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# Limitations (A Response to Judge Posner)

Chad M. Oldfather

*Marquette University Law School*, [chad.oldfather@marquette.edu](mailto:chad.oldfather@marquette.edu)

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## Limitations (A Response to Judge Posner)

*Chad M. Oldfather*\*

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### I. INTRODUCTION

Among the advice that Judge Posner offers to his fellow judges is the suggestion that they remain mindful of their limitations:

I suggest that when trying to make up his mind about which way to vote, the judge remind himself of his limitations (limitations that all judges have)—the limitations of his knowledge of the law, the limitations of his knowledge of the case at hand, the limitations of his knowledge of the real-world context of the case, and the limitations (or distortions) of his thinking that result from the biases that all judges bring to judging. Not that it is wrong, let alone possible, to judge without biases. ... But one should try to be aware of one's priors, so that they do not exert too great an influence on one's judicial votes.<sup>1</sup>

There are echoes here of what is, for me, one of the more apt descriptions of the proper judicial mindset. It comes from a talk that Justice David Souter gave at Stanford Law School. Justice Souter was speaking at the memorial service for Professor Gerald Gunther, and he referenced the judicial style of Judge Learned Hand, drawing upon the depiction provided by Gunther in his biography of Hand:

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\* Professor, Marquette University Law School.

1. Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts – One Judge's Views*, 51 DUQ. L. REV. 3, 21-22 (2013).

I read Gerry's book, and found out what Hand was actually like: indisposed to call the wall facing him black or white, judging with a diffidence near to fear sometimes, deciding a case only because he had no escape. . . . [P]artway through [the book], we're apt to think what a misalignment of mind and duty.

Then we read some more, and the man and the job seem to reconcile . . . . The chronic evenhandedness compelled the judge to come out and say what he was really choosing between; the torment of competing reasons forced him to face the very facts that placed his principles in tension; and not just face the facts, but heft them and feel their weight until finally the needle of his mind moved off dead center. . . . [A]s that understanding emerges in our minds, it comes with a companion question: If Hand is the prototype good enough for Gerry Gunther . . . why not for every judge who reads the book?

There's no mistaking Gerry's answer, that Learned Hand's necessities are every judge's common obligations: suspicion of easy cases, skepticism about clear-edged categories, modesty in the face of precedent, candor in pitting one worthy principle against another, and the nerve to do it in concrete circumstances on an open page.<sup>2</sup>

For Judge Posner, at least, having this mindset does not entail taking a great deal of time to reach decisions. "It is not a protracted process unless the judge has difficulty making up his mind, which is a psychological trait rather than an index of conscientiousness."<sup>3</sup> Justice Souter's description of Judge Hand's de-

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2. David Souter, *Wisdom for Judges*, 37 STANFORD LAW., no. 2, 2003, at 31, 31.

3. RICHARD A. POSNER, HOW JUDGES THINK 299 (2008) [hereinafter POSNER, HOW JUDGES THINK]. In this regard, it is interesting to read the following passage from Judge Posner's review of Gunther's book:

Yet the only feature of Hand's eccentric personality that seems to have had much to do with his judicial performance (if you don't include in that performance his temper tantrums on the bench) was his self-doubt. It seems to have driven him to work hard in order to prove himself to himself—hopelessly, of course—over and over again, and to have insulated him from the overconfidence that is the occupational hazard of being a judge, especially a judge who is smarter than his colleagues and is therefore tempted to browbeat them rather than deliberate with them, and to make snap judgments supported by perfunctory rationales. Because Hand was very afraid of getting things wrong, he performed his judicial tasks with a conscientiousness uncommon in a highly experienced judge, and this shows in the opinions—in the exception-

cisional process suggests that it may not be as Posner describes for all judges.<sup>4</sup> I suspect that is right. It is not difficult to imagine that there are some judges, even experienced ones, for whom the matter of working through all the materials in a case in a way that is appropriately mindful of one's limitations will be time consuming. Even so, it seems to me that both descriptions contain extraordinarily good advice (and not merely for judges). It is also, it further seems to me, advice that is very difficult for any of us to follow consistently.

Judge Posner notes in the early pages of his book *How Judges Think* that he feels "a certain awkwardness in talking about judges, especially appellate judges (my main concern), because I am one. Biographies are more reliable than autobiographies, and cats are not consulted on the principles of feline psychology."<sup>5</sup> I take comfort in this admission. Although I have devoted my scholarly career to studying and writing about judges, I have always felt a certain awkwardness in doing so, because I am not one. There are limitations inherent in both perspectives, and thus is good advice that Judge Posner gives, for scholars as well as judges. It is also advice that is surely in some sense merely aspirational rather than realizable, especially if judges are left to apply it on their own. As Justice Cardozo put it, "[w]e may try to see things as objectively as we please. None the less, we can never see them with any eyes but our own."<sup>6</sup> Those eyes are fallible in all sorts of ways. We are subject to all manner of cognitive biases and shortcomings.<sup>7</sup> We imagine that others are more like us, or that they perceive the world as we do, to too great a degree.<sup>8</sup> We perhaps even imagine that we know ourselves better than we do.

As the discussion to this point undoubtedly suggests, this response will not be following the standard prescription that "when

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ally scrupulous weighing of contrary views that is so distinctive a characteristic of them, and that makes Hand the Henry James of judicial stylists.

Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 *YALE L.J.* 511, 526 (1994).

4. Indeed, it seems not to have been that way for Justice Souter, at least during the early portion of his tenure on the Supreme Court. See JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 146-47 (2007).

5. POSNER, *HOW JUDGES THINK*, *supra* note 3, at 2.

6. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 13 (1921).

7. See generally, e.g., DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

8. This is the "false consensus effect." See, e.g., Gary Marks & Norman Miller, *Ten Years of Research on the False-Consensus Effect: An Empirical and Theoretical Review*, 102 *PSYCHOL. BULL.* 72 (1987).

you strike at a king, you must kill him.” My disagreements with Judge Posner are not that large. Indeed, I have almost certainly cited Judge Posner in my scholarship more frequently than any other writer, and not merely because of his skills as a writer and expositor of ideas, or the fact that there is so much of his work to cite. I find his descriptive account of the judicial process to be (almost) entirely persuasive. This is so partly because it is consistent with what many of the other great judges who have written on the subject have said.<sup>9</sup> But it is also because his account rings true to me. Though I have never been a judge, my experience of the world—some combination of introspection coupled with the observation of others—suggests to me that it must be as he describes. That is, that judges do, and in many cases must necessarily, engage in the sort of pragmatic reasoning that Judge Posner attributes to them. Law should and does play a large role in this process, but it cannot be the sole determinant. Judges must often look beyond the law, though they will vary in terms of the points at which they will depart from a sincere effort to be guided by proper legal materials, in their conceptions of what proper legal materials are, and in the extent to which they attempt to guard against following their own naked preferences when they have reached the point at which those legal materials no longer provide guidance. And, of course, judges will vary in the extent that they are aware of all of this.

