Interview

# A CONVERSATION WITH JUDGE RICHARD A. POSNER

*Judge Richard A. Posner of the Seventh Circuit Court of Appeals is one of the most prominent members of the federal judiciary and one of its most prolific writers. His nonjudicial writings address diverse and timely issues, including terrorism,[1] sex,[2] antitrust,[3] intelligence,[4] the Bush v. Gore controversy,[5] the legitimacy of moral reasoning,[6] from a law and economics viewpoint that has evolved over the years to a broader pragmatic perspective.*

*In 2008, he turned his attention to judges and how they do their jobs. Judge Posner's book,* How Judges Think,*[7] takes up the prevailing theories about what motivates judges' decisions and adds his own, heavily grounded in the notion that judges' experiences and backgrounds play a large role where decision outcomes are uncertain. Judges—at least the vast majority—are pragmatists, seeking to maximize various goals within a legal tradition that imposes its own vision of what it is to be a "good judge."*

*In November 2008, Judge Posner sat down for an interview with a class on the study of judicial behavior at Duke Law School. The class, led by Professor Mitu Gulati and Dean David Levi, had read the book as part of a year-long review of the empirical literature on judicial decisionmaking. Their conversation ranged over various topics, including reaction to the book, Posner's experience as a judge, and future directions for empirical studies of the judiciary.*

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1. RICHARD A. POSNER, COUNTERING TERRORISM: BLURRED FOCUS, HALTING STEPS (2007).
2. RICHARD A. POSNER, SEX AND REASON (1992).
3. RICHARD A. POSNER, ANTITRUST LAW (2d ed. 2001).
4. RICHARD A. POSNER, REMAKING DOMESTIC INTELLIGENCE (2005).
5. RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001).
6. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999).
7. RICHARD A. POSNER, HOW JUDGES THINK (2008).

QUESTION: I am curious about the feedback you received from judges on your book. Are they hostile to the idea of studying judges? Given the provocative title and subject matter, I'm guessing that there must have been much discussion of your book in the judicial community.

JUDGE POSNER: I have received very little feedback from judges. I don't think that judges do much reading—at least, not much secondary reading. The ordinary judicial job itself requires a great amount of reading. Most judges probably figure that that is enough.

I have personal friends whom I have talked to about these issues; people like Michael Boudin and Steve Breyer. But generally the judicial community is not like the academic community. Judges, my sense is, do not spend a great deal of time reflecting about what they do and why they do it in the ways that they do it. Think about continuing legal education for judges. It tends to be vocational. There will be lectures about particular substantive areas of law, but rarely, if ever, will there be lectures or discussions of the research on the study of judges.

QUESTION: Our impression is that at least some judges are familiar with the portion of your book that tackles the question of whether judicial salaries should be raised. At least one of them suggested you were perhaps not as concerned about an increased salary because of the large amount of money you likely make from royalties on your books. Is that the case?

JUDGE POSNER [chuckling]: I'm sorry that my views on the salary question displeased some. I don't make very much at all in terms of royalties on my books. They are not big sellers. And I don't write them in the hope of making royalties. It is just mainly academic writing.

QUESTION: Who was your intended audience for the book?

JUDGE POSNER: Most people write for themselves. Academic writing, which is what this was, is not focused on an audience. I try to write very simply. Beyond that, I don't have a precise sense of audience. Maybe law professors, law students, and political scientists. Not much more than that. I didn't expect judges to be that interested.

QUESTION: I'd like to ask about the "good judge" concept. The book attaches a great deal of weight to that concept. When we see judges acting outside acceptable bounds, is that because the good judge conception has failed to constrain?

JUDGE POSNER: I don't think many judges are cynical. I don't think many would say, "I will do something different from what I am supposed do as a judge because I can get away with it." But that is true in all jobs. If serious, the job holder tries to do a good job. If a judge goes out of bounds, it might be because he thinks it is terribly important to do so. The job description is sufficiently loose. You can do a lot.

Judge Reinhardt, on the Ninth Circuit, for example, is a very smart judge with a terrible reversal rate at the Supreme Court. But he ploughs ahead. He does not have that much respect for the Supreme Court. But he does not think of himself as an irresponsible judge. On the Supreme Court, there were judges like Blackmun and Douglas who pushed at the boundaries. Douglas, he really pushed the envelope.

