

PROFILES

THE BENCH BURNER

How did a judge with such subversive ideas become a leading influence on American legal opinion?

BY LARISSA MACFARQUHAR

Richard Posner is introduced. He extends a limp hand, smiles tepidly, and says something polite. He is long and spare, his eyes pale as a fish, his clothing conventional, his features thin. He moves delicately, seeming to hover rather than stand: he has about him the distant, omniscient, ectoplasmic air of the butler in a haunted house. He escorts his visitor to the waiting room of his personality, where the visitor will sit, lulled by the bland ambience of the place, until it is time for murder.

It is not apparent from his mild exterior that Posner is the most mercilessly seditious legal theorist of his generation. Nor is it obvious that, as a judge on the Seventh Circuit Court of Appeals, he is one of the most powerful jurists in the country, second only to those on the Supreme Court. He is powerful, moreover, not just by merit of his position: he is powerful because he has decided to be. In hearing a case, he doesn't first inquire into the constricting dictates of precedent; instead, he comes up with what strikes him as a sensible solution, then looks to see whether precedent excludes it. In 1991, he ruled that a group of deputy sheriffs who, without a warrant or probable cause, assisted with the seizure of a mobile home had not violated the Fourth Amendment because, rather than entering the house, they had removed it whole. (This finding was reversed unanimously by the Supreme Court, whose sarcastic opinion called it "creative.") Posner finds the rituals of the courtroom vexing impediments to the real business of punishing criminals and freeing up markets. "I'm not fully socialized into the legal profession," he says. "I'm like an imperfectly housebroken pet. I still have difficulty understanding—and this is something that most people get over in their first two weeks of law school—lawyers spouting things that they don't believe. If someone is obviously guilty, why

do you have to have all this rigmarole?"

Posner did not set out to seize power: he spotted it drifting and gleefully pocketed it, like a stray hundred-dollar bill. As one of the founders of the law-and-economics movement in the nineteen-seventies, he had promoted the idea that laws should be evaluated for their consequences—economic and otherwise—as much as for their fairness, and that judges should not deliberate over rights and duties in the abstract but figure out what kind of incentives their rulings were putting in place. Now that law and economics has become part of the legal establishment, it does not seem strange when Posner talks in his opinions about markets as well as precedent. More recently, he has taken up what, in the hands of gentler souls like the philosopher Richard Rorty, is the tolerant anti-doctrine of pragmatism, and made it the underpinning for his career as a flamboyantly candid judicial activist.

As much as for his contentious opinions, Posner is famous for his freakish productivity. He publishes a book every half hour. Now sixty-two, he has written thirty-one books, more than three hundred articles, and nearly nineteen hundred judicial opinions. He has written books about AIDS, law and literature, and the Clinton impeachment trial, and articles about pornography, Hegel, and medieval Iceland. This year alone, while working full time as a judge and teaching at the University of Chicago Law School, he published "Breaking the Deadlock," a book about the Bush-Gore election; a second, updated edition of his 1976 book, "Antitrust Law"; and two collections of essays. He also wrote "Public Intellectuals," a four-hundred-page diatribe against the species, and "Law, Pragmatism, and Democracy," in which, among other things, he derides democracy's anti-élitist pretensions and the animal-rights movement. He is, by a wide margin, the jurist most often cited

in scholarly articles—cited almost as much as the next two, Ronald Dworkin and Oliver Wendell Holmes, added together. As Milton Friedman, the legendary Chicago economist, puts it, "He's a very brilliant fella and he's written on everything under God's green sun. What else do you want?"

If Posner is aggressively unconventional in his judging, he is ten times as much so in his books. To paraphrase an author he admires, André Gide, Posner writes not to defend himself but to be accused. This is, of course, one of the primary reasons for his fame. He began propounding the conservative economics of the Chicago School in the late nineteen-sixties, when the legal academy was almost entirely left of center; for this reason, he became the object of furious criticism even before he published his more outré theories. He relishes facts, the more obscure and counterintuitive the better, but as rhetorical weapons rather than as data. His accounts of the world are sometimes so eccentric as to be almost Martian. He has argued, for instance, that a higher proportion of black women than white women are fat because the supply of eligible black men is limited; thus, black women find the likelihood of profit from an elegant figure too small to compensate for the costs of dieting. As John Donohue, a law professor at Stanford, delicately puts it, "A little bit of empirical support goes a long way for him."

Critics find Posner exasperating, because often he simply doesn't take the trouble to answer their careful refutations. It is not that he is incapable of doing so—it is, rather, that he is more attracted to rhetoric than to proof, and believes it is more powerful. He is not, in the end, very interested in the sort of prudent rigor that produces watertight logic. He is not the type to spend years testing his arguments for leakage, sealing tiny cracks and worrying endlessly over



Richard Posner says that he is like his cat, Dinah: "playful, but with a streak of cruelty." Photograph by Martin Schoeller.



"The Farmers' Almanac is calling for a long, hard winter."

possible ripostes: he would rather risk sending them young into the world, flawed but forceful, with the advantage of surprise. And yet the uproarious pugilism and the desire to shock evident in his pages are nowhere visible on the surface of the man. "I have exactly the same personality as my cat," Posner likes to say. "I am cold, furtive, callous, snobbish, selfish, and playful, but with a streak of cruelty."

