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# Concurrence, Posner-Style: Ten Ways to Look at the Concurring Opinions of Judge Richard A. Posner

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CONCURRENCE, POSNER-STYLE: TEN WAYS TO LOOK AT  
THE CONCURRING OPINIONS OF JUDGE RICHARD A.  
POSNER

*Robert F. Blomquist\**

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## I. INTRODUCTION

While a significant body of legal scholarship has emerged on appellate judicial opinion style,<sup>1</sup> little systemic study has been given to examining the nature of modern American concurring opinion style. Style is an ambiguous and eclectic concept, and the opinion style of Judge Richard A. Posner, former Chief Judge of the United States Court of Appeals for the Seventh Circuit, and oft-mentioned candidate to become a Justice of the Supreme Court of the United States, is worth trying to delineate and to understand.<sup>2</sup>

In a series of three previous articles, I analyzed Judge Posner's general opinion style during his "rookie season" as a federal appellate court judge,<sup>3</sup> Posner's inchoate dissenting opinion style over the course of his first decade on the court of appeals,<sup>4</sup> and his maturing dissenting opinion style in his later years on the bench.<sup>5</sup> In this Article, I turn to Judge Posner's concurring opinion style

<sup>1</sup> See Robert F. Blomquist, *Playing on Words: Judge Richard A. Posner's Appellate Opinions, 1981-82—Ruminations on Sexy Judicial Opinion Style During an Extraordinary Rookie Season*, 68 U. CIN. L. REV. 651, 656-84 (2000) [hereinafter Blomquist, *Playing on Words*] (referencing various views on judicial opinion style, including distinguished judges, professors, and attorneys).

<sup>2</sup> See, e.g., Stephen J. Choi & G. Mitu Gulati, *Choosing The Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23 (2004); Stephen J. Choi & G. Mitu Gulati, *Mr. Justice Posner? Unpacking The Statistics*, 61 N.Y.U. ANN. SURV. AM. L. 19 (2005); Stephen J. Choi & G. Mitu Gulati, *Ranking Judges According to Citation Bias (as a Means to Reduce Bias)*, 82 NOTRE DAME L. REV. 1279, 1299 (2007) (stating that "Richard Posner, who shows [up] at the top of almost every citation ranking of either judges or legal academics, shows up" as the most frequently cited judicial opinion writer by the United States Court of Appeals judges of the opposite political party).

<sup>3</sup> See Blomquist, *Playing on Words*, *supra* note 1.

<sup>4</sup> Robert F. Blomquist, *Dissent, Posner-Style: Judge Richard A. Posner's First Decade of Dissenting Opinions, 1981-1991—Toward an Aesthetics of Judicial Dissenting Style*, 69 MO. L. REV. 73 (2004) [hereinafter Blomquist, *Dissent, Posner-Style*].

<sup>5</sup> Robert F. Blomquist, *Judge Posner's Dissenting Judicial Oeuvre and the Aesthetics of Canonicity*, 36 N.M. L. REV. 161 (2006) [hereinafter Blomquist, *Aesthetics of Canonicity*]; see also THE QUOTABLE JUDGE POSNER: SELECTIONS FROM TWENTY-FIVE YEARS OF JUDICIAL OPINIONS OF RICHARD A. POSNER (Robert F. Blomquist ed., forthcoming 2008).

during his first quarter century of appellate judging.

The structure of the remainder of this Article, before my conclusion, is as follows. First, in Part II, before taking up Judge Posner's concurring opinions, I probe for a working description of the nature and motivations for modern American concurring judicial opinions by looking at previous legal scholarship and exemplars of judicial concurrence.<sup>6</sup> In Part III, I analyze the published concurring opinions written by Judge Posner during 1981–2006—his lifetime tenure to date on the federal appellate bench.<sup>7</sup> Finally, in Part IV, I offer some general observations about Judge Posner's concurring opinion style, and consider some implications of my study for better understanding the form and function of American concurring judicial opinions.<sup>8</sup>

## II. THE NATURE OF CONCURRING OPINIONS

### A. Background

Interestingly, and ironically, the etymology of the word *concur* starts in the fifteenth century as meaning “to run together, assemble, meet, rush together in hostility” and “[t]o run together violently or with a shock; to come into collision; to collide.”<sup>9</sup> Over the ensuing centuries *concur* softened in meaning to also encompass “flow[ing] together, as streams (material or immaterial),” “[t]o converge and meet,” “[t]o combine in action, to co-operate,” and “[t]o agree in opinion.”<sup>10</sup> The cognate word *concurrence* developed a few centuries after the first English usage of the word *concur*.<sup>11</sup> *Concurrence* came to mean “[r]unning together, confluence; meeting,” “[o]ccurrence together in time, of events or circumstances; coincidence; a juncture,” and “[c]ombination in effecting any purpose or end, or in doing any work; co-operation of agents or causes.”<sup>12</sup>

Indeed, a concurring judicial opinion can be testy—or even downright hostile—to the majority opinion from which it reacts; this is, perhaps, most probable in the case of a partial dissent and a partial concurrence combined in the same opinion. In the case of a

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<sup>6</sup> See *infra* notes 9–78 and accompanying text.

<sup>7</sup> See *infra* notes 79–399 and accompanying text.

<sup>8</sup> See *infra* notes 400–433 and accompanying text.

<sup>9</sup> 3 OXFORD ENGLISH DICTIONARY 675 (2d ed. 1989).

<sup>10</sup> See *id.*

<sup>11</sup> See *id.* at 676.

<sup>12</sup> *Id.*

pure concurring opinion, however, we would expect the opinion to be congenial to the opinion in chief of the majority or plurality—although this can probably not be presumed; perhaps the concurrence agrees with the result or the reasoning of the court but takes the principal opinion of the court to task for not going far enough in expanding the holding, or for the opposite reason of going too far.

The motivation of an appellate judge in writing a dissenting opinion—or even a partial dissent—is intuitively obvious (i.e., a dissenting opinion disagrees to one degree or another with the holding, reasoning, or combined holding/reasoning of the principal opinion in a case).<sup>13</sup> The reason why a judge would go to the trouble of writing a concurring opinion—an opinion in agreement or partial agreement with the chief opinion of a court—is harder to fathom. One must assume that there are costs and benefits of writing a separate concurrence. Costs include extra time and effort in the context of a pressing docket of cases and an expectation that each judge is responsible for writing a fair share of the opinions of the court, alienation or possible alienation of one's judicial colleagues, and opening one's concurring opinion to outside criticism by commentators and the press. What might the broad theoretical benefits be of writing a separate concurring opinion? No doubt there are reasons for writing a concurring opinion which overlap with writing a dissenting opinion: self-expression, advancing the truth, competing with other judges and academics in the legal marketplace of ideas, improving the majority's final work product by forcing the prevailing side to deal with points raised in the concurrence, and mental honing of a judge's agreement and disagreement with the majority's approach to a particular legal area (e.g., freedom of the press issues).<sup>14</sup> Moreover, one type of dissenting opinion, termed a "collaborative" dissent by Professor Charles Fried, is closely related to a concurring opinion since both attempt to work with the premises and reasoning of the majority's approach as a cooperative effort to further shape the development of

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<sup>13</sup> For a discussion of the various motivations an appellate judge might have for writing a dissenting judicial opinion, see Blomquist, *Dissent, Posner-Style*, *supra* note 4, at 76–83. It should be noted that it is conceivable that trial court judges—when convened as a tribunal of special district court judges by statutory arrangement—may write dissenting or concurring opinions from the chief opinion of the tribunal; however, this is rare. My assumption in this Article is that *appellate* judges write concurring or dissenting opinions when they choose to write separately from the majority or plurality of an *appellate* court.

<sup>14</sup> *Cf. id.*

future legal doctrine.<sup>15</sup> In contradistinction, no cooperation is apparent in the case of the other kind of dissent, described by Fried as “oppositional” dissent.<sup>16</sup>

### *B. Some Traditional Views on Concurring Opinions*

As pointed out in Robert A. Leflar’s *Appellate Judicial Opinions*, the use of concurring opinions by appellate judges “varies from court to court and from judge to judge.”<sup>17</sup> Most legal observers probably share the view that concurring opinions should not be routinely issued and should “respect the doctrine of *stare decisis*” while suggesting “an evolution of legal principles required by changed conditions and concepts.”<sup>18</sup>

One author has suggested two scenarios that justify the writing of thoughtful concurring opinions. First, “[u]pon occasion, the opinion of a majority will not actually be erroneous, yet it will verge upon error by straining a legal doctrine to its utmost.”<sup>19</sup> In this context, “a considered and well-stated concurring opinion can be of value by warning that the doctrine must not be pressed too far.”<sup>20</sup> Second, “[i]n other instances, a majority may announce a doctrine which is sound when applied to the facts before the court, but which would be wholly unsound if given a general application.”<sup>21</sup> In this closely related instance, “a timely concurring opinion may suffice to check any extension of the doctrine, and thereby better our jurisprudence.”<sup>22</sup>

Another author, focusing on the work of the Michigan Supreme Court, addressed the problematics of a concurrence in result only that does not explain the basis of the concurrence.<sup>23</sup> What are readers to make of such unexplained concurrences and are they helpful or unhelpful?

When a [judge] concurs in result only, but does not bother to explain why he does not also concur in the opinions of other

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<sup>15</sup> See Charles Fried, Comment, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 180–83 (2002).

<sup>16</sup> See *id.*

<sup>17</sup> APPELLATE JUDICIAL OPINIONS 203 (Robert A. Leflar ed., 1974).

<sup>18</sup> R. Dean Moorhead, *The 1952 Ross Prize Essay: Concurring and Dissenting Opinions*, 38 A.B.A. J. 821, 884 (1952).

<sup>19</sup> *Id.* at 823.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See Richard S. Miller, *The Work of the Michigan Supreme Court During the Survey Period: A Statistical Analysis*, 11 WAYNE L. REV. 1 (1964–1965).

[judges] who favor the same result, he leaves several possibilities open. Perhaps he disagrees with the reasoning of the other [judges], believing it to be faulty. If so, he would seem to have an obligation, possibly constitutional in nature, to set forth the correct reasoning as he sees it. If his objection is to the scope or breadth of the decision or of some dictum in the opinion, his reasons might become very useful in restricting or broadening the effect of his brethren's opinions in future cases. Certainly the benefit of his different reasoning might prove helpful to other appellate courts considering a similar problem, or possibly to [the same reconstituted appellate court] reconsidering the same problem at some future date.<sup>24</sup>

The late Chief Justice William Rehnquist, writing in a 1973 article, opined that constitutional adjudication—at least in the Supreme Court of the United States—“invites, at least, if does not require, more separate opinions [by appellate judges] than does adjudication of issues of law in other areas.”<sup>25</sup> This tendency to write separate concurring opinions, or dissenting opinions, Rehnquist theorized, exists because “*stare decisis* does not have the same weight in constitutional interpretation as in other cases” and there might be an incentive, therefore, of an appellate judge to “want to state his own views if they differ significantly from those of the majority [of the court].”<sup>26</sup>

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<sup>24</sup> *Id.* at 12 (footnote omitted). The author of this article goes on to muse:

Perhaps [the concurring-in-result only appellate judge] is too busy with other opinions to waste his time reporting a minor disagreement. Perhaps he agrees with the reasoning of his colleagues but dislikes the language they used to express it. Or he thinks the opinion may be an unpopular one and does not wish to be recorded as joining it. Perhaps he has not had an opportunity to examine the briefs and records carefully or to research the problem, but concurs in result simply because he feels, instinctively, that the outcome is correct. No one, of course, is entitled to draw any of these conclusions from a concurrence in result . . . . The point is, however, that anyone is entitled to conclude that [an appellate judge] had *some* reason for not joining his colleague's opinion. Such a concurrence provides no guidance and, unfortunately, casts a shadow on the authoritativeness of the signed opinion while leaving open a question about the motives of the concurring [judge]. A written opinion, even a brief one, setting forth [an appellate judge's] reasons for concurring separately would eliminate these difficulties.

*Id.* at 12, 14.

<sup>25</sup> Justice William H. Rehnquist, *The Supreme Court: Past and Present*, 59 A.B.A. J. 361, 363 (1973).

<sup>26</sup> *Id.*

### C. Recent Takes on Concurring Opinions

Barry A. Miller suggests, in a 2002 article, that a customary role for a concurring opinion is to discern a legal issue “as relevant but decide[] that it is not dispositive and leav[e] it for another day.”<sup>27</sup> Miller cited a concurrence by Justice Kennedy in *Wisconsin Department of Corrections v. Schacht* as exemplifying this kind of concurring opinion.<sup>28</sup>

In an exchange between Professors Barry Friedman and Robert W. Bennett, in a 2001 law review symposium, both academics seemed to agree that while litigation is “party-centered,” other views of important legal and policy questions are raised by concurring judicial opinions (in conjunction with dissenting opinions and amici briefs).<sup>29</sup> Accordingly, a concurring judicial opinion can play the role of a limited “conversation” about critical questions embedded in a democratic society.<sup>30</sup> Sometimes, this conversation between jurists who render separate judicial opinions changes other jurists’ minds in future cases.<sup>31</sup> Other, more cynical, observers contend that in some appellate courts—particularly the Supreme Court of the United States—judges are not really interested in using separate concurring (and dissenting) opinions for purposes of engaging in an open conversation with their colleagues; rather, according to this view, separate opinions are, now, routinely farmed out to law clerks for writing in a kind of one-upmanship display of competition between appellate judges more interested in rebutting or neutralizing the rhetoric of other appellate judges.<sup>32</sup>

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<sup>27</sup> Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1301 n.245 (2002).

<sup>28</sup> *Id.* (citing *Wis. Dep’t of Corrs. v. Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring) (“noting important questions but suggesting resolution in a later case following full briefing and argument”).

<sup>29</sup> See Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845, 883–84 (2001); Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 946 (2001).

<sup>30</sup> See Friedman, *supra* note 29, at 946; cf. Bennett, *supra* note 29, at 888.

<sup>31</sup> See Daniel Gordon, *Brennan’s State Constitutional Era Twenty-Five Years Later—The History, the Present, and the State Constitutional Wall*, 73 TEMP. L. REV. 1031, 1034 n.35 (2000) (citing BERNARD SCHWARTZ, *THE SUPREME COURT, CONSTITUTIONAL REVOLUTION IN RETROSPECT* 354–55 (1957)).

<sup>32</sup> See EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* 29, 271–73 (1998) (asserting that Supreme Court law clerks perform vital functions including drafting majority, concurring, and dissenting opinions, and exchange between the Justices in voting conferences is non-existent); Nadine J. Wichern, Comment, *A Court of Clerks, Not of Men: Serving Justice in the Media Age*, 49 DEPAUL L. REV. 621, 652 (1999) (arguing that on the current Supreme Court, law clerks spend much of their time writing separate opinions with little supervision); Wichern,

With his Yankee common sense and his own considerable experience as a United States Court of Appeals Judge, Frank M. Coffin offers his unique take on when concurring opinions are justified in his 1994 book, *On Appeal: Courts, Lawyering, and Judging*.<sup>33</sup> Coffin compares a concurring opinion with a dissenting opinion: “A concurrence is like a fencing foil; it elegantly makes its usually bloodless points. A dissent, on the other hand, is more like a broadsword. It takes more resolution and commitment to wield it and there is the expectation of drawing at least a little blood.”<sup>34</sup> As Judge Coffin sees it, appellate judges are vindicated in penning concurring opinions in four circumstances:

1. When a judge strongly prefers a *different theory or ground* to support the result, e.g., the judge would not reach the merits because of a procedural bar.
2. When a judge wishes to *limit the holding*, e.g., the judge concurs in this case involving the interstate transfer of prisoners but would not extend this to apply to an intrastate transfer.
3. When a judge wishes to *expand a holding*, e.g., the judge points out that the instant case by its reasoning and holding effectively overrules a precedent.
4. When a judge wishes to *expand the majority’s reasoning* on a particular point, e.g., the judge wishes to drive home a point to the bar or the trial courts, or to address a dissenter’s argument in a more thorough manner than would fit the court’s opinion.<sup>35</sup>

Professor Cass R. Sunstein, in his 1999 book, *One Case at a Time*,

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*supra*, at 652 n.226 (suggesting that an example of a situation where a law clerk was probably delegated the power to write a “concurring opinion in a case with large ramifications [was in] *Washington v. Glucksberg*, the assisted suicide case, in which Justice Sandra Day O’Connor wrote a concurrence qualifying the majority’s opinion by warning that the case did not mean there was a constitutional right to a physician’s aid in dying” (citing *Washington v. Glucksberg*, 521 U.S. 702, 736–38 (1997) (O’Connor, J., concurring)).

<sup>33</sup> FRANK M. COFFIN, *ON APPEAL: COURTS, LAWYERING, AND JUDGING* (1994).

<sup>34</sup> *Id.* at 227.

<sup>35</sup> *Id.* at 226–27. According to Judge Coffin:

A judge should never merely declare that she concurs. This is no more illuminating . . . than two examples collected for a judges’ seminar . . . :

I concur in the result and so much of the opinion as supports the result.

And this gem, delivered by an Irish chief justice, after hearing the view of his two colleagues:

I agree with the decision of my brother on the right for the reasons stated by my brother on the left.

*Id.* at 227 (endnote omitted); *cf. supra* note 24 and accompanying text.

highlighted the pivotal role played by Justice Sandra Day O'Connor through her use of "minimalist" concurring judicial opinions on the Supreme Court.<sup>36</sup> According to Sunstein, Justice O'Connor came to be known for *characteristic* minimalist concurrences that "typically limit the reach of majority decisions, suggest ways of accommodating both sides, and insist to the losers that they haven't lost everything, or for all time."<sup>37</sup> Professor Mark Tushnet amplified Sunstein's insights about the role of concurring opinions on the Supreme Court in his foreword to the Harvard Law Review analysis of the Supreme Court's 1998 Term.<sup>38</sup> Professor Ronald Dworkin largely agrees with Sunstein's insight that concurring opinions on the Court often serve to narrow the scope of the majority opinion.<sup>39</sup>

Professor Ronald J. Krotoszynski, in a 1997 article,<sup>40</sup> analyzed a concurring opinion by Judge Guido Calabresi in *United States v. Then*<sup>41</sup> as an example of a "constitutional flare to Congress."<sup>42</sup> *Then* involved a case that presented the question of "whether the sentencing disparity between persons convicted of crimes involving crack and powder cocaine constituted a violation of the Fifth Amendment's implied guarantee of equal protection of the laws."<sup>43</sup> Judge Calabresi used a concurring opinion to the Second Circuit rejection of *Then*'s constitutional attacks on the sentencing disparity to warn Congress that a future case might prove to be unconstitutional.<sup>44</sup> As explained by Professor Krotoszynski:

Judge Calabresi [in his concurrence] was very careful not to give a formal opinion as to how the court would resolve a later case involving his hypothetical facts. He simply noted that the existence of compelling evidence demonstrating a racial linkage would give a reviewing court pause, should Congress maintain a stance of benign neglect or, worse yet, [allow the 100:1 ratio to continue] notwithstanding a

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<sup>36</sup> CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT xiii (1999).

<sup>37</sup> *Id.*

<sup>38</sup> Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 93–94 (1999).

<sup>39</sup> See, e.g., Ronald Dworkin, *Assisted Suicide: What the Court Really Said*, N.Y. REV. OF BOOKS, Sept. 25, 1997, available at <http://www.nybooks.com/articles/1078>.

<sup>40</sup> Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1 (1998).

<sup>41</sup> See 56 F.3d 464, 466–69 (2d Cir. 1995) (Calabresi, J., concurring).

<sup>42</sup> Krotoszynski, *supra* note 40, at 7 (internal quotation marks omitted).

<sup>43</sup> *Id.* at 11.

<sup>44</sup> *Id.* at 13.

Sentencing Commission proposal to revise the disparity downward. Judge Calabresi rhetorically raised two questions: (1) Precisely at what point does a court say that what once made sense no longer has any rational basis? and (2) What degree of legislative action, or of conscious inaction, is needed when that (uncertain) point is reached? Significantly, Judge Calabresi made no attempt to answer his own questions. On the contrary, he admitted that their very existence powerfully counseled in favor of restraint.<sup>45</sup>

For Krotoszynski, Judge Calabresi's concurring opinion in *Then* was justified. Contrary to the panel majority taking Judge Calabresi "to task for offering Congress advice on its core policy-making functions,"<sup>46</sup> Professor Krotoszynski supports Judge Calabresi's concurring opinion as a type of traditional dialogue between the judiciary and Congress.<sup>47</sup> Moreover, "judges routinely offer opinions on matters of constitutional law in various ways," according to Krotoszynski, "including dicta, alternative holdings, and concurrences."<sup>48</sup> From a broader philosophical perspective, "[g]iven that federal judges must write opinions that attempt to justify their rulings, the question of how much to write cannot be avoided. Some judges will write more, some will write less."<sup>49</sup> Some will write concurring opinions. Some will choose to remain silent.

Professor Henry T. Greely performed a quantitative analysis of the career judicial opinions of Judge John Minor Wisdom of the United States Circuit Court for the Fifth Circuit in a 1996 article.<sup>50</sup> Greely made the interesting observation that Judge Wisdom exhibited an "increasing willingness to write separately in en banc decisions"<sup>51</sup>; two explanations for this tendency are: (1) the natural

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<sup>45</sup> *Id.* at 13–14 (internal quotation marks omitted) (footnotes omitted). Krotoszynski went on to observe:

Rather than simply ignore the mounting data that augur against the constitutionality of the disparity, Judge Calabresi [in his concurring opinion] was remarkably candid. In his view, the Sentencing Guidelines ratio *might* be heading toward unconstitutionality in light of changed circumstances. But he clearly and expressly reserved final judgment. At the end of the day, he confessed that future circumstances might, or might not, provide sufficient support for a claim similar to the claim pressed by *Then*.

*Id.* at 14 (internal quotation marks omitted) (footnote omitted).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 16.

<sup>48</sup> *Id.* at 34.

<sup>49</sup> *Id.* (footnote omitted).

<sup>50</sup> See Henry T. Greely, *Quantitative Analysis of a Judicial Career: A Case Study of Judge John Minor Wisdom*, 53 WASH. & LEE L. REV. 99 (1996).

