Judge Posner through Dissenting Eyes

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The Honorable Richard D. Cudahy*

What follows may be an unusual attempt at a dedicatory essay. But these are memories that come quickly to mind in connection with a colleague whom I esteem and respect in every way and to whom this issue of THE JOURNAL OF CONTEMPORARY HEALTH LAW AND POLICY is dedicated.

On December 4, 1981, Richard Posner was named to the Seventh Circuit - one of the first of seven appointments by President Ronald Reagan to our court. As the first, last, and only appointee of President Carter to the same court, I awaited this event with bated breath - and some trepidation. At that point in history, there had been enough oratory about out-of-control federal judges taking the affairs of the country into their own hands to make one wonder what was in store with the new administration. And the arrival of Dick Posner did not disappoint. The impact of his intellect and personality was immediate and profound. He brought Law and Economics from the high perch that he had won for it in the academy to a central role in Seventh Circuit jurisprudence, and in federal law generally; and he sought to give out-of-control judges a better sense of their proper place. It would be rewriting history to claim that I helped him blaze most of the many new trails to which he pointed. In fact, I lapsed into dissent a good part of the time. But even that role helped me to appreciate the power of his arguments and the style that led to their acceptance.

The mention of dissent leads me to recall several of the many cases where Judge Posner left his unmistakable mark in the early days of his service on our court. In Merritt v. Faulkner,¹ the panel dealt with the claim of an indigent prisoner that he had become functionally blind as a

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* Senior Circuit Judge, U.S. Court of Appeals for the Seventh Circuit. Judge Cudahy received his B.S. degree from the United States Military Academy in 1948 and his J.D. from Yale Law School in 1955. He is a member of the special division of the Court of Appeals for the District of Columbia Circuit to appoint independent counsels.

¹. 697 F.2d 761 (7th Cir. 1983).
result of an operation performed under prison auspices. It was, therefore, a species of health care case. The main issue was whether the plaintiff was entitled to appointment of counsel to pursue his claim. The late Luther Swygert wrote a majority opinion granting appointment of counsel. Judge Posner dissented on this issue declaring, "I said [in a dissent in another case] that a prisoner who has a good damages suit should be able to hire a competent lawyer and that by making the prisoner go this route we subject the probable merit of his case to the test of the market."² As the third member of the panel, I filed a special concurrence taking issue with Judge Posner’s market theory and relying heavily on the plaintiff’s alleged blindness. Among other things, I said, “Not entirely facetiously, it occurs to me that the barriers to entry into the prison litigation market might be very high.”³

In 1987, Merritt’s lawsuit popped up again, this time before a panel of Judges Cummings, Cudahy and Posner on the issue whether a settlement approved by the district court should be sustained.⁴ At this time, it appeared that Merritt’s claim of functional blindness was exaggerated and, in any event, the condition was not traceable to the operation. In a special concurrence, Dick vigorously defended his economic proposal previously rejected and suggested that it was the judges who were blind and not the prisoner. He asserted, “To speak with some understatement, prison inmates often lie . . .” and, by bringing large numbers of civil rights suits,

they waste the time of prison officials, federal judges, and, in this case, appointed counsel, who labored diligently in a barren vineyard. . . . Mindful that attorneys’ time is not a free good that we can shift about as we please without harming other people who need legal services, we should let the market direct the allocation of those services in cases where there is an effective market in them.⁵

I responded perhaps shrilly that,

Since the financial net worth of most prisoners is zero and their economic value while incarcerated perhaps less than zero, it is not surprising that efforts to take them seriously as human beings are sometimes scorned. . . . Somehow I doubt that we will ever find lawyers knocking on jail cell doors for business—even