The Dirksen Courthouse in downtown Chicago is a tall, black Mies van der Rohe building on South Dearborn, accessorized with a red metal sculpture by Alexander Calder set in the wide plaza across the street. Every weekday morning, Posner enters this sober edifice through a side door and rides up to his office, on the twenty-seventh floor, in a special judges' elevator. The judges' elevator is operated by means of an electronic I.D. card, and Posner recently discovered that the elevator can read the card through several layers of material; now he shaves nearly ten seconds off his daily routine by turning around, bending over slightly, and presenting his posterior to the card reader instead of taking out his wallet and waving the card directly.

One recent Monday, Posner arrived at the courthouse to hear six cases: a tort suit against a pharmaceutical company; a commercial case involving the right to transport gas into Indiana; a disability-benefits dispute brought by a deaf actuary; a suit filed by two brothers who claimed that a village rejected their real-estate development plans owing to the animosity of a neighbor, Mr. Funderburk; a case involving liability for damages incurred in an accident on a barge; and a rape case being tried in federal court because the events had taken place on an Indian reservation. Posner entered the courtroom and spied the small group of lawyers sitting there waiting for the day's business to begin. He was in a benign mood as he joined his two colleagues on the bench, and wondered if he had been unduly harsh with the litigants who had come before him the previous Friday. The night before, he had dreamed that he became enraged at a lawyer who had mistaken sixty thousand dollars for six thousand dollars, and rudely called him a country bumpkin.

The attorney for the plaintiff in the pharmaceutical case, Ms. Relkin, was the first to stand up. Relkin was a short, heavyset woman in a gray skirt suit who

conveyed the impression that she would be hard to knock over. Her client, Mrs. Nelson, had sued the manufacturer of a drug named Parlodel, which she had taken to dry up her breast milk. Mrs. Nelson had suffered a stroke at the age of twenty-five, and claimed that it had been caused by the drug. The issue in the appeal was whether she had brought her suit within the two-year statute of limitations. Relkin claimed that at the time of the stroke there was insufficient evidence to point to Parlodel as its cause, and so the beginning of the limitations period should be pushed forward until the time when proof had presented itself. As is his wont, Posner interrupted almost immediately.

"But that can't be right," he said, in his pallid monotone. "That would extend the statute of limitations indefinitely. You're run down by a truck, and you don't know whether the truck ran you down because it was driven negligently, constructed negligently, or it was just one of those things, so you just sit around for ten years waiting for someone to tell you, 'Oh, that driver had a bad record?'"

"Certainly in that example it does get to the point of the absurd," Relkin conceded, "but that is New Jersey's law."

They argued back and forth. "Look," Posner said. "You have a twenty-five-year-old woman, she takes this medicine, she has a stroke—which is very unusual for twenty-five-year-olds—and the Physicians' Desk Reference says that there have been, I don't know, fifteen strokes, or something, resulting from the use of this drug. Why isn't that enough to put any reasonable person on notice?"

Relkin, showing signs of irritation, told him, "She spoke with her doctors . . . and they brushed it off." The two other judges looked bored. One yawned; one fiddled with his pen, laid his head back on his chair, and gazed at the ceiling. Posner, however, was enjoying himself.

"So this treating doctor calls up the fox and asks whether the fox ate the chicken," he said. "The fox says no. Now, that can't be reasonable investigation."

"Well, one would hope that a pharmaceutical company speaking to doctors prescribing the drug would be candid," Relkin protested.

"Oh, surely not!" Posner said impa-

tiently. "Why would you expect a potential defendant to be candid? What kind of world do we live in?"

Posner has a reputation among lawyers who argue in front of him for being harsh but not nasty. He is contrasted, in this regard, with two of his colleagues on the Seventh Circuit: Frank Easterbrook, a fellow-conservative, and Ilana Rovner, who is relatively liberal. "Easterbrook is mean," one private criminal-defense attorney says. "When he hears an answer he considers stupid, he rolls his eyes and snorts." Rovner, on the other hand, is described by the lawyer as "walking emotion. She will say to the defendant, *Hello, Mr. So-and-So, how are you? How is the food in the jail?*" "Posner takes the Michael Corleone approach," a state attorney says. "It's business, not personal."

Posner is aware that some lawyers find his judging style difficult. In 1994, during his term as chief judge, the Chicago Council of Lawyers published an evaluation of him that was evidently the distillation of complaints from many embittered veterans of his court. The evaluation described him as frequently bored by the arguments the lawyers presented, and tending to lead the discussion in the direction of issues that interested him. It concluded, "A very substantial number of lawyers believe that Chief Judge Posner routinely does not pay sufficient attention to the facts, or leaves out crucial facts, in order to reach desired conclusions. . . . Chief Judge Posner feels less constrained by precedent, history, and the proper limits on appellate judging than, in the Council's view, he should. . . . He wrote in [his book about Benjamin] Cardozo 'the appellate judge is the central figure in Anglo-American jurisprudence.' Whether or not that claim is accurate, it is instructive as a statement of Chief Judge Posner's self-image."

The defense lawyer in the Indian rape case, the last case to be heard that morning, appeared to be around fourteen years old. He was tall and pen-shaped and wore a dark suit that looked like a school uniform. "May it please the court," he said, "my name is John Storino, and I represent the defendant and appellant, Michael A. Peters."

