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BOOK REVIEW

A FEDERAL JUDGE'S VIEW OF RICHARD A. POSNER'S *THE FEDERAL COURTS: CHALLENGE AND REFORM*

*Diana Gribbon Motz**

President Ronald Reagan appointed Richard A. Posner, then a well-known law and economics professor at the University of Chicago Law School, to the United States Court of Appeals for the Seventh Circuit in 1981. Twelve years later, in 1993, Judge Posner became Chief Judge of that court. As Chief Judge, he serves as chairman of the judicial council in that circuit, and as a member of the Judicial Council of the United States. In addition to the normal duties of an appellate judge (which he has so well executed that he has produced the most often-cited circuit opinions in the country), during the summer Judge Posner, sitting specially as a trial judge, tries complicated, non-jury, civil cases. Moreover, he continues to teach at Chicago, and to author innumerable law review articles and a book each year. Certainly no living American lawyer, academic, or judge has managed to excel in so many arenas.

Judge Posner's most recent book, *The Federal Courts: Challenge and Reform*,[1] is a revision and recasting of his 1985 book, *The Federal Courts: Crisis and Reform*.[2] In both, Judge Posner describes and explains "the large, complex, powerful, controversial, and somewhat overworked [federal] judicial system," evaluates "the proposals for improving it," and makes "his own proposals for improvement."[3]

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* Circuit Judge, United States Court of Appeals for the Fourth Circuit. My thanks to my law clerks, Benjamin Barton, Natalie Coburn, and Cynthia Stewart, for their invaluable assistance (but hopefully not their ghost-writing abilities) during the 1996–97 court year, culminating in their comments on and assistance with this review.

1 RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM (1996).

2 RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985).

3 POSNER, *supra* note 1, at xi.

He believes a "new edition" of his 1985 work is required because "much has changed since the earlier edition."[4] Remarkably, the changes he notes are not only in the law, caseload, and workload of the federal courts but in his own thinking about them. Throughout the revision, as if it is the most natural thing in the world, Judge Posner lays out various flaws in his earlier analysis—facts he overlooked or overstated, problems he ignored or exaggerated.

Undertaking a book that points out the flaws in one's earlier analysis is indicative of the compelling intellectual honesty that characterizes Judge Posner's work as an academic and a jurist. Maybe all academics are this forthcoming—but I doubt it. I do know it is rare to find a judge who acknowledges, let alone exposes his (or her) own errors. Yet Judge Posner's candor extends to his judicial opinions.[5]

In sum, Judge Posner's powerful mind and intellectual honesty deserve, indeed command, respect and admiration. I have undertaken this review (including some modest criticism) only because his curiosity about legal problems and creativity in considering—and reconsidering—solutions to them invites comment. Judge Posner serves up so many theories, suggestions, and criticisms that anyone curious or concerned about the work of the federal courts will find much to interest them. I begin with a general overview of the book and then discuss certain of Judge Posner's proposals that particularly interested me.

I

The premise of *Challenge and Reform* is that rather than experiencing a caseload and workload "crisis," as Judge Posner argued in 1985, the federal courts have managed to address the steep growth in their caseload surprisingly well; their "challenge" is to continue to do so in the future without diminution of quality.

The book is divided into four parts. The first generally describes the organization and jurisdiction of the federal courts.[6] The second details the "challenge" before the federal courts, namely the steep increase in caseload since 1960 and the causes of this increase—among others, provision of lawyers for indigents, enactment of a myriad of new federal statutes (and so, new bases for federal jurisdiction), and

4 *Id.*

5 *See, e.g.*, Brotherhood of R.R. Signalmen v. ICC, 63 F.3d 638, 641 (7th Cir. 1995) (repudiating his earlier analysis in *Fox Valley & Western Ltd. v. ICC*, 15 F.3d 641, 644 (7th Cir. 1994)).

