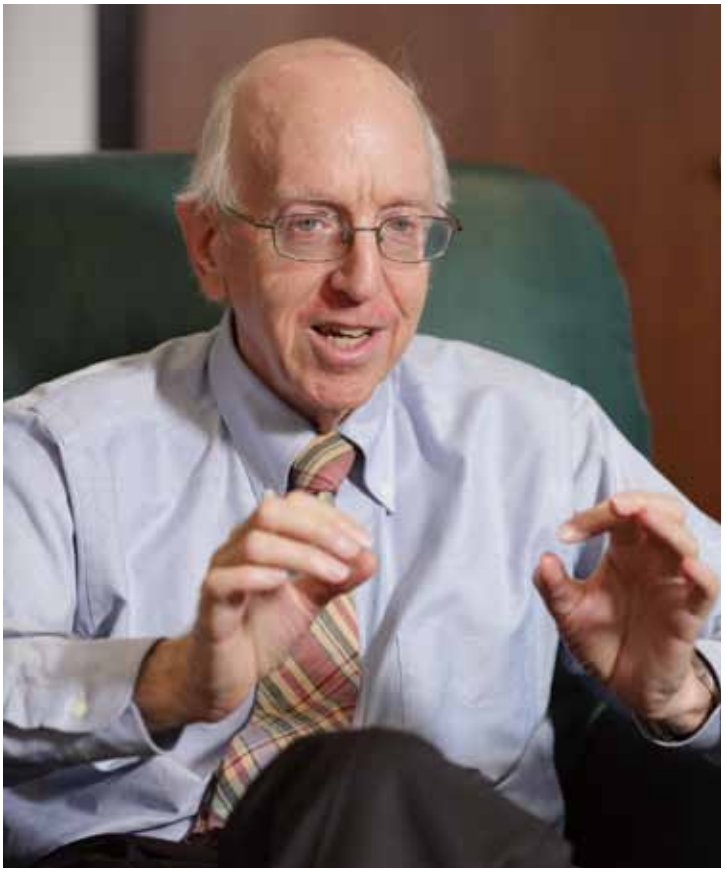

Rhetoric & Law

The double life of Richard Posner, America's most contentious legal reformer

by LINCOLN CAPLAN

JUDGE Richard A. Posner, LL.B. '62, is a fierce iconoclast who adorns his chambers with icons. In one corner are photographs of Justice Oliver Wendell Holmes and Judge Henry Friendly. In the opposite corner is one of Justice Benjamin Cardozo. In Posner's words, Holmes is "the most illustrious figure in the history of American law." Friendly was "the most powerful legal reasoner in American legal history." Cardozo "has no peers" among twentieth-century state court judges and was "a great judge."

It's been a generation since Friendly died: he sat on the U.S. Court of Appeals for the Second Circuit, in Manhattan, from 1959 to 1986. The other two died long before him: Holmes served on the U.S. Supreme Court from 1903 to 1932; Cardozo made his reputation on New York State's highest court for 18 years and then sat on the U.S. Supreme Court for six until he died in 1938. But for Posner, they remain alive through their judicial opinions as shapers of legal pragmatism, which he considers the only viable approach to judging in the United States today.

In *The Metaphysical Club*, Louis Menand, Bass professor of English, called the "attitude" of pragmatism "an idea about ideas." "They are "not 'out there' waiting to be discovered," Menand wrote, "but are tools—like forks and knives and microchips—that people de-

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vise to cope with the world in which they find themselves." Pragmatism holds that people, not individuals, produce ideas, which are social, "entirely dependent, like germs, on their human carriers and the environment." The survival of ideas, Menand wrote, "depends not on their immutability but on their adaptability."

Posner describes legal pragmatism as a "practical and instrumental" application of that attitude. It is: "*forward-looking*, valuing continuity with the past only so far as such continuity can help us cope with the problems of the present and of the future;" "*empirical*," focused on facts; "*skeptical*," doubtful that any decision, legal or otherwise, represents "the final truth about anything" because frames of reference change over time; and "*antidogmatic*," committed to "freedom of inquiry" and "a diversity of inquirers"—in other words, to the "*experimental*"—because progress comes through changes in frames of reference over time, "the replacement of one perspective or world view with another." (The italics are his.)

His ideas about judges and judging command attention because of his authority as a thinker and a doer. His approach to law, some legal scholars contend, makes the field worthy of a Nobel Prize—which he would win, many say, by acclamation. At 77, he has been the most influential American legal scholar during his almost half-century in the academy, for all but one year at the University of Chicago Law School: in 2000, Fred Shapiro, a librarian at Yale Law School, calculated that Posner was the most cited legal scholar "of all time" by a wide margin (Holmes was third). He is also in his thirty-fifth year as a highly respected member of the U.S. Court of Appeals for the Seventh Circuit, which encompasses Illinois, Indiana, and Wisconsin. He has been among the country's most influential judges in shaping other court decisions, measured by the number of times other judges have cited his judicial opinions.

The Heretic

His latest book, *Divergent Paths: The Academy and the Judiciary*—his *sixty-fourth* since 1973 (counting each edition of several of his legal treatises), many published by Harvard University Press—makes clear another reason for his renown: Posner's advocacy for legal pragmatism and his celebration of judges who have practiced it well are weapons in his long-running war against what he regards as their nemesis. In *Overcoming Law* (1995), he wrote, "The 'law' to which my title refers is a professional totem signifying all that is pretentious, uninformed, prejudiced, and spurious in the legal tradition." He calls this view "legalism," "legal formalism," and "classical legal thought," the idea that law is a self-contained field of knowledge whose methods of reasoning can solve human problems in ways that best serve our society. In the *Harvard Law Review*, he wrote that much of his professional energy "has been devoted to opposing this conception."