Storino proceeded to rehearse the details of the case. Barbara House, the

complaining witness, was Peters's sister-in-law, and on the night in question she and her brother had bought two cases of beer and gone over to Peters's house to play cards. House drank about ten beers and fell asleep on the living-room floor. Two hours later, House's mother arrived and found her daughter lying unconscious on Peters's bed wearing only a shirt; Peters himself was hiding in the closet in his underwear. It was clear that the two had had sex; the question was whether House had been conscious at the time and able to give her consent.

"All right," Posner said after Storino was finished. "So what is he doing in the closet, then?"

"I would assert that there's a perfectly logical—"

"He was embarrassed," Posner said, answering for him.

"Right. His mother-in-law is knocking on the bedroom door, and it is his sister-in-law who he is—"

Posner interrupted him. "So you're saying she had the ten beers, she agrees to have sex, she has sex, she falls asleep, but, because of the amount of alcohol, when she wakes up she doesn't remember the sex."

"Exactly."

House herself admitted that she had no memory of the evening, but she maintained that she disliked Peters and would never have agreed to sleep with him. To counter this claim, Storino presented evidence that House frequently drove Peters to and from work and showed up with him at parties. There were no physical indications of forced sex, and Peters had had a hickey on his neck, which Storino cited as evidence that House had been a willing participant.

Mr. Gonzales, the prosecutor, stood up to make his presentation, but Posner intervened.

"The hypothesis that she consented to have sex, had sex, fell asleep, and for-

got," Posner said to him. "Isn't that as plausible as the government's?"

Gonzales tried but failed to convince him otherwise.

"Really, all you have to go on, I think, is the history of animosity, and yet there may be animosity, but you'd have to call them family friends, wouldn't you?" Posner said. "They socialize together. . . . Maybe if you have ten beers in you, he looks better than he usually does."

Posner likes to take topics that are normally accorded a certain sentimental deference and treat them with jarring candor, and sex is one such topic. In 1992, he published a book called "Sex and Reason," which argued that the sex drive was subject to the control of rational calculation. The fact that sex was an instinctive urge, he claimed, did not preclude an economics of sex any more than the fact that hunger was an urge precluded a science of agriculture.

Some of Posner's conclusions in "Sex and Reason" were merely odd—he speculated, for instance, that high heels were considered sexy because they suggested that a woman was incapable of running away from her spouse—while others were contentious, such as his suggestion that normal men would rape women and seduce children if there were no laws against it (it's the ones who do it in spite of the risk of punishment who are the real weirdos). One of his most controversial recommendations was that the current adoption system be replaced by a free market in babies, which, he maintained, by offering financial incentives to biological mothers, would make both would-be parents and potential sellers better off. In "Sex and Reason," he explained that he was advocating not the selling of babies so much as the selling of parental rights—he was not, after all, suggesting that babies be sold as slaves or organ donors—but the clarification did not, somehow, have the impact of the original argument, and "baby-selling" has since become one of the primary slogans of his notoriety.

"Sex and Reason" exhibited in a particularly colorful fashion one of Posner's ongoing contradictions—that between his libertarian instincts and his attraction to the practical straightforwardness of utilitarianism. On the one



hand, he declares himself a liberal of the nineteenth-century ilk—a view he summarizes, paraphrasing John Stuart Mill (in a phrase that takes on a certain *je ne sais quoi* in a book about sex), as “Your rights end where his nose begins.” On the other hand, he argues that people’s moral beliefs are the product of intractable emotions like sympathy and disgust, and so those emotions must be taken into account in a calculation of social welfare. “Disgust when sufficiently widespread,” he writes, “is as solid a basis for legal regulation as tangible harm.” Thus, while he talks admiringly of anti-moralistic sexual mores in Sweden, at the same time he argues that the practical fact that homophobia exists in the military is a compelling reason to exclude gay people.

In “Sex and Reason,” Posner was interested in conscious sexual choices, but he is also committed to a theory of unconscious rationality: sociobiology. He is a thoroughgoing Darwinian, and believes that many of the social and moral ideas commonly held to be cultural are in fact traceable to the dictates of reproduction. He subscribes to the idea, for instance, that altruism derives from the evolutionary imperative to perpetuate one’s genes by taking care of those who share them. This coheres nicely with his general economic approach. As he puts it, “Economic theory is closely related to the theory of evolution. . . . Evolution deals with unconscious maximizers, the genes; economics with conscious maximizers, persons.”

Sociobiology might seem to be an odd idea for a libertarian to be attracted to—most libertarians are committed, after all, to the idea that human choices are freely made rather than determined by forces beyond conscious control—but Posner does not feel a sentimental attachment to the idea of freedom. He is a libertarian of an instrumental, utilitarian sort: he simply believes that libertarian policies, in social life as in markets, will tend to maximize wealth and happiness. Liberty, for him, is a pragmatic principle, not a moral one.

Posner lives in a comfortable, medium-sized house in Hyde Park, a few blocks from the university campus, with his wife, Charlene, and their cat, Dinah. The house is furnished unobtrusively: the living-room sofas and chairs are up-

holstered in brown and mustard; the floors were for several decades covered with a wall-to-wall carpet of forest green, until, a few months ago, Posner and Charlene decided to exchange the carpet for wood floors and Oriental rugs. Charlene is reserved and competent, her habitual expression a watchful half smile that suggests that she has views but will offer them only if asked to do so. With wide-lensed glasses, chin-length brown hair, and dirndl skirts, she still looks like the Radcliffe girl that she is, class of 1960. Dinah is a gray Maine coon cat, whose chilly temperament is for Posner a continual source of suffering.

