

A Tale of Two Posners

RICHARD A. POSNER
PUBLIC INTELLECTUALS
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JUDGE RICHARD A. POSNER is without doubt the dominant legal intellect of this age. The good Judge Posner authors analytically impressive opinions for the United States Court of Appeals for the Seventh Circuit¹ and oftentimes writes thoughtful and erudite books.² But, alas, the good Judge Posner is not the only Posner, for the bad Judge Posner not only has the audacity to tell a portraitist for a national magazine that he, like his beloved cat, Dinah, has “a streak of cruelty,”³ but now he has gone and published a volume entitled *Public Intellectuals: A Study of Decline*,⁴ which the *New York Times Book Review*

has dismissively criticized as “sloppy” and “slapdash.”⁵

Dinah the cat is unlikely ever to seek retribution for her depiction in the pages of *The New Yorker*, but scores if not hundreds of self-imagined “public intellectuals” will now have an easy time making fun of Posner’s embarrassingly bad effort at providing a send-up of their egotistically unworthy endeavors.⁶ Reviewer after reviewer has weighed in on what a methodological hash Posner has made of his subject while attempting to assemble a group portrait of those who merit inclusion in what might be viewed as potentially august

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- 1 See, e.g., *Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463 (CA7 1998), and *Hope Clinic v. Ryan*, 195 F.3d 857, 876 (CA7 1999) (Posner, J., dissenting).
- 2 See, e.g., *Cardozo: A Study in Reputation* (Chicago: University of Chicago Press, 1990).
- 3 Larissa MacFarquhar, “The Bench Burner,” *The New Yorker*, 10 December 2001, 78, 79.
- 4 Cambridge: Harvard University Press, 2001.
- 5 David Brooks, “Notes From A Hanging Judge,” *New York Times Book Review*, 13 January 2002, 9.
- 6 As Posner notes, the origins of the term lie in Russell Jacoby’s 1987 book, *The Last Intellectuals: American Culture in the Age of Academe*.

company. Many critics have rightfully complained about the remarkable arbitrariness with which some particular individuals have been included or excluded from Posner's long but variegated lists of "PIs."

Easy laughs come at the expense both of some of those he mistakenly included – right-wing television talking head Ann Coulter is an "intellectual"?⁷ – as well as of some whom he inexplicably overlooked – how about Michael Eric Dyson, for example?⁸ Maybe Judge Posner doesn't watch BET. Some detect an under-representation of left/liberals in the Posnerian intellectual universe,⁹ while others rightly note a vast overrepresentation of – surprise surprise – law professors and economists.¹⁰ But Posner's capriciousness is breathtaking. He *excluded* prominent law professor and death penalty opponent Anthony Amsterdam on the grounds that Amsterdam is an "activist," yet Amsterdam's colleague Derrick Bell – who also litigated on behalf of the NAACP Legal Defense and Education Fund before joining the professoriate and eventually migrating to New York University Law School – is included. Go figure. Posner confesses to excluding *New York Times* columnist Maureen Dowd on the grounds that she is "not very 'intellectual'" – how right can you be? – but fellow *Times*-man William Safire and knee-jerk conservative George Will somehow merit inclusion. And Posner's generosity toward some liberals likewise approaches if not quite equals the Coulter Standard: Sidney Blumenthal, Susan Faludi, and Jack Newfield? C'mon.

But most readers should tire of this

particular game quite fast. Yet Posner's sloppiness – and that of his presumed editors – should not be quickly dismissed. On page twenty-nine of *Public Intellectuals* one may be surprised to see Posner characterize the late Irving Howe, who for many years taught as a professor of English at the City University of New York Graduate Center, as a "nonacademic" "PI". But Posner corrects his error – or at least confuses his reader – very swiftly indeed, for on *the very next page* Professor Howe is *correctly* described as an "academic" PI. Did anyone proofread this book prior to publication? Apparently not, but what is evident here ought to raise a most serious question in Posner's mind about whether his amazingly copious productivity has now reached a point of declining returns.

