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Tributes: Health, Heart and Mind: The Contributions of Richard A. Posner to Health Law and Policy

Diane P. Wood

TRIBUTES

HEALTH, HEART AND MIND: THE CONTRIBUTIONS OF RICHARD A. POSNER TO HEALTH LAW AND POLICY

*The Honorable Diane P. Wood**

My first reaction upon being asked by the editors of THE JOURNAL OF CONTEMPORARY HEALTH LAW AND POLICY to write a dedicatory essay for my friend and colleague, Richard A. Posner, was "why health law in particular"? Those who are familiar with the vast scope of Judge Posner's writings will understand the problem immediately. This, after all, is the person whose book on Economic Analysis of Law[1] is now in its fifth edition. Its chapters sweep through topics as diverse as the common law of property, contracts, torts, and family relations; criminal law; the public regulation of the competitive process found in the antitrust laws, employment laws, and utility regulation; the laws governing financial markets; and the legal process itself. But Judge Posner has also written about so much more, including law and literature, jurisprudence, the role of sex in social and legal institutions, and the failed attempt at removing President William Clinton from office that so consumed the country during 1998 and 1999.

Much of what Judge Posner has had to say in his more general writings bears importantly on the issues in the field of health law and policy. Those issues begin with vexing economic problems such as how to finance the delivery of health care, how to support cutting edge research, and the redistributive roles of government and private insurance. But that is just the beginning. Ethical issues exist over the morally superior way to ration health care resources, and rationing of some kind will always be necessary as long as the supply is less than the demand. Thorny debates lie ahead over subjects like the ways in which genetic knowledge can be used by different parties (including the medical profession, private insurers, and the government) now that the human genome project has mapped the

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1. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (5th ed. 1998).

entire human genetic code, the way in which the human body and its organs should be treated, and the ethics of research using embryos or fetuses. Judge Posner has had much to say that bear on these important questions, some of it quite provocative.

In addition to his academic writings, Judge Posner has had many opportunities over his nearly twenty years on the federal appellate bench to address topics bearing on health law. It is there where any judge must draw back from intellectual speculation and work within a legal system to come to concrete decisions about real people. Many who think of Judge Posner as epitomizing the "law and economics" movement, and who further think that such a devoted exponent of the dreary science must take an antiseptic view of human behavior, would be surprised to learn how right they might be about the first point, yet how wrong about the second. I would like to highlight just a few of those decisions in this essay, particularly cases that have been decided since I had the privilege of joining him on the bench, to illustrate the degree to which Judge Posner combines brilliance of scholarship with genuine empathy.

The first example, *Murrey v. United States*,[2] was a medical malpractice case that was brought by the widow of a man who died while in the care of a Veterans Administration hospital in the Chicago area. The events leading up to Mr. Murrey's death were appalling, as Judge Posner's opinion for the court makes clear. He first visited the hospital in 1986, when he was sixty-five years old and in mediocre health, with problems including high blood pressure, obesity, chronic bronchitis, emphysema, psoriasis, and hypoglycemia. He received treatment for these problems, but he returned to the hospital in 1989 and was diagnosed with prostate cancer, a fairly aggressive, fairly advanced case, according to the medical records available to the court. The urologists at the hospital advised Mr. Murrey to undergo the surgical removal of the entire prostate; he was reluctant and wondered about alternative treatments, but they assured him that surgery was better "because of Mr. Murrey's 'great' physical condition and because the hospital did not offer radiation treatment."[3] In fact, surgery may not have been discernibly better for Mr. Murrey, because of his age, the stage of his cancer, the comparative risks of operation and radiation, and "the greater likelihood of unpleasant side effects, such as impotence and incontinence."[4]

In fact, surgery turned out to be a catastrophic choice for Mr. Murrey,

2. 73 F.3d 1448 (7th Cir. 1996).

3. *Id.*. at 1450.