A plague on both his houses, *Divergent Paths* is another attack on federal judges and the top tier of law schools whose graduates are more likely to become law clerks to federal judges and to practice in national law firms. He attacks these elites because he is convinced American democracy depends on them. The book's message is that the academy and the judiciary talk past each other, in impenetrable jargon about useless theory and legalistic lingo that hides the real reasons for rulings. The jargon stems from what he calls the "law-and" problem: the flooding of law-school faculties with Ph.D.s in dozens of other academic fields. The lingo stems, in his view, from the fact that the Constitution and federal statutes rarely dictate precisely the outcome in a court case, so judges "fall back on their priors—the impulses, dispositions, attitudes, beliefs, and so on that they bring to a case," before they look at the facts and at the law to be applied—and then use lingo to obscure their actual grounds for deciding.

The book joins a long list of Posner calls for reform and proposes a slew of specifics: for example, that law schools offer courses—"[p]sychology, sociology, economics, organizational theory, and related fields"—for the continuing education of judges that "focus on how judges act rather than on what they (often their law clerks rather than they) say in their opinions." The ideas are sensible and, for the most part, respectfully offered.

The diagnoses leading to them, however, radiate disdain: "Curiosity, which is related to receptivity, deserves weight in the selection of judges, yet is given none and as a result is an uncommon judicial trait because most judges don't think it relevant to their job." Or: "It's odd that while Presidents are allowed to serve for only eight years, there's no limit on the tenure of Supreme Court Justices, even though the Supreme Court is largely a political court because of how the Justices are selected, the absence of a court empowered to reverse it, and the political significance of so many of the Court's decisions."

Posner heaps particular scorn on the Court, because, in his view, its "failures and inadequacies" harm the constitutional system. He doesn't like the Court as an institution. One of the worst of its failures for him is "the rearview mirror syndrome," looking backward "for the answers to current issues—backward to our eighteenth-century Constitution for example." Posner concedes there is meaning and value in some provisions of the document: he especially likes the prohibition against the government granting titles of nobility. But he usually regards America's fundamental law as a relic, written by men who could not possibly imagine our era so they wrote in vague terms that require jurists to be creative law-makers: "The Constitution is just authorization to the Supreme Court and the lower courts to create a body of common law, which we call 'constitutional.'" In contemporary politics, most heatedly in the rhetoric of "originalism" and "textualism" versus "judicial activism" surrounding the confirmation of nominees to the Court, these are fighting words.

Divergent Paths, unexceptional by Posner standards, is the latest evidence that he remains America's most contentious legal reformer—basically, a heretic. It's no surprise that moral philosophers like the late Ronald Dworkin have flatly disagreed with him. He is dismissive of their view that it's possible to create a theory of ethics, telling us how to live our lives, by making a system of rules based on concepts of right and wrong and building law on that foundation. ("I hate the moral philosophy stuff. It is theology without God," he told *Lingua Franca* magazine in 2000. "I don't like theology with God, I don't like theology without God. It's preachy, it's solemn, it's dull. It's not my cup of tea at all.") "The arguments he offers for his main claims are so spectacularly unsuccessful," Dworkin wrote, "as to make urgent a question he himself raises. What actually explains his fierce hostility—he calls it a 'visceral dislike'—toward the academic work he has set himself against?"

But it is surprising and significant that self-defined pragmatists have contested Posner's view of legal pragmatism, too—because it isn't pragmatic enough. In *The Yale Law Journal*, the legal scholars

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Michael Sullivan and Daniel J. Solove wrote, "In Posner's hands, pragmatism stands for hard-nosed 'common sense' and 'reasonableness,' rejecting what he views as pie-in-the-sky abstract theories of reform. But what passes for legal pragmatism," they said, "is often a brand of commonplace reasoning that is more complacent than critical." To them, he is trying but failing to conceal unbridled judicial activism in a highfalutin (his favorite putdown) phrase.

James Boyd White, an emeritus professor at the University of Michigan, wrote that Posner's legal pragmatism means deciding cases "by a judicial balancing of costs and benefits." White continued that "the only reason for attending to prior legal texts, in his view, is that to disregard them would have social costs, and these costs should be taken into account by the person with power." To White, "this misunderstands the nature of both law and democracy, including the obligation—moral, political, and legal—to respect the authority of legal texts and the fundamental principle of separation of powers." In Posner's vision of American law, White concluded, law loses "its essential meaning."

The fights Posner engages in naturally tend to fortify his position as he defines it. In key instances—out of self-interest, since it's certainly not out of ignorance, but also out of impudence—he glosses over how he redefines a seemingly common term, like pragmatism, in a way that is uncommon. His writing seems to create a cocoon of refreshing, if sometimes mordant, candor, in which a reader can take refuge from the swirl of controversy that surrounds him. But the controversy is often dramatically more contentious than he lets on.

From Lit to Law and Economics

In *Reflections on Judging*, Posner's polemical memoir published in 2013, the first chapter is "The Road to 219 South Dearborn Street," the address of the classic steel-and-glass Chicago office tower, designed by Ludwig Mies van der Rohe, where his Seventh Circuit chambers, on the twenty-seventh floor, look out on Lake Michigan. In a footnote, he wrote, "I must take this opportunity to thank my parents (now long deceased), especially my mother, for having pushed me, from my earliest youth, to excel academically, much as Asian American parents push their kids."

His mother was a high-school English teacher in the New York City public schools and started reading Homer and Shakespeare to him when he was three (or "maybe earlier," he wrote). After skipping his last year at Bronxville High School, he went to Yale at the age of 16. He was elected to Phi Beta Kappa as a junior and, in 1959, graduated *summa cum laude* in English. Practitioners of the New Criticism dominated the Yale English faculty. As Posner explained, the school downplayed "biographical and historical approaches to literature" and "treated the literary work as an autonomous aesthetic object." That training, he wrote, "made me a better close reader than I otherwise would have been" and "liberated me from excessive dependence on history as a guide to understanding a text."

