

Richard Posner is a Monster

By Allen Mendenhall



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WILLIAM DOMNARSKI is probably right when he writes that Richard Posner, like his hero Oliver Wendell Holmes Jr., “seemed destined for a literary life.” Holmes modeled himself on Emerson; he was the class poet at Harvard and earned his reputation as a thoughtful if controversial man of letters who could write with panache.

Posner, who majored in English at Yale, modeled himself on Holmes. “Holmes,” Posner declared in a missive, “is the greatest jurist, at least of modern times, because the sum of his ideas, metaphors, decisions, dissents, and other contributions exceeds the sum of contributions of any other jurist of modern times.” Posner’s writing similarly stands out for its flair and confidence.

Both men extended their influence beyond their legal opinions and have contributed to philosophy, becoming provocative historical figures in their own right. Posner has correctly invoked Holmes as a pragmatist, even if Holmes avoided the designation and referred to William James’s pragmatism as an “amusing humbug.” A member of the short-lived Cambridge Metaphysical Club that birthed pragmatism in the 1870s — and which also included James and C. S. Peirce — Holmes at least imbibed the pragmatism that was, so to speak, in the Boston air. Posner’s pragmatism, however, is only tangentially related to the thinking of Peirce and James, and so one hesitates to call it pragmatism at all.

In a move that must irritate University of Miami professor, Peirce supporter, and Richard Rorty critic [Susan Haack](#), Posner distinguishes his variety of pragmatism — what he calls “everyday pragmatism” — from philosophical pragmatism. His thesis is most pronounced in his book *Law, Pragmatism, and Democracy* (2005). The quotidian pragmatism that inheres in the law is, in his view, practical and forward-looking and based on “reasonableness.”

It’s not always clear how this mode of pragmatism intersects with, or diverges from, the so-called traditional or classical pragmatism, though it differs markedly — and refreshingly — from what Haack labeled “vulgar Rortyism,” that Frenchified variety of structuralism that dispensed with truth as a meaningful category of discourse.

One suspects, given his outsized ego, that Posner delights in having placed his stamp on legal pragmatism, thereby forcing perplexed students in philosophy departments to come to terms with his ideas and square them with not only Peirce and James but also John Dewey, George Herbert Mead, and W. V. Quine.

Posner's self-importance can be charming or off-putting. You might see him as an erudite, spirited dandy playing the part of flamboyant intellectual; or, more cruelly, as a bitter sophist bent on celebrating his own idiosyncratic views and maliciously dismissing his opponents with callous words and harsh indictments. Certainly his gratuitous rhetorical attacks on the late Antonin Scalia warrant this latter take.

And yet the man speaks with a high, soft voice; loves and spoils his cat; and spends most of his time reading and writing. It's hard to condemn such things.

Posner is on record as having fancied himself as not just equal to, but more intelligent than, Learned Hand and Henry Friendly — two giants of American law — because he considered himself more informed about economics. This is surprising, chiefly because his self-assessment occurred before he became a judge.

As a judge, Domnarski tells us, “he could seek to persuade his new judicial colleagues to follow him, so as to further shape the law as he saw it — in his own image.” He continues to shape everything, it seems, in his own image, including, perhaps, Domnarski's biography, which he read both in draft form and as a final manuscript.

One wonders how heavily he edited his own biography — how much latitude he enjoyed in fashioning his story. He sat for interviews and emailed with Domnarski, which wouldn't be unusual or improper had he not been a primary source of his own legend, as he certainly appears to have been. As a young man, Posner exercised his authority as president of *Harvard Law Review* to include certain content over the objections of his peers. Might he have done this with his biographer?

Posner, an only child, is used to promoting himself, and his acquaintances at different stages of his life often note his arrogance. As early as high school, he would say “the Poze knows,” and called himself “the mighty one,” writing in yearbooks that he “welcomes you as a High Priest of Posner Worship.” You can write this off as playful, but you can't write off the fact that he cites himself in cases more than any other judge — though not by name, Domnarski points out, as if to acquit him of unseemly motivations.

An editor of a peer-reviewed journal once complained that Posner had cited himself too often in a paper, to which Posner rejoined that self-citation was necessary because he had produced most of the relevant literature on the subject. “The Poze knows,” the footnotes might have read. Another time an exasperated Posner wrote to editors at Cambridge University Press, “Don't you know who I am?” — the same remark that **landed Henry Louis Gates Jr. in hot water under different circumstances.**

Although Domnarski connected with over 200 people to piece together this book, Posner's personal opinion of himself seems to control the narrative and crowd out contrary valuations that critics may have offered. It's not

that Posner's accomplishments and reputation are unearned. He's worked hard to become perhaps the best-known and most prolific federal circuit judge in our nation's history, and his talents and learning are unquestionable and impressive. The person who emerges in these pages is exceptional at what he does, but difficult to like. He graduated first in his class at Harvard Law School but was not popular. He remains good with ideas — just not with people. He'd rather disseminate brilliant theories than keep them to himself, even when they're in bad taste or poor form. Whether that's a virtue or vice depends upon one's priority for manners and decorum.

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Posner's most remarkable and admirable quality, it seems to me, is his ability — even willingness — to accept constructive criticism in stride. He doesn't take evaluations of his work personally, and he invites opposition to fine-tune and improve his ideas. He instructs his clerks to criticize his draft opinions line by line so that he can perfect his rationale. “[W]e should want” and “insist upon,” he wrote to a colleague, “challenge and criticism; the rougher the better; for one of the great dangers of achieving eminence is that people are afraid to criticize you and then you end up inhabiting a fool's paradise.”

