A Reply to Judge Posner

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Oh my. I had thought the Federal Judiciary—or some of it at least, including by its own proud proclamation, the Seventh Circuit—was the last refuge of courtesy in our increasingly mean-spirited society. Surely not on the evidence of this Article.

After fifteen pages of intermittently scholarly, esoteric and impenetrable analysis of judicial style, Judge Posner launches a surprise eight-page strike on an obscure five-page opinion of mine so insignificant that even I had to dig into memory to recall it.[1] Why? It turns out because "she is the only other judicial participant in this Special Issue."[2]

If I am somewhat stunned, let me explain to the reader that I learned of Judge Posner's intent to use *United States v Morris*[3] as the centerpiece in his denunciation of the "pure" judge only upon receiving the galleys of his article, though from the footnote credits it is clear earlier drafts were widely circulated among other participants and faculty.

I feel like Humphrey Bogart in *Casablanca*: "Of all the gin joints, in all the towns, in all the world, [he] walks into mine."

Other jurists in Judge Posner's taxonomy get judged on their whole life's work; I am rated on the basis of a single minor opinion drawn "essentially at random."[4] (What exquisite random aim Judge Posner has! It is Number 513 in a career corpus of 660 opinions as of this writing.) This lonely wisp, without more, apparently consigns me to the fearful rhetorical hell reserved for lazy and untalented "pure" judges whose opinions are notorious for "jargon," "solemnity," "high sheen," "impersonality," "piled-up details," "fondness for truisms," "unembarrassed repetition of

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[1] "'Littlepaugh', [the old judge] said musingly . . . . 'You know,' he said marveling, 'you know, I didn't even remember his name.'" Robert Penn Warren, *All the King's Men*, 367 (Harcourt Brace, 1946).

[2] Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U Chi L Rev 1421, 1436 (1995).

[3] 977 F2d 617 (DC Cir 1992).

[4] Posner, 62 U Chi L Rev at 1437 (cited in note 2).

obvious propositions," "long quotations from previous cases," "euphemisms," and "exaggerated confidence."[5]

Wow! What has happened to the vaunted Seventh Circuit civility? An out-of-town guest is invited to sup at the master's table, only to find she is the main course. Moreover, after *Morris*' bones are picked clean, we do not even get the satisfaction of seeing what the much-lauded "impure" opinion looks like; it is described in glowing terms for pages on end, but only one paragraph from a 1946 Learned Hand opinion is served up as an aperitif. And if the reader has a little trouble fitting it into the mold, that's of no moment. "Don't be fooled," Judge Posner opines, "by the florid character of some . . . of Hand's prose. It reflects the culture in which he grew up. He was born in 1872."[6]

Probing deeply, Judge Posner has also exhumed (out of context) two random comments from my article on "How I Write"[7] to conclude: "I think she thinks that the time for elegance . . . has passed. I imagine she thinks that after so many opinions . . . it would be impertinent to suppose the basic meaning of the statute unsettled, the wheel uninvented; and that Holmes is a charming fossil."[8]

Would it also be impertinent if I were to suggest that Judge Posner make his case from a fair sampling of my career work or even from my article elsewhere in this issue, but not from those scattered snippets?

That off my chest, let me make a few points in poor *Morris*'s defense.

I think Judge Posner is criticizing a style of judging, not a style of writing, as if, in every opinion, every principle of law or interpretation were up for grabs, a happy hunting ground for the creative judge-explorer. He finds the simple marshalling of facts and their placement in a line of precedent unworthy of the talents of the truly intellectual judge. The incremental growth of

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[5] Id at 1430.

[6] Id at 1432 n 19.

[7] Patricia M. Wald, *How I Write*, 4 Scribes J Legal Writing 55 (1993). "I connect the style of *Morris* with Judge Wald's comment that '[f]ormer academicians . . . sometimes feel a compulsion to reinvent the wheel,' and her comment that Holmes . . . 'wrote elegantly, but he also made mistakes.'" Posner, 62 U Chi L Rev at 1442-43 (cited in note 2).