6 *See* POSNER, *supra* note 1, at 3–50.

establishment of law libraries for prisoners.[7] This part also surveys how the courts to date have risen to this challenge: by expansion—more and harder working Article III judges, more Article I judges, and much more extra-judicial help (most notably law clerks), and by streamlining—for example, limits on oral argument and the increased number of unpublished opinions.[8] Part three suggests possible "incremental reforms," or "palliatives," for meeting this "challenge," like raising court fees, abolishing diversity jurisdiction, and creating new federal courts to specialize in certain complex areas of law.[9] The final portion of the book proposes "fundamental reforms" to deal with the caseload increase, which include a radical realignment of state and federal jurisdiction, and encourages judges to exercise "judicial self-restraint" and improve the "judicial craft."[10]

As I learned when I served with Judge Posner on the fifteen-member Federal Courts Study Committee (appointed by Chief Justice Rehnquist at the direction of Congress), there is a cottage industry of legal scholars who have declaimed the caseload "crisis" in the federal courts and proposed solutions to that "crisis." Certainly this book makes a worthwhile contribution to that body of work. Indeed, *Challenge and Reform* is both more sensible and more analytical than most studies I've read.

Judge Posner does an excellent job of demonstrating that there has been a caseload increase, of describing the positives and negatives of the current coping strategies, and of proposing new solutions. At every step of the way he makes great efforts to be even-handed. He marshals data and persuasive arguments to support his conclusions, but also presents the counterarguments and recognizes the weaknesses of his approach.

This is not to say that the book is uniformly riveting; it is not (although it is hard to imagine an old-fashioned page turner on this subject). Judge Posner too often bogs down the text in a thicket of charts and figures. Indeed, my only general reservation about *Challenge and Reform* is its ubiquitous use of charts, figures, and raw data.

The sheer volume of data juxtaposed with certain very basic explanations of the work of the federal courts suggests that Judge Posner was not sure what audience he was trying to reach. On the one hand, the charts and statistics (*e.g.*, number and length of completed civil and criminal trials in 1960, 1983, 1988, 1993 and 1995) suggest that

7 *See id.* at 53–123.

8 *See id.* at 124–89.

9 *See id.* at 193–270.

10 *See id.* at 273–382.

Challenge and Reform is written for the hardcore aficionada of federal court reform—the cottage industry to which I have referred. On the other hand, Judge Posner includes fairly elementary chapters about the organization and jurisdiction of the federal courts. These chapters suggest that he is attempting to reach a more broad-based audience.

As Judge Posner notes in another context, "It is essential in any form of writing to know who your audience is."[11] *Challenge and Reform* itself would have benefited from more focus upon this "essential question." The book is too technical for the nonspecialist (and, at least in some respects, too elementary for the specialist). Yet, unless we are ready to rely on some sort of trickle-down theory of ideas, the suggested reforms must reach more than a few academics.

Moreover, largely through charts and statistics, Judge Posner attempts to quantify what I see as basically unquantifiable. I hasten to add that I am not totally opposed to the use of hard data. Many of Judge Posner's statistics are necessary; some are compelling. For example, the huge increase in the caseload of the federal appellate courts and the fact that appellate judges today are working much harder than they did thirty years ago is quickly crystallized by examination of three such statistics: "There were 66 circuit judgeships in 1960; there are 167 today; there would be 886 if the number of judgeships were increased to the point necessary to maintain the same ratio of judgeships to cases as in 1960."[12] Furthermore, I recognize that Judge Posner has deliberately included more charts and statistics in this second edition to meet criticism that the first edition had a high ratio of impressions to data.[13] Nor do I have any good response to the argument that without data we are reduced to anecdote.

But, I believe informed anecdote tells us more than data about some aspects of the federal courts. For example, the attempt to gauge the respective difficulty of different types of appellate cases by determining what percentage of them are decided by signed appellate opinions, in my view, proves little.[14] Using this method, of twenty-two categories of cases, forfeiture and penalty cases are the second most difficult (surpassed only by environmental cases), FELA cases are the fourth most difficult, and civil rights cases against the federal government are the least difficult, except for prisoner suits. My own experience indicates that not one of these characterizations is accurate

11 *Id.* at 158.

12 *Id.* at 132.