QUESTION: In the first part of your book you focus on how judges—mostly federal circuit judges—make decisions as whole human beings, not just political actors. But in the second half of the book you turn to the Supreme Court, and you treat the Justices as purely political decisionmakers. Is there a reason for this discrepancy, and do you think it would make sense to apply your analysis in the first part of the book to the Court?

JUDGE POSNER: There are two ways in which personality affects Supreme Court Justices. The first has to do with temperament. Take, for example, Blackmun. He was very emotional. Much of what he did resulted from his emotional reactions to cases. O'Connor, in turn, was very offended by how she was treated by Scalia.

The second way has to do with the differential preference for rules and standards. Some want rules and others care less about those rules. Breyer is clearly more comfortable with loose standards. In the Eldred[8] case, for example, the Supreme Court said in effect that "limited times" just meant short of infinite. Breyer wanted instead a

8. Eldred v. Ashcroft, 537 U.S. 186 (2003).

loose multifactor test. Well, that sort of thing, I suspect, drives folks like Scalia and Thomas crazy because of the amount of discretion that such a test would give judges. But I don't think that the tight rules that the rule lovers want to adopt have any more fixity. No one has done a study that tells us which works better at governing behavior.

Temperament affects people and so does politics. Judges are no different.

QUESTION: What are your own political preferences?

JUDGE POSNER: I cannot talk about my party-based political affiliations. That isn't appropriate for me to do as a judge. On my general political philosophy, as distinct from my preferences for any politician or political-party platform: I started out liberal, but became more and more conservative first during the turmoil of the late 1960s, which I found extremely repulsive, and then when I started meeting economists like Stigler and Coase and Friedman. I am less dogmatically conservative today, for example, on environmental (e.g., global warming) matters. I was never a social or religious conservative.

QUESTION: Is it true that you were a registered Democrat when President Reagan nominated you to the bench?

JUDGE POSNER: Yes, but only because I wanted to vote in the Democratic primary for a friend. It was not an issue that came up during the confirmation process.

QUESTION: By the time you were nominated, you had already written a number of provocative articles, including some that articulated views on judicial behavior and one especially controversial one on the market for babies. Did you get questioned about your research?

JUDGE POSNER: No, not at all. There were some pleasantries exchanged, but that was it.

QUESTION: In recent years, there appears to be have been greater scrutiny applied to judicial nominees, particularly for the Supreme Court. What do you think the effect of that greater scrutiny has been?

JUDGE POSNER: There has been greater scrutiny. More scrutiny has resulted in candidates with better professional credentials. Take the Harriet Miers affair. The Justice Department, I suspect, thought that she was not adequately prepared to answer questions at the hearings. The senators have staff who prepare tough questions for the nominees. But the senators don't know how to follow up on the question that someone else created. The result is that if you are adept like Roberts, you can get away with not answering the question. He got away with saying things like that stuff about balls and strikes.[9]

But even though we have more qualified judges, it is not clear that the output is better as a result. They have better staff these days too and a lighter workload. Still, why isn't there better output? There hasn't been any actual improvement in the opinions. Take the Heller[10] case on the right to bear arms. Scalia and Stevens produced opinions that are dazzling as research products. There were lots of citations to esoteric material. But there was no real improvement in the value of the opinion. At the end of the day, it may not be really that important to have judges with better qualifications.

QUESTION: What got you interested in being a judge? Our sense is that your career, at the time you became a judge, could have easily gone in a different direction, with all the success that your consulting firm Lexecon was having and the demand for your advice in antitrust cases.

JUDGE POSNER: I had no interest in being a judge until I received a call in June 1981 from a friend in the Justice Department who asked me if I would consider an appointment to the Seventh Circuit. I said of course not, but then I said give me twenty-four hours to think it over, and after discussing it with my father and my wife and a few others I decided to do it. Partly because I was enthusiastic about advancing economics-oriented thinking in the judiciary, I felt that I shouldn't turn down the opportunity. And in part I thought it would basically just replace consulting and some teaching and law school

9. In his confirmation hearings before the Senate Judiciary Committee, Chief Justice Roberts explained his belief in judicial restraint by analogizing the role of a judge to that of an umpire in a baseball game—the umpire's job is to call balls and strikes, whereas the pitcher and batter play the game. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 56 (statement of John G. Roberts, Jr.).

10. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

committee work, so that I would have as much time for academic research and writing as before—and that turned out to be true. The consulting was lucrative, so my income plunged, but my wife didn't care, so neither did I, and I found consulting rather dull. I was the head of Lexecon and the business getter, so a lot of what I did was explaining what the firm did and some elementary principles of economics and how they could help in litigation. And finally, I thought writing judicial opinions would be fun, as it turned out to be.

QUESTION: Whom did you talk to about your appointment, and what did they think—particularly your father who was very liberal?

JUDGE POSNER: My father was pretty apolitical. He was a lawyer and thought it a great thing to be a judge. I also spoke to a former boss of mine whom I greatly respected, Philip Elman, a Federal Trade Commissioner—later in practice—and he reacted as my father had done.

QUESTION: Is it true that you require that your law clerks call you "Dick" and not "Judge"? We have heard that this annoys some of the other judges, who think it is important they be referred to as "judge"—that helps keep a distance between them and the others.

JUDGE POSNER: It is true that I ask my clerks to call me "Dick" rather than "Judge." There is a practical reason for this. I need my clerks to be candid with me and tell me when I have made mistakes. Forbidding them to be formal encourages them to be completely forthright and candid in the expression of their views. I cannot get my secretary to call me by my first name though. I tried repeatedly, but failed.

I also tell my law clerks: "Look, when you read this draft opinion, you may start out assuming that it will be good. Don't do that. I want you to presume error in tone, style, analysis, logic and so on." I need my law clerks to tell me where there are errors because there are bound to be some.

QUESTION: We were wondering whether you meant for the book to describe how you and other judges judge or to say how they should judge. In particular, is there a message to law students about how we should think about law or judges?

JUDGE POSNER: I certainly intended to be descriptive. But judges need to be aware that the legalistic approach[11] can sometimes take one to the wrong place or, at least, not very far. The legalistic approach has become more popular and I suspect it relates to the way law is taught these days.

QUESTION: Could you talk a little bit about the implications of what you say in the book for law schools? It seemed like you didn't think that law schools did a terribly good job of bridging the gap between the judiciary and academia. How can law schools go about fixing the problem?

JUDGE POSNER: There are two separate questions. First, what role should law professors and law students play in criticizing judges and what they do? Second, what is the role of the legal academy in monitoring and evaluating judicial performance? And relatedly, what should be done in developing criteria of evaluation?

In terms of the measures being used to evaluate judicial performance by academics, like number of citations and number of cases reprinted in casebooks and reversal rate, the problem is in coming up with weights to give the different measures. The weighting that is done ends up being arbitrary. But the project is a good one, if the weighting problem can be solved.

But the criticism of opinions is not terribly useful. Judges don't pay a lot of attention to these critiques. They don't think law professors are giving them much in the way of useful, constructive criticism. And it is not that useful to be looking backwards at errors in past opinions. By the time a judge reads a law review article criticizing or analyzing an opinion of his, it is likely that a lot of time has gone by since the opinion was written. Happy judges don't want to look back at their mistakes. Of my 2,500 or so opinions, a number

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11. Judge Posner explains that legalism is a theory of judicial decisionmaking in which the judge lacks discretion, as doctors treat an illness:

> The treatment decisions of physicians are determined . . . by the physicians' understanding of the structure of the physical world, and the aspiration of the legalist is that a judicial decision be determined by a body of rules constituting "the law" rather than by factors that are personal to judges, in the sense of varying among them, such as ideology, personality, and personal background. The ideal legalist decision is the product of a syllogism in which a rule of law supplies the major premise, the facts of the case supply the minor one, and the decision is the conclusion.

POSNER, *supra* note 7, at 41.

are doubtless wrong. If I brooded over all the mistakes in those opinions, I'd be unhappy. Who wants that?

I had a case that involved bits and pieces of evidence of discrimination. I talked about the "mosaic of discrimination."[12] Years later, I realized that a "mosaic" rule had emerged. But that was ridiculous. You don't need a mosaic.[13] Judges love clichés. They are always grasping at clichés.

Law professors are not performing the service for the judiciary that they used to. We still have a common law system and law professors used to perform a useful function in cleaning up and clarifying the array of cases that emerged from the courts. Treatises were useful and so were restatements. They identified and dispatched outlier cases and created a coherent body of law. That was the kind of work that engaged the leading academics.