“My cat doesn’t like me,” he says mournfully. “This cat, to whom I am slavishly devoted. She tolerates me, she’s polite, but she clearly prefers Charlene. She regards me as a servant. I feed her, I brush her, I clean the kitty-litter box, I shower her with endearments—I’ve even started taking her to the vet to try to bond with her. Charlene says that I love Dinah more than anything human, but that is false.” Posner has resigned himself to loving Dinah in the self-abasing tradition of courtly love, the object forever unattainable.

Posner loves cute animals of all kinds, except dogs. He dislikes dogs partly out of a sense of duty—he feels that, given his commitment to cats, it would not be quite proper for him to like dogs as well. But it is also the canine personality that he finds distasteful. Years ago, when he and Charlene lived in Washington, they owned a Norwegian elkhound of servile disposition, poignantly misnamed Fang; whenever anyone evinced the slightest displeasure with him, Fang’s lips would tremble with anxiety, and Posner found this irritating. Posner is an ardent fan of monkeys, his instinctive attraction perhaps bolstered by his sociobiological sense that monkeys are basically humans with fewer affectations. A couple of years ago, he watched a nature program about baboons, and found them so delightful that he decided to call the zoo and adopt one.

Posner spends weekday mornings in the courthouse, and in the afternoons he goes home to write. His study is a crowded but orderly room on the second floor. On the mantelpiece, he has placed a small framed photograph of Dinah and a couple of pictures of his children, Eric and Kenneth. (Eric is also a law professor

at Chicago who writes about law and economics; Kenneth is a securities analyst in New York.) Next to these stands a photograph, which Posner cut out of a magazine and framed, of a hairy Syrian hamster standing on its hind legs in a posture that reminds Posner of the “Winged Victory of Samothrace,” in the Louvre. On the top of one of his bookshelves stands a plywood scale that the economist George Stigler made and gave to him twenty years ago, when Posner became a judge: in one pan of the scale is a small wooden block labelled “Justice”; in the other pan is a larger, heavier block labelled “Efficiency.”

Posner doesn’t like to waste time, so he sticks to a routine (he calls himself “rigid and Germanic”). But it is not just his regular habits that allow him to be as productive as he is: he has structured his life so as to free his mind from any distractions whatsoever. Charlene is in charge of all the domestic arrangements: Posner describes their relationship as the traditional Jewish one, in which the pasty-faced scholar husband stays home and studies while the wife attends to worldly activities. Until a few weeks ago, Posner had never used an A.T.M.—when he needed cash, he took it from Charlene’s wallet.

Charlene does all the cooking except for a little meal that Posner makes every Friday night: for an appetizer, he puts together a plate of smoked salmon, chopped onion, capers, and lemon; for the main course, shrimp cocktail, he mixes a sauce that consists of mayonnaise, some cocktail sauce for color, a little sugar, a drop of Worcestershire sauce, and (the secret ingredient) two teaspoons of sherry. (He has never made this sauce for guests, because he worries that the proportions aren’t linear, and that it would go wrong if he attempted to make it for more than two people.) Posner rarely goes abroad for vacation. He is a cautious tourist, he says, prone to anxieties about foreign thieves and muggers. He likes visiting Switzerland, although, he says, “I understand that sophisticated people find it boring.” He stopped watching television a day or two after the World Trade Center collapsed, lest speculations about future attacks make him a nervous flier.

Half a dozen times a year, Posner and Charlene will have people over for dinner—often the Chicago economist Wil-

liam Landes, Posner's best friend, and his wife—but, on the whole, Posner prefers to avoid social life. "People don't say interesting things," he says. "A lot of socializing is just dull—I'd rather read a book. I have a friend, an economist who's Swedish, and he told me that Sweden has terrible television, so people there spend their time visiting each other. But that's worse, because when you watch television you get some information, you even get some moral instruction, you learn to be nice to single mothers or what have you, but socializing, particularly family—well, that is deadly. When you're just talking with your friends about trivia, what's the point?"

Posner is content with his life. He doesn't want any more money, and he has been happily married for thirty-nine years, since shortly after he first spotted Charlene in a housedress taking out her garbage. When asked if he has any regrets, he pauses for a minute to think, and then says he wishes that he hadn't wasted so much time going to movies in college. "I'm not any kind of genius or anything," he says. "I went to college early"—at the age of sixteen, to Yale—"so I've had a lot of years of working, but I think I needed that. If I'd had more interests or activities and lost that work time, I think my career would have suffered."

Posner is content, as it happens, but content isn't what he set out to be. One reason he could never be a liberal (in the current sense of the word) is that, like many conservatives, he finds the idea of ordinary happiness uninspiring. He has no interest in a politics whose goal is to give people shelter and enough to eat. He loves fierceness and glory and heroism. When he looks into the future, he sees a rationalized, disenchanted world—a Scandinavian-style utopia in which people are dull and sated and genius has disappeared from the earth. "No sane person," he says, "not even I, would, for the sake of aesthetics, try to restore the Athenian slave state, the High Renaissance, the Russian Revolution, world wars, et cetera. The price is too high. But life will lack risk and savor."