I hope to achieve two things in this Essay, both of which are meant to amplify Judge Posner’s recognition of the limitations that afflict us all, and to highlight the wisdom embodied in Justice Souter’s discussion of Judge Hand and Professor Gunther. The first is to underscore the existence of these limitations by pointing out ways in which Judge Posner—himself unquestionably a judicial and intellectual giant—has failed to account for limitations of himself or others. The second is to suggest a couple of ways in which I believe the judicial process might be modified so as to account for these limitations.

## II. LIMITATIONS

Like all of us, Judge Posner has his blind spots. Some of these are attributable primarily to a lack of experience. Judge Posner’s

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9. See generally CARDOZO, *supra* note 6. Cardozo is the primary, but hardly the only, example. See also, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 100-15 (1930); Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 *YALE L.J.* 218 (1961).

practice experience was both brief and atypical, so it is unsurprising that he might fail to fully appreciate the situation of a practicing lawyer.<sup>10</sup> Others are attributable primarily to the tendency we all share to imagine that others are able to do things at the same level and in the same manner as we can. This creates problems for those, like Judge Posner, whose skills and aptitudes place them at the far end of the right tail of the bell curve. Such people may fail to appreciate fully the relative lack of skills and aptitudes possessed by those more toward the middle of the distribution. Both these blind spots manifest themselves in Judge Posner's advice for lawyers and for his fellow judges.

#### A. *Judge Posner's Critique of Lawyers*

The essence of Judge Posner's critique of lawyers is that they often fail to appreciate matters from the perspective of judges. Whether due to laziness, a misplaced assumption that judges are more knowledgeable than they truly are, or something else, they submit briefs and deliver oral arguments replete with impenetrable acronyms and devoid of the background knowledge necessary for judges to get a complete grasp of what is at stake.<sup>11</sup> More generally, they do not understand how busy judges are, they do not understand the legal and factual tools judges need to be provided, and they do not understand the constraints under which judges operate. They instead hold unreasonable expectations of judges, failing to recognize that judges will never have the time to become as familiar as they are with their case, or even in many (or most) cases the doctrinal backdrop against which it is being litigated.

My experience in practice suggests that this is often, though not always, true. I will relate two anecdotes. The first involved a conversation with an experienced lawyer following an oral argument before an intermediate court of appeals in a relatively com-

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10. To his credit, though, Judge Posner has elsewhere recognized, at least in the abstract, the notion that a judge's practice background, or lack thereof, will affect his performance as a judge:

To take another example, judges whose background is law teaching rather than private practice tend to be harder on the lawyers who appear before them because such judges have less insight into the constraints on a lawyer's performance that are imposed by time, money, and client pressures than do judges who come out of private practice. The less forgiving attitude of the ex-academic may affect the strictness with which he enforces deadlines and other procedural rules as well as his attitude toward sanctioning lawyers for mistakes.

POSNER, *HOW JUDGES THINK*, *supra* note 3, at 74.

11. Posner, *supra* note 1, at 35-36.

plex civil matter. He did not think the argument had gone that well, based primarily on his sense that the judges failed to fully grasp the points he was trying to make. Even so, he expressed the hope that when the judges went back through the briefs and the record they would recognize the complexity and nuance that they had thus far failed to appreciate. This was a vision of what some have called the “Learned Hand model” of appellate adjudication,<sup>12</sup> in which one might easily conjure up images of thoughtful judges spending their nights sitting in front of a fireplace sipping wine while pondering their way through a difficult case. It is not a realistic view.

The second anecdote involves a conversation with a different experienced lawyer. This lawyer had reviewed a draft of a brief I had written for submission to the same intermediate court of appeals. It was well-written, he told me, and the legal arguments were solid. That was great, he continued, so far as it went. But it didn’t go far enough. “You need to make them believe that your client got screwed.” This lawyer recognized the realities of the situation—understood his audience—in a way that the first did not. He understood that judges do not have the time to be going back through the briefs in a leisurely fashion. As an advocate, it is best to regard oneself as having one shot to persuade the court, to demonstrate that your client got screwed.

It is hardly surprising that most lawyers should fail to appreciate the perspective of judges. A common refrain of new judges is that they did not fully appreciate the nature of the job, even after a career as a lawyer that may have seen them spend a great deal of time arguing in front of and otherwise interacting with judges. The effect is perhaps even more pronounced with a court like Judge Posner’s. A federal court of appeals will seem more distant to most members of the bar than a local trial court. The legal culture is such that federal judges are minor celebrities, and the lawyer is likely to impute more knowledge to them than she would to others. To that extent, then, Judge Posner almost certainly has a point in critiquing lawyers for not fully appreciating the judicial perspective. Indeed, it is a point that generalizes well beyond the context of appellate advocacy. Effective communication of any sort requires an appreciation not only of the message one wishes to convey, but also of the point of view of one’s audience, including

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12. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Model*, 81 CORNELL L. REV. 273, 278 (1996).

the things that members of that audience may not know or may understand in a different way than one does.<sup>13</sup>

The failings that Judge Posner identifies are not merely rhetorical. One of the major themes of his critique is that lawyers consistently fail to provide the court with enough background information, with the “legislative facts” necessary to put a given dispute in context.<sup>14</sup> That context is necessary not only to enable the court to reach the right result in the case before it, but also to provide the court with the information it needs in order to formulate a workable and appropriate legal standard for future cases. I have no doubt that he is right about this, for it is all too easy to assume that things we regard as familiar or obvious are likewise familiar or obvious to those with whom we communicate.<sup>15</sup> Thus one respect in which some lawyers fail to appreciate their audience is by failing to adapt to the fact that the judges do not live within the same alphabet soup of acronyms, for example, that they do, or deal with the same complex factual situations regularly enough to have a full understanding of the background.

But even while we ought to accept Judge Posner’s critique, we should also recognize that there are important respects in which his analysis and expectations reflect unrealistic assumptions

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13. Probably the best statement of this idea comes from David Foster Wallace. Wallace wrote about teaching freshman composition classes, and teaching students to avoid “the error of *presuming* the very audience-agreement that it is really their rhetorical job to *earn*.” DAVID FOSTER WALLACE, *Authority and American Usage*, in *CONSIDER THE LOBSTER AND OTHER ESSAYS* 66, 106 (2006). He writes:

Helping them eliminate the error involves drumming into student writers two big injunctions: (1) Do not presume that the reader can read your mind—anything that you want the reader to visualize or consider or conclude, you must provide; (2) Do not presume that the reader feels the same way that you do about a given experience or issue—your argument cannot just assume as true the very things you’re trying to argue for.