Today, the leading academics do not see intellectual profit in writing a treatise or a restatement. Today, cutting-edge law articles use social science. They draw from fields like psychology, economics, et cetera. They don't work with doctrine as much. Much of the current academic publishing ends up being too academic and esoteric. As for the restatements and treatises today, they are competent. But the work of producing them is not engaging the leading academics any longer.

QUESTION: In light of the motivations for your book, do you have any advice for law students who are about to go into practice?

JUDGE POSNER: With regard to trial lawyers, I have little to say. There are good and bad trial lawyers. One of the defining characteristics of good trial lawyers is that they are well organized. I used to teach a course on evidence combined with trial advocacy. My experience was that the rules of evidence were useless. First, I notice from my forays into the district court as a volunteer trial judge that

12. Troupe v. May Dep't Stores Co., 20 F.3d 734, 736–37 (7th Cir. 1994) (allowing a case to survive summary judgment because the plaintiff presented a "combination of ambiguous statements, suspicious timing, discrimination against other employees, and other pieces of evidence none conclusive in itself but together composing a convincing mosaic of discrimination against the plaintiff").

13. *See* Sylvester v. SOS Children's Vills. Ill., Inc., 453 F.3d 900, 904 (7th Cir. 2006) ("[I]t was not the intention in *Troupe* to promulgate a new standard, whereby circumstantial evidence in a discrimination or retaliation case must, if it is to preclude summary judgment for the defendant, have a mosaic-like character.").

the lawyers who do not make any (or at least make very, very few) objections often won. This makes sense because the jury draws negative inferences from objections that are sustained. I also found that with most evidentiary objections, the lawyer could just rephrase the question and the objection would disappear. An evidence class really should be about trial advocacy. That is, about how to get the evidence you need into the case. Students in the class would play different roles in our mock trials. I really enjoyed this.

As for materials, NITA, the National Institute of Trial Advocacy, prepares case files. I used those. They are brilliantly done materials—realistic trial simulations. What I noticed was that some students had an uncanny knack for the courtroom. Others, who might have done well on an exam, were not able to tackle the courtroom. Beyond personality, those who are organized do better, as I said.

In appellate practice, the lawyers are often quite bad, sometimes awful. I don't understand why. I sometimes wonder whether there is an oxygen deficiency in the courtroom. I sometimes become exasperated. I'll give you an example. We have a red light that goes on at the end of the time given for oral argument. Last week, we had an argument and the light went on. I had another question for the lawyer, though, and I asked it. He asked for permission to answer. That was ridiculous. I had just asked him the question! And then it happened a second and third time during the same set of oral arguments; a question would be asked after the red light went on and the lawyer would ask for permission to answer. By the third time, it became truly stupid. Why were the lawyers spending their time on this red-light nonsense?

One of the other things they do that is frustrating has to do with leaving time for rebuttal. If you don't leave yourself time for rebuttal, the other guy can say anything. It is nuts not to leave some time for rebuttal, but lawyers will often use up their time. I end up often giving them some time anyway.

In making their arguments, too often the lawyers try to hammer us by citing opinions—*X* v. *Y*, *A* v. *B*, and so on. I try to tell them not to bother us with all these citations. It is unlikely that some prior opinion will completely decide the case. It is too difficult to map on the facts of some other case exactly. And the lawyers don't seem to understand that we are not specialists—we don't spend that much time analyzing those prior cases.

I had a case last month that centered on a telecommunications issue. I read the briefs and didn't understand what was going on at all.

So, when the case was argued, I asked for a simple explanation of what was going on. The same lawyer who had submitted an incomprehensible brief was able to explain the issue in five minutes.

It's as if lawyers had absolutely no conception about the conditions under which judges work. We don't know that much in the first place and we don't spend that much time preparing for the individual case.

Maybe all this is the result of the growing gap between practice and the academy. Why can't the lawyers recognize what kinds of constraints judges operate under?

Last month, I heard a big criminal case. Lots of money was at stake. After making his argument, one of the lawyers was walking away from the podium and he swung around and made a motion. It was so strange. He could have submitted a written motion after the argument. I ignored the oral motion. I'm not sure the other judges on the panel even heard it.

