

2006

Judge Posner's Dissenting Judicial Oeuvre and the Aesthetics of Canonicity

Robert F. Blomquist

Valparaiso University School of Law

Follow this and additional works at: http://scholar.valpo.edu/law_fac_pubs



Part of the [Judges Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

Robert F. Blomquist, *Judge Posner's Dissenting Judicial Oeuvre and the Aesthetics of Canonicity*, 36 N.M. L. Rev. 161 (2006).

This Article is brought to you for free and open access by the Law Faculty Presentations and Publications at ValpoScholar. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.

JUDGE POSNER'S DISSENTING JUDICIAL OEUVRE AND THE AESTHETICS OF CANONICITY

ROBERT F. BLOMQUIST*

In the autumn of 2001, Judge Richard A. Posner completed twenty years of judicial service and started his third decade on the federal appellate bench. During his tenure as a judge, Posner's output of scholarly books¹ and articles² has continued to flow like a waterfall, attracting widespread attention.³ Moreover, Posner's judicial opinions have been noticed for their perspicacity and edifying style.⁴ In particular, his dissenting judicial opinions are unusually powerful and persuasive.

In this Article, I extend and refine the project that I started in the *Missouri Law Review* (where I examined the judicial opinion style of Judge Posner's dissenting opinions during his first decade on the bench, 1981 through 1991)⁵ with a fresh critique of his dissenting judicial opinion style during his last dozen years as a judge, from 1992 through 2003. The fivefold aim and structure of this Article is as follows. First, Part I provides a statistical overview of Judge Posner's appellate decisions during this twenty-two year (to date) judicial career. I am particularly interested in charting the frequency of his dissenting opinions. Second, Part II summarizes Judge Posner's dissenting judicial opinion style during his early years on the United States Court of Appeals for the Seventh Circuit. Third, Part III analyzes and evaluates Judge Posner's dissenting judicial opinion style during 1992 through 2003—his more mature years as a jurist. Fourth, Part IV draws some conclusions about Judge Posner's evolving dissenting judicial opinion style and comment on the implications of my work for increased understanding of the aesthetics of judicial dissenting opinions. Finally, Part V offers some thoughts in relation to the corpus of Judge

* Professor of Law, Valparaiso University School of Law. B.S. University of Pennsylvania (Wharton School), 1973. J.D. Cornell University, 1977. My thanks go to Stephen Choi, Mitu Gulati, Richard A. Posner, and Thomas Ulen for helpful and insightful comments regarding an earlier draft. I am grateful to my research assistants, Genevieve Boardman and Jon R. Rogers, for their invaluable assistance.

1. See, e.g., RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* (2004) [hereinafter *CATASTROPHE*]; RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION AND THE COURTS* (2001); RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* (2001); RICHARD A. POSNER, *PUBLIC INTELLECTUALS: A STUDY OF DECLINE* (2001). Posner has authored more than forty books. For a complete list, see University of Chicago Law School, Publications, Presentations and Works in Progress, <http://www.law.uchicago.edu/faculty/posner-r/ppw.html> [hereinafter *Publications*].

2. See, e.g., *Publications*, *supra* note 1 (listing more than 400 law review articles and essays published by Posner to date).

3. See, e.g., Richard A. Epstein, *The Perils of Posnerian Pragmatism*, 71 U. CHI. L. REV. 639 (2004) (reviewing RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003)); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 702 (2003) (discussing Posner's writings on law and economics in torts).

4. See, e.g., 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. CINN. L. REV. 651, 654, 732–35 (2000) [hereinafter *Sexy Style*]; *Supreme Stats*, LEGAL AFFAIRS, Sept.–Oct. 2004, at 31 (utilizing baseball statistical methodology to rank Judge Posner “#1” for opinion productivity, opinion quality, and independence among circuit court judges likely to be considered for a Supreme Court vacancy). Although not nominated for the most recent vacancies, recent writings by Professors Stephen J. Choi and Mitu Gulati argue that Judge Posner would be the most qualified federal appellate judge in America to be elevated to the U.S. Supreme Court. See Stephen J. Choi & G. Mitu Gulati, *Justice Richard A. Posner? Unpacking the Statistics*, 61 N.Y.U. SURV. OF AM. L. 19 (2005) [hereinafter *Unpacking the Statistics*]; Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice*, 78 S. CAL. L. REV. 23 (2005) [hereinafter *Choosing*].

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

Posner's dissenting opinion style as it has evolved over two decades on the aesthetics of judicial canonicity. In this final Part, I seek to bypass contentious ideological debates about what might be characterized as the "canon" of stellar judicial opinions and to explore, in relation to the dissenting judicial opinions of Judge Posner, how aesthetic *pleasure* plays into what we in the legal community find valuable, how this can *change* over time, and how *chance* works on the formation of the judicial canon.

This Article also has two further, secondary proposes: (1) to provide data and analysis for the President of the United States in nominating Judge Posner for a future vacancy on the Supreme Court, and (2) to provide U.S. senators with helpful information in assessing Posner's character, fitness, and merit for confirmation as Justice Posner.

I. STATISTICAL OVERVIEW

During the twenty-two year survey period of Judge Posner's service as a United States Court of Appeals Judge—from his starting date during the autumn of 1981 until the end of 2003 (technically, slightly longer than twenty-two years)—Judge Richard A. Posner wrote a total of 1,988 published opinions, or an average of about ninety opinions per year.⁶ Of these 1,988 opinions, Judge Posner authored 1,847 opinions for the Seventh Circuit majority.⁷ Posner wrote a total of 141 published separate opinions during this timeframe.⁸ These separate opinions consisted of

6. See *Dissent Aesthetics*, *supra* note 5, at 93. 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	% SEPARATE OPINIONS	% DISSENTS
1981	3	0	0	0	3	0.00%	0.00%
1982	77	2	0	6	85	9.41%	7.06%
1983	81	7	3	5	96	15.63%	8.33%
1984	77	4	1	5	87	11.49%	6.90%
1985	88	6	0	9	103	14.56%	8.74%
1986	78	3	1	4	86	9.30%	5.81%
1987	79	4	0	2	85	7.06%	2.35%
1988	72	3	2	3	80	10.00%	6.25%
1989	72	3	0	3	78	7.69%	3.85%
1990	86	3	0	5	94	8.51%	5.32%
1991	73	1	1	4	79	7.59%	6.33%
1992	77	1	0	6	84	8.33%	7.14%
1993	98	0	0	3	101	2.97%	2.97%
1994	100	2	0	1	103	2.91%	0.97%
1995	89	2	1	2	94	5.32%	3.19%
1996	103	0	0	2	105	1.90%	1.90%
1997	88	0	1	0	89	1.12%	1.12%
1998	83	1	0	2	86	3.49%	2.33%
1999	90	2	0	5	98	7.14%	5.10%
2000	80	1	1	2	84	4.76%	3.57%
2001	85	2	1	1	88	4.55%	2.27%
2002	89	1	1	3	94	5.32%	4.26%
2003	79	2	0	5	86	8.14%	5.81%
Total	1,847	50	13	78	1,988	7.09%	4.58%

7. *Id.*

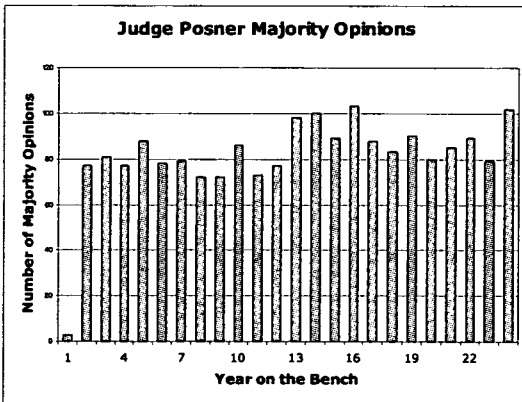
8. *Id.*

seventy-eight dissenting opinions, fifty pure concurring opinions, and thirteen mixed concurring/dissenting opinions.⁹

The distribution of Judge Posner's eighty-two dissenting and mixed concurring/dissenting opinions over his first twenty years on the federal bench is illuminating. From late 1981 through the end of 1986, he wrote a total of thirty-four dissenting opinions (41.5% of all his dissenting opinions during his first twenty years as a judge).¹⁰ From 1987 through the end of 1991, he wrote twenty dissenting opinions (24.4% of all his dissenting opinions during his first twenty years as a judge). From 1992 through the end of 1996, he wrote fifteen dissenting opinions (18.3% of all his dissenting opinions during his first twenty years as a judge), and from 1997 through the end of 2001, he authored thirteen dissenting opinions (15.9% of all his dissenting opinions during his first twenty years as a judge).¹¹ Thus, as Judge Posner's tenure on the bench has lengthened, he has tended to write fewer dissenting opinions.¹²

The following figures (assembled from the statistical data in the table in footnote 6) provide a graphic depiction of Judge Posner's output of various types of judicial opinions:

FIGURE 1



9. *Id.*

10. For the purposes of these calculations, "dissenting opinions" includes both pure dissents and mixed concurring/dissenting opinions. *See infra* note 11.

11. *Id.* My statistics do not reflect whether Judge Posner's dissenting opinions were dissents from panel majority opinions, dissents from en banc majority opinions, partial concurring and dissenting opinions, or dissents from majority opinions declining to reverse a panel opinion en banc. However, in the discussion that follows, I do make these distinctions.

12. While we must wait for data through the end of 2006 to make a comparable five year comparison with Posner's earlier five-year timeframes, it appears that his output of dissenting opinions will likely increase during 2002-2006 since he has already written nine dissenting opinions during 2002-2003 (four dissenting opinions during 2002 and five dissenting opinions during 2003). *See supra* note 6 and accompanying text. As I speculated in an earlier article:

A possible reason for Posner's decreasing rate and number of dissenting opinions is his increased 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).

Dissent Aesthetics, supra note 5, at 94.

FIGURE 2

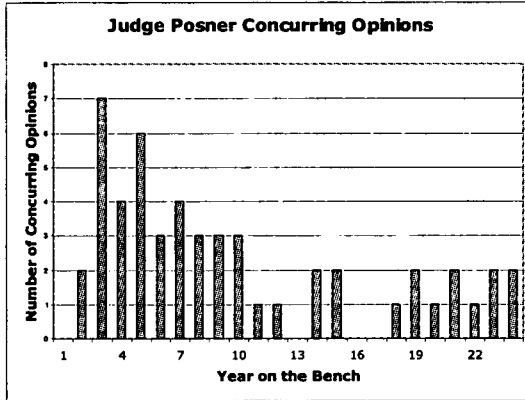


FIGURE 3

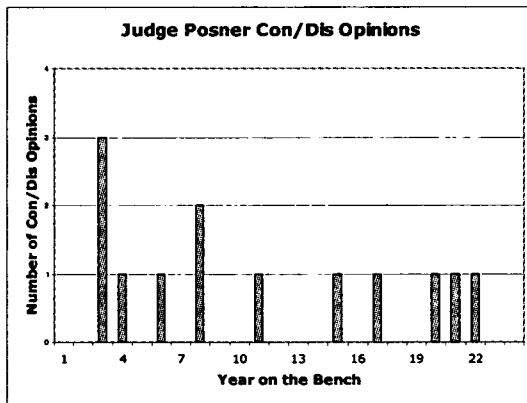
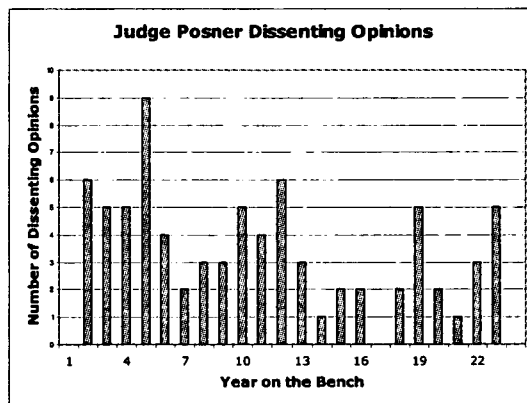


FIGURE 4



II. A SYNOPSIS OF JUDGE POSNER'S EARLY DISSENTING OPINION STYLE, 1981-1991

During his first two years as a federal appellate judge, Judge Posner was mainly motivated to write dissenting opinions to satisfy a cathartic need to evince dissatisfaction with sloppy, shopworn, or inefficient legal reasoning.¹³ Commencing in 1983, Posner's dissenting style became more confident and caustic.¹⁴ Among the multiple dissenting voices that he employed during his first five years on the bench, from 1981 through 1986, were the following: Posner the Academic,¹⁵ Posner the Tendentious Economist,¹⁶ Posner the Taskmaster,¹⁷ Posner the Cassandra,¹⁸ Posner the Humanitarian,¹⁹ and Posner the Epistemologist.²⁰ Opinions that epitomize the panache of Judge Posner's dissenting style during 1981 through 1986 were *United States v. Markgraf* (a dissent that vigorously championed the rights of a farm couple by imagining how this couple might feel about having their home foreclosed and how Congress would have preferred the dispute to be resolved);²¹ *Geras v. Lafayette Display Fixtures, Inc.* (an opinion where Posner adroitly employed irony to sympathize with the majority jurists while insisting upon the recognition of strict constitutional principles);²² *Haffner v. United States* (a dissent that triggered a belly laugh at the folly of the majority's approach to statutory interpretation);²³ and *United States v. Green* (an opinion where Posner brilliantly utilized an assortment of stylistic devices to uncover the injustice of a conviction for mail fraud).²⁴ Yet, Judge Posner also authored some ugly dissenting opinions during this timeframe—exemplified by his stylistics in *Alliance to End Repression v. City of Chicago*²⁵ and *Chaulk v. Volkswagen of America, Inc.*²⁶—that were tarnished by inappropriately aggressive personal attacks.

During 1987 through 1991, the second part of his first decade as a federal appellate judge, Judge Posner's dissenting opinion style was generally most persuasive when he used empathy as a technique, as in *Anilina Fabrique de Colorants v. Aakash Chemicals & Dyestuffs, Inc.*²⁷ and *Wyletal v. United States*.²⁸

13. This Part is a distillation of my earlier article on Posner's dissenting judicial opinion style. See generally *Dissent Aesthetics*, *supra* note 5.

14. *Id.* at 97.

15. See, e.g., *Hayes v. Allstate Ins. Co.*, 722 F.2d 1332, 1336-41 (7th Cir. 1983) (Posner, J., dissenting).

16. See, e.g., *Merritt v. Faulkner*, 697 F.2d 761, 769-71 (7th Cir. 1983) (Posner, J., concurring in part and dissenting in part).

17. See, e.g., *United States v. Knop*, 701 F.2d 670, 676-77 (7th Cir. 1983) (Posner, J., dissenting).

18. See, e.g., *Vail v. Bd. of Educ.*, 706 F.2d 1435, 1449-56 (7th Cir. 1983) (Posner, J., dissenting), *aff'd by equally divided court*, 466 U.S. 377 (1984).

19. See, e.g., *DePass v. United States*, 721 F.2d 203, 206-10 (7th Cir. 1983) (Posner, J., dissenting).

20. *Id.* at 207.

21. 736 F.2d 1179, 1186-88 (7th Cir. 1984) (denial of reh'g en banc) (Posner, J., dissenting).

22. 742 F.2d 1037, 1045-54 (7th Cir. 1984) (Posner, J., dissenting).

23. 757 F.2d 920, 921-23 (7th Cir. 1985) (Posner, J., dissenting), *superseded by statute*, Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984).

24. 786 F.2d 247, 255-60 (7th Cir. 1986) (Posner, J., dissenting).

25. 733 F.2d 1187, 1192-97 (7th Cir. 1984) (Posner, J., concurring in part and dissenting in part).

26. 808 F.2d 639, 643-45 (7th Cir. 1986) (Posner, J., dissenting).

27. 856 F.2d 873, 882-84 (7th Cir. 1988) (Posner, J., dissenting).

28. 907 F.2d 49, 51-53 (7th Cir. 1990) (Posner, J., dissenting).

Conversely, his dissenting opinion style was generally least compelling during this period when he directly or indirectly made personal attacks—as in *Reilly v. Blue Cross & Blue Shield United of Wisconsin*²⁹ and *Visser v. Packer Engineering Associates, Inc.*³⁰

Three Posnerian dissenting opinions during his first decade on the federal appellate bench demonstrate aesthetic sublimity: *International Union, UAW v. Johnson Controls, Inc.*,³¹ *In re Sanderfoot*,³² and *United States v. Marshall*.³³ In crafting all three of these dissents in cases that all eventually were heard by the Supreme Court—with two out of three of the cases being reversed by the High Court³⁴—Judge Posner demonstrated virtuosity in being able to masterfully combine numerous stylistic techniques in dissenting performances that were greater than the sum of the individual parts of the respective dissenting opinions. Moreover, in each of the aforementioned dissenting opinions, Judge Posner employed connoisseurship in being able to expertly judge the appeal and persuasiveness of his various stylistic techniques.

By the end of his first decade as a federal appellate judge, Posner had learned to instill life and power into his dissenting opinions by deploying a variety of attractive stylistic techniques. Occasionally during this timeframe, however, Judge Posner lapsed into issuing dissenting opinions that were grating, displeasing, and downright unattractive. In his best dissenting opinions during 1981 through 1991, Posner displayed astute calculation in gauging the winning effect his prose would have—entertaining his readers and persuasively sketching for them pictures of disparate human behaviors and motives. In his finest dissenting opinions, Posner gave thoughtful attention to rhetoric, writ large (in the grand Aristotelean sense of *ethos*, *pathos*, and *logos*), as well as dexterity to particularized rhetorical techniques such as amplification; balance; paradox; brevity; emotional appeals; allusion and citation to authority; metaphorical substitutions and puns; and repetition of letters, syllables, words, and ideas.³⁵

The Posnerian dissenting signature during his first ten years as a judge might—depending upon whether a critic were a connoisseur of military strategy, wine tasting, film, furniture, or swimming—be described in some, or all, of the following ways: “precision bombing runs,” “citric with a memorable aftertaste,” “a clockwork green (as in economics),” “severely utilitarian,” and “delightfully bracing.”³⁶ Posner’s most effective dissenting opinions during his first decade as a judge were those that utilized style as a handmaiden of morality. Those dissents paid serious attention to the integrity and honesty of argumentation, rather than engaging in self-conscious posturing of positions.

29. 846 F.2d 416, 426–27 (7th Cir. 1988) (Posner, J., concurring in part and dissenting in part).

30. 909 F.2d 959, 963 (7th Cir. 1990) (Posner, J., dissenting).

31. 886 F.2d 871, 902–08 (7th Cir. 1989) (en banc) (Posner, J., dissenting), *rev'd*, 499 U.S. 187 (1991).

32. 899 F.2d 598, 606–07 (7th Cir. 1990) (Posner, J., dissenting), *rev'd sub nom.* Farrey v. Sanderfoot, 500 U.S. 291 (1991).

33. 908 F.2d 1312, 1331–38 (7th Cir. 1990) (en banc) (Posner, J., dissenting), *aff'd sub nom.* Chapman v. United States, 500 U.S. 453 (1991).

34. See *supra* notes 31–33.

35. See *Dissent Aesthetics*, *supra* note 5, at 157–59.

36. *Id.* at 160.

In a word, over the course of his first decade on the bench, Judge Posner became more pragmatic in the fights he picked with the majority, in the stylistics of his dissents, and in his role as a collegial judge.

III. JUDGE POSNER'S MATURING DISSENTING JUDICIAL OPINION STYLE, 1992–2003

During 1992 through 2003, Judge Posner matured in the ways he wrote dissenting opinions by improving his appeal to “practical reason,” a term that Posner himself described as a quality “[b]etween the extremes of logical persuasion and emotive persuasion” when he assessed the judicial opinions style of his hero, Justice Oliver Wendell Holmes, Jr.³⁷ In the discussion that follows, I will focus, in rough chronological order, on a few of Judge Posner’s aesthetically noteworthy dissents written during this period. As a departure from my earlier scholarship on Posner’s dissenting judicial opinion style, I will forego analysis of specific rhetorical techniques manifested in his dissents. Instead, I will concentrate on Posner’s appeals in his dissenting opinions to broad, emotionally, and logically salient themes that are attractive and memorable (and, on occasion, unattractive and forgettable).