Posner grew up in New York—first in Manhattan and then in Scarsdale. His mother's relatives were Jews from Vienna who looked down on his father's family, which was from Romania and

poorer than they were. "They were all poor," Posner says, "but my mother's family had toilet paper, and my father's family had newspaper." His mother was a Communist and was friendly with the family that adopted the Rosenberg children. The day Stalin died was a day of mourning in the Posner household. Posner's mother taught in the New York City public schools. His father had a checkered career: as a young man, he worked in a jewelry business with some cousins; then, having attended law school at night, he became a criminal-defense lawyer. After the Second World War, he became a moneylender, specializing in second mortgages in New York slums; he was so successful at this that he bought a Cadillac and, in 1948, moved his family to Scarsdale.

When Posner grew more conservative (he thought of himself as a liberal until he was thirty or so), his mother was horrified. "We had terrible fights," he says. "I became really furious at her. See, she was one of these bright fools, my mother—quite a bright person, but very limited. The other thing that annoyed me about her was that I worried about her politics interfering with my career. Every time I got a government job, I always felt obligated to tell the authorities that I had this mother who had probably been a Communist. It was an annoying piece of baggage. Then eventually she became senile

and forgot about politics and actually became very benign. Both Charlene and I breathed a sigh of relief." Looking back on his red-diaper childhood, Posner considers his parents hypocrites. "It was just talk," he says of their radicalism. "They wanted me to live the same conventional life that they lived."

Both Posner's parents lived into their nineties. "My mother, in the course of her decline, broke her hip," Posner says. "In the olden days, people broke their hips and died, which was great; now they fix them." After his mother broke her hip, his father found it difficult to take care of her, so his parents moved to assisted-living facilities in Chicago. When his father grew very frail and sick, Posner asked the gerontologist what the point of keeping him alive with all these procedures was; the doctor informed him that termination of care had to be voluntary. "Because my father was more or less *compos mentis* and wanted treatment, you couldn't deny it," Posner says. "Growing up the way he did, struggling the way he did, the notion of giving up, not fighting to the end, was anathema to him. I hope my generation can be a little more rational about this. I'd like to choose my own time of exit."

"I don't know if this is true of everybody," Posner says, "but I loved my parents when I was growing up and they were really the sort of parents you should



"Take this, Luke. They say it's impossible to get a decent baguette west of the Pecos."

be grateful to—my mother gave me great cultural enrichment, and my father helped me buy our first house, so they were ideal parents. But my thoughts about them are dominated by their old age. I don't make allowances: when I think about them, there's no affection. Charlene thinks I'm a little bit unnatural about my family. But so many people have these decrepit, horrible old parents, and then they're so upset when they die at ninety, and regard it as a medical failure that the doctors didn't do this and didn't do that. My father was even annoyed when my mother died—he thought the doctors hadn't tended her carefully enough—though by the time she died she couldn't speak, she couldn't use her hands, she wasn't human. And it's not as if you had a cute animal with the same mental ability—when you see human beings like that, you don't think, Well, she's on the level of a chipmunk." Asked what he felt when both his parents had died, he looked puzzled, as though the question didn't make sense to him. "I don't have any feeling about it," he said.

Martha Nussbaum, a philosopher at the University of Chicago and a friend of Posner's, believes that his upbringing and his pious, Communist mother are the reason that he is now repelled by moralism of any kind, and takes refuge in literature. He loves scandalous, immoralist writers such as Stendhal and Gide, and, indeed, the world of French novels is in many ways more congenial to Posner's caustic temperament, and to an economic, self-interested view of human nature, than that of the law. (It should be noted that he is not an aesthetic snob, however: among his favorite movies are those starring Meg Ryan and a more obscure work entitled "That Dam Cat.")

Posner is as much aesthete as analyst; more than a clever rebuttal he relishes mastery of tone. One of his favorite terms of abuse is "maladroit." He appreciates the lumbering, earnest activist only as a comic character, and he is positively allergic to rectitude. "Some people take pride in being 'good,' which is to say better than most other people," he writes. "But that is pride rather than morality. It is related to the striving for status."

What Posner really despises, though, is, as he sees it, the whining, sanctimonious pedantry of moral philosophers.

Asking oneself whether one's beliefs are justified, he feels, is an esoteric, self-indulgent business, practiced only by those safely ensconced in tenure. Ordinary people are unreflective, simply believing whatever they believe; moreover, moral reflection has never persuaded anyone to change his mind or pursue one course of action over another, and thus is a deluded and useless activity. "Knowing the moral thing to do," he writes, "furnishes no motive, and creates no motivation, for doing it." (The contention that no one has ever been persuaded by a moral argument, and that non-philosophers never question their beliefs, strikes his philosophical critics as so obviously wrong that they have tended to throw up their hands rather than rebut it.) Posner contrasts the academic philosopher with what he calls "moral entrepreneurs," such as Martin Luther King or the feminist Catharine MacKinnon (whom Posner admires despite disagreeing with her politics): those who, through sheer charisma and rhetorical force, sweep people headlong out of their accustomed inertia and inspire new moralities altogether.

At Yale, Posner majored in English. He studied with Cleanth Brooks, and wrote his senior thesis on Yeats's late poetry. He still knows many of Yeats's poems by heart, and uses them as templates for "sizing" his own reactions to life's events. Thinking about careerism, for instance, calls to his mind this passage from "The Choice":

The intellect of man is forced to choose
Perfection of the life, or of the work,
And if it take the second must refuse
A heavenly mansion, raging in the dark.