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². *Id.* at 769.
³. *Id.* at 768-69.
⁴. See Merritt v. Faulkner, 823 F.2d 1150 (7th Cir. 1987).
⁵. *Id.* at 1157-58.
with the promise of a contingent fee.\textsuperscript{6} Thus did the issue evolve from one of fairness to a question of resource allocation. It is significant that Judge Posner’s concerns later found their way into court practice with the requirement that a request for appointment of counsel by an indigent must be preceded by an effort to hire one in the market.\textsuperscript{7}

In \textit{Roland Machinery Co. v. Dresser Indus.},\textsuperscript{8} Judge Posner extended his jurisprudence boldly on several fronts and set foot on the rocky terrain of district court discretion. This case concerned a preliminary injunction in an antitrust case involving cancellation of an exclusive distributor agreement and exclusion of a competitor from the market. In reversing the district court’s grant of the injunction, Judge Posner first espoused a narrowed view of antitrust liability by emphasizing that, “The exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself.”\textsuperscript{9} Then, he advocated a “sliding scale” approach to the factors required for a preliminary injunction so that, as likelihood of success on the merits increased, there could be a corresponding decrease in the requisite balance of harms. Likewise, as the showing of harm grew stronger, less would be required of the merits demonstration. After ascribing to the district court an erroneous finding about the plaintiff’s loss if the injunction were denied and an error of law in failing to consider the effect on competition of the injunction provisions, Judge Posner was able, by applying the “sliding scale” formula, to find an abuse of discretion. This case is an early instance of his strong inclination to decide matters on appeal that some others would leave to the trial courts. Judge Swygert (appointed by President Kennedy), in dissent, thought that the abuse of discretion standard of review had been left by the wayside. In the course of a long dissenting opinion, he said, “Apparently the majority believes that if the district court reaches a conclusion on the evidence with which the reviewing court disagrees, the district court’s determination regarding the balance of harms and the overall propriety of granting or denying injunctive relief is entitled to no deference whatsoever.”\textsuperscript{10}

Later, in \textit{American Hospital Supply Corp. v. Hospital Products Ltd.},\textsuperscript{11} speaking for another panel that included Judge Swygert, Judge Posner

\begin{itemize}
\item \textsuperscript{6} \textit{Id.} at 1154.
\item \textsuperscript{7} \textit{See} \textit{Jackson v. County of McLean}, 953 F.2d 1070 (7th Cir. 1992).
\item \textsuperscript{8} 749 F.2d 380 (7th Cir. 1984).
\item \textsuperscript{9} \textit{Id.} at 394.
\item \textsuperscript{10} \textit{Id.} at 396.
\item \textsuperscript{11} 780 F.2d 589 (7th Cir. 1986).
\end{itemize}
reaffirmed Roland Machinery but reduced its preliminary injunction test to a mathematical formula: grant the preliminary injunction if $P \times H_P > (1-P) \times H_{P'}$. This algebraic jurisprudence not surprisingly stirred up a hornet's nest among those less congenial with mathematics. Judge Swygert, in dissent, commented that, "Like a Homeric Siren the majority's formula offers a seductive but deceptive security." Judge Flaum (who fifteen years later would succeed Judge Posner as Chief Judge) was moved (in Lawson Products, Inc. v. Avnet Inc.) to pour water on the troubled waters in an opinion interpreting Roland Machinery and Lawson Products, which summed up matters by asserting, "To remove any possible confusion, we conclude that these opinions are in harmony with the traditionally flexible and discretionary responsibilities of the district judge, sitting as chancellor in equity..." But, even with this rose-colored gloss, Roland Machinery remains a landmark.