A. *An Appeal to Simple Justice*

In 1992, Judge Posner authored a pure dissenting opinion from a panel majority decision in a prisoner’s rights case, *Hamilton v. O’Leary*.³⁸ Posner’s dissent deftly employed the logic of probabilities with an elegantly understated concern for the justice of revoking a state inmate’s good time credits for constructive possession of an assortment of homemade weapons found in a vent in the common area of the prison.³⁹ The context of the case was a section 1983 action for damages against

37. RICHARD A. POSNER, *LAW AND LITERATURE* 272 (rev. & enlarged ed. 1998) [hereinafter *LAW AND LITERATURE*].

38. 976 F.2d 341, 347 (7th Cir. 1992) (Posner, J., dissenting). During 1992, Judge Posner authored five additional pure dissenting opinions: *Crane v. Indiana High School Athletic Ass’n*, 975 F.2d 1315, 1326 (7th Cir. 1992) (Posner, J., dissenting) (objecting to federal court interference in a high school athletic association’s decision to disallow a student to play golf after he transferred school districts); *In re Grabill Corp.*, 967 F.2d 1152, 1159 (7th Cir. 1992) (Posner, J., dissenting) (disagreeing with the majority’s conclusion that federal bankruptcy court judges could not conduct jury trials); *In re Grabill Corp.*, 976 F.2d 1126, 1128 (7th Cir. 1992) (Posner, J., dissenting) (disagreeing with the majority’s denial of rehearing en banc); *Billish v. City of Chicago*, 962 F.2d 1269, 1302 (7th Cir. 1992) (Posner, J., dissenting) (disagreeing with panel majority’s decision to affirm the grant of a summary judgment for the defendant in a reverse discrimination lawsuit by white firefighters), *vacated and reh’g en banc granted*, 962 F.2d 1269 (7th Cir. 1992); and *United States v. 7326 Highway 45 North*, 965 F.2d 311, 320 (7th Cir. 1992) (Posner, J., dissenting) (disagreeing with the reversal of summary judgment in favor of the government in a drug forfeiture case).

39. As explained in the majority opinion, the weapons were found during a “shakedown” at the Stateville Correctional Center in Joliet, Illinois, where Edward Hamilton was imprisoned at the time. *Hamilton*, 976 F.2d at 343 (majority opinion). Hamilton shared Cell C-227 with three other inmates. *Id.*

Cell C-227 is on the second of four galleries—that is, there are two floors of cells above the second gallery and one floor of cells below. From Cell C-227, Hamilton and his cellmates have access to a large vent. The vent runs the entire vertical length of the four galleries, from the fourth gallery down to the first gallery, and between two cells on each floor. Thus, Hamilton alleges, the prisoners in eight cells, a total of 32 prisoners, have access to some part of the vent.

Id. The six homemade weapons found by two correctional officers consisted of a 16.5-inch steel pipe, a 7.5-inch file, an 11-inch sharpened rod, and three 9.5-inch shanks. *Id.*

various prison officials.⁴⁰ The majority concluded that the state disciplinary committee below had sufficient evidence of Hamilton's guilt to conclude that he constructively possessed the contraband weapons and, therefore, deserved to have his good behavior credits revoked.⁴¹ Thus, the court affirmed the district court's dismissal of Hamilton's civil rights complaint.⁴² Posner's discussion of probabilities in his *Hamilton* dissent is piercing. Noting that the prisoner alleged that a total of two cell blocks on one floor of the prison (with each cell block containing four prisoners) had "equal access to the vent in which the weapons were found," Judge Posner concluded that the state disciplinary committee had insufficient evidence to dock Hamilton of his good behavior credits by stating that, "[o]n the record before the committee, the probability that the plaintiff had possessed one or more of these weapons cannot be reckoned as greater than one in eight, or 12.5 percent."⁴³ While musing that, in prison circumstances, "purely collective guilt" might be theoretically "deemed to satisfy due process," Posner observed that the state officials in the instant case had not advanced that line of argument.⁴⁴ Distinguishing a Supreme Court case used by the panel majority to bolster its holding and reasoning, Judge Posner differentiated the facts at bar through his perspicacious analysis of human nature and statistical probabilities. The case involved three inmates who were all "seen fleeing the scene of the crime."⁴⁵ Posner reasoned in his dissent:

Each [of the fleeing inmates in the Supreme Court case] was thus acting guilty; the probability that each *was* guilty was considerable. Here it is entirely possible that only one of the eight inmates who had access to the vent possessed the six weapons, and there is no evidence to suggest that Hamilton was more likely to be that one than any of the seven other inmates were. Nor is it argued that the six weapons are likely to have been jointly owned by all inmates having access to the place where they were kept.⁴⁶

Posner, no patsy on criminals or prison inmates, could have easily found a way to agree with the panel majority by emphasizing the deferential standard of review enjoyed by the prison disciplinary committee. What makes his dissenting opinion memorable, however, is his willingness to insist on scrupulous inferences and standards of proof for Hamilton, a hapless, lowly, and forgotten prisoner who had the misfortune of being pegged as guilty by proximity in a situation where other locationally proximate prisoners did not suffer as serious penal consequences.⁴⁷

40. *Id.* at 342; *see also* 42 U.S.C. § 1983 (2000).

41. *See Hamilton*, 976 F.2d at 342.

42. *Id.* at 343.

43. *Id.* at 347 (Posner, J., dissenting).

44. *Id.*

45. *Id.* (distinguishing *Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 454 (1985)).

46. *Id.*

47. Posner's dissent continued an attractive characteristic demonstrated in his earlier dissenting opinions of being concerned for relatively insignificant litigants, as well as significant ones, and affording each an equal measure of justice. *See, e.g., Dissent Aesthetics, supra* note 5, at 99–102 (discussing his dissent in *DePass v. United States*, 721 F.2d 203, 206 (7th Cir. 1983) (Posner, J., dissenting) (a Federal Tort Claims Act case where a plaintiff was negligently struck by a car driven by a federal employee, suffering, among other injuries, a traumatic amputation of his left leg below the knee)); *id.* at 108–09 (discussing his dissent in *United States v. Markgraf*, 736 F.2d 1179, 1186 (7th Cir. 1984) (denial of reh'g en banc) (Posner, J., dissenting) (a mortgage foreclosure action against a destitute farm couple)).

B. A Plea for "Biting the Bullet"

In 1993, Judge Posner dissented, in part, from an en banc decision of the Seventh Circuit, after rehearing, in the products liability case *Todd v. Société BIC, S.A.*, involving the alleged wrongful death of a child who was playing with a butane lighter.⁴⁸ It is instructive to analyze the style of this dissenting opinion for two reasons. First, Posner's dissent is of a rare sort: a formal disagreement with an en banc opinion of his Seventh Circuit colleagues. Second, his dissenting opinion covers interesting substantive tort issues of products liability, as well as fascinating legal process questions of judicial review and federalism.

At the beginning of his *Todd* partial dissent, Judge Posner adroitly agreed with the en banc majority's disposition to dismiss the plaintiff's first theory of strict liability ("that BIC should have warned customers about the risks lighters pose to households with children").⁴⁹ He then incorporated by reference a separate partial dissent of a colleague in the case who would have affirmed the grant of summary judgment against plaintiff's second strict liability theory involving design defect for failing to make lighters child-resistant.⁵⁰ Next, Posner articulated the focus of his separate opinion: an essay⁵¹ about why "[t]o certify abstract questions" of tort law "about the consumer-contemplation test and the risk-utility test to the state supreme court is to misunderstand the nature of common law adjudication."⁵²

Assuming the mantle of what he has termed "an everyday-pragmatist judge"⁵³ in the body of his opinion, Judge Posner initially railed against judicial resolution of legal questions devoid of factual concreteness. In the following vivid passage of his *Todd* dissent, Posner philosophized in an accessible, sympathetic, and jargon-free manner, about the relative competencies of judges and legislators:

Judges lack many things that legislators have, but one thing we have is first-hand experience with the facts crystallized in adversary litigation. In areas where the making of substantive rules—"legislating," in a sense—is left to judges, it is because the experience generated by the hearing of cases is thought an adequate or even a superior substitute for the sources of information and persuasion to which legislators turn (or are turned). Common law rules and principles well up

48. 9 F.3d 1216, 1225 (7th Cir. 1993) (Posner, C.J., concurring in part and dissenting in part), *aff'd*, 21 F.3d 1402 (7th Cir. 1994). Moreover, during 1993, Judge Posner wrote two pure dissenting opinions: *EEOC v. Illinois*, 986 F.2d 187, 190 (7th Cir. 1993) (Posner, J., dissenting) (dissenting from affirmation of summary judgment for state holding that special state police officers were subject to mandatory retirement), and *Reed v. Gardner*, 986 F.2d 1122, 1128 (7th Cir. 1993) (Posner, J., dissenting in part) (disagreeing with outcome in civil rights case appeal involving a claim by motorists who were injured in an automobile collision with a drunk driver who brought an action against a police officer who had failed to arrest the drunk driver).

49. *Todd*, 9 F.3d at 1217 (majority opinion).

50. *Id.* at 1225 (Posner, C.J., concurring in part and dissenting in part). The separate opinion that Posner incorporated by reference on the design defect issue was Judge Manion's partial dissent. *See id.* at 1227 (Manion, J., dissenting in part).

51. For a discussion of Judge Posner's penchant for writing judicial opinions in the form of essays, see *Dissent Aesthetics*, *supra* note 5, at 110.

52. *Todd*, 9 F.3d at 1225 (Posner, C.J., concurring in part and dissenting in part) (internal quotation marks omitted).

53. RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY 12 (2003) [hereinafter LAW, PRAGMATISM AND DEMOCRACY].

out of the judge's experience with the facts of actual cases and are honed by the experience of encountering different facts in later cases.⁵⁴

For Judge Posner, it made no sense for the Seventh Circuit to certify to the Supreme Court of Illinois a request to make general "rules applicable to all non-purchasers of dangerous or defective products and to all consumer products whose risk can be appreciated by their intended users."⁵⁵ Rather, what mattered for him was the particular factual texture and nuanced details of the present case. As he explained with almost novelistic flair and colloquial directness:

[This] is a case about a small child who used a cigarette lighter to set a fire that killed another small child. The only issue we ought to be concerned with is whether the state supreme court would permit such a case to go to a jury. I say—with diffidence, in view of the disagreement within our court—that the answer is fairly clearly "no."⁵⁶

Concerned about the legal process issues of institutional competence and settlement,⁵⁷ Posner expressed alarm and succeeded, by his use of cascading analysis and incisive questions, in arousing mild consternation about the potential ramifications of the majority's certification decision. He wrote:

As is plain from the long footnote in the majority opinion, the respective costs and benefits of child-resistant cigarette lighters raise difficult questions that a jury could not responsibly answer, and underneath them is the broader question how far, and through what institutional means, society should go to make ordinary household products child-proof (or child-resistant). If lighters are to be made child proof, can kitchen knives, microwave ovens, and electrical sockets be far behind? Is a comprehensive national program of protecting children from the menaces of everyday life to be formulated and administered by—juries?⁵⁸

Turning to his perennial concern about judicial efficiency,⁵⁹ Judge Posner opined that the "purpose of the certification procedure is not to dump our cases, even our

54. *Todd*, 9 F.3d at 1225 (Posner, C.J., concurring in part and dissenting in part).

55. *Id.* (internal quotation marks omitted).

56. *Id.*

57. Henry M. Hart, Jr. and Albert M. Sack's classic work provided the first comprehensive scholarly consideration of the importance of comparative institutional strengths and weaknesses. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge & Philip P. Frickey eds., 2001) (1958). These scholars articulated a number of vital insights that, in recognition of their fundamental interdependence with others, "people form themselves into groups for the protection and advancement of their common interests, or they accept membership in groups formed by others," *id.* at 2, and that individuals establish "the institutionaliz[ation] [of] procedures for the settlement of questions of group concern." *Id.* at 3. Continuing their social theory, Hart and Sacks noted that since "different procedures and personnel of different qualifications invariably prove to be appropriate for deciding different kinds of questions," it follows "that every modern society differentiates among social questions, accepting one mode of decision for one kind and other modes for others—for example, courts for 'judicial' decisions and legislatures for 'legislative' decisions." *Id.* Judge Posner's passage obviously draws upon this seminal line of thought and is written in what might be called a legal process style.

58. *Todd*, 9 F.3d at 1225–26 (Posner, C.J., concurring in part and dissenting in part) (citations omitted).

59. For earlier Posnerian dissents based on concerns of judicial efficiency, see, for example, *United States v. Board of School Commissioners*, 677 F.2d 1185, 1190 (7th Cir. 1982) (Posner, J., dissenting), and *Anilina Fabrique de Colorants v. Aakash Chemicals & Dyestuffs, Inc.*, 856 F.2d 873, 882 (7th Cir. 1988) (Posner, J., dissenting).

diversity cases, on state courts.”⁶⁰ Rather, instead of “convert[ing] certification to abstention” by ill-advised certification to a state supreme court, Posner claimed that the proper “purpose of certification is to identify controlling issues that can be resolved without immersion in the details of the case,” such as interpretation of the meaning of a state statute.⁶¹ But, according to Judge Posner, “[c]ertification is rarely if ever appropriate in a fact-laden common law case, such as” the case at bar.⁶² In concluding his dissent Posner was frank, direct and concise:

I voted to rehear the case en banc; I think we should bite the bullet and decide it now. By certifying these questions to the Supreme Court of Illinois we merely delay the resolution of the case, impair the proper operation of the common law process and, burden another court.⁶³

C. A Call for Purposeful Statutory Construction

In 1994 Judge Posner dissented from a panel opinion authored by his colleague, Frank Easterbrook, in *Resolution Trust Corp. v. Chapman*,⁶⁴ which held that a federal banking statute provided the appropriate standard of care in suits by the federally-created Resolution Trust Corporation (RTC) against officers and directors of insolvent federally chartered financial institutions.⁶⁵ Judge Posner has an abiding intellectual interest in questions of statutory interpretation.⁶⁶ It seems that he relishes a good statutory puzzle. In *Chapman*, he viewed the matter in a vastly different light than his fellow judges.⁶⁷ In a nutshell, Posner thought it was “Crazy!” to “turn[]” the purpose of a federal banking statute “on its head” by allowing directors of federal financial institutions to enjoy the protection of a lax federal standard of care, “gross negligence,” instead of the background state standard (the law of the state of incorporation of the federal financial institution) of simple negligence.⁶⁸ In reaching the aforementioned conclusion, Judge Posner started by framing the issue on appeal in a straightforward and vivid manner:

The issue presented by the appeal in this directors’ liability suit is the standard of care to which to hold the directors of savings and loan associations in Illinois sued by the Resolution Trust Corporation. The Security Savings & Loan Association received a charter from the State of Illinois in 1880, and opened for business that year in Peoria. A century later, in 1982, Security exchanged its state charter for a federal one. Seven years later it went broke and passed into the

60. *Todd*, 9 F.3d at 1226 (Posner, C.J., concurring in part and dissenting in part).

61. *Id.* (citations omitted).

62. *Id.*

63. *Id.* at 1227.

64. 29 F.3d 1120, 1125 (7th Cir. 1994) (Posner, C.J., dissenting). This dissenting opinion was Posner’s sole pure dissent for the year; he did not author any partial concurring and partial dissenting opinions during 1994.

65. *Id.* at 1123–24 (majority opinion).

66. See, e.g., LAW, PRAGMATISM AND DEMOCRACY, *supra* note 53, at 62–63, 67–68, 74, 82, 271–74; Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952 (2003); *Dissent Aesthetics*, *supra* note 5, at 146–49.

67. Judge Rovner wrote a concurring opinion, wherein he claimed, “Although I join Judge Easterbrook’s opinion, I am sympathetic to the sentiments expressed by the dissent.” 29 F.3d at 1125 (Rovner, J., concurring). Rovner concluded, “I am ultimately unpersuaded by the dissent, however, as I agree with Judge Easterbrook that the internal affairs doctrine compels application of federal law to the internal affairs of a federally-chartered financial institution.” *Id.*

68. *Id.* at 1127 (Posner, C.J., dissenting).

hands of the RTC, which brought this suit against Security's former directors to obtain damages for their negligent mismanagement of Security's lending and investment activities during the period, as it happens, after Security became a federal S&L. The directors' negligence is alleged to have harmed Security's shareholders, to whose rights the RTC has succeeded, and it is that harm which the suit seeks to redress. The question we are asked to decide is whether the defendants can be held liable for simple negligence, in light of 12 U.S.C. § 1821(k), passed the year Security went broke and conceded (at least for purposes of this appeal) to be applicable to this suit.⁶⁹

Posner then described the origins of the new federal banking statute as "empower[ing] the RTC to sue the directors of federally insured financial institutions for gross negligence or any greater disregard of duty."⁷⁰ He went on to point out, however, that because of the federal statute's savings clause, "nothing in this section shall impair or affect any right of the RTC under other applicable law."⁷¹ The legislation's savings clause, according to Posner, worked as follows if a federally insured institution was state chartered: "if a state tries to immunize the directors of such institutions from liability for any nonintentional act, even if grossly negligent, the RTC can still sue; and...it can sue for simple negligence if applicable state law makes the directors liable for simple negligence."⁷² In Judge Posner's view, the more troublesome question was what happened if "the institution [had] a *federal charter* instead of a state charter?"⁷³ Rejecting recent precedent of the Seventh Circuit, Posner would have allowed the RTC to utilize Illinois law that "ma[de] the directors of financial institutions...liable to shareholders for simple negligence."⁷⁴

Laying out the specific reasons for his dissent, Judge Posner first interpreted the purpose of section 1821(k)—"as the timing of the statute's enactment and other features of its [legislative] history make clear"⁷⁵—to be "plac[ing] a *floor* under the liability of directors of savings and loan associations, which were falling like ninetpins."⁷⁶ He followed up this colorful metaphor by surveying the mischief that Congress sought to cure⁷⁷ and paraphrased the bill's sponsor in the Senate by stating that "[t]he purpose of the new federal statute was to preempt those [state] laws to the extent they shielded directors from liability for gross negligence or worse misconduct."⁷⁸ Moreover, Posner discerned the purpose of the savings clause to section 1821(k) as "ensur[ing] that if a state went further than the federal statute, and

69. *Id.* at 1125.

70. *Id.* (citing David B. Fischer, Comment, *Bank Director Liability Under FIRREA: A New Defense for Directors and Officers of Insolvent Depository Institutions—Or a Tighter Noose?*, 39 UCLAL. REV. 1703 (1992)).

71. *Id.* (alteration omitted).

72. *Id.*

73. *Id.* (emphasis added).

74. *Id.*

75. *Id.* at 1126.

76. *Id.* (emphasis added).

77. *Id.* According to Posner's dissenting opinion: "A number of states had, beginning in the early 1980s, passed laws limiting the liability of corporate directors for mismanagement of corporate affairs." *Id.*

78. *Id.*

punished simple negligence by directors, the RTC could use state rather than federal law."⁷⁹

Midway through his dissenting opinion, Judge Posner offered a thoughtful essay on why Congress did not spell out in the new banking statute "[t]he liability of directors of S & Ls which happened to have federal rather than state charters...."⁸⁰ In the course of his analysis, Posner made the case for a pragmatic judicial statutory construction:

The likeliest reason for the apparent oversight [regarding the liability of S&L directors of federally chartered banks] is that there was no history of having to decide which jurisdiction's law would govern a particular dispute over directors' liability. Directors' liability had been primarily a common law field; the pertinent common law doctrines (the business-judgment rule, the duty of loyalty, etc.) had been similar across states...and banks and related financial institutions were invariably local rather than multistate, so potential interstate conflicts in the obligations of bank directors could not arise. *Congress is not gifted with omniscience and does not have the leisure to be able to tie a pretty ribbon around every piece of legislation, and so it often either overlooks or chooses not to attempt to solve problems that lack present salience or urgency.* The use by judges of the form of words that Congress has employed to deal with the problem that was before it—in this case, the problem of states' curtailing the liabilities of directors—to solve a problem of which there is no evidence that Congress was even aware is a formula for the perversion of legislative purpose. We play "Gotcha!" with Congress. We make traps of its words.⁸¹

As Posner saw it: "Congress believed that by passing Section 1821(k) it was empowering the RTC to obtain damages whenever directors were grossly negligent (or worse), regardless of the provisions of state law."⁸² In his view, "[t]here [was] no evidence that Congress believed it was creating a new immunity for directors of federal S&Ls by depriving the RTC of the benefit of state laws that imposed higher duties on directors."⁸³

Judge Posner's dissent in *Chapman* is memorable for its argumentative combination of understated emotion (the derelict S&L directors should not be able to achieve immunity for their negligent supervision) and subtle logic (the judiciary should consider what problem Congress was trying to address and not read the words of the statute out of context).

