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Posner's new book gives us all pause to think about fellow humans

I studied Greek over a half-century ago and do not pretend to remember much. But I do recall a class in which we were translating a scene from the "Iliad," the Greek epic about the Trojan War.

Hector, Troy's best warrior, is talking to his wife before he returns to battle. He then leans down to pick up his son Astyanax. The little boy is frightened of the horse-hair plume on Hector's helmet. The husband and wife share a parental laugh as Hector removes his helmet before picking up his son and hugging him. It would turn out to be the last time Hector ever saw his family before he was killed in battle.

At the time, I was struck that a domestic scene written more than 2,500 years ago could still be so evocative today. But the instructor teaching our class went beyond this. He observed that what is equally significant was who was involved in the story: not the Greeks, but their enemies. Homer is skillfully reminding his Greek audience that their enemies are people not much different from themselves.

The word "empathy" has only been around since 1909. But the idea it expresses is the ability to vicariously experience the feelings, thoughts and experience of another goes back much further. And it is a capacity that is vital for a lawyer to possess.

Obviously, she needs to feel what it must be like to be in the shoes of her client. But equally important, a lawyer must try to feel what it is like to be in the place of her adversary.

Emily Katz Anhalt has written a perceptive new book titled "Enraged: Why Violent Times Need Ancient Greek Myths" (Yale, 2017). It is based on her belief that the stories a culture tells help shape the choices we make and the ways we treat one another.

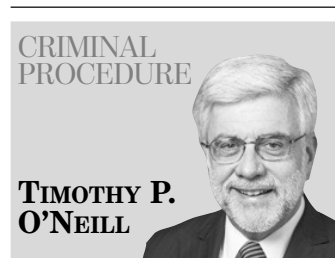
She contends that despite the innumerable deaths, the Iliad is hardly a celebration of war. The victims are "not nameless fighters." In a scene describing horrible carnage, the epic occasionally stops and describes in great detail the life of one of the dead warriors.

We learn of the wife of one, the elderly parents of another; the children of yet another. Homer makes sure that we understand that the "glory" of a hero like Achilles comes at the expense of the senseless deaths of so many innocent men. In Anhalt's words, "The Iliad makes us see all dying warriors, not just Greek ones, as fully human and important and their deaths as tragic."

I thought of this necessity for empathy when I read former judge Richard A. Posner's newest book, "Reforming the Federal Judiciary" (2017). On the one hand, this self-published book is intended as an explanation for his sudden retirement from the 7th U.S. Circuit Court of Appeals in September. But it is also a *cri de coeur* castigating the court for its treatment of pro se litigants.

"I am embarrassed that it took me a long time to notice the mistreatment [of pro ses by many different actors in the criminal justice system] ... I don't know why it took a long time ..."

It may surprise you to learn that about half of the appellants in the 7th Circuit are pro se. Of this group, about half are prisoners. And only 12.9 percent of pro se litigants obtain relief. Posner is critical of the court's refusal to help find a lawyer for pro se litigants in those cases where having a lawyer is crucial. But he is equally critical of the court's practice of denying relief without



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providing the pro se litigant an adequate (and understandable) explanation of why.

He particularly disapproves of the court's handling of its staff attorney program, which is largely responsible for cases involving pro se litigants.

Posner characterizes himself as "the only member of my court who feels empathy for the pro ses. And I admit that it's a relatively new feeling for me." On the issue of empathy, he continues, "I confess that for the first 25 or even

30 years of being a federal judge I did not feel empathy for many litigants. They were nothing to me; they were alien; about half of them were prison inmates, criminals, and many of the other pro ses were ex-criminals; all struck me as failures."

He dates his new-found empathy as starting around this March. And what caused it? He bluntly states, "I don't really

know." But he goes on to note that "I am embarrassed that it took me a long time to notice the mistreatment [of pro ses by many different actors in the criminal justice system] ... I don't know why it took a long time ... But better late than never."

Posner says this near the end of the book, but makes no reference to an incident described much earlier that he said occurred only recently: his first visit to the Cook County Jail. Interestingly, this was only the second visit he had ever made to a correctional facility.

He describes his reaction to the five inmates with whom he spoke: "All of them were pleasant, articulate, unthreatening and really seemed quite normal." He then calls his tour of the jail "an eye-opening experience." Characterizing prisoners as, in a sense, the "clients" of federal judges, he contends that judges need to "understand them better than most of us do."

Reading Posner's book made me think of Homer's depiction of the Trojan War. On the one hand, the war could be seen as nothing more than the deaths of thousands of fungible warriors outside the walls of Troy. Yet Homer occasionally stops and makes us look at the complex human being behind one of them. He makes us see, really see, the bonds we share with those we so glibly call "aliens" or "enemies."

Posner says that he wrote more than 3,300 opinions in his career. Yet his all-too-brief experience at the Cook County Jail reminds us how important it is for lawyers and judges to get past legal labels.

We cannot simply deal with plaintiffs and defendants, appellants and appellees, petitioners and respondents. We have to recognize we are judging human beings. And this means that, ultimately, we are actually judging ourselves.