Because (1) and (2) seem so simple and obvious, it may surprise you to know that they are actually *incredibly hard* to get students to understand in such a way that the principles inform their writing. The reason for the difficulty is that, in the abstract, (1) and (2) are intellectual, whereas in practice they are more things of the spirit. The injunctions require of the student both the imagination to conceive of the reader as a separate human being and the empathy to realize that this separate person has preferences and confusions and beliefs of her own, p/c/b’s that are just as deserving of respectful consideration as the writer’s. More, (1) and (2) require of students the humility to distinguish between a universal truth (“This is the way things are, and only an idiot would disagree”) and something that the writer merely opines (“My reasons for recommending this are as follows:”). . . . I therefore submit that the hoary cliché “Teaching the student to write is teaching the student to think” sells the enterprise way short. Thinking isn’t even half of it.

*Id.* at 106 n.59.

14. See, e.g., Posner, *supra* note 1, at 11-12, 29, 35-37.

15. DAVID FOSTER WALLACE, *supra* note 13, at 106 n.59.

about lawyers and the constraints under which they practice. He would like a Wobegonian bar in which every lawyer is above average. But not every lawyer—and it may be more accurate to say not many lawyers—possess the intelligence and creativity necessary to meet his standards. All sorts of limitations come into play—bounded time, bounded rationality, and bounded intelligence more generally. Just as recognition of lawyers' failings in appreciating the judges' position ought to inform how they go about their jobs, so, too, ought recognition of a judicial failure to appreciate the position of lawyers impact judges' work. There are a couple ways in which this might work.

Consider first the possibility that what Judge Posner perceives as a failure to appreciate the judicial point of view represents instead lawyers' attempt to appreciate other (non-Posnerian) judges' point of view.<sup>16</sup> After all, one of Judge Posner's critiques of his fellow judges is that many, probably even most, either masquerade as formalists because they believe that is what they are expected to do or, worse yet, that they perceive themselves as engaged in nothing more than formalist analysis.<sup>17</sup> Lawyers, who if they have already internalized any of Judge Posner's advice to them have done so with respect to his injunction "[a]void irritating the judges,"<sup>18</sup> consequently have a difficult course to navigate. The safe bet is to play the formalist game. A judge who merely masquerades as a formalist will be happy to continue the charade, and one who perceives himself to be nothing more than a formalist would be confused or offended by the suggestion that he ought to take more than formal legal materials into account. Thus the lawyer who plays along with the formalist game, who beats the court over the head with citations to precedent,<sup>19</sup> will regard himself as giving at least most of his audience what it wants. (Part of

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16. Consider, for example, a bar journal article responding to Judge Posner's call for lawyers to use the Internet more to improve their briefs:

Suffice it to say that with the line between adjudicative facts and nonadjudicative facts so uncertain, many attorneys are understandably reluctant [to] stray beyond the confines of the familiar record to find and deploy fresh ammunition from the Internet in their appellate briefs. How can the appellate advocate employ, as Judge Posner urges, the "underutilized resource" of the Web to improve an appellate brief while avoiding accusations of, and conceivably sanctions for, going outside the record?

Charles D. Knight, *Searching for Brother Jim: Improving Appellate Advocacy with the Internet*, THE CIRCUIT RIDER, April 2010, at 12, 14.

17. See Posner, *supra* note 1, at 5-8.

18. *Id.* at 39.

19. See POSNER, HOW JUDGES THINK, *supra* note 3, at 119 (describing "the standard technique of appellate advocacy" as "beating appellate judges over the head with cases").

the reason Judge Posner may get less of what he wants is that his court does not let lawyers know ahead of time who the judges on their case will be.) I am sure that Judge Posner would say, and I would agree, that those lawyers are still failing to appreciate their audience, because in the interesting cases formalism will never be the entire story. But that just brings us to our next sense in which Posner might fail to appreciate the lawyer's situation.

Judge Posner has pointed out elsewhere that judges with an academic background tend to be harder on the lawyers who appear before them than their colleagues who have come from practice.<sup>20</sup> The judge who has not practiced, or whose time in practice was short or long ago or in some way unrepresentative, seems likely to be less sensitive to the constraints under which lawyers operate. Some of these are relatively apparent, such as the possibility that a lawyer will lack the time to devote to generating the sort of work product that Judge Posner seeks. That lack of time may be the result of having to juggle too many matters, or the product of a client's unwillingness to foot the bill for work done at that level, or some combination of the two. It may be the product of cognitive limitations. Thinking and writing are hard work, and the ability to engage in those activities proficiently is, as I am sure Judge Posner has noticed, not evenly distributed.

It may also be that the lawyers give Posner the formalism he does not want as opposed to the consequentialism he does because that the latter is more costly to deliver. His thirst for background facts assumes a certain type of lawyer. The failings that Judge Posner identifies are the failings of specialists who are unable to meet the needs of the generalist judiciary. These are lawyers whose shortcomings are related to their presentation of cases. It is not that they lack knowledge, but that they have not effectively conveyed it. What he overlooks is the possibility that the lawyers themselves may not know or understand the background. This may sound farfetched, or like the sort of thing that inherently involves a lawyer failing at his job, but I suspect that it is surprisingly common. Lawyers won't always be intimately familiar with the industry that is the setting of litigation, and the economics of law practice—especially nowadays, where clients do not rely on outside lawyers to be consistent, trusted advisors—make the longstanding model of the lawyer who gains a deep appreciation for his clients' business a thing of the past. Thus, few lawyers

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20. See *supra* note 10.

have the luxury of specializing to the extent necessary to become the sort of experts that Judge Posner's analysis assumes. Many lawyers, even at larger firms, maintain a practice that is a bit generalist in nature. One of my law school professors, having had a successful career as a litigator, once made a remark to the effect that the real skills that a litigator brings to the table are transferable, and that he felt he could learn all the specific substantive law he needed through a couple days in the library. Those folks still exist.

The resulting reality is that the lawyers may not be in a position to provide background facts at the depth that Judge Posner seeks. Consider a commercial dispute. The transaction that is the subject of the litigation will likely have been structured by a different lawyer with different expertise, and often many years before. What the parties to that deal were seeking to accomplish may be completely opaque to the litigators. Moreover, the knowledge that the specialist was trying to impart to the transaction will often not be the sort of thing that is readily reconstructed. It will be the product of years of experience, encompassing not only knowledge about the law and the business context in which the transaction took place, but also the dynamics of negotiation and leverage and how those might play out differently in different cases. The result is that even a lawyer experienced in the subject matter might not be able to do any better than engage in informed speculation concerning what the parties were trying to accomplish in structuring a given deal. Another alternative is that the parties to the transaction themselves did not really appreciate what they were doing. It might have been put together by lower-level employees of a large organization who were acting according to a sort of commercial formalism in which they were, in effect, tied to a script and lacked not only discretion but also the sort of depth of understanding that would have been necessary to effectively exercise it.