Posner applied to law school and got in "with no burning interest in law" and as "a default career choice," in part because his father was a lawyer (he went to night school and became a criminal-defense lawyer) and businessman (in the jewelry business and then in a lucrative corner of finance, as a provider of second mortgages to people who bought houses in New York slums). He was obsessed with literature, but didn't want to make a living teaching or writing about it. "I loved my first year at the Harvard Law School," he wrote, "in all its brutishness. Harvard stacked its best teachers in the first year and they were superb, though cold, demanding, and at times nasty. At the end of the year I had the strange feeling that I was more intelligent than I had been a year earlier."

He was elected the law review's president and, in 1962, won the school's Fay diploma, awarded to the graduating LL.B. (now J.D.) student with the highest combined grade point average during the three years of study. Justice William Brennan had delegated the selection of his two law clerks to Paul Freund, Harvard's revered constitutional scholar. He asked Posner to clerk for Brennan. Posner said yes. "I have to say at the risk of blasphemy that I found the Supreme Court an unimpressive institution," he wrote. "I was stunned to discover that Supreme Court Justices didn't write all their own judicial opinions ([Justice William O.] Douglas did—and his were the weakest, though not because he was dumb—rather because he was bored); the Harvard law professors, although extremely critical of the liberal Justices, had not let on that law clerks played such a large role."

> **"The Supreme Court's** work tempo my year (the 1962 Term) was slow; I worked less hard that year than any year since."

He went on, "The Supreme Court's work tempo my year (the 1962 Term) was slow; I worked less hard that year than any year since. I read a great deal of literature in the evenings and on weekends, particularly classic English and American novels, from Dickens to Faulkner, because I had concentrated on poetry and drama at Yale, the preferred subjects of the New Critics." He "toyed with the idea (though [he] quickly abandoned it) of quitting law and getting a graduate degree in English," but shortly before the clerkship ended, he was offered and took a job as an assistant to Philip Elman, a member of the Federal Trade Commission.

For Brennan, Posner had worked on an antitrust case about a major bank merger. For Elman, who regarded Posner as "my genius assistant," he worked on consumer-protection and competition, or antitrust, issues. After two years, he moved to the office of the U.S. Solicitor General (then Thurgood Marshall), where he argued six cases before the Court and wrote briefs in many others, with a focus on cases dealing with antitrust and regulation.

After a little more than two years, he left to join the staff of a presidential task force on telecommunications policy—a year that cemented his interest in antitrust and regulation. Then he taught for a year at Stanford Law School, where he turned 30, and accepted an offer to go to Chicago Law School as a tenured professor, "because of its unique concentration of economists accessible to law professors and interested in law. And from then on I taught, and published academic work, in the emerging field of

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economic analysis of law."

The last sentence theatrically understates what Posner accomplished in the field. Building on the work of Nobel Prize-winning economists Gary Becker, Ronald Coase, and George Stigler, the economist Aaron Director, and the legal scholar Guido Calabresi, a Yale Law professor and dean who is now a distinguished federal judge, Posner did more than anyone else to promote the approach called "law and economics." It applies economic analysis to laws regulating explicit economic activity, like antitrust, tax, and corporate law, and to laws regulating nonmarket activities, which run a wide gamut. The field remains the most influential movement in the law since the 1930s.

In *Economic Analysis of Law*, first published in 1973 and now in its ninth edition, he explained how American common law—judge-made rules about subjects like contracts, crime, property, and torts dealing with problems not directly related to markets—bears "the stamp of economic reasoning"and where it doesn't, it should. In the preface to the latest volume, he wrote that "a relative handful of economic doctrines—such as decision under uncertainty, transaction costs, cost-benefit analysis, risk aversion, and positive and negative externalities—can, by their repeated application across fields of law and legal rules, describe a great deal of the legal system...."

The radical approach attracted exactly what Posner seemed to be working hard for—attention to law and economics outside the legal world.

The book has an establishment tone, as the urtext about what Posner calls "the foremost interdisciplinary field of legal studies." A generation ago, however, Posner was the constant target of the kind of criticism he was hurling at others. He was said to misunderstand what he aimed to describe and fix: law, markets, and society. He was censured for taking a blinkered approach to economics, the free-market-favoring Chicago School view of Stigler and others who taught him the subject, and for favoring efficiency and individual liberty at the expense of equality, fairness, and justice in law and economics. He was condemned for oversimplifying the economic concept of utility, or self-interest, as maximizing wealth, when the meaning of wealth depends on an individual's values, tastes, and circumstances. He was a full-fledged formalist—with economics the self-contained field of knowledge whose methods of reasoning he swore by.

Posner reveled in the clamor. As an alternative to student-run law reviews—he dislikes them because he thinks students are too inexperienced in law and editing and (Posner's words) "often torment" authors with endless revisions—he founded and edited the *Journal of Legal Studies*. With the economist Elisabeth M. Landes, he coauthored an infamous article called "The Economics of the Baby Shortage," which the journal published in 1978. They analyzed "the regulation of child adoptions" as an "example of nonmarket regulation that may be no less perverse than the widely criticized governmental efforts to regulate imports, transportation, new drugs, bank entry, and other market activities."

The article, technical and jargon-driven, included tables of data about childbirths and adoption placements, figures showing supply and demand curves for babies, and equations explaining the key factors affecting both curves. It is densely written and includes standard academic caveats, as in, "The objections to baby selling must be considered carefully before any conclusion with regard to the desirability of changing the law can be reached."

Throughout the article, in addition, Posner and Landes made taunting observations about "how the world would look if a free market in babies were permitted to come into existence"—in a world where baby sales were legal and the role of adoption agencies was limited or eliminated.