4. *Id.*

not because of anything about himself, but because of the way the hospital handled his case. The operation itself took seven hours, and afterward Mr. Murrey was placed in the intensive care unit, where he was apparently making a satisfactory recovery. At 8:35 the next morning, he was given morphine when he complained about abdominal discomfort. Within five minutes, the nurses observed that his blood pressure had dropped significantly (to 64/51); the critical care resident concluded that he was in shock. The resident thought this might have been due to internal bleeding, but she was not sure, and so she administered several tests to rule out other causes. Those tests were completed by 9:57 A.M., and left internal hemorrhaging as the most likely explanation. For a variety of disturbing reasons, however, Mr. Murrey was not moved to an operating room for another hour and a half: the reasons might have included difficulty in tracking down his treating physician (necessary under one of the hospital's rules) or the lack of an available operating room. By the time surgery began, at noon, Mr. Murrey had been bleeding for hours. He died on the operating table at 3:10 P.M.

Two aspects of Judge Posner's opinion reveal the way he conceptualized this sad tale. The first revolves around the question whether the delay really mattered for someone with advanced prostate cancer and a host of other health problems; the second relates to the way medical resources were or should have been allocated here. With respect to the first, Judge Posner wrote that even by 9:57 A.M., "Murrey's prospects for survival were dim" only five to ten percent according to his own expert, if the operation had begun immediately.[5] But Judge Posner said neither that this was so remote as to be worthless, nor that all life is valuable no matter what. He said the following instead:

> A loss is a loss even if it is only probable, as are most things in life. No doubt Murrey would have paid a lot (if he had had a lot to pay) for a 5 percent chance of survival if the alternative was a certainty of immediate death. This shows that he lost something by being deprived of that chance. If 200 people were in Murrey's situation and received improper care, we would expect 10 to have survived if all 200 had received proper care, so that if none of the 200 was entitled to any damages the hospital would have escaped liability for malpractice that had caused a number of deaths in a realistic sense of 'cause.' Damages for the loss of a chance are necessary to prevent the under- deterrence of medical negligence.[6]

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5. *Id.* at 1453.

6. *Id.* at 1454.

Even a relatively small chance, then - one out of twenty - was enough to show that Mr. Murrey had lost something valuable by the hospital's conduct.

The other point of interest to which Judge Posner devotes some attention in the opinion relates to the hospital's rather astonishing effort to exculpate itself by alleging that the operating rooms were all busy, and hence it had to leave poor Mr. Murrey in his room to bleed to death. Here are his observations on that point:

> No evidence was presented that all the operating rooms were occupied by patients who were under a general anesthetic and who could not have been moved without risk to an operating room not equipped for general anesthesia, or that the hospital had made any contingency plan to deal with a surgical emergency (perhaps by arrangement with a nearby hospital) when its limited number of operating rooms were full, or that it is a sound principle of medical practice that all operations are created equal and therefore none may be interrupted, even if one could be interrupted, at trivial risk to the patient and the interruption would save the life of another patient who is bleeding to death elsewhere in the hospital. Such a principle might be hard to square with the principle of triage, that is, of prioritizing medical care when resources are inadequate to take care of all patients at once.... One of the government's witnesses opined that only a hospital that performs 'emergency' operations, which is to say a hospital with a trauma center, need have an operating room available at all times for emergency. We shall not conceal our skepticism. Risky surgery performed under nonemergency conditions, such as the operation to remove this elderly and unhealthy man's prostate gland, can be expected in a small but not trivial fraction of cases to produce a postoperative crisis requiring emergency surgery. The failure to foresee and take measures to cope with this possibility strikes us as presumptively negligent.[7]

It is impossible to read these remarks without seeing clearly both the incisive analytic mind and the sympathetic heart of the person writing them. This is not to say, of course, that either Judge Posner or any other responsible judge would allow feelings of pity to overwhelm legal principle. Legal rules are written for all cases and for the long term. Medical malpractice is conventionally understood as a species of negligence law, and that law in turn is all about allocating risks and imposing the cost of prevention on the party best able to assume it.

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7. *Id.* at 1454-55.

Interestingly, Judge Posner has suggested that there is also a contractual element in the medical malpractice cases, to the extent that the doctor's failure to exercise the customary level of care toward her patient violates an implicit contractual term between the two. But having said that, it is clear that Judge Posner, in applying these legal rules as objectively as he can, is well aware of the human drama that is going on in the case.