13 *See id.* at xiv.

14 *See id.* at 75, 230.

(except for prisoner cases, perhaps). Tax, antitrust, securities, bankruptcy, civil rights, and diversity cases frequently pose more consistently difficult questions than forfeiture, FELA, and even many environmental cases. Judge Posner, himself, is uncomfortable with some of the conclusions that these statistics seem to "prove" and offers some corrections based on his experience. A more fundamental basis for correction, not specifically acknowledged by Judge Posner, is that not infrequently judges publish the easy cases and bury (in per curiam unpublished status) the difficult ones. Not edifying, but true.

Another drawback to relying so heavily on quantifiable data is that inaccuracies or incompleteness in that data can result in the overstatement—or understatment—of ultimate conclusions. For instance, in evaluating the "workload per judgeship across the circuits," Judge Posner relies on the number of "authorized" judgeships for each circuit.[15] However, many of the circuits have never had all authorized judgeships simultaneously filled. For example, in the Fourth Circuit, since 1991 there have been fifteen authorized judgeships but, except for one month in 1993, the court has never had more than thirteen active judges. The Ninth Circuit has been operating for some time with twenty-five percent fewer judges than it has been allotted. (Nor does there seem to be any prospect that many of the authorized additional judgeships will be filled in the foreseeable future, let alone that Congress will authorize additional judgeships.) If the actual number of active judges were used in determining the caseload per judge, the workload might well appear as arduous as many conscientious judges find it.

Attempts to support every judicial caseload and workload solution with scientific data also present a practical difficulty. Achieving "scientific judicial administration," which Judge Posner says he hopes to "advance,"[16] seems to me about as likely as being able to herd cats. Federal judges, endowed with life tenure to ensure their independence, fiercely guard that independence. Some may be persuaded to try some of Judge Posner's ideas, but I seriously doubt that anything short of congressional or Supreme Court mandate (and of course those are always subject to judicial "interpretation") would accomplish many of the reforms that Judge Posner seeks. Relying on reams of data as proof of the efficacy of proposed reforms will, I believe, exacerbate judicial skepticism about the reforms themselves. The statistics and charts, on which Judge Posner so heavily relies, rather than persuading the tradition-bound judiciary, may be so off-putting to many

15 *See id.* at 231–34.

16 *Id.* at xiv.

judges, not trained as hard scientists, as to discourage them from considering even modest reforms.

But the above observations do not reach the important message of *Challenge and Reform*—Judge Posner's description of the challenge, his discussion of the current methods for coping, and his suggestions for new solutions. I have chosen five areas of the book for more detailed comment: the usage of law clerks, the curtailment of oral argument and resort to unpublished opinions, the call for increased user fees in the federal courts, the theory of judicial restraint, and the plea for increased judicial collegiality.

II

A major portion of *Challenge and Reform* is dedicated to detailing the steps that the federal appellate courts have taken to meet an increased caseload—more judges working harder, heavy reliance on extrajudicial assistance (particularly law clerks), curtailment of oral argument, nonpublication of opinions, a trend toward establishing clear rules, and increased use of sanctions. Not only does Judge Posner correctly identify the steps taken to deal with the caseload, but he also persuasively argues that some of these trends are unfortunate.

As he did in the earlier edition, Judge Posner spends a good deal of time demonstrating that to meet the caseload crisis, appellate judges have misused law clerks, delegating not just all research but a good deal of opinion writing to them. He "proves" this by citing statistics showing the increase in the length, footnotes, and citations in federal appellate opinions. I don't quarrel with the proof, but I don't think it is necessary. All one needs to do is to read the heavily footnoted, citation laden, characterless, appellate opinions prevalent today to be convinced that these are the work of intelligent and careful, but inexperienced, lawyers. (Indeed, all one needs to do in some cases is compare the opinions of a single judge from year to year to discern obvious differences in style and approach that can only signal a new author or authors.)