<sup>51</sup> *Id.* at 118.

contentiousness of cases set by the full circuit court for rehearing en banc, and (2) the greater importance of en banc decisions compared to panel decisions to the “law of the circuit.”<sup>52</sup> Thus, over twenty-five percent of Judge Wisdom’s concurring opinions on the Fifth Circuit “were written in response to en banc decisions of the court.”<sup>53</sup> Generalizing his data collection to United States Circuit Judges in all appellate circuits, Professor Greely noted that “[a]lmost all [circuit] judges write more dissenting opinions than concurring opinions, but not all.”<sup>54</sup> Moreover, Greely pointed out that “judges sampled from the Ninth and the District of Columbia Circuits seem to write separately much more often than . . . other circuit[] [judges].”<sup>55</sup> Offering comparisons with other circuit judges, including Judge Posner, Professor Greely concluded:

Overall, Judge Wisdom’s separate opinion profile seems most like that of his old friend Judge Tuttle of the Fifth and Eleventh Circuits, Judge Goodwin of the Ninth Circuit, and Judges Cummings and Posner of the Seventh Circuit. Each of those judges writes separately about 10% of the time and writes separate concurrences quite infrequently. Beyond the fact that all those judges are well respected, it is hard to find other similarities between them.<sup>56</sup>

United States Circuit Judge Edward R. Becker made an incisive point in an article entitled *In Praise of Footnotes* about the important role that footnotes play in concurring or dissenting judicial opinions.<sup>57</sup> As Judge Becker sees it, footnotes in separate opinions can be strategically deployed by an appellate judge to “call into question the correctness or prudence of a rule of law espoused by the majority opinion, or [to] advocate a new or different rule.”<sup>58</sup> Becker explains how a footnote in a concurring or dissenting opinion can maximize the potential future impact of a separate judicial opinion by observing:

Opinions of this genre, if they are to have their intended effect of law reform, must perforce be scholarly and detailed; . . . footnotes often play an important role in scholarly exegesis. Footnotes make it possible to define

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 128 (footnote omitted).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 129.

<sup>57</sup> Edward R. Becker, *In Praise of Footnotes*, 74 WASH. U. L.Q. 1, 7 (1996).

<sup>58</sup> *Id.*

confusing terms and to explain potentially confusing but extraneous procedural issues that seemed important at one point but later turned out not to be dispositive. They also make it possible to set forth unobtrusively jurisdiction or standard of review . . . , and to identify analogous but unconnected proceedings (explaining their relevance). These matters are of especial value to the novice reader. Finally, footnotes can even be used to inject some humor into an opinion or to offer an interesting aside.<sup>59</sup>

In a fascinating 1995 student note, Igor Kirman focuses on the proliferation of concurring opinions by United States Supreme Court Justices.<sup>60</sup> Kirman observes that “[f]luctuating from a low of one in 1937 to a high of ninety-five in 1981, the rising incidence of concurring opinions [by Supreme Court justices] suggests a need to understand their role in modern Supreme Court jurisprudence.”<sup>61</sup> Moreover, “[c]ontributing to this need,” according to Kirman, is the impact that some concurring opinions by Supreme Court justices have had on the evolution of legal doctrine on the Court.<sup>62</sup> Kirman distinguishes between two fundamentally different kinds of Supreme Court concurring opinions: (1) a *concurrence in judgment* which is “[w]ritten by a Justice who does not join the majority opinion” and “is intended to express agreement with the majority’s result but not with its reasoning,”<sup>63</sup> and (2) a *simple concurrence* which “is written by a Justice who agrees both with the majority’s result and with its reasoning, but [who] writes separately nonetheless.”<sup>64</sup> While Kirman’s differentiation of types of concurring opinions is driven by his concern for elucidating the precedential value of various concurrences by Supreme Court Justices,<sup>65</sup> his analytical framework also sheds light on appellate

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<sup>59</sup> *Id.* (footnotes omitted). Judge Becker, however, acknowledges the negative view Judge Posner holds for footnotes in judicial opinions: “The principal appeal [of the footnote] is to the author . . . [sic] it spares him the pain of having to discard anything he considers to have some value or interest, and it enables him to show, or at least pretend, that he is hard-working, learned and scrupulous.” *Id.* at 11 (footnote omitted).

<sup>60</sup> Igor Kirman, Note, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083 (1995).

<sup>61</sup> *Id.* at 2083 (footnotes omitted).

<sup>62</sup> *Id.* at 2083–84, 2084 n.7 (citing as an example *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).

<sup>63</sup> *Id.* at 2084. “The concurrence in judgment is really a dissent from the rationale of the majority opinion.” *Id.*

<sup>64</sup> *Id.* (footnote omitted).

<sup>65</sup> *Id.* at 2119. The “two-step inquiry” will allow “lower courts [to] minimize the precedential chaos that results when they give decisional force to a concurring opinion that

concurring opinion styles, in general. For example, it is instructive to pay closer attention, on the one hand, to what a concurring appellate judge is *claiming she is doing* (say, a judge who contends that she agrees with the majority's result and reasoning), and, on the other hand, to what a concurring appellate judge is *functionally doing in the actual language of her concurrence*. For example, she departs from the reasoning of the majority opinion by being more expansive or restrictive than the holding—as opposed to merely clarifying, restating, or summarizing the majority's opinion. Indeed, while all separate appellate opinions (pure dissenting, partial dissenting and concurring, and pure concurring) can be read for shades of meaning and types of ambiguity, it would appear that separate opinions labeled as concurrences by judicial authors—in whole or in part—are likely to contain the most complex layers of ambiguity. This is because an appellate judge who claims that he is concurring with the majority opinion (partially or completely) is overtly or covertly attempting “to inspire consubstantiality” through the use of the rhetorical trope of a concurrence; such a rhetorical strategy by an appellate judge is “designed to unite” members of the majority and the concurring judge or judges “in spite of members’ divergent tendencies,” requiring “persuasively encompassing competing values at a sufficiently abstract level.”<sup>66</sup> Thus a rhetorical trope, like a judicial concurring opinion, is similar to Professor David Zarefsky’s discussion of a “condensation symbol” which has “no clear referent but serve[s] to ‘condense’ into one symbol a host of different meanings and connotations which might diverge if more specific referents were attempted.”<sup>67</sup>

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may be at odds with its corresponding majority opinion.” *Id.*

<sup>66</sup> ENCYCLOPEDIA OF RHETORIC 24 (Thomas O. Sloane ed., 2001).

<sup>67</sup> DAVID ZAREFSKY, PRESIDENT JOHNSON’S WAR ON POVERTY: RHETORIC AND HISTORY 10–11 (1986). There are, alas, many rhetorical uses of ambiguity. By way of illustration:

[T]he U.S. Constitution and many diplomatic agreements depend on their ambiguities to provide flexibility without sacrificing unity. Like rhetorical tropes, especially irony, humor and puns rely on their measure of ambiguity to advance strategically a point or to inspire consubstantiality.

Argumentative strategies, such as association and disassociation, operate by maneuvering ambiguous interpretative boundaries. Association attempts to link meaningfully referents formerly viewed as unrelated and thus create a fresh interpretive and evaluative context for the issue at hand. Disassociation strategically divides that which is interpreted currently as unitary into distinct parts that invite divergent evaluations. Transcendence and transformation operate similarly, strategically changing the scope and circumference of a phenomenon’s interpretive borders and so redefining meaning.

Another . . . rhetorical use of ambiguity is to deny its presence. Declaring that a purportedly ambiguous issue actually is not so may be designed to convince auditors to

Professor Scott C. Idleman, in a 1995 article, touches on the function of appellate judicial concurring opinions in his discussion of judicial candor.<sup>68</sup> According to Idleman's analysis, progress in "the long-term doctrinal or conceptual development of the law"<sup>69</sup> may arguably be advanced by encouraging judges, who choose to write separately from their respective courts, to "plant[] seed[s]" or "squirrel[]" away ideas for "new principles or doctrines in subsequent . . . cases."<sup>70</sup> Idleman cites Judge Posner for the proposition that concurring opinions (along with dissents) "have played so important a role in the development of the law that it would be a great error to suppress them; it would actually make law less rather than more certain, by concealing from the bar important clues to the law of the future."<sup>71</sup>

Professors Lewis A. Kornhauser and Lawrence G. Sager, in a jointly authored 1993 article in the *California Law Review*, undertook an ambitious project which offered important insights on the need for appellate courts, as collegial enterprises, to reconcile votes by individual judges on the outcome of the overall case with the views by these judges on each of the issues in the case (provided by concurrences of one sort or another).<sup>72</sup> Considering this problem with special reference to the Supreme Court of the United States,

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support the *rhētōr* as a leader clear-sighted and determined enough to steer them effectively through this troubling "apparent" indeterminacy. Finally, a rhetor strategically may highlight ambiguity's presence, then argue that it is impossible to resolve it satisfactorily, even temporarily. This tactic serves to block agreement on a proposed judgment or course of action.

ENCYCLOPEDIA OF RHETORIC, *supra* note 66, at 24 (citations omitted). See generally WILLIAM EMPSON, SEVEN TYPES OF AMBIGUITY (Chatto & Windus, 3d ed. 1963) (1956) (widely recognized as the last century's landmark opus systematizing and defending literary uses of ambiguity).

<sup>68</sup> See Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995).

<sup>69</sup> *Id.* at 1370.

<sup>70</sup> *Id.* at 1370–71 (footnotes omitted).

<sup>71</sup> *Id.* at 1371 n.205 (citing RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 236 (1985)). Idleman, however, is ultimately skeptical about encouraging judicial candor too much because of countervailing considerations of judicial restraint. *Id.* at 1372. In concluding his article on judicial candor, Idleman quotes an old article by Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 819 (1961):

Candor . . .

"is a virtue, in judicial opinions as elsewhere, and we need much more of it. But to 'tell all,' with complete and unmitigated candor, is not always a virtue in judicial opinions or elsewhere. Restraint may be a virtue too, for reasons sometimes of decency and sometimes of wise planning."

Idleman, *supra* note 68, at 1416.

<sup>72</sup> Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1 (1993).

Kornhauser and Sager make a whimsical but vital conceptual distinction between what they call “true concurrences,” on the one hand, and “two-cents concurrences,” on the other.

“True” concurring opinions . . . are not measurably less problematic than dissents, since they are dissents from the rationale adopted by the majority. “True” concurrences announce and defend the author’s unwillingness to subscribe to the majority’s rationale for an outcome that the author supports. By contrast, in “two-cents” concurrences, the author is willing to join in both the outcome and rationale sponsored by the majority, but wishes to add her own, presumably consistent, thoughts on the matter.<sup>73</sup>

Interestingly, “[i]n Supreme Court practice, ‘true’ concurrences are introduced with the phrase ‘Justice X, concurring in the judgment,’ while ‘two-cents’ concurrences are introduced with the phrase, ‘Justice X, concurring.’”<sup>74</sup> Moreover, “[i]n recent years, it has been increasingly common for Justices who join in the majority outcome to write separately to explain their agreement with discrete portions of the majority rationale and their disagreement with others.”<sup>75</sup> Indeed, “[o]pinions of this sort,” in the Supreme Court, “are now introduced with the phrase, ‘Justice X, concurring in part and concurring in the judgment.’”<sup>76</sup> Professors Kornhauser and Sager argue that all appellate courts—consistent with their function as “collegial enterprises”—should “directly confront the doctrinal paradox” of separate concurring opinions and “deliberately determine the method of case decision that will control.”<sup>77</sup> They conclude “that the best method for choosing between decisional methods is” a so-called “metavote” whereby the members of an appellate court would “vot[e] for a particular method after discussing such factors as whether the outcome or rationales for it are more important, whether the issues to be decided are independent, the seriousness of the consequences of the outcome, hierarchical management concerns, and internal management considerations.”<sup>78</sup>

### III. TEN WAYS TO LOOK AT THE CONCURRING OPINIONS OF JUDGE

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<sup>73</sup> *Id.* at 8 n.14.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1.

<sup>78</sup> *Id.*

RICHARD A. POSNER

*A. Statistics*

During his first twenty-five years as a United States Court of Appeals Judge—measured from his starting date during the fall of 1981<sup>79</sup> until the end of 2006 (technically, a bit longer than twenty-five years)—Judge Richard A. Posner wrote a total of 2,272 published opinions, or an average of about ninety-one opinions per year.<sup>80</sup>

The distribution of Judge Posner's fifty-four pure concurring

<sup>79</sup> See Blomquist, *Playing on Words*, *supra* note 1, at 684.

<sup>80</sup> Of these 2,272 opinions, Judge Posner wrote 2,122 opinions for the Seventh Circuit majority. Posner authored a total of 150 published separate opinions during this timeframe; these separate opinions consisted of eighty-three dissenting opinions, fifty-four pure concurring opinions, and thirteen mixed concurring/dissenting opinions. My research assistant and I calculated these figures based on a hand count of all published authored opinions by Judge Posner on the Westlaw federal court Seventh Circuit database of published opinions. The following table summarizes this information.

Year	Majority	Concurrence	Concurrence/Dissent	Dissent	Total
1981	3	0	0	0	3
1982	77	2	0	6	85
1983	81	7	3	5	96
1984	77	4	1	5	87
1985	88	6	0	9	103
1986	78	3	1	4	86
1987	79	4	0	2	85
1988	72	3	2	3	80
1989	72	3	0	3	78
1990	86	3	0	5	94
1991	73	1	1	4	79
1992	77	1	0	6	84
1993	98	0	0	3	101
1994	100	2	0	1	103
1995	89	2	1	2	94
1996	103	0	0	2	105
1997	88	0	1	0	89
1998	83	1	0	2	86
1999	90	2	0	5	98
2000	80	1	1	2	84
2001	85	2	1	1	88
2002	89	1	1	3	94
2003	79	2	0	5	86
2004	102	2	0	0	104
2005	75	1	0	1	77
2006	98	1	0	4	103
Total	2,122	54	13	83	2,272

opinions over these twenty-five years is illuminating. From late 1981 through the end of 1986, he wrote twenty-two concurring opinions (40.7% of his career concurring opinions); from 1987 through the end of 1991, he wrote fourteen concurring opinions (25.9% of his career concurring opinions); from 1992 through the end of 1996, he wrote five concurring opinions (9.3% of his career concurring opinions); from 1997 through the end of 2001, he authored six concurring opinions (11.1% of his career concurring opinions); and from 2002 through the end of 2006, he wrote seven concurring opinions (13.0% of his career concurring opinions).<sup>81</sup> Thus—consistent with my findings regarding the frequency of his dissenting opinions<sup>82</sup>—as Judge Posner’s tenure on the bench lengthened, he tended to write fewer concurring opinions (with an interesting uptick of concurrences during his most recent period as an appellate judge). A possible reason for Posner’s generally decreasing rate and number of concurring opinions is his heightened satisfaction with Seventh Circuit opinions. “Posner’s increased satisfaction, in turn, is probably related to both his own persuasiveness in convincing his colleagues to adopt his reasoning on assorted legal issues and to the appointment of more like-minded judges to the Seventh Circuit (as well as the Supreme Court).”<sup>83</sup> Other possible reasons for Posner’s decreasing rate of concurring opinions are Posner’s judicial maturation over time, his intermittent role as Chief Judge, and his ambition for appointment to the Supreme Court.

### B. *Different Ways to Look at Posner’s Concurrences*

Splitting a subject into multiple perspectives—or ways of looking—can yield interesting insights. Indeed, two women writing in separate fields—Jane Smiley in literary criticism and Gretchen Rubin<sup>84</sup> in political biography—provide inspiration for those of us

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<sup>81</sup> See *id.* My statistics do not reflect the type of pure concurring opinions written by Judge Posner. However, in the discussion that follows I do make analytical distinctions of what kinds of concurring judicial opinions Judge Posner wrote. See *infra* notes 84–399 and accompanying text.

<sup>82</sup> See Blomquist, *Dissent, Posner-Style*, *supra* note 4, at 94 (discussing the finding that the frequency of Judge Posner’s dissenting opinions decrease corresponding to his judicial tenure).

<sup>83</sup> *Id.* (providing a similar observation to account for the decreased rate of Posnerian dissenting opinions over his judicial career).

<sup>84</sup> Rubin has a stellar legal background. She received her undergraduate and law degrees from Yale and was editor-in-chief of the *Yale Law Journal*. She clerked for Justice Sandra Day O’Connor of the U.S. Supreme Court and served as counsel to the Federal

writing in the discipline of law. Smiley, in her book *Thirteen Ways of Looking at the Novel*,<sup>85</sup> crafted an intimate writerly series of meditations on the many facets of novels and novel-writing. Among the assorted ways of thinking about her subject, Smiley considered “what is a novel”; “who is a novelist”; “the origins of the novel”; “the psychology of the novel”; “morality and the novel”; and “reading a hundred novels.”<sup>86</sup>

Rubin, in *Forty Ways to Look at Winston Churchill*, provides a fascinating rationale for her fragmented glimpses of the long life of the famous British statesman, author, and adventure-seeker.<sup>87</sup> Rubin explained:

As I plunged into his life, a truth (often noted, often overlooked) confronted me: Churchill’s portrait could be drawn in innumerable ways, all “true.” I was struck to see his biographers reach different conclusions from the same facts. Was Churchill a military genius or a meddling amateur? Was he a great defender of liberty or a reactionary imperialist? Was he a success or a failure? Once I had command of the material, I amused myself by tracing how each account exaggerated certain details, and slid over others, to support its conclusions.<sup>88</sup>

Rubin’s observation that facts are subject to “multiple interpretations and characterizations”<sup>89</sup> is edifying and provocative. Moreover, her description of the artistic tradition of a “multi-angle approach”<sup>90</sup> is fascinating:

There’s a long tradition of reexamining the same subject in multiple ways: the four Gospels, Bach’s *Goldberg*

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Communications Commission Chairman Reed Hundt. She taught at Yale Law School and Yale School of Management. For a further discussion and analysis of Rubin’s work, see <http://www.gretchenrubin.com/about/about.html>.

<sup>85</sup> JANE SMILEY, *THIRTEEN WAYS OF LOOKING AT THE NOVEL* (2005).

<sup>86</sup> *Id.* at vii (capitalization omitted) (chapter headings in table of contents). As she explains in her introduction, in the wake of 9/11, she had difficulty continuing her twenty-year career as a novelist so she decided to re-energize her work by reading one hundred novels to gain fresh perspectives on her craft as a fiction writer. *See id.* at 3–13. Smiley’s synopses (of what turned out to be 101 novels) range from the ancient Japanese novel, MURASAKI SHIKIBU, *THE TALE OF GENJI* (Kencho Suematsu trans., Tuttle Books 2000) (1004)—about a well-born woman describing tales of relationships between the sexes—and the twenty-first century novel, IAN MCEWAN, *ATONEMENT* (2001)—about three pivotal days in an extended English family’s life over the course of several decades of the twentieth century.

<sup>87</sup> GRETCHEN RUBIN, *FORTY WAYS TO LOOK AT WINSTON CHURCHILL: A BRIEF ACCOUNT OF A LONG LIFE* (2003).

<sup>88</sup> *Id.* at 3–4.

<sup>89</sup> *Id.* at 6.

<sup>90</sup> *Id.* at 9.

*Variations*, Wallace Steven's "Thirteen Ways of Looking at a Blackbird," Kurosawa's *Rashomon*, and Monet's Haystack and Rouen Cathedral series all demonstrate the subtleties that emerge when a single subject is viewed under different lights.<sup>91</sup>

In her second biography, *Forty Ways to Look at JFK*, Gretchen Rubin provides another multi-angle approach to examining the numerous accounts of the short life of John F. Kennedy.<sup>92</sup> I was captivated by her amplification of her meta-biographical technique and her explanation of one of the key inspirations for her approach. As Rubin explains in her introduction to the book:

I was struck by Virginia Woolf's diary entry of November 28, 1928, in which she described her ambition for *The Waves*: "I mean to eliminate all waste, deadness, superfluity. . . . [sic] Waste, deadness, come from the inclusion of things that don't belong to the moment; this appalling narrative business of the realist: getting on from lunch to dinner: it is false, unreal, merely conventional." That's what I wanted to accomplish: to eliminate as much as possible, to clarify what I thought important. I wanted a way both to sweep in trifles and to slice through the thicket of facts to make sense of what's known. Instead of selecting a single viewpoint—as almost all biographers do—I wanted a structure that would encompass multiple conclusions and would reveal the biographer's machinations to readers.<sup>93</sup>

The Smiley-Rubin kaleidoscopic technique is suitable for the task of commenting on the concurring opinion style of Judge Richard A. Posner for three reasons. First, this approach allows legal observers to see functional patterns in the relatively rare concurring

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<sup>91</sup> *Id.* at 8–9. Among the differing ways of looking at Churchill, Rubin discusses the following: "Churchill's genius with words: his greatest strength"; "Churchill's desire for fame: his motive"; "Churchill's disdain: his dominant quality"; "Churchill's belligerence: his defining characteristic"; "Churchill the painter: his favorite pastime"; "Churchill the spendthrift: a weakness"; "Churchill's empire: how he saw the world"; "Churchill's imagination: how he saw history"; and "Churchill and Hitler: nemesis." *Id.* at ix–x (capitalization and italics omitted except for proper nouns) (chapter headings in table of contents).

<sup>92</sup> GRETCHEN RUBIN, *FORTY WAYS TO LOOK AT JFK* (2005).

<sup>93</sup> *Id.* at 6. Among the differing ways of looking at JFK, Rubin discusses the following: "Kennedy's excellence: his most outstanding quality"; "Kennedy the fox: his nature"; "Kennedy's mystique: what made him interesting"; "Kennedy's high ideals: what he represented"; "Kennedy's cool: a secret of his appeal"; "Kennedy as muse: what he inspired"; and "who killed John F. Kennedy? The mystery of his assassination." *Id.* at xi–xii (capitalization and italics omitted except for proper nouns) (chapter headings in table of contents).

performances that Posner chooses to stage. Second, this technique permits us a way to compare and contrast Posner's concurring opinion style with his dissenting opinion style, as well as his majority opinion style. Third, this method will allow future scholars to compare Posnerian concurring style with the concurring style of other appellate judges.