[8] In a footnote, Posner pounces on my reference to Holmes as "one 'of our best opinion writers of the 19th Century,'" to point out, schoolmarmishly, that "[Holmes] was not appointed to the U.S. Supreme Court until 1902." Posner, 62 U Chi L Rev at 1443 n 66 (cited in note 2). But, of course, Holmes sat for over a decade before that (1889-1902) on the Supreme Judicial Court of Massachusetts where he honed the lovely and elegant style that I celebrate quite as much as Judge Posner.

the law through such opinions is apparently for lesser judges. Yet, as he admits, some cases call for bold strokes, others for modest advancement or even mere restatement and minor elaborations.

Judge Posner gives lip service to the distinction, but refuses to apply it to a case such as *Morris*, where the court's primary task was to decide if there was enough evidence to permit the jury to infer that Morris lived in the apartment and possessed the drugs and guns found there. No party challenged the basic meaning of the gun law; the only issue on appeal was whether the evidence showed Morris possessed the gun to protect the drugs stored there or with the intent of using it in their future distribution. No one suggested Morris was an innocent defender of his drug-strewn castle. The "meticulous" accounting of the facts Judge Posner seems to sneer at is there for prosecutors, defense attorneys, and trial judges in future cases to help determine "what kind of evidence will suffice to show that a defendant is guilty of a generic crime that can be committed against a thousand different factual backdrops."[9]

Neither the academy nor Holmes's "one in a thousand" is the primary audience for judicial opinions; the litigants and lawyers in Judge Posner's "world of action" are.[10] It is they who look to those opinions for the law they must follow.

Indeed I *do* believe opinions are more user-friendly if they state the outcome right off. They are not just "storytelling" exercises seeking to create dramatic tension. Real lives and fortunes are at stake. I believe, as well, in telling the reader up front the court's standard of review; *Morris* did it in one paragraph. "Unnecessary" for Judge Posner, perhaps,[11] but for Criminal Justice Act lawyers, it provides the lens through which the facts and law in the rest of the opinion must be filtered.

Judge Posner, like many others, clearly abhors open-ended, multifactor balancing tests, and he criticizes *Morris* unmercifully for not relating the factors discussed to *his* notion that the real purpose of the gun law was to distinguish between guns used to protect home and hearth and those used for nefarious purposes. Thus he would find "decisive" the "factor . . . that [Morris] had stuffed two guns under the cushions of his couch—an extraordi-

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[9] *United States v Bailey*, 36 F3d 106, 120 (DC Cir 1994) (en banc) (Wald dissenting).

[10] Posner, 62 U Chi L Rev at 1435 (cited in note 2).

[11] Id at 1437.

nary location for a home defense arsenal."[12] Why for heaven's sake? He was found sitting on the couch when the police broke in. As a homeowner (though not a gun owner), I would keep my weapon of choice close to me whether the enemy without were a drug dealer competitor or an ordinary burglar.[13]

In the past I have admired a great deal (though not all) of Judge Posner's work. But I don't find this kamikaze style of discourse particularly useful or attractive. And if it is to be the norm for a symposium, I think fair notice ought be given. I had none. Maybe on some future occasion Judge Posner and I might have a more productive exchange about "pure" and "impure" opinion writing. Or, at least, as Jake Barnes said to Lady Brett, "Isn't it pretty to think so?"

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[12] Id at 1442.

[13] Judge Posner thinks it "weird" to discuss "constructive possession" of drugs by the live-in occupant of an apartment. Id at 1438. I don't know about Chicago drug dealers, but Washington traffickers often share apartments and store their stashes in other people's digs. We have many cases where the owner or tenant does not have actual possession of the drugs found in his apartment. Life can be even more "impure" than opinion writing; it is downright messy in the drug trade. Judge Posner cannot accept the inference that someone who hides a gun under the couch cushion could be held guilty of "carrying" the gun. Id at 1438-39. Our precedent says otherwise. Judge Posner doesn't like our circuit's then-and-still-articulated test for "use" of a gun under 28 USC § 944: "the gun facilitated or had a role in the trafficking offense." Posner, 62 U Chi L Rev at 1439 (cited in note 2). I gather I should have ignored or overruled that articulation as dangerous to my rhetorical repute.