This does not mean that judges who heavily rely on their law clerks have delegated decision-making authority. Judge Posner does not suggest this, and there is no evidence—not even anecdotal evidence—to support such a conclusion. Nor does it mean that federal judges are lazy. Many judicial responsibilities simply cannot be delegated—reading briefs, preparing for and participating in oral arguments, conferencing with colleagues to decide cases, reviewing and commenting on draft opinions of other judges. Yet judges are expected and want to resolve cases as swiftly as possible. To do so, it is

easy to understand why most judges turn to law clerks for an initial draft of an opinion. Of course, conscientious judges—and most are conscientious—actively edit clerk-drafted opinions.

However, the fact remains that whoever writes the first draft of an opinion generally forms the approach taken in the opinion. And I agree with Judge Posner that clerk-written (albeit judge-edited) opinions differ from opinions written by judges in style and length. Gone are the idiosyncrasies of judges of yesterday—great and less great—and in their place we have the far more homogenous law review style of smart, young law school graduates. As Judge Posner points out, "[t]he result is not just a loss of flavor, but a loss of information. A judge's style conveys a sense of the judge that can be used to help piece out his judicial philosophy from his opinions."[17]

Similarly, opinions written by law clerks are also longer than those written by judges. Indeed, one of our fellow members of the Federal Court Study Committee told me that the reason that federal appellate opinions are now so long is that judges don't have time to rewrite and shorten what law clerks have written. When a law clerk writes an opinion, he or she is teaching him or herself the subject. A judge may do this once, but presumably the second or fortieth time a judge sees a similar problem, the judge can jump immediately to the crux of the case rather than laying out all of the preliminary analysis.

Judge Posner also believes that opinions written by law clerks lack candor (unwillingness to acknowledge that a holding is novel), truly thorough research (because the law clerk is too busy with writing responsibilities), and credibility (an overly broad or unnecessary holding neither required by, nor consistent with, the structure and tone of the opinion itself).[18] Maybe he's right, although it's very hard to "prove" this. However, I am not sure that these deficiencies can be charged to the law clerks. Indeed, in my experience, law clerks proclaim all too readily that a case presents a completely new problem (perhaps so that it won't have to be harmonized with existing precedent). Moreover, if a judge presses (and sometimes assists), law clerk research is generally entirely adequate, and probably more than a judge would or could do alone. As for overboard or unnecessary holdings, I think these are more often the result of express judicial direction, rather than law clerk initiative.

In any event, the most serious problem I find in law clerk-drafted opinions is the sheer lack of analysis. Typically, the opinion states the facts, the standard of review, the arguments of one party, the argu-

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17 *Id.* at 145.

18 *See id.* at 147–49.

ments of the other party, the various authorities supporting each side, and then concludes with general agreement with one side or the other. This does not seem to me a very satisfactory way to find and apply the law.

Of course, judges may not do much better. As Judge Posner points out, because law clerks are "generally picked on a meritocratic basis, whereas the judges are not, they usually have better legal analytic abilities, as well as more energy and freshness than their judges."[19] What clerks usually do not have is the life or legal experience, which is necessary to the most essential quality we want and expect from our judges—judgment. For myself, I know that I am far more interested in six pages of reasoning by an experienced federal judge than forty pages full of citations, precedent, and footnotes sent out under the judge's name.

The question remains what to do about the misuse of law clerks. Not even Judge Posner suggests that judges stop hiring law clerks, or even stop hiring as many law clerks. What he urges is that the judge write every opinion and use law clerks only for research. The law clerk will thus have an opportunity to research thoroughly and the judge will put his or her own imprint on the opinion. That would be ideal, but is perhaps impossible. Unless the judge is among a small minority of people who can craft opinions quickly, easily, and well, it may simply be impossible for the judge to find the time to write every opinion—even relatively unimportant ones—from scratch and still issue opinions with the promptness the parties expect and often need. If judges are not able, or willing, to write the entire opinion, it seems to me that at the very least they should ensure that the facts are absolutely accurate, provide clear analysis of the disputed legal issues, and eliminate pages of text that simply enunciate principles that are already well established. This may not result in felicitous writing or novel legal theories, but it will result in shorter, more intellectually honest opinions.

