REALIST LAWYERS AND REALISTIC LEGALISTS: A BRIEF REBUTTAL TO JUDGE POSNER

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As Judge Posner—an avowed realist—notes, debates between realism and legalism in interpreting judicial behavior are as old as judging.[1] One modern incarnation of the debate involves the validity and meaning of empirical legal studies, a breed of scholarship that codes information about judicial decisions and uses statistical analysis to describe judicial behavior. In our recent article, "Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking,"[2] Judge Harry T. Edwards and I argue that this scholarship is often marred for a variety of reasons ranging from the conceptual to the practical.

With respect to this issue, Judge Posner provides an important counterpoint. Although debates between realists and legalists are sometimes heated, Judge Posner recognizes that they are often overblown because "[m]uch but by no means all of the apparent disagreement [between us] dissolves if proper weight is given to concessions on both sides."[3] Although there are vast differences of emphasis between the legalist and realist schools of thoughts, the models of judicial behavior are essentially similar.

A "realist legal model," which combines aspects of both the realist and legalist schools of thought, recognizes not only that traditional legal materials are a key determinant of judicial decisions, but also that law is not deterministic, and that ideology (properly

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1. Richard A. Posner, *Some Realism About Judges: A Reply to Edwards and Livermore*, 59 DUKE L.J. 1177, 1178 (2010).

2. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009).

3. Posner, *supra* note 1, at 1185.

understood) is also central to legal decisionmaking. This model, which better comports with widespread notions of how legal decisions are actually made, can serve as a more solid foundation for empirical study of judicial behavior than the law-politics divide that oversimplifies the complex relationship between legal materials, values, and normative analysis that is at the heart of legal reasoning.

A. The Fundamental Consensus

In their pure forms, the legalist and realist camps are starkly different. The realists see judges as playing a "legislative role,"[4] deciding cases according to preexisting "attitudes" or preferences.[5] The legalist approach in its pure form sees judges as legal "machines" simply applying law to facts in a mechanistic process.[6]

Of course, no one (or very few, especially within the legal community) subscribes to the legalist or realist positions in their pure form. Although many have argued against legal formalism, very few appear to have strenuously defended this view.[7] Alternatively, even realists like Judge Posner recognize that law often has an extremely important role in determining case outcomes.

Once these "concessions" are recognized, what remains are largely similar views about how judicial decisions are made. This shared model (perhaps the realist legal model) proposes that traditional legal materials, including precedent, records on appeal, and applicable laws and statutes, are central to legal reasoning and, combined with widely shared notions of how to interpret those materials, dictate outcomes in a large majority of cases. The realist legal model also recognizes that law, on its own, is not deterministic, and that judges' values, beliefs, and perspectives—ideology broadly construed—influence judicial outcomes. This influence is not bad in

4. *Id*. at 1177.

5. *See generally* GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946–1963 (1965) (attempting to demonstrate through empirical evidence that political and economic liberalism impact judicial decisionmaking by the Supreme Court).

6. Judge Posner uses the idea of an "oracle" with the "personality of a coaxial cable" to describe the legalists' view of judges. Posner, *supra* note 1, at 1178.

7. Edwards & Livermore, *supra* note 2, at 1915 (citing Brian Z. Tamanaha, *The Realism of Judges Past and Present*, 57 CLEV. ST. L. REV. 77, 91 (2009)). *See generally* BRIAN TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2009) (deconstructing the formalist-realist divide by revealing that formalist-era jurists, as well as leading contemporary legal formalists, held realistic views of the law).

the sense that it is opposed to law or extrinsic to legal reasoning. Rather, it has an important and central place in the American legal system. Traditional legal materials and ideology, then, are complementary aspects of judicial decisionmaking.[8]

B. Residual Differences

Judge Posner identifies two areas of "residual difference."[9] First, Judge Posner sees an implicit claim of moral realism in our recognition that law includes "forms of moral and political reasoning."[10] Judge Posner rejects moral realism, which he defines elsewhere as "the doctrine that there are universal moral laws ontologically akin to scientific laws."[11] He is therefore troubled by what he sees as a moral-realist foundation to our claim that law encompasses moral or political reasoning and would instead favor an approach that acknowledges only that moral and political beliefs play a role in the law. Second, Judge Posner disagrees about the role of judicial deliberations in shaping outcomes.

