

Introduction

Renaissance Judge

Richard A. Posner is the most respected judge in America, with the possible exception of a few current Supreme Court Justices.⁵ He is also an intellectual polymath who is celebrated as an author of scores of fascinating books and articles on law, public policy, and current affairs.⁶ Posner has served as a U.S. circuit judge on the Court of Appeals for the Seventh Circuit for over a quarter century. During his first twenty-five years on the federal appellate bench, he has written over 2,250 published judicial opinions.⁷ Indeed, *he* (not his law clerks, as is the norm among other judges) writes *his own* opinions: sparkling essays of human pathos, legal brain twisters, and sweet pragmatic reason.⁸ Although many of Posner's judicial opinions are included in student casebooks,⁹ “[i]t is high time”¹⁰ that Judge Posner's most scintillating quotations from his judicial opinions are brought together in a single volume.

The Rationale and Structure of This Anthology

The word *anthology* is derived from the Greek, meaning “collection of flowers.”¹¹ This book, then, is a collection of alluring excerpts that I have carefully picked from the lush garden of Judge Posner's 2,250 published judicial opinions during the period of 1981–2006. These judicial opinions are infused with concise, witty statements about law and life that are penetrating, satiric, aphoristic, or humorous.

This anthology does not compile Posner's complete opinions; nor is it a comprehensive compendium. I have winnowed, cut, and eliminated a great deal of text from the full corpus of his opinions, with an editorial eye on the most arresting insights contained in the opinions. I have created fifty subject matter categories, arranged in alphabetical order, from Abortion to Zoning and Planning. The subject headings were chosen based on practical

ease of reference; to avoid confusion, subheadings are avoided. Within each of the subject matter topics, quotations from Judge Posner's opinions are arranged in chronological order by the dates the opinions were issued. On occasion, different quotations from a single Posnerian judicial opinion are included under different subject headings. Legal citations are provided for each selected quote; however, complete citation history (that is, whether the cases were subject to further appeals, affirmances, or reversals) is omitted. When multiple quotations are included under a single subject heading, an "*id.*" citation is used. The text of each quotation is presented as faithfully as possible to the original. Wording, punctuation, emphasis, and capitalization are largely preserved. However, Posner's citations to other cases, statutes, books, articles, and websites are included only when essential.

The quotation selections in this anthology are intended to succinctly relay Posner's thoughts, ideas, paraphrases of law, summaries of useful knowledge, and the like. However, as Posner is wont to say, *context* is important. Therefore, the prudent reader will look up the complete opinion in which a particular quotation is found to clarify Judge Posner's frame of reference. The reader too is encouraged to compare and contrast Judge Posner's judicial opinions with the judicial opinions of other noteworthy appellate judges. Judge Posner's intellect and judicial reasoning powers, for example, parallel those of the late Judge Learned Hand. One is reminded of Judge Posner in meditating on the comment of Second Circuit Judge Henry J. Friendly describing Learned Hand: "[Hand's] stature as a judge stemmed not so much from the few great cases that inevitably came to him over the years . . . as from the great way in which he dealt with a multitude of little cases, covering almost every subject in the legal lexicon."¹² And, "Hand's capacity to turn remarks upon mundane subjects into sparkling jewels"¹³ is a rare judicial quality that Judge Posner shares. Similarly, Walter Lippmann's comment concerning the need for more judges like Hand "who know the law and know life and know human motives"¹⁴ applies equally to Posner.¹⁵

Refreshingly and fortunately, Posner's judicial opinions are written in an informal style that is pitched to the everyday language of an intelligent layperson. Footnotes are omitted from Posner's opinions; his writing is pellucid and powerful. What Posner wrote about Holmes applies to Posner himself: "All educated Americans and especially American lawyers in all branches of this alarmingly powerful profession have much to learn from [him]";¹⁶ Posner's judicial opinions have a timeless quality that speak to our own time and, I believe, will speak to future Americans for generations to come. Readers will find nuggets of sagacity in every subject matter category of this anthology. Indeed, forthright and poignant observations are found under the Aliens, Attorney and Client, Criminal Law, and Prisons headings.