My second example is *Ralston v. McGovern*,[8] a case brought by a prisoner who claimed that his right under the Constitution to be free from cruel and unusual punishment was violated when prison guards denied necessary medical care to him. Ralston, the prisoner in question, suffered from Hodgkin's Disease, for which he had been treated with radiation. The radiation treatments left him with painful blisters in his throat and pain in his mouth, for which his doctor had prescribed pain medication. Upon returning to his cell block after one of the radiation treatments, Ralston asked prison guard McGovern for his pain medication, but McGovern refused to give it to him. The district court dismissed Ralston's action based on the Eighth Amendment to the Constitution, not on the ground that McGovern's action failed to satisfy the "deliberate indifference" standard required in these cases, but instead on the ground that Ralston's pain did not present a serious enough medical problem to make the refusal to alleviate it cruel and unusual.

Once again, Judge Posner's opinion reflects both the hard-headed economist conducting a cost-benefit analysis of the situation, and the humanist who could appreciate what this unfortunate prisoner was going through. He begins by acknowledging that not every refusal of medical treatment triggers constitutional protection:

> Medical 'need' runs the gamut from a need for an immediate intervention to save the patient's life to the desire for medical treatment of trivial discomforts and cosmetic imperfections that most people ignore. At the top of the range a deliberate refusal to treat is an obvious violation of the Eighth Amendment, . . . and at the bottom of the range a deliberate refusal to treat is obviously not a violation. . . . Where to draw the line between the end points is a question of judgment that does not lend itself to mechanical resolution. It is a matter of determining the civilized minimum of public concern for the health of prisoners, which depends on the particular circumstances of the individual prisoner.[9]

Here we have both a structure and an admission that mathematical

8. 167 F.3d 1160 (7th Cir. 1999).

9. *Id.* at 1161.

formulae or other artificial ways of drawing lines will simply not suffice. Instead, that elusive but all-important quality, judgment, is the only thing that will do the metric to which Justice Potter Stewart referred in his famous remark about obscenity: "I know it when I see it."

After that comment, the discussion in *Ralston* continues in the same dualistic vein:

> Beyond this it is difficult to generalize, except to observe that the civilized minimum is a function both of objective need and cost. The lower the cost, the less need has to be shown, but the need must still be shown to be substantial. It seems to us that to refuse to treat, at trivial cost, the pain caused by cancer and cancer treatments borders on the barbarous. Realism requires recognition that the terror which cancer inspires magnifies the pain and discomfort of the frequent side effects of cancer treatments.... The prison guard's deliberate refusal of [prescribed medication] was a gratuitous cruelty, and not a trivial one, even if the context of cancer is ignored.[10]

So costs and benefits will be weighed in deciding the many Eighth Amendment medical treatment cases that prisoners bring, but at the same time Judge Posner at least will not be blind to the terror experienced by the cancer sufferer or to the barbarity of a guard's deliberate decision to refuse medication to a man who was literally spitting blood after his radiation treatments.

Precision in analysis and careful attention to detail is critical not only in the medical profession, but also in the administrative process. The next example of Judge Posner's approach to cases implicating health care comes from the area of social security disability benefits. It would be easy to become jaded after many years of hearing these cases, given their number, given the deferential standard of review that appellate courts owe to the findings of administrative law judges, and given the real risk of awarding benefits to malingerers. But *Sarchet v. Chater*[11] shows that Judge Posner has not succumbed to those temptations. This was the case of a forty-two-year-old woman, Ms. Sarchet, who suffered from fibromyalgia and who claimed that she was totally disabled by the disease. The administrative law judge thought otherwise and denied her claim for benefits, but Judge Posner, writing for a unanimous panel, reversed that decision.

In the end, the administrative law judge's opinion did not have a chance, after Judge Posner subjected it to his laser-like scrutiny. Here is

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10. *Id.* at 1162.

