NELLCO
NELLCO Legal Scholarship Repository

Duke Law School Faculty Scholarship Series | Duke Law School

4-1-2009

Autocrat of the Armchair (Reviewing Richard A. Posner, How Judges Think)

David F. Levi
Duke University School of Law

Follow this and additional works at: http://lsr.nellco.org/duke_fs

Part of the Courts Commons, and the Judges Commons

Recommended Citation
Levi, David F., "Autocrat of the Armchair (Reviewing Richard A. Posner, How Judges Think)" (2009). *Duke Law School Faculty Scholarship Series.* Paper 173.
http://lsr.nellco.org/duke_fs/173

This Article is brought to you for free and open access by the Duke Law School at NELLCO Legal Scholarship Repository. It has been accepted for inclusion in Duke Law School Faculty Scholarship Series by an authorized administrator of NELLCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

Book Review

AUTOCRAT OF THE ARMCHAIR

DAVID F. LEVI†

Richard Posner is a marvel.[1] He carries a full caseload as a U.S. circuit judge on the Seventh Circuit, teaches at the University of Chicago Law School, blogs with a Nobel Prize–winning economist (Gary Becker), and writes at least a book a year as well as any number of articles. His opinions are nicely written and explained. His scholarly writing covers a wide range of academic and public policy topics, from sex to literature, from jurisprudence to aging. Any large issue or event, such as the impeachment of a president or the treatment of captured Al Qaida members, is likely to elicit an interesting and thorough treatment of the topic from Judge Posner. Somehow he manages to be in the thick of things without diminishing his judicial role, although it is not unlikely that his more provocative academic writing kept him from an appointment to the United States Supreme Court in the 1980s. By all accounts, he is also a generous judicial and academic colleague. How he does all of this is one of the mysteries. Perhaps the explanation is simple: he is brilliant, hard working, and intellectually fearless. He is all of these things and more.

But is he an empiricist?

To be more precise, as a researcher who purports to describe how most judges think at all levels of the legal system, does he identify a reliable, sufficiently large data set and then apply

---

Copyright © 2009 by David F. Levi.

† Dean and Professor of Law, Duke University School of Law. Previously, United States District Judge for the Eastern District of California (1990–2007), Chair and Member of the Civil Rules Advisory Committee (1994–2003), and Chair of the Standing Committee on the Rules of Practice and Procedure (2003–2007). I am grateful to Mitu Gulati, Ernest Young, Lauren Collins, and Jennifer Dominguez for their many helpful comments and suggestions. I also thank the *Duke Law Journal* for its part in organizing this Symposium and particularly for its understanding of why this subject matter is of such importance.

1. Judge Posner is a great admirer of Oliver Wendell Holmes Jr. *See* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. (Richard A. Posner ed., 1992). The allusion in the title is to Oliver Wendell Holmes Sr.'s popular *Atlantic Monthly* column, *The Autocrat of the Breakfast-Table*.

appropriate statistical tests to the data such that others can evaluate the strength of his generalizations and replicate his conclusions using the same or other reliable data sets? Put somewhat differently, if Judge Posner were to take the stand as an expert on how most judges think most of the time, would his testimony be based upon "sufficient facts or data" to qualify as "reliable" under the Federal Rules governing admissibility of expert testimony?[2] Furthermore, as a distinguished judge who advocates for a particular approach to judging, an approach he calls "pragmatism,"[3] does he give sufficient attention to the need for reliable "empirics": transparent factfinding that can be challenged and tested, at the very least, by the parties to the litigation?

These questions might seem impertinent, even churlish. After all, Judge Posner has written several articles and at least one book that draw heavily on databases to answer questions about the legal system.[4] He is one of the founders of law and economics, and has been a key part in the upsurge of law and economics scholarship and law and social science research more generally, much of which consists of empirical study.

Judge Posner is certainly capable of empirical work and understands how it is done and its importance. But in his latest work on judging, *How Judges Think*,[5] he is no empiricist unless we are satisfied with "armchair empiricism." His generalizations about the ways of the judge and the world are ex cathedra pronouncements that generally lack any identified objective support outside of his own

---

2. Federal Rule of Evidence 702, Testimony by Experts, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702. The notes to Rule 702 caution: "If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *Id.* advisory committee's note; *see also* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 585–98 (1993).