So too will one find incisively practical commentary under the Damages, Evidence, Federal Civil Procedure, Judges, Jury, Statutes and Interpretation of Language, and Torts groupings. Unusually bracing and cogent viewpoints are found under two unique headings of this book: American Society and Posnerian Wisdom.

A Short Biography of Richard A. Posner

Born on January 11, 1939, Richard A. Posner grew up in New York City and its suburbs. He was a superb student—elected to Phi Beta Kappa as a college junior, Posner graduated *summa cum laude* from Yale in 1959 and then first in his class from Harvard Law School in 1962, where he served as president of the *Harvard Law Review*. After Harvard Law School, Posner worked for several years in Washington, D.C., during the Kennedy and Johnson administrations in a stint of stellar legal jobs: law clerk to Justice William J. Brennan Jr., assistant to Federal Trade Commissioner Philip Elman, assistant to Solicitor General Thurgood Marshall, and general counsel of President Johnson's Task Force on Communications Policy. In 1968 Posner entered law teaching at Stanford and, in 1969, became professor of law at the University of Chicago Law School. He was appointed by President Reagan in 1981 as a U.S. circuit judge for the Seventh Circuit (having federal appellate jurisdiction over Illinois, Indiana, and Wisconsin).

Posner is generally viewed as the founder of Law and Economics as a general approach to legal problem solving. His hundreds of scholarly articles and numerous books have explored how economics applies to a variety of legal subjects, including antitrust, common carrier regulation, contracts, family law, legislation, procedure and torts. Posner's big ideas—advanced in his scholarly writings and his judicial opinions—have included economic efficiency as a goal of the common law, wealth maximization as a purpose of law and social policy, and pragmatism as an overarching approach to making and applying American law. In recent years, Judge Posner has expanded his nonjudicial writings to include book-length examinations of such current topics as the impeachment of President Clinton; the election of 2000; plagiarism in literature, academia, art, film, and music; the cultural and legal aspects of human sexual relations; national security; and the role of public intellectuals. His academic writings have been translated into twelve languages. He has received nine honorary degrees and garnered numerous awards. Posner is a member of a variety of prestigious societies such as the American Law Institute, the Mont Pèlerin Society, the Century Association, the American Academy of Arts and Sciences, and the American Economics Association. In December 2004, Posner started a joint blog with Nobel

Prize-winning economist Gary Becker. His interests are encyclopedic; his energy is indefatigable; his mind is a national treasure.¹⁷

Judge Posner's Opinion Style and Substance

"Judge Posner does not know how to write dull opinions," writes Harvard Law School Dean Elena Kagan. "In part, this is a matter of style."¹⁸ Thus, "Posner's aphorisms, his sardonic humor, his colorful voice, make all his opinions interesting to read."¹⁹ But Judge Posner's judicial opinions also have a "bite":

He is constantly asking why the problems before him have arisen—what features of the world are responsible for the parties' conflicts and their inability to resolve them. He is always exploring why legal doctrines are the way they are—behind the boilerplate statements and string citations provided by the litigants, what purposes and goals the law is seeking to serve. And Judge Posner is an explainer. Oh, he may mention some precedent; invoke some authority here or there, but far more often and much more extensively . . . he discusses policies, details, consequences, and offers reasons, whether sounding in (among others) efficiency or morality or rule-of-law values. And so, there is much to say about Judge Posner's opinions—much to say because he says so much in them.²⁰

Kagan's comments join the large body of scholarly literature written about Judge Posner's judicial opinions.²¹ The focus in this anthology is more specific than in other cited commentary. This book provides the reader with inimitable observations about American life from a uniquely wise commentator.²² First and foremost, Posner is an extremely well-known and influential judge, an entertaining writer, and a public intellectual who has articulated a series of elegantly written, provocative views on a variety of subjects.

Second, Posner is so prolific that keeping up with his writings is difficult for all but a few persons; a one-volume collection of scintillating passages from his judicial opinions provides a handy reference for judges, lawyers, law students, and intelligent laypersons.