QUESTION: I'm interested on your view about how judges should tackle the inevitable empirical questions that arise at trial. Should judges confine themselves to the empirical evidence that the parties bring to the case in their briefs? Or should they be allowed to go beyond the briefs and recognize empirical realities about the world or about how individuals respond to incentives and so on?

JUDGE POSNER: My focus in the book is on appellate judges. I do find trials interesting though. I often volunteer to sit on the district court for trials. I typically do not do criminal cases because I am uncomfortable with having to do criminal sentencing because that is something that the district judges receive extensive instructions about, and we appellate judges do not. But I thoroughly enjoy the civil trials. Over my twenty-seven years of doing these trials, I have continued to enjoy doing them.

One question that comes up all the time is whom to believe. Empirical judgments about the world inevitably come into play here. With a criminal trial, I imagine that different judges have different judgments about whether they are inclined to believe the cops or the defendant. I know that when judges make these empirical judgments, they are reacting to their own experiences. They are driven by their preconceptions, their experiences, to a very great extent.

QUESTION: I think we agree.[14] So much of law is about facts about institutions. When we think a court is wrong, it is often that we think it has erred about institutional facts. When I was a judge in California, I worked on an open primary case. It was likely to get appealed no matter what we decided at the lower level. So, we tried to take enough evidence at the trial so as to give the appeals court an adequate factual basis from which to work, to make its decision. The district court has the mechanisms and tools to develop facts. The appeals court is limited in this respect; its hands are tied in terms of the facts.

JUDGE POSNER: When the appeals court finds itself with inadequate facts, which is not infrequently, the lawyers are partially at fault as well. I am distressed at the poor job that lawyers do in terms of giving us facts. Lawyers don't help us enough in helping us get to sensible decisions.

I wrote the opinion in the Crawford[15] case. It was affirmed 6-3, with the conservatives and Stevens in the majority.[16] On my court, the vote was 2-1. The question was whether the Indiana voter ID law disenfranchised too many legitimate voters. On the other side was the interest in protecting against voter fraud. There was no evidence on either side. What ended up being decisive in the end in the thinking of the majority in my case (and this is reflected in our opinion) was simply that we didn't want to micromanage state election laws. If we got into that business, where would we stop?

QUESTION: In our seminar, we have been reading a number of articles coming out of the modern legal origins literature that seem to build on your early work on the efficiency of the common law.[17] Our sense from your more recent writing, though, is that your current

14. The questioner is David F. Levi, Dean of the Duke University School of Law and former Chief Judge of the United States District Court for the Eastern District of California.

15. Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007), *aff'd*, 128 S. Ct. 1610 (2008).

16. *See Crawford*, 128 S. Ct. 1610 (Stevens, J., joined by Roberts, C.J. & Kennedy, J., announcing the judgment of the Court); *id.* at 1624 (Scalia, J., joined by Thomas & Alito, JJ., concurring in the judgment).

17. *E.g.*, Simeon Djankov et al., *Courts*, 118 Q.J. ECON. 453 (2003); Daniel Klerman & Paul J. Mahoney, *The Value of Judicial Independence: Evidence from 18th Century England*, 7 AM. L. & ECON. REV. 1 (2005); Paul J. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503 (2001).

views diverge from those who have been asserting the efficiency of the common law and its superiority over civil law. Is that so?

JUDGE POSNER: Much of my academic writing has been devoted to trying to explain common law doctrines and procedures on economic grounds; that is a major theme of my book *Economic Analysis of Law*, now in its seventh edition. The idea that common law is more efficient than civil law goes back at least to Max Weber. Weber observed that English law seemed more supportive of commercial activity than civil law. He didn't have a good answer for why, though. My sense is that it has to do with the fact that English judges were appointed from practice. They knew about and understood business interests. They had learned about the practicalities of commercial transactions as lawyers. Brian Simpson, for example, had argued that the common law was not as chaotic as it seemed, because of the common social backgrounds of the judges. And in most common law areas, it is rarely feasible for courts to advance other social policies than economic efficiency. The problem with civil judges is that they are insulated from real judging. And there isn't the luxury of academic leisure to study and learn.

The problem with the claims in the legal origins literature is the degree of path dependence assumed. It is just not clear why seventeenth-century colonial origins should matter quite so much. Forget the origins part. The fact is that there are different political cultures. The European civil law systems are so much more legalistic and bureaucratic. You are a judge all your professional life.