3. *See* text accompanying *infra* note 13.

4. *E.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM (1996); Tomas Philipson & Richard A. Posner, *A Theoretical and Empirical Investigation of the Effects of Public Health Subsidies for STD Testing*, 110 Q.J. ECON. 2 (1995); Richard A. Posner, *The 2000 Presidential Election: A Statistical and Legal Analysis*, 12 SUPREME CT. ECON. REV. 1 (2004).

5. RICHARD A. POSNER, HOW JUDGES THINK (2008).

experience and belief. For many of his assertions, it would appear that his dataset of judges is a set of one—himself. Further, as an advocate for a particular kind of pragmatic judging—consciously and explicitly making law embodying sound social policy—Judge Posner gives little or no attention to the critical, what I would call "empirical," question: How does the judge, particularly the appellate judge, know what the consequences of a new rule of law will be and whether those consequences are likely to be good for society? These are contestable issues that can be the subject of testimony and challenge within the courtroom and the litigation process. When the record is not developed, how does the judge make sound decisions about the social policy consequences of different legal rules?[6]

I write from the perspective of one who served as a U.S. district judge for almost seventeen years and who was deeply involved in the federal rulemaking process. Much of what I have to say about the book stems from these two experiences. These experiences and that perspective lead me to question a description of judging that pays so little attention to the average case or to the processes of fair adjudication, including the roles of the advocate and of our procedural rules and practices. Indeed, one detects not just Judge Posner's well-known disdain for legal formalism,[7] but something else more troubling and fundamental: a resistance to the limitations on a judge that are basic to our system, particularly that judges sit to decide the issues actually presented within the confines of a particular

6. For example, a party might contend that affirmative action programs in professional schools are necessary to the development of leaders in the military and in business. *See* Grutter v. Bollinger, 539 U.S. 306, 330–31 (2003). This assertion can be established or contested by expert testimony, based upon data and statistical tests, or perhaps by other evidence, including personal experience, offered under oath and subject to cross-examination. Without such evidence and testing processes, however, a judge would have no reliable basis for believing or disbelieving the mere assertion of this causal relationship. Appellate judges who go beyond the record to rely on factual contentions in amicus briefs or academic literature that have never been tested in the courtroom, that have been "mailed in," and that would not be admissible, start down a perilous path inconsistent with the carefully constructed truth-seeking process that has served well for many years.

7. *See, e.g.*, POSNER, *supra* note 5, at 371–72 ("Legalists invent canons of construction (principles of interpretation) and distinctions between dictum and holding; embrace statutory and constitutional literalism but carve narrow exceptions for literal readings that produce absurd results; exalt rules over standards; [and] wash their hands of messy factual issues by adopting principles of deferential appellate review . . . ."); Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1663 (1990) ("Legal formalism is the idea that legal questions can be answered by inquiry into the relation between concepts and hence without need for more than a superficial examination of their relation to the world of fact. It is, therefore, anti-pragmatic as well as anti-empirical.").

case and record. One senses that for this judge—a brilliant man steeped in economics and academic learning, eager to make his mark on the development of the law and to exercise his broad lawmaking powers in the tradition of the great appellate lawgivers—such matters as precedent, the procedural posture of a case, the strategic decisions of the lawyers to advance certain positions and forgo others, and the actual facts in the record simply get in the way.[8]

Judge Posner's basic point is that judicial decisionmaking is not governed strictly by logic or the reasoned application of the law—text and prior decisions—to facts, a process he calls "legalism" and the adherents of which he calls "legalists." According to Posner, "there is a pronounced political element in the decisions of American judges, including federal trial and intermediate appellate judges and U.S. Supreme Court Justices."[9] There is also a personal element to judging, he avers, because a judge's personal characteristics "such as race and sex; personality traits, such as authoritarianism; and professional and life experiences, such as having been a prosecutor or having grown up in turbulent times influence judging."[10] Political and personal factors, according to Posner, generate preconceptions, often unconscious, that affect judicial decision making.[11]