Indeed, a portion of Judge Posner's discussion is an open acknowledgement that segments of the bar may lack the knowledge to provide the background information that he would like judges to have. He identifies immigration cases as involving a context in which the record before his court is often deficient.<sup>21</sup> Part of the explanation he provides is unsurprising: the caseloads of immigration judges are too great to allow them to do an adequate job, "and the immigration bar is weak because most illegal

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21. Posner, *supra* note 1, at 14.

immigrants (including asylum seekers) have very little money and because immigrants tend to gravitate to lawyers of the same ethnic background regardless of the lawyer's competence."<sup>22</sup> Yet there is a component to his explanation that is somewhat more surprising. It is not only immigration judges but also "the Justice Department's lawyers [who] display an appalling ignorance of foreign countries—of facts about them that should be common knowledge and not require 'proof' in the normal sense of the word."<sup>23</sup> What is interesting about this is that it involves a set of lawyers who would typically be regarded as "good" lawyers—those in the Justice Department—who do not know what it is that they need to be effective.

One view is to regard this as a failure of lawyering. The immigration bar is generally not skilled enough to make the most effective case, and the government lawyers are either uncharacteristically unskilled or are unmotivated to gain the necessary knowledge. The judges may be pure of motive or not, but in any case they lack the time to get beneath the surface of any of the cases put before them. But there is another perspective on this. It may be that the lawyers are doing precisely what Judge Posner suggests they do, which is to know their audience and give it what it wants. What follows is merely speculation on my part, since I have no experience in immigration courts, but from the description Judge Posner offers, it is not difficult to imagine that the lawyers do not provide the background facts that Judge Posner desires, or even bother to learn about them, because they have come to understand that judges are not interested in them. This might be so in the case of immigration judges because of the caseload concerns that Judge Posner identified. Beyond that, Judge Posner contends that many members of the Article III judiciary "are not well informed about foreign countries."<sup>24</sup> In a sense, then, the problem may not merely be one of individuals not doing their jobs, but one that takes on something of a structural cast as well, involving a set of deficiencies that feed upon and amplify one another.

One might reach the end of this analysis and remain unmoved. Even if one accepts my suggestion that judges fail to fully appreciate the situation of lawyers, the reasoning might run, the pre-

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22. *Id.*

23. *Id.*

24. *Id.* at 15.

scriptive result is the same. It is lawyers who have the job of convincing judges, and therefore it is lawyers who must understand the judicial mind, and not the other way around. And that is undoubtedly the perspective that I would counsel for any lawyer. But I think it is too shortsighted of a view for judges to take. The judiciary and the judicial process do not, after all, exist for the benefit of judges. They exist for the benefit of the litigants and for society more broadly. Full consideration of the prescriptive implications of this state of affairs, then, requires us to take into account how these various limitations might affect the system's ability to serve its larger goals, and how it might be modified in order to ameliorate those effects. We will return to those questions below.

### B. *Judge Posner's Critique of Judges*

Judge Posner has consistently described American judges as ultimately operating pursuant to some variety of pragmatism.<sup>25</sup> Often this pragmatism manifests itself as formalism—in cases where the rules provide straightforward answers, most versions of the pragmatist calculus counsel in favor of following the rules, and thus formalism accurately describes the process. Posner's problem, then, is not so much with judges' choice of decisional methodology as it is with two aspects of their execution. The first of these is judges' failure to be candid in their discussions of their decisional process. The second is their tendency to adopt an unduly passive posture.

Judge Posner points out in multiple places in his article that “judges tend not to be candid about how they decide cases. They like to say they just apply the law—given to them, not created by them—to the facts.”<sup>26</sup> Yet he also concedes that most of the time that story is a more-or-less accurate depiction of what the judges are actually doing.<sup>27</sup> The law often provides the answer, and in those cases an opinion that tells a formalist story can also be a candid opinion. It is those cases in which the law does not supply a ready-made answer—the ones that fall within what Posner calls

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25. See POSNER, HOW JUDGES THINK, *supra* note 3, at 230 (“The word that best describes the average American judge at all levels of our judicial hierarchies and yields the greatest insight into his behavior is ‘pragmatist’ (more precisely, as I shall explain, ‘constrained pragmatist’).”).

26. Posner, *supra* note 1, at 3.

27. *Id.* at 4.

the “open area”<sup>28</sup>—where judges are most likely to provide a description that falls somewhere short of a full and accurate description of their decisional process.

What results are opinions that compensate for their lack of candor by including what might be characterized as filler. They overrelate unnecessary facts while at the same time leaving out the sort of background facts that either do or ought to constitute the information truly driving the decision. And in difficult cases they depict a process in which the judicial role

is to transform issues of fact and policy into semantic issues (so-called ‘plain meaning’—often not so plain when read in context—of statutes or the interpretation of precedents) or apply ducking principles—principles of deferential review of rulings by district judges and especially by administrative agencies, which deal disproportionately with technical matters—that enable appellate judges to avoid having to decide the actual merits of the parties’ arguments to them. This is evasion.<sup>29</sup>

A related problem is that of passivity. Posner is somewhat vague on the causes of this passivity, noting in one place that the system of lateral entry that characterizes the American judiciary results in judges less inclined to be passive<sup>30</sup> yet suggesting only a few pages later that a judge appointed out of the typical practice environment would regard his role as umpireal.<sup>31</sup> Whatever the source, the problem with the passive formalist (the two characteristics need not travel together, but one gathers that Judge Posner’s sense is that they typically do) is an unwillingness to probe beneath the surface. The formalist is content to play the semantic game, and the passive formalist looks no further than what the parties provide. “The lawyers will offer their interpretations of the legal materials and the judge will match them to the materials and decide which advocate is more faithful to the language of the statute or the holdings of decisions that have the status of precedents.”<sup>32</sup> This is in contrast to the realist judge, who peers be-

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28. See POSNER, *HOW JUDGES THINK*, *supra* note 3, at 9.

29. Posner, *supra* note 1, at 16.

30. *Id.* at 4.

31. *Id.* at 6.

32. *Id.*

neath the surface and is not satisfied to accept the world as it is presented by the advocates.<sup>33</sup>

Underlying Judge Posner's depictions is a sentiment similar to the one voiced by Justice Holmes: "I have long said there is no such thing as a hard case. I am frightened weekly but always when you walk up to the lion and lay hold the hide comes off and the same old donkey of a question of law is underneath."<sup>34</sup> As Judge Posner's voluminous and wide-ranging writings demonstrate, there are few problems that he regards as beyond his ability to solve. I am in no position to say that he is wrong about that, though I will note my skepticism. But I am confident in saying that whatever the extent of his abilities, they outstrip those of the bulk of American judges. Even in the context of that relatively elite intellectual community, he is a one-percenter. And as tends to be the case with one-percenters of all stripes, he cannot fully appreciate the nature of life in the middle of the bell curve. To be sure, he acknowledges that judges, as a class, find it difficult to make sense of the increasingly complex activities that generate litigation.<sup>35</sup> But to recognize a problem is not necessary to appreciate its full extent.