In another case of the early 1980s, Judge Posner struck out in several directions to protect defendants against what seemed to him to be abusive (and frivolous) litigation, again over dissents including my own. Marrese v. American Academy of Orthopedic Surgeons was an antitrust case (involving health care in a way), consuming innumerable pages of the Federal Reporter until it was finally put out of its misery by the Supreme Court on grounds provided by an intervening case not considered by the Seventh Circuit and not of interest here. The underlying facts involved the Academy's rejection of the plaintiffs - Drs. Marrese and Treister - for membership in this professional organization, to which the vast majority of orthopedic surgeons belonged. The two doctors received no hearing or statement of reasons for their rejection and had originally brought in state court an unsuccessful common law action containing no antitrust allegations. Failing there, they entered federal court under the Sherman Act, requested discovery of the Academy's records of the turn-down of the plaintiffs and of other applicants, won the trial judge's approval and his citation of the Academy for criminal contempt (with a $10,000 fine) when it refused to turn over the records. The Academy protested that the requirement would have a chilling effect on the members' candid
evaluation of applicants for membership. In two successive opinions, Judge Posner reversed the finding of criminal contempt and the underlying discovery order and held that the complaint should have been dismissed on grounds of res judicata based on the earlier state case. In his first opinion, he also analyzed the merits of the doctors' antitrust claim in order to put limitations on discovery.\textsuperscript{18}

Retired Supreme Court Justice Potter Stewart, who was sitting on the panel by designation, dissented from each of the two panel opinions, saying that the trial court's discovery orders did not abuse its broad discretion, that res judicata to bar an exclusively federal cause of action could not be based on a state action and that it was premature to reach the merits to limit discovery. But Dick Posner stuck to his guns in the \textit{en banc} rehearing that followed.\textsuperscript{19} His res judicata theory there was essentially that the plaintiffs could have brought a claim under the Illinois Antitrust Act (which was similar, though not identical, to the Sherman Act) when they brought their suit in state court; but they failed to do so, and this should bar the federal action.\textsuperscript{20} After struggling valiantly with the essential problem (he called it "technical") that a Sherman Act claim could not have been brought in state court, Judge Posner concluded philosophically that, "although the application of res judicata often produces a harsh result, the result here is less harsh than in many other cases."\textsuperscript{21}

On the discovery issue, Judge Posner explored the voluntary associational interests that this professional association had in its membership files. The district court had issued a protective order to cover the contents of the files, but Judge Posner nevertheless considered the discovery order intrusive.\textsuperscript{22} He pointed out that "Since an association would not be genuinely voluntary if the members were not allowed to consider applications for new members in confidence, the involuntary disclosure of deliberations on membership applications cannot but undermine the voluntary character of an association and therefore harm worthy interests."\textsuperscript{23} And he discussed ways in which discovery could have been made less intrusive as well as improper motives for seeking discovery, such as to force settlement.\textsuperscript{24}

Dick wrote for a plurality and there were several partial dissents as well

\textsuperscript{18} Id. at 1093-95.
\textsuperscript{19} See 726 F.2d 1150 (7th Cir. 1984).
\textsuperscript{20} See id. at 1152.
\textsuperscript{21} See id. at 1156.
\textsuperscript{22} See id. at 1160.
\textsuperscript{23} Id.
\textsuperscript{24} See id.
as two full dissents by Judge Harlington Wood and me. Judge Wood discussed discovery and I, res judicata. Judge Wood examined the course of the discovery requests in the trial court and noted that the panel opinions “created the impression that this court was trying the case on its antitrust merits before the case had much of a chance to get started in the trial court. That prejudgment still hangs heavy over Judge Posner’s latest opinion.” Judge Wood added, “Judge Posner’s opinion, by bestowing on the Academy some new kind of privilege in the nature of a first amendment interest, seems to agree with the Academy that its files are almost sacrosanct.”

I covered the doctrinal incongruities of the plurality position on res judicata. I pointed out how speculative the plurality opinion became in asking, for example, whether or not the plaintiffs “really” needed or “really” sought damages. I said that, “The plurality may have concluded in advance of trial (and even of discovery) that the defendant is a wholly innocent vehicle of professional enlightenment, while the plaintiffs are vengeful malcontents seeking to harass their betters.” I summed things up by calling the plurality effort, “judicial activism in the service of judicial abdication.” This last is perhaps more than a rhetorical flourish since, at least as I saw the case, *Marrese* was an aggressive effort to shape doctrine to cut off the flow of serial litigation thought to be abusive or frivolous. The case is an interesting exercise in suppressing “unjustified” litigation, which many thought to be a high priority in the overloaded federal courts. But I can’t imagine its taking the shape it did without Dick Posner’s bold leadership.