QUESTION: Could you talk about your view of international law and the use of materials from other jurisdictions? Should the use of those external materials not be more important?

JUDGE POSNER: Legal cultures are very different. It is treacherous to assume that a foreign culture, and its corresponding legal system, should bear upon what we do. What the Israeli Supreme Court does, for example, is not useful. There is no real legal structure there. The government is corrupt and dysfunctional, and judges perforce fill the void: they are "good government" and are respected accordingly, and this enhances their political power. In other words, the reason the judges have so much power in that context is that they are honest and the politicians are corrupt. It is a different world out there. It is fine to read those foreign opinions, but not to use them as authority.

Think of capital punishment. It might be abolished as a formal matter in a hundred countries, yet some of them might be implementing capital punishment extrajudicially. Referring to the foreign decisions for the most part is little more than fig leafing. If you allow judges more sources of authority, you give them more discretion.

In the book, I also emphasized the selectivity with which these foreign decisions or rules are cited in our courts. For example, most countries are more conservative than we are on abortion rights. So, in that context, judges tend not to look to foreign courts for authority. But they do with respect to the death penalty.

QUESTION: Your book discusses a vast literature of empirical studies of judicial behavior. Why do you think judges do not pay more attention to that literature?

JUDGE POSNER: A big problem is that most studies are not done by lawyers. When you read something by someone in a different field, you tend to discount it. I was just reading an article by the political scientist, Harold Spaeth, who has done a ton of empirical work on the topic of judicial behavior.[18] His article talked about Bentham and Holmes in ways that lawyers and legal academics would probably find inadequate and frustrating. Now, that portion of his article was not that important to his actual study. But it grates lawyers to see that he does not take seriously what they consider important. And that becomes a tempting and convenient way to dismiss everything else he says because we have already decided that he is an outsider who doesn't understand what we do.

There are perhaps two other reasons. First, judges and law professors have an investment in thinking that the judicial process is technical and legalistic. The political science model undermines that.

Second, judges aren't sure how they should respond to this work. They think rightly or wrongly that they are doing the best they can. So, what do they do if faced with the results of political-science studies? They don't really see the payoff. If you can tell them

18. *E.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, MAJORITY RULE AND MINORITY WILL *passim* (1999) (contending that Justices privilege their preexisting views of the law over precedent when deciding cases); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL *passim* (1993) (arguing that Justices implement policy preferences in their decisions).

something useful that they could use in their work—something that would help them do their job better—that could help. Maybe they would pay attention to that.

I'll mention a couple of studies that I am working on with Lee Epstein and Bill Landes. One has to do with the question of why judges do not dissent more. Judges do not dissent every time there is a disagreement about the outcome of a case. So, the question is, what do you get out of dissenting and what do you lose? This is a question that judges ask when they have to make the choice about whether to dissent. If our study can produce convincing evidence on the costs and benefits (not pecuniary of course) of dissent, perhaps it will change behavior.

It turns out that dissents are very rarely cited. A judge might want to know that. Supreme Court Justices dissent a lot. They have much more time to do so because of their control of their docket. Also, the Supreme Court pays less attention to precedent. On the court of appeals, we have a lot less time for dissenting, and we pay more attention to precedent and so are less likely to overrule a case on the basis that it contained a forceful dissent.

A second study that we are doing is of judges asking questions during oral argument. It turns out that you can predict the outcome of a case by looking at the pattern of questioning. The side that is asked more questions tends to lose.

The initial thinking on a case tends to be important, probably more so on the court of appeals than on the Supreme Court. On the court of appeals, we have our conference and then we discuss the cases. The vote there is tentative, but tends to have momentum. At conference, the judges vote in reverse order of seniority (it is the opposite in the Supreme Court). The senior judge worries that if the two others disagree, there is going to be an uphill battle to change their minds.

The questions asked at oral argument are a way of talking to the other judges. If judges understood this better, it might affect how they behave in oral argument.

I dissent rarely. I go along sometimes even when I disagree. Our disagreement may simply reflect differences in our experience. If you don't have great confidence that you are necessarily right, you won't dissent as much.