One portion of Judge Posner's article, in particular, underscores the extent of the gulf between his skills and those of his fellow judges. He takes the position that judges should write their own opinions<sup>36</sup> (a position that I have some sympathy with<sup>37</sup>), and works off a quote from Justice Ginsburg:

Justice Ginsburg has been quoted as saying that she would like to 'write all of my opinions myself, but there is just not enough time to do that.' Instead, she says, she edits heavily. But the claim that she doesn't have enough time to write her opinions is odd, given how few opinions Supreme Court Justices write. Over the past five complete terms (2006 through 2010), Ginsburg has written a total of only 75 opinions (39 majority opinions, the rest concurring or dissenting opinions). That is an average of only 15 opinions per term. Suppose it would take her 4 hours to write the first draft of an opinion,

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33. *See Id.* at 11.

34. Letter from Oliver Wendell Holmes, Jr., to Frederick Pollock (Dec. 11, 1909), in *Holmes-Pollock Letters* 155, 156 (Mark DeWolfe Howe ed., 1961).

35. Posner, *supra* note 1, at 15.

36. *Id.* at 26.

37. *See* Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 *GEO. L.J.* 1283, 1325 (2008).

on average. That would be 60 hours a year. If she works 2000 hours a year, writing her own opinions would require reallocating only 3 percent of her time from other judicial tasks—mainly, one supposes, editing law clerks' drafts, which must be time consuming; so the net increase in her opinion writing/editing would be slight.<sup>38</sup>

This math may work for Judge Posner. I doubt that it works for many other judges. Speaking for myself, the prospect of writing even the first draft of a Supreme Court opinion, or its equivalent, in four hours strikes me as fanciful. Perhaps if the writing were an isolated process, such that I had already completed all my researching and outlining, and faced only the task of converting bullet points into prose, it would be possible. Even then, though, I am not sure I could type fast enough to make that physically possible.<sup>39</sup> Either way, it strikes me as a highly optimistic time frame, and getting to the point where I was able to simply type would have required dozens of hours of work.

A partial response to this would be to say that the Supreme Court's opinions are terribly overwritten, and no doubt my perspective is at least somewhat colored by the fact that the bulk of my writing these days is academic in nature, such that it comes with a different set of expectations and generally without built-in deadlines. But even this essay, responding to a single article and written under a deadline, took vastly more than four hours to complete. And as I think back to my days in practice, where my writing was more consistently subject to deadlines and billing-related constraints, I conclude that it would have been difficult to generate something approaching a high-quality product that quickly. Having read a lot of drafts from a variety of authors, I doubt that I am alone in this regard. Indeed, the fact that almost no federal judges have taken up Judge Posner's suggestion that they write their own opinions<sup>40</sup> leads to the conclusion that I am not.

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38. Posner, *super* note 1, at 27.

39. And while I am not a gifted typist by any means, I am closer to that than I am to a two-fingered hunt-and-peck typist.

40. See, e.g., Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (And Should We Care)?*, 32 FLA. ST. U. L. REV. 1077 (2005).

*C. Judge Posner's Prescriptions, and Mine*

The core of Judge Posner's advice for advocates and judges is, in my view, unassailable. They must be aware of their own limitations, and the limitations of others. They must be mindful of their role, and the role of others. They should work harder, and they should work differently. All true. Yet there are two basic problems with this prescriptive takeaway. The first is that there is no reason to believe that mere exhortation – which is what Judge Posner offers – will produce change. The second is that efforts to implement Judge Posner's advice may not generate the sorts of results he intends.

Consider first the issue of effectiveness. There is little doubt that lawyers need this advice. It is unquestionably true that there is lots of bad lawyering out there, such that there are plenty of briefs submitted to courts of all stripes that are not as good as they should be. Indeed, my time as a judicial clerk quickly dispelled any worries I might have had concerning my ability to work as a lawyer, simply because so many of the briefs I saw were so bad. It accordingly comes as no surprise to me that Judge Posner should decry briefs for failing to include the sort of background facts that would enable him to better understand the context in which a given dispute arose, and thereby to reach a better result and craft better law to govern similar disputes going forward. Indeed, it might not be unrealistic to think that lawyers will be receptive to a judge's suggestion that they ought to be doing things differently, for lawyers certainly are conditioned to do what judges want. Even so, the effects are likely to be marginal at best. Judge Posner is hardly the first authority to suggest that appreciating one's audience is the key to rhetorical effectiveness, and the widespread availability of that advice has hardly alleviated the problem of substandard lawyering.<sup>41</sup> Significant change in behavior will seemingly only follow change in the conditions or incentives under which lawyers work.

Judges as the audience for this sort of advice present a different problem. Judge Posner has noted that judges do not pay a great

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41. E.g., CAROLE C. BERRY, *EFFECTIVE APPELLATE ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT* 53 (3d ed. 2003) (“Communication and rhetorical research indicate that a persuasive model must obviously regard the receiver as a top priority. Persuasion cannot take place if the object of the communicative intent is not convinced. The literature is replete with studies leading to information about the importance of audience. . . . The advocate must know the receivers and adapt the message accordingly to have a persuasive effect on the audience.”); *see also supra* note 13.

deal of attention to the critiques of academic commentators.<sup>42</sup> Partly this is because judges simply do not have the time to absorb the critique of a professoriat that they regard as increasingly distant from the realities of law practice and judging.<sup>43</sup> But it also has to do with the substance of those critiques, which often amount to assertions that judges are simply too dim to see things the right way without academic guidance.<sup>44</sup> Yet Judge Posner does not offer much that is different. Whatever the effectiveness of his advice among lawyers, it is difficult to imagine it gaining any more traction among judges simply because it comes from one of them rather than from an academic, perhaps especially because Judge Posner is himself a former academic.

One of the difficulties with simply exhorting judges to be more candid without changing the parameters within which they work is that there is no way to tell whether an opinion that describes law-driven decision-making is sincere (because, again, even Posner concedes that most of the time that is an accurate depiction of what judges do) or not. An opinion written by a judge who is trying to mask a decision reached on pragmatic (or other non-law-driven) grounds need not look any different than an opinion written by a judge who simply has not thought all that deeply about the issues and so truly believes that he reached his decision because that is what “the law” compelled him to do.

But even assuming judges were to take Judge Posner’s advice to heart, we might be concerned about the manner in which it would be implemented. Let us assume that the adversaries do not do their part. This could be because they misconceive their role for the reasons outlined above, because they are not up to the task, or simply because, as advocates for a particular position, they are unlikely to take any sort of dispassionate look at the big picture, and are therefore unlikely to give courts all the information they need to decide responsibly. Whatever the reason, it is in the situation where lawyers fail that the case for departing from passivity is strongest.

Yet there are dangers in judges doing too much on their own. One is that of creating the appearance that judges are indifferent

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42. See POSNER, *HOW JUDGES THINK*, *supra* note 3, at 205.