D. A Protest Against Human Indignity

In 1995 Judge Posner authored a partial concurring and dissenting opinion from a panel opinion in *Johnson v. Phelan*, which held that monitoring of naked male prisoners by female guards was not a violation of the prisoners' constitutional rights, thereby dismissing the prisoner's complaint for failure to state a claim.⁸⁴ This

79. *Id.*

80. *Id.*

81. *Id.* (emphasis added).

82. *Id.*

83. *Id.*

84. 69 F.3d 144, 151 (7th Cir. 1995) (Posner, C.J., concurring in part and dissenting in part). During 1995,

Posnerian dissent is notable for both its imaginative empathy with common prisoners (refusing to view incarcerated human beings as disenfranchised “others”) and its inspired logic in seeking to fathom the meaning of the constitutional prohibition of cruel and unusual punishment, all coupled with its common sense approach in construing the potential impact of the decision on equal job opportunities for women prison guards.⁸⁵

Posner started his partial dissent by agreeing with his panel colleagues: “Johnson’s equal protection claim has no possible merit, . . . there is no possible basis for imputing liability to the president of the Cook County Board of Commissioners, and . . . the claims against the defendants in their official capacities must be dismissed as unauthorized suits against the State of Illinois.”⁸⁶ But then he added, “that is where my agreement ends.”⁸⁷ Judge Posner saw an issue raised by the case under the Cruel and Unusual Punishments Clause of the Eighth Amendment, observing that “like so much in the Bill of Rights it is a Rorschach test.”⁸⁸ He went on to frame the constitutional approach, as he envisioned, of how the U.S. Supreme Court would resolve the case at bar under the Eighth Amendment:

What the judge sees in [the Bill of Rights] is the reflection of his or her own values, values shaped by personal experience and temperament as well as by historical reflection, public opinion, and other sources of moral judgment. No other theory of constitutional interpretation can explain the elaborate edifice of death-penalty jurisprudence that the Supreme Court has erected in the name of the Eighth Amendment. Or the interpretation of the amendment as a charter, however limited, of the rights of prisoners. The limitations imposed by the amendment might be thought, indeed were thought for more than 150 years after the amendment was adopted, to end with the sentence, leaving the management of prisons, the informal “punishment” meted out by brutal guards, constitutionally unregulated.⁸⁹

The above-quoted language of Judge Posner’s partial dissenting opinion in *Johnson* shows his penchant for what he calls an “impure” style of judicial opinion that seeks to “‘explain[] to a hypothetical audience of laypersons why’” he would

Judge Posner wrote two other dissenting opinions—both pure dissents. See *United States v. Nagib*, 44 F.3d 619, 623–25 (7th Cir. 1995) (Posner, C.J. dissenting) (objecting to remand for determination of whether the criminal defendant received ineffective assistance of counsel in his first appeal). Judge Posner also urged for a remand “with instructions that the district judge re-examine his ruling on the admission of bad acts evidence . . . and that, if he concludes that the evidence should have been excluded [to] grant Nagib a new trial.” *Id.* at 625 (opining that it is fruitless for the court to engage in conjecture whether or not Nagib’s attorney had a strategic reason for his appellate actions). He stated, “Anything is possible. The moon may be made out of green cheese after all. But the law does not insist on metaphysical certainty, even when the issue is the imposition of capital punishment on a person who denies that he is guilty.” *Id.*; see also *Scarino v. Justices of the Supreme Court*, 47 F.3d 173, 173 (7th Cir. 1995) (Posner, C.J., dissenting from denial of rehearing en banc) (objecting on Dormant Commerce Clause grounds to an “Indiana rule which . . . places a kind of tax on the practice of law in other states by permitting a lawyer to practice in Indiana without taking and passing the Indiana bar exam if the lawyer’s practice is more than 50 percent ‘in Indiana’”).

85. *Johnson*, 69 F.3d at 153–54 (Posner, C.J., concurring in part and dissenting in part).

86. *Id.* at 151.

87. *Id.*

88. *Id.*

89. *Id.*

decide the case differently from his colleagues in the panel majority.⁹⁰ Indeed, Posner's opinion style throughout his *Johnson* dissent epitomizes this impure style and contrasts with the "pure" style of judicial opinion writing because it avoids, in his own words, "the jargon, the solemnity, the high sheen, the impersonality, the piled-up details conveying an attitude of scrupulous exactness," while also eschewing "the fondness for truisms, the unembarrassed repetition of obvious propositions, the long quotations from previous cases," and "the euphemisms, and exaggerated confidence corresponding to the declamatory mode of 'pure' poetry."⁹¹ The impure style is further illustrated by the next portion of his *Johnson* dissent, where he followed up general musings about the open-textured, uncertain quality of modern constitutional jurisprudence⁹² with what he calls "the essential background facts and values on which" he believed "the judgment in this case must ultimately turn."⁹³ This was important for Judge Posner because he disagreed with his Seventh Circuit colleagues that "the Justices have spoken to the issue presented by this case."⁹⁴ Describing his method at this juncture of the dissenting opinion as "painting in broad strokes,"⁹⁵ Posner philosophized about the "different ways" one could choose to "look upon the inmates of prisons and jails in the United States in 1995."⁹⁶ As he explained, in remarkably haunting and dystopian language:

One way is to look upon them as members of a different species, indeed as a *type of vermin, devoid of human dignity and entitled to no respect*; and then no issue concerning the degrading or brutalizing treatment of prisoners would arise. In particular there would be no inhibitions about using prisoners as the subject of experiments, including social experiments such as the experiment of seeing whether the sexes can be made interchangeable. The parading of naked male inmates in front of female guards, or of naked female inmates in front of male guards, would be no more problematic than "cross-sex surveillance" in a kennel.⁹⁷

90. *Sexy Style*, *supra* note 4, at 663 (quoting Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421 (1995)).

91. *Id.*

92. Several of Posner's pieces exemplify his academic writings criticizing those that espouse determinate, grand theories of constitutional adjudication. See, e.g., RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999) [hereinafter *PROBLEMATICS*]; RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); and Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998). Cf. DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 160 (2002).

[G]rand theory is unnecessary to establish the legitimacy of our ongoing constitutional practices, which find their ultimate justification in producing a tolerably fair and workable society. [Moreover,] grand theory is destructive of reasoned decisionmaking by courts. Thus...we agree with part of Judge Posner's recent argument against grand theory. Like Posner, we think grand theory is often a dead end. But unlike Posner, we think that taken cautiously and in small doses, it might have some potential benefits.

Id.

93. *Johnson*, 69 F.3d at 151 (Posner, C.J., concurring in part and dissenting in part).

94. *Id.*

95. *Id.* at 152.

96. *Id.* at 151.

97. *Id.* (emphasis added).

Rhetorically building on his theme of “us” versus “them” and the dangers that could flow from such a dichotomy, Judge Posner opined: “I do not myself consider the 1.5 million inmates of American prisons and jails in that light. This is a non-negligible fraction of the American population.”⁹⁸ Furthermore, as Posner pointed out, raising the emotional intensity of his argument:

And [these figures constitute] only the current inmate population. The fraction of the total population that has spent time in a prison or jail is larger, although I do not know how large. A substantial number of these prison and jail inmates, including the plaintiff in this case, have not been convicted of a crime. They are merely charged with crime, and awaiting trial. Some of them may actually be innocent. Of the guilty, many are guilty of sumptuary offenses, or of other victimless crimes uncannily similar to lawful activity (gambling offenses are an example), or of esoteric financial and regulatory offenses (such as violation of migratory game laws) some of which do not even require a guilty intent. It is wrong to break even foolish laws, or wise laws that should carry only civil penalties. It is wrongful to break the law even when the lawbreaker is flawed, weak, retarded, unstable, ignorant, brutalized, or profoundly disadvantaged, rather than violent, vicious, or evil to the core. But we should have a realistic conception of the composition of the prison and jail population before deciding that they are a scum entitled to nothing better than what a vengeful populace and a resource-starved penal system choose to give them. *We must not exaggerate the distance between “us,” the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.*⁹⁹

Drawing upon the concept of social norms,¹⁰⁰ Posner pointed out that “[t]he nudity taboo retains great strength in the United States. It should not be confused with prudery. It is a taboo against being seen in the nude by strangers not by one’s intimates.”¹⁰¹ Raising and rejecting the premise that prisoners, like animals, have no

98. *Id.* In the years since Judge Posner wrote his dissent in *Johnson*, the number of prison and jail inmates has substantially increased to about 2.2 million individuals. See *THE WORLD ALMANAC AND BOOK OF FACTS* 204 (William A. McGeveran et al. eds., 2006). A more nuanced breakdown of this statistic is as follows:

As of June 30, 2004, there were 1,494,216 prisoners under the jurisdiction of federal or state adult correctional authorities. The total prison population grew 2.3% which was less than the average annual growth of 3.5% since 1995. As of mid-2004, these two systems housed 2/3 of the incarcerated population. Jails, which are locally operated and typically hold persons awaiting trial and those with sentences of a year or less, held most of the remainder (713,990); not including those held in community-based programs.

As of June 30, 2004, the rate of incarceration in state and federal prisons for sentences of more than one year was 486 per 100,000 U.S. residents, up from 411 at year-end 1995.

Id.

99. *Johnson*, 69 F.3d at 151–52 (Posner, C.J., concurring in part and dissenting in part) (emphasis added).

100. In recent years, there has been an explosion of academic writing on social norms and the law. See, e.g., ERIC POSNER, *LAW AND SOCIAL NORMS* (2000).

101. *Johnson*, 69 F.3d at 152 (Posner, C.J., concurring in part and dissenting in part). Qualifying his general observation about the American nudity taboo with more nuance, Posner went on in his dissent to informally contend:

Ours is a morally diverse populace and the nudity taboo is not of uniform strength across it. It is strongest among professing Christians, because of the historical antipathy of the Church to nudity; and as it happens the plaintiff alleges that his right “to practice Ch[r]istian modesty is being violated.” The taboo is particularly strong when the stranger belongs to the opposite sex. There are radical feminists who regard “sex” as a social construction and the very concept of

rights,¹⁰² Posner staked out the logical claim that it is “the duty of a society that would like to think of itself as civilized to treat its prisoners humanely.”¹⁰³ In addition, Posner sarcastically concluded his general observations about nudity and American social norms by quipping, “I think that the interest of a prisoner in being free from unnecessary cross-sex surveillance has priority over the unisex-bathroom movement and requires us to reverse the judgment of the district court throwing out this lawsuit.”¹⁰⁴

After laying the above-described philosophical foundation, Judge Posner’s *Johnson* dissenting opinion took up “the particulars of this case and the state of the precedents.”¹⁰⁵ He started with the starkly worded pro se complaint of “Albert Johnson, a pretrial detainee in the Cook County Jail,” who complained that “female guards were allowed to watch his naked body while he showered and used the toilet.”¹⁰⁶ Then, he articulated the issues that governed the dispute: “[T]he main issue raised by this appeal is whether a prisoner has an interest that the Constitution protects in hiding his naked body from guards of the opposite sex.”¹⁰⁷ Moreover, according to Posner, “[a] subordinate issue is whether...the complaint...sufficiently alleges deliberate as distinct from merely accidental exposure to survive dismissal,”¹⁰⁸ to meet the standard of a section 1983 cause of action.

Moving from the factual particulars to the general structure of constitutional protections implicated by the prisoner’s complaint, Posner contended that viewing the case as a species of the right to privacy or the right to be free of unreasonable searches and seizures was “too tortuous and uncertain a route to follow in the quest for constitutional limitations on the infliction of humiliation on prison inmates.”¹⁰⁹ Rather, for him, the Eighth Amendment’s Cruel and Unusual Punishment Clause, applied to the states through the Due Process Clause of the Fourteenth Amendment, was a more straightforward and practical lens through which to examine Johnson’s complaint.¹¹⁰ Since Judge Posner assumed that the caselaw of the various circuit courts of appeal recognizes “that purely psychological punishments can sometimes be deemed cruel and unusual,”¹¹¹ the core of the appeal was the following refined issue: “[W]hether exposing naked prisoners to guards of the opposite sex can ever be deemed one of these cruel and unusual psychological punishments.”¹¹²

“the opposite sex,” implying as it does the dichotomization of the “sexes” (the “genders,” as we are being taught to say), as a sign of patriarchy. For these feminists the surveillance of naked male prisoners by female guards and naked female prisoners by male guards are way stations on the road to sexual equality.

Id.

Interestingly, a few years before the *Johnson* case was decided, Judge Posner authored an entire book on human sexuality and the law. See RICHARD A. POSNER, *SEX AND REASON* (1992) [hereinafter *SEX AND REASON*].

102. *Johnson*, 69 F.3d at 152 (Posner, C.J., concurring in part and dissenting in part).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 152–53.

110. *Id.* at 153.

111. *Id.*

112. *Id.*

Responding to the main point in the reasoning of the majority opinion (that equal employment opportunities of female guards and efficient prison administration lead to the conclusion that there is no Eighth Amendment violation),¹¹³ Posner disagreed by dint of forceful logic and searing hypothetical example, stating:

I have no patience with the suggestion that Title VII of the Civil Rights Act of 1964 forbids a prison or jail to impede, however slightly, the...opportunities of female guards by shielding naked prisoners from their eyes. It is true that since the male prison population is vastly greater than the female, female guards would gain no corresponding advantage from being allowed to monopolize the surveillance of naked female prisoners. But Title VII cannot override the Constitution. There cannot be a right to inflict cruel and unusual punishments in order to secure a merely statutory entitlement to equal opportunities for women in the field of corrections....Just as it would not be a defense to a charge that the rack and thumbscrew are forms of cruel and unusual punishment to demonstrate that they are cheaper than imprisonment, so it is not a defense to the infliction of cruel and unusual psychological punishments that they advance women's career opportunities.¹¹⁴

Judge Posner followed up this portion of his dissenting opinion in *Johnson* by a dexterous distinguishing of the principal Supreme Court precedent against his argument, *Bell v. Wolfish*—a case that held, in his rendition, “that pretrial detainees may be subjected to digital and visual inspection of the rectum for concealed weapons or other contraband.”¹¹⁵ Posner pointed out, however, that “[i]t does not follow that no constitutional issue is raised if the search is performed by a male guard on a female prisoner, or a female guard on a male prisoner.”¹¹⁶ Posner thought that pragmatism, not what he considered the hyperbole of the majority decision, was needed to wisely decide the case. First, he urged that a realization that a somewhat open-textured constitutional test was advisable (“the Eighth Amendment requires in my view that reasonable efforts be made to prevent frequent, deliberate,

113. *Id.* at 147–48 (majority opinion). As eloquently stated by the author of the majority opinion, Judge Frank Easterbrook:

[C]ross-sex monitoring reduces the need for prisons to make sex a criterion of employment, and therefore reduces the potential for conflict with Title VII and the equal protection clause. Cells and showers are designed so that guards can see in, to prevent violence and other offenses. Prisoners dress, undress, and bathe under watchful eyes. Guards roaming the corridors are bound to see naked prisoners. A prison could comply with the rule Johnson proposes, and still maintain surveillance, only by relegating women to the administrative wing, limiting their duties (thereby raising the cost of the guard complement), or eliminating them from the staff.

To the riposte that Title VII and the equal protection clause can't authorize a violation of the eighth amendment, we rejoin: True enough, but not pertinent. A warden must accommodate conflicting interests—the embarrassment of reticent prisoners, the entitlement of women to equal treatment in the workplace. A state may reject the prisoner's claim if it has a reason....The interest of women in equal treatment is a solid reason, with more secure footing in American law than prisoners' modesty, leading to the conclusion that there is no violation of the eighth amendment....When interests clash, a judge must prefer those based on legislative decisions over those that reflect their own views of sound policy.

Id.

114. *Id.* at 153–54 (Posner, C.J., concurring in part and dissenting in part) (citations omitted).

115. *Id.* at 154 (discussing *Bell v. Wolfish*, 441 U.S. 520, 556–57 (1979)).

116. *Id.* at 154–55.

gratuitous exposure of nude prisoners of one sex to guards of the other sex").¹¹⁷ Second, he advocated for an appreciation of the "reality...that crime is gendered, and the gender is male."¹¹⁸ Third, he argued for a clear distinction between motive and intent such that the relevant constitutional touchstone was not whether the motive "of the prison officials are in some sense punitive" to give rise to liability under the Cruel and Unusual Punishment Clause,¹¹⁹ but rather, whether the prison officials had the requisite intent of "deliberate indifference" because "[i]f prison officials know that they are subjecting male prisoners to gratuitous humiliation, the infliction is deliberate, even if the officials are not actuated by any punitive purpose and are not even certain that humiliation will result."¹²⁰ Finally, Judge Posner suggested the need for a sympathetic attitude by the judiciary to a pro se prisoner who contends that he is being treated in a fashion akin to "barbarism"¹²¹ and was not given the opportunity to develop the specific facts of his predicament at trial.¹²²

E. An Expostulation for Deciding Whether a Heightened Standard of Proof Is Required at a Sentencing Hearing

In 1996, Judge Posner wrote a relatively rare dissent from a denial of a hearing en banc in *United States v. Rodriguez*.¹²³ Anticipating the view that would be taken

117. *Id.* at 155.

118. *Id.* (citing Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151 (1995)). Posner particularized this assertion by stating, "The vast majority of criminals are male. The vast majority of their victims are male. These are inescapable realities in the design of penal institutions and the validation of penal practices." *Id.*

119. *Id.*

120. *Id.* Judge Posner supported his analysis of the distinction between motive and intent with three more colorful hypotheticals. The first hypothetical was: "If prison officials use the thumbscrew and rack to discipline unruly prisoners, it is immaterial that their motive is not to punish but merely to maintain good order in the prison, or to save money." *Id.* His second hypothetical was: "The public beheadings of murderers by Saudi Arabia are, I imagine, motivated not by sadism but rather (to the extent that they have any secular motivation) by a belief that the public infliction of cruel and unusual punishments minimizes the crime rate," thus "[i]f prison officials deliberately expose male prisoners to the gaze of female guards, or female prisoners to the gaze of male guards, it should be irrelevant that the motive of the officials may have been merely to avoid sorting custodial tasks by gender." *Id.* The third Posnerian hypothetical to illustrate the point in the text was: "If someone plants a bomb in an airplane, his intent in the eyes of the law is to kill, though his motive might be to intimidate political opponents, obtain publicity, demonstrate skill with explosives, collect life insurance on a passenger, or distract the police from his other criminal activities." *Id.*

121. *Id.* at 156.

122. *Id.* Judge Posner ended his dissent by writing:

My colleagues say that we must respect "the hard choices made by prison administrators." I agree. There is no basis in the record, however, for supposing that such a choice was made here, or for believing that an effort to limit cross-sex surveillance would involve an inefficient use of staff—"featherbedding," as my colleagues put it. *There is no record.* The case was dismissed on the complaint. We do not know whether the Cook County Jail cannot...feasibly confine the surveillance of naked male prisoners to male guards and naked female prisoners to female guards. We do not even know what crime Johnson is charged with. My colleagues urge deference to the prison administrators, but at the same time speak confidently about the costs of redeploying staff to protect Johnson's rights. *It would be nice to know a little more about the facts before making a judgment that condones barbarism.*

Id. (emphasis added).

