMS, *A SHORT BOOK OF BAD JUDGES*
(Wildy, Simmonds and Hill Publishing 2013)

THIS IS, INDEED, a very short book about Bad Judges. The Bad Judges are all English judges; they are all dead; much of their misconduct is tame compared to the modern American experience of Bad Judges. So why read it? Three distinct reasons.

First, the book inevitably poses the recurring and important question of what do we mean by a Bad Judge. The author – Graeme Williams, Queen’s Counsel and with judicial experience of his own – provides his personal, appropriately short, attempt at defining what makes a Bad Judge. He quotes from Francis Bacon’s essay “Of Judicature” that “Patience and gravity of hearing is an essential part of justice: and an over-speaking judge is no well-tuned cymbal”; and then identifies three broad categories of Bad Judging: criminal misconduct, misconduct in court, and misconduct in the administrative functions

Douglas R. Cox is a lawyer practicing in Washington, D.C. He has been counsel in many cases overseen by good judges.

that go with being a judge. He argues that “Corruption” in the form of bribery is not something found on the English bench in modern times (although, of course, Francis Bacon was not above a bribe). He notes that a Bad Judge has the knack “of sending all the parties to a piece of litigation, including the winners, away dissatisfied.”

The book focuses on the second type of badness, what might be called lack of judicial temperament – rudeness on the bench, inattention, impatience with lawyers’ presentation of the case, self-aggrandizing conduct. This focus is understandable, both because this type of Bad Judge is much more common than his other two categories, and because it gives rise to the best anecdotes.

For example, Williams criticizes one judge for “discourtesy” on the bench, including groaning, resting his head on his forearms, and repeatedly exclaiming “Oh God!” during counsel’s speech to the jury. Surely bad judicial conduct, likely to be highly prejudicial; and surely very off-putting for counsel.

But here as elsewhere, the misdeeds of Williams’ Bad Judges, compared to public examples of judicial misconduct in the United States, appear to be trivial. Judicial moaning is not as offensive to the dignity of the law and to the fairness of the proceedings as the conduct of the (now deceased) Supreme Court Justice who, during argument, would sometimes rotate his chair so that he was facing away from counsel as a signal of his purposeful inattention.

Some of the Bad Judges Williams describes carried things off with remarkable self-confidence. One judge had been temporarily stayed from hearing cases while his misconduct toward counsel and parties was under review by his judicial superiors; when he was reinstated, he scheduled 150 cases to be heard all on the same day at 9 in the morning, not deigning to appear himself until after lunch. Another judge showed his disagreement with the appellate decision overturning his judgment, by reading the decision aloud in court, with critical commentary on the appellate judges – en route to refusing to enforce the appellate order.

As noted, Williams is confident that Corruption does not occur among English judges in the modern era. In contrast, in the United States, there are unfortunately comparatively recent cases of proven

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criminal conduct – notably including two federal judges who were impeached and removed from the bench for crimes involving in one instance perjury, and the other a bribery scheme. So here again American Bad Judges leave their English peers far behind.

Many American practitioners will have their own sense of what makes a Bad Judge, largely consistent with Williams' second category. Lack of judicial temperament, lack of preparation and lack of capacity perhaps lead the list. Undue delay in handling cases is also a common ground of complaint. It is one thing to lose a case; it is something entirely different to lose a case due to judicial unfairness, laziness or ignorance. It would be difficult, however, for an active American practitioner to write a book about American Bad Judges currently serving on the bench – which explains why many books about Bad Judges are written by lawyers who have retired from the fray, or by professors or pundits who do not practice; and indeed may explain why all of Williams' chosen subjects are dead. No active practitioner wants to criticize the judge who may hear the next case.

In the United States, there are various websites by which the “candid” views of the bar can be collected on a purportedly confidential basis, but many practitioners distrust the assurance of confidentiality and thus never offer negative observations. If a lawyer with personal knowledge of a Bad Judge consults those websites, the lawyer will readily see that the “anonymous” comments are carefully phrased and rarely critical. Those who are most thoroughly informed about Bad Judges are the least likely to publicize their views.

As a result, the American public does not really understand Bad Judging of the kind Williams describes, and as American lawyers experience Bad Judging in practice. Rather, because the American press tends to boil Bad Judging down to a question of politics, of “liberal” versus “conservative” outcomes, the American public is not informed about the more common failings of judicial rudeness and inattention. Williams' book, even with its purely English context, is a corrective to this underreporting.

The second reason to read the book is to consider, not Bad Judges, but Good Judges. It is clear that, in Williams' survey of the English bench, there are many hundreds of judges he would classify as

Good Judges – or at least, as Not Bad Judges. He describes Bad Judges as “laudably scarce” in the modern era. The same is true in the United States. However grotesque the aberrations are, judicial performance is remarkably high across a remarkably broad front. Lawyers can read this book and wonder at the outliers, while taking satisfaction in the overall fairness and success of our Anglo-American judicial system.

The third reason why this short book is worth reading is because Williams includes a strong dose of donnish humor, of the kind that *Green Bag* readers appreciate. He explains how Richard Bethell, a future Lord Chancellor, was retained by his first client, an Oxford college, because the college administrator “recalled Bethell’s felicitous translation of a strophe of Pindar in the viva voce examination for his degree some years earlier.” Williams comments that this is “a striking example of the mysterious reasons for early success at the Bar. What better reason could there be?” In a similar vein, Williams cites one decision by the old convention of abbreviating the reporter’s name, in this case one Edmund F. Moore, for the delight of citing to “Moo.” which he describes as a “pleasantly absurd Law Report reference, which I have waited a professional lifetime to use.”

Williams’ good humor may explain why there is one type of Bad Judge not hinted at in his book – the judge who, for ideological or partisan reasons, is dissatisfied with the constraints of judging and wishes to be a legislator, sociologist or psychologist, forcing cases to come out the “correct” way without regard to the actual requirements of the law or the judicial function. It may be that England has missed out on that great struggle over what it means to be a judge; that the judicial wars are uniquely an American phenomenon; or perhaps these Bad Judges were beyond the scope of the author’s lighthearted approach – subversion of a constitution, even an unwritten one as in England, is no laughing matter.



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*Yours very sincerely
Richard Bethell*

A young Richard Bethell (later the first Baron Westbury), probably not long after his facility with ancient Greek brought him his first important client.
