

# Foreword

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Richard Posner is the most prolific federal judge and academic in the history of American law.<sup>1</sup> He is also among the most influential. Posner authored dozens of books and hundreds of articles before his retirement from the bench in 2017. He signed more than 3,300 judicial opinions.<sup>2</sup> Those works are among the most cited of any judge.<sup>3</sup> They show a constant and wide-ranging influence on the law. In the academy, the “differential in terms of total influence on the casebooks between Posner and almost all [ ] other judges is staggering.”<sup>4</sup>

Those facts together mean that this is just the first of many symposia that will reflect on Posner’s career as a judge and

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<sup>1</sup> See Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J Legal Stud 409, 424 (2000) (calculating that Judge Posner is, by far, the most cited legal scholar, cited nearly twice as much as the second most cited scholar). See also Lincoln Caplan, *Rhetoric and Law: The Double Life of Richard Posner, America’s Most Contentious Legal Reformer* (Harvard Magazine, Jan–Feb 2016), archived at <http://perma.cc/PED3-8GYU> (“[Judge Posner] has been among the country’s most influential judges in shaping other court decisions, measured by the number of times other judges have cited his judicial opinions.”).

<sup>2</sup> See David Schaper, *Federal Judge Richard Posner, a Leading Legal Voice, Retiring from Bench* (NPR, Sept 1, 2017), archived at <http://perma.cc/TU23-QPTX>.

<sup>3</sup> See, for example, Stephen J. Choi and G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S Cal L Rev 23, 50–51 (2004) (finding Posner to be the most cited federal judge, and cited more than four standard deviations above the mean, for the period 1998–2000); Christopher C. McCurdy and Ryan P. Thompson, *The Power of Posner: A Study of Prestige and Influence in the Federal Judiciary*, 48 Idaho L Rev 49, 56 (2011) (finding exceptionally high citation and invocation rates starting immediately after Posner joined the bench); William Domnarski, *The Correspondence of Henry Friendly and Richard A. Posner 1982–86*, 51 Am J Legal Hist 395, 395 n 2 (2011) (noting that Friendly and Posner were cited by “name by the U.S. Supreme Court, the U.S. Courts of Appeals, and the U.S. Districts Court more often by far than any other circuit court judges”); Fred R. Shapiro, 29 J Legal Stud at 424–26 (cited in note 1). But see Robert Anderson IV, *Distinguishing Judges: An Empirical Ranking of Judicial Quality in the United States Courts of Appeals*, 76 Mo L Rev 315, 338–52 (2011) (ranking Posner lower than do Choi and Gulati using a methodology that orders judges by the coefficient of their negative and positive citations).

<sup>4</sup> Mitu Gulati and Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 Iowa L Rev 1141, 1155 (2002) (noting that “Posner has more than ten times the number of opinions in casebooks than almost 90% of the judges” the authors studied).

scholar. But as the authors in this volume have known and worked with Posner directly (ten former clerks and two University of Chicago colleagues), there is much to be learned from the impressions they leave here—not only about Posner but perhaps as well about the character of our time.

Judge Posner came to the bench after an already extraordinary academic career. His work in the academy was foundational. Posner sketched big pictures, leaving generations after him to connect the dots. His casebook, *Economic Analysis of Law*,<sup>5</sup> now in its ninth edition,<sup>6</sup> is among the most widely read law books of our time. It reordered the way scholars (and then lawyers) came to think about critical areas of the law. And it imposed a certain discipline on anyone trying to make sense of how the law should evolve.

As the authors in this Symposium see it, that academic career had an important effect on Posner the judge, especially early on. There may be specific areas where his founding of the law-and-economics movement drove specific doctrinal results<sup>7</sup>—though I remember him admonishing his other clerks and me that he was not appointed to impose a theory of economics on the law—but the more significant effect comes simply from a discipline of pragmatic reason. Rules should make sense. The enterprise of the academic is to understand how or whether rules make sense. Posner felt entitled to carry that discipline to the bench. Throughout his career, he drove the law to make sense in pragmatic or consequential terms—at least when there was no “ukase”<sup>8</sup> that directed differently.