123. 73 F.3d 161, 162 (7th Cir. 1996) (Posner, C.J., dissenting from denial of rehearing en banc). In 1996, Posner authored one additional dissenting opinion. See *Am. Int'l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1462 (7th Cir. 1996) (Posner, C.J., dissenting) (ranting about the performance of a trucking company's trial defense counsel who, in Posner's view, blew the case for his client in a diversity jurisdiction legal malpractice action). See

by the U.S. Supreme Court a few years later,¹²⁴ Posner pithily summarized the question on which rehearing en banc was sought: “[W]hether a heightened standard of proof, either clear and convincing evidence or proof beyond a reasonable doubt is required in a case in which the real trial occurs at the sentencing hearing rather than at the trial of guilt.”¹²⁵

The problem in *Rodriguez* was that, after the guilt phase where “the prosecutor invited the jury to convict on the basis of evidence that the defendant had” sold ten ounces of marijuana, the sentencing judge “found by a [mere] preponderance of the evidence that the defendant had actually sold more than 1,000 kilograms of marijuana.”¹²⁶ Thus, this high volume contraband sentencing finding, coupled with Rodriguez’s criminal record, triggered a mandatory federal sentence of life imprisonment.¹²⁷ With perfect pitch, situating the occasion for appellate review midway between the pathos of sending a human being to prison for life for the sale of ten ounces of marijuana and the logic of insisting upon constitutionally-mandated, evidentiary standards of proof, Judge Posner powerfully conveyed the real world momentousness of the prisoner’s appeal:

The extraordinary severity of the punishment prescribed by Congress for sellers of marijuana, and Congress’s increasing tendency to specify mandatory minimum terms, thereby curtailing the sentencing discretion of judges and the Sentencing Commission, are controversial. But I accept absolutely the power of Congress to adopt these policies and I have no desire to attempt an end run around them. Yet even if their legitimacy, if not necessarily their wisdom, is wholeheartedly accepted, as I think it my duty as a judge to do, there is a serious question whether it is permissible to sentence a person to life in prison, without possibility of parole, at the end of a brief and casual sentencing hearing in which...the rules of evidence are not enforced, in which the standard of proof is no higher than in an ordinary civil case, and in which the judge’s decision will make the difference between a light punishment and a punishment that is the maximum that our system allows short of death.¹²⁸

Raising the specter that little things can make a big difference,¹²⁹ Posner pointed out that “[h]ad the defendant been sentenced on the basis of a sale of 10 ounces of marijuana, his sentence might have been as short as 18 months.”¹³⁰ His dissent went on to articulate plausible arguments for requiring a “heightened standard” of proof at a sentencing hearing before a federal judge, predicated on potential procedural due process concerns.¹³¹ Brilliantly, however, Posner claimed that “[t]here is an even better argument” that an enhanced standard of proof at sentencing hearings “should

infra notes 134–139 and accompanying text for a discussion of Posner’s *American International Adjustment Co.* dissent.

124. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

125. *Rodriguez*, 73 F.3d at 162 (Posner, C.J., dissenting from denial of rehearing en banc).

126. *Id.*

127. *Id.* at 162–63 (discussing 21 U.S.C. § 841(b)).

128. *Id.* at 162.

129. See generally MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2002).

130. *Rodriguez*, 73 F.3d 161, 162 (7th Cir. 1996) (Posner, C.J., dissenting from denial of rehearing en banc).

131. *Id.* at 163.

be required in such cases simply as an intelligent rule of the federal common law of criminal procedure, without reference to the Constitution," since the burden of proof at a sentencing hearing has not been specified by Congress and, therefore, is "left to the federal courts to resolve."¹³²

With characteristic caution and measured respect for the law-interpreting process of en banc appellate review, Judge Posner ended this succinct dissenting opinion with an eloquent call for full court review, opining:

I do not go so far as to say that I would vote to adopt the higher standard of proof if rehearing en banc was granted. That is a difficult question, in part because of the difficulty of defining the scope of such a rule. I say only that the question is sufficiently important, the stakes in personal liberty sufficiently great, that the full court should examine it. We are not overburdened with en banc proceedings, and I cannot think of a more suitable issue on which to expend some of the resources that we are able to devote to such proceedings.¹³³

F. A Rambling Rant Against Attorney Malpractice

Why did Judge Posner go to the time and trouble to write a rambling dissent from a panel decision that granted a new legal malpractice trial to an Indiana defense lawyer, Mr. Galvin, who was adjudicated below as being professionally negligent for losing a personal injury action brought by the estate of a woman driver, Mrs. Dickinson, who died a month after she suffered injuries in a negligently-caused truck accident? In the diversity case of *American International Adjustment Co. v. Galvin*, Posner disagreed with his panel colleagues, who interpreted the Indiana standard of professional practice as not requiring, as a matter of law, that the defense attorney determine the cause of the driver's death in order to procedurally knock out, prior to trial, the plaintiff's survivor action (which otherwise would allow full damages, including pain and suffering, from the time of the injuries sustained in the vehicular accident until her death).¹³⁴ Posner certainly had a valid point in his dissent: defense counsel, Mr. Galvin, was sloppy since he "had only to establish that the tort had been the cause of Mrs. Dickinson's death and his client would have little reason to fear a large verdict,"¹³⁵ and the case would be governed by Indiana's wrongful death statute, which limited recovery to the "victim's medical and funeral expenses plus any pecuniary or other loss incurred by the victim's survivors."¹³⁶ According to Posner, "Galvin knew this, but for unfathomable reasons decided against serving interrogatories or requests for admissions on his adversary, deposing the doctors who attended Mrs. Dickinson in the hospital, or otherwise establishing the cause of death and then moving for summary judgment on the survival claim."¹³⁷ Galvin's mistake led to the introduction of a videotape at trial, which depicted the horrific suffering of Mrs. Dickinson on the day she died in her hospital bed from a pulmonary embolism. In addition, Galvin compounded his client's potential

132. *Id.*

133. *Id.* at 164.

134. 86 F.3d 1455, 1462 (7th Cir. 1996) (Posner, C.J., dissenting).

135. *Id.* at 1463.

136. *Id.*

137. *Id.*

exposure for damages because he did not seek "to instruct the jury not to consider the videotape and the other evidence bearing on Mrs. Dickinson's pain and suffering"¹³⁸ after he won a partial directed verdict excluding the survivor claim.

The style of Judge Posner's dissenting opinion here is not characterized by practical reason, but, rather, by a hyper-technical scholasticism and mean-spiritedness. He went out of his way to personally embarrass Mr. Galvin and the former Indiana state judge who provided an expert opinion of the legal standard of care for a defense attorney in a personal injury action governed by Indiana law. Unfortunately, Judge Posner's dissent in *American International Adjustment Co.* is reminiscent of his unattractive tendency, occasionally manifested during his first decade as a federal appellate court judge, to engage in "overly-aggressive personal attacks" in the course of his dissenting opinions.¹³⁹

G. An Argument for Judicial Creativity in Applying Title VII to Sexual Harassment by Supervisory Employees

In one of his finest dissenting performances during his entire judicial career, in 1997 Judge Posner wrote a partial concurring and dissenting opinion in *Jansen v. Packaging Corp. of America*,¹⁴⁰ a consolidated case that, in Posner's view, "present[ed]...difficult and important questions concerning the application of Title VII of the Civil Rights Act of 1964 to sexual harassment by supervisory employees."¹⁴¹ At the outset of his partial dissent, Posner indicated his agreement "with the basic approach"¹⁴² of the plurality en banc concurring opinion prepared by Circuit Judge Flaum.¹⁴³ Framing the general tenor of his disagreement with the Seventh Circuit plurality, the first paragraph of Judge Posner's opinion succinctly explained:

Our most substantial difference concerns the employer's liability, in "quid pro quo" sexual harassment cases, for what I shall call "noncompany acts"; these are illustrated by a supervisor's threat that is not followed up by termination, demotion, or other acts that change the contractual relation between the victimized employee and the employer.¹⁴⁴

In the gentle, probing, scholarly analysis that follows Posner's opening, he seemed to be thinking out loud about the nature of sexual harassment by supervisory corporate employees in America, the sources of law available to the federal judiciary in resolving these disputes, and the common sense repercussions of judicially choosing one approach over another.¹⁴⁵ Starting his dissenting brainstorm, Posner complained that too many lawyers misinterpreted the U.S. Supreme Court's

138. *Id.* at 1464.

139. *See Dissent Aesthetics*, *supra* note 5, at 156-57.

140. 123 F.3d 490 (7th Cir. 1997) (reh'g en banc) (Posner, C.J., concurring in part and dissenting in part). The named case was consolidated with *Ellerth v. Burlington Industries, Inc.* During 1997 Judge Posner wrote no other dissenting opinions.

141. *Id.* at 506.

142. *Id.*

143. *Id.* at 495 (Flaum, J., concurring).

144. *Id.* at 506 (Posner, C.J., concurring in part and dissenting in part).

145. *Id.* at 506-08.

observation in a 1986 case that “Congress wanted courts to look to agency principles”¹⁴⁶ in interpreting Title VII actions for “sexual harassment of one employee by another”¹⁴⁷ as a ruling that “Title VII incorporates the American Law Institute’s *Restatement of Agency*.”¹⁴⁸ As he explained later in his statutory essay, the American Law Institute’s forty-year array of black letter agency rules is a “petrified text”¹⁴⁹ that was “designed mainly for two types of case neither of which” was before the court.¹⁵⁰ Yet, “[s]ince neither the text nor the legislative history of Title VII indicates what agency principles the authors of the statute had in mind, the formalist gropes for another text, finds the *Restatement*, and treats it inappropriately as a surrogate statute.”¹⁵¹ As Posner cogently pointed out, however, adding a touch of righteous indignation:

[H]ad the Supreme Court told us to use the *Second Restatement of Agency* as the framework for evaluating sexual harassment under Title VII, I would bow to its command. It did not; but by citing the *Restatement* it gave lawyers and judges a straw to grasp at. The straw has broken in their hand. The *Restatement* turns out to be hopelessly vague in its bearing on the issue of employers’ liability for sexual harassment, being vaguely worded and addressed to other issues...The judges and lawyers who insist that the *Restatement of Agency* is The Way either are disingenuous, wishing to conceal their true grounds of decision, or are in the grip of the formalist belief that difficult cases can be decided by teasing out the meaning of words in a text composed with other problems in mind, *without need to examine the social policies that the law might be thought to be serving*.¹⁵²

Judge Posner, in search of sound agency principles to apply to the “statutory tort of employment discrimination” created by Title VII,¹⁵³ concluded that it would be unwise to borrow “agency law of the state where the dispute arose”¹⁵⁴ since this “could introduce striking geographical disuniformities and indeed would empower a state to nullify Title VII.”¹⁵⁵ Continuing his quest, Posner astutely observed that “[j]ust as I do not think that Title VII’s silence with respect to the applicable agency principles points us toward the incorporation of state law, so I do not think that its silence can tell us anything about the *structure* of those principles.”¹⁵⁶ Suggesting, by subtle implication, the advisability of nuanced agency principles of employer

146. *Id.* at 506 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986)).

147. *Id.*

148. *Id.*

149. *Id.* at 508.

150. *Id.* “The first is the tort committed against a stranger, as where a truck driver employed by the defendant runs down a pedestrian. The second is the contract between a stranger and an agent of the defendant.” *Id.* Posner noted: “[T]he *Second Restatement of Agency* (there is no third) was promulgated 40 years ago, before Title VII was enacted and before the concept of sexual harassment had emerged as a distinct legal concept.” *Id.*

151. *Id.* at 510.

152. *Id.* at 509 (emphasis added). Posner followed up this observation with the following scholarly quotation: “We condemn *Lochner* as formalistic not because it involves a choice, but because it attempts to describe this choice as compulsion.” *Id.* at 509–10 (quoting Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 511–12 (1988)).

153. *Id.* at 506.

154. *Id.* at 507.

155. *Id.* Posner went on to opine: “Deciding what agency principles shall govern liability under a liability-creating statute such as Title VII is not free-wheeling common-law rulemaking; it is filling a statutory gap, a standard office of interpretation.” *Id.*

156. *Id.* at 508.

liability for sexual harassment by employees against other employees, Posner claimed that Title VII's silence regarding relevant agency principles

cannot tell us whether...the employer should be strictly liable for *all* acts of sexual harassment on or off the premises...by all employees, or whether distinctions should be made on the basis of kinds of employee (such as supervisory or nonsupervisory) or kinds of act (such as demotion versus a sexual solicitation versus forcible rape), or some combination of the two.¹⁵⁷

In what is the brilliant core of his dissent, Judge Posner asserted that the Supreme Court had invited lower federal courts to fashion "what the best regime of liability would be for" sexual harassment cases.¹⁵⁸ Echoing insights of legal process jurisprudence, Posner asserted: "It would be misleading even to speak of applying to this case 'the law of agency.' That would imply the existence of some ready-at-hand body of rules that we have only to apply to a new set of circumstances. *The problem is not application; it is creation.*"¹⁵⁹

Grabbing the bull by the horns, Posner engaged in judicial policy analysis of prioritizing the most sensible tort law policies¹⁶⁰ to deal with the problem of employer liability for employee sexual harassment under Title VII. He found it appropriate to give primacy to the tort policy of deterrence over the policy of compensation because of his concerns with what he perceived to be an over-regulation of American labor markets.¹⁶¹ Yet, as he explained, compensation of sexual harassment victims by employer Title VII liability in the appropriate case is a worthy secondary policy for legal doctrine to express:

We...cannot avoid the task of trying to create a set of agency principles that will deter sexual harassment without imposing an unreasonable burden on employers. I do not consider the burden of liability on employers a negligible consideration in formulating federal common law rules to govern aspects of employment regulation. Our labor markets are becoming choked by regulation, all well meaning but cumulatively an impediment to the efficient employment of the nation's most valuable economic resource, which is its workers.

I emphasize *detering* sexual harassment rather than *compensating* its victims because, unlike many torts—and again the clearest illustrations are torts that inflict physical injury—sexual harassment does not usually bring about a significant change in the victim's wealth. The victim may be humiliated and deeply distressed by it; rarely will she (or the very occasional he) be impoverished by it. This is not to say that psychological pain should not figure in the calculation of damages. It should. All I wish to emphasize is that an award of damages in these cases is not *primarily* designed to protect the victim's standard of living. The payment of damages in the usual case of sexual

157. *Id.*

158. *Id.* at 510.

159. *Id.* (emphasis added); see also HART & SACKS, *supra* note 57. The subtitle of this classic in legal process jurisprudence is "Basic Problems in the Making and Application of Law."

160. There are at least a dozen key policy considerations that drive twenty-first century tort law. See generally Robert F. Blomquist, *Re-Enchanting Torts*, 56 S.C. LAW REV. 481, 497–98 (2005) (discussing policies of compensation, deterrence, administrative efficiency, avoiding intractable inquiries, loss spreading, and liability proportionality to fault as key tort policy drivers).

161. *Jansen*, 123 F.3d at 510 (Posner, C.J., concurring in part and dissenting in part).

harassment is an instrument for deterring future incidents of such harassment rather than for restoring lost earnings or for financing expensive curative or rehabilitative measures.¹⁶²

According to Posner, given the primary goal of deterrence of employment-related sexual harassment by employers, the usual standard of care for supervisor harassment should be negligence rather than strict liability—the same standard adopted by many federal courts of appeal to address hostile environment sexual discrimination by an employee's non-supervisory workers.¹⁶³ The rationale for the less onerous negligence standard is that “[a] law that requires the employer to do more than is feasible to control harassment will impose costs without creating deterrent benefits.”¹⁶⁴ Moreover, as Posner opined, “In these circumstances, strict liability would not only be expensive and unnecessary, and possibly regressive as well; it would be futile.”¹⁶⁵ Adding new insights to the nature of employer liability for sexual harassment of an employee by “a supervisor rather than a line employee,” Judge Posner distinguished in his analysis “between two types of sexual harassment by supervisors.”¹⁶⁶ Thus:

In the first type, the supervisor uses or attempts to use his supervisory authority to obtain sexual favors from an employee. This is the domain of what has come to be called “quid pro quo” harassment. In the second type of case, the supervisor does not use or attempt to use his supervisory authority at all. He harasses an employee, but he does so in exactly the same way that an employee who had no supervisory authority would harass another employee. He uses unwanted terms of endearment; he fondles or rubs up against his victim; he displays sex toys or tells dirty jokes; he brags about his sexual skills; he proposes marriage; he threatens to kill himself; in the extreme case...he rapes her.¹⁶⁷

Regarding the second type of supervisor sexual harassment, hostile environment harassment, Posner claimed that “[t]he proper standard of employer liability here is

162. *Id.*

163. *Id.*

164. *Id.* at 511. As Posner explained, weaving a web of likely economic consequences if a strict liability standard is adopted by the court:

In the long run, these costs will be borne largely by consumers, in the form of higher prices for the employer's product, and workers, in the form of lower wages (because the higher costs are labor costs). Many consumers and workers are women, so women, who are the principal victims of sexual harassment, will pay a big part of the costs that employers incur as a consequence of excessively harsh principles of employers' liability.

Id.

165. *Id.* Continuing with impeccable economic logic, Posner argued:

If the law imposes liability in harassment cases in which there is no reasonable measure that the employer could have taken to prevent the harassment, the *only* effect of the law will be to impose extra costs on employers and those with whom they are linked contractually. Employers will prefer paying the occasional judgment to incurring costs that, by definition, exceed the employer's foreseeable liability—by definition because, were the costs less than the expected liability, the failure to incur them would be negligence; it is only when they are greater, so that the employer would not be negligent for failing to incur them, that strict liability bites.

Id.

166. *Id.*

167. *Id.* at 511–12 (citation omitted).

negligence, just as in the case of harassment by nonsupervisory employees, because it is as costly to the employer to police this kind of harassment by a supervisor as it is to police the identical harassment by a coworker.¹⁶⁸ Posner admitted that, given the intimidating reality of a supervisor's authority over a potential victim of sexual harassment, "due care on the part of employers to prevent [hostile environment] sexual harassment by its supervisory employees may require the creation of additional complaint machinery when the complaint is against a supervisor."¹⁶⁹ He argued that the negligence standard should be the standby standard in that type of case, ending his discussion with the wry observation that "[e]xcessive complexity is the bane of American law; we have an opportunity to make it a little simpler."¹⁷⁰

Regarding the first type of supervisor sexual harassment, *quid pro quo* harassment, Posner divided this type into two categories: (1) a case when "the supervisor brings about a significant alteration in the terms or conditions of his victim's employment,"¹⁷¹ what Posner later in the opinion called a "company act,"¹⁷² and (2) "when the supervisor merely makes threats"¹⁷³ to alter the terms and conditions of employment of the victim, "even if the threats are effective" in causing the victim to submit to the supervisor's sexual advances—so-called noncompany acts.¹⁷⁴ As to a supervisor's sexual harassment culminating in a company act, Posner believed that a strict liability standard for the employer was suitable.¹⁷⁵ Conversely, as to a supervisor's sexual harassment culminating in a noncompany act, Posner believed that negligence was the proper standard for employer liability.¹⁷⁶ To aid understanding of his approach, Posner provided a table¹⁷⁷ as follows:

LIABILITY FOR SEXUAL HARASSMENT UNDER TITLE VII: A SUGGESTED APPROACH		
	By Supervisor	By Coworker
"Company act"	Employer strictly liable	N.A.
"NONCOMPANY ACT"	Employer liable only if negligent	Employer liable only if negligent

168. *Id.* at 512.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 512-13.

173. *Id.* at 513.

174. *Id.*

175. *Id.* at 512.

176. *Id.* at 513.

177. *Id.* at 515. Posner stated, in explaining his table:

The term "company act" signifies an act that significantly alters the terms or conditions of employment of the victim of sexual harassment and "noncompany act" signifies hostile-environment harassment by coworkers or supervisors or the kind of *quid pro quo* harassment that involves only unfulfilled threats (either because the victim submits or because she calls the supervisor's bluff), so that no company act is committed. The difficult borderline case is that of constructive termination precipitated by a threat. The termination will look to the supervisor's superiors like a voluntary quit. But since there is always some paperwork involved in an employee's quitting, the higher-ups in the company will have some ability to monitor constructive discharges, and I would therefore impose strict liability in such cases.

In the final portion of his partial dissenting opinion, Judge Posner applied his suggested analysis to the facts in the consolidated cases before the court.