III

Like misuse of law clerks, Judge Posner believes that curtailment of oral argument is another unfortunate reaction to the appellate caseload increase. Many circuits have eliminated oral argument altogether in the majority of their cases and/or have limited the time allotted to oral argument in each case. Gone forever are the days when

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19 *Id.* at 157.

Daniel Webster would argue in the well of the Supreme Court for weeks.

Gone, too, in many circuits are the days when each side is routinely allotted thirty minutes to argue its position. In the Fourth Circuit, we still generally permit argument for thirty minutes for each side, except in some agency appeals that are limited to fifteen minutes per side, but we hear argument in less than thirty percent of our cases—one of the smallest percentages in the country. I think we would be better served if we heard argument in more cases but limited oral argument to five or ten minutes per side in many cases. Although allowing oral argument in more cases would seem to require more time, I agree with Judge Posner that it would save time[20] by eliminating the necessity for the preparation and study of elaborate memoranda created in support of draft opinions in cases that are resolved without any oral argument.

As Judge Posner recognizes, closely associated with curtailment of oral argument is "another adaptation to the caseload growth: the unpublished opinion."[21] He gives a good exposition of the dangers of unpublished opinions—how they encourage sloppiness and ducking of important issues, how imprecise standards make it difficult to determine when an opinion merits publication, and how large numbers of unpublished opinions can distort a litigant's perception of winning and give an advantage to a recurrent litigant over a one-timer. But he finally settles on "the relevant tradeoff": freeing time for a judge and clerks to work on cases of broader interest because their precedential value is more important than providing litigants exhaustive reasons for the decision.[22] I agree, but I would go even further than present practice, at least as that practice exists in the Fourth Circuit.

Between July 1, 1996, and June 30, 1997, the Fourth Circuit published less than thirteen percent of our opinions, relegating a substantial majority to disposition in unpublished, non-precedent creating opinions. And yet, these non-precedential opinions require substantial time and care in their preparation because they generally contain a full recitation of the facts, the background of the relevant law, discussion of the parties' arguments, and the reasoning underlying the decision. It is not uncommon for an unpublished opinion to number twenty pages, double-spaced, which must be blue-booked, cite-checked, and carefully proofread.

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20 *See id.* at 161.

21 *Id.* at 162.

22 *See id.* at 169.

Some judges believe that every litigant deserves an exposition, if only a brief one, as to the basis for the court's decision. To me, however, this is an inefficient use of resources. Time spent "polishing" aspects of unpublished opinions could be better spent researching more complex points of law. After an abbreviated oral argument, I would dispose of these cases with one-line orders. Some circuits already use orders in this manner, and I have urged my court to do so as well. For example, my understanding is that the Second Circuit, which hears argument in more than sixty percent of its cases, handles a number of cases with short oral arguments followed by an order issued quickly afterwards. If litigants were given an opportunity to appear before an appellate court and state their positions and then were provided with a prompt resolution of their cases, I think many would willingly forego the *per curiam* opinion that we issue in every case—albeit not for some weeks or months.

While litigants certainly deserve a thorough analysis of their arguments, they do not always require the stylistically polished product designed for those unfamiliar with the case. The effort to create such a product is inevitable when "unpublished" opinions are widely available on computer databases. Disposing of at least some such cases by order would leave more time for both judges and their staffs to improve the quality of precedent-creating work.

IV

Among the incremental reforms Judge Posner proposes, his suggestion of increased user fees seems to me no better than the unfortunate misuse of law clerks and curtailment of oral argument to which appellate courts have already resorted in order to meet their increased caseload. Despite Judge Posner's economic-based argument that steep user fees would reduce caseloads and increase the quality of judicial decision making, I am as unconvinced now as I was when we discussed it as members of the Federal Courts Study Committee. (The Committee rejected a proposal to recommend adoption of user fees.)