43. *Id.*

44. *Id.* at 216 (“Academics who are serious about wanting judges to change have to appeal to their self-interest. To tell judges . . . that they are so dumb that they cannot even administer the absurdity exception to literal interpretation, and so should give it up, will not strike a responsive chord.”)

to lawyers' arguments. That indifference, in turn, could produce more bad behavior by conditioning lawyers to think that the arguments they submit will not be taken into account, such that they need not pay a great deal of attention to the quality of the arguments they make.<sup>45</sup> If judges appear to do whatever they want regardless of lawyers' input, lawyers have no incentive to focus on the quality of that input. There is also the danger that judges will fall prey to the dynamic embodied in the cliché that a little knowledge is a dangerous thing. In conducting his own research into background facts, the judge will seize on the features of the situation that seem salient to him. But the things that seem salient to a newcomer or a novice will not be the things that are salient to an expert. That is, to be sure, a dynamic that is to some considerable degree ineradicable in a world in which we have generalist judges.<sup>46</sup> The people applying and (to some degree) making the rules will in many contexts have a great deal less knowledge about the situations those rules will govern than will the lawyers who must implement them. Given that, a relatively rigid formalism is likely to produce rules that are suboptimal in many of the contexts in which they apply. Yet, if that formalism is consistently maintained, those who must live according to those rules will at least be able to count on the existence of fixed guideposts by which to navigate. The risk of striving to replicate expert judgment, which is what Judge Posner's quest for background facts amounts to, is that it will generate neither consistency nor the sort of true insight that true expert judgment could arguably produce.

The point manifests itself at another level as well. Judge Posner suggests that judicial forays into background facts are appropriate only where formalist reasoning does not provide answers.<sup>47</sup> But that may not be taking his logic far enough. He posits that judges are licensed to peer behind the rules only where the rules do not fully guide their analysis, and suggests that those are the

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45. I have elaborated on these points elsewhere. See Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121 (2005).

46. Partly this dynamic is a product of the generalist judiciary. See Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 874-75 (2012). Partly it is a product of the adversarial system, which presents judges with a particular set of facts and thereby tends to obscure the range of situations across which a rule of law might apply. See Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 346-47 (2009).

47. Posner, *supra* note 1, at 11.

situations where lawyers consistently fail to provide judges with the extra information they need.<sup>48</sup> If that is true—and it undoubtedly is insofar as lawyers not giving the court all that it would need to conduct the sort of fully realist analysis that Posner contemplates—then it probably holds true at an earlier stage of the game as well. That is, lawyers' refusal or inability to get underneath the applicable formalist materials could also affect the judge's ability to determine whether a case is the sort as to which formalism provides all the answers. In other words, whatever it is that causes lawyers to leave out the sort of background facts that ought to take center stage when formalism fails likely also causes them to leave out the facts that would make it apparent that a given case is not so readily resolved by formalist methods. One does not need to buy into any sort of radical indeterminacy thesis to believe that a sufficiently skilled and creative judge—who need not be Posnerian—would be able to conjure up arguments that move some significant portion of cases out of the easily-resolved-by-formalist-methods category. If that is so, it raises the question of why it is appropriate for the judge to do some of the lawyer's work in those cases where the judge can determine from the face of the briefs that formalism does not work as opposed to those where the judge cannot. Is it that some minimum quantum of adversarial creativity gets rewarded (or punished, as the case may be), or is it simply a product of the happenstance of the distribution of apparent factual scenarios relative to the legal standards?

Where does this leave us? Exhortation may be all well and good—and indeed some of what I am about to offer perhaps qualifies as mere exhortation—but real change seems unlikely to come unless it is generated through some tangible means of changing judges' incentives. There are ways in which this can happen. One thing that is striking about our system of adjudication is that it has, in many respects, remained unchanged despite tremendous changes in the context in which it occurs. Take the example of appellate litigation. In the federal courts, at least, appellate judges face caseloads that are markedly greater than those of their counterparts from a half-century ago.<sup>49</sup> On the surface, though,

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48. *Id.* at 11-12.

49. Compare ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MAR. 31, 2011, tbl. B-1, 21-24 (2011), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/B01Mar11.pdf> (showing 55,753 cases commenced in the court of appeals in 2011), with ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD

the process looks largely the same, with the parties submitting briefs and the courts issuing opinions justifying their decisions. Of course, there are some changes visible on the surface—the decline in oral argument and the prevalence of less-developed “unpublished” opinions being perhaps the most prominent. There are others lurking not too far beneath the surface, such as the increased role of staff and law clerks in the creation of opinions. But these are modifications designed to lessen the burden on judges, and in doing so they may also lessen the likelihood that judges will engage deeply with the issues in the way that Judge Posner would like, and increase the likelihood that meritorious or difficult issues are overlooked.

The seeds of one such change lie within Judge Posner’s analysis. Underlying his suggestion that judges should write their own opinions is a recognition that the opinion writing process can serve as an important source of discipline on judicial decision-making. He contends that “the process of writing, which means searching for words, for sentences, in which to express meaning, is a process of discovery rather than just of rendition and therefore often gives rise to new ideas . . . .”<sup>50</sup> This is absolutely right, and if decision and justification are, as he suggests, inextricably bound processes,<sup>51</sup> then so is his conclusion that judges ought to write their own decisions.

Elsewhere I have proposed the implementation of a mechanism I call “framing arguments” in order to harness the power of opinions to channel the decision-making process.<sup>52</sup> The basic idea is that judicial opinions ought to include party-generated statements of the issues before the court. There are, of course, many different ways in which the device could be implemented, but the basic idea is to ensure that the parties’ conception of the dispute is readily available to the reader of an opinion. There need not be a requirement that the court decide the case on a ground suggested by the parties, or that it even engage with any of the issues proposed by the parties.

Framing arguments would not solve all the problems that Judge Posner identifies, but I believe their implementation would help,

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STATISTICS: JUNE 30, 1960, tbl.B-1, 210 (1961) (showing 3,899 cases commenced in the courts of appeals in 1960).

50. Posner, *supra* note 1, at 25.

51. See Oldfather, *supra* note 37, at 1319-20.

52. See Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 794-801 (2006).

and have laudatory effects more generally. To be sure, the presence of framing arguments concept would not compel candor. It would make it slightly more difficult for evasion to occur. A judge who is required to place the parties' contentions next to the justifications for his decision, and who knows that the world will be able to see them as well, will be more likely to provide some sort of response to those contentions. That is valuable even if that response ultimately amounts to the conclusion that the parties have missed something. At the same time, it would make it more difficult for the court to avoid difficult issues that it might prefer to minimize or ignore. A tendency toward responsiveness would likely enhance the parties' sense of having meaningfully participated in the process. And at the margins, at least, it seems likely to generate improved advocacy. This would be so for the simple reason that lawyers who know that their formulation of the issues will end up as part of the court's final product are more likely to put more thought into the process of reaching that formulation.