The radical approach to the subject attracted exactly what Posner seemed to be working hard for—attention to law and economics outside the legal world. It showed how economic reasoning could illuminate problems and lead to solutions in unexpected parts of American life. In a paper published last year, the Northwestern University law professor and Republican adviser Steven Calabresi wrote with a co-author, "The thing that kept Posner off every single Supreme Court list I have ever seen is his baby-selling proposal, his weird personality, and his supreme penchant for judicial lawmaking in the guise of law and economics rather than originalism."

Back in 1981, at 42, Posner was an academic superstar and president of a lucrative consulting firm he had founded with two colleagues called Lexecon, Inc., which gave companies advice about whether their practices in the marketplace would violate antitrust laws and about regulation of airlines, railroads, and public utilities—markets where economic analysis conventionally applied. He enjoyed a potent combination of influence and affluence. He had also taught himself ancient Greek, with the help of a classicist, so he could read Homer and the New Testament in the original.

In June that year, he got a call to see if he was interested in being appointed a judge on the Seventh Circuit. The Reagan administration sought to put conservative legal scholars on federal appeals courts to remake the law. When he clerked for Brennan, he thought of himself as a liberal. But he had leaped to the right (becoming "more and more conservative first during the turmoil of the late 1960s, which I found extremely repulsive," he told the legal scholar Ronald Collins), and the pro-market, pro-wealth-maximization bias of his law-and-economics passion put him on the Reagan list. He equivocated briefly and, a week later, said yes.

In his judicial memoir, he mentioned "a final, quite petty consideration that played a role in my decision to accept the appointment." Representing a railroad, he testified before an administrative law judge and was "subjected to a very effective cross-examination." The railroad's general counsel got "very annoyed" with Posner for letting himself "be yanked around" by the lawyer. Posner: "My reaction was, Who needs this? I want to be on the other side of the bench. I want to be the torturer rather than the victim."

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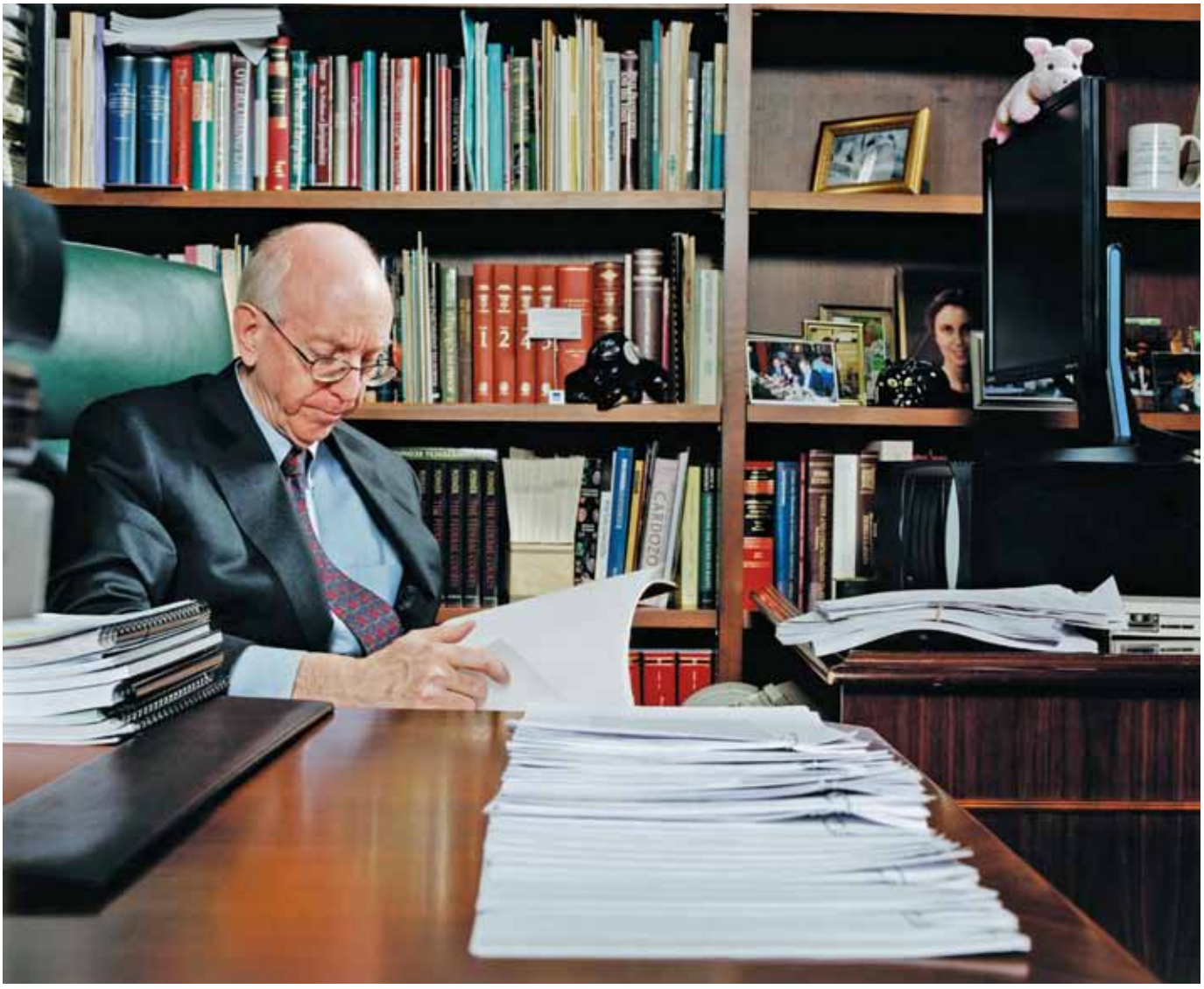