Furthermore, Judge Posner contends that there is a significant legislative aspect to judging; judges inevitably must make the law in the open areas where the law is unclear and undeveloped. According to Posner, this lawmaking role is unavoidable: "A combination of structural and cultural factors imposes a legislative role on our judges that they cannot escape."[12] Having established to his satisfaction that legalism fails to explain judicial behavior and that the legalist approach cannot resolve cases in the open areas of the law, Posner offers his own template for judging, an approach he calls "pragmatism" and describes as "basing judgments . . . on consequences, rather than on deduction from premises in the manner of a syllogism."[13]

---

8. *See generally* Linda E. Fisher, *Pragmatism is as Pragmatism Does: Of Posner, Public Policy and Empirical Reality*, 31 N.M. L. REV. 455, 491–92 (2001) (documenting how Judge Posner's "pragmatist agenda" leads to his reliance on "extra-record facts").

9. POSNER, *supra* note 5, at 369–70.

10. *Id.* at 370.

11. *Id.* at 11. Relying upon Bayesian decision theory, he calls such preconceptions "Bayesian priors." *Id.* at 67; *see also infra* note 30 and accompanying text.

12. POSNER, *supra* note 5, at 372.

13. *Id.* at 40.

Curiously, Judge Posner considers that these are controversial claims, even ones as banal as the claim that judges make the law by applying it to new fact settings or that judges could be influenced by their own life experiences. These claims may have been shocking in the late nineteenth century when Justice Holmes asserted that history has more to do with the development of the law than logic,[14] but in a post legal-realist world, these claims are the new orthodoxy. According to Posner, however, most judges would vociferously deny that their decisions are ever influenced in the slightest by "political"[15] or personal considerations, and most judges pretend that they are finding the law and not making it.[16] For what it's worth, from the ease of my own armchair, I would take just the opposite position: I would say that most judges are more than aware that they are "making law," in the sense of amplifying it, when they apply precedents or statutory language to particular factual settings. I would also contend that most judges, particularly the very best ones, are acutely aware of the

---

14. "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881). The idea that legal materials sometimes leave an open area within which the judge is freer to develop the law goes back many years. *See* H.L.A. HART, THE CONCEPT OF LAW 121–50 (1961); HANS KELSEN, PURE THEORY OF LAW 348–56 (Max Knight trans., Univ. of Calif. Press 1967) (1934); EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2–3, 7 (1949).

15. Judge Posner continues the unfortunate use of the term "political"—with its overtone of partisan bias—to describe a judge's reliance on judicial philosophy. Judge Michael Boudin, a participant in this Symposium, comments upon the misleading use of the term in one of his contributions to this Issue. *See* Michael Boudin, *A Response to Professor Ramseyer,* Predicting Court Outcomes Through Political Preferences, 58 DUKE L.J. 1687, 1688 (2009) (calling the "political" label of a judicial opinion "mere provocation"). For a compelling argument that much of what Posner and others think of as "political" is actually quite consistent with legal decisionmaking, see Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After* Gonzales v. Raich, 2005 SUP. CT. REV. 1, 14–15, 18–21.

16. Judge Posner pokes a good deal of fun at Chief Justice John G. Roberts Jr. He repeatedly points to and then mocks the Chief Justice's assertion at his confirmation hearing that judges are like baseball umpires who just apply the rules to the facts as they unfold on the ground. *E.g.*, POSNER, *supra* note 5, at 78–81; *see also Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005). Yet even Judge Posner concedes that much of the time this is exactly what judges do, POSNER, *supra* note 5, at 8, although one doubts that it is what Supreme Court Justices do much of the time, *see* Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 708 (2007) ("Supreme Court Justices cannot even agree on the basic contours of the 'strike zone' . . . because the constitutional text itself is indeterminate and the potential source materials for gleaning its meaning in particular settings are both numerous and contested.").

potential of personal factors, including judicial philosophy, life experience, and personality, to affect how judges approach and then decide legal issues. I would further say that part of the art of judging rests in recognizing the existence of these potential influences and then dealing with them in some appropriate way, depending on the nature and strength of the influence.