Posner says that he has always liked Yeats because Yeats is a "full-fledged Nietzschean." Nietzsche is perhaps the philosopher who has had the deepest influence on Posner. Posner takes from him a conception of morality (made by humans, not found in the world), a conception of ethics (tenth-hand bromides, clung to by those lacking the courage or imagination to think for themselves), and, most of all, an intellectual temperament (delighting in muscular language and the power to shock). Explaining his attraction to Nietzsche, he



PORTRAIT BY RICHARD AVEDON *George
Comes the Sun," but his finest moment was his*



"Little bastard played you like a video game."

says, "The idea—a bit banal, I'm afraid, when stated in summary form—is that a person is responsible for his own life. External forces and events are just the raw materials out of which we make a life, and we have no right to blame anyone else for the result because it was ours to make or muff. This is a philosophy, or a psychology, basically optimistic, cheerful, and forward-looking, of self-assertion, of liberation from oppressive frameworks such as that created by religion or other dogmas."

After college, Posner briefly considered going to graduate school in English literature but decided to go to Harvard Law School instead. There he earned the lasting enmity of the authorities by inviting, to the *Harvard Law Review's* seventy-fifth-anniversary dinner, a speaker who had written a luridly malicious review of a book by one of Posner's professors. (Posner thought he would be entertaining.) Years later, Posner was approached for a job by the Stanford and Yale law schools but not by Harvard.

At the time Posner graduated from law school, and, indeed, until the end of the nineteen-sixties, he still considered himself a liberal Democrat. He

voted for Kennedy, Johnson, and Humphrey (since then he has voted Republican). He clerked for Supreme Court Justice William Brennan. (Once, misunderstanding his instructions, he wrote up an opinion arguing the reverse of Brennan's decision; it was so compelling that Brennan and the Court changed their minds and adopted it.) Following his clerkship, he went to work for the Federal Trade Commission, and then served as an assistant to Thurgood Marshall when Marshall was Solicitor General.

Toward the end of the sixties, however, Posner began to move to the right, because he disliked the disorder of the student riots. Then, in 1968, while he was teaching at Stanford, he met two conservative economists from the University of Chicago, Aaron Director and George Stigler. Having been raised to believe that conservatives were evil, Posner was surprised to discover that he liked these economists. He concluded, first, that politics and personality had nothing to do with each other, and then, as he became more interested in economics, he found that he agreed with them. He moved to the University of Chicago the next year.

Around the same time, Gary Becker, another Chicago economist, who later won the Nobel Prize, published an article analyzing the effects that particular laws had on the behavior of criminals, assuming the criminals were rational. When Posner read Becker's article, it was clear to him that not only criminal law but all law created incentives for people to act in certain ways. Law didn't just show up after the game was over, patting backs and slapping wrists—it set the rules and assigned the penalties that determined how the game was played in the first place. Surely, then, the important thing was to figure out what kind of game these rules and penalties were producing in practice. Why, Posner wondered, did judges talk so much about precedent and fairness rather than about real-world consequences, as though their only responsibility were to "the law" in the abstract—as though law existed in a sealed-off realm separate from life?

Posner also became aware of another, even more famous article, which argued for a consequence-oriented approach to civil law—"The Problem of Social Cost," published in 1960 by Ronald Coase, another Chicago economist and Nobel Prize winner. Suppose, Coase's argument suggested, that a railroad runs next to a farmer's field and that trains emit sparks that destroy the crops nearest the track. Suppose, too, that it would cost the railroad a hundred dollars to install a mechanism to prevent the sparks from flying, but the ruined crops are worth only fifty dollars to the farmer. Traditionally, a legal thinker might consider this a case of conflicting property rights, and would decide that the railroad's right to full use of the track trumped the farmer's right to full use of his land, or vice versa, leaving the loser worse off. But, Coase pointed out, it would be more efficient for the railroad to pay the farmer, say, sixty dollars for a right to emit sparks: that way the railroad would pay out sixty dollars instead of the hundred dollars it would have cost to install anti-spark mechanisms, and the farmer would profit sixty dollars from the land rather than fifty, and both would be better off. Coase's article showed that it made sense to think of rights not in terms of moral desert but in terms of property.

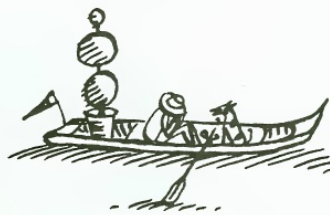
As Posner and others began to look into the way that law worked and the consequences it had produced in the past, they discovered a strange phenomenon: although the judges whose collective decisions made up the common law had mostly talked about rights and duties, in practice they had decided their cases as though they were trying to bring about the outcome that a free market would have produced. In, say, the case of the railroad and the farmer, a judge might think that he was balancing competing rights; but, more often than not, the decision he made would turn out to be the same as the one that an economist like Coase would have advocated. It came to seem to Posner as though economic efficiency were a hidden force that had driven law for centuries. Law had imagined that it stood above markets, imposing upon them its own notions of fairness and duty; but, all along, the pull of the market was stronger, shaping judges' ideas without their knowing it, and making economists of them while they thought they were in another business altogether.