"No Hostile Indians"

Posner is tall, thin, and slightly stooped, with an unusually high, soft voice and eyes that can shift quickly from mischief to menace. In *The New Yorker* in 2001, Larissa MacFarquhar described him as having "the distant, omniscient, ectoplasmic air of the butler in a haunted house," which, unnervingly, he does. But there is nothing gloomy about him. He emits the confidence and cheer of a man who has minimized the hassles in his life and spends his days pretty much as he wants to, reading, thinking, and writing. Yale law professor Abbe Gluck was surprised when, out of the blue, Posner asked her to research and write an article with him after admiring her groundbreaking scholarship about how Congress drafts statutes. She said, "He's the most spectacular, energetic intellect you could come in contact with. And he's phenomenally productive: when he's thinking about something, it gets his full attention until he's figured it out."

He sees decline all around him, yet finds delight in folly and in his perpetual work. "That was fun," he said recently, about working as Philip Elman's assistant 50 years ago. "That was fun," he said about his stint in the Solicitor General's office. He likes working with smart people, is a snob about who *is* smart, and insists that colleagues criticize his work as cold-bloodedly as possible. ("No pussyfooting, I tell my law clerks.") About one third of his former clerks are law professors, an unusually large fraction for any federal judge. The contrast between his polished, idea-driven, sometimes social-science-y prose about law and his blunt, gossipy talk is unexpected and disarming.

About the Supreme Court, he said, "You know they still have a spittoon sitting beside each chair on the bench? What kind of crap is that? Right?" And: "Now who would say, for example, that the nine Supreme Court Justices were the nine best lawyers in the country. That'd be preposterous. Now, what if the proposition was, well, they're among the hundred best lawyers in the country. That'd be ridiculous. Among the thousand best lawyers in the country, out of a million lawyers? No! I think today's Supreme Court is extremely mediocre."

It's startling to hear a sitting federal judge insult the justices on the record, but Posner's view is that he gives the Court and its precedents the respect they are due. Posner's favorite Supreme Court ruling to attack in the past decade has been *District of Columbia v. Heller*, the 2008 case in which, by 5-4, the conservative ma-

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jority ruled that the Constitution's Second Amendment protects an individual's right to possess a handgun for self-defense.

To Posner, the decision and, in particular, the majority opinion by Justice Antonin Scalia, is "an example of motivated thinking"—thinking shaped by how he and the other justices in the majority wanted the case to come out. They used their own version of history as a basis for their interpretation of the amendment, he believes, even though, by his count, 14 of the 18 historians who signed friend-of-the-court briefs disputed that view. The justices did "what is derisively called 'law office history,'" Posner wrote about Scalia's historical account: "The derision is deserved."

In 2012, when the Seventh Circuit reviewed an Illinois statute that prohibited people from carrying a gun that was loaded and ready to use, Posner wrote the opinion for the court striking down the law. (Posner's judicial opinions from 1981 to 2007 are available online at projectposner.org.) Responding to a plea "to repudiate the Court's historical analysis," Posner wrote, "That we can't do." As a scholar, he could ridicule the *Heller* case and a later one applying the *Heller* interpretation of the Second Amendment to the states. As a judge, he was bound by the holding. Among Posner followers, his opinion in the Illinois case seems so faithful to *Heller* that it is tongue-in-cheek: "Twenty-first-century Illinois has no hostile Indians. But a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower."

Scalia and Posner equally appalled *The Atlantic*'s Supreme Court correspondent, Garrett Epps. He wrote, "Neither the Supreme Court nor the Seventh Circuit displays the slightest concern for the real-world effects of its decision. Instead, what matters is a kind of airless, abstract reasoning. To Justice Scalia, it is clothed in the garb of history; to Posner, it represents 'pragmatism.' In fact, that callous indifference to consequences—ahistorical and unpragmatic—disfigures both the Supreme Court's Second Amendment cases and reveals a flip attitude toward the problems of those who must live their lives outside federal courthouses surrounded by metal detectors and marshals."

One of the ways the jobs of Supreme Court justices and federal appellate judges differ markedly is that, in all but a tiny share of cases, the justices *choose* the cases they hear based on petitions for review, whereas appellate judges, in all of their cases, are *required* by rules of procedure to consider appeals from decisions in federal trial courts. That's one reason that, of the 7,000 or so cases Posner has heard and the 3,140 or so in which he has written opinions, relatively few have produced blockbuster decisions or opinions. It's another reason why he disses the Supreme Court: "You should take what comes," he told Ronald Collins—overlooking the fact that it was Congress, in 1925, that gave the Court the discretion to pick its cases.

From the time he joined the Seventh Circuit until this past November, according to Sarah Ryan of the Yale Law library, the Supreme Court chose to review about 175 cases from the Circuit. Posner was on the three-judge panel in 60 of them, and wrote the majority opinion in 25. Of those 25, the Supreme Court upheld 52 percent of his opinions and overturned the rest. He wrote a dissent in nine cases, with the Court taking his position in five (reversing the Circuit). There have been a modest number of cases in which the justices have quoted him in a significant way by name as the author of an opinion. (The familiarity suggests that, among the nation's 179 federal appeals-court judges, he is among the best known to them.) Seventh Circuit followers regard him as conservative on economic issues, libertarian on social issues, and, for the most part, moderate.

The most dramatic Supreme Court decision of the term that ended last June held that there is a constitutional right to gay marriage. Justice Anthony Kennedy's majority opinion contains grand language about the Constitution's promises of liberty, the centrality of marriage to the human condition, and individual dignity, but it isn't clear about the steps in constitutional analysis he followed to reach the conclusion that marriage is a fundamental right for gay as well as heterosexual couples.