There are a number of problems with Judge Posner's descriptions and prescriptions. Most fundamentally, much of what he asserts about how judges think is just assertion, lacking any factual support in empirical study or even anecdote. One suspects that most of Posner's claims are based on examination of his own decisional processes or, perhaps, on his personal observations of some of his colleagues. Yet unfortunately, the book is neither structured nor argued as an autobiography.[17] Here are some of the many generalizations one finds in the book drawn from one knows not where:

- "Most judges who oppose abortion rights do so because of religious belief rather than because of a pragmatic assessment of such rights."[18]
- "A judge in a nonjury proceeding who has to decide whether to believe a witness's testimony will often have formed before the witness begins to testify an estimate of the likelihood that the testimony will be truthful."[19]
- Judges are more inclined to convict than jurors because "judges learn that prosecutors rarely file cases unless the evidence against the defendant is overwhelming."[20]
- "[M]any, maybe most, judges would if asked deny that they bring preconceptions to their cases[.]"[21]
- "[J]udges whose background is law teaching rather than private practice tend to be harder on the lawyers who appear before them."[22]

17. An intellectual autobiography by Judge Posner would be a wonderful addition to the sparse literature of judicial autobiography.

18. POSNER, *supra* note 5, at 13.

19. *Id.* at 65.

20. *Id.* at 68.

21. *Id.* at 72.

22. *Id.* at 74.

- "Appellate judges promoted from the trial court may be more likely than other appellate judges to vote to affirm a trial judge."[23]
- "[A] former trial judge promoted to the court of appeals may be more likely to focus more on the 'equities' of the individual case . . . and less on its precedential significance than would his colleagues who had never been trial judges."[24]
- "Most judges blend the two inquiries, the legalist and the legislative, rather than addressing them in sequence."[25]
- "Accustomed to making nonlegalist judgments in the [nonroutine cases], the judge is likely to allow nonlegalist considerations to seep into his consideration of the [routine case]."[26]
- "Intuition plays a major role in judicial as in most decision making."[27]
- "[T]here are a few professions . . . in which the negative correlation between age and performance is weak. Judging is one of them, though part of the reason is that judges in our system are appointed at relatively advanced ages; this means that early decliners tend to be screened out and judges tend not to get bored, or run dry, at the same age at which persons in other fields do who have been in the same line of work for many years."[28]
- "Rather than a shortage of applicants for federal judgeships, there is a surplus."[29]

There are many more similarly rank assertions in the book. No studies are cited because there is nothing to cite to. The problem with these assertions for the most part is not that they are clearly untrue—some of them are couched tentatively, perhaps in acknowledgement of the lack of data and supporting empirical research—but that, in the absence of data and empirical studies, it is impossible to know how true or untrue they are. Thus, if Judge Posner's assertions were based upon data, it would be possible to test and then calibrate the

23. *Id.*
24. *Id.*
25. *Id.* at 84.
26. *Id.* at 85.
27. *Id.* at 107.
28. *Id.* at 161.
29. *Id.* at 164.

significance of some of these assertions, and then to ask important follow-up questions. For example, to say that intuition or preconception plays a role in judicial decisionmaking is not to say anything useful. Judge Posner takes great delight in relying on Bayesian decision theory to make the point that judges have preconceptions, "priors" in Bayesian jargon,[30] which can affect their decisions. The existence of preconception in the legal system is well known. Many of the procedures in a trial or other proceedings attempt to neutralize the effects of bias or preconception.[31] In a jury trial, for example, lawyers and judges use voir dire to expose potential jurors' preconceptions. Once exposed, the judge can address and neutralize these preconceptions to the satisfaction of the participants or the lawyer will strike the juror. Judges and lawyers constantly remind jurors to keep an open mind as a trial proceeds to guard against premature conclusions based upon only some of the evidence. In court trials, I frequently reminded myself to simply listen and not attempt to reach tentative views of how the case ultimately would be decided. I did not like to discuss ongoing court trials with law clerks or colleagues precisely because I did not wish to start characterizing

30. Judge Posner is unapologetic in his use of such jargon. "Judicial preconceptions are best understood, we shall see, with the aid of Bayesian decision theory. Not that this is how judges themselves would describe their thought process. And 'Bayes's theorem' is not the only term I shall be using that is likely to alarm some readers of a book about judges." *Id.* at 11. Like Monsieur Jourdain, who was so delighted and surprised to learn that he had been speaking in prose all of his life, see MOLIÈRE, THE BOURGEOIS GENTLEMAN 30–31 (Bernard Sahlins trans., Ivan R. Dee, Inc. 2000) (1670), I believe that most judges would be startled to learn that their preconceptions are actually Bayesian priors. I question whether Posner's addition of this label advances the central preoccupation of all who are involved in the litigation process with finding ways of neutralizing preconception and bias—by jurors, judges, and witnesses, whether conscious or unconscious. Because there are no data, it is difficult to know whether unconscious priors have any significant effect on judges in some or most cases. As to conscious priors, I find it difficult to believe that a good trial judge would ever rely in significant part on a hunch or prior to find any material fact by a preponderance of the evidence. Indeed, addressing such preconceptions is one of the critical goals of a fair trial proceeding and of the rules that govern such proceedings.