Judge Posner recognizes the economic argument for low court fees, that they are external to judicial decision making which benefit the public at large, thus making some public subsidy for the judicial system appropriate. He maintains, however, that the current subsidy (nearly ninety-nine percent) is too large. He also recognizes the problems associated with indigent litigants—but would account for indigents by scaling fees to their ability to pay.[23] Similarly, he recognizes

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23 *See id.* at 199–200.

the sentiment that it is "unfair" to tie judicial services to a plaintiff's willingness to pay. But he responds to this point by noting that fees are not preventing plaintiffs from suing, but merely inducing them to sue in the state courts; he emphasizes that there is "no tradition of *entitlement* to litigate issues of federal law in federal courts."[24] Although Judge Posner acknowledges that there is a "darker side" to his user fee proposal—namely, state courts could raise fees too, leaving poorer litigants no recourse—he essentially dismisses this fear.[25]

My concern with sharply increasing user fees in the federal courts is one of principle. There is no "user fee" imposed on those who wish to address the other two branches of government. Although there are certainly ways that money can provide an individual with a louder voice in those branches, through campaign contributions, paid lobbyists, and the like, such monies are not directly payable to the governmental branch in question and thus are closer to legal fees or other informal costs of litigation (after all, your voice is generally louder—or at least clearer—in court if you can spend more on your lawyer). Furthermore, "fees" such as campaign contributions do not bar the gates completely to those seeking access to the governmental function in the way that a steep filing fee would bar access to the courts. I firmly believe that the federal judiciary, like the other branches of the federal government, should be broadly accessible to all persons, regardless of their economic assets.

Although Judge Posner may be right that sharply increased filing fees would marginally decrease the federal caseload and increase the quality of judging, the message that such fees would send must also be considered. It is a message I find inconsistent with the principles upon which this country was founded and which should remain a hallmark of our system of justice.

V

Prominent among Judge Posner's "fundamental reforms" for the federal judiciary is his call for "judicial self-restraint," which he defines as "separation-of-powers judicial self-restraint," meaning that a judge ought to try "to limit his court's power over other government institutions."[26] Judge Posner points out that this type of self-restraint is not necessarily "liberal" or "conservative" in the usual sense of those words, because, for example, certain political conservatives support increased enforcement of property rights under the Takings Clause,

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24 *Id.* at 201.

25 *See id.* at 203.

26 *Id.* at 318.

which would increase judicial power over local zoning laws, contrary to Judge Posner's view of judicial self-restraint. The concept of "judicial self-restraint" constitutes a desirable reform, because, Judge Posner argues, it would result in a decreased caseload and a more efficient judiciary.

At first glance, the call for judicial self-restraint seems somewhat unprincipled. To use one of Judge Posner's own examples, the overruling of *Marbury v. Madison*,[27] would qualify as a "self-restrained" decision (because it would pare the control of courts over other government institutions), but such a radical decision could not realistically be defended solely on the basis of smaller caseloads or greater autonomy for the other branches of the government.[28] Judge Posner recognizes, however, that self-restraint cannot be a singular judicial imperative, for it is "a contingent, a-time-and-place-bound, rather than an absolute good."[29] In fact, he concludes his discussion of judicial self-restraint by noting that "[r]estraint is not everything. *Brown v. Board of Education* was an activist decision."[30] (Occasional understated humor is one of the unexpected bonuses of Posner's prose.)

This caveat certainly makes Judge Posner's suggestion more palatable, and more realistic in terms of general acceptance by judges. Still, it seems almost naive to suggest that something as amorphous as "judicial self-restraint" could qualify as a "fundamental reform." First, I note that in my experience there are really very few close cases where a principle like "judicial self-restraint" will even come into play. Most cases do not offer an opportunity to apply an extra-legal principle like judicial restraint because they are "easy"; that is, a precedent or a statute commands a certain result and most judges would agree, regardless of their individual principles or preferences. Most cases are decided without dissent precisely because there is little room for personal preferences or principles—the law is clear (or as clear as it gets). For example, even Judge Posner would not apply his principle of "self-restraint" to a case challenging *Marbury v. Madison*; he would simply apply controlling precedent.