*How* the law was to be so driven is a critical question. Posner was not a lazy pragmatist, deciding an answer independently of doctrine. (Indeed, I recall more than once his reversing an initial vote in a case because “the opinion would not write.”) Instead, doctrine provided the framework from which Posner built, or to which Posner built. Thus, Douglas Baird sees first principles guiding Posner’s development of promissory estoppel in contract

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<sup>5</sup> Richard A. Posner, *Economic Analysis of Law* (Little, Brown 1973).

<sup>6</sup> Richard A. Posner, *Economic Analysis of Law* (Aspen 9th ed 2014).

<sup>7</sup> Scott Hemphill describes one of Posner’s first antitrust cases as a direct application of the insights that Posner had developed as an antitrust scholar. See C. Scott Hemphill, *Posner on Vertical Restraints*, 86 U Chi L Rev 1057, 1062 (2019).

<sup>8</sup> See Richard A. Posner, *The Federal Judiciary: Strengths and Weaknesses* 80 (Harvard 2017). A ukase is a “proclamation by a Russian emperor or government having the force of law.” Merriam-Webster, archived at <http://perma.cc/5GAJ-CJR2>.

law, as “the inner logic of the common law rules”<sup>9</sup> began an inquiry that was then rendered subtle and specific by the specifics of the facts. The reverse is true in tort law, as Saul Levmore writes: the strategy was again to “use the case as an opportunity to interpret inherited law as efficiency enhancing and then to make modest changes consistent with this efficiency-minded approach.”<sup>10</sup> Levmore argues that Posner’s “immediate influence [as a judge] might be described as incremental rather than monumental, but it is bolstered by the fact that he advanced a law-and-economics perspective in a manner that eliminated conceptual competitors.”<sup>11</sup> That is a similar conclusion to the one drawn by Rachel Sachs, who finds little effect in property law from Posner the judge but significant effects from Posner the academic.<sup>12</sup> In each of these cases, these two perspectives work together, enhancing the work of the judge while making more significant the work of the academic.

This is big thinking, though in a very specific sense. No doubt, there are Dworkin-like judges in America, aiming to make everything make sense according to some deep theory of morality or justice.<sup>13</sup> We just don’t know who they are because that enterprise, within the American legal tradition, cannot succeed. It is not within our DNA. It might exist elsewhere—Israel’s Aharon Barak, professor and former justice of the Israeli Supreme Court, may be the world’s most successful example.<sup>14</sup> But within the American legal practice, grand thinking is just not productive.

Yet modest, or maybe pragmatic, big thinking is. (Kathryn Judge calls it “humble pragmatis[m].”<sup>15</sup>) The pragmatist does not demand that it all fit together. He does not even insist that this corner now under review fits at all. Instead, the pragmatist imposes a basic demand of reason, as he insists that the law justify

<sup>9</sup> Douglas G. Baird, *Unlikely Resurrection: Richard Posner, Promissory Estoppel, and The Death of Contract*, 86 U Chi L Rev 1037, 1051, 1055 (2019).

<sup>10</sup> Saul Levmore, *Richard Posner, the Decline of the Common Law, and the Negligence Principle*, 86 U Chi L Rev 1137, 1149 (2019).

<sup>11</sup> *Id.* at 1138.

<sup>12</sup> Rachel E. Sachs, *Judge Posner’s Reconstruction of Property Theory*, 86 U Chi L Rev 1201, 1204–05 (2019).

<sup>13</sup> See Tom Lininger, *On Dworkin and Borkin*, 105 Mich L Rev 1315, 1317–19 (2007) (explaining Ronald Dworkin’s legal philosophy and noting Dworkin’s criticisms of many judiciary luminaries, including Posner).

<sup>14</sup> See generally Ariel L. Bendor and Zeev Segal, *The Judicial Discretion of Justice Aharon Barak*, 47 Tulsa L Rev 465 (2011).