What follows, then, consists of ten ways to look at the concurring style of Judge Richard A. Posner: (1) as a congressional adviser, (2) as an advocate of law and economics, (3) as an institutional critic, (4) as a nitpicker, (5) as a weaver of hypotheticals, (6) as a bold cutter of Gordian knots, (7) as an interpreter of statutes, (8) as a critic of judicial standards of review, (9) as a frank commentator on law, and (10) as a show-off during en banc appellate proceedings.

#### 1. Posner as Congressional Adviser: Reflections of His Far-Reaching Intellect and Energy

Two of Judge Posner's most distinctive and winning characteristics are his extraordinary *intellect* and *energy*. One manifestation of these personal qualities is his breathtaking, extra-judicial publication rate of fifty books and over four hundred law review and academic articles.<sup>94</sup> Another manifestation of this intellectual dynamism is the number and rate of his judicial opinion production.<sup>95</sup> Yet another materialization of this mental vivaciousness is the phenomenon of Posner's memos to Congress contained in several concurring judicial opinions. Judge Posner's 1982 concurring opinion in *United States v. Franzen* was his first example of this type of concurrence.<sup>96</sup> Posner "th[ought] it unfortunate as a matter of fundamental principle" that the appellate panel was constrained "to reverse the dismissal of the petition for habeas corpus in this case" and wrote his concurring opinion "to explain why [he thought] it unfortunate, in the hope that Congress will consider reforms in the habeas corpus statute."<sup>97</sup> Opining that if the court "were writing on a clean slate," he would

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<sup>94</sup> See Blomquist, *Aesthetics of Canonicity*, *supra* note 5, at 161 n.1. For a complete list of his publications, see Publications, Presentations and Works in Progress, University of Chicago Law School, <http://www.law.uchicago.edu/faculty/posner-r/ppw.html>. (last visited Jan. 1, 2008) [hereinafter Publications].

<sup>95</sup> See Blomquist, *Playing on Words*, *supra* note 1, at 684–89, 733; see also Blomquist, *Aesthetics of Canonicity*, *supra* note 5, at 162–64 (continuing a statistical overview of Judge Posner's work).

<sup>96</sup> 676 F.2d 261, 267 (7th Cir. 1982) (Posner, J., concurring).

<sup>97</sup> *Id.*

be inclined to declare that the petitioner Jones would be ineligible under federal constitutional and statutory law to reopen his criminal case, tried in Illinois state court, involving murders performed by state prison inmates during the course of a prison riot that occurred in 1965.<sup>98</sup> Posner was of this view because:

It is an affront to the principles both of federalism and of rational criminal procedure for a single federal district judge to reexamine fact findings fairly made by a state trial court and affirmed with full opinion by the state's highest court. It undermines the responsibility and morale of state judges, denies reasonable finality to criminal proceedings and thereby undermines the legitimacy of the criminal-justice system, imposes unduly on the time of our busy district judges, arouses false hopes in state prisoners, and probably does not increase the overall accuracy of constitutional determinations.<sup>99</sup>

But, bowing to reality, Posner acknowledged in *Franzen* that it was not the case that the Seventh Circuit was writing on a clean slate since a 1966 federal statute,<sup>100</sup> enacted in response to a 1963 Supreme Court decision,<sup>101</sup> dictated the result in the present case.<sup>102</sup> Cleverly, Posner went on to point out that the jurisprudential insistence on an expansive right of habeas corpus review for state prisoners was “a product of its time”<sup>103</sup>—the Warren Courts’ aggressive constitutionalization of state criminal procedure coupled with “widespread skepticism” concerning the willingness of southern states to protect the civil rights of blacks.<sup>104</sup> Moreover, according to Posner’s concurring opinion, “[t]imes have changed” and more recent Supreme Court opinions had hinted at a weakening of expansive federal habeas corpus entitlements for state prisoners.<sup>105</sup> As Posner saw it, Congress gave no indication in passing 28 U.S.C. section 2254(d) that it wanted old Supreme Court precedent on federal habeas corpus rights of state prisoners to be frozen in time—forestalling evolving judicial reform—“but the effect

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 268 (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1962–1963)).

<sup>100</sup> See 28 U.S.C. § 2254(d) (2000).

<sup>101</sup> *Townsend v. Sain*, 372 U.S. 293 (1963), *overruled by* *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

<sup>102</sup> *Franzen*, 676 F.2d at 268.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

of the statute has been to preserve as if in amber the outmoded jurisprudence” of the Warren Court.<sup>106</sup> In closing his concurrence, Posner made the following suggestion to Congress:

If I am correct that the statute has, through inadvertence, come to have an effect different from the one it was intended to have, then it would seem to follow that Congress should reexamine the statute; specifically, that it should consider amending it to provide that federal courts in habeas corpus proceedings may not reexamine state-court factfindings based, as in the present case, on a full and fair evidentiary hearing.<sup>107</sup>

In rapid succession, Judge Posner fired another statutory flare to Congress in his concurrence in *Trecker v. Scag*—a 1982 securities fraud case implicating federal securities law.<sup>108</sup> Posner wryly asserts the reason for his separate concurrence from the majority opinion which he joins “without reservations”; he “write[s] separately only to express [his] doubts whether this case really belongs in the federal courts.”<sup>109</sup> As he puts it: “I do not mean that we do not have jurisdiction; I mean that perhaps we should not have jurisdiction.”<sup>110</sup> Posner’s beef is that such a “local,” small potatoes case—involving a Wisconsin closely held corporation with all of the disputants save one being Wisconsin residents—should not be taking up the valuable time and resources of United States judges; he implies during the course of his analysis that Congress might want to think seriously about tightening up on the jurisdictional provisions of the federal securities statute to exclude these localized disputes.<sup>111</sup> First, he opined that: “If I thought Congress really wanted the federal courts to decide lawsuits of this sort, involving primarily local law applied to local disputes between local residents,

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<sup>106</sup> *Id.* at 269–70.

<sup>107</sup> *Id.* at 270. In *Phelps v. Duckworth*, 772 F.2d 1410, 1416 (7th Cir. 1985) (en banc) (Posner, J., concurring), Judge Posner wrote another opinion suggesting that Congress reform federal habeas corpus procedures for state prisoners. At the outset of his concurrence he observed:

I hesitate to add to the pile of opinions in this case; separate opinions are the bane of the modern American judiciary. But the case so vividly illustrates the tenuous character of the modern law of federal habeas corpus for state prisoners, and so urgently underscores the need for a fresh approach to the entire subject, that I cannot resist commenting . . . .

*Id.*

<sup>108</sup> 679 F.2d 703, 710 (7th Cir. 1982) (Posner, J., concurring).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *See id.*

I would bow to its desire without protest, for there is no constitutional obstacle to federal jurisdiction.”<sup>112</sup> But his take on the expansive trend of administrative rulemaking and Supreme Court precedent since Congress passed the original securities legislation is that federal jurisdiction has mushroomed to encompass “a garden-variety squabble among shareholders in a closely held corporation” with no interstate impact.<sup>113</sup> Second, Posner pointed out that Rule 10b–5 “was defensible as a catch-all prohibition of deceptive devices when the enforcement of the rule was confined to the SEC” because of practical budget constraints that prevented the agency “from [enforcing] anything like all the cases that are within the potential reach of the statutes and rules that it enforces”; but private parties have a different set of incentives that tend to induce litigation “so long as the expected damages exceed, however slightly, the expected cost of the litigation to the plaintiff.”<sup>114</sup> Third, Posner noted that because of *stare decisis* “we have and cannot renounce jurisdiction in this case, even though our jurisdiction is the unintended result of administrative and judicial actions that have pushed the federal courts into an area that a proper conception of federalism would assign to state legislatures and judges.”<sup>115</sup> Finally, Posner recalled plaintiff’s counsel’s comment during oral argument that he had not brought the *Trecker* suit in state court because “there were no cases under Wisconsin’s counterpart to Rule 10b–5—all the case development had been federal.”<sup>116</sup> Posner’s response to counsel’s candor was an implicit differentiation between the expansive text of the New Deal era federal securities statute, on the one hand, and what he viewed as the narrower congressional intent behind the legislation: “This is not what Congress intended to happen,” he said, “when it enacted section 10(b) in 1934; I regret that we cannot enforce its actual intentions.”<sup>117</sup>

In a 1989 criminal case involving the murder of a teenage girl and the subsequent conspiracy to kill a government witness (also a teenage girl), *United States v. D’Antoni*, Judge Posner wrote a concurring opinion to point out a flaw in the federal maximum

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 711.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 712.

<sup>117</sup> *Id.*

sentencing statute for conspiracy.<sup>118</sup> According to Posner, the statute at bar—18 U.S.C. section 371—“makes no sense.”<sup>119</sup> The basic flaw was congressional inadvertence in failing to provide for a maximum sentence for conspiracy to kill a federal witness, coupled with an unrealistic maximum sentence of five-years incarceration for any criminal conspiracy—no matter how heinous.<sup>120</sup> In light of a number of cognate federal criminal statutes which provide maximum sentences of ten years or more for various conspiracies (such as a conspiracy to deprive a person of his civil rights, conspiracy to destroy a vessel, and conspiracy to defraud the government), “[t]here is no reason for such a low ceiling” for conspiracy to murder a child witness in a drug prosecution.<sup>121</sup> Judge Posner went on to explain that such a criminal sentencing anomaly “contributes to the randomness of federal criminal punishment.”<sup>122</sup> By way of dramatic anecdote, Posner pointed out: “The same day we heard argument in this case we heard argument in a case where the defendant had received a fifty-year sentence for a relatively minor drug offense.”<sup>123</sup> In specific advice to Congress, Posner opines:

Congress should revise section 371 so that its maximum penalty depends on the crime the defendants conspired to commit. (At the same time it might wish to address another striking deficiency in the federal criminal code—the absence of a general attempt statute.) One way to do this would be to make the maximum penalty for the conspiracy equal to the maximum for the underlying crime, with perhaps a cap of twenty years when the underlying crime is punishable by a longer sentence, provided the conspiracy fails. There is an argument for punishing *successful* conspiracies *more* severely than crimes committed without conspiracy, on the ground that a conspiracy is more dangerous than an individual criminal.<sup>124</sup>

In closing his criminal sentencing memorandum to Congress, Posner observed: “The precise method of implementing the reform is not important. The principle that criminal sentences should be

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<sup>118</sup> 874 F.2d 1214, 1221 (7th Cir. 1989) (Posner, J., concurring).

<sup>119</sup> *Id.*

<sup>120</sup> *See id.* at 1222.

<sup>121</sup> *Id.* at 1221–22 (citing various maximum-sentence provisions in the federal statutes).

<sup>122</sup> *Id.* at 1222.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

related to the gravity of the criminal conduct is, and deserves Congress's attention. Inadequate punishment can work a miscarriage of justice, just as excessive punishment can."<sup>125</sup>

In 1990, Judge Posner offered advice to Congress to resolve a federal securities fraud statute of limitations problem in his concurring opinion in *Short v. Belleville Shoe Manufacturing Co.*<sup>126</sup> Posner didn't like to have to borrow a statute of repose from another federal securities statute to deal with the absence of an appropriate limitations period for 10b-5 suits.<sup>127</sup> In colorful language, he complained that "[b]orrowing a period of limitations from one statute to use with another that doesn't have its own limitations provision is a matter of which round peg to stuff in a square hole."<sup>128</sup> In particular, in Posner's analysis: "It artificially truncates the court's choice of an *appropriate* period, one well suited to the *particular* statute under consideration. It also runs the risk of applying one unprincipled legislative deal to a problem entirely outside the scope of the deal."<sup>129</sup> He offers an apt illustration of his concerns:

Suppose Statute A specifies no period of limitations. Statute B regulates analogous conduct, and has a six-month period. But maybe B has such a short deadline for suit only because the interest group that opposed the enactment of B had enough muscle to block a longer deadline that would have made more sense from a neutral standpoint. In that event, to borrow B's limitations period for use with A will project the interest-group pressures that deformed B into a completely new area of conduct.

Whether or not courts are aware of this danger, they do attempt to correct for it by considering, as part of the borrowing procedure, the suitability to the substantive rule under consideration of the limitations periods in the various candidate statutes of limitations. But this places a lot of balls in the air. The considerations bearing on the suitability of one limitations period compared to another include the difficulty of investigating potential violations, the possibility that the consequences of wrongdoing will be delayed, the

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<sup>125</sup> *Id.*

<sup>126</sup> 908 F.2d 1385, 1393 (7th Cir. 1990) (Posner, J., concurring).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

opportunities for wrongdoers to conceal the wrong, the rate at which evidence of wrongdoing and also evidence pertinent to the alleged wrongdoer's defense is likely to decay, the sophistication of the relevant tribunals in handling stale evidence, the desirability of freeing court time for fresh claims, the interest of potential defendants in repose—that is, in knowing after a definite period has passed that they no longer have to worry about being sued—and the effect on the deterrence of statutory violators of reducing the time for bringing suit.<sup>130</sup>

Judge Posner continued his advice to Congress in *Short* by voicing concern about courts applying a “standardless, discretionary judgment: a multifactor test with no weights on the factors.”<sup>131</sup> Moreover, he opined that “[s]ince courts cannot be expected to converge on a uniform outcome when they are operating under such a standard, predicting what statute of limitations will be borrowed is impossible and as a result extensive litigation often is necessary before a definitive conclusion on the limitations period emerges.”<sup>132</sup> Posner raised, but then rejected, the idea of courts to candidly “create statutes of limitations for claims that lack them”;<sup>133</sup> the problem with this approach is the disparity that would exist in lower court decisions on appropriate limitation periods.<sup>134</sup> Judge Posner suggests that an “institutional solution is necessary” with two possible approaches.<sup>135</sup>

“One . . . would be for Congress to adopt a rule that every statute shall contain a statute of limitations.”<sup>136</sup> To enforce such a rule would require a congressional agency to canvass new federal statutory enactments and point out statutes which lack congressional limitations periods or, alternatively, to adopt a rule of interpretation whereby “if a statute contains no period of limitations, there . . . is no deadline on suing.”<sup>137</sup>

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<sup>130</sup> *Id.* at 1393–94.

<sup>131</sup> *Id.* at 1394.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1394–95.

<sup>137</sup> *Id.* at 1395 (citation omitted). Posner notes in this regard:

This would cause considerable havoc but could be mitigated by a rule (well within the power of judges to create, I believe) that, in the absence of a statutory limitations period, the courts will apply the equitable doctrine of laches even if the cause of action is legal rather than equitable. Then the defendant could defend by showing that the plaintiff had unreasonably delayed in bringing the suit and that the defendant had been hurt by

A second potential way for creating uniform limitation periods for federal statutes which lack such periods “would be for Congress to delegate to the Judicial Conference of the United States, or to some new agency modeled on the Sentencing Commission . . . the power to adopt by regulation a period of limitations for any statute that does not have one.”<sup>138</sup> According to Judge Posner, “[t]his would lift the burden from Congress of having to specify a limitations period in every enactment and would shift it to an expert body that could avoid the delay of litigation. It would be a great improvement over borrowing.”<sup>139</sup>

Another prominent example of Judge Posner deploying a concurring judicial opinion as a policy memorandum to Congress is his concurrence in the 2003 immigration dispute, *Oforji v. Ashcroft*.<sup>140</sup> Indeed, at the outset of his concurring opinion, Posner joins the majority opinion “in the main, though we interpret some of the facts in this confusing record differently.”<sup>141</sup> Posner “write[s] separately not to quibble over these differences but to invite congressional attention to a pair of anomalies in the immigration laws.”<sup>142</sup> The first rule that he suggests Congress needs to reconsider is the flat ten-year period for an alien living in the United States to plead hardship to her children (born in the United States and, therefore, American citizens) as a basis for suspension of the parent’s deportation proceeding.<sup>143</sup> Judge Posner’s rationale on this point is as follows:

[The ten-year] rule has only a tenuous relation to the hardship of children whose parent is ordered deported. What is true is that the longer the children have lived in the United States, the greater the hardship to them of being sent back to their parent’s native country—one of the unappetizing choices facing these children and a choice made more excruciating the longer they remain here and become acclimated to American ways. But the length of time a child has lived in the United States depends on when she was born as well as on when her parents came to the United States.

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the delay.

*Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> 354 F.3d 609, 619 (7th Cir. 2003) (Posner, J., concurring).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 620.

The parent may have been here for ten years but the child [may] have been born six months ago; or the parent may have been here for nine years but the child [may] have been born eight years ago. *The [ten-year- flat period] rule is irrational [when] viewed as a device for identifying those cases in which the hardship to an alien's children should weigh against forcing her to leave the country.*<sup>144</sup>

A second immigration rule which Posner suggests Congress should rethink is the absolute “awarding of citizenship to everyone born in the United States,” with a few exceptions for cases involving children of foreign officials.<sup>145</sup> Although potentially anchored in the language of “section 1 of the Fourteenth Amendment,” Judge Posner believes that the real problem is a statutory one since Title 8 of the United States Code dictates the automatic citizenship approach for all children born in America—regardless of the circumstances.<sup>146</sup> Posner is concerned about abuses that such a bright line rule fosters—such as the tens of thousands of babies born in the United States every year to “illegal immigrants and others who come here to give birth so their children will be American citizens.”<sup>147</sup> According to his reasoning, “[w]e should not be encouraging foreigners to come to the United States solely to enable them to confer U.S. citizenship on their future children.”<sup>148</sup>

## 2. Posner as Advocate of Law and Economics: His Leitmotif

A recurrent theme running through the scholarly and judicial work product of Richard A. Posner is his discussion of economic principles applied to the myriad of problems in the law. Indeed, Posner is viewed by many as the founder of the Field of Law and Economics. So it is not surprising that Judge Posner has chosen to utilize his concurring and majority opinions as occasions for emphasizing how (in his view) economics can clarify and elucidate the best way to resolve legal issues. Early in his tenure on the federal appellate bench, Posner offered numerous Law and Economics concurring opinions. For example, in the 1983 case of *Planned Parenthood Ass'n of Chicago Area v. Kempiners*, Posner joined the per curiam opinion which vacated the district court's

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<sup>144</sup> *Id.* (emphasis added).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 620–21 (citing 8 U.S.C. § 1401(a) (2000)).

<sup>147</sup> *Id.* at 621 (internal quotation marks omitted) (citation omitted).

<sup>148</sup> *Id.*

ruling in favor of the plaintiff's constitutional claim for the taking of additional evidence on the issue of standing; he wrote separately to examine Planned Parenthood's economic stake in the litigation.<sup>149</sup> The Illinois statute at issue "creates a program for state funding of organizations that offer assistance in problem pregnancies, provided the organization does not refer or counsel for abortion."<sup>150</sup> The nub of Judge Posner's concurrence addressed the probability of Planned Parenthood receiving money from the state program:

Planned Parenthood has standing to challenge [the statutory] proviso if there is a reasonable probability that striking it down would result in a tangible benefit to Planned Parenthood: namely, receiving money under the program. I do not think Planned Parenthood has to show that it will be certain to receive money if the proviso is struck down; but if that is only a remote possibility, Planned Parenthood's tangible stake in the outcome of this lawsuit is too slight to give it standing.<sup>151</sup>

Unfortunately, the remainder of his concurring opinion is rambling and incomprehensible on the issue of standing because of the speculative and incoherent musings that Judge Posner indulges in for the purpose of guessing why the plaintiff delayed in applying for a state grant.<sup>152</sup> Posner's concurring opinion in another 1983 case, *St. Joseph Bank & Trust Co. v. United States*,<sup>153</sup> also falls short of providing economic analysis which illuminates the federal income tax issues at bar. Instead, Posner's riffs on "the economics of the family" and the ways that "[a] housewife contributes to the wealth of the family by freeing up, for the production of additional market income, time that the husband would otherwise have to devote to household work," come across as more exhibitionist and extravagant than analytically useful.<sup>154</sup>

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<sup>149</sup> 700 F.2d 1115, 1135 (7th Cir. 1983) (per curiam) (Posner, J., writing separately).

<sup>150</sup> *Id.* (internal quotation marks omitted) (citing Ill. Rev. Stat. 1981, ch. 111 ½, §§ 4601–100 (current version at Problem Pregnancy Health Services and Care Act, 410 ILL. COMP. STAT. ANN. 230/4–102 (West 2007))).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 1136–37.

<sup>153</sup> 716 F.2d 1180, 1186 (7th Cir. 1983) (Posner, J., concurring).

<sup>154</sup> *Id.* at 1187. For another example of an extravagant, turgid "Law and Economics" analysis, see *Bohen v. City of E. Chicago*, 799 F.2d 1180, 1189 (7th Cir. 1986) (Posner, J., concurring).

If such [sexual] harassment is rampant, the city will have to pay higher wages to attract female employees. It is unlikely to reap an offsetting gain in lower wages for male employees who obtain along with their jobs a license as it were to harass female workers. Many, perhaps most, men don't want such a license; and among those who do, still most

In contradistinction, Judge Posner's Law and Economics analysis concurrence of why it made sense to award costs to the government defendants in an unfounded lawsuit brought by neighbors who were upset about a Department of Housing and Urban Development property which had become vacant and allegedly derelict, was forceful and compelling.<sup>155</sup> As eloquently expressed by Posner:

[A] factor that the plaintiffs ask us to consider is whether, if they had won the case, it would have been a "landmark" decision; they argue that the efforts of litigants who press for fundamental changes in the law should be subsidized, lest the high risk of losing deter such litigants. I question the validity of this argument in today's legal climate. The federal courts are choking with litigation, much of it completely meritless; fear of losing seems not to be much of a deterrent. And to reward the loser of what would have been a landmark case if he had won creates the following paradox: the more frivolous the suit, the greater the landmark it would establish in the unlikely event that it succeeded, and hence the stronger the argument for denying the winner his costs. A successful suit to overrule *Brown v. Board of Education* and thus make racial segregation in public schools once again lawful, would be one of the all-time legal landmarks. No one takes the landmark argument for forgiving the loser's costs that seriously; no one argues for interpreting Rule 54(d) to encourage the bringing of lawsuits that have no reasonable chance of succeeding, merely because if they did succeed they would work a legal revolution. The present lawsuit had no reasonable chance of succeeding, and in fact borders on the frivolous.<sup>156</sup>

The above-mentioned quotation from Posner's *Burroughs* concurrence is winning because it is cast in terms that everyone can understand and it utilizes an example that powerfully illustrates the operation of the economic principles involved in deciding whether or not to award costs against the losing plaintiff. Another example of a practical take on economic issues is found in Judge Posner's concurring opinion in *Jones v. Miller*;<sup>157</sup> in that

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don't value it as much as women disvalue being harassed. More important, the productivity of both male and female employees must suffer if harassment is common. *Id.* at 1192.