But the methodological imprecision and general carelessness of *Public Intellectuals* also quite surprisingly carries over into the very concepts that ought to form the heart of the book, had the project been carefully and critically thought out. By the time that some readers reach chapter four – many will have fallen by the wayside long before that point – they ought to be excused for feeling completely befuddled when Posner instructs them that "[t]he most influential journalists and commentators may be getting their ideas directly from the academic source rather than from public-intellectual translators." Now wait just a minute. The preceding chapters are all replete – see the names noted above – with almost constant invocations concerning the "intellectual" status of journalist after journalist. And, equally worse, the apparent *thesis* of this book is that the increasing dominance of academics *as*

7 See Carlin Romano, "Critic at Large," *The Chronicle Review*, <http://chronicle.com/weekly/v48/i22/22b02001.htm> (visited 5 February 2002).

8 See David J. Garrow, "The Man Who Was King," *New York Review of Books*, 13 April 2000, 40 (reviewing Michael Eric Dyson, *I May Not Get There With You: The True Martin Luther King, Jr.*).

9 See Romano, note 7 *supra*.

10 Posner *may* think this is defensible. See *Public Intellectuals* at 173 ("we see a marked increase [over time] in the percentage of public intellectuals who are either lawyers or economists").

public intellectuals is largely responsible for the supposed qualitative “decline” that Posner highlights in his sub-title. So *now* the reader is being informed that both journalists/commentators *and* at least some sub-set of academia are categorically *distinct* from PIs. The impression that the good judge has not done his most basic homework with maximum care, and that this book has to a considerable degree been collated or compiled out of previously published articles, rather than carefully honed, is unfortunately quite unavoidable.¹¹

The demerits of *Public Intellectuals* are thus extremely considerable, especially in execution as well as in formulation, but Judge Posner’s initial instinct or idea for the book – and instinct is indeed likely the better word – was not by any means erroneous or poorly targeted. Posner’s instinctive hostility is focused upon what he views quite correctly as the utter unresponsiveness of the “market” for public intellectuals to inept or indeed consistently erroneous job performance by widely-celebrated purveyors. Ergo Judge Posner has a defensibly clear idea of what it is he doesn’t like, but even his most broad-stroke presumptions about why this state of affairs has come to exist suffer from some misconceptions that greatly blinder his otherwise really quite inclusive explorations.

Posner’s market-oriented worldview leads him to imagine that the societal demand for public intellectuals is genuine rather than almost wholly generated from within news media organizations themselves. For Posner, “[t]he media are conduits for the demand of the general public rather than the primary demanders themselves.” He could not be more wrong.

Think for a few moments about the major venues and arenas in which public intellectuals

display their wares. Three major categories dominate the horizon. First, countless print or broadcast news stories utilize brief quotations from ostensibly relevant PIs who presumably bring at least some special knowledge to the subject at hand. These media-selected voices are contacted by reporters or producers who are seeking either to fulfill the professional requirement that every story has at least two sides or the widespread desire to find some “independent” voice who happens to articulate precisely the journalist’s own point of view. In the first instance, a PI has to be a partisan; in the second, a PI has to be a voice of insight, nuance, or cynicism.

Second, broadcast media, especially the seemingly ever-expanding universe of cable television news shows, require “talking heads” to take up air time. “Talk radio” “phoners” pioneered this use of publicity-hungry PIs long before CNN, Fox, and the multiplicity of networks whose initials end in “NBC” expanded the demand many times over. In these venues, the length of one’s sentences and the avoidance of multiple “ums” and “you knows” are the crucial performance standards.

Third, many newspapers and some magazines of course publish “byline” pieces authored by PIs. In the common imagination, this involves a fierce and oftentimes futile competition to appear on the “op-ed” page of the *New York Times* or the *Washington Post*. In truth, however, far and away the most common way in which PIs appear in general circulation media is as book reviewers examining the newly-published work of other PIs. The modest visibility and widespread distribution of such assignments suggest their limited utility for anyone who seeks to advance her worldview, or even her simple name recognition, with any wider public.

11 In the closing Acknowledgments in *Public Intellectuals*, Judge Posner declares that “[m]ost of this book is new,” aside from some very considerable portions of chapters 3, 6, 7, 8 and 10. If so, then glasses are always half-full, and never half-empty.

Posner fails to appreciate almost totally the extent to which PIs are thus simply convenient and most oftentimes completely free resources of which large news media institutions can take easy advantage. Why add more employees and their attendant benefit costs to one's payroll when eager and willing volunteers will do your company's handiwork either for free or for an exceedingly modest stipend of perhaps \$500 for three days work?

