

TRIBUTE TO JUDGE RICHARD A. POSNER

If you have ever visited the University of Chicago Law School, you know that faculty offices are distributed around the library and that students find places to study in the stacks just outside the offices. So picture a third-year law student studying for class. It is spring, 1984, and computers have not yet become common or widely available. Somebody in one of the nearby offices is clacking away on a typewriter. Well, clacking isn't exactly the right word. Instead, the student hears something that sounds more like "brrrrrrrr . . . brrrrring, brrrrrrrr . . . brrrrring, brrrrrr . . . brrrrring": like someone just hitting keys, as fast as humanly possible, pausing every minute or so to put in a new sheet of paper.

Curious, and maybe just a little bit annoyed, the student creeps to the door to see who is making this irritating racket. There, hunched over a typewriter, is Richard Posner. Having gone to the bench just before my first year in law school, Judge Posner had not been around much, though of course I knew who he was. He returned to part-time teaching only after his first few years as a judge. Hence my belief that I had found a quiet corner in which to study undisturbed, a corner whose peace and quiet was now destroyed by the return of this impossibly fast typist and almost comically prolific writer.

Richard Posner's intellectual gifts are famous and much discussed any time anyone writes about him. But one needs to see it up close really to appreciate what this all means. A former colleague of mine from the University of Chicago once confessed that, when he was a kid, he had wondered what the dumb kids thought and how their brains worked. He decided he had figured it out one day when he had a horrible head cold, the kind that makes it hard to think straight or quickly. This worked, he said, and made him feel better—until the day he realized that Richard Posner was probably sitting around wondering how *his* brain worked and concluding that he (Posner) understood it after catching a similar brain-dulling head cold.

My own first, close encounter with Judge Posner's intellectual capacities came a few years later, when I was a young, untenured member of the faculty at the University of Chicago. Dick was chair of a subcommittee of the Federal Courts Study Committee, and I was his reporter. Together, we drafted a long report recommending various procedural reforms. Working this out and getting others to agree required occasional meetings with the whole com-

mittee in Washington, D.C. We were on our way home from one of these meetings and had just boarded a plane when I gave Dick the draft of my first big article: a 120-page piece on choice-of-law theory. He read it while the remaining passengers boarded the flight and we taxied out to the runway. It was like watching Dick type, as he flipped pages nearly without pause. He finished the entire manuscript as we took off, and I thought to myself, "That's impossible. I *wrote* the damn thing and I can't read it that fast!" We discussed it for practically the entire two-hour flight home to Chicago. To my amazement, not only had Dick read it: he had in fact followed the arguments, including the footnotes, and absorbed them well enough to find a number of mistakes. The helpfulness of his comments was sufficient, though just barely, to compensate for the devastating feelings of inferiority thus evoked.

Anyone who knows Dick has similar stories to tell. There is, fortunately (for the rest of us, I mean), a compensating weakness. For the same providence that granted Dick Posner his uncanny abilities to read, absorb, and analyze saw fit to even things out by giving him a blessedly short attention span. The result is a body of work that spans a stupendously broad range of topics—law, economics, literature, philosophy and jurisprudence, democratic theory, sexuality, and more—but that still leaves room for the rest of us to have a say. Do not forget, moreover, that this impressive body was produced by Dick in his part-time job. In his day job, as a judge, he has generated an equally impressive body of judicial opinions addressing virtually every question of contemporary significance in law. And we also should not forget the seemingly endless stream of essays, reviews, commentaries, and epistolary correspondence that flows from his pen. No one in law since Oliver Wendell Holmes has produced such a rich body of writing to explore.

The reference to Holmes is not accidental. For when histories are written of law in the twentieth century, there seems little doubt that it will be Holmes who stands out as the outstanding figure of the first half of the century, and equally little doubt that it will be Richard Posner who occupies this position for the century's second half.

Nor do the similarities end there. Like Holmes, Dick Posner is a renaissance intellect whose interests and knowledge encompass almost every topic of contemporary importance. Like Holmes, Posner has shared this knowledge with the world in multiple capacities: as teacher, judge, academic author, public commentator, and private correspondent. Like Holmes, much of the force of Posner's ideas lies in the power of his pen: his ability to write with grace and

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eloquence, avoiding the clodden prose produced by most of us and presenting ideas with an elegance that makes them accessible and persuasive. Like Holmes, Posner is at his best in the essay format: in short, punchy pieces that make their point and end, rather than in extended analyses of a problem. (And as anyone who has attempted to write in both forms can attest, this is a compliment of the highest order.)

But the chief similarity between Posner and Holmes is deeper and rests at the level of their basic philosophical commitments. For like Holmes, Posner is committed to a philosophy and practice that is, at its heart, *pragmatic*: that views conceptual abstractions as misleading, often dangerous, and invariably empty masks for something else. And like Holmes, Posner has made his central mission, as a judge and as a public intellectual, to force decision making onto grounds that deal with the practical and the real, with actual consequences and facts.

Yet there is, I believe, a difference between the two scholars. For in the final analysis, Holmes was a more thoroughgoing skeptic than Posner. At least in the public positions he took, Holmes's skepticism—unlike Posner's—went beyond philosophy and history and included science itself. It was this thoroughgoing skepticism, in fact, that made Holmes a hero for populists and democrats. In private, Holmes was often contemptuous of policies he upheld as a judge, but in his public actions, Holmes' skepticism ran across the board. Richard Posner, in contrast, believes in science, especially in social science. He believes we can adduce facts to resolve our difficulties and solve our problems, facts that free us from any need for conceptualism and make it unnecessary to argue about abstract values.

For myself, I doubt that this is right. I think one needs either to adopt the more skeptical Holmesian position (though Dick might want to argue about my reading of Holmes) or the more philosophically grounded position of Holmes' erstwhile friend and rival William James. But these disputes, and others like them, are why Posner will be remembered as the most significant figure in law of our time. For he, more than anyone else, has provided the intellectual hub around which everyone else's ideas have been developed and organized.

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