H. An Equable Proposal for Protecting Privacy Interests in Garbage

In 1998, in *United States v. Redmon*,¹⁷⁸ Judge Posner penned a fascinating, level-headed essay,¹⁷⁹ dissenting from the en banc majority opinion that had, among other things, affirmed the police tactic of warrantless searches of a criminal defendant's garbage cans "while the cans were sitting just outside his garage" on a common driveway.¹⁸⁰ The searches led to evidence of cocaine trafficking and conviction for federal drug and career offender violations.¹⁸¹ At the start of his dissenting opinion, Posner provided a thumbnail sketch of the relevant facts, issue, and holding, suggesting that the majority's approach would lead to greater administrative complexity without offsetting practical benefits:

The defendant lived in a house with an attached garage that was at the end of a driveway 28 feet from the public street. He kept his garbage cans in the garage, but when a garbage pickup was due he would take them out of the garage...rather than, as would be more common but also unsightly and forbidden by a local ordinance, at the curb of the public street. Presumably...the garbage collectors would walk up his driveway, carry the cans to the street, empty them into their truck, and return the cans to their place in front of the garage. The question raised by Redmon's appeal is whether the police could, consistently with the Fourth Amendment, walk up the driveway and search the cans, without a warrant or probable cause, while the cans were up against the garage awaiting the garbage collectors. The odd thing about the answer given by the majority opinion—"yes"—is that it will complicate the administration of the law without conferring any practical benefit on law enforcers. The better answer would be that searches, including searches of garbage, that take place within the curtilage of the defendant's property must comply with the Fourth Amendment's restrictions on searches. The search here took place within the defendant's curtilage, and so his conviction should be reversed.¹⁸²

After this overview, Judge Posner launched a gentle, exploratory investigation of the constitutional status of a person's garbage. Initially, he observed that while "[i]t is tempting to suppose that the search of a garbage can could never violate [the Fourth Amendment right] because the act of discarding something as trash or garbage is a relinquishment of any interest in it,"¹⁸³ such interpretation "must be

178. 138 F.3d 1109 (7th Cir. 1998) (en banc).

179. *Id.* at 1128 (Posner, C.J., dissenting).

180. *Id.* at 1111 (majority opinion).

181. *Id.* at 1110. During 1998 Judge Posner penned two other dissenting opinions: *United States v. Wilson*, 159 F.3d 280, 293 (7th Cir. 1998) (Posner, C.J., concurring in part and dissenting in part) (claiming that the criminal defendant who was convicted of the federal offense of possessing a gun in interstate commerce while subject to a domestic relations protective order should have his conviction voided because he had no reason to believe that the act for which he was convicted was wrongful), and *Doe v. University of Illinois*, 138 F.3d 653, 679–80 (7th Cir. 1998) (Posner, C.J., dissenting from denial of rehearing en banc) (arguing that the court should, in a Title IX case, exercise its plenary jurisdiction to craft a standard of liability for public educational institutions for hostile environment sexual harassment by other students).

182. *Redmon*, 138 F.3d at 1128–29 (Posner, C.J., dissenting).

183. *Id.* at 1129.

wrong” since “it would entitle the police to enter the home itself and rifle the trash cans and wastepaper baskets found there, supposing they could do this without committing a breach of the peace (as they could by pretending to be servicemen of one sort or another).”¹⁸⁴ Posner followed up this cloak-and-dagger imagery by pointing out that “it is equally well established in the case law that once the garbage is taken away by the garbage collectors, the (former) owner of the garbage has no right to complain” if the police comb through the refuse “without bothering to get a warrant or otherwise demonstrating the reasonableness of the search” and “find contraband or evidence of crime to use against him.”¹⁸⁵ For Posner, resolution of the constitutional puzzle in *Redmon* came down to the proper way of looking at the police behavior—whether it should be viewed as a mere “petty trespass,”¹⁸⁶ involving no exclusion of the fruit of the poisonous tree, or whether it, rather, should be viewed as a serious, “menacing” trespass¹⁸⁷ of the defendant’s property rights, thereby necessitating exclusion of the ill-gotten evidence and the follow-up evidence obtained by search warrant. According to his pellucid, colloquial analysis:

It is tempting to view the present case [as a petty trespass]. Although the garbage cans were not adjacent to the curb, they were awaiting pickup, and it might not seem to make much difference whether the police sneak up the driveway and search the garbage there or wait until it has been taken to the garbage truck at curbside. (I am assuming the garbage truck does not drive into the driveway for the pickup, though as I have already noted there is nothing in the record about the details of the garbage collection). Both are trespasses. But reaching a few inches over someone’s property line is a petty trespass...while marching up his driveway to rummage through the garbage cans placed at the head of the driveway is not. It is true that the garbagemen had permission to march up to the garage to get the cans, just as there is an implicit permission for friends, service people, and many others to march up to one’s front door....*But one’s right to complain about a trespass does not depend on one’s refusing to invite anyone onto any part of his property, for then only hermits (and not all of them) would have property rights.*¹⁸⁸

Grounding his suggested resolution of the case on the common law doctrine of curtilage,¹⁸⁹ Posner pointed out that this doctrine should be interpreted in light of privacy interests because “ever since the invention of wiretapping, which is a nontrespassory invasion of home or office, emphasis in the interpretation and application of the Fourth Amendment has shifted from the protection of property to the protection of privacy.”¹⁹⁰ Making the distinction between privacy and secrecy, Posner used the trope of a prying archaeologist who is obsessed with sorting through a person’s garbage¹⁹¹ to clarify his contention that privacy (what the Fourth

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 1130.

188. *Id.* at 1129–30 (citations omitted) (emphasis added).

189. “Curtilage” is defined as “the area intimately linked to the home, both physically and psychologically.” *Id.* at 1130 (internal quotation marks omitted).

190. *Id.*

191. *Cf.* WILLIAM RATHJE & CULLEN MURPHY, RUBBISH! THE ARCHAEOLOGY OF GARBAGE (2001)

Amendment protects) is broader and more elastic than secrecy. Posner explained, in language evocative of a Patricia Highsmith short story,¹⁹² that

[a] garbage can is not a secure repository of secrets, though this is not because, as remarked in the majority opinion, raccoons can get at garbage; raccoons are not interested in human beings' secrets. Garbage cans are insecure because once the garbage leaves your property you can't physically prevent anyone from going into it and piecing together the letters that you tore up and threw away and reconstructing your balance sheet from your discarded check stubs, and your diet and drinking habits from refuse and empty bottles, and, if the snoop is a skilled archaeologist, perhaps obtaining over a period of months a detailed picture of your intimate and maybe disreputable private life.

So there are no secrets in garbage. But it doesn't follow that garbage isn't private. Most people don't think about the possibility of serious snooping in their garbage, or can't afford paper shredders and trash compactors...and burn boxes and private landfills that would be necessary, though not necessarily sufficient...to eliminate all occasions for extruding readable trash and revelatory garbage from home or office. It doesn't follow that one would be unreasonable to be horrified to discover that the archaeologist had been at work reconstructing your life from your garbage and was about to publish a detailed profile of your private life, including your sex life. The tort law of privacy would provide you with a remedy against such a publication....I assume that copyright law would provide you with a remedy if one of the things that the archaeologist found and wanted to publish was the discarded first draft of your unpublished novel, as the act of discarding would not be an abandonment of the copyright....I conclude from these examples that there are legally protected interests in garbage even after it leaves one's property, and I do not see why they should not be interests that the Fourth Amendment protects, once its scope is acknowledged to reach beyond property to privacy.¹⁹³

Discerning no law enforcement imperative for conducting garbage-within-curtilage cases,¹⁹⁴ concerned about the repercussions of allowing police to search a garbage can on someone's property,¹⁹⁵ and mindful of police uncertainty concerning where the judiciary would eventually draw the constitutional line in similar cases,¹⁹⁶ Judge Posner ended his dissent by proposing "drawing the line at the curtilage."¹⁹⁷

(documenting the "Garbage Project," a study on garbage at the University of Arizona).

192. See generally ANDREW WILSON, *BEAUTIFUL SHADOW: THE LIFE OF PATRICIA HIGHSMITH* (2003) (describing the chilling and highly original "outsider" fiction of Highsmith).

193. *Redmon*, 138 F.3d at 1131 (Posner, C.J., dissenting) (citations omitted).

194. *Id.* at 1132.

195. *Id.* at 1131.

Otherwise [without a curtilage rule], whenever the police spot a garbage can on someone's property they will have at least a colorable case for being allowed to go on the property and search it even though it might turn out not to contain garbage, since garbage cans are not infrequently used for other purposes. And once they reach it, they can of course glance around and if they see contraband or illegal activity through a window of the house and don't have time to get a warrant, they can enter the house and search and arrest.

Id.

196. *Id.* at 1132.

197. *Id.*

I. A Conscientious Suggestion That an Exculpatory Witness Statement Should Not Have Been Excluded

During 1999, in *United States v. Amerson*,¹⁹⁸ Judge Posner authored a succinct, compelling dissent from the majority opinion of his panel colleagues in a criminal case where the trial court refused to allow the defendant's proffer of an uncorroborated, third-party affidavit that would have, if believed by the jury, exculpated Amerson from conviction for possessing a quarter of an ounce of crack cocaine with intent to distribute.¹⁹⁹ Reflecting a pattern of dissent employed during his more mature years as a federal appellate judge—championing the underdog in several of his dissenting opinions²⁰⁰—Posner commenced his dissent in *Amerson* in a temperate, respectful manner, noting:

Amerson was convicted of unlawful possession of a quarter of an ounce of crack cocaine with intent to distribute it and was sentenced to 15 years in prison. Given the length of the sentence, we should review the rulings of the district judge with more than the usual care to make sure that an innocent man has not been convicted. I do not doubt that my colleagues have tried conscientiously to do this, but I am not persuaded that the conviction can stand.²⁰¹

In taut, suspenseful, narrative prose, Posner went on in the second paragraph of his dissent to summarize the facts:

The Peoria police raided a second-floor apartment that they suspected was a crack house. In one room they found Timothy Heard, who as they entered broke a window with his fist. The police testified that they found a small container of crack on the floor of the room. They waited in the apartment and several customers for crack showed up, one of whom was arrested. Night fell. There was a knock at the front door. It was Robert Amerson. A voice within called, "Who is it?" and Amerson answered, "It's Rob. Open the door." One of the crack dealers who was being detained in the house by the police shouted, "Rob, it's the police." Immediately the police yanked the door open and as they did so—according to the testimony of the three officers who were in the front room of the apartment—Amerson tossed a plastic bag over his shoulder. The police testified that they found the bag, containing small "rocks" of crack cocaine, on the ground in front of the building but that they found nothing but shards of glass

198. 185 F.3d 676 (7th Cir. 1999).

199. *Id.* at 690 (Posner, C.J., dissenting). During 1999 Judge Posner authored four other pure dissenting opinions. See *Hope Clinic v. Ryan*, 195 F.3d 857, 876 (7th Cir. 1999) (Posner, C.J., dissenting) (arguing that the state's partial-birth abortion statutes at bar were both unconstitutionally overbroad and vague and that the majority's use of limited precautionary injunctions was an invalid "gimmick"); *Kopec v. City of Elmhurst*, 193 F.3d 894, 905 (7th Cir. 1999) (Posner, C.J., dissenting) (opining that a city's firing of a part-time police officer was a violation of the federal Age Discrimination Employment Act); *Outsource Int'l, Inc. v. Barton & Barton Staffing Solutions*, 192 F.3d 662, 669 (7th Cir. 1999) (Posner, C.J., dissenting) (dissenting from the enforcement of a covenant to compete in a diversity suit, even though he believed it was "the right disposition from the standpoint of substantive justice" because an Illinois state court would not have enforced the covenant at bar); *Am. Grain Trimmers, Inc. v. Office of Workers' Comp.*, 181 F.3d 810, 819 (7th Cir. 1999) (en banc) (Posner, C.J., dissenting) (ranting against the administrative law judge's handling of the employer's expert medical witness in a Longshore and Harbor Worker's Compensation Act/death benefits case).

200. See, e.g., *infra* notes 242–248 and accompanying text.

201. *Amerson*, 185 F.3d at 690 (Posner, C.J., dissenting).

on the ground below the window that Heard had broken. Amerson denied having had or tossed any crack.²⁰²

The third paragraph of Judge Posner's dissenting opinion in *Amerson* mentioned that although Heard, one of the persons inside the building, refused to testify as a defense witness in Amerson's criminal trial "on Fifth Amendment grounds," Heard signed an affidavit which stated that "on the night of the raid he had 'heard police enter the apartment. Being in possession of two packages of cocaine I ran to the back bedroom and attempted to dispose of them.'"²⁰³ Posner continued to quote from the unadmitted affidavit, stating: "'One [of the bags] landed inside. Later one was found outside. Robert Amerson was unaware of any of this, for he was not yet present, but was later charged.'"²⁰⁴

Posner departed from his fellow appellate jurists by considering the trial judge's exclusion of the Heard affidavit as "a clear and prejudicial error" under the standard of *Federal Rules of Evidence* 804(b)(3), requiring, in Posner's view, a new trial.²⁰⁵ As he read the rule, "statements against penal interest offered to exculpate a criminal defendant [are] inadmissible unless 'corroborating circumstances clearly indicate the trustworthiness of a statement.'"²⁰⁶ Thus, as interpreted by Judge Posner, "it [was] on the precise meaning of the italicized adverb that the soundness of the district judge's ruling depend[ed]."²⁰⁷

Skillfully and concisely laying out the background of the *Federal Rules'* exception against hearsay for out-of-court declarations against penal interest and carefully marshalling the federal appellate caselaw on the subject, Posner distilled the touchstone of the judicial inquiry as follows: "[D]eciding whether the corroborating evidence clearly indicates that the trustworthiness of the corroborated statement requires...consideration not only of the corroborating evidence itself (here a broken window, as we are about to see) but also of the circumstances in which the statements were made" that would be indicative "of its trustworthiness or lack thereof...such as the competence and incentives of the declarant."²⁰⁸ According to Posner's interpretation, "[c]orroboration was supplied by the broken window, which indicated that Heard had wanted to throw incriminating evidence out of the apartment," and the testimony of one Sharon Parker "that Heard had had more than one packet of cocaine with him, though only one was found in the room, suggesting that at least one other had made it out of the window."²⁰⁹ Posner criticized the majority because they gave "credit [to] the police testimony over that of the criminals" regarding Heard's throwing of a packet of cocaine outside the house, upbraiding his colleagues for not doing their job since "the issue is the admissibility, not the weight, of Heard's affidavit."²¹⁰ Deploying relentless logic with a light

202. *Id.*

203. *Id.* (quoting Heard affidavit).

204. *Id.* (quoting Heard affidavit).

205. *Id.* at 690–91 (citing FED. R. EVID. 804(b)(3)).

206. *Id.* at 691 (quoting FED. R. EVID. 804(b)(3)).

207. *Id.*

208. *Id.* (citations and internal quotation marks omitted).

209. *Id.* at 692.

210. *Id.*

emotional touch, Posner discerningly and eloquently took the contextual measure of Heard's motive:

Turning to the critical issue...of motive, I point out that no reason has been given why Heard, whose affidavit could be used to convict him of possession with intent to distribute of [sic] almost five times as much crack cocaine as the police claim that he had, would admit to that possession if it were untrue. Even if the increment in the amount possessed would not affect his sentence...it would ice the case against him, since it is a confession, which is stronger evidence than the word of the police. And even if he refused to repeat his admission at his trial, on Fifth Amendment grounds, his affidavit, which is sworn, could be used to convict him. So his statement exculpating Amerson was really and substantially against his penal interest. There is no indication that he and Amerson are friends or relatives, or that he gave the affidavit in response to a threat, or that he was paid for it, or that he would rather gum up the works of the criminal justice system than minimize his own chances of being locked up for the next 15 years, or that he was trying to curry favor with the police or prosecutors, or that he wished to distance himself from Amerson, even at the cost of taking all the blame himself, in order to avoid being charged with conspiracy.²¹¹

Judge Posner found fault with the district court judge for not "explor[ing] the circumstances" surrounding the creation of the Heard affidavit before ruling that it was inadmissible.²¹² Insisting on rigorous performance, Posner explained that "[o]n the present, incomplete record, Heard's affidavit seems about as trustworthy as other forms of hearsay that are admitted under one or more of the multitudinous exceptions to the hearsay rule."²¹³ While "[t]he district judge thought otherwise...he did not explain his thinking process, and specifically did not point to anything in the record that might support his conclusion...."²¹⁴ Posner argued that while "[d]istrict judges are granted a wide discretion in ruling on issues of evidence, but deferential does not mean abject—appellate courts do sometimes reverse rulings on evidence," deference should "never properly [be] given to rulings the grounds of which are not explained...unless the grounds are obvious."²¹⁵

Concluding his dissent with the punchy, informal, hard-hitting language that is the hallmark of a Posner dissenting opinion,²¹⁶ he offered a clear-eyed, alternative, cynical explanation of the *Amerson* facts:

Without Heard's affidavit, it was Amerson's word against that of three police officers. These are long odds, since Amerson had a criminal record that could be used to impeach his credibility. Heard's affidavit would have shortened the odds a bit. A person who is trying to avoid a 15-year sentence is entitled to that bit. *It is not unknown for police to lie in order to get a conviction. It is not uncommon for police to make a mistake. They may have made one here. (For that matter, they may have lied). It may have been dark when they opened the*

211. *Id.* (citation omitted).

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* (citations omitted).

216. See *Dissent Aesthetics*, *supra* note 5, at 157–61.

door to Amerson (it was night, and whether the motion-detector light with which the building was equipped was on or off is hotly contested) and they may have mistaken an excited gesture with empty hands for the throwing of a package of crack no bigger than a golf ball. The veracity of the police testimony is undermined by the prosecutor's insistence (based on I know not what) that Amerson carried the crack in his hand from his car, which he had parked on the street in front of the apartment building. I should think it more likely that a crack dealer would carry the package of crack in his pocket (if as in this case it would fit in a pocket) until he got inside the house, rather than risk being seen with it in his hand, or dropping it, or not having the free use of both of his hands.²¹⁷

J. A Cutting Critique of the Court's Unwillingness to Grant a Rehearing En Banc

In 2000—anticipating the split over interpretation of the Employee Retirement Income Security Act (ERISA) before the Supreme Court and possibly tantalizing the Court to grant certiorari²¹⁸—Judge Posner filed an incisive dissenting opinion from the Seventh Circuit's denial of a rehearing en banc in *Moran v. Rush Prudential, HMO, Inc.*²¹⁹ His opinion is characterized by judicious intelligence. First, he pointed out the likely costs that the panel decision would trigger for employer-sponsored ERISA medical-benefit plans.²²⁰ Second, he predicted that the court's holding would provide an invitation to “states to evade the preemptive force of ERISA simply by deeming its regulations of ERISA plans to be plan terms.”²²¹ Third, his dissent was

217. *Amerson*, 185 F.3d at 693 (Posner, C.J., dissenting) (citation omitted) (emphasis added).

218. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002).

219. 230 F.3d 959, 973 (7th Cir. 2000) (Posner, J., dissenting from denial of rehearing en banc). During 2000, Judge Posner authored two other dissenting opinions: *Perry v. Sheahan*, 222 F.3d 309, 318 (7th Cir. 2000) (Posner, J., concurring in part and dissenting in part) (arguing that while he concurred with the result, he would have also accepted the sheriff's employees' claim of qualified immunity in seizing a tenant's guns during an eviction proceeding), and *Kitzman-Kelley v. Warner*, 203 F.3d 454, 461 (7th Cir. 2000) (Posner, C.J., dissenting) (disagreeing with the remand of the case because “it [was] obvious that the district judge [would] have to grant the defendants immunity—indeed [would] have to dismiss the suit for failure to state a claim” in a section 1983 action by a ward of the State of Illinois).