In a September 2014 opinion striking down state laws in Indiana and Wisconsin banning same-sex marriage, Posner did that admirably—before the Supreme Court's ruling.

He wrote, "Our pair of cases is rich in detail but ultimately straightforward to decide. The challenged laws discriminate against a minority defined by an immutable characteristic, and the only rationale that the states put forth with any conviction—that same-sex couples and their children don't need marriage because same-sex couples can't produce children, intended or unintended—is so full of holes that it cannot be taken seriously."

To Hal R. Morris, a Chicago lawyer who teaches a seminar about the Seventh Circuit at Chicago-Kent Law School, *what* Posner decides and says about a ruling are usually less important than *how* he decides and says it. More than any other federal appellate judge, Posner apparently feels no compunction about doing his own research about the facts of a case before him—going

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outside the factual record of the trial his court is reviewing, to the great irritation of lawyers in the case and sometimes to his colleagues. Josh Blackman, a young law professor, blogs about this "judicial fact-finding run amok"—and the denunciation of it by Posner's colleagues.

One 2014 case, for example, dealt with whether workers at a poultry-processing plant should be paid for the time it took them to remove and put on protective gear at the start and end of their 30-minute lunch break. The workers said it took 10 to 15 minutes; the company said two to three. Posner bought the gear and videotaped and timed his law clerks putting it on (95 seconds) and taking it off (15 seconds), for a total of less than two minutes. In his majority opinion ruling against the workers, Posner admitted that this was "a novel approach" and not "evidence": "the intention was to satisfy curiosity rather than to engage in appellate fact-finding—but it is information that confirms the common sense intuition that donning and doffing a few simple pieces of clothing and equipment do not eat up half the lunch break."

The Seventh Circuit's chief judge, Diane Wood, dissented and upbraided Posner: "I am startled, to say the least, to think that an appellate court would resolve such a dispute based on a post-argument experiment conducted in chambers by a judge. As the majority concedes, this cannot be considered as evidence in the case. To the extent (even slight) that the court is relying on this experiment to resolve a disputed issue of fact, I believe that it has strayed beyond the boundaries established by Federal Rule of Civil Procedure 56."

The core of Posner's self-defense is that the adversary system at the heart of American justice doesn't work, because the job of lawyers is zealously to press their client's case and *not* to help judges find the truth—so sometimes he has to find it himself. In another case last summer in which he relied on Internet research, Posner said it was "heartless to make a fetish of adversary procedure if by doing so feeble evidence is credited because the opponent has no practical access to offsetting evidence." Judge David F. Hamilton responded that Posner's use of the evidence was an "unprecedented departure from the proper role of an appellate court. It runs contrary to long-established law and raises a host of practical problems the majority fails to address." He went on, "Appellate courts simply do not have a warrant to decide cases based on their own research on adjudicative facts." Posner's judicial fact-finding is one reason some seasoned lawyers who practice before appellate courts find his judging reckless and irresponsible.

Posner's judicial opinions, which he makes a point of saying he writes himself, reflect his confidence that he has a warrant to write about cases in his own way. They contain few footnotes, little jargon, even less cant, and almost no acronyms—in contrast to opinions of the vast majority of other appeals-court judges. They generally emphasize the facts instead of the law, to show the consequences of the court's decision and, when necessary, to get around the obstacle of a judicial precedent by distinguishing the facts in that case from those in the current one. Unless it's obvious, they explain the purpose of any legal doctrine on which the opinion rests and don't announce the court's decision until the end of the opinion, after he has explained the basis for it. He tries to be "practical and candid" and to avoid "solemnity and pomposity." He generally succeeds.

In a widely noted example, he reversed field about laws requiring voters to show photo identification at their polling place after there was clear evidence about the laws' negative impact. In 2007, in a 2-1 decision, he voted to uphold Indiana's voter ID law largely because, he wrote, "there are no plaintiffs whom the law will deter from voting" and "the inability of the sponsors of this litigation to find any such person to join as a plaintiff suggests that the motivation for the suit is simply that the law may require the Democratic Party and the other organizational plaintiffs to work harder to get every last one of their supporters to the polls." By 2014, he realized that his surmise about motivation had been wrong and that voter ID laws are "now widely regarded as a means of voter suppression."

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In a dissent from the decision of the 10 "active," or non-senior, judges on the Seventh Circuit not to reconsider as a full Court a decision upholding Wisconsin's voter-identification law, he summarized why the law should have been struck down:

> The data imply that a number of conservative states try to make it difficult for people who are outside the mainstream, whether because of poverty or race or problems with the English language, or who are unlikely to have a driver's license or feel comfortable dealing with officialdom, to vote, and that liberal states try to make it easy for such people to vote because if they do vote they are likely to vote for Democratic candidates. Were matters as simple as this, there would no compelling reason for judicial intervention; it would be politics as usual. But actually there's an asymmetry. There is evidence both that voter impersonation fraud is extremely rare and that photo ID requirements for voting, especially of the strict variety found in Wisconsin, are likely to discourage voting. This implies that the net effect of such requirements is to impede voting by people easily discouraged from voting, most of whom probably lean Democratic.

The opinions are crisply written, tightly organized, and brightly argued. They are easy to follow and a pleasure to read. They stand out among opinions by appeals-court judges the way Justice Elena Kagan's do for the Supreme Court: they say simply why a ruling matters and are addressed to citizens as well as judges and lawyers. Posner's are especially good at translating legal con-

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volutions into clear-cut terms: penalizing the illegal sale of "incredibly light" LSD by the weight of the relatively heavier sugar cube that delivers the drug, he wrote, is like "basing the punishment for selling cocaine on the combined weight of the cocaine and of the vehicle (plane, boat, automobile, or whatever) used to transport it...."