<sup>15</sup> Kathryn Judge, *Judges and Judgment: In Praise of Instigators*, 86 U Chi L Rev 1077, 1080 (2019).

itself. That justification is grounded in “consequences over doctrine.”<sup>16</sup> Thus, mandamus doctrine gets “ben[t],” Dan Klerman writes, to permit a thicker review of certification decisions in class action litigation;<sup>17</sup> Article III constraints are relaxed, Eugene Kontorovich argues, to enable more aggressive judicial review;<sup>18</sup> and multifactor balancing tests get replaced, Yair Listokin insists, with tests focused more directly on the substance of the results.<sup>19</sup> Even when the authors conclude that the judge was ultimately incorrect, the error was motivated by a desire to make the law make more practical sense. That is Listokin’s conclusion about Posner’s innovation within tax law.<sup>20</sup> It is Jennifer Nou’s conclusion about his effort to police the boundaries for administrative law judges’ defense of decisional independence.<sup>21</sup>

This more basic constraint of reason over doctrine, over time at least, may teach how little in the law makes grand sense. Posner’s career certainly evinces that learning. He began with a strong assumption about the inherent efficiency of the common law. That view evolved. Klerman describes a “late decadent” stage in the arc of Posner’s work.<sup>22</sup> But “decadent” is likely precisely the wrong word: Posner’s opinions over time simplify the analysis to rely less on devices and pretended doctrine and more on the informed judgment of experience, guided by the intricacies of the facts in the cases decided. Many lamented this trend, but the lament is better directed at the emptiness of law. To Posner, “[t]he cardinal sin of most judges and justices . . . is their disingenuous allegiance to a formal conception of law.”<sup>23</sup> The key word in that sentence is “disingenuous.” There was nothing Posner hated more than that flavor of fake.

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<sup>16</sup> Id at 1090, quoting Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 Cal L Rev 519, 539 (2012).

<sup>17</sup> Daniel Klerman, *Posner and Class Actions*, 86 U Chi L Rev 1097, 1103 (2019).

<sup>18</sup> Eugene Kontorovich, *Posner’s Pragmatic Justiciability Jurisprudence: The Triumph of Possibility over Probability*, 86 U Chi L Rev 1117, 1130–31 (2019).

<sup>19</sup> Yair Listokin, *Posner on Tax: The Independent Investor Test*, 86 U Chi L Rev 1157, 1162–63 (2019).

<sup>20</sup> Id at 1170.

<sup>21</sup> Jennifer Nou, *Dismissing Decisional Independence Suits*, 86 U Chi L Rev 1187, 1199–1200 (2019).

<sup>22</sup> Klerman, 86 U Chi L Rev at 1099 & n 13 (cited in note 17).

<sup>23</sup> *The Judicial Philosophy of Richard Posner* (The Economist, Sept 9, 2017), archived at <http://perma.cc/YPC7-RYZ4>.

Indeed, maybe surprisingly (until one remembers, as Baird reminds us, that Posner was not trained as an economist but instead studied literature<sup>24</sup>), “the facts” turned out to be the most important theory for this founder of the law-and-economics movement. All of us clerks were astonished, in the best possible way, with the interest and care with which Posner came to know the cases he would decide. Cases were morality plays; Posner was the judicial chorus. And as Tim Wu writes, Posner displayed a palpable desire “to improve the law and prevent its misuse.”<sup>25</sup> It was just one of his superhuman capabilities that allowed him, practically always, to be the one most informed about the facts he was adjudicating.

This was in part because Posner did his own work. Unlike most federal judges, Posner wrote his own opinions. Clerks were critics. But to write a story requires real understanding. That was easier for Posner than for many—he wrote and read faster than anyone I’ve known. But easier does not mean easy.

He also had a hunger for work. Kathryn Judge describes a fight Posner never needed to pick, triggered by a matured understanding of the failures of the market as they applied to fiduciary law and mutual funds.<sup>26</sup> Judge Frank Easterbrook had written an opinion more skeptical of the judges than of the market. Posner, who would complete two books reflecting on the market’s collapse in the 2008 financial crisis, was not as convinced of the rationality of that market. And thus he was open to a rule that would allow the law to challenge the market or, more specifically, as Judge puts it, one that would reject the assumption that “markets are far better than judges.”<sup>27</sup> That standard, Posner argued, was more consistent with the existing legal rule and more consistent with reality.

The Supreme Court was the less-than-inspiring adult who stepped onto the field to end the judicial quarrel. The Court’s opinion celebrated not reason but the lobotomization of federal courts. The questions that had divided Easterbrook and Posner, the Court suggested, were too difficult for the judges. They were

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<sup>24</sup> Baird, 86 U Chi L Rev 1055–56 (cited in note 9).