220. *Moran*, 230 F.3d at 973 (Posner, J., dissenting from denial of rehearing en banc). Judge Posner, in this regard, pointed out that the Illinois statute “that requires HMOs to submit to review by an independent physician the decision by the HMO not to cover a treatment deemed medically necessary by the patient's physician...[would] effect a substantial change in the employer's plan” and, in his view, “[was] not a general regulation of insurance...it [was] a regulation of HMOs which are the service providers under a great many ERISA medical-benefits plans.” *Id.* Judge Posner—always insightful in analyzing the costs of regulation—went on in his dissenting opinion to argue that the Illinois statute “interfered with the federally specified system for enforcing such [health benefit] entitlements” and “add[ed] heavy new procedural burdens to ERISA plans.” *Id.* With a hint of annoyance, Posner discussed the predictable new costs that the panel decision would spur:

These burdens do not come without cost. The expense of an arbitration by the independent physician could easily equal the expense of the medical treatment that the HMO had refused to authorize. Piling on costs in the administration of ERISA plans will shrink benefits and deter some employers from offering health insurance at all. In addition, the Illinois law obviously is intended (responding to the torrent of criticisms of HMOs) to tilt the administration of those plans in favor of participants by giving them an additional remedy while not giving them any additional remedy to the plan. The law undermines the statutory purpose of federal uniformity in the administration of ERISA plans. If such laws are permissible, the rights of participants in an ERISA plan will change as they are transferred by their employer from state to state, even though they are nominally under the same plan.

Id. at 973–74.

221. *Id.* at 974.

cloaked in restrained rhetoric of mild rebuke for the illogical, incomplete panel decision and the unwillingness of a majority of his Seventh Circuit colleagues to rehear the case anew. Thus, Posner contended:

This case is well worth the attention of the full court. The panel's decision creates a square conflict with another circuit, is very probably unsound, and will affect an enormous number of cases. It is also a single-issue case, and the issue is one of law, so that en banc consideration would be unlikely to create a fractured result or bog the court down in factual questions. Rarely have we had so strong a candidate for en banc review.²²²

Moreover, Posner threw a few barbs at the panel decision by noting: "Although the panel's opinion is long, it does not respond to the [economic] concerns... although they were forcefully argued in the HMO's brief and in an amicus brief supporting the HMO"²²³; the reasoning of the panel "is just a *façon de parler*,"²²⁴ and "it would authorize a state to require ERISA plans to double their benefits," thus constituting a "transparent...evasion of ERISA's preemption clause" with "nothing that would enable the panel to distinguish that case."²²⁵ In the final two paragraphs of his dissent, Posner drove home two "unresolved tension[s]" in the panel opinion: (1) a recent Supreme Court decision, "which [the panel opinion] does not cite,"²²⁶ and (2) the incompatibility of two propositions on which the panel opinion depends. In a final flourish, Judge Posner explained these two tensions:

The [panel] opinion appears to depend on two propositions: first, that the Illinois law regulates insurance rather than ERISA plans and thus is not preempted; second, that by virtue of Illinois law the requirement of independent physician review is written not only into an insurance contract but also into the plan itself, which makes the requirement enforceable in federal court. The two propositions are incompatible. If the statute merely regulates insurance and therefore is not preempted, how can it be part of an ERISA plan and enforceable in federal court? If, on the other hand, the requirement imposed by the statute is and must be incorporated into the plan, then Illinois has done more than merely regulate the contents of an insurance policy. *It has regulated the contents of an ERISA plan—which means that its law is preempted.*²²⁷

Socrates—known to all for his penetrating questions that undercut his interlocutors' reasoning—would be proud of this Posnerian unmasking.²²⁸

222. *Id.* at 973.

223. *Id.* at 974.

224. The French phrase *façon de parler* means "manner of speaking."

225. *Moran*, 230 F.3d at 974 (Posner, J., dissenting from denial of rehearing en banc).

226. *Id.* According to Posner, the panel's opinion "[was] in tension with *Pegram v. Herdrick*," 530 U.S. 211 (2000), "which it [did] not cite." *Id.* As Posner explained: "Although *Pegram* held that combined treatment-eligibility decisions by an HMO are not fiduciary decisions under ERISA, it did not doubt that ERISA applied to HMO-managed ERISA plans; the panel, by contrast, seems to think ERISA inapplicable to such plans." *Id.*

227. *Id.* (emphasis added).

228. Indeed, the Supreme Court's opinion affirming the Seventh Circuit majority, likewise, suffers from the logical flaws pointed out in his dissenting opinion. See *Rush Prudential HMO, Inc. v. Moran*, 533 U.S. 948 (2001).

K. A Playful Intellectual Romp Examining the Purpose of Child Pornography Criminal Statutes

Judge Posner authored a rambling, but highly stimulating, professorial style dissenting opinion from the Seventh Circuit's denial of a rehearing en banc in *United States v. Sherman*,²²⁹ a 2001 case involving the interpretation of a federal child pornographic statute and the federal sentencing guidelines.²³⁰ Posner, it must be remembered, is fascinated with the interface of human sexuality and the law.²³¹ So it is no surprise that he took a rather prosaic issue concerning the appropriateness of grouping closely related criminal counts for purposes of federal sentencing and transformed it into a type of seminar paper on comparable types of criminal offenses where "there are no identifiable victims (e.g., drug or immigration offenses) where society at large is the victim."²³² While Posner's scolding, academic manner in some of his dissenting opinions can be off-putting and aesthetically unattractive,²³³ his dissent in *Sherman* is interesting, provocative, and scholarly in the best tradition of opinions which probe beneath the surface semantics of an issue in an attempt to uncover a more nuanced and sophisticated understanding.

Toward the beginning of his opinion, Judge Posner offered the reader a summary of his key dissenting contention:

Since drug and immigration offenses, as I'm about to show, often do have identifiable secondary victims yet are offered as paradigmatic examples of "groupable" offenses, I believe that if the child pornography offense in section 2252A of the federal criminal code is like the drug offenses in the code, the primary "victim" is society at large. And as it is the same victim in all three counts, *Sherman* is entitled to have them grouped (with what effect on his sentence the briefs do not say) without regard to the presence of identifiable secondary victims.²³⁴

At this juncture, Posner provided a poignant policy analysis of two types of federal criminal statutes that are similar to the child pornography criminal statute at hand:

I think that the offense in section 2252A is more like a drug offense than it is like such offenses as murder and robbery, with their clearly identifiable "primary" victims, and that the children used in the pornography are merely the secondary victims, much like many of the people employed in the drug

229. 268 F.3d 539 (7th Cir. 2001) (Posner, J., dissenting from denial of rehearing en banc).

230. *Id.* at 550. During 2001, Judge Posner wrote one other dissenting opinion, *Malachinski v. Comm'n*, 268 F.3d 497, 510 (7th Cir. 2001) (Posner, J., concurring in part and dissenting in part) (disagreeing with the majority's holding that the U.S. Tax Court lacked jurisdiction to apply the taxpayer's deposit toward his tax deficiency). His dissent in *Malachinski* offered telling insights in favor of a more efficient procedure for litigating disputes over deposits against potential deficiencies—common sense parables like, "If you make a deposit on the purchase of a lamp, not knowing the price, and the price turns out to be less than the deposit, the seller will refund the difference—you've 'overpaid.'" *Id.* at 511. It also included a thoughtful discussion of the standard of review. *Id.* at 511–12.

231. SEX AND REASON, *supra* note 101.

232. *Sherman*, 268 F.3d at 550 (Posner, J., dissenting from denial of rehearing en banc).

233. *See, e.g., Dissent Aesthetics, supra* note 5, at 129–30, 149–50.

234. *Sherman*, 268 F.3d at 551 (Posner, J., dissenting from denial of rehearing en banc) (quoting 18 U.S.C. § 2252A (2000)).

trade—the “mules” who die when the bags of cocaine that they’ve swallowed burst, the wives and girlfriends who are roped into assisting their husbands or boyfriends in the drug trade, the drug dealers killed in gang wars, and the addicts who turn to selling drugs to support their habit. Nominally, most of these are “consenting adults,” but, realistically, many are coerced or inveigled into criminal participation. Yet the principal concern behind the criminalization of drug dealing is not with any of these unfortunates; it is with the consumption of the drugs and with the entire range of consequences thought to flow from that consumption. Similarly, many illegal immigrants are abused, sometimes even enslaved, by employers or by the traffickers in illegal immigrants, but the chief concern behind the restrictions on immigration is not with those unfortunates but with the effect of unrestricted immigration on citizen employment, on crime, and on welfare and other government programs.²³⁵

Then, Posner linked the criminal law policies of drug laws and immigration laws with child pornography laws—all of which, according to his analysis, have society at large as their primary victims.²³⁶ Posner contended in this regard:

The adult men and women who perform in pornographic films may be degraded, exploited, and therefore victimized by their participation in the production of pornography, as argued in Catherine A. MacKinnon, *Only Words* (1993), but they are not the primary victims. No more are the children used in the production of pornography the primary victims, at least in the judgment of Congress. We know this from the fact that as part of the Child Pornography Prevention Act under which Sherman was convicted Congress amended the definition of child pornography to make clear that it includes pornography created by means of realistic computer simulations or by using adults made up to look like children.²³⁷

Moreover, Posner construed the statutory language and the legislative history to express a “parity of concern” regarding “simulated and actual pornography,”²³⁸ that allowed the inference “that the primary victim is *not* the child used in the pornography but the child seduced or molested by a pedophile stimulated by such pornography.”²³⁹ Posner also claimed that “we should be realistic and acknowledge that sheer disgust at [adults] who have a sexual interest in prepubescent children is a principal motivation for such legislation.”²⁴⁰ Finally, he posited that the only issue at bar was what Congress thinks the consequences of child pornography should be:

What the *actual* consequences of child pornography are I do not know; maybe the primary victims are the children used to make such pornography (maybe, for that matter, they are the *only* victims—maybe child pornography is a sex substitute rather than an incitement—apart from disgusted adults). That is not the

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 552.

239. *Id.*

240. *Id.*

issue. The issue is whom the statute deems the primary victims to be. Of that there is little doubt.²⁴¹

Accordingly, Posner would have had the Seventh Circuit rehear the matter of Sherman's sentencing and would have voted to have his conviction for three counts of possessing child pornography grouped for purposes of sentencing.

L. A Frank Unmasking of a Social Security Disability Denial

In 2002, Judge Posner, in his dissenting opinion in *Sims v. Barnhart*,²⁴² refused to go along with what he thought was a travesty of justice and a charade regarding a claimant's application for disability insurance benefits and supplemental security income (SSI).²⁴³ In a searing opening salvo, Posner marshaled the facts in the record, employing simple but vivid language to demolish the administrative decision below. He wrote:

According to the uncontroverted facts, the applicant for disability benefits, Linda Sims, age 46 at the time of the administrative law judge's decision, is of dwarfish stature (4 feet 9 inches), is anemic, and has a shriveled kidney that may be responsible for her stratospheric blood pressure (220/108). Her blood pressure is controllable by medication, but she sometimes forgets to take it. She has had three strokes, has bouts of depression, a history of alcoholism, and an IQ of only 72—a combination of mental and psychological deficiencies implying a level of mentation at which it is easy to forget things. She is prone to fainting. *The idea that she is capable, as the administrative law judge found, of doing "light work"—which is not sedentary work, but is light factory work—"standing and walking (I am quoting the ALJ) for at least six hours per day, with maximum lifting of twenty pounds and frequent lifting of ten pounds"...is laughable.* No employer would dare to hire her. Her fainting fits alone would make her a menace to her coworkers as well as herself in a factory setting and expose her employer to substantial liability....²⁴⁴

Judge Posner went on to take aim at the administrative law judge's (ALJ's) request of a vocational expert in the hearing. He demanded that the expert "take into account the fact that Sims had the equivalent of a high-school education" because "[s]he left school after the eighth grade but later earned a GED certificate." In doing so, Posner fashioned a colorful analogy to show why the ALJ's approach was "irrational."²⁴⁵ According to Posner, "Sims obtained the equivalent of a high-school

241. *Id.*

242. 309 F.3d 424, 432 (7th Cir. 2002) (Posner, J., dissenting).

243. *Id.* at 432. During 2002 Posner wrote three other dissenting opinions: *Bracy v. Schomig*, 286 F.3d 406, 419 (7th Cir. 2002) (en banc) (Posner, J., concurring in part and dissenting in part) (agreeing that the state court judge who presided over plaintiffs' state court capital murder trial engaged in the practice of accepting bribes in other criminal proceedings but disagreeing that the plaintiffs' death sentences should be reversed), *United States v. D'Ambrosia*, 313 F.3d 987, 995 (7th Cir. 2002) (Posner, J., dissenting) (disagreeing with the majority that the application of a four level "organizer or leader" enhancement to the defendants' sentences was warranted), and *Perry v. McCaughtry*, 308 F.3d 682, 693 (7th Cir. 2002) (Posner, J., dissenting) (disagreeing with the majority's rejection of a federal habeas corpus petition because the state court's judgment "that Perry received effective assistance of counsel was not reasonable, and so Perry is entitled to a new trial").

244. *Sims*, 309 F.3d at 432 (7th Cir. 2002) (Posner, J., dissenting) (first emphasis added) (citations omitted).

245. *Id.* at 433.

education before she had any strokes, a point ignored by the ALJ; he might as well have said of an Alzheimer's patient that he might still be able to work because he had a college degree."²⁴⁶ In criticizing the panel majority for denying Sims federal disability benefits and urging the Social Security Administration to be more careful in future cases in weighing the combined effects of a claimant's impairments (like Sims' "low IQ and her high, though theoretically controllable, blood pressure"²⁴⁷), Posner ended his dissent with an acerbic, but compelling, manifesto. He stated, "For Sims, the future is now. She was entitled to a competent examination of the issue of disability in light of her total impairments. She did not receive it."²⁴⁸

M. A Paean to Upstart Churches and Their Equal Protection Rights

Judge Posner filed five dissenting opinions in 2003, but the most memorable was his quirky, but dazzling, performance in *Civil Liberties for Urban Believers v. City of Chicago*,²⁴⁹ a Posnerian dissent replete with learned constitutional analysis of governmental zoning powers, deft comparison of irrational social fears of the mentally retarded with irrational social fears of obscure religious sects, and illuminating analysis of the law and economics of church and state. At first, Posner described the functional zones of the City of Chicago insofar as they impact churches. In Zone 1, which he labeled "residential,"

[c]hurches can locate there without having to obtain a permit from the zoning board, as can a number of other nonresidential entities, such as clubs, restaurants, schools, libraries, and drugstores, though restaurants and drugstores only in high-rise apartment buildings. Other nonresidential land uses in the residential zone either require a permit or are banned outright.²⁵⁰

Zone 2, which Posner called "commercial," was reserved, in Posner's words, "for business and other commercial uses, including not only office buildings and retail stores but also wholesale outlets, warehouses, and light manufacturing, but excluding certain transportation facilities and heavy manufacturing" where "churches require a permit."²⁵¹ Zone 3, which Posner called "manufacturing" land uses under Chicago's ordinance were limited to "transportation facilities and heavy

246. *Id.*

247. *Id.*

248. *Id.*

249. 342 F.3d 752, 768 (7th Cir. 2003) (Posner, J., dissenting). Judge Posner's other four dissenting opinions of 2003 were as follows: *Zurba v. United States*, 318 F.3d 736, 745 (7th Cir. 2003) (Posner, J., dissenting) (opining that while he was "not a literal interpreter of statutes...there should be a reason—in fact, a good, compelling reason—to ignore statutory language" capping the amount recoverable to the amount originally specified by the claimant in the notice of claim under the Tort Claims Act), *Rice v. McCann*, 339 F.3d 546, 550 (7th Cir. 2003) (Posner, J., dissenting) (arguing that the criminal drug convict was entitled to a writ of habeas corpus and a new trial because of the court's refusal to admit exculpatory hearsay evidence at a joint trial), *Murrell v. Frank*, 332 F.3d 1102, 1122 (7th Cir. 2003) (Posner, J., dissenting) (claiming that the defendant was denied effective counsel because of a fundamental failure to investigate the facts surrounding a shooting one night "at a nightclub in Milwaukee's inner city"), and *United States v. Randle*, 324 F.3d 550, 560 (7th Cir. 2003) (Posner, J., dissenting) (claiming that the majority's reversal of a district court's restitution order in bankruptcy was "pointless, as well as erroneous").

250. *Civil Liberties for Urban Believers*, 342 F.3d at 768 (Posner, J., dissenting).

251. *Id.*

manufacturing,” where “churches are flatly forbidden, although bars, restaurants, and union lodges are freely permitted.”²⁵²

Secondly, Judge Posner explained the core issue in the case, as he saw it: “The question is whether the City’s restrictions on where churches may locate are rational” under the Equal Protection Clause of the Fourteenth Amendment.²⁵³ Posner interpreted the Supreme Court and other federal appellate precedent as requiring a rationality review in “a category of sensitive uses or activities, where judges are to be more alert for unjustifiable discrimination than in the usual case in which government regulations are challenged on equal protection grounds.”²⁵⁴ Posner read the leading case of *City of Cleburne v. Cleburne Living Center, Inc.*, which invalidated a zoning ordinance barring group homes for the mentally retarded, as allowing a kind of “‘sliding scale’ approach to equal protection” and instantiating “the proposition that discrimination against sensitive uses is to be given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities.”²⁵⁵

Thirdly, Posner analyzed why “[c]hurches are no less sensitive a land use than homes for the mentally retarded”—but for different reasons.²⁵⁶ As he argued:

The mentally retarded are victims of irrational fears and cruel scorn; they are shunned. Religious people are not shunned, but religion arouses strong emotions, sectarian rivalry is intense and often bitter, and the mixing of religion and government is explosive. When government singles out churches for special regulation, as it does in the Chicago ordinance, the risk of discrimination, not against religion as such—Chicago is not dominated by atheists—but against particular sects, is great enough to require more careful judicial scrutiny than in the ordinary equal protection challenge to zoning.²⁵⁷

Fourthly, in Posner’s most remarkable and innovative portion of his dissent, he elaborated on the law and economics of church and state in America and why it is important to our constitutional values to foster religious competition.²⁵⁸ Posner

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 769 (citing *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)).

256. *Id.* at 770.

257. *Id.*

258. *Id.* at 770–72. One of the problems, as Posner saw it, was between “well-established sects” and “new, small, or impecunious churches.” *Id.* at 770. Citing an internet website, Posner opined:

Not only did [the well-established religious sects] acquire the land on which their churches are built in residential areas when such land was relatively cheap and abundant, and therefore affordable by noncommercial entities, such as churches (and there are of course some wealthy churches); in addition, because nonconforming uses are grandfathered, the churches that have managed to get permission to build over the years in nonresidential zones are untouchable. But what of new, small, or impecunious churches, such as the 40 to 50 obscure sects, one of which has only 15 members, that compose the principal plaintiff, Civil Liberties for Urban Believers? And obscure they are. It is telling that of the six other named plaintiffs—Christ Center (150 members), Christian Covenant Outreach Church (ministering to teenagers and former gang members), His Word Ministries to All Nations, Christian Bible Center (35 members), Church on the “Way” Praise Center, and Monte de Sion Church—only one (Christian Bible Center) is on the city’s list of area churches.

Id. at 770.

pontificated that “[a]s David Hume would have predicted, the greater vitality of American religion than of religion in countries in which there is an established church or churches owes much to our unwillingness to allow government to favor particular sects.”²⁵⁹ Moreover, he claimed:

Religious competition presupposes free entry into the religious “marketplace.” A new church is unlikely, however, to have the resources necessary for building its place of worship in a residential area other than a slum, especially as the Chicago ordinance requires that the church provide parking, which will mean that unless its building is tiny it will have to acquire more than one city lot. A church that wants to build in the commercial zone, where land is cheaper, must obtain a special permit; and if it wants to build in the manufacturing zone, it is out of luck unless it can procure an amendment to the zoning ordinance.²⁶⁰

As Judge Posner viewed the matter, “storefront churches”—located in non-residential neighborhoods of American cities—would continue to increase because of a combination of tighter zoning laws and sky-rocketing real estate prices where “the only place for churches to turn to are existing commercial spaces.”²⁶¹ And, even though “Chicago’s prohibition against locating a church in the commercial zone is not absolute” because of the possibility of obtaining a special permit, “obtaining one is costly for a marginal enterprise; the zoning board enjoys broad discretion in deciding whether to grant or deny a permit; and a public hearing is required at which opposition to the church’s application for a permit is predictable because churches do not enhance commercial activity.”²⁶²

Fifthly, Posner objected to the “absurdly paternalistic” argument by the City that “it is bad for the churches themselves to be located in commercial or industrial areas, because of noise and commotion.”²⁶³ From his perspective, deciding whether to locate “is a judgment for the church to make rather than government, by trading off the cost to the church of noisy and profane surroundings against the benefits in lower costs of land acquisition and proximity to sinners, including prostitutes, drug addicts, and gang members.”²⁶⁴

Concluding his dissenting opinion, Judge Posner stated: “Chicago’s zoning ordinance imposes the same severe burden on new churches that the ordinance invalidated in the *Cleburne* case imposed on homes for the mentally retarded, and with no greater justification. In doing so it denied the plaintiffs the equal protection of the laws.”²⁶⁵

IV. SOME THEORETICAL INSIGHTS REGARDING JUDGE POSNER’S EVOLVING DISSENTING STYLE

As explained below, the maturing dissenting opinion style of Judge Posner has been characterized by two key qualities: humanistic dissent and legalistic dissent.