There is little doubt that Judge Posner would be opposed to the concept of framing arguments. Although he does not directly say as much in his article, his skeptical asking of the question whether courts must address all the parties' contentions certainly suggests that he does not view the prospect with relish.<sup>53</sup> More generally, he regards error correction as a secondary function of the federal courts of appeals.<sup>54</sup> At the same time, he characterizes the umpireal conception of judging as, in effect, boring—it “is attractive from the standpoint of avoiding controversy and limiting effort.”<sup>55</sup> He would, I suspect, regard the need to deal with the presence of framing arguments as an unnecessary imposition, a requirement that he waste time on all the silly, patently non-meritorious arguments that lawyers make on behalf of their clients. In my view, that represents another instance of his being insufficiently appreciative of a limitation, in this case one imposed by the role of the judiciary and of an appellate judge within it.

### III. CRIMINAL CASES AND APPELLATE REVIEW

I want to touch on one more aspect of Judge Posner's article. An unmistakable implication of the piece is that he has an understand-

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53. Posner, *supra* note 1, at 32 (“Must every opinion list the parties' contentions?”).

54. *Id.* at 14 (“correcting erroneous factual determinations is incidental to that primary responsibility for doctrine”).

55. *Id.* at 7.

ing that few criminal appeals are meritorious. This is most apparent in the portion of his discussion in which he divides the cases on the court of appeals' dockets into three broad types, one of which is direct appeals in criminal cases.<sup>56</sup> "Almost all these appeals," he notes, "are by a convicted defendant, and in the vast majority of cases he is not paying his lawyer and as a result the proportion of cases of very little merit—cases easily and satisfactorily disposed of by formalist methods—is very high."<sup>57</sup>

One way to interpret this statement would be as an additional critique of lawyers, particularly of the perceived quality of the indigent defense bar. I suspect, though, that this is not what Judge Posner has in mind. Rather, he is making a point about incentives. Parties who do not have to bear the cost of an appeal are more likely to pursue one even when an objective analysis of their case would suggest that they are extremely unlikely to prevail. This is especially so when the consequences of a successful appeal are so substantial, as they typically are to criminal defendants. As an analysis of incentives, this is unremarkable, and it seems likely to be the case that criminal appeals as a class include fewer meritorious appeals than do other sorts of cases.

The problem arises in that this interpretation of incentives reinforces another widely held belief about the nature of the criminal justice system. Consider, for example, Alan Dershowitz's "rules of the justice game." These rules, Dershowitz contends, "seem—in practice—to govern the justice game in America today. Most of the participants in the criminal justice system understand them. Although these rules never appear in print, they seem to control the realities of the process."<sup>58</sup> Dershowitz propounds thirteen such rules, the first two of which are most important: "Rule I: Almost all criminal defendants are, in fact, guilty. Rule II: All criminal defense lawyers, prosecutors and judges understand and believe Rule I."<sup>59</sup>

Combine the insight about the incentives of indigent defendants with the assumption that almost all criminal defendants are guilty and what results—and there is more than a whiff of it in Judge Posner's discussion<sup>60</sup>—is the sense that these cases are not

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56. *Id.* at 8.

57. *Id.*

58. ALAN M. DERSHOWITZ, *THE BEST DEFENSE* xxi (1982).

59. *Id.*

60. Elsewhere Judge Posner has remarked that "judges learn that prosecutors rarely file cases unless the evidence against the defendant is overwhelming. Prosecutors' re-

worth much judicial attention. There are at least two senses in which one might justify that conclusion. The first, and this is the one that Judge Posner almost certainly has in mind, is in the sense that the arguments that criminal defendants are putting before the courts are likely to be, simply as a matter of the formalistic application of the governing legal rules, unmeritorious. The second, which provides us with assurance that we need not worry overmuch about the extent to which the first is accurate, is the sense embodied in Dershowitz's rules. It is rooted in the assumption that those bringing a direct appeal following a criminal conviction are almost certainly guilty, such that resolving an appeal in their favor would tend to generate costs (of a new trial, of freeing a guilty defendant, and so forth) with no associated benefits. The consequence, perhaps, is to orient judges toward finding merit in a criminal appeal not simply when the defendant raises a strong argument, but does so in a context where it appears that there will be systemic, rather than simply individualized, consequences from finding in the defendant's favor. (Judge Posner hints at this in the context of his statements asserting that his role is more about law declaration than error correction.<sup>61</sup>)

Others have recognized this state of affairs, and the peculiar logic of the criminal justice system that we have set up. As Bill Stuntz pointed out, the pathologies of our system have led us to a place in which we have substituted procedural arguments, largely centered on constitutional rights, for factual investigation and for consideration of the underlying issue of whether those charged with crimes are actually guilty of them.<sup>62</sup> In his recent book chronicling the many ways in which the system is susceptible to error, Dan Simon observes that “[o]ne of the most bewildering and underappreciated features of the criminal justice process is the low value it assigns to the accuracy of its factual determinations or, in legal parlance, to the discovery of truth.”<sup>63</sup>

Simon's book is a masterful survey and synthesis of psychological research bearing on all phases of the criminal process. He demonstrates the many ways in which cognitive biases and other

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sources are very limited relative to the incidence of crime, and so they concentrate on cases in which guilt is clear . . . .” POSNER, *HOW JUDGES THINK*, *supranote3*, at 68.

61. Posner, *supra* note 1, at 14.

62. See generally William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1 (1997).

63. DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 209 (2012).

forms of human error can afflict the investigative process. An investigation that sets off in a false direction can sustain itself through the workings of confirmation bias and motivated cognition, building momentum toward a coherent-seeming but mistaken conclusion.<sup>64</sup> These errors can be the product of, or be compounded by, the all-too-common phenomena of mistaken identification<sup>65</sup> or false memory.<sup>66</sup> The adjudicative process is unable to reliably detect these errors, and consequently provides an ineffective check.<sup>67</sup> In sum, “[t]he limited accuracy of criminal investigations, compounded with the limited diagnosticity of criminal adjudication, lead to the conclusion that the criminal justice process falls short of delivering the precision that befits its solemn epistemic demands and the certitude it proclaims.”<sup>68</sup>

Along the way Simon notes that those criminal cases that make it to trial—and consequently those that appear on direct appeal—are not representative of prosecutions overall.<sup>69</sup> Even in the federal courts, the vast majority of criminal cases are resolved via plea bargains. Of those that are not, some perhaps go to trial for reasons similar to those underlying the relative overrepresentation of non-meritorious appeals—that is, the defendant may conclude even in the face of overwhelming evidence of guilt that there is no downside in taking the matter to trial. (This might be the case, for example, if the prosecution simply refuses to engage in meaningful plea negotiations by offering some sort of reduced charge or sentence.) But at the end of the day it is likely to be the case that some substantial portion of the cases that go to trial, and thus end up before an appellate court on direct appeal, will involve legitimate issues of guilt and innocence. Many of these may be cases that are easy cases in the first sense above, in which there simply were no legal errors in the trial court. In an important sense, however, they are not.