An earlier and simpler case, *Menora v. Illinois High School Ass’n.*, perhaps shows Judge Posner at his pragmatic best in trying to promote a solution efficiently satisfactory to both sides. But I, almost as usual, dissented. Possibly, this reflected my own impressions of the Association that frequently it could be arbitrary and unreasonable and this might have been the district court’s sense as well. The case involved the rights of Orthodox Jewish high school boys to wear yarmulkes attached to their hair with bobby pins while playing interscholastic basketball, in the face of an Association rule limiting headwear in these circumstances to a headband no wider than two inches. The plaintiffs’ claim was based on the requirement of their religion that their heads be covered at all times, except when they were (a) unconscious, (b) immersed in water or (c) in imminent danger of loss of life. Enforcement of the rule against Orthodox

25. *Id.* at 1169.
26. *Id.* at 1183.
27. *Id.* at 1175.
28. 683 F.2d 1030 (7th Cir. 1982).
Jews ostensibly burdened their right to free exercise of their religion by banning them from basketball if they insisted on playing with yarmulkes attached with bobby pins. Against this, the Association argued a safety interest: if the yarmulke or the pins fell off during a game, they could be slipped on or tripped over. The district court had found as a fact that yarmulkes attached with bobby pins did not present a significant safety hazard, and, therefore, the Association rule was a unconstitutional violation of the free exercise clause of the First Amendment.29

Judge Posner, in an intricate analysis, pointed out that affixing a yarmulke with bobby pins was surely not the only way of meeting the religious requirement while playing basketball. In assigning the initiative to the plaintiffs, Judge Posner said in comments having an economic ring, “If the plaintiffs can totally allay the state’s safety concern at zero, or practically zero, cost to them, they must do so. Otherwise the state’s concern, even if relatively slight, will be a compelling interest in relation to the (non) burden on the plaintiffs' religious freedom.”30 Should the Association then prove adamant about departing from its two-inch-only-headband rule, the panel authorized the district court to move against it. But the district court’s order was vacated and remanded, no doubt reflecting the basic view that school athletic officials, and not federal judges, were the proper arbiters of basketball safety.

In dissenting, I accepted the district court’s well-supported finding that yarmulkes attached with bobby pins were safe. I was also at pains to point out that the Association, as well as the National Federation of which it was a member, had inflexibly clung to the rule as drafted. And I noted that, “the majority seems to have overlooked [authoritative] principles when it placed the burden of accommodation on the plaintiffs rather than on IHSA. This may well be the more efficient solution but it does not in my view represent the prevailing law.”31 I thought that the majority’s solution, though ingenious and perhaps practical, did not speak forcefully or directly to the denial of a constitutional right.

Finally, in The Original Great American Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd.,32 we return to the familiar terrain of preliminary injunctions granted in an exercise of discretion by the district court, as well as legal analysis fortified by an estimate of the economic consequences. After the franchisor, Cookie Company, terminated the Sigels’ (operators of the franchisee, River Valley) franchise, the Sigels

29. See id. at 1032.
30. Id. at 1035.
31. Id. at 1038.
32. 970 F.2d 273 (7th Cir. 1992).
continued to sell cookies under the Cookie Company's trademark, using
bootleg batter bought elsewhere after their supply of Cookie Company
batter ran out. The discretionary injunction was granted largely because
of a finding that the balance of harms weighed heavily in favor of the
Sigels, who claimed that an opposite result would put them out of business
and put in jeopardy their home, two houses they owned and a retirement
fund, pledged as collateral for a loan. On the other side of the coin were
numerous alleged violations of the franchise agreement, whose terms the
district court had thought commercially unreasonable, and other claims
and counterclaims on the merits. Judge Posner's panel opinion
distinguished *Lippo v. Mobil Oil Corp.*, a case decided in favor of a
franchisee, which I had written but from which an outraged Judge Posner
emphatically dissented. Rejecting a view that *Lippo* mandated a tilt
toward franchisees, Judge Posner delivered his hallmark rebuke to judicial
liberality that,