Now that Posner is so influential, his description of the law has become self-fulfilling: these days, many judges think like economists because Posner has told them to. But one of the most striking instances of a judge thinking like an economist before Posner came along was that of Learned Hand deciding *United States v. Carroll Towing Company*, in 1947. The case involved a boat that, through want of supervision, had been allowed to crash into another boat. In order to decide who should be held liable, Hand came up with a formula dictating that a person should be considered negligent only if the amount he had spent on precautions against an accident was less than the probability of the accident's occurring, multiplied by the accident's cost. A person should not be expected, in other words, to bankrupt himself installing every possible safety device; he should be responsible only for making a sensible calculation that balanced cost-effective caution and risk. (Guido Calabresi, who is now, like Posner, a federal appeals judge, published an article in 1961 arguing, in a similar vein, that courts should endeavor to minimize the cost of accidents to soci-

ety by holding liable the party who could have avoided the accident most cheaply. This article was one of the most important in the inception of law and economics, along with those of Becker and Coase.)

The law was, then, already closely aligned with Posner's Chicago School free-market principles, but there were still areas of inefficiency that Posner felt were in need of correction: antitrust law, for example. Were antitrust laws, he wondered, really preventing market-restricting practices like price-fixing? Or were they themselves restricting the market by harassing companies with needless rules? Posner's skepticism about antitrust legislation had an enormous impact, and led to his being appointed, in 1999, a mediator in the government's antitrust lawsuit against Microsoft. (It was hoped that Posner would be acceptable to both sides—to Microsoft because of his hostility to antitrust law, and to the government because of his hostility to cartel-like behavior that threatened a free market.) Other ideas in the same vein were less influential. For instance, Posner argued against the notion that racial discrimination was bound to give way because it was economically inefficient. Some discrimination could be rational, he maintained, because it lowered the cost of gathering information: if an employer believed a race to be generally correlated with undesirable characteristics, then discriminating against members of that race was no less sensible than discriminating against a brand of toothpaste because of a bad experience with one tube.

It was not until Posner started writing dozens of articles on the economic approach to law that it began to have a real impact. He published the famous "Economic Analysis of Law" in 1973 (now in its fifth edition), which established law and economics as a field in its own right. Law and economics became



so prevalent as a component of anti-trust litigation that in 1977 Posner, along with his friends William Landes and Andrew Rosenfield, decided to form a consulting company, Lexecon, that would advise law firms and corporations on economic issues. The company was extremely successful, and provided Posner with a significant income until he was compelled to give up his stake in it, upon his assumption of the judgeship, in 1981.

In recent years, Posner has more or less confined himself to the question of what effects a law is likely to produce, but at one time he had a more ambitious mission. Twenty years ago, he argued that free markets were not just useful tools for producing wealth but also morally valuable because they distributed goods to those who most wanted them, as measured by the price they were willing to pay. He was immediately attacked by a number of people, notably the legal philosopher Ronald Dworkin. It was pointed out that willingness to pay a high price for something did not indicate desire so much as wealth; and that, furthermore, according to Posner's logic, a person with no money deserved nothing, regardless of how his poverty came about. On this point, Posner, uncharacteristically, conceded.

Having written on every subject in the universe, Posner is invited to speak at all sorts of occasions, not only by large law schools but also by dozens of obscure associations and sub-associations and societies of narrow purpose. At the annual meeting of the American Bar Association, in particular, Posner is everywhere in demand, and when the meeting is held in Chicago, as it was this year, he feels it would be churlish to turn down too many invitations. Thus, when the week of the conference rolled around, he donned a gray suit and a plaid tie, collected his decrepit straw hat for the protection of his skin against the sun, and braced himself for several days of tediously fulsome introductions, book signings, posing for cameras (his fans often ask to be photographed with him), and requests for him to speak in strange and unappealing places like Brazil. The first group he had agreed to address called itself Scribes. Posner had never heard of

Scribes, but he approved of its mission—the encouragement of stylish writing on legal subjects—so he had accepted its invitation to lunch.

Posner's sense of the importance of legal rhetoric was rather more extensive, however, than that of the Scribes fellows nostalgic for a more ornamental era. In his book about the Bush-Gore election, for instance, Posner claimed that the main problem with the Supreme Court's decision favoring Bush was its rhetorical incompetence. It was the pragmatically correct verdict because it averted the danger of a political crisis, but the judges were at fault for failing to cloak their obviously pragmatic decree in convincing legal jargon. Posner delights in the brinkmanship of clever rhetoric. The trick, he feels, is to be as frank as possible about the pragmatic motives behind a decision, while clothing them in just enough formalist legal language to enable the decision to pass as a legitimate judicial move. In an ideal world, Posner believes, everyone would be as pragmatic about justice as he is, and judges would be able to be brazenly candid about their reasoning, as was his hero, Oliver Wendell Holmes; meanwhile, though, rhetoric is fun.

For the past ten years or so, Posner

has called himself a pragmatist, meaning that he believes that there is no objective way to choose between incompatible moral positions. Pragmatism has a bracingly impious air that he finds exhilarating. "Politics is about enmity," he says. "It's about getting together with your friends and knocking off your enemies. The basic fallacy of liberalism is the idea that if we get together with reasonable people we can agree on everything. But you can't agree: strife is ineradicable, a fundamental part of nature, in storms and in human relations."

Posner likes to argue that judges do not confront moral issues—only questions of strategy. He claims, for instance, that in *Brown v. Board of Education* the Court made its decision against segregation on the purely instrumental ground that segregation had been found to injure black students' self-esteem—though most people would view the decision that black self-esteem was a consideration of legal relevance as a moral one, and by no means uncontroversial in 1954. It is one of Posner's most persistent and confounding convictions that it is possible to practice a purely "pragmatic" jurisprudence. He argues that since there is no objective way to discover the definitive meaning

of an ambiguous law, judges should ignore highfalutin morality talk and simply make decisions based on what is sensible and conducive to social welfare—disregarding the obvious fact that deciding what is sensible and conducive to social welfare is a controversial business in which moral principles are inevitably at stake. This problem has been pointed out to Posner many times, and he has conceded it many times, but he always slides back again into his old ways.