<sup>25</sup> Tim Wu, *On Posner on Copyright*, 86 U Chi L Rev 1217, 1219 (2019).

<sup>26</sup> Judge, 86 U Chi L Rev at 1081–84 (cited in note 15).

<sup>27</sup> *Id.* at 1088.

for Congress. The Court thus backed away from Easterbrook's innovation and Posner's clarified standard. The manner of judge as tinkerer was rejected. Judge as "robot" was affirmed.<sup>28</sup>

The manner of judge as tinkerer works well (or safely) only in a judge with a certain character. Posner was not a populist. He didn't feign that all were equal in capability or insight. Yet he consistently pushed ego out of his chambers. His clerks were to call him by his first name. They were to criticize his opinions openly and forcefully—and not just while they were clerks. One summer, after I had become a law professor, I spent a month in Budapest teaching law. These were the days before email, so to send comments on a draft book Posner was completing, I had to use the fax. We had an increasingly heated exchange over a number of days, and finally, one evening, I sent a letter I regretted. It was too critical, and unfairly so. I immediately sent an apology. I had "gone too far," I told him. The next morning, I received his answer. I could never "go too far," Posner wrote. "I am surrounded by sycophants," he lamented. The last thing he needed was for me, or anyone, to pull punches or, as Judge puts it, "to spend time with otherwise intelligent people rendered mute by his glow."<sup>29</sup> This was a self-awareness of what it would take to be the kind of judge that he wanted to be. To self-consciously relax (what he regarded as) the pretense of legal constraint required simultaneously boosting a practice of professional constraint. Posner as a scholar studied that practice in the correspondence of judges such as Cardozo and Holmes.<sup>30</sup> He lived it as a judge in the exchange with clerks and colleagues. So long as he was convinced that you were disinterested—a condition that the lawyers in the cases would not satisfy—he was eager to hear criticism and, in the ordinary case, engage it. That criticism had an effect—even, as Hemphill writes, against the earlier positions taken by Posner the academic.<sup>31</sup>

This practice mattered to the law. For example, Posner grabbed the field of intellectual property and, as Tim Wu and

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<sup>28</sup> Id at 1092.

<sup>29</sup> Id at 1085.

<sup>30</sup> See Richard A. Posner, *Cardozo: A Study in Reputation* 31–32 (Chicago 1990). See also generally Richard A. Posner, ed, *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.* xiii–xiv (Chicago 1992).

<sup>31</sup> As Hemphill writes, although one of Posner's first antitrust opinions affirmed an argument he had advanced as an academic, one of his last antitrust opinions rejected an argument he had made as a scholar. Hemphill, 86 U Chi L Rev at 1062, 1073 (cited in note 7).

Jonathan Masur describe, changed its development. In part that change was substantive: as Wu argues, Posner evolved the law of characters and fair use in copyright,<sup>32</sup> and in patent law, as Masur describes, “he laid out a comprehensive economic theory of the circumstances under which a patent holder’s actions will or will not constitute violations of antitrust law.”<sup>33</sup>

But more than specifics, Posner changed the course of the debate within the field of intellectual property. Masur notes a profound effect on patent law once “Posner argued, more explicitly than any other federal judge ever had, that the courts had gone too far in expanding the powers of patent owners.”<sup>34</sup> Posner was the one who brought “criticism of the patent system writ large [ ] from the academy to the judiciary,” Masur writes, leading it across “the law’s version of the blood-brain barrier.”<sup>35</sup> Once Posner “began to describe the ills of the patent system, the tide seemed to turn decisively against the advocates of ever-stronger patents.”<sup>36</sup> This had, as Masur concludes, “as much of an impact on patent law as judges who [had] focused on that field throughout their entire careers.”<sup>37</sup>

There was a similar effect within copyright law. As the internet put pressure on old ways of profiting from creativity, the courts were initially quite skeptical of dot-com innovations. Cases like *UMG Recordings, Inc v MP3.com, Inc*,<sup>38</sup> were extraordinary in their punitive and unthinking embrace of the old against the new. But when Posner penned an essay questioning this extremism, it was as if a boil had been lanced.<sup>39</sup> The courts have become the most important source of sensible evolution in the doctrine of copyright as applied to digital technologies. Posner didn’t cause that evolution, yet his writing made it respectable.