That strength is most evident and eloquent when Posner is calling out hypocrisy in law-making and in judicial opinions that engage in legalism to uphold bogus justifications and their ill consequences. He did that in 1999 in a dissent from a Seventh Circuit decision that upheld Illinois and Wisconsin statutes making it a crime for a doctor to perform a so-called partial-birth, or late-term, abortion. The case dealt with an issue that the Supreme Court will address this term in one of its most politically charged cases: When is an abortion restriction unconstitutional because it is an "undue burden"—a substantial obstacle to seeking a legal abortion? In other words, when is a restriction designed to make abortion scarcer rather than safer, as it pretends to? Posner wrote:

> I do not deny the right of legislatures to enact statutes that are mainly or for that matter entirely designed as a statement of the legislators' values. Nothing in the Constitution forbids legislation so designed. Many statutes are passed or, more commonly, retained merely for their symbolic or aspirational effect. But if a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue. The statutes before us endanger pregnant women—and not only pregnant women who want to have an abortion. There is no exception for women whose physicians tell them you must have an abortion or die. It is true that if a "partial birth" abortion is necessary to save the woman's life, the statutes permit this. But if her life could be saved by another type of abortion, even one that threatened her health—that threatened to sterilize her or to paralyze her—then the physician would be committing a felony if he performed a "partial birth" abortion.

The Jurist as Aesthete

Posner's opinions are as combative as his scholarship in their efforts to persuade. To recognize what's missing from them, it's useful to read his writing about why judicial opinions should be regarded as a form of literature, which he addresses in his treatise *Law & Literature*, in its third edition. (To help teachers identify works for students to read besides the over-assigned *Billy Budd*, *The Merchant of Venice*, and *To Kill a Mockingbird*, he includes a list of 29 other works, beginning with *Alice's Adventures in Wonderland* and ending with Franz Kafka's *The Trial*.) He uses the term "rhetoric" to describe what opinions at their best contain, covering "the gamut of persuasive devices in communication, excluding formal logic." How is it possible to persuade, without logical or empirical proof? He writes, "The answer is that in areas of uncertainty, areas not yet conquered by logic or science, we are open to persuasion by all sorts of methods, some remote from logic and science." ("Some of Holmes's best opinions," he wrote, "owe their distinction to their rhetorical skill rather than to the qualities of their reasoning; often they are not well reasoned at all.")

A common device of rhetoric is the "ethical appeal"—"the speaker's attempt to convey a sense that he is a certain kind of person, namely one you ought to believe." Another is the placement of a statement so it appears to be a conclusion, "suggesting that the writer has set forth premises that lead up to it," even if "the preceding lines do nothing of the sort" and "instead they present an incantatory series of images." A third is the withholding of provisos, or hedging, because "very few people have the courage of plain speaking, so when we hear it we tend to give the speaker a measure of credit."

"In areas of uncertainty, areas not yet conquered by logic or science, we are open to persuasion by all sorts of methods, some remote from logic and science."

In writing about literature and its relationship to law, Posner uses a different voice, buoyant with affirmation. The examples bolstering his lessons come from great works of literary art—poems, plays, and novels. With the exception of "the ethical appeal," the other examples of rhetoric mentioned above come from W.B. Yeats's famous poem "The Second Coming," which ends: "And what rough beast, its hour come round at last,/Slouches toward Bethlehem to be born?"

Among Posner fans and critics, it's a truism that his ideas about the law have changed substantially over time. "Posner has evolved, because he has learned things and has studied things," said Furman professor of law Lawrence Lessig, who clerked for him: "That includes a willingness to acknowledge he was wrong." There's also an axiom that his temperament hasn't changed. Posner is as Posner was, regularly irascible, mercilessly critical, polemically arguing his cause. His temperament may not have changed, but if that's so it has not stayed the same in the way most people think.

Posner's insightful writing about his heroes, surely informed by his study of literature, provides some entrancing evidence of a sympathetic side. On Friendly: "There were five quite different Henry Friendlys: Friendly *en famille*—cold, taciturn, remote, and awkward; Friendly among his peers, mentors, clients, colleagues—tactful, personable, friendly, effective; Friendly in his dealings with his law clerks and with many of the lawyers who appeared before him—curt, grumpy, intimidating; Friendly in his judicial opinions and academic writings—formal, erudite, almost Teutonic; and finally Friendly in his correspondence—graceful, warm, generous, light—Bizet to the Wagner of his judicial opinions."

On Cardozo: "Incorruptible, scandal-free, moderate, seemingly apolitical, not given to (visible) self-aggrandizement, Cardozo radiated character. This made it more likely that other judges, academics, and practicing lawyers would give his opinions the benefit of the doubt—thinking that if they were minded to dis-

