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The Prolific Iconoclast

To appeals court judge Richard Posner, a founder of the law and economics movement, the greatest sin is that of conformism.

Judge him not guilty.

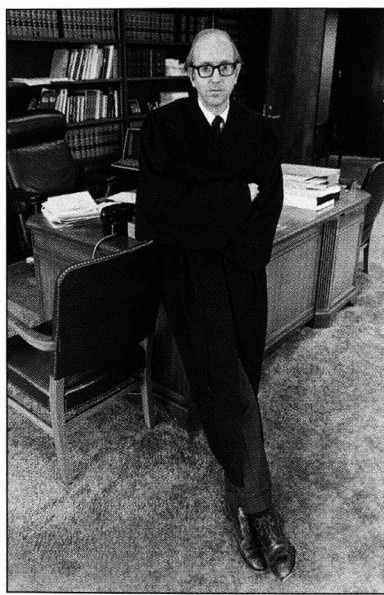
RICHARD POSNER IS THE CHIEF judge of the U.S. Court of Appeals for the Seventh Circuit, a position he has held since 1993, on a court on which he has served since 1981. He is the most prolific federal judge, ever. And while serving on the court of appeals, he has remained among the most prolific legal scholars, ever. If citations measure influence, then Posner is easily the most influential living legal jurist—his 30 books, 330 articles, and 1,680 opinions are by far the most cited, and among the most critiqued.

He is labeled a conservative, and a founder of the law and economics movement. True conservatives might question his allegiance (he is a skeptic of originalism, and a critic of the war on drugs), and his influence in law and economics is more than that of a founder. Posner is the movement's Henry Ford, not its James Madison: He has put into production a set of pragmatic insights about the relationship between legal rules and outcomes (how will rules affect behavior; how can behavior be better made to fit legal rules), and he has applied the method to an endless range of legal topics—everything from contracts and antitrust to the Constitution's religion clauses and the behavior of judges.

On its frontiers, the law and economics movement looks wacky, but this is the nature of a frontier, not the movement. Philosophers might get exercised about the foundations of the approach, but as the movement has matured beyond the politics of its early days, it has transformed whole areas of the law. We all are law-and-economists now. Fields such as corporate law and antitrust are unrecognizable to those schooled before the law and economics movement. And while forty-somethings may have been trained to be skeptical of its reductionist, and anti-redistributionist, tendencies, its insights are now normal science. The first edition of Robert Bork's *The Antitrust Paradox* used law and economic arguments (many by Posner) to ridicule the Supreme Court's antitrust jurisprudence; the second edition had to confess, somewhat sheepishly, that for the most part, the Court had been saved.

But Posner bores with normal science. Although his *Economic Analysis of Law*, now in its fifth printing, spans the full range of the subject, his recent interests hang at the fringe. In the past few years, Posner has written about the regulation of sex, including a book about AIDS. He has turned an economist's lens to the problems of aging. He has tried to capture the influence of another extraordinary judge, Benjamin Cardozo, by examining citations. He is a central figure in the "law and literature" movement, and has written extensively about jurisprudence, moral theory, and judicial administration. In his 1995 book *Overcoming Law*, he fixed firmly on a commitment that captures well his character: that no single approach, law and economics included, would ever fully capture the complexity of the law.

If Posner has a hero, it is more Holmes than economics, or the Federalists. Holmes's is the character of his writing—beautifully simple and direct (Posner has never used a footnote in a judicial opinion). It is the flavor of his judicial philosophy—pragmatic and skeptical of high



Posner: A legal craftsman

theory. And it is the mark of his craft—and Posner does have a craft. For unlike the vast majority of judges, Posner actually writes his own opinions. His clerks are hired critics; Posner does the work. This is a great virtue in a system in which judges have so much power. The writing constrains. When an opinion "just won't write," Posner changes his mind.

As he has his life. Posner began as the child of leftists (a famous story has him giving his train set to the Rosenberg children); he has since moved to the right. His education was in English literature; his influence is now economics. He was a clerk to Judge Henry Friendly and

Justice William Brennan, and then a staffer to Thurgood Marshall. But his ideas are his own, as if unaffected by these teachers. He has moved, or been moved, by his questions, or those he has questioned. None can claim him as his own.

There is something more that distinguishes this judge. Posner is not a man who writes to please. (His most recent book, *An Affair of State*, about the Clinton impeachment, is certain to please no one.) That is not to say that he writes to displease, or that he writes to be difficult. It is to distinguish him from the world that fits words to the pollsters' forms—that is, from just about everyone else in public life. Posner is completely unappointable as a Supreme Court justice, for the best of all possible reasons. He has never worried about being intellectually loyal. He disappoints partisans on both sides of overly simplified divides. He writes seriously and extensively, with an aim to engage.

There is something rare and extraordinary, if a bit ironic, about this uncalculating economist and public figure. But it reflects the deepest of Posner's beliefs: that the greatest sin of a scholar, and in turn a judge, is the sin of conformism.

His is not a virtue our system rewards. It is, nonetheless, a virtue.

Lawrence Lessig, the Berkman Professor of Law at Harvard Law School, clerked for Judge Posner in the 1989–90 term. He teaches and writes in the areas of constitutional law, contracts, comparative constitutional law, and the law of cyberspace. His most recent book is Code and Other Laws of Cyberspace (Basic Books).