

TRIBUTE TO JUDGE RICHARD A. POSNER

The encomiastic mode is often in vogue in legal gatherings. It is not my own preference because it almost always ends in self-congratulation as its primary motivation. Even so, I think it is appropriate in every sense on this occasion. Richard Posner is not only our most frequently cited scholar in the legal academy, he is also the most important.

There are many ways of demonstrating the significance of such a multifaceted career, and I will hold to the ones that I know best—Judge Posner’s work in law and literature, in jurisprudence, in legal rhetoric, in his overriding concern with style in argument and writing. Much has been made of how much Richard Posner writes. My own interest turns instead on how well everything that he publishes is written and on the clear integrity of voice that his prose always exhibits. No one else that I know writes faster, better, with such fluidity and concision, or with greater purpose, or with the variety of concerns, and power of perception that this scholar brings to our discipline.

Instead of exploring the many manifestations of these accomplishments in detail, a litany of merit badges, I want to explain how I think that these achievements have been made possible. Honoring a deserving figure is our goal, but some attention to the underlying source of power and eloquence in the writer, teacher, and judge might be a more useful gauge for the rest of us.

One of Judge Posner’s favorite themes in writing, recognizable in many of his works, has to do with the concept of efficiency, but no one, so far as I know, has bothered to understand what this claimed value has meant as a fuel of character and an engine of personal prowess.

Montaigne said it best with seven simple words. “To compose our character is our duty,” he wrote in 1588.¹ These words from “Of Experience”—to compose our character is our duty—sound simple enough, but how many individuals do you know who have been able to use them with a clarifying efficiency that allows “order and tranquility”² to become supreme tools of investigation and analysis?

To compose one’s character means to see oneself in relation to one’s society with detached clarity—a distanced view of such com-

1. MICHEL DE MONTAIGNE, *Of Experience*, in THE COMPLETE ESSAYS OF MONTAIGNE 850 (Donald Frame trans., Stanford University Press, 1958).

2. *Id.* at 851.

elling wholeness that the possessor, like Montaigne, can take on the world around him without anxiety and with a certitude of accuracy that dismisses all fear of reproach or rebuke.

I have seen Richard Posner at work and play in many guises. Over dinner, as a teacher, before an overwhelmingly hostile audience, on the bench, in personal conversation, and during the heated debate of a reading group. I feel quite confident that our heaped praise upon him this afternoon will mostly amuse him in an analytical way. The quiet demeanor and good humor of the man never changes. He not only knows who he is at every moment, he knows without ever losing the most intense interest and sympathy in explaining what is taking place around him.

It would be a mistake to characterize this intense interest as simple curiosity. In Judge Posner, it takes the form, rather, of what I will call dispassionate affection for the things of this world. The affection is “dispassionate” because it quite readily skewers the many foibles it sees, some quite close to home. It remains affection, nonetheless, in that it always engages in possibilities. Its chief virtue lies in its ability to see well beyond itself in its desire to fashion a better answer to the problems before it.

What all of this means in practical terms for the accomplished writer I will try to state in brief. A successful figure rarely challenges the framework that has made him successful, and this limitation applies with peculiar force to the conservative impulses of the legal profession. We love to congratulate ourselves. Richard Posner offers the grand exception to that general rule in his flexibility as a writer of many themes and his courage in challenging the shibboleths of the law.

Whether he is insisting on a new way of addressing old problems (in the field of law and economics), *or* criticizing the overreach of a new movement (critical legal studies), *or* clarifying the limited utility of another movement (law and literature), *or* addressing the crisis of overload in the federal courts, *or* taking the academy to task for its ethereal irrelevance on philosophical grounds, Judge Posner always sees farther than his adversaries—most of whom pick at his language while shying away from the vision that the language contains.

I could take any one of the published arguments just mentioned to prove the point. I could even take one of the many judicial opinions. (Among his many skills, Judge Posner knows Greek and avidly reads the classics. These pursuits have made him a classical rhetorician, and I often use one of his opinions from the Seventh Circuit to demonstrate the ingredients and strategies of legal

eloquence in a class that I teach on that subject.) Instead, I want to take a now relatively obscure piece in the oeuvre, “The Decline of Law as an Autonomous Discipline” from 1987.³

The editors of *The Harvard Law Review* have asked him to contribute to a centennial celebration of the journal’s existence, and Judge Posner begins by reminding them “[t]hat the *Review* is 100 years old has no significance. . . . The reason the *Harvard Law Review* is 100 years old is that it was started 100 years ago; the law reviews of all the major law schools are still being published, and if they had been started 100 years ago they too would be 100 years old.”⁴ Patiently, the writer explains “[e]ven the fact that I live in a house that is eighty-two years old has greater significance.”⁵ He then offers a droll prophecy: “What is true, however, and an apt subject for anniversary reflections, is that the *Harvard Law Review*, for reasons outside the control of the able students who run it, may have reached the peak of its influence—may, indeed, have started its journey down the mountain.”⁶

There follows a breathtaking sweep of all fields of law and of the pedagogical basis of a legal education across the century—a proof from on high of the lost autonomy of the law and the need for greater interdisciplinarity to solve legal problems. Of course, the growing interdisciplinarity of our field is a commonplace today, but no one that I can name demonstrates the truth of that development with quite the skill, the range, the penetration, the apt detail, and the quiet confidence that Judge Posner brings to the subject. The essay is more than graceful. It is profound in its prescriptive warning against over-reliance on legal doctrine and formalistic legal discourse to solve problems.

It is this ability to stand outside of a profession in which he is nonetheless intimately engaged on several levels that makes Richard Posner such a valuable resource for all of us. One who composes his character develops a natural guard against self-deception. Richard Posner pushes constantly against blind spots and the phony affirmations in our professional understanding. He asks not for celebration but for self-scrutiny of what we do and, therefore, a better understanding of what we should be doing. He is the example of

3. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

4. *Id.* at 761.

5. *Id.*

6. *Id.*

what Montaigne claimed for us at our best: “a spirited mind never stops within itself.”⁷

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7. MONTAIGNE, *supra* note 1, at 818.