Posner has referred to himself as a “monster,” a characterization he's also reserved for Wagner, Tolstoy, Nietzsche, Wittgenstein, Proust, Kafka, and Michelangelo. The term thus seems like an odd form of self-appraisal rather than regret or self-loathing. It accords with his grand notion that he is “a Promethean intellectual hero,” not just some federal judge who happens to be well read.

Posner remains “a writer first and a lawyer second.” He's correct that, as he told one correspondent, “the modern practice of law does not offer a great deal of scope for the poetic imagination.” Law schools have divided faculty into fields and sub-fields, and specialists in different areas of practice are increasingly unable to speak to one another in a common idiom or with shared vocabularies. Posner studied at Yale under Cleanth Brooks, who directed Posner's research on William Butler Yeats, so he knows a thing or two about the poetic imagination and memorable expression.

But maybe the law is not about poetic imagination. Maybe it requires a prosaic and mechanical mind that can dispassionately and without fanfare adjudicate the soundness of legal arguments presented by the parties to a case. If so, Posner may have been better suited for a different profession, one he would have loved and within which he could have more appropriately flaunted his creativity. Being an English professor, though, would've been out of the question; he dismisses much of what English literature departments regard as scholarship as “bullshit.” He uses the same word to describe work in the legal professoriate, of which he was once a seminal figure. By age 30, in fact, he had achieved the rank of full professor at the University of Chicago Law School. He cultivated the image of an iconoclastic rabble-rouser willing to subject all human activity to cost-benefit analysis. He popularized the law-and-economics movement and eagerly imparted that economic efficiency supplied the right methodology for describing and delineating common-law judging, which involved practical resolutions to concrete problems. The doctrinaire Posner of this period drifted far from the Communist roots of his mother. More recently, though, he's alleged that capitalism is a failure and moved decidedly to the left on key issues.

Perhaps because of his haughtiness, the law can seem boring and routine without him. There's something to be said for the color and liveliness he brings to his office, and for his belief that “the law really is a very limited field for a person of literary bent.” Domnarski's treatment may seem deferential, but it doesn't cover up

Posner's naked, sometimes brutal honesty. Posner is willing to say what others aren't, and able to say it more eloquently.

If, as Domnarski avers, Posner considers the average lawyer to be like Bartleby or Ivan Ilych — fancifully tragic figures — then he must disdain or pity those lawyers who come before him in the courtroom and submit their briefs for his relentless scrutiny. The 1987 *Almanac of the Federal Judiciary* states that lawyers who argued before Posner found him to be “arrogant, impatient, dogmatic,” and “opinionated,” and that he “dominates arguments” and “cross-examines lawyers as if they were 1-Ls in a Socratic exchange with a professor.” The man is important, no doubt, but never learned how to play nicely.

Ever the Darwinian, Posner has suggested that great books prove their merit over time in the competition of the marketplace; perhaps his reputation will too.

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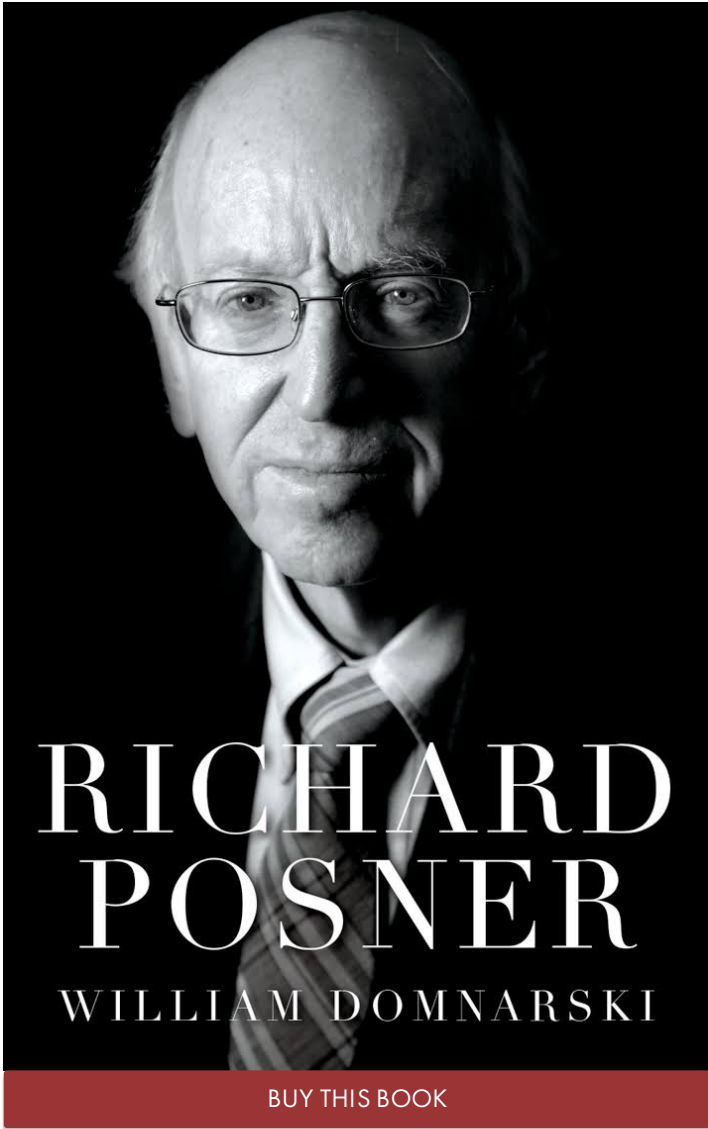
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