This suggests a potential avenue for reform, on which more below, but it also tells us something about judging. It is this sort of case that presents one of what Judge Alex Kozinski has called the “real issues of judicial ethics.”<sup>70</sup> Kozinski agrees that most cases

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64. *Id.* at 17-49, 120-43.

65. *Id.* at 50-89.

66. *Id.* at 90-119.

67. *Id.* at 144-205.

68. *Id.* at 208.

69. *Id.* at 8.

70. Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095 (2004).

that come before the federal appellate courts are easy, at least in the sense that most any group of three federal appellate judges would agree on their appropriate resolution.<sup>71</sup> “But then, once in a while, it turns out that what looked like an easy case is actually quite difficult, because of a small fact buried in the record, or a footnote in a recent opinion. After more than two decades of judging I have found no way to separate the sheep from the goats, except by taking a close look. But how close a look one takes in a particular case is strictly a matter of the judge’s own conscience.”<sup>72</sup> A judge operating in the world depicted by Dershowitz will be subject to many of the same biases as the other actors in the system, and ultimately is unlikely to be too troubled by the prospect of failing to spot a difficult procedural issue on the ground that the potential beneficiary of that discovery is most probably substantively guilty. A judge in Simon’s world—our world—ought to feel differently.

The reason these two states of affairs can exist—appellate judges who think most cases are easy, and a criminal justice system that does not reliably sort the guilty from the innocent—has something to do with the nature of appellate review. Simply put, “I didn’t do it” is one of the worst claims a criminal defendant can raise on appeal.<sup>73</sup> Instead, “reviewing courts confine their inquiries almost exclusively to procedural issues and all but eschew questions of fact. When they do engage in factual examination, courts view the evidence in the light most favorable to the prosecution, and subject their analysis to high thresholds of proof.”<sup>74</sup>

Here, too, Judge Posner makes an observation that points in a fruitful direction. In the course of making the case that appellate judges ought to do more of their own augmentation of the background facts,<sup>75</sup> Judge Posner attacks the notion that appellate

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71. *Id.* at 1098.

72. *Id.* at 1098.

73. Such claims, at least as they are addressed in Minnesota, provide a concrete example of one of Judge Posner’s complaints about judicial opinions. He observes that courts conceal their true analysis in, among other things, “bromides that do not describe actual judicial practice.” Posner, *supra* note 1 at 29. The Minnesota appellate courts articulate the standard by which they review claims of insufficient evidence in language that characterizes their review of the record as “painstaking.” *See, e.g.*, *State v. McCauley*, 820 N.W.2d 577, 589 (Minn. Ct. App. 2012). A Westlaw search (“painstaking /5 record” in the MN-CS database) turns up 1124 opinions (as of November 4, 2012) that use this phrase. Whatever the nature of the Minnesota courts’ review of these claims, I am confident that it does not involve a process of the sort that is typically associated with the word “painstaking.”

74. SIMON, *supra* note 63, at 202.

75. Posner, *supra* note 1, at 11-13.

courts ought to defer as categorically as they do to trial-level factfinding.<sup>76</sup> Here, he clearly has adjudicative facts in mind, and his critique—of the suggestion that the trial judge is better-positioned to judge things like witness credibility and to assess the weight of evidence more generally—goes to the core of the “oft-repeated proposition[] accepted as age-old wisdom of the profession.”<sup>77</sup> Even when he pulls back from the full impact of the proposition, he does so on grounds not of competence but context and institutional role.<sup>78</sup> Trial-level fact finders spend more time with a case, he points out, and therefore are likely to have a better feel for the facts. Moreover, he contends, facts are not the core of the appellate courts’ job, which is “to repeat, restate, correct, and maintain uniformity of legal doctrines, and correcting erroneous factual determinations is incidental to that primary responsibility for doctrine; getting the facts just right is not that important from the appellate judges’ perspective. So they defer.”<sup>79</sup>

In my view, Judge Posner is quite correct to observe that the competence-based justifications for appellate deference to lower-court factfinding are overstated.<sup>80</sup> Indeed, there are respects in which appellate courts are arguably in a better position to assess facts than trial juries or trial judges. The appellate court’s primary source of factual information is a trial transcript. The “age-old wisdom of the profession” holds that this places the reviewing court in an inferior position. It does not have access to witness demeanor or tone of voice, the reasoning goes, and so it cannot make the necessary credibility judgments. But, as Simon demonstrates, juries are actually ill-equipped to make those assessments.<sup>81</sup> At the same time, a transcript provides a less ephemeral source than oral testimony, enabling the appellate court to linger in places, and to move back and forth through the trial.<sup>82</sup> The lack of access to demeanor may prove to be a benefit, since it prevents the appellate court from being misled.<sup>83</sup> Appellate courts are at least as capable as trial-level factfinders at assessing circumstantial and documentary evidence, and are further advantaged rela-

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76. See generally *Id.* at 13-14.

77. *Id.* at 13.

78. *Id.* at 14.

79. *Id.*

80. See Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 449-66 (2004).

81. See SIMON, *supra* note 63, at 208.

82. Oldfather, *supra* note 80, at 454-55.

83. *Id.* at 459.

tive to juries in having a greater range of experience with the sorts of situations that are likely to arise.<sup>84</sup>

Given the higher standard of proof in criminal cases, we might expect it to be the case that appellate courts would be less inclined to defer. Appeals courts need not engage in de novo review of facts, but neither should they abdicate responsibility altogether, which is the current practical reality. Judge Posner's discussion seems to recognize this logic, though there is no sense that he would be willing to follow it to the conclusion that there ought to be more aggressive appellate review of facts in criminal cases. As Simon's analysis makes apparent, an analysis that is truly open to the existence of limitations, not only of judges, but of all the actors in the system, should conclude otherwise.

#### IV. CONCLUSION

In a review of Judge Posner's book *How Judges Think*, Dean (and former Judge) David Levi concludes, in effect, that a better title would have been *How I Think*.<sup>85</sup> Levi contends that Judge Posner's "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 experience and belief. For many of his assertions, it would appear that his dataset of judges is a set of one—himself."<sup>86</sup> There is more of the same in the article to which I have responded. Some of that is unavoidable, some is not.

Still, there is much that is good here. The suggestion to be mindful of our limitations, with which I opened, is a set of wise words for all of us. So, too, is his suggestion that advocates' failure to understand what judges need—to understand their limitations—is partly the fault of legal education.

Law schools naturally focus on imparting the vocabulary and rhetoric of legal rules and standards, without which one cannot function as a lawyer. . . . 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. Maybe

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84. *Id.* at 459-66.

85. David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791, 1792-93 (2009).

86. *Id.*

they are afraid of inducing premature skepticism in the students or angering the judges.<sup>87</sup>

I have tried—for now only in my own little corner of the law school world—to remedy this problem. It is no coincidence that Judge Posner's works have been the centerpiece of the class each time I have done so.

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87. Posner, *supra* note 1, at 36.