11. 78 F.3d 305 (7th Cir. 1996).

some, but by no means all, of the criticism:

> The administrative law judge's opinion contains a substantial number of illogical or erroneous statements that bear materially on her conclusion that Sarchet is not totally disabled. There is first of all a pervasive misunderstanding of the disease. The administrative law judge criticized Sarchet for having consulted a rheumatologist rather than an orthopedist, neurologist, or psychiatrist. Fibromyalgia is a rheumatic disease and the relevant specialist is a rheumatologist. The administrative law judge also depreciated the gravity of Sarchet's fibromyalgia because of the lack of any evidence of objectively discernible symptoms, such as a swelling of the joints. Since swelling of the joints is not a symptom of fibromyalgia, its absence is no more indicative that the patient's fibromyalgia is not disabling than the absence of headache is an indication that a patient's prostate cancer is not advanced.[12]

No one could doubt from this passage or from the rest of the opinion that this woman's medical condition received nothing but the most careful attention from the author of the opinion.

Since one of the questions in social security disability cases is whether the applicant retains any residual functional capacity to work that would enable her to perform any job in the national economy, the opinion also looked at the administrative law judge's conclusion that Sarchet did retain the necessary capacity. "Decisive" is hardly the word for the rejection it gives to that conclusion:

> The administrative law judge made a number of unfounded sociological speculations which bespeak a lack of imagination concerning the lives of many of the people who apply for social security benefits. [The judge found Sarchet's credibility undermined by her poor work history.] Ignored is the long list of medical ailments from which Sarchet suffers and, so far as appears, has long suffered, over and above fibromyalgia. She has thickening of the vocal cords that makes her inaudible after speaking for an hour and a half or two hours. She has moderately severe emphysema. She is depressed, and takes antidepressants. She is emotionally unstable. She is obese.... Despite all this, if she were a highly educated person she could do brain work between popping pills. She is not highly educated. Whether or not she is disabled within the necessarily restrictive meaning of the Social Security Act and its regulations, she is

12. *Id.* at 307.

> unemployable and has been for a long time.[13]

Another quality that this passage reflects is the insistence on genuine expertise, rather than casual assumptions about matters that are empirically testable.

Indeed, because the ways in which medical, pharmacological, and economic expertise factor into legal judgments is of such central importance to the area of health law and policy, a further word on this aspect of Judge Posner's jurisprudence is warranted. The leading modern case on the way the federal courts treat expert witnesses is the Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[14] Although *Daubert* expressed the standards that expert testimony must satisfy in a more elaborate way, Judge Posner describes the principle of *Daubert* as one that requires an expert witness who says that he is offering an opinion based on science to use "real" science, not "junk" science.[15] This is a principle he has not hesitated to apply in cases involving medical claims. Thus, in *Rosen v. Ciba-Geigy Corp.*,[16] he considered the expert support for a claim by the plaintiff Rosen (a smoker) that the defendant's nicotine patch caused him to have a heart attack. Rosen relied on the testimony of a distinguished cardiologist, Dr. Fozzard, from the University of Chicago to support his claim, but Judge Posner found that Dr. Fozzard had not done his job right. Both the passage in which he rejects the Fozzard testimony and the prelude to it, in which he discusses the nature of science, are worth a look:

> To reach this conclusion [i.e. that Dr. Fozzard's testimony was not "real science"] we do not have to become philosophers of science and set forth the necessary and sufficient conditions of 'real' science. When the Supreme Court in *Daubert* told judges to distinguish between real and courtroom science, it was not with the object of discovering the essence of 'science', if there is such an essence. The object, we think, . . . was to make sure that when scientists testify in court they adhere to the same standards of intellectual rigor that are demanded in their professional work. . . . Dr. Fozzard's deposition, while expressing what may be an insightful, even an inspired, hunch concerning the cause of the heart attack that Rosen experienced in June of 1992, lacks scientific rigor. The deposition offers neither a theoretical reason to believe that wearing a nicotine

13. *Id.* at 308.

14. 509 U.S. 579 (1993).

15. Wilson v. City of Chicago, 6 F.3d 1233, 1236 (7th Cir. 1993).

16. 78 F.3d 316 (7th Cir. 1996).