A third reason to read the judicial observations included in this compendium is to experience in Posner's mind what the nineteenth-century historian Jacob Burckhardt once wrote about Napoleon: "the combination of an unparalleled magical will power with an enormous all-mobile intelligence. . . ."²³ Posner possesses an encyclopedic knowledge (not only of law,

but of literature, history, economics, science, and current events). Readers get drawn into his informal and colloquial yet razor-sharp examinations of tangled human dramas. And it is hard to disagree with the force and grace of Posner's logic and wordplay.

A fourth purpose for this anthology is to peek at some of his dissenting performances, which take his colleagues to task for shopworn, inefficient, or sloppy legal reasoning.²⁴ Judge Posner is skillful in voicing dissenting arguments that sometimes result in reversal by the Supreme Court.²⁵ Moreover, he is adept in employing multiple dissenting voices²⁶ in his opinions such as *Posner the Taskmaster*,²⁷ *Posner the Cassandra*,²⁸ *Posner the Humanitarian*,²⁹ and *Posner the Epistemologist*.³⁰ Posner's dissenting opinions are at their best when he appeals to "practical reason," the phrase Posner used to describe the judicial opinion style of his hero, Justice Oliver Wendell Holmes Jr.: "Practical reason" is a quality "[b]etween the extremes of logical persuasion and emotive persuasion."³¹ Posnerian dissenting opinions typically advance one overarching theme of law or justice, for example, "An Appeal to Simple Justice"³² in the prisoner's rights case, *Hamilton v. O'Leary*³³; "A Plea for 'Biting the Bullet'"³⁴ in a diversity tort case involving the death of a child who was playing with a butane lighter in *Todd v. Société BIC, S.A.*,³⁵ "A Call for Purposeful Statutory Construction"³⁶ in interpreting a federal banking statute in *Resolution Trust Corp. v. Chapman*,³⁷ and "A Protest Against Human Indignity"³⁸ in a case involving the monitoring of naked male prisoners by female guards in *Johnson v. Phelan*.³⁹

Fifth, another reason to sample Judge Posner's judicial utterances is to reflect on his personality and how it impacts his opinion style. Posner likes the variety of cases that he encounters on the bench, the exchanges with lawyers during oral arguments, the power of his position to impact the lives and fortunes of litigants, the influence he has to articulate the law, and his relations with his law clerks (what he describes as having additional children without the responsibilities of parenthood).⁴⁰ Posner dislikes the run of dull cases that his court—along with every intermediate appellate court—encounters.⁴¹ Judge Posner appreciates the spur that his cases have provided to his intellectual writings—particularly regarding sexual mores, labor law, evidence, and judicial behavior.⁴² Conversely, he values the way that his academic work in antitrust law, economic regulation, evidence, and torts has provided useful lenses for viewing his judicial cases.⁴³

This jurist—some might be tempted to call him *Hercules*—is a paragon of judicial virtue who establishes a standard of excellence as an American appellate judge. Judge Posner's work habits are remarkably disciplined and focused. In typical fashion, when his panel of three judges hears oral arguments at the Dirksen Center in Chicago, six cases per day are processed; each of the panel judges is assigned two cases per day. *That evening* when he

goes home, Posner writes rough drafts on his computer for the two cases he has been assigned, sending his law clerks the drafts. Brackets—with requests for case precedent, statutory references, or additional research—mark off the work to be done by his law clerks.⁴⁴ Unlike another one of his judicial heroes, Judge Learned Hand of the New York-based U.S. Court of Appeals for the Second Circuit, Posner often himself prepares the preconference memorandum for a case or writes bench memoranda.⁴⁵ After receiving comments from his law clerks concerning a draft opinion, Judge Posner writes another draft (and rarely a third draft) before circulating the opinion to his fellow judges on his panel.⁴⁶

