As a federal judge and leading academic theorist, Richard Posner has words on everything from economics to old age.

Former Justice William J. Brennan Jr. once referred to Richard A. Posner as one of only two geniuses he had ever met. The other, he said, was Justice William O. Douglas. Although Brennan never said what led him to this assessment, a story from the days when Posner was one of his clerks may provide a clue.

It was the 1962-1963 Court term and Posner, who is today chief judge of the 7th U.S. Circuit Court of Appeals based in Chicago, had been asked to prepare a draft opinion in the case of a defendant who wanted a hearing on his second post-conviction petition. Fresh from Harvard Law School, where he had been law review president and valedictorian, and had graduated magna cum laude, Posner took to the task with relish.

Brennan liked the draft, but there was a problem: In conference, the justices had voted to deny a new hearing; Posner's draft granted it. "It was a complete misunderstanding on my part," Posner has since recalled. Still, he says, Brennan was both amused at the situation and impressed with his clerk's reasoning. "I'll see if I can sell it," he told Posner. And so it was that in the case of Sanders v. U.S., 373 U.S. 1, the Supreme Court was reversed by a 23-year-old clerk and did grant the hearing.

Since then, Posner has himself often been mentioned as a possible nominee to the Court. He has had an extraordinary career, and his writings—both judicial and scholarly—remain profoundly influential throughout the legal culture. Even critics acknowledge his brilliance, and his productivity has been truly breathtaking: about 1,400 judicial opinions (nearly 1,300 of them majority) since 1981, 25 books, and nearly 300 articles, essays and reviews on topics ranging from antitrust to aging, healthcare to homophobia, literature to sex.

In that voluminous outpouring lies the probable rub. Posner, at 58, is the antithesis of what, in late 20th century American politics, is so often sought after: a stealth nominee. Paper trails can be dangerous things, and Posner's makes Robert Bork's look skimpy by comparison. And even though Posner's ideas are there for anyone to read, critics have described him in sometimes mutually exclusive terms: shallow and overly ideological, a conservative activist and a liberal, a Renaissance man and a one-issue wonder. To be sure, Posner can confound conservatives as readily as he does liberals, and he professes as much disdain for strict constructionists as he does scorn for judicial activists.

Still, in both the academy and the courts, Posner is a power to be reckoned with. But to many he remains some sort of intellectual cipher. And so the question arises: Who is Richard Posner and why does he matter?

Inevitably, every discussion of Posner's career touches upon his enormous appetite for work—whether as the basis for admiration or criticism. He writes his opinions, books and articles himself, from scratch, with research help from law clerks and students at the University of Chicago, where he was a professor of law from 1969 to 1981 and remains a part-time faculty member.

He is conversant in the literature of ancient Greece and the legal culture of medieval Iceland, but he is also at home with word processors and modems, and uses them with ease to boost his productivity.

Posner laughs when asked why he writes so much, but his response is serious: "It's probably a form of compulsive behavior," he maintains. "Some people just get into a groove in which they write all the time. If you become oriented to that kind of activity it is just what you do."

He explains that there is a certain creative satisfaction in seeing a book published. "There are various forms of creativity, but writing a book or even a judicial opinion is like painting," he says. "At first there is nothing, but then gradually what's never existed before comes into being. And it's always somewhat unexpected. You are never exactly sure what you are going to say. So I think that's important to some people, that they have the feeling they are making..."
"Most judges either don’t have the facility of writing or they don’t have the time."
—Richard Posner

something that didn’t exist before.

“You think, this may be full of mistakes, but this is some new artifact that’s been created, and people read it, and may get some ideas from it. It’s added something to the stock of the world’s goods.”

If Posner is compulsive, he is in good company, according to former clerk and University of Chicago law Professor Larry Lessig. “He writes like Mozart composed music,” he says. “Once he figures it out, he just writes.”

But Posner doesn’t just write. “His is an intellectual productivity of an unusual kind,” says Robert Bone, professor of law at Boston University. “He’s a generative scholar; he generates ideas and he sets them up clearly for others to react to.”

University of Michigan law Professor Yale Kamisar puts it this way: “He gives you a framework, a way of looking at things in so many different fields. And then he leaves the crumbs for the birds.”

Law in the Marketplace

The ideas that first put Posner on most observers’ scholarly and jurisprudential maps concerned the application of economic theory to legal problems.

Although he didn’t invent the field, he is the person most closely associated with the school of law and economics, arguably the most influential new method of legal analysis to appear during the past two decades.

His first book, Economic Analysis of the Law, has been called the “Mao’s book” of the law and economics movement. In his subsequent books, Posner has examined a wide variety of human problems and interactions through the lens of market and cost-benefit analysis, including sex (Sex and Reason, 1992) and old age (Aging and Old Age, 1995).