<sup>155</sup> *Burroughs v. Hills*, 741 F.2d 1525, 1537 (7th Cir. 1984) (Posner, J., concurring).

<sup>156</sup> *Id.* at 1538 (citation omitted).

<sup>157</sup> 768 F.2d 923, 930 (7th Cir. 1985) (Posner, J., concurring).

concurrence, Posner gives commonsense advice to district judges for issuing opinions in bankruptcy cases by suggesting that the busy judges decide cases by tentative oral opinions, followed by a review of the transcript for necessary polishing, citations, and amplification.<sup>158</sup>

Judge Posner's 1987 concurring opinion in *Chicago Board of Realtors, Inc. v. City of Chicago* is valuable because it explains, through straightforward economic analysis, how the ostensible "health, safety, and welfare" purposes for the regulation of residential leases are disingenuous at best and a sham at worse.<sup>159</sup> Posner explains that by "requir[ing] the payment of interest on security deposits; requir[ing] that those deposits be held in Illinois bank;" allowing tenants to withhold rent for some reasons; permitting tenants "to make minor repairs and subtract the reasonable cost of the repair from their rent;" and regulating the late charges landlords can charge tenants, among other changes, the City of Chicago's new residential lease ordinance will have the perverse effect of undermining the quantity and quality of the housing stock available to renters.<sup>160</sup> As Posner put it, "[f]orbidding landlords to charge interest at market rates on late payment of rent could hardly be thought [of as] calculated to improve the health, safety, and welfare of Chicagoans" and, indeed, "may have the opposite effect."<sup>161</sup> The likely consequences of this part of the ordinance are easy to envision in the simply stated language deployed by Judge Posner:

The initial consequences of the rule will be to reduce the resources that landlords devote to improving the quality of housing, by making the provision of rental housing more costly. Landlords will try to offset the higher cost (in time value of money, less predictable cash flow, and, probably, higher rate of default) by raising rents. To the extent they succeed, tenants will be worse off, or at least no better off. Landlords will also screen applicants more carefully, because the cost of renting to a deadbeat will now be higher; so marginal tenants will find it harder to persuade landlords to rent to them. Those who do find apartments but then are slow to pay will be subsidized by responsible tenants . . . who

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<sup>158</sup> *Id.* at 932.

<sup>159</sup> 819 F.2d 732, 741 (7th Cir. 1987) (Posner, J., concurring).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

will be paying higher rents, assuming the landlord cannot determine in advance who is likely to pay rent on time. Insofar as these efforts to offset the ordinance fail, the cost of rental housing will be higher to landlords and therefore less will be supplied—more of the existing stock than would otherwise be the case will be converted to condominiums and cooperatives and less rental housing will be built.<sup>162</sup>

Judge Posner should have quit his economic analysis of the Chicago rental ordinance while he was ahead. After all, he was concurring with the majority opinion which had affirmed the district court's denial of a preliminary injunction sought by Chicago landlords because the ordinance did not violate any federal constitutional standard.<sup>163</sup> Judge Posner's extended economic diatribe (with a parade of economic horrors surmised without substantial economic evidence) goes over the line of reasonable concurrence and takes on the form of an ideological libertarian manifesto.<sup>164</sup>

In his concurring opinion in the 1990 case, *United States v. McKinney*,<sup>165</sup> Judge Posner offered some pithy observations on "the standard for reviewing determinations of probable cause" in criminal cases by lower court judges.<sup>166</sup> In the first place, he likened a judicial probable cause determination in a criminal proceeding to a "finding of negligence in an ordinary tort suit," concluding that both types of judicial findings involve "the application of the legal standard to the facts of the particular

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 734–37, 740–41 (majority opinion).

<sup>164</sup> The following economic analysis in Judge Posner's concurring opinion is unpersuasive because it is not rooted in reasonable inferences but sounds arrogant and ideological:

The ordinance is not in the interest of poor people. As is frequently the case with legislation ostensibly designed to promote the welfare of the poor, the principal beneficiaries will be middle-class people. They will be people who buy rather than rent housing (the conversion of rental to owner housing will reduce the price of the latter by increasing its supply); people willing to pay a higher rental for better-quality housing; and (a largely overlapping group) more affluent tenants, who will become more attractive to landlords because such tenants are less likely to be late with the rent or to abuse the right of withholding rent—a right that is more attractive, the poorer the tenant. The losers from the ordinance will be some landlords, some out-of-state banks, the poorest class of tenants, and future tenants. The landlords are few in number (once owner-occupied rental housing is excluded—and the ordinance excludes it). Out-of-staters can't vote in Chicago elections. Poor people in our society don't vote as often as the affluent.

*Id.* at 742 (Posner, J., concurring) (citation omitted).

<sup>165</sup> 919 F.2d 405, 418 (7th Cir. 1990) (Posner, J., concurring), *abrogated by* *United States v. Spears*, 965 F.2d 262 (7th Cir. 1992).

<sup>166</sup> *Id.*

case.”<sup>167</sup> In Posner’s view, “appellate review of the application of law to fact should be deferential.”<sup>168</sup> In the second place, he employed forceful Law and Economics methodology to show how a lower court finding of probable cause and a lower court finding of negligence are bottomed on an identical kind of judgment:

Both negligence and probable cause require a judgment of reasonableness that is made after balancing costs and benefits (the costs of care and the benefits of accident avoidance in the negligence case, and the costs of getting evidence of criminal guilt by other means and the benefits in protecting privacy in the probable-cause case) and is based explicitly on probabilities (the probability of an accident in the negligence case and the probability that a search will turn up evidence of crime in the probable-cause case).<sup>169</sup>

Several years later in his 2001 concurrence in *Great Lakes Warehouse v. NLRB*, Posner utilized economic exegesis to untangle some knotty principles of federal labor law.<sup>170</sup> He urged the National Labor Relations Board (NLRB) or a future reviewing court “in an appropriate case, which this is not” to amplify and rethink the “conventional principle that offering a promotion is one method of interfering with a union organizing campaign” and “the equally conventional principle that failure to impose discipline uniformly can be evidence of discrimination against a union supporter.”<sup>171</sup> Deploying the effective tropes of a “carrot” and a “stick,” Judge Posner sought to illuminate the questions. First, regarding a “carrot,” he wrote:

The idea that the carrot is as potent as the stick, and therefore that it is as “coercive” to offer a union supporter a promotion to management as it is to fire him, is unsound. Most workers welcome a promotion, and so a company that has a practice of promoting union supporters to get them out of the bargaining unit, the group of workers that vote on whether to unionize the unit, will actually increase the expected income of being a union supporter. The more eager the company is to buy off union supporters, the more union supporters there will be. So likely, therefore, is such a tactic

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<sup>167</sup> *Id.* at 419.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 419–20 (citation omitted).

<sup>170</sup> 239 F.3d 886, 891 (7th Cir. 2001) (Posner, J., concurring).

<sup>171</sup> *Id.* at 892.

of discouraging unionization to backfire that the Board should hesitate to infer such a motive from the offer of promotion.<sup>172</sup>

Second, regarding a “stick,” Posner opined:

[One of the litigants] received the stick, not the carrot; but the use of evidence of nonuniformity in the imposition of discipline to support an inference [of] discrimination has a downside that, again, [is not adequately] recognize[d]. If a company risks legal trouble by exercising lenience in the enforcement of its work rules, it will have an incentive to enforce those rules in a uniform and therefore harsh manner. Lenience will be out. Workers as a whole may suffer. It does not follow that evidence of discriminatory enforcement should be inadmissible, because having strict rules on attendance or performance but enforcing them only against union supporters would be a potent method of discouraging unionization. But the downside [of] this type of evidence that I have pointed to is an argument for the Board’s resolving close cases against an inference of discrimination.<sup>173</sup>

Judge Posner also brought a judicious blend of Law and Economics perspectives to his 2002 concurring opinion in *Schroeder v. Hamilton School District*, which agreed with the majority that a former public school teacher did not present a material issue of fact sufficient to avoid a summary judgment in the school’s favor on a Section 1983 claim (which alleged that he was denied equal protection by the school’s failure to take effective steps to prevent him from being harassed on account of his same-sex orientation).<sup>174</sup> Posner chose to write separately in the case to emphasize that the result would be the same even if the teacher was able to prove that the school administration’s “response to his complaints about the harassment to which he was subjected was tepid in comparison to [the] response to [the] signs of racial prejudice” at the school.<sup>175</sup> He highlighted four key economic considerations in his concurrence in *Schroeder*—all of which supported his startling claim that “[t]he administration of the public schools of this country in the current climate of rancid identity politics, pervasive challenges to authority,

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> 282 F.3d 946, 956 (7th Cir. 2002) (Posner, J., concurring).

<sup>175</sup> *Id.*

and mounting litigiousness is an undertaking at once daunting and thankless.”<sup>176</sup> First, Judge Posner noted that “it is not irrational to prioritize protective activities. It is in fact unavoidable, because of limitations of time and (other) resources.”<sup>177</sup> In Posner’s view: “If race relations are a particularly sensitive area in a particular school, the school authorities are not irrational in deciding to devote more time and effort to defusing racial tensions than to preventing harassment of a homosexual (or overweight, or undersized, or nerdy, or homely) teacher.”<sup>178</sup> Second, examining the economics of unknown harassment, Posner wrote that “when most of the abuse directed at a person is anonymous,” as it was in the case at bar, “the school authorities may be unable to prevent it without a disproportionate commitment of resources to the effort or a disproportionate curtailment of student rights.”<sup>179</sup> Third, Judge Posner emphasized the logic of school administrator’s “reticence about flagging issues of sex for children” based on the following legitimate educational concerns: “[I]t is possible for a rational school administration to fear that if it explains sexual phenomena, including homosexuality, to schoolchildren in an effort to get them to understand that it is wrong to abuse homosexuals, it will make children prematurely preoccupied with issues of sexuality.”<sup>180</sup> Again, elaborating on a theme of rational cost-benefit calculation for school officials, Posner stated a fourth economic consideration that supported judicially denying the plaintiff’s legal claim:

[I]t is a mistake automatically to equate favoritism to discrimination. The difference is that while discrimination against a group harms the group, favoritism for another group may not harm the nonfavored group, or may harm it too slightly for the law to take notice. Even if the school authorities had no good reason to be as solicitous of the welfare of their black and female students as they were, it

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<sup>176</sup> *Id.* at 959.

<sup>177</sup> *Id.* at 958 (citations omitted).

<sup>178</sup> *Id.* Judge Posner added the following additional analysis to this first point:

It is true that the out-of-pocket costs of some additional measures that the [school] might have taken, for example adding to every memo warning against discrimination on grounds of race the words “or sexual orientation,” would have been slight. But such an addition would have a negligible effect without amplification—except perhaps to dilute the warning against racial discrimination. *The more amplification, moreover, the greater the dilution—which shows that the measure would not have been costless after all.*

*Id.* (emphasis added).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

would not follow that, had they been less solicitous of them, Schroeder would have benefited; and, if not, how was he hurt?<sup>181</sup>

Judge Posner ended his *Schroeder* concurring opinion with a bold bow of political philosophy, managing to tie together his Law and Economics reasoning into a well-wrapped conclusion:

We judges should not make [the administration of the public schools] even more daunting [than it already is] by injecting our own social and educational values in the name of “rationality review”. So while in hindsight it appears that the defendants could have done more to protect Schroeder from abuse, it is equally important to emphasize that lackluster is not a synonym for invidious or irrational. There is no evidence that the defendants were hostile to Schroeder because of his sexual orientation—or because of anything else, for that matter. And they cannot be said to have been irrational in failing to do more than they did, as there were rational considerations counseling against more vigorous action.<sup>182</sup>

### 3. Posner the Institutional Critic: His Concern with Core Competencies, Boundaries, and Purposes

Another way to look at the concurring judicial opinions of Judge Richard A. Posner is to consider those concurrences which have emphasized institutional considerations. In this regard, Posner is adept at understanding the legal process dimensions of the American system of making and applying law in numerous instantiations of organizations.<sup>183</sup> He has an uncanny ability to fathom the appropriate boundaries of judicial intervention and management of public policy problems, on the one hand, while understanding the proper role of other institutions, on the other hand. An early example of Posner’s use of the concurrence as a method of institutional critique is his 1983 concurring opinion in

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 959.

<sup>183</sup> The classic American legal book on the importance of law and institutions is HENRY M. HART, JR. & ALBERT M. SACKS, *LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (tent. ed. 1958). For an extended discussion of institutional factors that bear on American legislatures, see Robert F. Blomquist, *The Good American Legislator: Some Legal Process Perspectives and Possibilities*, 38 AKRON L. REV. 895 (2005).

*Gautreaux v. Pierce*.<sup>184</sup> Judge Posner strongly preferred a different theory than the majority opinion,<sup>185</sup> which affirmed the district court's factual finding that the so-called Academy Square housing project, approved by the Federal Department of Housing and Urban Development (HUD), was in the "best interest[] of the community"—the standard earlier set in the complex litigation by a consent decree.<sup>186</sup> Posner had a serious problem with the justiciability, under Article III of the U.S. Constitution, of a federal district judge passing on the essentially political issue of whether or not a fifteen percent ceiling of public housing units in a census tract on the Near West Side of Chicago could be exceeded if "HUD shows to the court's satisfaction that the project is in the best interests of the community where the assisted housing would be located."<sup>187</sup> Initially, he pointed out that for a trial judge's decision "to be judicial in character, the standard for decision must be definite enough to allow a reasoned judgment, as distinct from a political judgment such as a legislative or administrative body might make."<sup>188</sup> Next, in a fascinating meditation on the "best interests of the community" standard in the consent decree in the case at bar compared with other judicial best interest standards, he concluded that these other standards were established by Congress (in contrast to the consent decree), could be given meaning by the context of the statutory language (in contrast to the consent decree), and usually focused on a particular individual (in contrast to the consent decree specifying a "community" which "is an aggregation of individuals having different, and in this case warring, interests").<sup>189</sup> In a related insight, Posner opined that "[i]f the parties to the decree wanted someone to make a best interests of the community determination, as evidently they did, they should have appointed an arbitrator."<sup>190</sup> At this point in his concurring opinion, Judge Posner noted that there were analogous situations when judges would not set unspecified terms in an agreement:

A court will not enforce an ordinary contract that is indefinite—a contract that does not specify a price, for

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<sup>184</sup> 707 F.2d 265, 270 (7th Cir. 1983) (Posner, J., concurring).

<sup>185</sup> See *supra* notes 34–35 and accompanying text for this reason for writing an appellate concurring opinion, among other reasons.

<sup>186</sup> *Gautreaux*, 707 F.2d at 269 (majority opinion).

<sup>187</sup> *Id.* at 270 (Posner, J., concurring) (internal quotation marks omitted).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 270–71.

<sup>190</sup> *Id.* at 271 (internal quotation marks omitted); see, e.g., HART & SACKS, *supra* note 183, at 306–30 (discussing arbitration).

example (unless it appears that the parties meant the price to be the market price or some other readily ascertainable standard of value). . . . When courts do in effect fix a price—when they fix the reasonable “price” of life and limb in awarding damages in personal-injury cases, for example—they do so in accordance with objective standards, which are lacking here. If courts will not let contracting parties delegate to them the function of setting essential terms of the contract, no more should they agree to play city planner just because the parties would like them to.<sup>191</sup>

Posner was not persuaded by the evidence of best interest of the community relied upon by the majority opinion (noting “[t]he various shards of evidence on which my brethren rely seem to me unpersuasive singly and in combination”).<sup>192</sup> But, shifting ground, he argued that the district court’s order should be affirmed since the appellants in the present case lacked standing because they were “neither parties to the decree nor third-party beneficiaries” to the decree.<sup>193</sup> To allow these appellants to challenge the consent decree would, in Posner’s colorful turn of phrase, “turn every consent decree into a statute.”<sup>194</sup> Thus:

If a seller of bakery products sued a competitor for predatory pricing, and they entered into a consent settlement that the court approved and embodied in a consent decree forbidding the defendant to sell its bakery products below cost, no other sellers of bakery products besides the plaintiff could later intervene to enforce the consent decree because they thought the defendant was hurting them by selling below cost. The consent decree would not be a privately enforceable statute limiting the defendant’s pricing freedom; it would be a source of enforceable rights only to the plaintiff. Similarly, the lawsuit that the consent decree in this case settled was brought by black people complaining of segregated public housing, and the decree was for their benefit. No one else has a legally enforceable right to block the project in the name of the decree.<sup>195</sup>

Posner’s institutional critique in his 1982 concurrence in *Trecker*

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<sup>191</sup> *Gautreaux*, 707 F.2d at 271 (Posner, J., concurring) (citations omitted).

<sup>192</sup> *Id.* at 272.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 273 (citation omitted).

<sup>195</sup> *Id.*

*v. Scag*<sup>196</sup> was premised not on the core competency of federal courts in resolving judicial types of disputes, as was his concern in *Gautreaux*,<sup>197</sup> but on the institutional purpose that Congress had in mind in enacting the federal securities statute in 1934. In *Trecker*, Posner could not believe that Congress wanted federal courts to exercise “federal jurisdiction in a case [which was] a garden-variety squabble among shareholders in a closely held corporation, which could not even be maintained as a diversity action because of the lack of complete diversity among the parties.”<sup>198</sup>

Judge Posner spoke to the institutional concerns of the Federal Bureau of Investigation (FBI) in his concurrence in the 1983 en banc case of *Egger v. Phillips*.<sup>199</sup> *Egger* involved a former FBI agent who brought suit against his former superior seeking damages based on allegations that his transfer from an FBI field office in Indianapolis to Chicago and his subsequent discharge for failure to report to his new duty station was in violation of his constitutional rights.<sup>200</sup> Posner agreed that the ex-FBI agent could not sue his former supervisor for money damages for institutional reasons: “I am not convinced,” he wrote, “that this case should be decided differently [from a previous Seventh Circuit decision which disallowed a suit for money damages sought by members of an army reserve unit for their transfer to another unit]”;<sup>201</sup> this was because “of the potential disruptive effect of damages liability on the FBI’s ability to maintain discipline and cohesion.”<sup>202</sup>

In his 1984 concurrence in *Burroughs v. Hills*, Judge Posner wrote separately to emphasize the important boundary issue that the loser of a federal lawsuit should be responsible for paying costs.<sup>203</sup> His 1985 concurring opinion in *United States v. OCCI Co.* focused on the institutional nature of HUD’s decision to foreclose on a commercial mortgage;<sup>204</sup> such a decision, according to Posner, should not be subject to judicial review because of the lack of any

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<sup>196</sup> 679 F.2d 703, 710 (7th Cir. 1982) (Posner, J., concurring). For a discussion of Posner’s concurrence in *Trecker v. Scag* as an example of his concurring opinions providing advice to Congress, see *supra* notes 108–17 and accompanying text.

<sup>197</sup> See *supra* notes 184–195 and accompanying text.

<sup>198</sup> *Trecker*, 679 F.2d at 710–11.

<sup>199</sup> 710 F.2d 292, 324–25 (7th Cir. 1983) (en banc) (Posner, J., concurring).

<sup>200</sup> *Id.* at 294.

<sup>201</sup> *Id.* at 325.

<sup>202</sup> *Id.*

<sup>203</sup> 741 F.2d 1525, 1537 (7th Cir. 1984) (Posner, J., concurring). For a discussion of Posner’s concurrence in *Burroughs* as an example of Law and Economics reasoning, see *supra* notes 155–56 and accompanying text.

<sup>204</sup> 758 F.2d 1160, 1166 (7th Cir. 1985) (Posner, J., concurring).

meaningful standard to apply and because:

The decision to foreclose on a commercial mortgage [by HUD] rather than give the mortgagor more time, like the decision how much rent to charge for an apartment, *is a managerial and business rather than legal judgment*. It has to be made and implemented quickly in order to be effective, and courts can do little to improve it . . . .<sup>205</sup>

Judge Posner's concurrence in another 1985 case, *Gotches v. Heckler*,<sup>206</sup> like his concurring opinion in *OCCI*,<sup>207</sup> focused on administrative efficiency and efficacy as worthy institutional goals.<sup>208</sup> *Gotches* involved a class action claim of a widow of a retired railroad worker who had been receiving both railroad retirement and social security benefits prior to his death.<sup>209</sup> The railroad worker's widow, through her attorney, sought to effect changes in the government's award of benefits to surviving widows in similar cases throughout the country.<sup>210</sup> The government delayed for about six months in signing a consent decree in the class action and the widow's attorney sought the award of his attorney's fees under the Equal Access to Justice Act.<sup>211</sup> While Posner agreed with the majority opinion—which remanded computation of the attorney fees based on a reasonable calculation of the benefits he had obtained for Mrs. Gotches but not for his fees in negotiating a consent decree which covered generic cases<sup>212</sup>—he was disturbed by “some of its reasoning and about . . . the opinion's unduly harsh tone of criticism of the government.”<sup>213</sup> Posner considered the institutional dynamics of government review of administrative policy change to be a vital government interest which should be respected by the judiciary and given a wide berth:

When the federal government is confronted by a demand to make far-reaching changes in the administration of major programs, under the supervision of a federal judge, the public interest is disserved if the government simply caves in and signs a consent decree drafted by the plaintiffs' counsel,

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<sup>205</sup> *Id.* at 1167 (emphasis added).

<sup>206</sup> 773 F.2d 108, 112 (7th Cir. 1985) (Posner, J., concurring).

<sup>207</sup> See *supra* notes 204–05 and accompanying text.

<sup>208</sup> *Gotches*, 773 F.3d at 112–15 (Posner, J., concurring).

<sup>209</sup> *Id.* at 109–10 (majority opinion).

<sup>210</sup> *Id.* at 109.

<sup>211</sup> *Id.* at 109–12 (citing Equal Access to Justice Act, 28 U.S.C. § 2412 (1982)).

<sup>212</sup> *Id.* at 112.