These were fields that had become stuck either through a stacked judiciary (patents) or a fundamental shift in technology (copyright). Posner’s effect here was thus quite visible.

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<sup>32</sup> See generally Wu, 86 U Chi L Rev at 1223–39 (cited in note 25).

<sup>33</sup> Jonathan S. Masur, *Posner’s Unlikely Patent Intervention*, 86 U Chi L Rev 1171, 1176 (2019).

<sup>34</sup> *Id.* at 1183.

<sup>35</sup> *Id.* at 1185.

<sup>36</sup> *Id.*

<sup>37</sup> Masur, 86 U Chi L Rev at 1172 (cited in note 33).

<sup>38</sup> 92 F Supp 2d 349 (SDNY 2000).

<sup>39</sup> See generally William F. Patry and Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 Cal L Rev 1639 (2004).

But not just here. The essays in this Symposium span a wide range of Judge Posner's judicial work. Three focus on the common law—contract,<sup>40</sup> tort,<sup>41</sup> and property law.<sup>42</sup> Four on putatively statutory fields—copyright,<sup>43</sup> patents,<sup>44</sup> tax,<sup>45</sup> and antitrust.<sup>46</sup> Two touch roughly constitutional norms, as they consider the limits of federal policing of the administrative state<sup>47</sup> and judicial policing of its own jurisdiction.<sup>48</sup> One considers directly the work of courts, and the doctrines that might add to the efficacy of courts doing justice.<sup>49</sup> And one hides a strong view about the character of this judge under an essay putatively about a fight over fiduciary obligations with mutual funds.<sup>50</sup>

Whatever the quibbles, all reveal a common respect for the extraordinary work of a judge not hesitant to press pragmatic reason into law. All of the authors in this volume are academics. It is in our nature to admire such a commitment. None of us could imagine a life that had achieved it as effectively. And some of us (Judge and Wu, especially, and I would add myself to this list too) can't imagine another serving in the model of Posner—not because humanity won't produce talent as impressive (not many, but some) but because our politics has made the idea of such people becoming judges all but impossible. Ours is an age, Wu says, "in which we celebrate the individual but recoil from any real instantiation of individuality."<sup>51</sup> Posner is the quintessential individual; thus there will never be another Posner on the federal bench.<sup>52</sup>

Never is a long time. And as there is so much reason for our politics to solve the fundamental cause of that crisis, perhaps it will be solved, permitting once again a judiciary that can include a more colorful mix than the merely inscrutable or predictably loyal. Yet whether it can or not, none of us can doubt how rare and deep the influence of this judge has been, not just on us, or

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<sup>40</sup> See generally Baird, 86 U Chi L Rev 1037 (cited in note 9).

<sup>41</sup> See generally Levmore, 86 U Chi L Rev 1137 (cited in note 10).

<sup>42</sup> See generally Sachs, 86 U Chi L Rev 1201 (cited in note 12).

<sup>43</sup> See generally Wu, 86 U Chi L Rev 1217 (cited in note 25).

<sup>44</sup> See generally Masur, 86 U Chi L Rev 1171 (cited in note 33).

<sup>45</sup> See generally Listokin, 86 U Chi L Rev 1157 (cited in note 19).

<sup>46</sup> See generally Hemphill, 86 U Chi L Rev 1057 (cited in note 7).

<sup>47</sup> See generally Nou, 86 U Chi L Rev 1187 (cited in note 21).

<sup>48</sup> See generally Kontorovich, 86 U Chi L Rev 1117 (cited in note 18).

<sup>49</sup> See generally Klerman, 86 U Chi L Rev 1097 (cited in note 17).

<sup>50</sup> See generally Judge, 86 U Chi L Rev 1077 (cited in note 15).

<sup>51</sup> Wu, 86 U Chi L Rev at 1221 (cited in note 25).

<sup>52</sup> *Id.*



the law, but on the ideals of anyone who would practice the very best of what the law could be.