31. There is a large body of literature on debiasing techniques. *See, e.g.*, Linda Babcock, George Loewenstein & Samuel Issacaroff, *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 914–23 (1997) (proposing debiasing mechanisms for negotiations); Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 200–02 (2006) (considering how debiasing through law works to address a range of legal questions in areas "from consumer safety law to corporate law to property law"); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1060, 1108–15 (2006) (advocating for new debiasing techniques in the race context). One might expect an empirical account of preconceptions to include a thorough investigation of these debiasing techniques and an analysis of whether they actually work in practice.

the evidence until I had heard all of it. For the same reasons, many judges continue to instruct jurors not to discuss the case until deliberations have begun and the jurors have heard all of the evidence, the arguments of counsel, and the judge's instructions. Good lawyers attempt to predict the sorts of preconceptions that a judge may have and then address them with either facts or arguments.[32] Good judges are constantly on the lookout for their own preconceptions. When preconception rises to the level of bias, good judges will recuse themselves on their own motion.

It is not nearly good enough to point out that judges and jurors, like others, have preconceptions. What would be useful and important to know is whether these preconceptions are fixed and strong, whether they may become fluid as a trial develops, and whether there are fair procedures for addressing them. Judge Posner does not seem to appreciate the dynamic nature of litigation and how many times in a case or trial a judge will rule one way and then reverse course later. What does this say about the strength of initial preconceptions? It would be important to know whether the ability to overcome preconception and keep an open mind is a part of the judicial craft that can be studied, learned, and improved upon. If scholars and judges could study preconceptions in some systematic way, they could ask many interesting empirical questions about them. And they might develop new methods for neutralizing, cabining, or, at least, revealing their role. Without data, however, Posner is at a loss to move forward our understanding and procedures. His bare assertion that judges are prisoners of their conscious and unconscious preconceptions diminishes the judicial role and the striving by conscientious judges for objectivity and fairness. His assertion will become fodder for ideologues who believe that everything is "political" and that all relationships are defined by power.[33]

---

32. When I was the U.S. Attorney for the Eastern District of California from 1986–1990, my office lost a suppression motion involving the search of a home that contained a methamphetamine laboratory, because the judge found that the affiant had omitted from the affidavit that the surveillance officers had seen young children present at the scene. The judge assumed that young children would not typically be present at the site of a methamphetamine lab because of the danger of explosion and fire, and that therefore this was material information detracting from probable cause. It was a failure of advocacy not to demonstrate to the judge that this assumption was incorrect: Methamphetamine manufacturers often show little concern for the safety of their children or neighbors.

33. In my brief experience as a law teacher, I find that law students are particularly susceptible to the belief that judges are political actors who routinely decide cases according to

Another empirical problem with the book as a description of how judges think is that Judge Posner is simply uninterested in the vast majority of cases that come before the courts. At least at the appellate level, he concedes that judges will decide the quotidian case in precisely the same way. The law will be clear, or clear enough, and the facts will be uncontested, assumed, as on an appeal from a summary judgment ruling, or found by the court below by trial or hearing. Applying the law to the facts in these cases may require a degree of discernment and elbow grease, but most appellate judges will come to the same conclusions on the arguments presented. In Posner's lexicon, these cases can be decided by the application of "legalist" techniques, which treat the law as a system of rules that produces predictable outcomes based on logic, reason, precedent, and common sense. These cases do not interest Posner even though, he concedes, they account for most of the cases that appellate judges are thinking about.[34] It is these cases that end up in "unpublished" dispositions from the courts of appeals.[35] The overall dominance of such cases within the system is probably even greater than the appellate statistics suggest if one considers that in many cases the parties do not elect to appeal from the judgment of the district court.[36]

Judge Posner is interested in the comparatively few cases that produce disagreement among judges and that tend to end up in the Supreme Court or in the casebooks. Though a fraction of the caseload, these are the cases that command his attention. These are

---

their own self-interest, partisan beliefs, previous experience, and such personal characteristics as gender, religion, and race.