<sup>213</sup> *Id.* at 112 (Posner, J., concurring).

without careful consideration of the costs, consequences, and ramifications. Government by judicial decree is not yet the norm in this country, and a public agency does neither the courts nor the taxpaying public a favor when it consents too readily to the entry of a far-reaching decree curtailing its freedom of action. It was prudent for the government to take several months to consider and negotiate over the plaintiffs' proposals.<sup>214</sup>

Judge Posner's 1988 concurring opinion in *Archie v. City of Racine*, an en banc rehearing by the full Seventh Circuit, returned his institutional gaze to concerns about the proper "allocation of governmental responsibilities between the states and the federal government."<sup>215</sup> The case involved a Section 1983 civil rights action which arose out of a local fire department dispatcher's failure to provide rescue services as requested by a black woman who died shortly thereafter.<sup>216</sup> The majority opinion determined that the dispatcher had violated no constitutional rights of the deceased woman and, therefore, the administrator of her estate and her surviving children had no cause of action.<sup>217</sup> Posner chose to "write separately to propose a slightly different though consistent view of the case."<sup>218</sup> At the start of his concurrence Posner sympathized with the "victims in these failure-to-rescue cases [who, like the decedent in this matter] appear to be drawn disproportionately from marginal segments of the community, where the ordinary political pressures for effective provision of public reserve services may be attenuated."<sup>219</sup> In addition, he conceded that given the "plastic . . . language of the due process clause of the Fourteenth Amendment, at least when viewed against the ambiguous history of the term 'due process'"; he concluded "that a respectable textual argument can be made in favor of the proposition that [the dispatcher] deprived [the caller] either of her property or her life without due process of law."<sup>220</sup> However, Judge Posner opined that he "[n]evertheless . . . agree[d] that the plaintiffs in the present case must lose."<sup>221</sup> Thus, in a constitutional sense, even a grossly

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<sup>214</sup> *Id.* at 114 (citation omitted).

<sup>215</sup> 847 F.2d 1211, 1224, 1226 (7th Cir. 1988) (en banc) (Posner, J., concurring).

<sup>216</sup> *Id.* at 1213–14 (majority opinion).

<sup>217</sup> *Id.* at 1214.

<sup>218</sup> *Id.* at 1224 (Posner, J., concurring).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 1225.

<sup>221</sup> *Id.*

negligent course of action by the dispatcher, under the circumstances in the record, did not rise to the level of intentional or reckless culpability;<sup>222</sup> moreover, Posner was alarmed at the potential for federal causes of action to displace state courts in the business of adjudicating contract and tort law disputes:

The combination of the procedural innovations that have in the last quarter century revitalized 42 U.S.C. § 1983 (the main vehicle for constitutional tort litigation), with the interpretations of the Fourteenth Amendment that in the same period have vastly expanded the amendment's substantive and procedural limitations upon state action, threaten between them to transfer almost the whole of public contract law and public-employee tort law from the state courts to the federal courts. Not only are the federal courts unprepared for such an influx of litigation, but the transference would be inconsistent with a rational allocation of governmental responsibilities between the states and the federal government. The Supreme Court and the lower federal courts have therefore attempted to come up with limiting principles, and while the scope of those principles is not entirely clear . . . they appear to defeat the effort by the plaintiffs in this case to demonstrate either a deprivation of property or a deprivation of life.<sup>223</sup>

As we have seen, Judge Posner's concurring opinion in *United States v. McKinney* can be primarily appreciated under the rubric of his penchant for economic analysis of law.<sup>224</sup> Yet, Posner added to his hallmark economic approach with an institutional analysis in *McKinney*, noting in this regard "the nature of the issue to be reviewed in relation to the *comparative institutional advantages* of trial and reviewing courts, and other pertinent *practical* considerations, rather than the words in which standards of appellate review are formulated, should . . . determine the scope of review."<sup>225</sup>

Judge Posner's 2001 concurring opinion in *Equal Employment Opportunity Commission v. Indiana Bell Telephone Co.* is an illustration of his turning the light of his exploration of institutional

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<sup>222</sup> *Id.* at 1226.

<sup>223</sup> *Id.*

<sup>224</sup> See *supra* Part III.B.2.

<sup>225</sup> 919 F.2d 405, 423 (7th Cir. 1990) (Posner, J., concurring) (emphasis added to the first phrase).

factors inward on the workings of his own United States Circuit Court of Appeals.<sup>226</sup> The Seventh Circuit was rehearing the case en banc; the gravamen of the dispute was the admissibility and relevance of the collective bargaining agreement as it bore on the discipline of an employee who had engaged in sexually offensive conduct resulting in alleged harassment of women employees.<sup>227</sup> While Posner agreed with the full court that “the panel erred in ordering a new trial on liability,” he objected to the en banc review of the panel decision.<sup>228</sup> He complained:

But we do not take cases en banc merely because of disagreement with a panel’s decision, or rather a piece of a decision, least of all a piece of a decision concerning the relevance of a particular item of evidence to a particular issue in a particular case. We take cases en banc to answer questions of general importance likely to recur, or to resolve intracircuit conflicts, or to address issues of transcendent public significance—perhaps even to curb a “runaway” panel—but not just to review a panel opinion for error, even in cases . . . in which sexual harassment is charged.<sup>229</sup>

Judge Posner noted that “such [en banc] determination is” improper because “[t]he questions” regarding the relevance of a company’s collective bargaining agreement with a union to a federal sexual harassment claim “have not arisen in any other reported case, and for all I know may never arise,” and because the trial court’s exclusion of the collective bargaining agreement evidence was “harmless,” the “grant of rehearing en banc was gratuitous as well as premature.”<sup>230</sup> He added:

And it was premature not only in the sense that there was no need to answer the questions yet, but also because, as a consequence of there being no other cases, we lack an adequate basis in experience for answering *general* questions about relevance; we lack sufficient particulars to be able to generalize intelligently.<sup>231</sup>

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<sup>226</sup> 256 F.3d 516, 529 (7th Cir. 2001) (en banc) (Posner, J., concurring).

<sup>227</sup> *Id.* at 519 (majority opinion).

<sup>228</sup> *Id.* at 529 (Posner, J., concurring).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* He continued in this vein:

It might well be thought foolhardy to lay down a blanket rule, not justified by considerations of privilege, that an entire class of evidence is “irrelevant,” and therefore inadmissible, in a broad class of cases having, potentially at least, diverse facts, without some sense of what those facts might be. A narrower rule might be unexceptionable.

#### 4. Posner as Nitpicker: Two Views

##### *a. Posner is a Nitpicker*

To nitpick is to “find fault in a petty manner,” to quibble in one’s criticism of others.<sup>232</sup> Ample evidence exists to support the proposition that Judge Posner frequently exhibits nitpicking tendencies when he writes concurring judicial opinions.

*Item #1:* His concurrence in *Planned Parenthood Ass’n of Chicago Area v. Kempiners* which engages in tedious speculation over the standing of the plaintiff organization to challenge the constitutionality of an Illinois statute that provided “state funding of organizations that offer assistance in problem pregnancies, provided the organization does not refer or counsel for abortion.”<sup>233</sup> In cryptic—and ultimately trivial—language, Posner pontificates as follows:

Planned Parenthood has standing to challenge this [statutory] proviso if there is a reasonable probability that striking it down would result in a tangible benefit to Planned Parenthood: namely, receiving money under the program. I do not think Planned Parenthood has to show that it will be certain to receive money if the proviso is struck down; but if that is only a remote possibility, Planned Parenthood’s tangible stake in the outcome of this lawsuit is too slight to give it standing.<sup>234</sup>

So, Posner’s quibble in *Planned Parenthood* resulted in a remand to the district court judge to conduct “an evidentiary hearing to explore the questions of standing raised in [his] separate opinion.”<sup>235</sup>

*Item #2:* Posner’s concurrence to the en banc decision in *Parisie v. Greer*, which is unnecessary prolix, adds to the multiplicity of separate opinions, and is gratuitously petty in addressing the merits of the appeal with the following off-handed remarks:

Turning, finally, to the merits of the appeal, I cannot agree that the appellant is entitled to a new trial so that he

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*Id.* at 530.

<sup>232</sup> THE OXFORD DICTIONARY AND THESAURUS 1007 (Am. ed. 1996).

<sup>233</sup> 700 F.2d 1115, 1135 (7th Cir. 1983) (Posner, J., concurring) (internal quotation marks omitted) (citation omitted).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 1116 (per curiam).

can introduce evidence that his murder victim was a homosexual . . . . Parisie wants the evidence admitted in order to bolster his defense of “homosexual panic,” which is the idea that a latent homosexual—and manifest “homophobe”—can be so upset by a homosexual’s advances to him that he becomes temporarily insane, in which state he may kill the homosexual. It is no business of mine whether the State of Illinois chooses to recognize a defense of “homosexual panic” as a subcategory of the insanity defense, but I cannot believe that the Constitution of the United States requires a state to allow defense counsel in a murder case to defame the murderer’s victim as a homosexual without satisfying the normal prerequisite to admitting evidence of reputation—that the evidence be based upon contact with the subject’s neighbors and associates rather than upon the personal opinion of the witness.<sup>236</sup>

*Item #3:* Posner’s concurring opinion in *Piper Aircraft Corp. v. Wag-Aero, Inc.*, a trademark infringement case, which goes on and on to muse on the unimportant issue of whether or not a trial court’s determination of laches ought to be treated as a discretionary judgment of the trial court which should be subject to reversal on appeal “only for a clear abuse of discretion.”<sup>237</sup> It is chock full of string citations,<sup>238</sup> it is aridly academic in tone and substance,<sup>239</sup> and it indulges in digressions from digressions.<sup>240</sup>

*Item #4:* The Posnerian concurrence in *Moore v. Marketplace Restaurant, Inc.*, agreeing with the affirmance, in part, and reversal, in part, of a Section 1983 action which was brought by individuals who were allegedly unlawfully arrested and imprisoned

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<sup>236</sup> 705 F.2d 882, 893 (7th Cir. 1983) (Posner, J., concurring) (internal quotation marks omitted) (citations omitted).

<sup>237</sup> 741 F.2d 925, 935 (7th Cir. 1984) (Posner, J., concurring) (internal quotation marks omitted).

<sup>238</sup> See, e.g., *id.* at 936.

<sup>239</sup> See, e.g., *id.* at 938 (“If I am right that the determination of laches ought not be treated as a discretionary judgment of the trial court, then how has the ‘abuse of discretion’ formulation become so entrenched? The answer seems to be historical; the phrase is a fossil of legal paleontology.”).

<sup>240</sup> See, e.g., *id.* at 939.

The time when equity relief really was discretionary—a judgment committed to the conscience of the chancellor—is past, the law of equity having long ago crystallized in a system of rules similar in basic character to the rules of the common law, though perhaps marginally more flexible. See the splendid discussion of the origins of equity in [string citations to various works of legal history]. (But what could be more flexible than the concept of “due care” which underlies negligence law?).  
*Id.* (citations omitted).

on charges of theft of services from a restaurant.<sup>241</sup> The concurring opinion creates more confusion than light; especially given the remand of a significant part of the litigation to the lower court for jury trial.<sup>242</sup> Moreover, the entire dispute was of a rather trivial nature, involving a group of out-of-towners who stopped at a restaurant and were so displeased with the service that they left without paying—ultimately to be arrested at the campground they were staying, and put in an unpleasant holding cell for several hours.<sup>243</sup> Why did Judge Posner find it appropriate to write a separate opinion from the straightforward majority opinion, and to quibble on nearly every issue in the case as if he were a first year law student writing the answer to a criminal law exam?

*Item #5:* In a concurring opinion to *Phelps v. Duckworth*, an en banc reversal of a panel opinion's approval of a district court's grant of habeas corpus relief, Posner led off his opinion with a frank admission: "I hesitate to add to the pile of opinions in this case; separate opinions are the bane of the modern American judiciary."<sup>244</sup> This (almost humorous) statement is immediately followed by another observation that dissuades a reader from even bothering to go to the trouble of reading the concurrence:

But the case so vividly illustrates the tenuous character of the modern law of federal habeas corpus for state prisoners, and so urgently underscores the need for a fresh approach to the entire subject, that I cannot resist commenting briefly (too briefly to do full justice to an immensely complex area) on what that approach might be, though I am mindful that judges at our level are not empowered to adopt it.<sup>245</sup>

And when one goes to the trouble of reading Judge Posner's concurring opinion in *Phelps*, it tends to repeat many points made in yet another concurrence by Judge Easterbrook, it is thick with dense legal historical points of questionable import, and it comes off as carping and niggling in complaining at its conclusion:

I look forward to the day when the Supreme Court will simplify constitutional criminal procedure and allow us to decide cases such as this on common-sense grounds, rather than making us dance an elaborate quadrille that finds us

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<sup>241</sup> 754 F.2d 1336, 1338–39, 1356 (7th Cir. 1985) (Posner, J., concurring in part).

<sup>242</sup> *Id.* at 1356.

<sup>243</sup> *Id.* at 1340–41.

<sup>244</sup> 772 F.2d 1410, 1416 (7th Cir. 1985) (en banc) (Posner, J., concurring).

<sup>245</sup> *Id.*

however in the same place when the music stops—with a conclusion that the defendant is not in custody in violation of the Constitution.<sup>246</sup>

There are numerous additional caviling concurring moments in Judge Posner's judicial oeuvre including: wailing about the long-standing Supreme Court gloss on Article I, Section 10, Clause 1 of the United States Constitution—the Contract Clause—and characterizing the Supreme Court's interpretations as “defang[ing] the [C]ontract [C]lause”;<sup>247</sup> niggling over the differing abstract considerations for judicial modification of institutional reform consent decrees, on the one hand, and private property consent decrees, on the other hand;<sup>248</sup> a rambling rant about the artistic and expressive merits of striptease dancing;<sup>249</sup> fussy worry over federalism concerns in burden-shifting rules applicable to employment discrimination cases;<sup>250</sup> picayune posturing over emerging jurisprudence in sexual stereotyping employment cases;<sup>251</sup> and irksome discussion of class-of-one equal protection litigation.<sup>252</sup>

*b. Posner is Not a Nitpicker*

Nitpicking, as previously stated, involves petty (and, therefore, trivial) fault-finding or hair-splitting.<sup>253</sup> Considered in another way, however, most of the “nitpicking tendencies” alleged to exist in Judge Posner's concurring judicial opinions<sup>254</sup> are really examples of his extraordinary diligence as a federal appellate judge. Indeed, these cases, examined from a different angle, are examples of: his rightful concern that litigants in federal litigation have proper standing;<sup>255</sup> his well-founded interest in avoiding cheapening the meaning of habeas corpus standards in state prisoner petitions;<sup>256</sup> his judicious regard for articulating and applying appellate

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<sup>246</sup> *Id.* at 1419.

<sup>247</sup> *Chi. Bd. of Realtors v. City of Chi.*, 819 F.2d 732, 744 (7th Cir. 1987) (Posner, J., concurring).

<sup>248</sup> *Money Store, Inc. v. Harriscorp Fin., Inc.*, 885 F.2d 369, 374–77 (7th Cir. 1989) (Posner, J., concurring).

<sup>249</sup> *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1089–99 (7th Cir. 1990) (en banc) (Posner, J., concurring).

<sup>250</sup> *Bourbon v. Kmart Corp.*, 223 F.3d 469, 473–77 (7th Cir. 2000) (Posner, J., concurring).

<sup>251</sup> *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1066–68 (7th Cir. 2003) (Posner, J., concurring).

<sup>252</sup> *Bell v. Duperrault*, 367 F.3d 703, 709–13 (7th Cir. 2004) (Posner, J., concurring).

<sup>253</sup> *See supra* note 232 and accompanying text.

<sup>254</sup> *See supra* Part III.B.4.a.

<sup>255</sup> *See supra* notes 233–35 and accompanying text.

<sup>256</sup> *See supra* notes 244–46 and accompanying text.

standards of review;<sup>257</sup> his impressive responsibility in delving into the rights of citizens to be treated with regard to their constitutional privacy entitlements;<sup>258</sup> and his free and independent role as a federal appellate judge to comment on matters of legal importance and to offer his own take on flagging, criticizing, solving, and reconciling legal problems.<sup>259</sup>

Looking at some further instances of nitpicking-at-first-blush Posnerian concurrences that, upon deeper reflection, are worthwhile concurring opinions can help us realize that Judge Posner typically has good reasons to add his penetrating insight when he chooses to concur. Consider his concurrence in *Greider v. Duckworth*.<sup>260</sup> On a surface level, perhaps, Posner seeks to split hairs in this *habeas corpus* case by seeking to separate “proof of guilt beyond a reasonable doubt” from proof of sanity beyond a reasonable doubt.<sup>261</sup> But, on a deeper level of analysis, Posner is right to make this distinction in this case (involving a state law where the first standard was allocated to the state as part of the prosecutor’s prima facie case and the second standard allocated to the defendant as a potential affirmative defense).<sup>262</sup> Take Judge Posner’s concurring opinion in *Gotches v. Heckler*.<sup>263</sup> Upon initial reading, one might be tempted to view his harangue about the “unduly harsh tone of criticism of the government”<sup>264</sup> in delaying resolution of a railroad retiree’s widow’s claim for federal benefits as trifling; yet, when one pauses to take in the full import of Posner’s critique, which boils down to the pragmatic necessity of allowing federal governmental officials to properly consider the consequences of signing a consent decree with far-ranging programmatic effects, his opinion takes on heft. And scrutinize Posner’s concurrence in *United States v. Hall*.<sup>265</sup> Why is it necessary for the judge to wax on to further expound upon a statement in the majority opinion that “may puzzle some readers,” to wit, “[a]n attempt to define reasonable doubt presents a risk without any real benefit?”<sup>266</sup> A preliminary reaction

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<sup>257</sup> See *supra* notes 237–40 and accompanying text.

<sup>258</sup> See *supra* notes 241–43 and accompanying text.

<sup>259</sup> See *supra* notes 247–52 and accompanying text.

<sup>260</sup> 701 F.2d 1228, 1235 (7th Cir. 1983) (Posner, J., concurring).

<sup>261</sup> *Id.* at 1236.

<sup>262</sup> *Id.* at 1235.

<sup>263</sup> 773 F.2d 108, 112 (7th Cir. 1985) (Posner, J., concurring).

<sup>264</sup> *Id.* For a discussion of Posner’s concurrence in *Gotches* and as an example of institutional concern, see *supra* notes 206–14 and accompanying text.

<sup>265</sup> 854 F.2d 1036, 1043 (7th Cir. 1988) (Posner, J., concurring).

<sup>266</sup> *Id.* (internal quotation marks omitted).

to this concurrence might be to skip the surplus that you would expect to follow. But that would be a mistake because Posner has useful points to add to the majority opinion that held that it was not reversible error for the trial judge to give the jury a reasonable doubt instruction.<sup>267</sup> First, Posner nods to the “district judge” who should be allowed, without reversal on appeal, to give a reasonable doubt instruction when “on the basis of his experience with juries and his observation of the particular jury thinks that such an instruction would help the jurors” in deliberating on a criminal law verdict.<sup>268</sup> Second, he explains that in spite of appellate deference to the lower court on this matter, “ordinarily the district judge will be well advised to attempt no definition of reasonable doubt” because “[t]his advice reflects experience (almost uniformly negative) with attempts to define the term.”<sup>269</sup> As Posner wisely points out: “The verbal elaborations that have been tried appear to add little if any substance to the meaning conveyed by the term itself; deeply entrenched in the popular culture as it is, the term ‘beyond a reasonable doubt’ may be the single legal term that jurors understand best.”<sup>270</sup> Thus, “[d]efinitions that translate the term into a probabilistic measure, while they may add content, are apt to mislead the jurors.”<sup>271</sup> Third, Posner illustrates his analysis with colorful contrasting illustrations. He says, “proof beyond a reasonable doubt requires . . . that the jury be certain of the defendants’ guilt, with this proviso: complete certainty—the certainty of such propositions as that cats do not grow on trees and that I have never set foot on Mars—is never attainable” in a criminal trial setting.<sup>272</sup> Finally, in concluding his *Hall* concurrence Judge Posner offers valuable and practical insights which usefully amplify the majority opinion:

Numerical estimates of probability are helpful in investments, gambling, scientific research, and many other activities but are not likely to be helpful in the setting of jury deliberations. No objective probability of a defendant’s guilt can be estimated other than in the rare case that turns entirely on evidence whose accuracy can be rigorously expressed in statistical terms (e.g., fingerprints and

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<sup>267</sup> *Id.* at 1037–38 (Kanne, J., majority).

<sup>268</sup> *Id.* at 1044 (Posner, J., concurring).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* (internal quotation marks omitted).

paternity tests). In other cases the jury's subjective estimate would float free of check and context. It is one thing to tell jurors to set aside unreasonable doubts, another to tell them to determine whether the probability that the defendant is guilty is more than 75, or 95, or 99 percent.

If judges are not going to tell juries to attach a percentage figure to proof beyond a reasonable doubt, and if attempts at verbal elaboration of reasonable doubt are likely to yield barren tautologies, it makes practical sense not to instruct the jury at all on the meaning of proof beyond a reasonable doubt. I therefore agree with [the majority's] admonition to the district judges.<sup>273</sup>

##### 5. Posner as Weaver of Hypotheticals and Wordplay: The Law Professor as Judge

In the course of writing his concurring judicial opinions, Judge Posner has manifested an appetite for hypothetical scenarios and elegant wordplay—habits of thought that, perhaps, he carries over from being a law professor.<sup>274</sup>

In his concurrence in *Greider v. Duckworth*, Posner memorably describes how madness impacts the criminal law:

You can be insane yet still be capable of entertaining the subjective desire to kill a human being. But you cannot be convicted of murder if you are so crazy that you kill without knowing what you are doing. Thus, if Greider was under the delusion that he was shooting two gerbils rather than two human beings, he could not be guilty of murder, but if this delusion took the form of thinking that he had a sacred duty to reduce the human population by two, he could be guilty of murder, at least guilty prima facie, though he might have a defense of insanity.<sup>275</sup>

In *Bohen v. City of East Chicago*, a female dispatcher for the city fire department was fired, according to her allegations, because she filed an Equal Employment Opportunity Commission (EEOC)

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<sup>273</sup> *Id.* at 1044–45 (citation omitted).