The conversation among lawyers, judges, and political scientists might improve if law schools hired more political scientists who do

research on judicial behavior. Lee Epstein, a political scientist whose appointment is at Northwestern Law School, is a good example. Being in a law school environment exposes her to the institutional details that lawyers and judges consider.

QUESTION: Your book talks about the value of looking to judicial biographies as a source of insight into the behavior of judges. But biographies of judges, particularly Supreme Court Justices, tend to be written by their former law clerks or other people who are close to them. And that might mean that the stories being told are biased. Wouldn't it be better to have scholars do in-depth case studies of judges?

JUDGE POSNER: I thought something like my book on Cardozo[19] was more useful as a way of studying judicial behavior than full-length biographies, but the suggestion hasn't been picked up. Andy Kaufman's biography of Cardozo,[20] though lengthy, is the best of the judicial biographies. Bruce Murphy's biography of Douglas[21] is also good, though it has inaccuracies. I published an article on judicial biography some years ago, *Judicial Biography*,[22] that you might find useful.

QUESTION: But it is hard to imagine any judge allowing a researcher to do a case study. Judges appear to want to preserve the mystique of what goes on in their chambers.

JUDGE POSNER: I think you are being unduly skeptical. Judges might be willing to open up their chambers to researchers. I would be open to that. If there is less mystique about what happens with judges and their decisionmaking, advocates would be able to make better arguments.

QUESTION: What about research on state courts?

JUDGE POSNER: The state courts are interesting. I recently gave a talk to a group of state court judges. It was an annual meeting for

19. RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1993).

20. ANDREW L. KAUFMAN, CARDOZO (1998).

21. BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS (2003).

22. Richard A. Posner, *Judicial Biography*, 70 N.Y.U. L. REV. 502 (1995).

state court judges and it was fascinating. They had this interesting and funny issue come up with respect to elections of judges. Imagine you are the judge in a county and you can be assigned to another county. If it is the period before an election, some of the judges said, you will want to get assigned elsewhere. The goal, if you are standing for reelection, is to avoid scrutiny. The goal in getting elected is to avoid negative attention, to be invisible. Apparently, the incentives are not to affirmatively show that one is doing a good job. The incentives are to avoid being blamed for the decision on some case in the short period before an election where people are paying at least some attention. Most of the time, there is no attention paid.

There is another angle on the study of judges that came up in my conversations with these state judges. Some judges asked me about specialized business courts and whether they were a good thing. The question, therefore, is one on how to study and compare those jurisdictions where there are business courts and those where there are not. It may be that there is less removal to federal district courts in contexts where there is the availability of a specialized business court. Or, there may be a greater fraction of people who choose arbitration in their contracts. It would be interesting to find out whether local businesses know about the quality of their local judiciary. Do they care? Lots of specialized business judging is just a timing thing.

QUESTION: You have been writing about judicial behavior for over three decades. In your early articles on judicial behavior, you typically had clear and simple models of judicial behavior. The model you describe in this book is so much more complicated. Have your views about judges and judging changed significantly since those early articles?

JUDGE POSNER: After thirty years, my views have changed significantly. I'll give you an example. Bill Landes and I wrote about diversity jurisdiction years ago. One sentence in the draft said something about judges not working hard. I changed it, said it was obviously false. I had clerked and had observed that some judges didn't work that hard, but I thought that others worked hard, surely they must have been. I was just deceived.

I also exaggerated the formalist commitments of judges in those early articles. Law clerks come away with a very unrealistic view of judges.

QUESTION: After thirty years on the bench, you are a long way from your days as a clerk. Do you find yourself getting bored?

JUDGE POSNER: Not at all. The work is not boring. The variety of cases is amazing and the mix of those cases keeps changing. This is especially the case with the civil docket. Immigration, child pornography, intellectual property—all of these have become big sources of cases. Plus, rarely is there an appeal without uncertainty about the legal issue. The work continues to be interesting.

Maybe in the future I will try to sit by designation on some of the other courts. The First Circuit is a good court and I have friends there, like Michael Boudin. It would be interesting to see how the other circuits operate and what their practices are. In particular, judges may vary in terms of their management styles. Justice Powell had a whole system where the clerks took turns on revising the opinion and making sure it fit a certain structure and style. And the clerks had different roles and different responsibilities; the production of opinions was highly formalized. That strikes me as awful. Surely, many judges cannot be using such a structure.