34. POSNER, *supra* note 5, at 8 ("Legalism drives most judicial decisions, though generally they are the less important ones for the development of legal doctrine or the impact on society."). Judge Posner now concedes that although his book purports to describe how all judges think, it is concerned mainly with the appellate courts, *see* Interview, *A Conversation with Judge Richard A. Posner*, 58 DUKE L.J. 1807, 1816 (2009), and only a subset of their cases—those in the "open area." Considering that unpublished opinions account for more than 80 percent of the appellate courts' dockets, *see infra* note 35, Judge Posner is actually focused on a relatively small number of cases within the remaining percentage.

35. *See* JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 48 tbl.S-3 (2007), *available at* http://www.uscourts.gov/judbus2007/JudicialBusinespdfversion.pdf (noting that 83.5 percent of opinions of cases in the U.S. courts of appeals are unpublished).

36. Many cases are not appealed at all. District judges decide them in whole or in part and the parties accept the rulings or come to some settlement based on their understanding of the value of the case according to their own "legalist" analysis. *See generally* U.S. Courts, Federal Courts Management Statistics, http://www.uscourts.gov/fcmstat/index.html (last visited Mar. 23, 2009) (showing that 349,969 cases were filed in federal district courts in 2008, whereas only 61,104 appeals were filed in the courts of appeals during that same time period).

the cases, he contends, that cannot be decided only by reference to prior case law, the language of statute, and the like, but seem to call forth some application of the judge's personal policy beliefs or judicial philosophy. These are the cases that generate disagreement and appeals, that drive the development of the law, and that create reputations for our great appellate judges.

But the typical case must have its due in any description of how judges think most of the time.[37] For an empiricist, the observation that in the vast majority of cases judges of different political stripes, genders, religions, races, ages, and experience all reach the same conclusion might be seen as the important point if one were to describe how judges think most of the time, instead of how appellate judges think a little bit of the time in uncertain cases.[38] The very fact that judges are usually "legalists" might cause one to ask if the legalist approach is the starting point in every case, including those that eventually require the judge to draw upon policy preferences. Judge Posner contends otherwise. He asserts that "[a]ccustomed to making nonlegalist judgments in the [nonroutine cases], the judge is likely to allow nonlegalist considerations to seep into his consideration of the [routine case]."[39] Why the reverse is not just as or more plausible, Posner does not say. And if the experience of our legal system by the people who use it matters, and I suggest that it should, the handling and disposition of the typical case would be of very great importance.

Judge Posner is not interested in the typical case. Like some other appellate judges, he seems to have a deep-seated enmity toward the everyday case. The dislike of the average case by certain federal appellate judges, including Posner, became clear during the 2004 debate over a proposed change to Appellate Rule 32.1 that made citable so-called "unpublished" opinions.[40] The unpublished opinion,

---

37. *Cf.* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 401–08 (1985) (emphasizing the need to consider less-litigated constitutional provisions when creating constitutional theories).

38. *See* Thomas J. Mills & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 841 (2008) (noting that a "great deal might be learned by incorporating unpublished opinions" into New Legal Realism analysis because most studies are now limited to published opinions that, because of their atypical nature, overstate the actual effects of judicial ideology and other characteristics).

39. POSNER, *supra* note 5, at 85.

40. The new rule invalidated local appellate rules that forbade the citation of "unpublished" opinions:

Rule 32.1. Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal

a misnomer given that all opinions are now published and available electronically, is a phenomenon of the federal circuit courts and some state appellate courts. Before electronic publishing, an unpublished opinion was truly unpublished; the court did not send the opinion to West or other publishers and it was usually available only to the parties in the litigation in slip form or in the file maintained at the courthouse. These opinions were not citable because they were not generally available, and to permit citation would give unfair advantage to institutional, repeat litigants who would have their own collections of these cases. But with the advent of electronic research and with the requirement that court filings be available on public court websites, it makes no sense to consider these opinions unavailable or unpublished. They are easily obtainable and they appear in any electronic search. Nonetheless, many of the circuits continued to treat such opinions as second-class citizens.[41] Some courts denied them precedential effect, but permitted citation for whatever guidance the opinion might offer, but other courts went a step further, barring the parties from even citing the opinion on pain of sanctions. Given that more than 80 percent of the output of the courts of appeals consists of unpublished opinions,[42] this prohibition was no small matter. This is not the place to rehash the arguments over the rule amendment.[43] The rule changed, and all unpublished opinions from all federal appellate courts at least may now be cited, even if they lack precedential force in some circuits.[44]