<sup>274</sup> Judge Posner is a lecturer at the University of Chicago Law School and, prior to his appointment as a federal appellate judge, was a full tenured professor at that school—becoming in 1969 the youngest tenured professor in Chicago's history. See Blomquist, *Playing on Words*, *supra* note 1, at 684.

<sup>275</sup> 701 F.2d 1228, 1236 (7th Cir. 1983) (Posner, J., concurring) (citation omitted).

complaint concerning sexual harassment.<sup>276</sup> Judge Posner filed a concurring opinion in the case involving the equal protection claim, noting that he “would characterize [the claim] differently from [the majority opinion]: not as a claim of sexual harassment but as a claim of failure to protect the plaintiff against such harassment.”<sup>277</sup> This difference in approach was “important,” as Posner put it, “because the male employees who actually harassed her are not the people she has sued.”<sup>278</sup> Later in his separate opinion, he illustrated this distinction with a hypothetical:

All this is not to suggest that the equal protection clause requires a state or municipality to devote disproportionate resources to preventing (or, more realistically, limiting) sexual harassment. Suppose the City of East Chicago had for purely fiscal reasons decided that in its fire department the law of the jungle would reign; the city would not discipline any employee for any misconduct, sexual or otherwise, toward another employee—whether the misconduct was theft, or battery, or rape, or anything else. Then women employees, even if they were hurt more by the policy than the men, could not complain of a selective withdrawal of protection, and hence of intentional discrimination against them, any more than they could complain if the city paid the market wage rate to all its employees and the rate happened to be higher for men than for women. But the record does not suggest that the city was indifferent to employees’ misconduct toward each other; so far as appears, the city disciplined employees for all misconduct except sexual harassment, with the result of giving its female employees systematically less protection than its male employees.<sup>279</sup>

Judge Posner’s concurrence in *Bohen* crystallizes the nub of the dispute and offers a better way of conceptualizing the suit against the municipality than the majority opinion because *Bohen*’s action is against her governmental employer, not the individual male employees who harassed her.

In a Title VII Civil Rights Act suit brought by a Jew, Jerold Pime,

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<sup>276</sup> 799 F.2d 1180, 1182 (7th Cir. 1986).

<sup>277</sup> *Id.* at 1189 (Posner, J., concurring).

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 1191 (citation omitted). For a Law and Economics discussion of Posner’s concurrence, see *supra* note 154.

Loyola University of Chicago's policy of reserving three vacancies in the Philosophy Department for Jesuit professors was challenged.<sup>280</sup> The majority opinion held that having a Jesuit presence in the Philosophy Department was a bona fide occupational qualification under the statute.<sup>281</sup> Judge Posner agreed with the majority "that Pime must lose this Title VII case" but his "ground [was] different from and narrower than [his] brethren's ground"; Posner thought that being denied a tenure-track position for not being a Jesuit was not a deprivation of an employment opportunity because of religion.<sup>282</sup> In a first set of hypotheticals in his *Pime* concurrence, Posner explained the basis for his difference in rationale from the majority's rationale:

It is true that you cannot be a Jesuit if you are not a Catholic; but only a tiny fraction of Catholics are Jesuits. If Pime were a Catholic but not a Jesuit he would be just as ineligible for the position as he is being a Jew, yet it would be odd indeed to accuse Loyola of discriminating against Catholics because it wanted to reserve some positions in its philosophy department for Jesuits, thus excluding most Catholics from consideration. Not only is Pime's being Jewish an adventitious circumstance in this case but so is the fact that Loyola is a Catholic school. It is hard to believe that the philosophy department of the University of Chicago—or of Brandeis University—would be guilty of a prima facie violation of Title VII if it reserved a few slots for Jesuits, believing that the Jesuit point of view on philosophy was one to which its students should be exposed; and Loyola should have the same right. To take another example, suppose Loyola reserved a slot for a rabbi, to teach Jewish theology; would this be a prima facie violation of Title VII? I cannot believe it would be; and if this conclusion is right it casts doubt on my brethren's assumption that the mere fact of reserving one or more slots for members of a religious order establishes a prima facie case.<sup>283</sup>

Based on his reasoning that "Pime ha[d] not made out a prima facie case of discrimination" on grounds of religion, Judge Posner continued his concurring opinion by arguing that "we need not

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<sup>280</sup> *Pime v. Loyola Univ. of Chi.*, 803 F.2d 351, 351 (7th Cir. 1986).

<sup>281</sup> *Id.* at 354.

<sup>282</sup> *Id.* (Posner, J., concurring).

<sup>283</sup> *Id.* at 354–55.

decide whether Loyola could rebut such a case by proving either that Loyola is a religious employer . . . or that being a Jesuit is a bona fide occupational qualification” under Title VII.<sup>284</sup> Indeed, as Posner explains in a second set of hypotheticals in his *Pime* concurrence, the logic of such an occupational qualification is on shaky ground:

Loyola wants to reserve seven of 31 tenure slots in the philosophy department for Jesuits, without specifying any subject-matter for the seven. There is no course that it believes only a Jesuit qualified to teach; it wants Jesuits in the department in order to maintain (as my brethren put it) “the educational tradition and character of the institution.” Although a worthy objective, this may not create the tight fit that the statute appears to require by the words “reasonably necessary.” No doubt it would be nice to have a minimum number of Jesuits in a school with a strong Jesuit tradition but by this type of reasoning the concept of bona fide occupational qualification could expand almost without limit. On the same type of showing made here, a men’s clothing store could claim a right to hire only men as salesmen in order to maintain the character of the store, or Ivy League universities the right to maintain a ceiling on the number of Jews in some departments in order to maintain the traditional character of those departments and of the university.<sup>285</sup>

Posner effectively and powerfully deployed allusions to irrational methods of divination in his concurring opinion in *Marozsan v. United States*,<sup>286</sup> a case reargued en banc before the entire Seventh Circuit. He agreed with the majority’s holding that a veterans’ benefit statute, which foreclosed judicial review of the Veterans’ Administration actions with respect to benefits, did not, however, preclude judicial review of the constitutionality of procedures used by the government agency in denying benefits.<sup>287</sup> Judge Posner wrote separately, in part, to rail against what he characterized as “a textbook illustration of the deficiencies of literalism as a style of statutory interpretation.”<sup>288</sup> His divination allusion is packaged in

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<sup>284</sup> *Id.* at 356.

<sup>285</sup> *Id.*

<sup>286</sup> 852 F.2d 1469, 1479–80 (7th Cir. 1988) (reh’g en banc) (Posner, J., concurring).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 1482.

the form of a hypothetical:

The government acknowledges that there is no purchase in the language or history of the [veterans' benefits] statute for a distinction between procedural and substantive constitutional claims. . . . The distinction lacks even intuitive appeal unless one contrasts a strong substantive claim with a weak procedural one . . . . Compare instead a contention that a difference in the level of veterans' benefits based on whether the veteran participated in a declared war rather than in an undeclared war is arbitrary, and hence a denial of equal protection . . . with a contention that the Veterans' Administration denies a veteran due process of law *by submitting his claim to trial by Ouija board or Tarot pack*. It would be arbitrary to suggest that the first contention could ground a federal suit but not the second. The only principled ground for a decision in favor of the government in this case would be that the judicial correction of unconstitutional denials of veterans' benefit claims is forbidden no matter what the nature of the constitutional infirmity.<sup>289</sup>

Posner's concurring opinions are chock-full of hypotheticals which he utilizes to clarify his own approach to issues as well as to make rhetorical points. Thus, in his concurring opinion in *Money Store, Inc. v. Harriscorp Finance, Inc.*, he warns against strict limits on judicial modification of consent decrees in "litigation seeking to reform private institutions";<sup>290</sup> in his concurrence in *Miller v. Civil City of South Bend*, he seems to think out loud by opining that "[i]t is tempting to argue that a striptease just *can't* be expressive because if it is then everything is—including kicking one's wastebasket in anger and putting geraniums in a window box";<sup>291</sup> in his concurring opinion in *Ragsdale v. Turnock*, he notes, by way of a hypothetical, to point out that "for many purposes the law *does* treat [fetuses] as people" such that "[i]n Illinois, if you shoot a pregnant

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<sup>289</sup> *Id.* (emphasis added).

<sup>290</sup> 885 F.2d 369, 377 (7th Cir. 1989) (Posner, J., concurring). His hypothetical states:

Suppose a group of white workers brought a "reverse discrimination" suit complaining about the effect of their employer's affirmative-action plan on the employment of whites. The employer might be entirely willing to consent to the entry of a decree that would make it more difficult to hire blacks. If the black workers persuaded the employer to seek modification of the decree, the court ought not consider itself cabined . . . .

*Id.*

<sup>291</sup> 904 F.2d 1081, 1092 (7th Cir. 1990) (en banc) (Posner, J., concurring).

woman in the abdomen and kill the fetus, you are guilty of the crime of intentional homicide of an unborn child, and the penalty is almost as severe as for first-degree murder”;<sup>292</sup> concurring in *United States v. Gage*, he illustrates that “[i]ntention and desire are not synonyms” in the law by the hypothetical: “If you plant a bomb in a plane desiring only to kill the passenger whose heir you are, you are guilty of first-degree murder (deliberate, premeditated) of the other passengers who die in the crash as well, even though you didn’t desire their death”;<sup>293</sup> in his concurrence in *EEOC v. Indiana Bell Telephone Co.*, he proposes a hypothetical case to show that it may be relevant in a future case of workplace harassment for a collective bargaining agreement to be considered as part of a potential defense;<sup>294</sup> and his concurring opinion in *Bell v. Duperrault* hypothesizes “irrational differences in treatment having nothing to do with discrimination against a vulnerable class abound at the bottom rung of law enforcement” such that “federal courts will be swamped with ‘class of one’ cases remote from the purpose . . . of the equal protection clause”<sup>295</sup> under the following illustration:

A police car is lurking on the shoulder of a highway in a 45 m.p.h. zone, a car streaks by at 65 m.p.h. and the police do nothing. Two minutes later a car streaks by at 60 m.p.h. and the police give that driver a ticket. Is it a denial of equal protection if the police cannot come up with a rational

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<sup>292</sup> 941 F.2d 501, 508 (7th Cir. 1991) (Posner, J., concurring).

<sup>293</sup> 183 F.3d 711, 718 (7th Cir. 1999) (Posner, C.J., concurring).

<sup>294</sup> 256 F.3d 516, 530–31 (7th Cir. 2001) (en banc) (Posner, J., concurring). Judge Posner wrote:

Let me propose a hypothetical case, not altogether remote from the present one though readily distinguishable from it, to which the existence and terms of a collective bargaining agreement would be relevant. A worker complains to a supervisor that another worker is harassing her. The supervisor responds by immediately transferring the alleged harasser to another part of the workplace. But because of the design of the workplace the transfer does not keep the two workers apart all the time and the worker who complained insists to the supervisor that the harasser be fired. The supervisor replies that the company’s collective bargaining agreement protects workers from being fired other than for cause and entitles any worker sought to be terminated for cause to notice and a hearing before a joint labor-management committee with appeal to an arbitrator, the entire procedure from complaint to final arbitration to be completed within 21 days. The complaint is filed and the arbitrator rules that the accusation of harassment is false and indeed malicious and therefore that there is no basis for terminating the harasser or even for separating him from the complainant.

Suppose the complainant then brought suit against the company under Title VII, charging that it had acted unreasonably in failing to fire her alleged harasser, as she had urged.

*Id.*

<sup>295</sup> 367 F.3d 703, 712 (7th Cir. 2004) (Posner, J., concurring).

explanation for why they ticketed the slower speeder?<sup>296</sup>

Judge Posner's masterful use of hypotheticals and appropriate allusions in his concurring judicial opinions are incisive and instructive to the bench and bar alike. Moreover, this creative wordplay helps him to grope his way through issues in many cases that he judges on appeal, and to arrive at nuanced and measured takes on these often complex doctrinal matters.

## 6. Posner the Great: Of Finding and Cutting Judicial Gordian Knots

Legend has it that when Alexander the Great took up the ancient challenge of untying the famous Gordian Knot, he "solved" the puzzle by taking his sword and cutting the knot in two.<sup>297</sup> In the same spirit, Judge Posner has frequently used concurring opinions to cut a variety of legal knots that have hamstrung his fellow judges.

In his concurrence in *Gautreaux v. Pierce*, for example, Posner wrote that he was "not persuaded by the grounds on which the district court [and his appellate colleagues] rejected the [plaintiffs'] objections to" the density requirements of a public housing project in Chicago.<sup>298</sup> Judge Posner "would affirm but on another ground."<sup>299</sup> That bold alternative ground was based on a lack of standing: "these appellants are neither parties to the [consent] decree nor third-party beneficiaries; therefore they have no standing to complain that its terms are being violated."<sup>300</sup>

Posner's concurring opinion in *Pime v. Loyola University of Chicago*—an opinion that we have previously examined as an example of Posnerian hypotheticals and wordplay<sup>301</sup>—can also be viewed as an instance of Posner wanting to resolve an appeal on a bold alternative ground which nonetheless agrees with the result of the majority opinion on appeal in dismissing the claim.<sup>302</sup> In *Pime*,

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<sup>296</sup> *Id.*

<sup>297</sup> In 333 B.C. "[a]t Gordium in Phrygia, tradition records his cutting of the Gordian knot, which could only be loosed by the man who was to rule Asia; but this story may be apocryphal or at least distorted." Alexander III the Great, 1 THE NEW ENCYCLOPEDIA BRITANNICA 468, 469 (15th ed. 1974).

<sup>298</sup> 707 F.2d 265, 270 (7th Cir. 1983) (Posner, J., concurring).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 272. For discussion of Posner's *Gautreaux* concurrence as an institutional critique, see *supra* notes 184–95 and accompanying text.

<sup>301</sup> See *supra* notes 80–85 and accompanying text.

<sup>302</sup> 803 F.2d 351, 354 (7th Cir. 1986) (Posner, J., concurring).

Posner characterized the employment discrimination suit by a Jewish professor, who complained about the university's reservation of tenure track slots in the philosophy department for Jesuit scholars as religious discrimination, as not really involving *religious* discrimination at all.<sup>303</sup> Accordingly, he thought the majority's reliance on the bona fide occupational qualification defense of Title VII was unwise and unnecessary.<sup>304</sup> As Posner opined:

If I am wrong in thinking that Loyola is not guilty of prima facie discrimination, I would give serious consideration to interpreting the defense of bona fide occupational qualification broadly enough to reach what Loyola has done, for it seems so remote from any concern that Congress had when it passed Title VII. But it is not necessary to decide whether Loyola has made out this defense and I think it would be the better part of valor to forgo reliance on it and place decision on the narrower ground. For reasons having nothing to do with antipathy to Jews or other non-Catholics, Loyola wants to have a certain proportion of its philosophy professors drawn from a particular religious order to which, as I have said, most Catholics do not belong and could not belong, because they would be either unable to satisfy the demanding entrance requirements or unwilling to take the vows of poverty, chastity, and obedience. In giving a modest and thoroughly understandable preference to members of this order, in circumstances that rebut any inference of invidious discrimination, Loyola is not discriminating against members of any religious faith within the meaning of Title VII.<sup>305</sup>

Judge Posner's concurrence in *United States v. Jackson* is another prominent example of his penchant for cutting to the essential heart of the matter.<sup>306</sup> Instead of relying on the majority opinion's principal ground that the criminal defendant was improperly left in the dark, and did not receive adequate notice, prior to his sentencing for bank fraud concerning a more severe sentence because of Jackson's purported abuse of a position of trust,<sup>307</sup>

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<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 356.

<sup>305</sup> *Id.* at 357.

<sup>306</sup> 32 F.3d 1101, 1111 (7th Cir. 1994) (Posner, C.J., concurring).

<sup>307</sup> *Id.* at 1110 (majority opinion).

Posner thought it better to resolve the appeal on the less controversial, alternative ground that the sentencing judge erred in presuming that Jackson “had abused a position of trust.”<sup>308</sup> Referencing the criminal law doctrine of “plain error,” which allows an appellate court to notice and correct palpable trial error, “even if it is not argued” on appeal,<sup>309</sup> Posner unsheathed his sword and verbally cut through the lack of notice verbiage in the majority opinion as follows:

Although the point is not argued by Jackson’s lawyer, it is virtually certain that the district judge erred in holding that Jackson had abused a position of trust. He was a money marketing clerk paid \$15,000 a year. A job so denominated and so meagerly remunerated is most unlikely to have been more responsible than that of a teller, and the [advisory] note to the relevant guideline says that embezzlement or theft by an ordinary bank teller does not warrant an adjustment for abuse of trust.<sup>310</sup>

Yet, Judge Posner in his concurrences has also cut through legal knots to forcefully make the case for a *broader* ground of decision than the majority based its holding upon. His 1998 concurring opinion in *Rodriguez v. City of Chicago* exemplifies this approach.<sup>311</sup> Rodriguez, a Chicago police officer, sued the city alleging that the police department engaged in religious discrimination in violation of Title VII in refusing to excuse him from guarding abortion clinics in the police district to which he was assigned.<sup>312</sup> The majority held that the officer had not been discriminated against in violation of the statute because the police department had provided Rodriguez with the opportunity, through the terms of a collective bargaining agreement, to transfer with no reduction in his level of compensation to a district within the city that did not have an abortion clinic.<sup>313</sup> Writing in his, then, capacity as Chief Judge of the Circuit, Posner would have audaciously held—in addition to that Rodriguez had been afforded appropriate accommodation—“that police officers and firefighters have no right under Title VII of the Civil Rights Act of 1964 to recuse themselves from having to protect persons of whose activities they disapprove for religious (or

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<sup>308</sup> *Id.* at 1112 (Posner, C.J., concurring).

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* (internal quotation marks omitted) (citation omitted).

<sup>311</sup> 156 F.3d 771, 778 (7th Cir. 1998) (Posner, C.J., concurring).

<sup>312</sup> *Id.* at 773–74 (majority opinion).

<sup>313</sup> *Id.* at 778.

any other) reasons.”<sup>314</sup> As an initial matter, Judge Posner’s concurring opinion confidently asserts a theory for sometimes deciding cases on broad rather than narrow grounds:

It is a matter of judgment whether to base the decision of an appeal on a broad ground, on a narrow ground, or on both, when both types of ground are available. If the judges are dubious about the broad ground, then they will do well to decide only on the narrow ground; but if they are confident of the broad ground, they should base decision on that ground (as well as on the narrow ground, if equally confident of it) in order to maximize the value of the decision in guiding the behavior of persons seeking to comply with the law. One of the most important things that appellate courts do is to formulate rules of law. They would formulate very few rules, and leave the law in a state of considerable and avoidable uncertainty, if they always chose to decide a case on the narrowest possible ground. It is true that the broader the ground, the more likely it is to sweep in cases that the judges cannot perfectly foresee, and this argues for caution in deciding cases on broad grounds, because there is greater risk of error, and for a willingness to carve exceptions as new cases imperfectly foreseen arise. *But I think that we could prudently have gone further in this case than the majority opinion does to clarify the law governing the duty of public-safety agencies to accommodate the religious beliefs of their employees, rather than leave the law in a state of uncertainty which the majority opinion may actually increase.*<sup>315</sup>

As a second matter, Posner offered policy justifications for a blanket rule of no cause of action under Title VII to claim exemption from duties to protect the public. In this regard, he opined that Rodriguez “is not entitled to demand that his police duties be altered to conform to his [religious views] any more than a volunteer member of the armed forces is entitled to demand that he be excused from performing military duties that conflict with his religious faith.”<sup>316</sup> Moreover, Posner would extend the analogy by disclaiming that “a firefighter is entitled to demand that he be entitled to refuse to fight fires in the places of worship of religious

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<sup>314</sup> *Id.* at 779 (Posner, C.J., concurring).

<sup>315</sup> *Id.* at 778 (emphasis added).

<sup>316</sup> *Id.* at 779.

sects that he regards as Satanic.”<sup>317</sup> According to Judge Posner, “[t]he objection to recusal in all of these cases” is not governmental inconvenience but “the loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect.”<sup>318</sup> He went on to express this policy consideration in concrete and vivid prose:

The public knows that its protectors have a private agenda; everyone does. But it would like to think that they leave that agenda at home when they are on duty—that Jewish policemen protect neo-Nazi demonstrators, that Roman Catholic policemen protect abortion clinics, that Black Muslim policemen protect Christians and Jews, that fundamentalist Christian policemen protect noisy atheists and white-hating Rastafarians, that Mormon policemen protect Scientologists, and that Greek-Orthodox policemen of Serbian ethnicity protect Roman Catholic Croats. We judges certainly want to think that U.S. Marshals protect us from assaults and threats without regard to whether, for example, we vote for or against the pro-life position in abortion cases.<sup>319</sup>

To Posner, “[t]he importance of public confidence in the neutrality of its protectors is so great that a police department or fire department or equivalent public-safety agency that decides not to allow recusal by its employees should be able to plead undue hardship and thus escape any duty of accommodation.”<sup>320</sup>

In another concurring opinion in *Shields v. Local 705, International Brotherhood of Teamsters Pension Plan*,<sup>321</sup> Judge Posner, like in his broad and bold concurrence in *Rodriguez*,<sup>322</sup> wanted to cut the Gordian Knot involving the ERISA principle of promissory estoppel; he would “hold that promissory estoppel can *never* be used to alter the terms of a defined-benefit plan, especially when it is a multiemployer plan.”<sup>323</sup> Policy considerations were paramount in Posner’s broad analysis. He observed, in this regard, that:

If terms are added by the operation of promissory estoppel

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<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* (internal quotation marks omitted) (citations omitted).

<sup>321</sup> 188 F.3d 895, 903 (7th Cir. 1999) (Posner, C.J., concurring).

<sup>322</sup> See *supra* notes 311–20 and accompanying text.