259. *Id.* (providing citation to economic analysis of religion journal articles).

260. *Id.* at 770–71.

261. *Id.* at 771.

262. *Id.*

263. *Id.* at 772.

264. *Id.*

265. *Id.* at 773.

A. Humanistic Dissent

During his second decade or so tenure as a federal appellate judge, from 1992 through 2003, Judge Posner surprisingly used many of his most memorable dissenting opinions to advance what might be called a humanistic concern for values of benevolence, kindness, and sympathy.²⁶⁶ Opinions that best characterize this style of humanistic dissent were in *Hamilton v. O'Leary*,²⁶⁷ *Johnson v. Phelan*,²⁶⁸ *United States v. Redmon*,²⁶⁹ *United States v. Amerson*,²⁷⁰ *Sims v. Barnhart*,²⁷¹ and *Civil Liberties for Urban Believers v. City of Chicago*.²⁷² Eschewing moral theory,²⁷³ Judge Posner's evolving style of humanistic dissent is based on his penetrating dissection of the facts at bar, whether the factual record involves statistical probabilities, social norms, or economic dimensions.²⁷⁴ In the course of Judge Posner's humanistic, fact-focused dissents, he is at his best when he transcends his more typical concern for efficiency to stake out worthy ends that he believes the law should pursue such as prisoner dignity, compassion for the severely disabled, and even-handed religious competition.²⁷⁵ Given that Posner's dissenting rate

266. See generally ENCYCLOPEDIA OF RHETORIC 350–59 (Thomas O. Sloane ed., 2001) (discussing the attitude of mind of humanism from the time of the European Renaissance to modern times).

267. 976 F.2d 341, 347 (7th Cir. 1992) (Posner, J., dissenting) (ruminating on statistical probabilities and the injustice of allowing a prison's revocation of an inmate's good time credits based on collective guilt for constructive possession of weapons found in a common vent shared by other prisoners); see also *supra* notes 38–47 and accompanying text.

268. 69 F.3d 144, 152 (7th Cir. 1995) (Posner, C.J., concurring in part and dissenting in part) (protesting thoughtfully against the indignity of allowing female prison guards to monitor naked male inmates and concluding that federal courts should seek to eliminate cruel psychological punishments as well as beastly physical torture); see *supra* notes 84–122 and accompanying text.

269. 138 F.3d 1109, 1128 (7th Cir. 1998) (en banc) (Posner, C.J., dissenting) (outlining the privacy interests that should attend a person's garbage on his property by imagining the ways that government might unconsciously intrude on an ordinary person's life by gathering the refuse and reconstructing private secrets); see *supra* notes 178–197 and accompanying text.

270. 185 F.3d 676 (7th Cir. 1999) (Posner, C.J., dissenting) (objecting temperately to the exclusion of an exculpatory affidavit of a third party declarant given the possibility that the police made a mistake or might have lied in circumstances where the defendant was facing a fifteen-year prison sentence for drug possession with intent to distribute); see *supra* notes 198–217 and accompanying text.

271. 309 F.3d 424, 432 (7th Cir. 2002) (Posner, J., dissenting) (indicting in a biting tone the denial of federal disability insurance benefits to a dwarfish, alcoholic, depressed, low-IQ woman who was prone to fainting spells); see *supra* notes 242–248 and accompanying text.

272. 342 F.3d 752, 768 (7th Cir. 2003) (Posner, J., dissenting) (analyzing the constitutional value of protecting storefront urban churches from arbitrary governmental zoning restrictions in a sensitive yet piercing opinion); see *supra* notes 249–265 and accompanying text.

273. Cf. PROBLEMATICS, *supra* note 92 (arguing against grand notions of moral theory and in favor of a greater understanding of the social, economic, and political facts of legal disputes).

274. But see Linda E. Fisher, *Pragmatism Is as Pragmatism Does: Of Posner, Public Policy, and Empirical Reality*, 31 N.M. L. REV. 455 (2001). Professor Fisher argued that, in his more mature appellate opinions, "Posner engages in a [pragmatic] wide-ranging search for useful empirical information derived from an extremely broad array of sources," and "[h]e frequently relies on extra-record fact, apparently discovered through his own independent research." *Id.* at 456. In her examination of a variety of Posner's majority, concurring, and separate opinions during the latter years of his judicial career, Fisher argued that Posner's opinion methodology is subject to criticism because "at times, Judge Posner acts like a chancellor in equity, independently adjudicating facts and sometimes ignoring settled law, rather than as an appellate judge reviewing lower court decisions." *Id.* at 458. This is, according to Fisher, because "[t]he facts and methods he relies on can skirt the edges of appropriate means of establishing validity, and can undermine deference to the parties' role in presenting evidence." *Id.*

275. Cf. Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 741 (2003) (book review) ("Posner is not interested in promoting methods for the

appreciably declined during his latter years on the Seventh Circuit and is, in terms relative to other federal court judges,²⁷⁶ reasonably moderate, one suspects that on those occasions when Judge Posner dissents for humanistic reasons, the legal community listens.

While Judge Posner demonstrated empathy in a handful of dissenting opinions during his first ten years on the federal appellate bench,²⁷⁷ this evolving dissenting style during his more recent years as a judge shows a resolution of his propensity for empathy into a praxis of worldly wisdom infused with practical reason. Unlike many appellate judges who merely know the sterile law, Judge Posner has exhibited Ciceroian qualities of passionate conviction counterbalanced by cool reason.²⁷⁸ Posner's evolving style of humanistic dissent seeks to put law into practice and make the law a practical tool for noble human ends. Judge Posner's maturing dissenting opinions reflect his wide-ranging knowledge of history, philosophy, politics, and law, in conjunction with his everyday mastery of economics. In over twenty years as an appellate judge, Posner has demonstrated his dexterity in putting passion to the service of proof.

B. Legalistic Dissent

Sometimes, in Posner's evolving dissenting style, he tended to cut against the grain of human compassion and empathy for discrete human beings to urge his judicial colleagues to, instead, make hard choices necessitated by the law. This second stylistic dissenting style, which evolved during his latter years as a federal appellate judge, might be called "legalistic dissent." During 1992 through 2003, Posnerian opinions that best exemplify this secondary style of legalistic dissent were *Todd v. Société Bic*,²⁷⁹ *Resolution Trust Corp. v. Chapman*,²⁸⁰ *Jansen v. Packaging Corp. of America*,²⁸¹ *Moran v. Rush Prudential, HMO, Inc.*,²⁸² and *United States v. Sherman*.²⁸³

community to develop shared ideals. Rather, the pressing need is for a set of elite managers to serve as efficiency experts, whose goal is to find the most efficient means to achieve our inherited ends.").

276. See *Unpacking the Statistics*, *supra* note 4; *Choosing*, *supra* note 4.

277. See *Dissent Aesthetics*, *supra* note 5, at 155–56.

278. See generally CICERO THE ADVOCATE (Jonathan Powell & Jeremy Patterson eds., 2004) (discussing Cicero's forensic speeches in ancient Rome in terms of effective techniques of persuasion in legal cases).

279. 9 F.3d 1216, 1225 (7th Cir. 1993) (Posner, C.J., concurring in part and dissenting in part) (attempting to convince his en banc colleagues to resist certifying a question of strict liability tort law to a state supreme court in a case where the facts were limited to a small child who used a cigarette lighter to set a fire that killed another small child), *aff'd*, 21 F.3d 1402 (7th Cir. 1994); see *supra* notes 48–63 and accompanying text.

280. 29 F.3d 1120, 1125 (7th Cir. 1994) (Posner, C.J., dissenting) (arguing against the majority's application of a federal banking statute, which had the effect of protecting errant bank directors from civil damages); see *supra* notes 64–83 and accompanying text.

281. 123 F.3d 490 (7th Cir. 1997) (Posner, C.J., concurring in part and dissenting in part) (urging his fellow judges in the majority to seriously think through the implications of an ambiguous U.S. Supreme Court precedent on sexual discrimination in the workplace and to distinguish categories of cases where the more plaintiff-friendly strict liability standard should govern an employer's liability); see *supra* notes 140–177 and accompanying text.

282. 230 F.3d 959, 973 (7th Cir. 2000) (Posner, C.J., dissenting from denial of rehearing en banc) (critiquing the court's unwillingness to grant an en banc hearing to a case that presented a difficult and paradoxical fit between a federal statute and a state statute even though the easy path was to allow the injured HMO claimant to prevail on her claim against her HMO); see *supra* notes 219–228 and accompanying text.

283. 29 F.3d 1120, 1125 (7th Cir. 1994) (Posner, C.J., dissenting) (dissenting from a denial of a rehearing en banc on the issue of whether a child pomographer should have the benefit of his three separate counts of

Judge Posner's secondary style of legalistic dissent—like his primary style of humanistic dissent—as manifested during 1992 through 2003, essentially involved appeals to practical reason. Posner's style of legalistic dissent, while focused on the need for the appellate court to grapple with legal uncertainties or ambiguities, also skillfully utilized emotional appeals designed to persuade his judicial colleagues of the wisdom of tackling a matter of legal interpretation or exegesis sooner rather than later, or vice versa.

C. Attractive Opinions

Among all of Judge Posner's dissenting judicial opinions decided during 1992 through 2003, three opinions demonstrated aesthetic panache: *Johnson v. Phelan*, *Jansen v. Packaging Corp. of America*, and *United States v. Redmon*.²⁸⁴ In *Johnson* and *Redmon*, examples of humanistic dissent, Posner created dissenting judicial performances that achieved great beauty by enticing the reader to identify with the hapless targets of the criminal justice system. In *Johnson*, Posner used forms of argument and visual imagery that make us imagine the human indignity of having prison guards of the opposite sex observe our every move and sometimes see us naked and helpless.²⁸⁵ In *Redmon*, Posner identified basic expectations of privacy—even in our garbage on our own property—that we would hope would be free of invasion from the prying eyes of government officials.²⁸⁶ In *Jansen*, an instance of legalistic dissent, Posner captured our attention by clarifying the murky state of the law of employer liability for sexual harassment by a supervisor and, through his incisive, situation-specific analysis of different types of sexual harassment, convinced us of the wisdom of a nuanced approach to liability dependent on the incentives of the employer in different contexts.²⁸⁷

D. Unattractive Opinions

Despite his evolution in the latter part of his judicial career to an enhanced and attractive overarching judicial dissenting opinion style, at times between 1992 and 2003, Judge Posner exhibited an unattractive dissenting style, as he occasionally did during his first decade on the bench.²⁸⁸ Most striking, Posner's 1996 dissent in *American International Adjustment Co. v. Galvin*²⁸⁹ is an ugly dissenting opinion because the dissent forgets about cost/benefit considerations and goes over the top in seeking to personally embarrass the trial lawyer for the insurance company and his expert witness.²⁹⁰ Even Judge Posner needs to remember the importance for an appellate judge to pick his battles with care and, when dissenting, to avoid aggressive and mean-spirited personal attacks.

possession grouped together for purposes of criminal sentencing); see *supra* notes 229–241 and accompanying text.

284. See *supra* notes 268, 269, 281.

285. See *supra* notes 84–122 and accompanying text.

286. See *supra* notes 178–197 and accompanying text.

287. See *supra* notes 140–177 and accompanying text.

288. See *supra* notes 29–30 and accompanying text.

289. 86 F.3d 1455, 1462 (7th Cir. 1996) (Posner, C.J., dissenting).

290. See *supra* notes 134–139 and accompanying text.

V. THE AESTHETICS OF DISSENTING STYLE AND POSSIBLE JUDICIAL CANONICITY

When we as legal scholars and practicing lawyers look at the corpus of an eminent jurist's judicial opinions over the course of a long career on the bench, we might be tempted to engage in ideological analysis and debate. Pursuing this kind of project, we would be interested in staking out what legal doctrines and principles and interpretations are "good" or "progressive" or "correct" and to compare a judge's judicial opinions to this ideological construct. That is not an enterprise I am interested in pursuing. Rather, I seek to bypass such contentious and now somewhat tired ideological debates and to explore, in relation to the dissenting judicial opinions of Judge Posner during roughly his first two decades on the federal appellate bench, how aesthetic *pleasure* plays into what we in the legal community find valuable, how this can *change* over time, and how *chance* works on the formation of the judicial canon. I am inspired in this aesthetic approach by two recent publications: (1) Sir Frank Kermode's Berkeley Tanner Lectures of November 2001, along with the responses of invited literary commentators, which resulted in the book *Pleasure and Change: The Aesthetics of Canon*,²⁹¹ and (2) Crispin Sartwell's elegant and enticing book, *Six Names of Beauty*.²⁹²

Lawyers and law professors might be inclined to object to applying aesthetic approaches to judicial opinions on the grounds that law is both more practical and more political than mere literature (and the philosophy of beauty) and that judicial opinions are, therefore, different in kind from works of literary art or philosophy. Perhaps there is some truth in this view. As Posner, himself, has explained, there exist fundamental differences between law and literature, which are rooted in the different social functions of legal and literary texts.²⁹³ But, as Posner has also demonstrated, there are areas of mutual illumination between legal texts, like judicial opinions, and literary texts, like novels and poems.²⁹⁴ In the same spirit that Posner wrote about economics and literature,²⁹⁵ I contend that great judicial opinions merge with the mix of great economic texts and great works of literature and beautiful objects at the level of aesthetic virtue.²⁹⁶

291. FRANK KERMODE, *PLEASURE AND CHANGE: THE AESTHETICS OF CANON* (Robert Alter ed., 2004) [hereinafter *AESTHETICS OF CANON*].

292. CRISPIN SARTWELL, *SIX NAMES OF BEAUTY* (2004).

293. See *LAW AND LITERATURE*, *supra* note 37, at 246–51.

294. See *id.* at 255–302 (examining judicial opinions as literature).

295. "The level at which economics and literature begin to merge is, surprisingly, the *aesthetic*." *Id.* at 301 (emphasis added).

296. As Posner trenchantly observed:

Economics is beautiful to those who know enough of it to be able to read economic books and articles and who have an aesthetic sense. Elegance, concision, surprise, precision, form, metaphor, narrative, example, economy of expression, architectonic order, mystery, wit...these aesthetic virtues are to be found at the highest levels of economic scholarship, just as they are to be found in imaginative literature and in the physical sciences.

Id. at 301–02.

Accordingly, under headings of *pleasure*, *change*, and *chance*,²⁹⁷ I shall discuss the aesthetics of Judge Posner's maturing dissenting judicial opinion style with the ultimate philosophical objective of assessing the possible canonical status of some of his dissenting opinions.

A. *Pleasure*

When trying to theorize what pleasure in reading judicial opinions entails, it is probably advisable to eschew grand synthesis and to proceed "episodically and ruminatively."²⁹⁸ An initial take regarding what is involved in reading canonical (or potentially canonical) judicial opinions is to note that there is something fundamentally different about the pleasure of reading a great judicial opinion, on the one hand, and physical pleasures like sipping a glass of sherry, taking a hot shower, or engaging in sexual relations, on the other hand.²⁹⁹ This epistemological difference is not necessarily the difference between "simple and complex pleasures"³⁰⁰ since, by analogy of reading Proust to reading an outstanding judicial opinion,

[t]he pleasure of a hot shower is no doubt simpler than the pleasure of reading Proust, but it is not self-evident that, say, the pleasure of sexual consummation, especially when an intense relationship between the partners is involved, is less complex than the reading experience, though it is surely quite different in kind.³⁰¹

While the precise nature about the difference between physical pleasures and literary pleasures is difficult to pin down, a useful point of departure is to comprehend a literary canon as being, in Alter's words, "a trans-historical community of texts" that "lives its cultural life through a constant dynamic interplay between each new text and an unpredictable number of antecedent texts and formal norms and conventions."³⁰² As Kermode explains: "[E]ach member [of the canon]

297. This three-part schema was suggested by Robert Alter from Frank Kermode's Berkeley Tanner Lectures. See Robert Alter, *Introduction to AESTHETICS OF CANON*, *supra* note 291, at 3 ("Two of [Kermode's] three central terms—*pleasure* and *change*—appear as the titles of his two lectures, and the third [implicitly contained] is *chance*.").

298. *Id.* at 6.

299. *Cf. id.* at 6–7 (discussing the distinction between simple and complex pleasures in the context of the pleasure afforded by a great work of literature).

300. *Id.* at 6.

301. *Id.* at 6–7.

302. *Id.* at 7. Alter's observation was based on Kermode's reference to Czech critic Jan Mukařovský. According to Kermode:

While I was thinking...I remembered...Czech critic Jan Mukařovský, who happened to be interested in aesthetic pleasure, not yet a taboo subject. Broadly speaking, he argued that the poetic object might be studied with formalist severity as artifact, but that its aesthetic purpose is achieved only by the action of a responsive reader. This response will certainly be conditioned by the norms and values of the reader's community, but also by individual choices and characteristics—very roughly speaking, by what gives him or her pleasure. Mukařovský further believed that part of the pleasure and the value its presence indicates and measures is likely to lie in the power of the object to transgress, to depart, interestingly and revealingly, from the accepted ways of such artifacts.

Thus, to qualify as possessing an aesthetic function, the work must give pleasure, and it must also be new. Mukařovský believed that such works had value because they gave pleasure to the individual, and were at the same time socially valuable because of the common element in the response of serious readers.

fully exists only in the company of others; one member nourishes or qualifies another...."³⁰³ Thus, "[t]his impulse of innovation" may be a useful benchmark to "distinguish the pleasure of the text from at least the simpler kinds of extraliterary pleasures."³⁰⁴ This "purposeful novelty," as a distinguishing characteristic of literary pleasure from mere physical pleasure, might be expressed as follows:

If you enjoy a hot shower after exercise, you might be disconcerted by a noticeable alteration in the water pressure or temperature. If you are an admirer of the novels of Philip Roth, you certainly don't want *Sabbath's Theater* to give you exactly the same pleasure you experienced in reading *The Counterlife* or a novel by anybody else, and its utterly surprising fusion of obscenity, hilarity, and somber existential seriousness is innovative and transgressive in precisely the way Kermode, paraphrasing Mukařovský, suggests a literary work should be.³⁰⁵

A handful of Judge Posner's dissenting opinions, over the course of his more than twenty years as a federal appellate judge, exhibit a purposeful novelty coupled with explicit and implicit affirmations of belonging to the textual community of great American appellate judicial opinions. In the best of his dissents, Posner reveals his gift for offering the reader a fresh representation of critical concepts—both legal concepts and those that can shed light on the law—as well as penetrating evaluations that carry a remarkable gravity. Thus, among his dissenting opinions written during his first decade as a judge, the following sample provides the kind of literary aesthetic pleasure described by Kermode: (1) *DePass v. United States*³⁰⁶ and *Dimeo v. Griffin*³⁰⁷ (where Posner implicitly invoked the memory of the classic Learned Hand decision, which discussed mathematical concepts in everyday English to explain, in his own common parlance, the nature of statistical knowledge in one dissent and the nature of risk in another);³⁰⁸ (2) *International Union, UAW v.*

AESTHETICS OF CANON, *supra* note 291, at 19 (emphasis added).

303. AESTHETICS OF CANON, *supra* note 291, at 33.

304. Alter, *supra* note 297, at 7.

305. *Id.* at 7–8.

306. 721 F.2d 203, 209–10 (7th Cir. 1983) (Posner, J., dissenting).

307. 924 F.2d 664, 676–77 (7th Cir. 1991) (Posner, J., dissenting).