Posner repeatedly indicts "the public," whom he mistakenly imagines as creating an independent demand for PIs' voices, for failing to pay careful enough attention to their exaggerations and errors so that there exists no potential downside for a PI who seeks to maximize her every possible opportunity to sound off on as many subjects in as many venues as she can. Posner repeatedly condemns how "[p]ublic intellectuals are often careless with facts and rash in predictions," but he devotes no attention whatsoever to the media enterprises for which PIs are free and eager voluntary workers.

Posner's well-informed appreciation of how irresponsible many PIs are in their public behavior does benefit, however, from one of his book's few truly insightful conceptual delineations, namely how PIs' public utterances can serve any one or more of three functions: information, entertainment, or solidarity. The first is of course the functional presumption most often thought to underlie the media's use of PIs, but anyone who has

ever watched "Crossfire" or any one of its many down-market imitators will immediately grasp the concept of an "entertainment" usage of PIs. Indeed, those old enough to remember the television heyday of the now-deceased Morton Downey will further appreciate that the only fundamental difference between professional wrestling and PIs engaged in a "Crossfire"-style discussion is the combatants' style of dress.

Posner realizes that this increasingly entertainment-oriented use of PIs goes a long way towards explaining why PIs "tend to be found at or near the extremes of the political-ideological spectrum," but this entertainment use bears a close and mutually interactive relationship with PIs' solidarity function of preaching to whatever choir might choose to listen. The expressly partisan style and substance which are central to both the entertainment and solidarity roles of PIs also help explain what gives rise to the pattern of errors and exaggerated hyperbole that is the primary target of Posner's book.

But the professional irresponsibility that Posner repeatedly lambastes¹² should not be blamed primarily upon the public's inability to police or punish it.¹³ Nor should anyone in academia hold out any hope whatsoever that newspaper reporters or television show "bookers" will ever make any systematic effort to sort intellectual wheat from self-promoter chaff. Once an Alan Dershowitz has secured a perch at Harvard Law School,¹⁴ or a Bruce

12 See *Public Intellectuals* at 127 ("many prominent public intellectuals are not prudent, careful, or sensible in their commentaries and predictions").

13 Posner recognizes this impossibility. "The academic public intellectual is an expert speaking to an educated audience few members of which will know enough about his subject ... to catch his errors." *Public Intellectuals* at 55.

14 Concerning Professor Dershowitz, see "CNN Breaking News," 14 November 2000 (Dershowitz twice calling Florida Secretary of State Katherine Harris "a crook"); ABC's "Good Morning America," 13 December 2000 (Dershowitz calling the Supreme Court's decision in *Bush v. Gore* the "Dred Scott of the 21st century"); CBS's "60 Minutes," 20 January 2002 (Dershowitz advocating torture as an interrogation tool so long as "we bring it into the legal system so that we can control it"); and NBC's "Today Show," 29 January 2002 (same). See also Larry Dempsey, "Silence is Golden" [letter to the

Ackerman one at Yale Law School,¹⁵ no one in the journalistic community should be expected to carry the burden of collectively evaluating either the thoughtfulness or the net wisdom of their public comments.

Like other quantitatively-inclined citation counters, Judge Posner is loathe to consider the significant measurement difficulties that would stem from a forthright acknowledgment that not all “mentions” one might receive in the *New York Times* or on NPR necessarily reflect positively or commendably upon the individual so mentioned. There may be no shortage of “so long as they spell my name right” publicity hounds in the world, but Posner’s unwillingness to acknowledge that a notable percentage of media “mentions” are the journalistic equivalent of a “but see” in legal academia detracts significantly from his analysis.

Posner’s failure to confront the magnitude

of negative citations either stems from, or at least certainly goes hand-in-hand with, another even more basic shortcoming in *Public Intellectuals*, namely his inability to recognize the extent to which PIs do suffer serious reputational harm as a result of conspicuous inaccuracies or oddball behavior. Posner’s assumptions are glaringly incomplete: “Since no one is paying close attention, academics who do not worry much about being fools in history pay only a small price for mouthing off irresponsibly on matters of current interest to the law public; their academic reputation is unlikely to be affected by their ventures into the public arenas.”