<sup>323</sup> *Shields*, 188 F.3d at 903.

that appear nowhere in the plan documents upon which the actuarial calculations are based, that the actuaries who designed the funding mechanism in the plan did not know about, and that . . . do not purport merely to summarize the plan, the plan may turn out to be seriously underfunded. These considerations are decisive against allowing the invocation of promissory estoppel in any case involving a defined-benefit plan.<sup>324</sup>

#### 7. Posner as Reader and Interpreter of Statutes: Searching for Pragmatic Construction

As one who is fascinated by the theory and practice of statutory construction,<sup>325</sup> it is not surprising that Judge Posner has taken up this subject in the course of several of his concurring judicial opinions. Posner's concurrences which have focused on problems of interpreting statutes are vivid, penetrating, and helpful. These opinions are not some abstract exercise in language amusements or diversions. Rather, a Posnerian concurring opinion about interpreting statutory commands typically pays attention to the *purpose* of the provision under review and how that purpose can be practically carried out by the judiciary. Take his concurring opinion in *St. Joseph Bank & Trust Co. v. United States* where he disagreed with the majority that a provision of the Internal Revenue Code governed a transfer of stock by a father to a trust for his children's education pursuant to a divorce settlement;<sup>326</sup> Posner opined that "[t]here is grave doubt that the statute is intended to have any application except in gift-tax cases but in any event it has no useful application to this case."<sup>327</sup> Rather than warping the language and purpose of the statutory provision to fit the facts of the case, Posner agreed that the distribution of stock was taxable to the father but for the reasons of a binding Supreme Court precedent that he claimed applied to the case at bar.<sup>328</sup>

Take another concurring opinion by Judge Posner that turned on issues of statutory interpretation: *Michels v. United States Olympic Committee*.<sup>329</sup> *Michels* was a suit for injunction by an American

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<sup>324</sup> *Id.* at 905.

<sup>325</sup> See Blomquist, *Aesthetics of Canonicity*, *supra* note 5, at 171.

<sup>326</sup> 716 F.2d 1180, 1186 (7th Cir. 1983) (Posner, J., concurring).

<sup>327</sup> *Id.* at 1187.

<sup>328</sup> *Id.*

<sup>329</sup> 741 F.2d 155, 158 (7th Cir. 1984) (Posner, J., concurring).

weightlifter who was successful in obtaining a preliminary injunction from the district court, pursuant to the Amateur Sports Act of 1978;<sup>330</sup> the preliminary injunction ordered the United States Olympic Committee (USOC) “to name . . . Michels as a conditional alternate to the 1984 United States Olympic Weightlifting Team and to address the merits of Michels’ claims under International Olympic Committee (IOC) procedures.”<sup>331</sup> Posner agreed with the majority that the Amateur Sports Act of 1978 did not permit private enforcement of the statute because of a compromise between legislative sponsors backed up by the common sense “reflection that there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games.”<sup>332</sup> Judge Posner wrote separately, however, to argue that even if the statute “could be enforced by a private suit, this suit would have to be dismissed for failure to state a claim.”<sup>333</sup> On this separate ground for vacating the district court’s preliminary injunction, Judge Posner looked to both the text and purpose of the legislation under scrutiny. As to the text, Posner pointed out that “[t]he only relevant duty imposed by the Act is the duty of the United States Olympic Committee to establish procedures for resolving disputes involving any of its members and relating to the opportunity of an amateur athlete . . . to participate in the Olympic Games.”<sup>334</sup> Michels’ dispute was “with the International Weightlifting Federation, an international organization that is not a member of the USOC” and, as Posner explained, “[h]is dispute was with the nonmember, the international federation, and it was outside the scope” of the statute.<sup>335</sup> As to the purpose of the statute, it makes sense, according to Posner, that “the statute does not require the U.S. Olympic Committee to establish machinery for resolving disputes between athletes and nonmembers” since “[t]he USOC has no control over nonmembers,” and, thus, “[t]he International Weightlifting Federation can thumb its collective nose at the U.S. Olympic Committee” and “if the USOC tried to put Michels on the U.S. Olympic Weightlifting team in defiance of the IWF’s expulsion,

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<sup>330</sup> *Id.* at 156 (majority opinion); 36 U.S.C. §§ 371–396 (1978) (current version at 36 U.S.C. §§ 220501–220529 (1998)).

<sup>331</sup> *Michels*, 741 F.2d at 156.

<sup>332</sup> *Id.* at 158–59 (Posner, J., concurring).

<sup>333</sup> *Id.* at 159.

<sup>334</sup> *Id.* (internal quotation marks omitted) (citation omitted).

<sup>335</sup> *Id.*

the IWF could ask the International Olympic Committee to disqualify the team.”<sup>336</sup>

Consider Judge Posner’s statutory analysis in his concurrence in *United States v. OCCI Co.* where he expressed doubts concerning existing precedent “that a mortgagor can set up, as an affirmative defense to foreclosure by the Department of Housing and Urban Development, the Department’s failure to comply with the statement of national housing objectives in 42 U.S.C. § 1441.”<sup>337</sup> Seeking to sensibly consider whether Congress had a purpose in passing the national housing legislation to allow delinquent borrowers from the federal government to delay and complicate government foreclosures, Posner wrote:

In this protracted [statutory] recital of hopes and homilies, one finds few specifics . . . and none that bear on foreclosure or could provide any guidance for a court called on to review a decision to foreclose. I think Congress would be surprised and dismayed to discover that by trying to give guidance of the most general sort—inspiration would be a better word—to HUD, it had made it harder for HUD to foreclose on delinquent mortgages, by giving mortgagors an argument with which to delay and very occasionally defeat foreclosure or at least make the process of foreclosure more costly.<sup>338</sup>

Note Posner’s purposeful statutory assessment of Title VII of the Civil Rights Act of 1964 in his concurring opinion in *Pime v. Loyola University of Chicago*;<sup>339</sup> his careful review of the legislative history of the religious-employer exemption led him to conclude that it was inappropriate to apply the exception in the case at bar.<sup>340</sup> Look at Judge Posner’s insistence on “the deficiencies of literalism as a style of statutory interpretation” and his claim that “[t]he idea that semantically unambiguous sentences—sentences clear ‘on their face’—sentences whose meaning is ‘plain’—can be interpreted without reference to purpose inferred from context is fallacious,” in his concurrence in *Marozsan v. United States*.<sup>341</sup> In his concurring opinion in *Marozsan* he rejected a literal interpretation of a veterans’ benefits statute that would have precluded judicial

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<sup>336</sup> *Id.* at 159 (citations omitted).

<sup>337</sup> 758 F.2d 1160, 1166 (7th Cir. 1985) (Posner, J., concurring).

<sup>338</sup> *Id.* at 1167.

<sup>339</sup> 803 F.2d 351, 354–58 (7th Cir. 1986) (Posner, J., concurring).

<sup>340</sup> *Id.* at 357–58.

<sup>341</sup> 852 F.2d 1469, 1482 (7th Cir. 1988) (en banc) (Posner, J., concurring).

review.<sup>342</sup> And, observe Posner's measured interpretation of the federal pension benefit statute, ERISA, in his *Shields v. Local 705, International Brotherhood of Teamsters Pension Plan* concurrence when he wrote that "courts in ERISA cases retain their normal common law powers to fill gaps in the statute. For statutes are rarely comprehensive; they are enacted against a rich background of common law principles that can be drawn on, as necessary, to put flesh on the legislative skeleton" subject to the following important interpretational qualification: "[A]ny common law elaborations of an incomplete statute [addressing such issues as equitable or promissory estoppel] must be consistent with the statute's language and animating policies."<sup>343</sup>

#### 8. Posner's Concerns About Standards of Appellate Review: Judging Lower-Level Decision-Makers

Judge Posner is well-aware of the critical importance of the standard of appellate review;<sup>344</sup> he has elaborated on this concern in assorted concurring opinions. For example, in his concurrence in *Piper Aircraft Corp. v. Wag-Aero, Inc.*, he devotes his entire opinion to considering which of two standards of review ("clear abuse of discretion" or "clearly erroneous") should govern appellate review of "a district judge's finding in a trademark or other intellectual-property case that the plaintiff was or was not guilty of laches."<sup>345</sup> In clear and concise prose he probes analogous standards of review for what he refers to as "pure factfindings" and "application of substantive rules to facts of the who-did-what-to-whom variety."<sup>346</sup> He affords a clarifying example to help understanding: "[I]f a district judge found that the defendant in a personal-injury case had been negligent, this finding, like a finding that the defendant had been going 50 miles per hour, could be overturned on appeal only if clearly erroneous."<sup>347</sup> Moreover, in a *tour-de-force* of analysis, Posner delineates that the review standard of "clear error has been held to be the proper standard for reviewing determinations of most

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<sup>342</sup> *Id.* (discussing 38 U.S.C. § 211(a) (repealed 1991)).

<sup>343</sup> 188 F.3d 895, 904 (7th Cir. 1999) (Posner, C.J., concurring) (citations omitted).

<sup>344</sup> *Cf.* BRYAN A. GARNER, *THE WINNING BRIEF* 372 (1999) (quoting FRANK M. COFFIN, *ON APPEAL: COURTS, LAWYERING, AND JUDGING* 114 (1994) ("[As an appellate judge, a] clear, succinct, and authority-supported statement of standard of review gets me off to a good start [in reading the briefs in a case.]").

<sup>345</sup> 741 F.2d 925, 935 (7th Cir. 1984) (Posner, J., concurring).

<sup>346</sup> *Id.* at 936.

<sup>347</sup> *Id.* (citations omitted).

mixed questions of law and fact in intellectual-property cases,” and “[a]lthough some such questions, particularly in patent cases, are treated as questions of law rather than questions of fact, none are treated as discretionary determinations.”<sup>348</sup>

Another prominent example of Judge Posner’s use of concurring opinions to examine and re-examine precedents concerning standards of review is his concurrence in *United States v. OCCI Co.*<sup>349</sup> In that concurrence Posner took the unusual step for an appellate judge to urge that review of decisions by HUD on whether or not to foreclose on a government mortgage should be “unreviewable.”<sup>350</sup> His reasons for this view are practical: “I do not know what constructive contribution this or any other court can make to the achievement of the nation’s housing goals by reviewing HUD’s decision to foreclose” a government mortgage.<sup>351</sup> In addition, according to his concurrence, “[t]here is no definite standard for a reviewing court to apply, and, given the lack of such a standard, little likelihood that a responsible reviewing court will ever invalidate, under [the statute], a decision to foreclose.”<sup>352</sup> Furthermore, he added in this regard: “All that judicial review can do in this setting is delay foreclosure and thereby complicate HUD’s already daunting mission. If ever there was a case where judicial review was unavailable because [as provided for under the Administrative Procedure Act,] ‘agency action is committed to agency discretion by law’ . . . this is the case.”<sup>353</sup>

Judge Posner’s concurrence in *Short v. Belleville Shoe Manufacturing Co.* provides another good illustration of his penchant for unflinching consideration for the dimensions of appropriate appellate standards of review.<sup>354</sup> The heart of Posner’s point in his concurrence was the “standardless, discretionary judgment” on appeal that is created when federal appellate courts “[b]orrow[] a period of limitations from one statute to use with another that doesn’t have its own limitations provision” in a dispute.<sup>355</sup> His concern focused on the multifaceted considerations that bore on borrowing a statute of limitations “with no weights on

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<sup>348</sup> *Id.* at 936–37 (citations omitted).

<sup>349</sup> 758 F.2d 1160, 1166 (7th Cir. 1985) (Posner, J., concurring).

<sup>350</sup> *Id.* at 1167.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.* (quoting 5 U.S.C. § 701(a)(2) (2000)) (other citations omitted).

<sup>354</sup> 908 F.2d 1385, 1393 (7th Cir. 1990) (Posner, J., concurring).

<sup>355</sup> *Id.* at 1393–94.

the factors.”<sup>356</sup> Thus:

Since courts cannot be expected to converge on a uniform outcome when they are operating under such a standard, predicting what statute of limitations will be borrowed is impossible and as a result extensive litigation often is necessary before a definitive conclusion on the limitations period emerges. It may not come until a Supreme Court decision is rendered resolving an intercircuit conflict that was years in the brewing.<sup>357</sup>

Writing in *United States v. McKinney*, Judge Posner’s concurring opinion spent considerable ink over “a disagreement within the [Seventh Circuit] over the standard for reviewing determinations of probable cause.”<sup>358</sup> He voiced his opinion that in reviewing probable cause determinations by lower-level decision makers “the proper standard is the clearly-erroneous rule used in other areas of law to review the application of a legal standard to a particular set of facts.”<sup>359</sup> Drawing together, by way of an example, “a finding of negligence in an ordinary tort suit,” with the finding of probable cause in a criminal matter, Posner opined that the former determination “is not a finding of fact in the sense that it could be made by someone uninstructed in the legal standard of negligence. Rather it is the application of the legal standard to the facts of the particular case.”<sup>360</sup> Reviews of negligence findings, Posner points out, are not *de novo*, but, rather, are “reviewed for clear error.”<sup>361</sup> So too, should appellate review of criminal law probable cause findings be “deferential.”<sup>362</sup>

Judge Posner’s concurring opinions that have discussed appellate standards of review skillfully penetrate to the nub of matters on appeal in federal courts: Which decision maker is in the best position to grapple with the issue in question? What values should apply in making and second-guessing various matters? And what benefits and costs attend the use of one appellate standard of review rather than another?

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<sup>356</sup> *Id.* at 1394.

<sup>357</sup> *Id.*

<sup>358</sup> 919 F.2d 405, 418 (7th Cir. 1990) (Posner, J., concurring).

<sup>359</sup> *Id.* at 418–19.

<sup>360</sup> *Id.* at 419.

<sup>361</sup> *Id.* (citations omitted).

<sup>362</sup> *Id.*

## 9. Posner Speaking Frankly: Bracing Directness as a Stylistic Technique

Ah, what power and panache can come about from frank, unadorned communication instead of prolix exercises in beating around legal bushes! Judge Posner's concurring opinions are replete with powerfully direct language. One of his best no-holds-barred concurrences was in *United States v. Kaminski*, at the start of his career as a federal appellate judge, when he decided to "write separately . . . to float a suggestion for giving practical content to the elusive concept, which is fundamental to the entrapment doctrine, of predisposition to commit a crime."<sup>363</sup> In a passage, worthy of full quotation, he wrote:

If the police entice someone to commit a crime who would not have done so without their blandishments, and then arrest him and he is prosecuted, convicted, and punished, law enforcement resources are squandered in the following sense: resources that could and should have been used in an effort to reduce the nation's unacceptably high crime rate are used instead in the entirely sterile activity of first inciting and then punishing a crime. However, if the police are just inducing someone to commit sooner a crime he would have committed eventually, but to do so in controlled circumstances where the costs to the criminal justice system of apprehension and conviction are minimized, the police are economizing on resources. It is particularly difficult to catch arsonists, so if all the police were doing here was making it easier to catch an arsonist . . . they were using law enforcement resources properly and there is no occasion for judicial intervention. And I am persuaded that that is the situation in this case.

Thus in my view "entrapment" is merely the name we give to a particularly unproductive use of law enforcement resources, which our system properly condemns. If this is right, the implementing concept of "predisposition to crime" calls less for psychological conjecture than for a common-sense assessment of whether it is likely that the defendant would have committed the crime anyway—without the blandishments the police used on him—but at a time and

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<sup>363</sup> 703 F.2d 1004, 1010 (7th Cir. 1983) (Posner, J., concurring).

place where it would have been more difficult for them to apprehend him and the state to convict him, or whether the police used threats or promises so powerful that a law-abiding individual was induced to commit a crime. If the latter is the case, the police tactics do not merely affect the timing and location of a crime; they cause crime.<sup>364</sup>

On more frequent occasions, Judge Posner deploys phrases that cut to the bone or sweep away niceties to uncover what is most germane, what is essential, and where wisdom can be found. His concurrences are loaded with this type of language, to wit:

“[T]his protracted recital of hopes and homilies.”<sup>365</sup>

“We stray . . . when we say that the failure to promote a person is . . . evidence that he was a victim of discrimination, when in fact there is no reason to think he was even qualified for the promotion, let alone that he was the best qualified for it.”<sup>366</sup>

“I hesitate to add to the pile of opinions in this case; separate opinions are the bane of the modern American judiciary.”<sup>367</sup>

“[T]he reservation of a few tenure slots for Jesuits in a private university founded by and to some extent still controlled by Jesuits . . . is less offensive than a racial quota in a steel mill or a fire department.”<sup>368</sup>

“Karl Marx said that every great event or personality appears twice in history: first as tragedy and then as farce. This case, a prisoner’s civil rights case, illustrates his adage, provided we do not insist on the greatness of the event.”<sup>369</sup>

“Persons who would . . . rob a bank in the face of [a] 20-year sentence are unlikely to be deterred by tightening the punishments screws still further. A civilized society locks up such people until age makes them harmless but it does not keep them in prison until they die.”<sup>370</sup>

“[I]f attempts at verbal elaboration of reasonable doubt are likely to yield barren tautologies, it makes practical sense not to instruct the jury at all on the meaning of proof beyond a reasonable

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<sup>364</sup> *Id.*

<sup>365</sup> *United States v. OCCI Co.*, 758 F.2d 1160, 1167 (7th Cir. 1985) (Posner, J., concurring).

<sup>366</sup> *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 137 (7th Cir. 1985) (Posner, J., concurring).

<sup>367</sup> *Phelps v. Duckworth*, 772 F.2d 1410, 1416 (7th Cir. 1985) (reh’g en banc) (Posner, J., concurring).

<sup>368</sup> *Pime v. Loyola Univ. of Chi.*, 803 F.2d 351, 355 (7th Cir. 1986) (Posner, J., concurring).

<sup>369</sup> *Merritt v. Faulkner*, 823 F.2d 1150, 1155 (7th Cir. 1987) (Posner, J., concurring).

<sup>370</sup> *United States v. Jackson*, 835 F.2d 1195, 1200 (7th Cir. 1988) (Posner, J., concurring).

doubt.”<sup>371</sup>

“Inadequate punishment can work a miscarriage of justice, just as excessive punishment can.”<sup>372</sup>

Thirty years ago a striptease that ended in complete nudity would have been thought obscene. No more. It is worth pausing a moment to ask why. Nudity as titillation or outrage is relative rather than absolute. In a society in which women customarily go about in public bare-breasted, there is no shock value in a bare breast, while in Victorian England . . . a bare ankle was a sensation.<sup>373</sup>

And, let us not overlook the following instances of Posnerian plainspoken, upfront candor in his concurrences:

The Supreme Court’s unwavering attachment to the principle leaves us no choice but to apply it, but that attachment is beginning to be questioned, and I would like to add my small voice to the chorus.

Borrowing a period of limitations from one statute to use with another that doesn’t have its own limitations provision is a matter of which round peg to stuff in a square hole.<sup>374</sup>

“By such ostrich methods an incoherent approach to the review of probable-cause determinations is perpetuated.”<sup>375</sup>

“[O]nly in law is ‘innovative’ a pejorative.”<sup>376</sup>

“Now all can see that the circuit’s position is a Rube Goldberg invention: a needlessly complex machine, which incidentally does not work.”<sup>377</sup>

“I am not trying to defy the Supreme Court.”<sup>378</sup>

“My brethren in defending the intermediate standard may in any event be spitting into the wind.”<sup>379</sup>

“In plumping for an intermediate standard my brethren are bailing water from a ship that the captain has decided to scuttle.”<sup>380</sup>

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<sup>371</sup> United States v. Hall, 854 F.2d 1036, 1044–45 (7th Cir. 1988) (Posner, J., concurring).

<sup>372</sup> United States v. D’Antoni, 874 F.2d 1214, 1222 (7th Cir. 1989) (Posner, J., concurring).

<sup>373</sup> Miller v. Civil City of S. Bend, 904 F.2d 1081, 1091 (7th Cir. 1990) (reh’g en banc) (Posner, J., concurring).

<sup>374</sup> Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1393 (7th Cir. 1990) (Posner, J., concurring) (citation omitted).

<sup>375</sup> United States v. McKinney, 919 F.2d 405, 420–21 (7th Cir. 1990) (Posner, J., concurring).

<sup>376</sup> *Id.* at 421 (parentheses omitted).

<sup>377</sup> *Id.*

<sup>378</sup> *Id.* at 422.

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

“My brethren have become hopelessly entangled in words—they have forgotten Justice Holmes’s admonition to think things not words—but even at the level of semantics they strike out.”<sup>381</sup>

“What is needed . . . is not a multiplicity of rigid rules stated in empty jargon, or even three rigid rules that hack crudely at a complex reality, but the sensitive application of the clear-error *standard*.”<sup>382</sup>

American law is too vague, too complicated, too expensive; and it is these things in part because judges are too fond of sterile verbalisms and outmoded distinctions. A tripartite standard of appellate review of determinations of probable cause is confusing, unworkable, and unnecessary. We should not fear to reject it for fear of being called innovative.<sup>383</sup>

“To object to a settlement on the ground that you shouldn’t have done as well in the settlement as you did identifies you as an ideological litigant; and an affront to one’s ideology is not an interest that will support standing to sue.”<sup>384</sup>

“[A] government official has decided to allow . . . human beings to die because the official lacks the stomach, political or otherwise, to litigate the case in the Supreme Court.”<sup>385</sup>

“The acts of concealment were the acts by which the parties to the kickbacks sought through the use of dummy corporations and the like to make it difficult for anyone to discover that kickbacks were being paid.”<sup>386</sup>

“This is a harsh law, and one would expect the government in enforcing it to make at least modest efforts to guard against mistakes.”<sup>387</sup>

“The INS was playing cat and mouse.”<sup>388</sup> “The procedural sloppiness demonstrated by the INS . . . , although extraordinary, is not grounds for reversal.”<sup>389</sup>

“Should a 90-year-old commit arson, it might unduly depreciate the gravity of his act to sentence him to a term of years equal to his

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<sup>381</sup> *Id.* at 423.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Ragsdale v. Turnock*, 941 F.2d 501, 506 (7th Cir. 1991) (Posner, J., concurring) (citations omitted).

<sup>385</sup> *Id.* at 509.

<sup>386</sup> *Martin v. Consultants & Adm’rs, Inc.*, 966 F.2d 1078, 1103 (7th Cir. 1992) (Posner, J., concurring).

<sup>387</sup> *Ghaly v. INS*, 48 F.3d 1426, 1436 (7th Cir. 1995) (Posner, C.J., concurring).

<sup>388</sup> *Id.* at 1437.