As to the first objection, moral realism is not a prerequisite to our argument. We simply note that judges are sometimes "obliged to rely—and to do so self-consciously and overtly—on political and ideological values in their legal reasoning."[12] We then argue that "[t]his cannot seriously be doubted, nor can it reasonably be seen as surprising," that this practice is included in the meaning of "legal reasoning," and that it is "merely part of the judicial function."[13]

Reasoning, in the sense that we use it, merely implies that the "political and ideological values" that judges rely on in their decisions are based not merely on "personal whim or preference" but instead are based on "a situated and disciplined elaboration of the conventional norms of the American political community."[14] This "elaboration" can take the form of reflection or discourse with other judges, but it does not rely on the existence of objective moral facts,

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8. Ideology and traditional legal materials, then, are complements—working together to produce judicial outcomes—rather than substitutes. This relationship has important implications for designing and interpreting the results of empirical analysis.

9. Posner, *supra* note 1, at 1186.

10. *Id*. at 1183 (quoting Edwards & Livermore, *supra* note 2, at 1900).

11. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY, at ix (1999) (adopting "pragmatic moral skepticism" over moral realism).

12. Edwards & Livermore, *supra* note 2, at 1947 (emphasis omitted).

13. *Id*. at 1947–48.

14. *Id*. at 1946.

nor does it preclude the influence of "professional training and experiences, political ideology, temperament, [and] personal-identity characteristics such as race and sex."[15] In some cases, the law requires recourse to moral beliefs, regardless of whether there are objective moral truths. Irrespective of the truth of moral realism, decisions based on moral beliefs cannot categorically be classified as ideological in a manner opposed or extrinsic to law. The realist legal model, then, does not rely on any claims about the truth of moral realism.

The other "residual difference" concerns the role of deliberation in judicial decisionmaking. Here there is no doubt a legitimate disagreement about an important aspect of judicial behavior. Judge Edwards has argued that there is a strong role for deliberation in shaping judicial outcomes.[16] Judge Posner is skeptical, and has written about the potential role of "dissent aversion" rather than deliberation in accounting for unanimous decisions.[17] Neither of these positions is more realist or legalist than the other[18]—they are simply competing empirical hypotheses that both fit within the same basic model.

Remaining differences tend to be matters of emphasis. Neither side denies the importance of unpublished decisions in the work of federal courts or the importance of novel legal questions to shaping the law, although one camp might focus efforts on one aspect over the other. But emphasis on particular legal products does not implicate the underlying model of judicial decisionmaking.

Although the realist legal model finds support among both partisans of the legalist and realist camps, it is not typically used as the basis for empirical legal studies. As a consequence, those studies offer less insight into how judicial decisions are made. By basing their

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15. Posner, *supra* note 1, at 1178.

16. *See, e.g.*, Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645–52 (2003).

17. Lee Epstein, William M. Landes & Richard A. Posner, Why (and When) Judges Dissent: A Theoretical and Empirical Analysis 1–2 (Nov. 13, 2009) (unpublished manuscript, on file with the *Duke Law Journal*).

18. Both positions are consistent with widely observed "panel effects." *See* Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1112 (2001) (noting that panel effects can be explained by either a "deliberation hypothesis" or a "dissent hypothesis"). Attempts have been made to distinguish between strategic and deliberative influences, *see, e.g.*, Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319 (2009), but significant difficulties remain, *see* Stefanie A. Lindquist & Wendy L. Martinek, Response, *Psychology, Strategy, and Behavior Equivalence*, 158 U. PA. L. REV. PENNUMBRA 75, 77–81 (2009), http://www.pennumbra.com/responses/11-2009/LindquistMartinek.pdf.

work on a richer model of judicial decisionmaking, empirical legal scholars can increase the explanatory power of their work and its usefulness in understanding judicial behavior.