In these and other writings,
Posner's intellectual boldness and his willingness to follow his theories through to their logical ends have made him the source of heated controversy. In what is probably still his best known and most controversial application of a rational-basis analysis to law, he asserted in "The Economics of the Baby Shortage" that baby-selling offered a plausible, rational and cost-effective alternative to adoption.

Were Posner to one day find himself a nominee to the high court, it's hard to imagine that the "baby-selling" article would not be the subject of some senatorial concern. Posner told one interviewer, in 1993, "I would be perfectly happy to defend my views about baby-selling to the Senate, but of course, as in the case of [Justice Department nominee] Lani Guinier, there would not be anybody listening."

Although criticism of law and economics has been abundant, most of it contending that it is inhumane to apply a cost-benefit analysis to conflicts and issues of human behavior, particularly when it leaves out the role of human emotion, the approach has become entrenched in both academia and jurisprudence.

Recently, in an interview at the National Press Club in Washington that aired on C-SPAN, Posner responded to the critics. "I don't think it's a criticism to say that the economic approach portrays a cold world, a Darwinian world, or that it has a cynical outlook," he said. "We're just monkeys with big brains. People don't like this. They feel that every time economics touches another field, it turns it to stone. So if economists start talking about love or altruism, it's no longer love or altruism because of the way in which they describe it."

Mark Tushnet, professor of law at Georgetown, agrees that law and economics is not inherently harsh. "If people criticize a Posner opinion that uses law and economics, they are criticizing the judge, not the method," he says, pointing out that liberal judges might apply a similar analysis but produce drastically different results.

Though he writes about theory, Posner says he is grateful to be working in the 7th Circuit, with all its grit and real-life problems. Surveying the city from his corner office on the 27th floor of Chicago's Dirksen Federal Building, the pale, somewhat stooped, ascetic-looking Posner holds forth on his legal domain.

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True to the Renaissance ideal, he values variety, as much in his scholarly pursuits as at the bench. His wide-ranging interests as well as his ability to write elegantly and forcefully are rooted in the twin influences of his English-teacher mother and his lawyer-father. As a child in New York City, Posner read voraciously, a habit that served him well at Yale, where he graduated in 1959 with a degree in English literature.

In fact, Richard Arnold, chief judge of the 8th U.S. Circuit Court of Appeals based in St. Louis, knew him at Yale and has said that, back then, he thought Posner was a socialist. (Today, it is Arnold who is generally considered the more liberal judge.)

Posner's fascination with economics began at Harvard Law School and then grew during his years in Washington as Brennan's clerk, as an assistant to the commission of the Federal Trade Commission, and finally during two years as an assistant to then-U.S. Solicitor General Thurgood Marshall. It was at the FTC that he began to look more closely at two areas of the law that would become major interests in his life—antitrust and the economics of regulation.

By the time he left Washington in 1968 to teach at Stanford Law School, he was sold on the law and economics theory.
In 1981, the Reagan administration was looking for young, conservative judges, and Posner fit the bill, according to Bruce Fein, then an associate attorney general responsible for helping to select Reagan's judicial nominees.

But Posner was ambivalent at first about an appointment, mainly because he was making a substantial income as president of Lexecon Inc., a private litigation-consulting firm that specialized in advising major corporations on antitrust matters.

Coming of Age

From the beginning of his tenure on the court, there were concerns that Posner, as an ivory tower scholar who had never practiced in a courtroom, didn't know what street-level justice was all about. He did little to help his cause when, shortly after his appointment he walked into the chambers of then-Chief Judge Walter Cummings and told him that he wanted to sit on more cases and write more opinions than the other judges.

Posner today acknowledges his early mistakes, noting with some irony that his prime responsibility as chief judge is "to maintain a collegial and productive atmosphere with the judges."

"I'm more a chairman-of-the-board-type of person than an executive officer," he says. "The part I like the most is assigning opinions."

Although judges of the 7th Circuit get along well and are productive, Posner has continued to attract criticism, much of it having a familiar ring.

A 1994 Chicago Council of Lawyers report stated, adding that Posner "often looks for ways to modify or overturn settled precedent when he does not care for the outcome that precedent might dictate."

A case in point: a 1995 Posner ruling that thousands of hemophiliacs who contracted the AIDS virus from blood-clotting medicine could not join in a lawsuit against drug companies.

A key basis for his decision was a concern that the defendants might be forced into bankruptcy—a notion that was never even raised by the defendants but only by Posner himself. Accusations of conservative judicial activism ensued.

The charges have been particularly notable in the area of law and economics. In 1992, for instance, Posner applied a cost-benefit analysis to the plain error question in a criminal case (United States v. Caputo, 978 F.2d 972 [7th Cir.]), and, in a frequently cited case, applied an economic analysis to the preliminary injunction standard (Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380 [7th Cir. 1984]).