For years, Posner had no solution, but recently he has been reading Carl Schmitt, and he has now come up with one. Schmitt was an early-twentieth-century German political theorist who believed that there is no objective way to settle moral or political disputes because all beliefs are the beliefs of a particular *Volk*, or cultural group, and there is no such thing as a universal rationality capable of mediating between them. Schmitt concluded that the only way to insure stability was to extract from society people whose beliefs were incompatible with those of the majority, and he used this argument to support Nazism's expulsion of Jews from the judiciary. While this scandalous pedigree lends Schmitt's theory, for Posner, a certain frisson, Posner himself uses Schmitt's logic to argue for the opposite conclusions.

In the book that he is now writing, "Law, Pragmatism, and Democracy," Posner argues that, since America contains so many irreconcilable points of view, and since it is hopeless to try to assimilate these points of view into one harmonious legal philosophy, the solution is to insure that the different points of view are represented in different judges. (In this way, oddly, both Schmitt and Posner are espousing a version of multiculturalism: they believe that different populations will always have different points of view, and that universal rationality is a myth.) One individual judge, Posner reasons, will never be able to put aside his personal disgusts and instincts, so the trick is to have lots of different judges whose instincts clash, and hope that, in the end, their views will cancel out in such a way as to approximate fairness. Of course, this is not a philosophy to comfort any particular defendant facing a



"Wings that don't work! Harps we can't play! And these infuriating nighties! Are you sure this isn't Hell?"

hostile reception; but that, Posner believes, is just the nature of life in a diverse society, and covering it up with a lot of obscurantist talk about liberal principles will not, in the end, make any difference.

Scribes turned out to be rather a fringe affair, the promotion of belletristic aspirations not being much of a priority in the law business; the lunch, accordingly, was held in a small room in a difficult-to-locate minor wing of the Hotel Inter-Continental. Hovering palely behind the lectern, Posner regarded his small audience without expression. There was an old Jewish joke, he told them, that summed up his views of judicial writing—and of law in general, for that matter—quite well. A man walks through a ghetto in Eastern Europe and spies a mohel's shopwindow (a mohel, Posner explained, is a person who performs circumcisions). He notices to his surprise that the window is full of watches. The man asks the mohel, "Why the watches?" and the mohel says, "Well, what would you like me to put there?"

Watches, Posner explained, wrinkling his nose ever so slightly, is what most of legal talk consists of—jargon, boilerplate, and patriotic flourishes. If only judges were bold enough to be candid—if only they would stop spouting pious rubbish about ethics and start talking about how the world really works—then they would take down the watches and fill their shopwindows with something else.

One Sunday morning in the early fall, Posner and Charlene took their four-year-old grandson, Nathaniel, to the zoo. Nathaniel had an appointment in the early afternoon, so Posner was eager to get to the zoo first thing, in order not to be short of time. He allowed, however, rather too much time, and so even though he absent-mindedly drove past the entrance and quite a long way into town before he noticed, he, Charlene, and Nathaniel still arrived forty-five minutes before the zoo opened. It was raining hard, so they first sat in the car and then, when that got too depressing, huddled, shivering, under the eaves of the ticket booth until the gates were unlocked.

It was not, truth be told, the first time



"Nothing yet, sir, but we have found Elvis."

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that Posner had felt cold-shouldered by the zoo. When his baboon-adoption materials arrived in the mail, they had contained not a picture of his baboon but only a postcard of a generic baboon. Posner discovered to his dismay that he had not, in fact, adopted a particular baboon but, instead, had contributed to a general fund, which entitled him only to part of a baboon, in a kind of time-sharing arrangement. Upon learning this, he had felt infantilized and perhaps even a little deceived by the zoo, but then he put these feelings aside and made inquiries about adopting a whole animal.

When the zoo opened, Posner, Charlene, and Nathaniel made their way to the monkey house. Inside, it was cavernous and steamy, and monkeys of varying species sat or screeched or leaped about. Posner's attention was caught by a pair of small black monkeys who were batting at each other while swinging from branch to branch with one paw. Posner, who is physically cautious, a slow crosser of streets, watched them for a minute, then turned anxiously to Charlene. "They might get hurt, horsing around like that," he said. "One of them might fall."

"They're *monkeying* around," Charlene corrected.

"I want to be a monkey," Nathaniel said.

When they left the monkey house, it was raining harder than ever. Still, having come all that way, Posner felt he should pay a visit to the baboons. The baboons were housed in a fenced-in area, in the center of which stood a large rock, pocked with shallow caves. Most were huddled inside the caves, away from the rain, but three baboons were sitting side by side on an exposed branch, perfectly still, enduring the weather in silence. Why? Posner mused, fascinated by the sight, which appeared to defy even the most minimal dictates of rationality. Did they *like* the rain? he wondered. They didn't look as if they liked it. Were they too stupid to move? Were they being punished in some way? Or were they, perhaps, conducting this bitter vigil in the service of some impenetrable simian stoicism? What if one of the stupid or criminal or stoical baboons turned out to be his baboon? Posner stood for a minute more, peering at the dripping, motionless trio on the branch, then turned away, baffled. ♦