Unfortunately, Posner is rarely assisted by the appellate briefs, prepared by lawyers in the cases he hears (exceptions are briefs in cases with high financial stakes and briefs filed by United States Attorneys' offices).⁴⁷ From Judge Posner's perspective most lawyers don't do a good job in seeing a case from a judge's standpoint; Posner thinks that lawyers tend to be mesmerized by precedent (putting too much emphasis on analogies).⁴⁸ Lawyers would be more effective, in his view, if they focused on practical consequences and on providing reasons why the law should be interpreted one way or the other.⁴⁹ Judge Posner pays particular attention to the questions his judicial colleagues ask counsel at oral argument and what other judges say in the postargument conference; Posner acknowledges that his colleagues on the federal appellate bench often make important points during oral argument or in judicial conference that had not occurred to him.⁵⁰

To the extent that he has favorite categories of cases, Judge Posner thinks the following types of disputes are “fun”: admiralty, antitrust, Indian, intellectual property, railroad cases, and torts.⁵¹ Indeed, reading Posner's opinions on these topics gives one the sensation of watching a kid in a candy store. He strongly believes in the analytical power of the common law (those bedrock doctrines and principles in fundamental subjects like contracts, property, and torts) to resolve most legal problems.⁵² Moreover, in reflecting on his first quarter century on the federal appellate bench, Judge Posner makes a surprising admission: that the vast federal regulatory system of congressional statutes supplemented by agency regulations is not as crazy as it looks at first blush—that the legislative/administrative structure of federal law makes some sense.⁵³ Another personal disclosure: Posner appreciates the prudential safety lessons he's learned in products liability cases like a coffee carafe that fell apart and scalded the owner⁵⁴ and a defective jar of peanuts that cut a consumer.⁵⁵

A sixth rationale for reading Judge Posner's judicial observations is to see how and *why* in a few selected cases he files separate concurring opinions.⁵⁶ As I have suggested elsewhere, there are “ten ways to look at the concurring style of Judge Richard A. Posner”:

(1) as a congressional adviser, (2) as an advocate of Law and Economics, (3) as an institutional critic, (4) as a nitpicker, (5) as a weaver of hypotheticals, (6) as a bold cutter of Gordian knots, (7) as an interpreter of statutes, (8) as a critic of judicial standards of review, (9) as a frank commentator on law, and (10) as a show-off during en banc appellate proceedings.⁵⁷

Indeed, it is illuminating to study both Posnerian *true concurring opinions* (where he supports the majority's outcome but differs in the proper rationale for the outcome)⁵⁸ and Posnerian *two cents concurrences* (where he agrees with both the outcome and the rationale of the majority but desires to add his thoughts on the matter).⁵⁹ Judge Posner is a master in using concurrences to “strategically inspir[e] consubstantiality with other judges”⁶⁰ by deploying “concurrences as rhetorical tropes to unite subscribing judges of the majority with his own spin on the law”; Posner “delicately exploit[s] ambiguity to unite divergent tendencies on the appellate court by persuasively condensing competing values in a case at a sufficiently abstract level.”⁶¹ Like his dissenting opinions,⁶² Posner's concurring opinions employ “performative language which seeks to develop alternative visions of the meaning and potential of law.”⁶³

A seventh reason to read Posner's judicial reflections is for the pure enjoyment of witnessing a great American judge endeavor to simplify what he has called the “semantic jungle” that tends to overgrow the law with multiple verbal distinctions.⁶⁴

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me current on new societal and technological developments, which helped me complete this book.

Appendix

Books by Richard A. Posner

UNCOMMON SENSE: THE BECKER-POSNER BLOG (University of Chicago Press 2009).

A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (Harvard University Press 2009).

LAW AND LITERATURE (3d ed., 2009).

HOW JUDGES THINK (Harvard University Press 2008).

ECONOMIC ANALYSIS OF LAW (7th ed., Aspen 2007).

COUNTERING TERRORISM (Hoover Institution and Rowman & Littlefield 2007).

THE LITTLE BOOK OF PLAGIARISM (Pantheon Press 2007).

NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (Oxford University Press 2006).

UNCERTAIN SHIELD: THE U.S. INTELLIGENCE SYSTEM IN THE THROES OF REFORM (Hoover Institution and Rowman & Littlefield 2006).

REMAKING DOMESTIC INTELLIGENCE (Hoover Institution 2005).

PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 (Hoover Institution and Rowman & Littlefield 2006).

CATASTROPHE: RISK AND RESPONSE (Oxford University Press 2004).

PUBLIC INTELLECTUALS: A STUDY OF DECLINE (paperback ed., Harvard University Press 2003) (new preface and epilogue).

THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (Harvard University Press 2003).

LAW, PRAGMATISM, AND DEMOCRACY (Harvard University Press 2003).

ECONOMIC ANALYSIS OF LAW (6th ed., Aspen 2003).

ECONOMIC FOUNDATIONS OF PRIVATE LAW (Richard A. Posner & Francesco Parisi eds., Edward Elgar Publishing 2002).

BREAKING THE DEADLOCK: THE 2000 ELECTION AND THE COURTS (Princeton University Press 2001).

ANTITRUST LAW (2d ed., University of Chicago Press 2001).

PUBLIC INTELLECTUALS: A STUDY OF DECLINE: A CRITICAL ANALYSIS (Harvard University Press 2001).

THE ECONOMIC STRUCTURE OF THE LAW: THE COLLECTED ECONOMIC ESSAYS OF RICHARD A. POSNER (Francesco Parisi ed., Edward Elgar Publishing 2001).

FRONTIERS OF LEGAL THEORY (Harvard University Press 2001).

- AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON (Harvard University Press 1999).
- THE PROBLEMATICS OF MORAL AND LEGAL THEORY (Harvard University Press 1999).
- ECONOMIC ANALYSIS OF LAW (5th ed., Aspen 1998).
- LAW AND ECONOMICS (Richard A. Posner & Francesco Parisi eds., Edward Elgar Publishing 1998).
- ESSAYS OF RICHARD A. POSNER ON ECONOMIC ANALYSIS OF LAW (Francesco Parisi ed., Edward Elgar Publishing 1997).
- LAW AND LITERATURE (enlarged & rev. ed., Harvard University Press 1998).
- LAW AND LEGAL THEORY IN ENGLAND AND AMERICA (Clarendon Press/Oxford University Press 1996).
- THE FEDERAL COURTS: CHALLENGE AND REFORM (2d ed., Harvard University Press 1996).
- A GUIDE TO AMERICA'S SEX LAWS (University of Chicago Press 1996) (with Katharine Silbaugh).
- AGING AND OLD AGE (University of Chicago Press 1995).
- OVERCOMING LAW (Harvard University 1995).
- PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE (Harvard University Press 1993) (with Tomas J. Philipson).
- ECONOMIC ANALYSIS OF LAW (4th ed., Little, Brown 1992).
- SEX AND REASON (Harvard University Press 1992).
- THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. (University of Chicago Press 1992).
- CARDOZO: A STUDY IN REPUTATION (University of Chicago Press 1990).
- THE PROBLEMS OF JURISPRUDENCE (Harvard University Press 1990).
- LAW AND LITERATURE: A MISUNDERSTOOD RELATION (Harvard University Press 1988).
- THE ECONOMIC STRUCTURE OF TORT LAW (Harvard University Press 1987) (with William M. Landes).
- ECONOMIC ANALYSIS OF LAW (3d ed., Little, Brown 1986).
- THE FEDERAL COURTS: CRISIS AND REFORM (Harvard University Press 1985).
- TORT LAW: CASES AND ECONOMIC ANALYSIS (Little, Brown 1982).
- THE ECONOMICS OF JUSTICE (Harvard University Press 1981).
- ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION (Little, Brown 1981) (with Kenneth E. Scott).
- ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS (2d ed., West 1980 & Supp. 1984–85) (with Frank H. Easterbrook).

THE ECONOMICS OF CONTRACT LAW (Little, Brown 1978) (with Anthony T. Kronman).

ECONOMIC ANALYSIS OF LAW (2d ed., Little, Brown 1977).

THE WORKLOAD OF THE SUPREME COURT (American Bar Foundation 1976) (with Gerhard Casper).

ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (University of Chicago Press 1976).

ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS (West 1974).

ECONOMIC ANALYSIS OF LAW (Little, Brown 1973).