C. Reforming Empirical Legal Scholarship

Professor Cross succinctly captures the central premise of the most influential thread of empirical legal studies: "Judicial politics or ideology is commonly juxtaposed with decision making according to law. . . . Whether the judge is deciding [cases] according to the better legal arguments or to his or her ideology is the question. Quantitative empirical research is suited to help answer this question."[19]

The realist legal model renders the question unintelligible. If what constitutes "the better legal argument" relies, in part, on reference to values; moral and political beliefs; and other components of ideology, then there is no conflict between the two—a decision need not be made according to law *or* ideology if one encompasses the other. Although some types of ideological considerations should not be considered legal arguments, it is not clear that empirical legal research, as it has traditionally been practiced, is "suited to help answer" whether and when those types of extralegal ideological considerations affect outcomes.

Put another way, ideology, broadly construed, is a necessary component of judging. Democratic values; notions of appropriate tools of interpretation; concerns about consistency, rule of law, and reliance interests; notions of fairness and equity: all of these factors can be categorized as ideology. In the vast majority of cases, there is sufficient ideological overlap that its distinct role in judicial decisionmaking is invisible. Judges and other experienced members of the legal community share common ideas about what the law means, and those ideas, along with relevant legal materials and factual findings, light a clear path toward the resolution of a case. In a small number of cases, judges have sufficiently different ideas about the appropriate interpretation of legal texts, or moral and political values, that they disagree on the appropriate resolution. But these types of cases are not necessarily more ideological than any other.

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19. FRANK B. CROSS, DECISION MAKING IN THE U.S. COURT OF APPEALS 12, 14 (2007). This is a strong statement of the goal of these studies; other scholars may offer a more limited view on the goal of empirical scholarship, focused on teasing out how various personal factors (for example, judges' age, gender, or prior background) impact outcomes.

Many studies have used judicial appointment variables, such as the party of the president who appointed a judge, as a crude proxy for judicial ideology. Under the realist legal model, this proxy mixes "bad" extralegal ideology with the regular "good" ideology necessary for legal reasoning, and is therefore not only crude but also confounding. Studies that use this proxy find both too much and too little ideology, and the correlations between these variables and outcomes say nothing about the role of law or ideology in determining case outcomes. Although appointment variables are not very instructive about judicial behavior, they may be better suited to studies about the appointments process and its effects.

If empirical legal scholars wish to study whether *extralegal* ideological considerations affect judicial decisions, they must first develop an appropriate normative account of what constitute extralegal considerations, and then develop a methodology for separating out those types of factors from standard, run-of-the-mill judicial decisionmaking. Identifying these extralegal factors and testing for their influence is a potential project for the field.

More important for understanding judicial behavior, the realist legal model can help refocus empirical legal studies on the legal materials at the heart of legal reasoning.[20] Some initial attempts have been made to study the effect of precedent.[21] The task of coding legal materials is not easy, but creative solutions or sheer muscle could overcome some of the problems, and systematic evaluation of the effect of precedent, records on appeal, or legal materials prepared by parties, could prove extraordinarily illuminating. More sophisticated analysis of the outputs—judicial decisions—could also prove extremely useful, and law professors may be well suited to the task.[22] Connecting more fully rendered data on opinions to information on precedent, for example, could help generate analysis on the viability of certain legal authorities in particular areas of law.

Given the state of empirical legal studies, this kind of sophisticated analysis is a long way off. Large-scale problems of coding, computation, analysis, and interpretation must first be

20. Other scholars sympathetic to the project of empirical legal scholarship have suggested that greater emphasis on the law would help improve research in this area. *See, e.g.*, Barry Friedman, *Taking Law Seriously*, 4 PERSPECTIVES ON POLITICS 261, 262 (2006).

21. *See* Edwards & Livermore, *supra* note 2, at 1928–29.

22. *See, e.g.*, Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63, 64 (2008).

overcome. Appropriate questions would require formulation, statistical models would require development, and methods for generating and processing data would have to be invented. None of this will be easy, but abandoning the past emphasis on the illusory law-politics divide and founding the field on a more realistic model of judicial behavior would be a good start.