> The more difficult it is to cancel a franchise, the higher the price
the franchisors will charge for franchises. So in the end the
franchisees will pay for judicial liberality and everyone will pay
for the loss of legal certainty that ensues when legal principles
are bent however futilely to redistributive ends.  

In dissent, on the economic point, I responded perhaps cattily,

> Illinois did not enact [the Illinois Franchise Disclosure Act]
because it thought franchisors were being abused by their
franchisees, as the majority seems to believe. Apparently, the
legislators had not read enough scholarly musings to realize that
any efforts to protect the weak against the strong would,
through the exhilarating alchemy of economic theory, increase
rather than diminish the burden upon the powerless.

I have sketched these cases to provide a glance at Dick Posner's
jurisprudence as seen by dissenting eyes. Such a perspective, whatever
else may be said about it, provides a close-up view of the immense talent
and powerful personality of the jurist to whose clever solutions one might
sometimes object.

I hope that I do not have to recall here all of Dick Posner's
accomplishments as a teacher, thinker, jurist, author and leader. As a
teacher, he made unique contributions to our understanding of the law
and its relation to many other fields of study - notably economics. In his
published work, he has explored so many diverse fields - from sex and

33. 776 F.2d 706 (7th Cir.1985)
34. 970 F.2d at 282.
35. Id. at 283.
marriage to aging and from literature to impeachment - that the question most frequently asked about him is, "How does he do it?" Besides all these things, he has been a leader both in guiding the course of the law in the Seventh Circuit and as its administrative leader, and he has made inestimable contributions to the federal system by serving on the Judicial Conference of the United States and by participating in several of its important studies. He was named as the mediator in one of the most important cases to appear in the federal courts in recent years. His judicial work is the most widely cited and quoted of any judge in the United States. (And it has occurred to me that, since his opinions are so widely circulated and admired, dissents from them may receive more exposure than they deserve). I know that I have certainly not noted all of his accomplishments but just to attempt to remember them is a task far beyond me.

I might mention finally one other important attribute of Judge Posner: he enjoys a warm and supportive family life with his wife, Charlene, and his two sons, Ken and Eric. Eric even serves on the University of Chicago Law faculty with his father. I have the impression that Dick grew up in an equally warm and close family, something I could sense when he has talked of taking care of his aging father in recent years. Much has been written about the left-wing political views of his parents in contrast to his own conservatism, but I don't think that this should be thought remarkable. More important, perhaps, was growing up in a warm and supportive environment, that may have shaped the powerful and productive personality he has shown the world. Then too, a happy childhood may help induce a view that things in the world are all right as they are.
SELECTED HONORS, POSITIONS AND
BIBLIOGRAPHY OF
RICHARD A. POSNER

DEGREES

Yale University
A.B., 1959, summa cum laude; Phi Beta Kappa
(elected junior year); Scholar of the House; Saybrook Fellows’ Prize.

Harvard University
LL.B., 1962, magna cum laude; Fay Diploma; Sears and Beale Prizes; President, Harvard Law Review.

Syracuse University
LL.D. (Hon.), 1986.

Duquesne University
LL.D. (Hon.), 1987.

Georgetown University
LL.D. (Hon.), 1993.

University of Ghent

Yale University
LL.D. (Hon.), 1996.

University of Pennsylvania
LL.D. (Hon.), 1997

Brooklyn Law School
J.D. (Hon.), 2000

EMPLOYMENT


1967-1968: General Counsel, President’s Task Force on Communications Policy.