There are two equally devastating ways in which to rebut this blissful illusion. The first requires the invocation of but a single word: Dershowitz.¹⁶ The second entails brief mention of three problematic stories that *Public*

editor], *Modesto Bee*, 24 January 2002, B6 (“Speaking of torture, is there any way to get Alan Dershowitz to stop talking?”); Thomas Oliver, “@ Wits End,” *Atlanta Journal Constitution*, 25 January 2002, A18 (“Alan Dershowitz, the Harvard law professor who helped O.J. Simpson get away with murder and who has disappeared from most television talk shows since he turns off more viewers than a test pattern, is now proposing we torture prisoners of war ...”). (Television citations are to transcripts in the LexisNexis News Library.)

- 15 Regarding Professor Ackerman, see his and Anne Alstott’s *The Stakeholder Society* (New Haven: Yale University Press, 1999) and their “\$80,000 and a Dream,” *The American Prospect*, 17 July 2000, 23, for the proposal that every American high school graduate should receive an \$80,000 payment from the federal government upon reaching the age of twenty-one. A sampling of reactions include David S. Broder, “Spread the Wealth,” *Washington Post*, 18 April 1999, B7 (noting the proposal “is wide-open to criticism ... as irresponsible”); Cass R. Sunstein, “Cash and Citizenship,” *The New Republic*, 24 May 1999, 42 (observing that “it is reasonable to think [] that the idea is preposterous”); Seth Bloom, “Reinventing Equality,” *The American Lawyer*, July 1999, 55 (citing the book’s “glaring omissions,” “sloganeering,” and “large dose of wishful thinking”); Pat Regnier, “The Birthday Bonus,” *Money*, August 1999, 30 (noting that the proposal “may sound like the most farfetched idea since the flat tax”); and Ludovic Hunter Tilney, “A Stake in the Future,” *Financial Times*, 27 May 2000, 4 (calling the idea “outlandish”). See also Professor Ackerman’s subsequent advocacy that the United States Senate refuse to confirm any nominee put forward by President George W. Bush to fill any vacancy on the U.S. Supreme Court because Bush is not an “independently elected” President but merely “an agent of the narrow right-wing [Supreme Court] majority that secured his victory” by means of a judicial decision that was “a blatantly partisan act, without any legal basis whatsoever.” Bruce Ackerman, “The Court Packs Itself,” *The American Prospect*, 12 February 2001, 48. Cf. George F. Will, “Moderates’ v. Madisonians,” *Newsweek*, 14 May 2001, 68 (calling Professor Ackerman an “excitable academic”).
- 16 See Jonathan Yardley, “Not in Our Front Yard,” *Washington Post*, 20 November 2000, C2 (“Take Alan Dershowitz. Take him, please,” for Dershowitz is “drawn to the camera and the microphone as the moth to the flame”); Gail Diane Cox, “You’ll Laugh, You’ll Cry, You’ll Call the State Bar,” *The Recorder*, 21 November 2000, 4 (Asking “What does it say about the believability of a tv docudrama that it

Intellectuals itself concisely reports but from which Posner draws a fundamentally incorrect conclusion. The earliest of these concerns the far-from-dependable brief amicus curiae that a slew of historians filed with the United States Supreme Court in the heavily-publicized 1989 abortion case of *Webster v. Reproductive Health Services*.¹⁷ As has been pointed out by others long prior to Judge Posner, one of the historians who signed the brief, James C. Mohr, had previously authored an important book which expressly contradicted multiple assertions made in that *Webster* advocacy brief.¹⁸ Posner reviews the complaints previously voiced by others about Mohr's conduct¹⁹ and unsurprisingly concludes that "Mohr's signing the brief ... was misleading and unprofessional."²⁰

If Judge Posner thinks that Professor Mohr has suffered no reputational harm as a

result of this event, he is ill- or mis-informed. He has been harshly rebuked by wholly reputable fellow scholars,²¹ and as someone who knows abortion history scholarship as well as anyone,²² but who is not personally acquainted with Professor Mohr yet also is expressly pro-choice, this writer feels fully comfortable in opining that Professor Mohr's professional reputation has suffered a serious and permanent stain as a result of the controversy surrounding the *Webster* amicus brief.