<sup>389</sup> *Id.* at 1438.

life expectancy.”<sup>390</sup>

“If the producer of *Antony and Cleopatra* refuses to cast an effeminate man as Antony or a mannish woman as Cleopatra, he is not discriminating against men in the first case and women in the second, although he is catering to the audience’s sex stereotypes.”<sup>391</sup>

## 10. En Banc Posner: Adding His Two-Cents

A final way to look at the concurring opinions of Judge Richard A. Posner in his first twenty-five years on the federal appellate bench is to observe his infrequent, though forceful, penchant for providing *his* particular take, *his* emphases, *his* vision of a particular area of federal jurisprudence that results in an en banc opinion by the full United States Court of Appeals for the Seventh Circuit.

By way of illustration, Posner has written separate concurrences in en banc proceedings in a 1983 case involving a habeas corpus proceeding by a state prisoner;<sup>392</sup> a suit by a former FBI agent seeking damages against his former superior;<sup>393</sup> a 1985 case involving a habeas corpus proceeding by a state prisoner;<sup>394</sup> a 1986 case involving a suit by a disgruntled federal job seeker denied employment;<sup>395</sup> a 1988 Section 1983 civil rights case against a fire dispatcher based on a failure to provide emergency rescue services;<sup>396</sup> a 1988 appeal by a veteran seeking to challenge the constitutionality of procedures employed by the Veteran’s Administration in denying him benefits;<sup>397</sup> a 1990 case brought by nude dancers and establishments offering nude dancing challenging the constitutionality of Indiana’s public indecency statute;<sup>398</sup> and a

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<sup>390</sup> *United States v. Prevatte*, 66 F.3d 840, 849 (7th Cir. 1995) (Posner, C.J., concurring) (parentheses omitted).

<sup>391</sup> *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1068 (7th Cir. 2003) (Posner, J., concurring).

<sup>392</sup> *Parisie v. Greer*, 705 F.2d 882, 892–93 (7th Cir. 1983) (en banc denial of reconsideration) (Posner, J., concurring).

<sup>393</sup> *Egger v. Phillips*, 710 F.2d 292, 324–25 (7th Cir. 1983) (en banc) (Posner, J., concurring).

<sup>394</sup> *Phelps v. Duckworth*, 772 F.2d 1410, 1416 (7th Cir. 1985) (reh’g en banc) (Posner, J., concurring).

<sup>395</sup> *Perry v. FBI*, 781 F.2d 1294, 1304 (7th Cir. 1986) (reh’g en banc) (Posner, J., concurring).

<sup>396</sup> *Archie v. City of Racine*, 847 F.2d 1211, 1224 (7th Cir. 1988) (reh’g en banc) (Posner, J., concurring).

<sup>397</sup> *Marozsan v. United States*, 852 F.2d 1469, 1479–80 (7th Cir. 1988) (reh’g en banc) (Posner, J., concurring).

<sup>398</sup> *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1089–90 (7th Cir. 1990) (reh’g en banc) (Posner, J., concurring).

2001 appeal involving the EEOC's interpretation of federal employment law against sexual harassment, and a collective bargaining agreement between the employer and a labor union.<sup>399</sup> In the course of his concurring opinions to en banc circuit opinions, Judge Posner has done more than to rehash legal analysis found in the other opinions in the cases. Rather, his analysis has been typically penetrating and perspicacious.

#### IV. SOME GENERAL OBSERVATIONS AND INSIGHTS

##### A. *Judge Posner's Evolving Style: The Strategic Inspiration of Consubstantiality*

In a quarter-century of judicial concurring opinions, Judge Richard A. Posner has filed a number of *true concurring opinions*—“announc[ing] and defend[ing] the author's unwillingness to subscribe to the majority's rationale for an outcome that the author supports.”<sup>400</sup> Prominent Posnerian true concurrences were in *Gautreaux v. Pierce* (where he forcefully argued that a consent decree that authorized a federal housing official to approve various percentage of public housing to a “best interest of the community” standard was nonjusticiable);<sup>401</sup> in *EEOC v. Indiana Bell Telephone Co.* (where he vigorously questioned the institutional wisdom of full court review of panel appellate opinions when the full appellate court lacked experience in making generalizations about the relevance of collective bargaining agreements in employment discrimination suits);<sup>402</sup> and in *Pime v. Loyola University of Chicago* (where he emphatically disputed the very existence of religious discrimination and argued that it was unwise to decide the case by application of the bona fide occupational qualification affirmative defense).<sup>403</sup> Posner's true concurrences are characterized by concerns about avoiding hasty judicial decision making without concrete facts and legal doctrine, about having courts steer clear of reviewing essentially political questions which are better left to other institutions, and about proper understanding and application

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<sup>399</sup> *EEOC v. Ind. Bell Tel. Co.*, 256 F.3d 516, 529 (7th Cir. 2001) (reh'g en banc) (Posner, J., concurring).

<sup>400</sup> *See supra* text accompanying note 73.

<sup>401</sup> *See supra* notes 184–195 and accompanying text.

<sup>402</sup> *See supra* notes 226–31 and accompanying text.

<sup>403</sup> *See supra* notes 280–85 and accompanying text.

of legal doctrine by courts. From the standpoint of law and aesthetics, Posner's true concurrences are best understood as articulations of "*grid aesthetic*" (visions of what the specific rules, doctrines, standards and principles should properly be in a case) with occasional explorations of "*energy aesthetic*" (issues of tension or synergy between competing legal conceptions).<sup>404</sup>

Yet, Judge Posner tends to file more *two-cents concurrences*—announcing that “the author is willing to join in both the outcome and rationale sponsored by the majority, but wishes to add [his] own, presumably consistent, thoughts on the matter.”<sup>405</sup> Indeed, because of the quantity and variety of Posner's concurring opinions, which ostensibly agree with the majority opinion in the case, we might be tempted to argue that he finds it appealing to offer his *fifty-cents worth*. Thus, we find Posnerian enhancements, embellishments, and upgrades to the majority opinions of his Seventh Circuit colleagues in the category of concurrences which I have called “Posner as Congressional Adviser” cases.<sup>406</sup> Judge Posner relishes policy analysis and loves to consider the multiple facets of public problems. Take his exhaustive essay on federal habeas corpus rights of state prisoners in his concurring opinion in *United States v. Franzen*: In the course of this separate opinion he considered principles of federalism, the morale of state court judges, the legitimacy of the criminal justice system, the efficiency of judges' work products, the psychological well-being of habeas petitioners, the accuracy of constitutional determinations, and the historical background which gave rise to Congress' enactment of the most recent statute on habeas corpus.<sup>407</sup> Take his thorough review of the wisdom of federal courts getting involved in intra-state, local securities fraud cases in the course of his concurring opinion in *Trecker v. Scag*.<sup>408</sup> Consider Posner's concurrence in *United States v. D'Antoni* where he looks at the purported logic of the federal maximum sentence statute for conspiracy to kill a federal witness, and ends up canvassing the federal criminal code with a

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<sup>404</sup> See Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1049, 1051 (2002). Schlag's grid aesthetic pictures law as follows: The grid is “a two-dimensional area divided into contiguous, well-bounded legal spaces. These spaces are divided into doctrines, rules, and the like. Those doctrines, rules, and the like are further divided into elements, and so on and so forth.” *Id.* The energy aesthetic involves “[c]onflicting forces of principle, policy, values, and politics [which] collide and combine in sundry ways.” *Id.*

<sup>405</sup> See *supra* text accompanying note 73.

<sup>406</sup> See *supra* Part III.B.1.

<sup>407</sup> See *supra* notes 96–107 and accompanying text.

<sup>408</sup> See *supra* notes 108–17 and accompanying text.

comparative eye, and offering straightforward advice for a legislative reworking of key sentencing provisions.<sup>409</sup> Posner's Law and Economics category of concurrences sometimes embody his over-interpreting or overdoing the costs and benefits of various legal issues with too much analysis. His *Chicago Board of Realtors, Inc. v. City of Chicago* concurring opinion is a prime example of this tendency. In that opinion, Judge Posner got carried away with his economic reasoning to a degree that some of his analysis on the likely impacts of Chicago's rent control ordinance took on the coloration of rank speculation.<sup>410</sup> Still, Posner's two-cents concurrences often add a vital perspective to a controversy. Go back to his *Archie v. City of Racine* concurring opinion and see how he does a better job than the majority opinion of explaining the failure of survivors to make out a Section 1983 claim against a municipal ambulance dispatcher. Posner combines a weighing of textual, precedential, and policy considerations which tilt in favor of denying the claim while acknowledging the human pathos (and possible second class treatment) received by the black decedent from the white dispatcher.<sup>411</sup>

What strikes me as the most interesting general observation about the quarter century of Posnerian concurring judicial opinions, though, is Judge Posner's virtuosity in strategically inspiring consubstantiality with other judges on the Seventh Circuit. In this regard, Posner uses concurrences as rhetorical tropes to unite subscribing judges of the majority with his own spin on the law by delicately exploiting ambiguity to unite divergent tendencies on the appellate court and by persuasively condensing competing values in a case at a sufficiently abstract level.<sup>412</sup> While Posner sometimes is ham-handed in a quest for consubstantiality by overplaying his hand with too much detail which can not be reasonably merged with the reasoning of the majority opinion,<sup>413</sup> think about those concurring performances where he pulls off fundamental agreement with his views of the law and the outcome of the case by subtly orchestrating abstract agreement with the majority. Think about

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<sup>409</sup> See *supra* notes 118–25 and accompanying text.

<sup>410</sup> See *supra* notes 159–62 and accompanying text.

<sup>411</sup> See *supra* notes 215–23 and accompanying text. By bringing to bear his unique perspective on the law (combining economics, deft interpretation, and sympathy for the underdog), Judge Posner's two-cents concurrences are characterized by what Schlag has called a perspectivist aesthetic. See Schlag, *supra* note 404, at 1052.

<sup>412</sup> See *supra* notes 66–67 and accompanying text.

<sup>413</sup> See, e.g., *supra* notes 159–64 and accompanying text.

his uses of ambiguity in the statutory interpretation case of *Michels v. United States Olympic Committee*. In that case Posner rhetorically persuaded the majority to disallow an athlete's attempt to use the federal courts to second-guess amateur athletic organizational decision making; his ostensible agreement that the disgruntled weightlifter could not use a federal statute to privately enforce his own claim was backed up by the rhetorically persuasive observation that even if the statute *could* be privately enforced, the weightlifter's lawsuit would have to be dismissed for failure to state a claim.<sup>414</sup> Or contemplate Posner's strategic concurrence with the dismissal of the mortgagor's appeal in *United States v. OCCI Co.*, where he expressed ambiguous doubt about the continued validity of precedent that allowed a mortgagor to assert an affirmative defense of noncompliance by HUD with the broad national housing objectives set forth in the federal statute, and cleverly characterizing the substance of those national housing objectives as nothing more than "hopes and homilies" with "few specifics."<sup>415</sup> Or meditate on the ingenious way that Judge Posner advances the overarching attractiveness of a purposeful method of statutory construction by his strategic concurrence in *Marozsan v. United States*. He agreed with the majority opinion which construed a federal veterans benefit statute as allowing judicial review of an administrative agency determination; he supported his concurrence with ambiguous general comments that would be hard for his colleagues to disagree with, to wit, "the deficiencies of literalism as a style of statutory interpretation" coupled with his denigration of "[t]he idea that semantically unambiguous sentences—sentences clear 'on their face'—sentences whose meaning is 'plain'—can be interpreted without reference to purpose inferred from context" in a statutory scheme.<sup>416</sup>

### B. *The Aesthetics of Judicial Concurring Style*

What thoughts does our detailed examination of the concurring opinion oeuvre of Judge Richard A. Posner inspire regarding the uses and attractiveness (or lack of attractiveness) of judicial appellate concurrences? What follows are some tentative and half-baked notes and unanswered questions.

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<sup>414</sup> See *supra* notes 329–36 and accompanying text.

<sup>415</sup> See *supra* notes 337–38 and accompanying text.

<sup>416</sup> See *supra* notes 341–42 and accompanying text.

1. While law makes moral claims by its very nature, law can also be, as John Gardner of Oxford's University College has written, "regarded and evaluated as . . . an object of aesthetic appreciation: as a literary genre, an intellectual architecture, a social spectacle, and so on."<sup>417</sup> Thus, just as "[l]awyers not infrequently come to think of their work as one might think of a work of art, prizing elegance, coherence, balance, and other aesthetic virtues, over moral virtues such as honesty, generosity, and humanity,"<sup>418</sup> appellate judges and the readers of appellate judicial opinions may come to value aesthetics over morality. Is such valuation legitimate and proper? Are concurring appellate judicial opinions "mainly . . . object[s] of aesthetic criticism, mainly suited to being deconstructed and transfigured and problematized?"<sup>419</sup> On a higher plane: "Is there any authentic moral insight lurking within an aesthetics of law [and concurring judicial opinions]? Does approaching the law [and concurring judicial opinions] as . . . object[s] of aesthetic appreciation count as any more than a vain distraction from the real job of revealing [their] moral strengths and weaknesses?"<sup>420</sup> According to one take on these questions, based on "the web of Nietzsche's revisionist aesthetics morality," indeed, "the highest admiration is reserved for the testing of one's creative limits, and . . . true virtue lies in overcoming all that constrains and dampens the human spirit."<sup>421</sup> Seen in such a light, appellate concurring opinions might be used more creatively by judges to add to, improve, and enrich the law. But are there examples of "good" creativity and "bad" creativity in the production of judicial concurrences?

2. Can creative judicial concurring opinions be more imaginatively conceived and fashioned by appellate judges to assist in the greater production of good legal ideas?<sup>422</sup> Is it wrong for appellate judges to use their concurrences to float ideas to the legislature, the executive, or the administrative agencies? If so, why is it wrong? If it is not wrong, how can concurrences be

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<sup>417</sup> John Gardner, *General Editor's Preface* to ADAM GEAREY, *LAW AND AESTHETICS*, at vii (John Gardner ed., 2001).

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

<sup>420</sup> *Id.* at viii.

<sup>421</sup> *Id.*

<sup>422</sup> *Cf.* PETER WATSON, *IDEAS: A HISTORY OF THOUGHT AND INVENTION FROM FIRE TO FREUD* 10 (2005) (discussing as one of the main failures in the field of intellectual history: the "failure among both historians and scientists to get to grips with 'imagination' as a dimension in life generally and in particular so far as the production of ideas is concerned").

improved to better help these non-judicial legal institutions? Moreover, how can concurring judicial opinions be improved to better help an appellate court refine and evolve its legal doctrine in discrete substantive and procedural areas? How can concurring judicial opinions be improved to assist higher appellate courts (i.e., a supreme court in a jurisdiction) refine and evolve legal doctrine?

3. How does the view that judicial concurring opinions are strategically used by appellate judges to advance consubstantiality through artful use of ambiguous language<sup>423</sup> fit with the notion that concurring opinions can help improve the law over time?<sup>424</sup>

4. Among the four major types of legal aesthetics—the grid aesthetic, the energy aesthetic, the perspectivist aesthetic, and the dissociative aesthetic<sup>425</sup>—what aesthetics do appellate judges favor when they craft concurring opinions? Remember, we have seen that when Judge Posner writes a true concurring opinion his style tends to reflect the grid aesthetic and the energy aesthetic.<sup>426</sup> Posner's two-cents concurrences, however, are characterized by a perspectivist aesthetic.<sup>427</sup> Posner's use of the dissociative aesthetic is rare (in his concurrences); but his concurring opinion in *United States v. McKinney* fits the bill of lawyers or judges talking past one another, with Judge Posner willing to judicially innovate to arrive at a more workable and coherent standard of review in criminal probable cause cases, and the majority opinion finding such judicial innovation totally inappropriate in light of purported Supreme Court precedent which already established the standard of review.<sup>428</sup> Do appellate judges learn from one another when a dissociative aesthetic appears in a colleague's concurring opinion? Or, do ideological positions harden in such cases? Are these types of

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<sup>423</sup> See *supra* notes 413–14 and accompanying text.

<sup>424</sup> See *supra* notes 421–22 and accompanying text.

<sup>425</sup> See *supra* notes 404, 411 and accompanying text. Schlag defines the dissociative aesthetic of law as follows:

Nothing is what it is, but is always already something else. Any attempt to refer to X is frustrated, as even the most minimal inquiry reveals that X is an unstable glomming-on of many other things that cannot be subsumed or stabilized within any one thing. The crucial contributions of the prior aesthetics . . . have all collapsed. No determinable identities, relations, or perspectives survive.

Schlag, *supra* note 404, at 1052.

<sup>426</sup> See *supra* note 404 and accompanying text.

<sup>427</sup> See *supra* note 411 and accompanying text.

<sup>428</sup> See *supra* notes 375–83 and accompanying text. Compare *United States v. McKinney*, 919 F.2d 405, 421 (7th Cir. 1990) (Posner, J., concurring) (“[O]nly in law is ‘innovative’ a pejorative.”), with *id.* at 409 (majority opinion) (disparaging Posner's proposed approach as inappropriate and involving “bold initiatives” which flew in the face of Supreme Court precedent).

raw concurrences helpful to the Supreme Court Justices reviewing an issue where there are conflicting views on the Court of Appeals?<sup>429</sup>

5. As recent critical scholarship has argued, lawyers and judges should return to the classical view of law as a creative enterprise that is deeply dependent on persuasive narration and literary prowess. As explained in the introduction of a 1999 book entitled *Law and the Image: The Authority of Art and the Aesthetics of Law*:

Law's art has been recently explored from a literary perspective. The school of jurisprudence variously described as "law and literature" or "literary jurisprudence" has revived the classical tradition for which successful law was perceived as a felicitous language and instruction into the legal arcana involved an introduction to the power of beautiful speech. The earliest customs and laws of Greece took the form of legends, myths, and tales, the earliest judge was a historian. The first legal form was the narrative, and the great lawgivers—Solon, Lycurgus, Plato himself—were successful narrators. . . . Demosthenes and Cicero were instructed in forensic rhetoric and the felicitous uses of speech and oratorical skill as well as in legal technique and procedure.

In a more general sense, throughout history *law has been the performative language par excellence*, a language whose success is measured by its consequences, its ability to act on the world.<sup>430</sup>

Persuasive narration of law—and its impact on human beings and social institutions in the real world—is a role to be played not only by paid advocates in a case but by appellate judges who are troubled by some dimension of a case on appeal. A potentially useful way of

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<sup>429</sup> Adam Gearey discusses a law and aesthetics concept stemming from the work of Roberto Unger which to my mind is similar to Schlag's dissociative aesthetic of law. He observes:

[Roberto Unger's work], more than any other recent manifestation of American Critical Legal Studies, has a vision of aesthetic 'negative capability' at its core. Negative capability emerges as the most recent development of a perennial concern, the capacity to reinvent our emotional connection with others outside institutional structures that are meant to contain and condition them.

GEAREY, *supra* note 417, at 99; *cf.* Schlag, *supra* note 404, at 1098 (noting that the "breakdown and reconstruction is perhaps the most intense aesthetic moment in law").

<sup>430</sup> Costas Douzinas & Lynda Nead, *Introduction to LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW 10* (Costas Douzinas & Lynda Nead eds., 1999) (emphasis added).

thinking about some concurring opinions (and, perhaps, many dissenting opinions) is to think of these appellate opinions as performative language which seeks to develop alternative visions of the meaning and potential of law. Thus, being concerned about the aesthetics of judicial concurring opinion style can help lawyers and judges to restate and reconceptualize the law. As law and aesthetics theorists have written in this regard: “If the law works through the creation and projection of ordered worlds, attention to style, detail, and form will help one understand law’s hidden vision and develop alternative worlds and visions that derive their legitimacy from repressed texts, histories, and traditions.”<sup>431</sup> Based on this idea, would we conclude that Judge Posner is an *artistic* concurring judge (some, most, or all of the time)? How would we grade other appellate judges?

6. If we are to take concurring judicial opinions seriously—by expecting that some opinions might help improve the law over time as other judges take a second look at particular legal doctrines, principles, interpretations and the like—we should also consider the aesthetic musings of Philip Fisher who has written an entire book on the human “ongoing [provisional] project of making sense” of the world “rather than the nature of knowing” things in the sense of “what Descartes called certain knowledge.”<sup>432</sup> A good judicial concurring opinion, then, might be thought of in terms of which Fisher has described as “a common poetics of wonder, a map of the features of thinking that guide us to satisfaction and a *feeling of intelligibility* within experience” not “knowing” it in Cartesian terms of clear and distinct ideas.<sup>433</sup>

## V. CONCLUSION

This Article started off with some background thoughts and differing views on the general nature of concurring judicial opinions. Then, after a brief statistical overview of Judge Richard A. Posner’s concurrences during his first twenty-five years as a federal

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<sup>431</sup> *Id.* These interdisciplinary scholars define their project in broader terms as well:

This collection [of essays] is the first attempt to develop a specifically legal iconology, to draw on the critical procedures of law, art history, and cultural studies in order to consolidate a new interdisciplinary field of visual culture and law. The focus is on the diverse interfaces between law and the artistic image.

*Id.* at 11.

<sup>432</sup> PHILIP FISHER, *WONDER, THE RAINBOW, AND THE AESTHETICS OF RARE EXPERIENCES* 8 (1998).

<sup>433</sup> *Id.* (emphasis added).

appellate judge, ten ways to look at Posner's concurrences were explored: (1) Posner as congressional adviser—opinions that highlight his far-ranging intellect and energy; (2) law and economics analysis which is the leitmotif of many of his judicial opinions; (3) Posner as an institutional critic; (4) two views on whether Judge Posner is a nitpicker in his opinions; (5) instances of the law professor as judge by reference to various hypothetical examples set forth in Posner's opinions; (6) Posner's penchant for cutting Gordian Knots in his opinions; (7) his pragmatic reading and interpretation of statutes; (8) Posner's focus on arriving at appropriate standards of judicial review; (9) the bracing directness and frank commentary in his opinions; and (10) Judge Posner's willingness to add his thoughts and takes in en banc cases before the entire appellate court.

The Article, then, transitioned from specific commentary to general observations. First, I characterized the over-arching style of Judge Posner's concurring opinions as focused on strategic inspiration of consubstantiality—building analytical bridges with his judicial colleagues' opinions on matters of law and policy that are important to Posner. Second, I dipped into the nascent literature on law and aesthetics to explore some potential larger purposes of judicial concurring opinions, in general, and to raise some unanswered questions.