Fans of Posner argue that he is more than able to decide cases with an open mind, and a number of observers, including the Chicago Council, point out that he is willing to speak out forcefully when he identifies something he finds fundamentally unfair.

An example is a recent dissent in which he eloquently stated the case for male prisoners who claimed a constitutional right under the
Eighth Amendment not to have female guards assigned to monitor them when they were showering. *Johnson v. Phelan*, 69 F.3d 144 (1995).

Posner clearly understands there are limits to applying rigid judicial theory to real cases. It is one of the reasons he has vehemently attacked doctrines like strict constructionism. “It would be very hard as a judge to hew to a particular line,” he notes, “to say, I’m going to try to bring the law more into phase with proper libertarian view, something like that.”

But he is quick to acknowledge that there are cases “even in a lower court like ours, where the judge has an opportunity, as all of these other conventional imperatives cancel each other out …, to vote his preferences. If [a judge has] a political philosophy, it’s going to be expressed in the decisions.”

**A Question of Viewpoint**

Posner’s two, often overlapping career paths, as a sitting federal judge and as a leading academic theorist, often accentuate the disparate evaluations of his reputation.

Not surprisingly, those who emphasize Posner’s attributes as a scholar are less concerned with how he deals with lawyers or procedural questions in his courtroom than with his creativity, thoughtfulness and writing style. With this audience, he often gets plaudits for his jargon-free, straightforward, sometimes humorous and often biting prose.

For example, at the beginning of an opinion concerning the appeal of an order by the Board of Immigration Appeals, Posner noted that the INS is notorious for delay in its proceedings due to failure to meet minimum standards of adjudicative rationality. “The lodgement of this troubled Service in the Department of Justice of a nation that was built by immigrants and continues to be enriched by a flow of immigration is an irony that should not escape notice,” he observed.

Posner says he has come to realize that it isn’t reasonable to expect all judges to put the kind of care into opinion writing that he does. “My views have softened,” he says. “I think the reality is that most judges, even though they are perfectly competent, either don’t have the facility of writing or they don’t have the time … so they delegate it to the law clerks and the result is a rather predictable, stereotypic opinion. But it does the job.”

Bryant Garth, administrative director of the American Bar Foundation, which serves as the research arm of the American Bar Association, suggests that Posner’s scholarship is criticized by academics because he is judged on an academic standard, which may be inappropriate. “Most people, particularly academics, have a model of what they consider scholarship for a really good book. And his [books] don’t really fit that model. You could say that his are just long essays.”

Garth goes on to say that Posner “should not be treated as a separate person for his judicial work and his scholarly work. He epitomizes a new model for a judge who is filling the influence gap that court of appeals judges face today because there are so many of them.”

Indeed, it may be this failure to see Posner’s scholarly books simply as attempts to get certain intellectual balls rolling—which they have done extraordinarily well—that has prompted recent criticisms that he simply writes too much.

The most frequent charge along these lines is that his work is lacking in scholarship and is merely an effort to solicit attention and stir up controversy.

Mark Kelman, a law professor at Stanford University, agrees that while Posner offers some tremendous insights, in a number of areas of law “he often is too hasty in making some arguments, and may be spreading himself too thin.”

But too thin for whom? There is little question that, if the goal has been to “add to the stock of the world’s goods”—as Posner contends—or to “generate ideas and … set them up clearly for others to react to,” as Boston University’s Bone suggests, then Posner has succeeded admirably. If, on the other hand, it was to consistently satisfy the rigorous standards of formal academic writing, perhaps the jury is still out.

No one denies that Posner brings a great deal of intellectual firepower to his decisions; the only question is whether it is always required for the job at hand. Does a great mind make a great judge?

One answer may be found in Posner’s 1990 book, *Cardozo, A Study in Reputation*. There, Posner devised a formula for gauging reputation and influence in the legal community, concluding that Cardozo was worthy of his distinguished reputation.

The formula includes a number of factors, but is heavily weighted toward quantity and style of writing. If one were to apply the formula to Posner’s own career, it is likely the conclusion would be similar.

“‘He is a significant figure because of substance, not just style,’” Garth says. “‘He is one of the pioneers of extending law and economics into domain after domain. This was radical in the 1960s, and it is conventional now.’”

For his part, Posner understands the political realities of judicial selection, and also the idea that judges selected for a court, let alone the highest court in the land, are not, and should not always be, the smartest candidates.

“I don’t think you want to have courts composed entirely of brilliant people,” he says, “because you want the ballast, and people who are sensible and maybe more connected to their society, not just people who are spinning off their intellectual webs.”