Posner's second such story concerns his friend Martha Nussbaum, a classicist and philosopher whose expert testimony in the well-known gay rights case of *Romer v. Evans* led several conservative scholars who were assisting the other side to allege that Nussbaum's sworn remarks were "a wholesale abuse of her scholarly authority and attainments."²³ Those

depicts Harvard quotemeister Alan Dershowitz sitting with his mouth shut, hour after hour, in the back of a room?"), Byron York, "Alan Dershowitz, Goofball," *National Review*, 5 February 2001, 37 (Observing that "For all his self-promotion and love of publicity, Dershowitz was at one time more respectable than he is today. The man who was once viewed as a flamboyant but solid civil libertarian has now taken on an almost clownish public persona." Cf. Alex Beam, "All Alan All the Time: Videolink tv Studio Serves Up the Talking Heads to the Networks," *Boston Globe*, 24 May 2000, C1 (quoting uplink manager Andrew Kelley as stating "Alan Dershowitz practically lives here").

17 Sylvia A. Law et al., "Brief of 281 American Historians as Amicus Curiae Supporting Appellees," *Webster v. Reproductive Health Services*, #88-605, 30 March 1989. See also Sylvia A. Law, "Conversations Between Historians and the Constitution," *The Public Historian* 12 (Summer 1990): 11-17.

18 See James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (New York: Oxford University Press, 1978). See also James C. Mohr, "Historically Based Legal Briefs: Observations of a Participant in the *Webster* Process," *The Public Historian* 12 (Summer 1990): 19-26.

19 See Gerard V. Bradley, "Academic Integrity Betrayed," *First Things*, August-September 1990, at 10-11; John Finnis, "'Shameless Acts' in Colorado: Abuse of Scholarship in Constitutional Cases," *Academic Questions*, Fall 1994, 10, at 12-19.

20 *Public Intellectuals* at 369.

21 See Finnis, note 19 *supra*, at 13, 18 ("In subscribing to the Brief, Professor Mohr was grossly misrepresenting his own scholarly findings" and "the production and submission of the Brief was ... a fraud on the Court and the nation."). See also James Davison Hunter, "Partisanship and the Abortion Controversy," *Society* 34 (July/August 1997), 30, 31 ("Drafters and key signatories knew that evidence existed that overlooked, ignored, or contradicted the arguments of the brief, but they signed the brief anyway").

22 See David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*, rev. ed. (Berkeley: University of California Press, 1998).

23 Finnis, "Shameless Acts," note 19 *supra*, at 35. See also Gerard V. Bradley, "In the Case of Martha Nussbaum," *First Things*, June/July 1994, 11, and Robert P. George, "'Shameless Acts' Revisited: Some Questions for Martha Nussbaum," *Academic Questions*, Winter 1995-96, 24.

contretemps attracted some highly-visible contemporaneous news coverage,²⁴ as well as several years worth of ongoing conservative salvos,²⁵ and over time became a standard ingredient in popular press portrayals of Nussbaum's career.²⁶ Posner's credible survey of the dispute leads him to conclude that "[t]he academic standing of Nussbaum ... has not been affected" by the accusations, but once again his conclusion seems far too sanguine, even if, on close examination, the conservatives' charges against Nussbaum's honesty seem strained and tendentious. Posner draws the conclusion that thus "there is no accountability for inaccuracy (or worse) in testimony by public intellectuals," but an extremely prominent profile of Nussbaum in the *New York Times Magazine* certainly suggests otherwise. After noting that the *Romer* dispute had involved "accusations of libel and perjury," the *Times* reporter recounted how "When I asked whether she thinks her scholarly reputation was tarnished by all the mudslinging, Nussbaum handed me the 136-page law-review article she published on the case. It bristled with dozens of pink Post-its. 'If you read this you will see that my arguments were all good and quite correct,' she said curtly."²⁷ If Judge Posner believes that coverage of that ilk in the *New York Times* leaves one's reputation "[un]affected," he is naive indeed.