---

judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(ii) issued on or after January 1, 2007.

FED. R. APP. P. 32.1.

41. Patrick J. Schiltz, *Much Ado About Little: Explaining the* Sturm Und Drang *over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1430–31 (2005) (summarizing the ways circuit courts treat unpublished opinions).

42. *See supra* note 35 and accompanying text.

43. Letter from Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 2–13 (May 6, 2005), *available at* http://www.uscourts.gov/rules/Reports/AP5-2005.pdf (summarizing the debates, arguments, and public comments over the proposed new rule 32.1); Letter from Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 53–93 (May 14, 2004), *available at* http://www.uscourts.gov/rules/Reports/AP5-2004.pdf (chronicling the arguments on each side of the debate); *see also* Schiltz, *supra* note 41, at 1458–90.

44. *See supra* note 40.

Judge Posner lined up with the opponents to the rule change in his circuit.[45] Like most of his colleagues,[46] he considered that citation of unpublished opinions would cause the judges a great deal of needless effort to distinguish cases that were best left undisturbed and unread.[47] He did not think then and he does not think now that these cases contribute anything to our understanding of how the legal system works or how judges think. Yet this point of view is questionable given the very large number of these cases. Indeed, one might have expected Posner, a sometime empiricist and an observer of the judicial system, at least to have appreciated the use that a lawyer could make of unpublished opinions to mount an empirical argument. One reason a lawyer might wish to cite to unpublished opinions is to show an appellate court how a rule is actually working in practice, where it is being applied, whether it is being applied consistently, and the like. There are many contexts in which knowing how a rule of law is actually coming to the courts will be important to advocacy, to the court, and indeed to the very pragmatism that Posner advocates. For example, when a defendant asserts qualified immunity, a party might wish to show how earlier rulings demonstrate that a rule of law either is or is not "clearly established." Or if one wishes to argue about the consequences of a particular rule of law for other cases and factual circumstances—and consequences are the lodestar of Posner's pragmatism—one would want to look at the vast majority

---

45. Letter from Richard A. Posner et al., to Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules 1 (Feb. 11, 2004), *available at* http://www.uscourts.gov/rules/Appellate_Comments_2003/03-AP-396.pdf.

46. Judge Easterbrook was a notable exception. *See* Letter from Frank H. Easterbrook, Circuit Judge, to Peter G. McCabe, Sec'y, Standing Comm. on Rules of Practice and Procedure 1 (Feb. 13, 2004), *available at* http://www.uscourts.gov/rules/Appellate_Comments_2003/03-AP-367.pdf; s*ee also* Tony Mauro, *Difference of Opinion; Should Judges Make More Rulings Available as Precedent? How an Obscure Proposal Is Dividing the Federal Bench*, LEGAL TIMES, Apr. 12, 2004, at 1 (quoting Judge Easterbrook's remark that barring citations to unpublished opinions "implies that judges have something to hide").

47. A letter to the Appellate Rules Committee Chair read, in part:

> Because the order is not citable, the judges do not have to spend a lot of time worrying about nuances of language. . . . [We] do not need to worry about nuances of language because the order will not be thrown back in our faces someday as a precedent. And thrown back they will be, no matter how often we state that unpublished orders though citable (if the proposed rule is adopted) are not precedents. For if a lawyer states in its brief that in our unpublished opinion in *A v. B* we said X and in *C v. D* we said Y and in this case the other side wants us to say Z, we can hardly reply that when we don't publish we say what we please and take no responsibility. We will have a moral duty to explain, distinguish, reaffirm, overrule, etc. any unpublished order brought to our attention by counsel.