> patch for three days, or removing it after three days, could precipitate a heart attack, or any experimental, statistical, or other scientific data from which such a causal relation might be inferred or which might be used to test a hypothesis founded on theory.[17]

The passage goes on to discuss heart attacks, the role of smoking in heart disease, the role of nicotine in contributing to plaque formation in arteries, the use of animal studies as a basis for conclusions about human health, genetic predisposition to heart disease, and the inappropriateness of basing legal conclusions on "inspired hunches" or conjectures, even from very distinguished experts.

Judge Posner was similarly critical of the expert's methodology in *Braun v. Lorillard Inc.*,[18] another case brought by a smoker who claimed that the type of filter the Lorillard tobacco company put in its Kent cigarettes was too dangerous, because it contained crocidolite asbestos. The plaintiff, Braun, later developed mesothelioma, a form of cancer strongly associated with exposure to that type of asbestos. After the plaintiff's widow lost her case in the district court, she appealed. One of the crucial issues she raised was whether the district judge properly excluded the expert testimony of a biochemistry professor, Dr. Schwartz, who would have testified that lung tissue obtained in the autopsy of Mr. Braun contained crocidolite asbestos fibers. With a scathing rejection of Dr. Schwartz's methodology, Judge Posner explained why the panel had decided to uphold the district judge's decision and keep the evidence out:

> Dr. Schwartz had never tested human or animal tissues for the presence of asbestos fibers (or, so far as appears, for anything else) before being hired by the plaintiff's lawyer. And he did not bother to familiarize himself with the standard methods for conducting such tests or to consult with scientists who are the experts in analyzing tissue.[19]

Expertise in testing building materials for the presence of asbestos, he concluded, was too remote from human tissue testing (at least without any showing of why one should transfer to the other) to be useful.

In the post-*Daubert* world, judges have taken seriously their role as gatekeepers who must screen expert testimony and exclude the irrelevant, the unfounded, or the unreliable. No one has encouraged them more in this respect than Judge Posner. An excellent example comes from yet another field of health law, the pharmaceutical industry. Twice Judge

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17. *Id.* at 318-19.
18. 84 F.3d 230 (7th Cir. 1996).
19. *Id.* at 234.

Posner has sat on panels at the court of appeals reviewing decisions in a massive private antitrust lawsuit that was brought against most of the major drug manufacturers, in which plaintiff retail pharmacies claimed that the manufacturers and wholesalers had conspired to deny discounts to them.

In *Prescription Drugs II*,[20] he had occasion to consider expert testimony that had been offered by Dr. Robert Lucas, an economist whose credentials included the Nobel Prize for Economics. The plaintiffs wanted Dr. Lucas to testify that the manufacturers of brand name prescription drugs engage in price discrimination (i.e. the practice of charging different prices to different buyers, depending on the intensity of their demand for the drug), showing that they have market power (because price discrimination is impossible if the buyers from whom the higher prices are demanded can simply go out in the market and purchase a satisfactory substitute). The district court excluded the testimony, and Judge Posner agreed that this was correct. His reason, however, differed from that of the district judge, who thought that Dr. Lucas had not spent enough time studying the drug market. Posh, said Judge Posner: the link between observed price discrimination and the existence of market power is such an obvious one that an economist of Dr. Lucas's stature should not have needed much time at all to see it. The problem was instead whether the market power owed anything to collusion among the firms, or if instead it was traceable only to the fact that each company made drugs for which very few (if any) substitutes were available. Nobel prizes may come or they may go: what Judge Posner wants is not just genuine expertise, but also careful attention to the details of the case, the industry concerned, the type of disease, or whatever the question may be on which expert testimony is required.

Insurance is another area of central importance for health care and policy. It will surprise no one that the economist in Judge Posner comes out with special force in these cases. One important decision concerned the effect, if any, of the Americans with Disabilities Act on insurance policies that impose a cap on coverage for AIDS or AIDS-related conditions. In *Doe v. Mutual of Omaha Insurance Co.*,[21] the insurer conceded that it could not show that its AIDS cap was consistent with sound actuarial principles. It also conceded that AIDS is a disabling condition within the meaning of the ADA. Nevertheless, Judge Posner's

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20. *See* In re Brand Name Prescription Drugs Antitrust Litigation, 186 F.3d 781, 786 (7th Cir. 1999).

