

TRIBUTE TO JUDGE RICHARD A. POSNER

I am not writing as a scholar of Judge Posner's work. He writes books faster than I can read them. What's more, no matter how much time I might take, some of what he writes would elude my grasp. Look, for example, at these two propositions from *The Economic Structure of Intellectual Property*.

$$\partial W/\partial z = f_N N_z w + f(N)w_z - (E_N N_z + E_z) = 0^1$$

$$N_z(f_N w - E_N) = -f(N)w_z + E_z^2$$

Who can understand them? I can see that they are equations, but beyond that? I checked the footnotes in search of help. The footnotes do give a translation: The first equation says, "Beauty is truth, truth beauty." The second says, "You can skip the rest of the book because that's all you need to know."

The recognition that Dick Posner's omnivorous books were all written by one person—in his spare time, after doing a job most of us find quite challenging—is as startling as it would be if we learned that the Great Pyramid of Gizeh was built by one man—in an afternoon—after playing three hours of basketball. I am not prepared to speak of his vast writings on all subjects, but rather, as an old friend, to give you a personal reminiscence and appreciation, which I ruefully recognize dates from almost as long ago as the Great Pyramid.

I had the good fortune to serve with Dick on the *Harvard Law Review* in 1962. That's forty-two years ago. I was in the class behind his. We were close friends, and I admired him immensely. In addition to his brilliance as a student of law, he had read everything under the sun, and put me onto some wonderful books. I remember especially Richard Hughes's *A High Wind in Jamaica*. It is a book all law students should read. If I had only that to thank him for, it would be a lot. Dick had an infectious child-like laughter and a delicious fascination for the ridiculous. In the midst of a law review edit, he would burst into raucous laughter prompted by some preposterous, but highly sophisticated, fantasy arising from the legal problem. He was always so much fun.

In the world of the Harvard Law School, Dick was an astonishing figure. He was the President of the *Review*. He was first in his class—by far. (In those savage days, each student received an *exact*

1. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 82 (2003).

2. *Id.*

class ranking, from 1 to 525). Dick was not only Number 1, but also rumored to share with Ronald Dworkin the distinction of being the two smartest students to have entered Harvard's halls perhaps since Henry Friendly.

In our open democratic society, success can result from many different forces. It is not always easy to pick out of a student group which will be the ones to achieve it. (I wonder, for example, how many observers of the student scene at Yale in the Viet Nam era would have correctly picked all the future presidents of the United States.) I can assure you that no one at the Harvard Law School in 1962 had the smallest doubt that Dick Posner would be a spectacular success at whatever he chose to do.

When Dick spoke in class, what had been obscure and confusing would suddenly become clear. It was amusing to see an entire classroom of students, many of whom had been dozing, suddenly poised over their notebooks, pens at the alert, ready to write as Dick started to speak. The Harvard Law School faculty in those days had a high opinion of itself. It was amusing to witness a customarily smug professor's unsuccessfully concealed alarm when Dick raised his hand to speak. Why alarm? A professor accustomed to veneration could be quite chagrined to hear the school's most brilliant student say, in Dick's mild, mellifluous way, "I don't see how anyone could reasonably hold that view"—and then to watch the entire class taking careful notes of Dick's methodical demolition of the professor's exegesis.

But I will not dwell on the Taming of the Smug. I would rather talk about the wonderful experience of working with Dick on problems of legal analysis. It was my immense good fortune that Dick assigned himself to be the supervising editor of both of my second-year writing projects. One was a case note involving the First Amendment rights of Jehovah's Witnesses convicted of violating a municipal ordinance prohibiting door-to-door solicitation. The other was a study of what is now called the Dormant Commerce Clause, then known as the "Negative Inference of the Commerce Clause"—that is, the inference, drawn from the Constitution's consignment of commerce to the Congress, that States were implicitly forbidden from imposing burdensome regulations and taxes on commerce.

The law in both areas was a vague, brooding mass of conflicting forces, imprecisely understood, without clear boundaries. Working with Dick toward an understanding of how the doctrines would function was a process of patient perseverance—not unlike scientific research—inspiring and fascinating. The President of the *Re-*

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view would spend endless hours with me, probing dozens of hypotheticals designed to expose every facet that would shed light on the interaction among the various competing principles.

For some judges, the legal method is easy work; it consists of cutting and pasting. A phrase lifted from one judicial opinion is insouciantly transplanted into another. Never mind the change of context; never mind whether the proposition could reasonably have been intended to apply in the new circumstances; never mind the practical consequences of its new deployment. Such superficiality was intolerable to Dick. Words used in a legal ruling could be assessed only in their context; the breadth and meaning of a ruling could not be properly understood without careful reflection on the consequences. A rule of law was not just a collection of words, but an organic force for the achievement of objectives, which, depending on the context, trumped some like forces and was trumped by others. Determining the proper boundaries of a rule required exhaustive study of the complex consequences of the competing interpretations.

It occurred to me as I was preparing these remarks that—although he was not yet using formulas like the ones I showed you and the baby had not yet been named—as a law student in the early 60s, with his clarity of organization, refined perception of consequences, and sensitivity to causal relationships, Dick was already instinctively doing what would later be called Law and Economics. Learning at his feet how to think about law was probably the most powerful and rewarding experience of my education.

For all that, I thank you, Dick. It is a joy to be here to celebrate your vast achievements, as part of this richly deserved tribute paid to you by this great law school. As long as I live, may I never forget, “ $\partial W/\partial z = f_N N_z w + f(N) w_z - (E_N N_z + E_z) = 0^1$.”

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