How Judges Think: A Conversation with Judge Richard Posner

By Jonathan Masur, Assistant Professor of Law

Over the past four decades, Judge Richard A. Posner, a judge of the Seventh Circuit Court of Appeals and longtime member of the Law School faculty, has built a reputation as one of the nation’s foremost polymaths. He has authored influential and provocative works that span a vast swath of law and life, ranging from antitrust regulation to human sexuality, to national security, to political philosophy, and to climate change and catastrophe, to name just a few.

In his latest book, How Judges Think, Judge Posner turns his formidable analytical lens on an especially well-suited target: his own profession. Drawing upon law and economics (the field he helped to found), behavioral psychology, and political theory, Posner presents a more comprehensive portrait of the judicial mind than has ever before been attempted. In so doing, he offers a biting critique of the many misconceptions about judging that have been held by scholars, the public, and even the judges themselves. What follows is a conversation between Judge Posner and Jonathan Masur, Assistant Professor of Law and one of Judge Posner’s former clerks.

JM: Your description of judges is striking for the lack of resemblance it bears to the standard portrayals of the judicial figure. According to your model, how do judges behave, and how has public—or even scholarly—perception of their work come to be so skewed?

RP: American judges operate in a setting of extreme uncertainty, which forces them to exercise an uncomfortably large amount of discretion, casting them often in the role of de facto legislators. They are reluctant to admit that they are (as I call them in the book) “occasional legislators,” and have been skillful in concealing the fact from the public, beingabetted in this regard by the legal profession, which has an interest in depicting the law as a domain of sophisticated reasoning rather than, to a considerable extent, of politics, intuition, and emotion. The secrecy of judicial deliberations is an example of the tactics used by the judiciary to conceal the extent to which such deliberations resemble those of ordinary people attempting to resolve disputes in circumstances of uncertainty. The concealment feeds a mystique of professionalism that strengthens the judiciary in its competition for power with the executive and legislative branches of government, the branches that judges like to call “political” in asserted contradistinction to the judicial branch.

JM: There is an easy caricature of your position that ignores the word “occasional” and paints judges as unbound, feckless politicians. This view of judging gained quite a bit of popular currency after the Supreme Court’s decision in Bush v. Gore, one that struck most observers as patently ideological. You don’t entirely reject this model of judging, but neither do you embrace it. Where do you think it has gone wrong, or in what way is its focus too narrow?

RP: I don’t think it’s wrong, but it’s incomplete insofar as it focuses entirely on the political motivations of judges. Those motivations are important, though it is simplistic to equate them with loyalty to a political party, but they are not the only important elements of a judge’s motivational structure. Bush v. Gore actually illustrates the point. The decision is not conservative from the standpoint of political ideology; it is liberal. The most plausible explanation for the outcome is that judges, including Supreme Court justices, want their colleagues and successors to be like-minded to them, and so they want as President someone who can be expected to appoint such judges when vacancies occur.

JM: Judges, as you describe them, approach cases very much as a layperson might: influenced by politics, intuition, and emotion, wanting to be surrounded by like-minded colleagues,
and (as you say in the book) with an eye towards consequences and common sense. Isn't this somewhat surprising? Wouldn't we expect the judicial profession, by its very nature, to attract only certain types of people—people with particularly great reverence for the determinacy of language or the power of reasoning by logical syllogism, for instance?

**RP:** That's an excellent question, one I should have devoted more attention to. The answer I think is that confronted with having to decide an actual case, the judge discovers (consciously or not) that semantic and logical analysis simply will not yield a "reasonable" answer, where what is reasonable depends on ideology, common sense, human emotions, and other factors that are not part of formal legal analysis.

**JM:** A portion of your book is devoted to discussing the failings of modern lawyers, who believe that law is a purely legalistic system and so provide judges with none of the purpose-driven or policy arguments that judges would find useful. Why do you think it is that lawyers have failed to adapt to pragmatic judging despite operating within such a competitive marketplace? Shouldn't lawyers have learned long ago that their typical arguments regarding precedent and language are of extremely limited value?

**RP:** I don't have a good answer. Your point about competition is a challenge to the answer I suggest in the book, which is that legal education has refused to be realistic about judges. Lawyers eventually learn that judges are more realistic than formalistic, but they have not been equipped by their education to articulate and substantiate pragmatic arguments in a form convincing to judges. Of course there are exceptions, and judges will make pragmatic judgments even if given little help by the lawyers. But their judgments would be sounder if they got more help from the lawyers.

**JM:** How is it that law schools have come to play such a substantial role in fostering this level of ineptitude within the profession? American legal education (and even much modern legal scholarship) focuses predominantly on the study of appellate decisions. Why haven't law schools done a more capable job of informing their students as to what really drives those decisions?

**RP:** The law schools naturally focus on imparting the vocabulary and rhetoric of legal rules and standards, without which one cannot function as a lawyer. And increasingly, with the rise of law and economics (economic analysis of law), the law schools provide students with sophisticated policy analysis of those rules and standards. What they do not much do is take the next step and impart a realistic understanding of the judicial process and of how in light of such an understanding to present cases most effectively to judges and juries.

**JM:** The principal goal of your book is to describe what judges are actually doing, as opposed to prescribing what you believe they should do. And yet many, if not most, sitting judges—including some of the country's most prominent jurists—would disagree (at least publicly) with your claims. Do these judges simply not understand their own work? Or have they found a reason to perpetuate a public perception that does not reflect reality?

**RP:** I think there is a degree of self-deception. A judge is more comfortable in thinking that his decisions are compelled by “the law”—something external to his own preferences—than by his personal ideology, intuitions, or suite of emotions. But there is also a natural tendency to try to reassure the public that judicial discretion is minimal, in order to defend the legitimacy of the judiciary. The tendency is paradoxically most pronounced at the Supreme Court level, the paradox being that it is the most political court. Precisely because it is a political court, its members feel the greatest need to deny that it is that. The aim is to enhance judicial power relative to that of other branches of government. I am not, however, meaning to suggest that it is wrong for the judges to be concerned about their power relative to those branches. The judiciary is a vital branch of government and needs to protect itself against inroads, though I am sympathetic to arguments that the judiciary, and in particular the Supreme Court, flexes its muscles too strongly.