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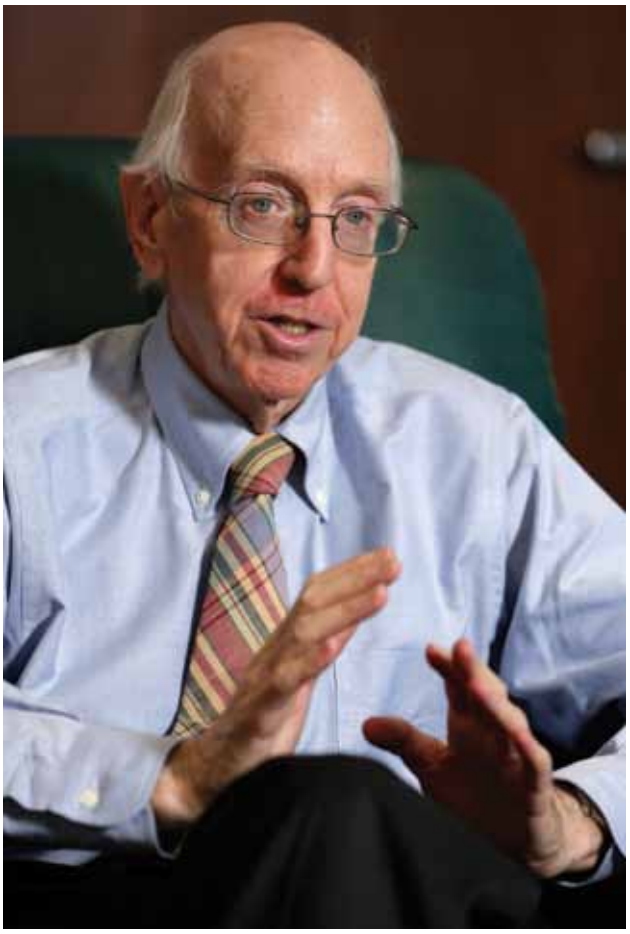
agree perhaps it was their judgment that was at fault, not Cardozo's." On Holmes: "Modern judges are quick to dissent in the hope of being anointed Holmes's heir, but they lack Holmes's eloquence and civility. Most of them do not realize that the power of Holmes's dissents is a function in part of their infrequency; he was careful not to become a broken record."

There is also a remarkable piece of evidence that Posner has led his double life since he was a young man. At Yale, after his junior year, he was selected for an exclusive program for a dozen or so seniors known as Scholars of the House. Each earned the liberty of spending his last year of college skipping regular courses and working on an individual sustained project. Posner's yielded a 322-page book called *Yeats' Late Poetry: A Critical Study*. The program ended a generation ago, but Scholars' completed projects are readable in the Yale library's Manuscript and Archives Room.



From the first sentence of the introduction ("I take it that the critic's job in the first instance is to make people read, with intelligence and appreciation, the kind of things that they would not be likely to read otherwise"), the manuscript has the intellectual poise and psychological maturity of something written by a more seasoned writer. Posner was 20 when he wrote it and he wrote well, though he now says that he thought it was poorly written (and blames that on a year spent at the movies, at Yale's Elizabethan Club, and on road trips to Vassar).

The volume called *Last Poems* was "virtually unknown," Posner wrote, and it was his conviction "that the richest lode of Yeats' poetry lies unexploited." He aimed to exploit it by assessing the poems as a "book, the volume of verse, in which Yeats was accustomed to arrange a number of poems for publication."

An oddity of Posner's esteem for the late poems was that Yeats, according to the critic Hugh Kenner, did *not* arrange them in the book. So Posner focused first on "the last three books in which Yeats arranged the poems": *The Tower*; *The Winding Stair and Other Poems*; and *From "A Full Moon in March."* With that approach, he called attention to "some of Yeats' finest poetic achievements," cast "a little new light on his more familiar poems," and made "a few suggestive generalizations about the defining qualities of Yeats as a poet." Then he explored all of that "with examples drawn from *Last Poems*."

Yeats's overarching theme, and Posner's, is the permanence of art: "behind theology, philosophy, the mystics' vision of Divine Essence, an old man's personal problems, love, the very laws of the world, stands art, especially literary art, poetry." There's a chapter about the Yeatsian Songs—generally interpreted as frolics and a kind of slumming on Yeats's part—that explains why they were the opposite, another way for Yeats to find meaning, in addition to solace and beauty, in a world of obvious imperfection. Posner's conclusion about Yeats's poetry, the late poems in particular, is that it's "joyous and exultant and free in a way unique in modern poetry—which is a thing largely of more somber hues."

Posner wrote as a peer of professional critics: his Yale adviser, Cleanth Brooks, the most eminent New Critic in English and American literature, whom he chided gently for calling a poem "rambling" when, as a meditation, it could not be "so precise and rigorous" as logic; and Richard Ellman, Yeats's prize-winning biographer, whom he credited with an insight about a poem, but chided for not erasing a "seeming incongruity" with that insight. It's not hard to imagine Posner's book finding a readership today—among Posner followers, perhaps among Yeats lovers and more widely—if it were published.

There are two Posners, his writing about literature makes plain: the ferocious reformer and the discerning aesthete, who understands the power of art—and has greater faith in its power than the law's to represent the best of the human spirit. Here's why he thinks that's no enigma: "Well, what we value in literature is invariably created by geniuses, right? They're the only ones who survive. But law, no. It's created by mediocrities for the most part." The contrast between his law voice and his literature voice is vivid. In writing to make law or reform it, Posner is sometimes combatting the conception of it he deplores. He is often combatting law itself. In reading and writing about literature, Posner restores himself for the fight. ▽

Lincoln Caplan '72, J.D. '76, shares his Harvard Law School education with several of the people mentioned in this feature: William Brennan Jr., LL.B. '31, LL.D. '68; Ronald Dworkin '53, LL.B. '57, LL.D. '09; Philip Elman, LL.B. '39; Paul Freund, LL.B. '31, S.J.D. '32, LL.D. '77; Henry Friendly, A.B. 1923, LL.B. '27, LL.D. '71; Oliver Wendell Holmes Jr., A.B. 1861, LL.B. '66, LL.D. '95; Elena Kagan, J.D. '86; Anthony Kennedy, LL.B. '61; Antonin Scalia, LL.B. '60; Fred Shapiro, J.D. '80; and James Boyd White, A.M. '61, LL.B. '64. He also shares his Harvard College education with Garrett Epps '72 and Larissa MacFarquhar '90. (Benjamin Cardozo, LL.D. '27, received an honorary Harvard degree.)

A visiting lecturer in law at Yale Law School, Caplan was editor of Legal Affairs *magazine, wrote about the Supreme Court for* The New York Times *editorial page, and is the author of five books. He profiled Cass Sunstein in "The Legal Olympian," published in the magazine's January-February 2015 issue.*

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