Letter from Richard A. Posner et al., *supra* note 45, at 1.

of cases in which the consequences are most likely to occur. In this sense, the unpublished opinion contains important data, not because the reasoning in the opinion may or may not be persuasive, but because of the very existence of the opinion, the outcome, and the controversy. Yet Posner is not interested in such data, and one may wonder why.[48]

This tendency to undervalue the data and the processes of the legal system is observable in *How Judges Think* in additional ways. Judge Posner purports to describe how all judges think, but he seems to have very little feel for the trial court and for the role of the bar and the parties. There is hardly any discussion of the influence on judicial thinking of the briefs, the arguments, and the lawyers' strategic decisions to press certain contentions and let others slide. The failure to discuss the effect of lawyering on how judges think leaves the impression that the briefs and other work product, including argument and direct- and cross-examination, are not of much significance. I disagree with this, and I think other trial judges would as well. In a courtroom, with the parties often present and intensely interested in the fairness of the proceedings, a judge feels quite constrained to address the questions and issues presented by the lawyers. A judge who declines to address those issues will appear unfair or biased. Similarly, a judge who generates arguments that the lawyers did not raise will appear to assist one side or the other. Lawyers and parties who face a judge acting as a roving commissioner will view the judge as yet another adversary in the courtroom, and as biased or even co-opted in some way. Perhaps I overstate these constraints or perhaps I was too sensitive to them as a judge. The point is that in a description of how all judges think, it leaves a huge

48. If the reason were simply the time it would take to distinguish the reasoning or holding in such cases, and a view that the cases are so inadequately prepared that they do not deserve this expenditure of time and attention, then it should satisfy that the cases have no precedential value and the court is free to ignore their reasoning and wording. But in an interview posted on the *How Appealing* website, Judge Posner indicates that he neither understands nor could accept such an approach:

> I don't like the idea of allowing unpublished opinions to be cited, which is another way of saying that I think courts should be permitted to designate some of their decisions as nonprecedential and therefore not worth citing. (Apparently under the new rule, we won't be allowed to forbid citation of unpublished opinions, but will be allowed to deny precedential force to them, a combination that seems to me to make no sense.)

20 Questions for Circuit Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit, HOWAPPEALING.COM, Dec. 1, 2003, http://howappealing.law.com/20q/2003_12_01_20q-appellateblog_archive.html.

hole to ignore the effect of lawyers and their clients, and the need to run a fair courtroom, on judicial thinking.

Nor does Judge Posner consider the way in which the record is developed in a case and the constraints that the record might impose on a fair-minded trial or appellate judge. Trial judges spend a good deal of their time deciding what evidence is sufficiently reliable to be admitted. Lawyers devote their attention to challenging and countering testimony that they view as misleading or inaccurate. The system imposes certain requirements, most notably, in the common law tradition, that witnesses cannot "mail" it in. They have to submit themselves to rigorous questioning under oath.

And this process for reliable, fair, and transparent factfinding points to another problem in Judge Posner's theory and discussion: He never addresses how a carefully constructed factual record relates to his theory of pragmatic judging. Yet without such a record, pragmatic judges are at sea and at large, making it up according to their own lights. For Posner, a good judge is one who develops the law in directions that are sensible and that produce beneficial consequences for society.[49] This is unobjectionable if the judge includes the lawyers in this quest such that there is a sound factual basis in the record—data—upon which the judge reliably can project those consequences. But judges who think that they know what is sensible or beneficial merely by dint of education or intellect are just as formalist as the "legalists" to the degree that they rely upon a fixed set of theories of human nature, economics, history, or political economy out in the ether to deduce rules of law, rather than building such rules from the ground up by responding to the particular facts of a particular situation and dispute. The trial judge who, after hearing argument, honestly identifies what the grounds of decision will be and permits the parties to address those grounds and develop in the record a factual basis in support or derogation of those grounds—including consequences to the greater society, if those consequences will be a basis for the decision—is to my mind the best trial judge. Similarly, the appellate judge who plays by the rules, abiding by the record presented and remanding to the district court for additional factfinding when necessary, is the best kind of appellate judge. And these judges are neither legalists nor pragmatists. These judges are empiricists.

---

49. *See* POSNER, *supra* 5, at 13 ("A pragmatic judge assesses the consequences of judicial decisions for their bearing on sound public policy as he conceives it.").