The judge's third example concerns himself, and the long-running and highly-publicized pissing match that has transpired between Ronald Dworkin and Posner. Once again

Posner wishfully concludes that "neither Dworkin nor I have paid any price for our nasty little spat, though a disapproving clucking of tongues is faintly audible in academic circles." Relative to this metaphor, it is Posner's hearing that must be seriously impaired, for the conclusion that both Dworkin and Posner have suffered reputational harm as a result of their series of exchanges seems all but undeniable. Just the other evening, perusing the newest issue of *The New York Review of Books*, this writer flipped past a piece by Professor Dworkin. In past years I would have at least skimmed anything featuring Dworkin's byline, but after ingesting his previous attacks upon Posner in the *New York Review*,²⁸ I passed, just as I have come to do in recent years when Alan Dershowitz's or Bruce Ackerman's bylines adorn some article. Other observers with superb critical track records believe that Judge Posner, rather than Professor Dworkin, has suffered the most harm in their exchanges,²⁹ but to deny that neither of them has sustained any major reputational damage is whistling past the graveyard rather loudly indeed.

All told, Posner's blindness – or deafness – regarding the frequency and extent of PIs' self-injurious behavior is one of *Public Intellectuals'* largest and most glaring shortcomings. Indeed, in any comparative measure of thoughtfulness and insight, anyone who is tempted to sit down with *Public Intellectuals* ought to do so only after carefully reading a far more obscure treatment of the same topic by Professor Ward Farnsworth that appeared in

24 See Jeffrey Rosen, "Sodom and Demurrer," *The New Republic*, 29 November 1993, 16.

25 See note 23 *supra*.

26 See especially Robert S. Boynton, "Who Needs Philosophy?," *New York Times Magazine*, 21 November 1999, 66.

27 *Id.* See also Martha Nussbaum, "Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies," 80 *Virginia Law Review* 1515 (1994).

28 See Ronald Dworkin, "Philosophy and Monica Lewinsky," *New York Review of Books*, 9 March 2000, 48, and Posner @ Dworkin, "An Affair of State: An Exchange," *New York Review of Books*, 27 April 2000, 60.

29 See Steven Lubet, "Ethics Clash of Two Giants," *National Law Journal*, 3 April 2000, A22.

the February 2001 issue of the *Boston University Law Review*.³⁰ In that article, Farnsworth argues that “when academics offer opinions in their professional capacities, they should use the same care and have the same expertise called for in their published professional work.”

Farnsworth’s uppermost concern is a problem previously addressed in an excellent essay by Neal Devins,³¹ namely the increasing proclivity of PIs to sign their names to all sorts of paid advertisements taking the form of ‘public letters’ which address subjects that many of the academic signers may have no special expertise concerning. As Farnsworth rightly argues, “[t]he possible long-run side effect” of such letters “is that the masses of signatures send a signal that academics do not take details and distinctions regarding expertise particularly seriously when offering their views.”³² Farnsworth fears that perhaps he himself is too old-fashioned in adhering to “a model of the academy that regards impartiality and nonpartisanship as important virtues,”³³ but, far more powerfully and persuasively than Posner, he convincingly makes the case that “academics who pontificate in public without the expertise expected of them in their professional work injure their colleagues and consumers alike.”³⁴

The greatest danger, Farnsworth rightly suggests, occurs “where an academic is so promiscuous in offering opinions that consumers stop taking him seriously as an expert.”³⁵ Although Farnsworth is too polite to do so, this insight could well be spoken of

as the Dershowitz Principle. But the impact of the Dershowitz Principle is not limited to individual promiscuous miscreants. Far more importantly, readers, viewers and other “consumers” who possess either relative independent knowledge, or a good memory may in time react not simply by drawing individual conclusions about a Dershowitz, a Mohr, a Nussbaum, or a Dworkin. They may also begin to view with cynicism or doubt the larger population of PI voices whom these individuals are perceived to represent. As Farnsworth accurately reasons, “if one law professor seems to be something of a ‘bozo,’ they will not only take him lightly but will take law professors in general more lightly. Maybe *many* of them are bozos.”³⁶ Right on – the Dershowitz Principle indeed.