21. 179 F.3d 557 (7th Cir. 1999).

opinion concludes that the insurance company was entitled to discriminate against certain diseases, including AIDS, when it drafts its policies.

In evaluating this opinion, it is important to note that he did not understand the plaintiffs to be arguing that all medical needs of people with AIDS were AIDS-related and thus excluded by the policies. Had that been true, then one might infer that the insurance company was unlawfully discriminating against people disabled by AIDS. With that possibility out of the picture (though I will return to it), he saw the plaintiffs as urging a position that would actually discriminate in favor of AIDS. The plaintiffs conceded that insurance companies can and do exclude coverage for pre-existing medical conditions, and so a company could exclude coverage for AIDS for a person who already had the disease when the policy went into force. This, to him, indicated that the rule the plaintiffs wanted was an arbitrary one. Worse, he feared that such a rule would require bookstores to stock books in Braille, or camera stores to stock cameras specially designed for disabled people; the economist in him saw nothing to justify such an enormous burden on the retail sector of the economy for such a small number of people.

The plaintiffs also pointed out that people who have the HIV virus get many of the same diseases that other people get, and at least for those diseases, the AIDS-related disease exclusion distinguished among sufferers only on the basis of their HIV-status. To this Judge Posner replied as follows:

> It is true that as the immune system collapses because of infection by HIV, the patient becomes subject to opportunistic infection not only by the distinctive AIDS-defining diseases but also by a host of other diseases to which people not infected with HIV are subject. Even when they are the same disease, however, they are far more lethal when they hit a person who does not have an immune system to fight back with. Which means they are not *really* the same disease.[22]

In fact, just a bit earlier in the opinion, Judge Posner recognizes that AIDS itself, or more accurately the HIV virus, does not cause illness directly; it just makes the individual more susceptible to other diseases. Some of those have become associated with AIDS, such as Kaposi's sarcoma, which are exceedingly rare (though not unknown) in the general population, and others have not. Later, he acknowledges briefly that there might be other conditions that also severely compromise the immune system, and he implies that it might be acceptable for insurance

22. *Id.* at 561.

companies to write exclusions for diseases "related" to those conditions as well.

Perhaps Judge's Posner's view of the insurance arrangements in *Doe v. Mutual of Omaha* is explainable in the final analysis by the network of contracts that produced them and a general preference for private ordering. (These contracts usually include the one between the employer and the insurance company, the one between the insured and the insurance company, and if the employment is not at will, the contract between employer and employee.) Employees who do not like the scope of coverage offered as part of their employment package can go out in the market and buy supplemental insurance. But in the case of AIDS, that seems to be just as unrealistic an assumption as the assumption that Ms. Sarchet could go out in the market and find a job: AIDS coverage is expensive, and one can predict that all insurance companies, each acting individually in its own self interest, would adopt exclusions like Mutual of Omaha's if they thought that federal law (especially the Americans with Disabilities Act) would permit it. Maybe, therefore, this is another instance in which Judge Posner thinks that the antidiscrimination laws have gone so far as to ban efficient behavior. What may be most troubling to him is the effort to apply a law prohibiting distinctions based on disability to the internal content of policies that are all about such distinctions.

There are vast areas of health law and policy on which Judge Posner has written that deserve far more comprehensive treatment than is possible in a brief introduction. His writings and thinking about reproductive issues, for example, are among his best known and most provocative. He has written about the aging process, yet another topic with strong health law and policy dimensions. He has undertaken a study of obesity, one of the most pervasive health problems in modern American society. THE JOURNAL OF CONTEMPORARY HEALTH LAW AND POLICY could hardly have chosen a more important legal scholar to honor in this issue: the kind of person about whom people are thinking when they toss off the phrase "Renaissance man," even though most others do not deserve the accolade. Richard Posner's contributions to health law and policy, like his contributions to so many other fields, have helped to shape our modern understanding of the field. To have done this much would have been a singular accomplishment; to have done it while keeping sight of the personal, the immediate, and the human, is nothing short of extraordinary.