308. "[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: *i.e.*, whether B is less than PL." *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (showing Judge Learned Hand's classic formulation of negligent conduct).

[A] judge is not free to say, in my court we do not allow statistical inference. Knowledge increasingly is statistical, and judges must not let themselves lag too far behind the progress of knowledge. As a matter of fact they have not lagged. The kind of evidence that the district judge rejected in this case, evidence of probability of survival, invariably based on studies of a group of people rather than of just the individual plaintiff, is an increasingly common basis for awarding damages.

DePass, 721 F.2d at 209–10 (discussing statistical knowledge).

[W]e have a persuasive argument...that horse racing under the influence of drugs poses a danger to life and limb.

Not—granted—the same level of danger as would be created by placing the Strategic Air Command in the hands of drug addicts. But magnitude of danger is not the only consideration. Probability of accident is also important. The product of magnitude and probability is, indeed, expected accident cost. That cost is high in horse racing because it is a dangerous sport and because the inherent dangers interact with the loss of judgment and control caused by drug use to make the drug-infested horse race a scene of enormous danger.

Dimeo, 924 F.2d at 676–77 (discussing the nature of risk).

*Johnson Controls, Inc.*³⁰⁹ (where Posner implicitly invoked the U.S. Supreme Court's opinion striking down a state's forced sterilization statute to presciently explain why a corporate policy that prohibited women workers, who might become pregnant, from working in a battery production facility should not be summarily affirmed without a detailed examination of "a host of unanswered questions" that did not appear in the frozen, summary judgment record of the case);³¹⁰ and (3) *In re Sanderfoot*³¹¹ (where Posner echoes the tenor of the critical dissent of Justice William Rehnquist in *United States Steelworkers of America v. Weber*, castigating the majority for misinterpreting the language and purpose of a federal employment discrimination statute, to vehemently disagree with the statutory reasoning and result of the Seventh Circuit panel decision, which held that a former wife's lien on the marital home was avoidable, under a federal bankruptcy statute, as impairing the former husband's homestead exemption).³¹²

During his second decade, or so, as a federal appellate judge, Judge Posner continued to write breathtakingly original dissenting opinions that provided pleasure to the reader because of Posner's innovative impulse and surprising fusion of argumentative techniques and transgressive (making the issue "new") artistry. Thus, in dissents written during his maturing years on the bench—most strikingly illustrated by his humanistic-style dissents in *Johnson v. Phelan*³¹³ and *United States v. Redmon*,³¹⁴ and his legalistic-style dissent in *Jansen v. Packaging Corp. of America*³¹⁵—Judge Posner enticed the reader to change dominant social paradigms: from a norm that prisoners have no dignitary rights to a view that they should not be subjected to "unnecessary cross-sex surveillance";³¹⁶ from a standard that criminal defendants have no privacy rights in their garbage to a suggested standard that government "searches, including searches of garbage, that take place within the curtilage of the defendant's property must comply with the Fourth Amendment's restrictions on searches";³¹⁷ from a criterion of using blackletter Restatement agency rules to resolve "statutory tort[s] of employment discrimination" created by

309. 886 F.2d 871, 902–08 (7th Cir. 1989) (en banc) (Posner, J., dissenting), *rev'd*, 499 U.S. 187 (1991).

310. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("We are dealing with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects."); *Johnson Controls*, 886 F.2d at 902–08 (Posner, J., dissenting) (examining and commenting on the economics of discrimination, noting "the feasibility of warnings as a substitute for a blanket exclusion of all fertile women," and the questionable justification of Johnson Controls' fetal protection policy given instances when the policy is "excessively cautious").

311. 899 F.2d 598, 606–08 (7th Cir. 1990) (Posner, J., dissenting), *rev'd*, 500 U.S. 291 (1991).

312. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 219–55 (1979) (Rehnquist, J., dissenting) (arguing that it was against Title VII of the Civil Rights Act of 1964 to allow reverse discrimination against a white worker with greater seniority rights than minority workers who displaced Weber in a craft training program); see also *Sanderfoot*, 899 F.2d at 606–08 (Posner, J., dissenting) (utilizing subtle emotional with logical analysis based on the text of the bankruptcy statute, the intent of Congress, precedent from other federal circuits, the tradition of equity in bankruptcy law, and policy analysis that indicated no institutional or systemic concerns that conflicted with his dissenting statutory interpretation).

313. See *supra* notes 84–122 and accompanying text.

314. See *supra* notes 178–197 and accompanying text.

315. See *supra* notes 140–177 and accompanying text.

316. *Johnson v. Phelan*, 69 F.3d 144, 152 (7th Cir. 1995) (Posner, C.J., concurring in part and dissenting in part).

317. *United States v. Redmon*, 138 F.3d 1109, 1129 (7th Cir. 1998) (en banc) (Posner, C.J., dissenting).

Congress to a policy-rational framework of potential employer liability for the sexual harassment of an employee by a supervisor, on the one hand, and a non-supervisory co-worker, on the other hand.³¹⁸

Another way to describe the special pleasure that the finest Posnerian judicial dissents provide the reader is to utilize the Hebrew word “yapha,” which means “to be bright, to glow.”³¹⁹ As Professor Sartwell explains this meaning of beauty:³²⁰

[F]irst of all, we might notice that the term [“yapha”] indicates a quality of the beautiful thing or person rather than of the perceiver: a thing, as it were, sheds or exudes its beauty. Beauty is something the beautiful object emits, like a light: a thing is beautiful in virtue of what it gives. A possibly related Aramaic term means to burst forth or to bloom, which is in turn related to the Arabic “wadu’a”, to become beautiful, as well as “ward-un” (rose or blossom), and “warada” (blossoming tree).

I have no evidence to support the assertion...but it seems to me likely that the human aesthetic sense arose not, for example, from the awesome majesty of a forest, mountain, sunset, but by the sudden burst or blossom of energized color into the field of vision: the flower, the fruit, the butterfly, the bird....The environment as a whole, or large chunks of it, is something that is largely taken for granted by the time one reaches awareness, though the sense of its quality can be refreshed, but beauty arises first in what stands out from that environment because of its unusual shape, bright coloration: the arousal of the senses.³²¹

Indeed, the best Posnerian dissenting opinions burst into the reader’s consciousness with an eruption of energized color—different in kind from the staid, stodgy, and pure style of judicial opinion.³²² Rather, Judge Posner’s attractive, impure³²³ style of opinion writing, in his own words, “eschew[s] the ‘professionalizing’ devices of the purist writer—the jargon, the solemnity, the high sheen, the impersonality, the piled-up details conveying an attitude of scrupulous exactness, the fondness for truisms,”³²⁴ and the like.

Perhaps Posner’s impure style of dissent captures the reader’s fancy, in the most comely of his dissenting opinions, by virtue of another aspect of what we might find beautiful: the Japanese word “wabi-sabi,” roughly translated as “humility” or “imperfection.”³²⁵ A dimension of what makes many Posnerian dissenting opinions

318. *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 506 (7th Cir. 1997) (Posner, C.J., concurring in part and dissenting in part).

319. SARTWELL, *supra* note 292, at 28.

320. According to Sartwell, his book is premised on the meaning of beauty in six different languages:

beauty (English): the object of longing
yapha (Hebrew): glow, bloom
sundara (Sanskrit): whole, holy
to kalon (Greek): idea, ideal
wabi-sabi (Japanese): humility, imperfection
hozho (Navajo): health, harmony.

Id. at xii.

321. *Id.* at 28.

322. See *Sexy Style*, *supra* note 4, at 663–64 (comparing pure and impure judicial opinion styles).

323. See *supra* notes 90–93 and accompanying text.

324. *Sexy Style*, *supra* note 4, at 663 (quoting Richard A. Posner, *Judge’s Writing Styles (and Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1430 (1995)).

325. SARTWELL, *supra* note 292, at xii. As Sartwell explains:

aesthetically beautiful is the *wabi-sabi* nature of his groping for legal answers, his attempts to sketch out the contours of a particular subject, his essential humility. An example of this type of austere, *wabi-sabi*, beauty is Judge Posner's dissent in *Civil Liberties for Urban Believers v. City of Chicago*,³²⁶ a case where his law and economics analysis of "storefront" churches competing with mainline churches is rough around the edges, but decidedly illuminating.

B. Change

The notion of change, in literary terms, "is a mark of the provisionality of canons"³²⁷ in different historical eras. "It seems unexceptionable that as cultural eras change and as we change individually, or even idiosyncratically, the canon we imagine we are reading changes as well, in regard to both how we see the works and what works are included."³²⁸

With regard to a hypothetical canon³²⁹ of stellar American judicial opinions, William Domnarski has suggested that there are certain touchstones that define judicial canonicity. For Domnarski there are six criteria for the American judicial canon: "[T]he judicial opinion (1) comes from the United States Supreme Court, (2) establishes or acts as a harbinger of (3) an important rule (4) affecting a fundamental aspect (5) of the American democracy or the American way of life (6) with clarity,

[Wabi-sabi is an aesthetic of poverty and loneliness, imperfection and austerity, affirmation and melancholy. Wabi-sabi is the beauty of the withered, weathered, tarnished, scarred, intimate, coarse, earthly, evanescent, tentative, ephemeral....Wabi-sabi is a broken earthenware cup in contrast to a Ming vase, a branch of autumn leaves in contrast to a dozen roses, a lined and bent old woman in contrast to a model, a mature love as opposed to an infatuation, a bare wall with peeling paint in contrast to a wall hung with beautiful paintings.

Id. at 114.

326. See *supra* notes 249–265 and accompanying text.

327. Alter, *supra* note 297, at 5.

328. *Id.* As Kermodé explains in his own words, change impacts canonicity in the way that "retrieval of forgotten music" by coming across, for example, a compact disc in a music store might, if it were replicated by several individuals, "mark changes in the understanding of the audience" of what great music was all about. AESTHETICS OF CANON, *supra* note 291, at 34. Kermodé goes on, in this regard, to explain how an obscure opera by Handel, *Rinaldo*, composed in the early eighteenth century and dismissed by music critics of that era, might come to be admired by twenty-first century music aficionados:

How explain this change? We have a modern familiarity with the baroque; we have scholars who understand it, and singers and musicians who know how to perform it; we can accommodate the heroic or pathetic gestures, the long recitatives, and the *de capo* arias. Our map of musical history has been redrawn; we have discovered how to listen to this music, a different skill from listening to Mozart or Verdi or Wagner. The change is fueled by more generous notions in ourselves; nothing has happened to the operas except they have come to be understood in their own pleasure-giving terms. We have made this music modern by acts of historical understanding; we have changed it and released its power to please. So, the canon expands. Of course, a withdrawal of attention can by the same token contract it.

Changes in the canon obviously reflect changes in ourselves and our culture. It is a register of how our historical self-understandings are formed and modified.

Id. at 36 (emphasis added).

329. To be part of any canon requires a work to be authoritative and accepted as representing the very best of a particular genre by the elite in the relevant field. *How* this process takes place, of course, is the really interesting question. As the balance of this article attempts to explain, the following variables impact judicial canonicity: (1) the pleasure a judicial opinion provides the readers, (2) how the perceptions of pleasure change over time, and (3) chance.

conviction, or eloquence.”³³⁰ Maybe Domnarski is on to something. He has even claimed that there could be other judicial canons: “There could be a canon of subclasses of constitutional jurisprudence,” such as Supreme Court decisions involving the “interpretation of the commerce clause, the due process clause, and the privilege and immunities clause.”³³¹ There could “be a canon for an audience looking at opinions as literature” involving “eloquent, moving, and literate passages.”³³² There could be a canon of great dissenting opinions by all American appellate judges, a canon of superb federal court of appeals decisions, or a canon of outstanding concurring opinions by all American appellate judges. And for subject matter aficionados, we might imagine a canon of remarkable judicial opinions in environmental law, tort law, contract law, labor law, civil procedure, securities law, bankruptcy law, and so on.³³³

Without getting into the controversial area of rigid, timeless judicial canonicity criteria,³³⁴ I think it intriguing to speculate why other judges and legal scholars have, in recent years, found the judicial opinions of Judge Posner interesting and attractive³³⁵ and, specifically, why some of Posner’s dissenting opinions might be viewed as outstanding dissents at the *fin de siècle*³³⁶ of the last century and in the opening decades of the twenty-first century. I offer four tentative reasons, all related to cultural change, for this Posnerian pull. First, Posner’s dissenting opinions frequently use the parlance of law and economics, a jargon that has become mainstream during the last two decades. Second, Posner is one of the founders and chief exponents in his academic, non-judicial, writings of Law and Economics analysis.³³⁷ Third, Posner’s candor and work-in-progress style of informal writing are refreshing and appealing to modern day legal professionals. Finally, Posner knows how to explain complicated matters in simple, easy-to-understand language.

C. Chance

Could it be that what we legal savants might find canon-worthy in the category of judicial dissenting opinions might be, in large measure, due to chance? The observation of literary theorists are thought-provoking on this issue. As Robert Alter interprets Frank Kermode’s Berkeley Tanner Lecture:

Because we all like to have firm handles to grasp when we try to make sense of complex phenomena, the usual assumptions we make about the [literary] canon are that it is somehow intentional, possibly on the part of writers who aspire to enter it and clearly on the part of communities of readers who fix the canon, and

330. WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 77 (1996).

331. *Id.* at 76.

332. *Id.*

333. In a sense, American casebooks, which reproduce edited versions of appellate decisions, are implicitly suggesting subject matter judicial canons.

334. *Cf.* Alter, *supra* note 297, at 5 (stating that the old school critic, “Matthew Arnold conceived his [literary] touchstones, drawn from such texts as the *Iliad*, the *Divine Comedy*, and the plays of Shakespeare, as enduringly valid, not really subject to change”).

335. *See, e.g., supra* notes 274–276 and accompanying text.

336. While this French term is typically used in connection with the end of the nineteenth century, it also refers to the end of any century. *See* <http://www.britannica.com/eb/article-9125584>.

337. *See, e.g.,* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (6th ed., 2003).

that, in keeping with this intentionality, it reflects certain intrinsic qualities in the works included, whether formal, aesthetic, moral, social, psychological, or ideological. Kermode, citing a couple of examples, suggests that canon formation might be more like a chess game in which from time to time the pieces get scrambled by some blind force of circumstance.

There are, for example, 150 psalms in the canonical biblical collection, which would appear to be a kind of anthology spanning several centuries of poetic production. Some of these, of course, are magnificent poems. At least a few others are rather formulaic and may strike many modern readers as relatively undistinguished. Did these poems make it into what would become the biblical canon because the ancient editors deemed them the 150 finest instances of psalmodic poetry in Hebrew, or because they best expressed the pieties of Israelite monotheism? Some of the psalms were obviously preserved because they had become fixtures in the temple service. But chance cannot be entirely excluded from the making of the canonical anthology. One is haunted by the thought of a Hebrew psalm as sublime as Psalm 8 or as eloquently moving as Psalm 23 that did not survive as part of the canon for the simple reason that the scroll on which it was recorded turned to dry dust in an ancient urn before the editors could include it in their authoritative collection. Kermode's notion of chance is surely worth keeping in mind as a salutary admonition to bland confidence in whatever generalizations about the canon we may make.³³⁸

A number of lighthearted (but potentially serious) questions of the role of chance in the potential canonicity of Judge Posner's dissenting judicial opinions are instigated by the notion of chance in the literary canon. First, would an economically focused intellectual like Posner have ever been appointed to the federal appellate bench but for the American political contingencies of Watergate, Jimmy Carter's election on the tide of Watergate, and the conservative backlash represented by Ronald Reagan's election to the Presidency? Second, is the sheer star quality of Posner's polymathic output of fascinating books and articles a reason for his judicial notoriety?³³⁹ What if Posner were a typical working federal appellate judge and was content to simply decide appeals without delving into all matter of intellectual fare in extra-judicial writings?³⁴⁰ Third, is it likely in future decades that lawyers will

338. Alter, *supra* note 297, at 4. Kermode explains in his lecture remarks:

[T]here is an element of chance in canonicity, and many examples testify to the truth of this. We ourselves make canons by attending closely to texts and contexts, but there may be among those texts some we choose not to attend to and which remain there by inertia. Other works may have some claim to be treated as canonical but aren't. Many authors have been rescued from neglect, but there must be many more who have had no such luck. A few plays of Sophocles were saved by an Alexandrian grammarian; Traherne, lost for almost three centuries, turned up in a London bookstall and benefited from the revival of interest in early seventeenth-century poetry that was gaining strength at the time of the discovery. There is no intrinsic preservative, but somebody at some point must have thought these were good things, and so began the history of their success. This person need not be a professional scholar, and very often isn't: the rediscovery of Botticelli was effected by persuasive amateurs (and was often based on paintings that weren't by Botticelli). But once retrieved, the works are kept alive by conversation, eventually supported by serious scholarship.

AESTHETICS OF CANON, *supra* note 291, at 34.

339. See, e.g., Larissa MacFarquhar, *The Bench Burner*, NEW YORKER, Dec. 10, 2001, at 78.

340. For his latest intellectual book (soon, no doubt, to be eclipsed by another of his stream of books), see CATASTROPHE, *supra* note 1.

stop reading Posner's dissenting opinions because, as Professor Frederick Schauer has argued, appellate opinions should not be viewed as "consumption items for law professors, as evidence of the creative intelligence of their authors, or as objects of aesthetic pleasure."³⁴¹ Is Schauer right when he contends that "the number of people who actually read judicial opinions is likely decreasing," and those who do "read" the opinions increasingly use computer-assisted search techniques to extract "chunks" of usable language to insert into legal briefs?³⁴² Fourth, would Judge Posner's dissenting opinions gain as much attention if he were a state court appellate judge? Fifth, is the "buzz" surrounding Judge Posner's qualifications to be elevated to a Supreme Court Justice³⁴³ a reason for present or future canonicity of his dissenting opinions as a federal circuit judge? What if Judge Posner becomes Justice Posner? What if he stays Judge Posner?

VI. CONCLUSION

Judge Richard A. Posner's dissenting opinion oeuvre, from his first days on the federal appellate bench through 2003 are, in general, a fascinating window on the mind of a brilliant appellate judge. During his over-two-decades (and counting) tenure as a judge, Posner's overarching style of dissent can be characterized as pragmatic dissent—one that skillfully and effectively uses a variety of rhetorical techniques in the service of pellucidly articulated substantive principles of law and animated arguments of justice to achieve practical ends of litigating parties embedded within social and political groups. Judge Posner's pragmatic dissenting style, however, has evolved in his more recent dissenting opinions to exhibit two key strains of practical reason: (1) humanistic dissent, wherein Posner champions an unpopular or underdog litigant with language of benevolence, kindness, and sympathy, and (2) legalistic dissent, wherein he advocates the advisability of making hard judicial decisions to exercise restraint, to grapple with the enlightened meaning of a statute, or to think through a sound gloss on a Supreme Court doctrine. In both his humanistic dissenting and legalistic dissenting sub-styles, Judge Posner has exhibited practical reason in his finest opinions by deftly situating the controversy between the polar extremes of logicity and emotionalism.

As we reflect on the very best of Posner's dissenting style (and, alas, he, from time-to-time, continues to fire off occasional dissenting duds that lack panache and jar our aesthetic sensibilities), it is edifying to realize how a handful of Posnerian dissents helps us to better understand judicial canonicity. Steering around ideological debates of what might be deemed "great" dissenting opinions, studying Posner's evolving dissenting judicial style can help legal scholars achieve richer understandings of how aesthetic pleasure impacts what we in the legal community

341. Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1456 (1995).

342. *Id.* at 1471–72.

343. See *supra* note 4. While it may be too early to tell, some of Posner's dissenting opinions (along with his majority and concurring opinions) have probably become canonical because of his "superstar" judicial status—a status that has come about for a variety of reasons (such as his prolific output of opinions and scholarly writings, the unique and aesthetically pleasing style of his writings, the range of his intelligence, and his candor). Thus, I contend that—like Holmes, Cardozo, and Brandeis before him—Posner's dissents have started to overshadow the majority opinions of his colleagues because of his extraordinary *ethos*.

find to be important, how these perceptions of pleasure can change over time, and how chance works in the formation of the judicial canon.