1968-1969: Associate Professor of Law, Stanford University.

1969-1978: Professor of Law, University of Chicago.

1978-1981: Lee and Brena Freeman Professor of Law, University of Chicago.


Richard A. Posner was born on January 11, 1939, in New York City, and grew up in New York and its suburbs. He graduated from Yale College in 1959, summa cum laude, having been elected to Phi Beta Kappa in his junior year; he was an English major and a Scholar of the House. He graduated first in his class from Harvard Law School in 1962, magna cum laude, and was President of the Harvard Law Review. He worked for several years in Washington during the Kennedy and Johnson Adminis-
trations—as law clerk to Justice William J. Brennan, Jr., as an assistant to Commissioner Philip Elman of the Federal Trade Commission, as an assistant to the Solicitor General of the U.S., Thurgood Marshall, and as general counsel of President Johnson's Task Force on Communications Policy.

Posner entered law teaching in 1968 at Stanford as an associate professor, and became professor of law at the University of Chicago Law School in 1969, where he remained (later as Lee and Brena Freeman Professor of Law) until his appointment to the Seventh Circuit in 1981. During this period Posner wrote a number of books (including Antitrust Law: An Economic Perspective, Economic Analysis of Law—now in its fifth edition—and The Economics of Justice) and many articles (a number of these in collaboration with the economist William Landes), mainly exploring the application of economics to a variety of legal subjects, including antitrust, public utility and common carrier regulation, torts, contracts, and procedure. He called for major reforms in antitrust policy, proposed and sought to test the theory that the common law is best explained as if the judges were trying to promote economic efficiency, urged wealth maximization as a goal of legal and social policy, contributed to the economic theory of regulation and legislation, and extended the economic analysis of law into fields new to such analysis, such as family law, primitive law, racial discrimination, jurisprudence, and privacy. He founded the Journal of Legal Studies, primarily to encourage economic analysis of law, and was a research associate of the National Bureau of Economic Research. He also engaged in private consulting and was from 1977 to 1981 the first president of Lexecon Inc., a firm made up of lawyers and economists that provides economic and legal research and support in antitrust, securities, and other litigation.

Posner became a Judge of the U.S. Court of Appeals for the Seventh Circuit in December 1981, and Chief Judge in September 1993. (The chief judge of a federal court of appeals has a nonrenewable seven-year term.) He continues to teach part time at the University of Chicago Law School, where he is Senior Lecturer, and to write academic articles and books. He has written 30 books and more than 300 articles and book reviews. His academic work since his becoming a judge has included studies in the economics of criminal law, labor law, and intellectual property; in jurisprudence, law and literature, and the interpretation of constitutional and statutory texts; and in the economics of sexuality and of old age. His re-

Posner received honorary degrees of doctor of laws from Syracuse University in 1986, from Duquesne University in 1987, from Georgetown University in 1993, from Yale in 1996, and from the University of Pennsylvania in 1997; and he received the degree of Doctor Honoris Causa from the University of Ghent in 1995. In 1994 he received the Thomas Jefferson Memorial Foundation Award in Law from the University of Virginia. In 1998 he was awarded the Marshall-Wythe Medallion by the College of William and Mary. He is a member of the American Law Institute, the Mont Pèlerin Society, and the Century Association, a fellow of the American Academy of Arts and Sciences, an Honorary Bencher of the Inner Temple, a corresponding fellow of the British Academy, an honorary fellow of the College of Labor and Employment Lawyers, a member of the editorial board of the European Journal of Law and Economics, and a Consultant to the Library of America, as well as a member of the American Economic Association and the American Law and Economics Association (of which he was President in 1995–1996). He was the honorary President of the Bentham Club of University College, London, for 1998. With Orley Ashenfelter, he edits the American Law and Economics Review, the journal of the American Law and Economics Association.

Posner is married to the former Charlene Horn and they have two sons, Kenneth and Eric, and three grandchildren.
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