Judge Posner in *Public Intellectuals* sounds considerably more pessimistic about the potential for improved self-policing of this problem than does Professor Farnsworth. Just as with his blindness (or deafness) concerning negative citations and reputational harm, Posner seems either disinterested or at best incurious about any possibility that a sense of *shame*, or possible shaming mechanisms, could lead to any significant improvement in PIs’ public behavior. But here again Posner’s imagination is too delimited by his market-fixated presumptions. The shaming power of the negative citation is real indeed, and the more attention that is given to the reputational harm sustained by imbroglios such as Posner’s own brawl with Dworkin, the more that other actual or prospective PIs will hesitate to behave

30 Ward Farnsworth, “Talking Out of School: Notes on the Transmission of Intellectual Capital From the Legal Academy to Public Tribunals,” 81 *Boston University Law Review* 13 (2001).

31 See Neal Devins, “Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom,” 148 *University of Pennsylvania Law Review* 165 (1999).

32 Farnsworth, “Talking Out of School,” 41.

33 *Id.* at 56.

34 *Id.* at 18.

35 *Id.* at 20.

36 *Id.*

in Dershowitz- or Mohr-like ways.

And that will be all to the good, for the most profound improvements will indeed come from self-policing of the most literal sort. Let one impressive and almost inspirationally uplifting example make the point, rare though it may be. It concerns another Posner, not one quite as widely heralded as the good judge, but also one whose record for self-correction compares more than favorably with that of the bad judge. Gerald Posner is the author of at least two all-but-definitive books, one on the assassination of John F. Kennedy³⁷ and another on the assassination of Martin Luther King, Jr.³⁸ But in November 2000, Posner was one of the earliest sponsors of “the pompously titled ‘Emergency Committee of Concerned Citizens 2000,’ which took full-page ads in the *New York Times* demanding a revote in Palm Beach” County, Florida, because of the infamous “butterfly ballot.”³⁹ In addition, Posner says, “I wrote op-eds for Salon.com and the *New York Daily News*. On television talk shows from MSNBC to Fox News’s popular ‘The O’Reilly Factor,’ I made the case for” Al Gore having been the true winner in the state of Florida. “In thousands of e-mails, I urged voters to deluge Clay Roberts, director of Florida’s Division of Elections, with appeals for a recount.”⁴⁰

But, ten months later, Gerald Posner was sufficiently honest and self-critical to admit

publicly “How wrong I was.” Motivated by partisan fervor, he confessed that in November of 2000 “I did not care” whether his behavior as a PI with regard to the Florida vote count had been anything other than simply partisan. “I was convinced that Al Gore was by far the best-qualified candidate and the man most fit to lead the U.S.” George W. Bush, on the other hand, “was not only untested nationally, but he seemed to me bereft of the character or intellect to become a real leader” So no holds, or no comments, were barred.

Yet Gerald Posner turned out to possess exactly those character traits that Richard Posner and Professor Farnsworth correctly believe are essential if a PI is to make an affirmative contribution to American public discourse, rather than simply entertain or sustain partisan solidarity. As Gerald Posner wrote in September 2001, “one of the hallmarks of good character is the courage to admit mistakes” and “I am compelled to admit I was mistaken.”⁴¹ If the landslide of commentary concerning Richard Posner’s tremendously disappointing *Public Intellectuals* encourages even a modest number of American PIs to ponder self-consciously the crucial maxim of self-critical reflectiveness that has been so beautifully exemplified by Gerald Posner, then the publication of this embarrassingly imperfect book will not have been in vain. 

37 Gerald Posner, *Case Closed: Lee Harvey Oswald and the Assassination of JFK* (New York: Random House, 1993).

38 Gerald Posner, *Killing the Dream: James Earl Ray and the Assassination of Martin Luther King, Jr.* (New York: Random House, 1998). See also David J. Garrow, “New ‘Leads’ in King Case Invariably Go Nowhere,” *Atlanta Journal-Constitution*, 29 March 1998, C1.

39 Gerald Posner, “I Was Wrong About Bush,” *Wall Street Journal*, 25 September 2001, A19.

40 Id. See, e.g., Gerald Posner, “The Fallacy of Nixon’s Graceful Exit,” *Salon*, 10 November 2000 (salon.com/politics/feature/2000/11/10/nixon.index.html) [visited 22 February 2002]; “The Edge with Paula Zahn,” Fox News Network, 14 December 2000 (LexisNexis News Library).

41 Id. Posner added that “Most people who lock themselves into a public position want to keep defending their original stance, even when in their heart they know subsequent events have proven them incorrect.”