Second, in those few close cases where judges may apply their own principles or preferences, there are a multitude of possible principles that judges might apply, and there is no reason to believe that judges will replace their own principles or preferences for Judge Posner's, no matter how persuasively he presents his. In fact, suggesting

27 5 U.S. (1 Cranch) 137 (1803).

28 *See* POSNER, *supra* note 1, at 320.

29 *Id.* at 321.

30 *Id.* at 334.

that all judges should exercise self-restraint as a "fundamental reform" is akin not just to attempting to herd cats, but to attempting to herd hostile cats. A refusal to engage in judicial self-restraint, as that principle is defined by Judge Posner, runs across the spectrum of judges of all philosophies—from politically conservative (consider the recent decisions in *United States v. Lopez*[31] and *Printz v. United States*[32]) to politically liberal (the criminal procedure revolution of the 1960s). Judges of every philosophy have some, if not many, judicial principles that they value above Posner-defined "judicial self-restraint." Thus, while all judges would likely agree that in some circumstances self-restraint is worthwhile, it is extremely unlikely that any consensus could be reached on when self-restraint was merited.

Judge Posner also faces a significant definitional problem. For example, many judges and court observers would argue that *Lopez* was a prototypical example of judicial self-restraint: the Supreme Court finally drew a limit to its previously unrestrained Commerce Clause jurisprudence. In Judge Posner's lexicon, however, *Lopez* was an un-self-restrained decision: it increased judicial intrusion upon another branch of government and increased the caseload of the courts with Commerce Clause challenges to almost every possible type of federal law, from CERCLA to long-existing criminal statutes. Thus, although many judges would likely agree with Judge Posner that "judicial activism" (a virtual bogeyman in 1990s) is bad, and that self-restraint is good, I doubt that many would agree on a common definition of those terms.

Lastly, as Judge Posner recognizes, many judges are unwilling to admit that any principles (including self-restraint) guide their decisionmaking; these judges argue that they rely solely upon the law itself to guide their decisionmaking. I agree with Judge Posner that in difficult cases where the law is truly unclear or the issue is novel, judges cannot actually rely solely upon the law; they must rely—consciously or unconsciously—upon their own experiences and principles. This is, of course, not necessarily bad; as I mentioned above, we value judges for their judgment. But the fact that many judges would reject outright Judge Posner's self-restraint principle as an impermissible extralegal consideration casts serious doubt upon its efficacy as a "fundamental reform."

In short, while "judicial self-restraint" is a popular concept these days, I doubt that it is a workable reform of the federal judiciary. There are too many independent-minded judges to expect that any

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31 514 U.S. 549 (1995).

32 117 S. Ct. 2365 (1997).

overarching concept of self-restraint could be adopted wholesale. As such, this chapter seems to be more of an exposition of Judge Posner's judicial philosophy than an actual reform proposal.

VI

The last section of *Challenge and Reform* includes Judge Posner's proposals for improving "The Judicial Craft." He makes numerous sensible suggestions for both district courts and appellate courts, but one aspect of the discussion struck me particularly: Judge Posner's concern over the recent "abuse—often shrill, sometimes nasty—of one's colleagues."[33] He is absolutely right. There is a disturbing and growing trend in appellate opinions—majority and concurring opinions, as well as dissents—to ratchet up the rhetoric to a level where a discussion of the merits of a case is lost in a personal attack on the integrity or intelligence of a judicial colleague.

As *Challenge and Reform* points out, such personal attacks do nothing to make an opinion more persuasive. To the contrary, the authoring judge (or justice) appears petulant and churlish, and the substance of the debate is lost in the shrill tone of the dialogue. Furthermore, abuse in opinions

> lowers the reputation of the judiciary in the eyes of the public . . . . If readers agree that the abuse is justified, they will naturally think less well of the judge being abused; if they think the abuse hyperbolic, they will think less well of the abusing judge; quite often they will think the abuse merited but intemperate and think less well of both judges.[34]

Such opinions also fray judicial relationships and make future consensus building more difficult. I often wonder about the motivation of a judge or justice whose opinions read as if they were screamed. Does this reflect a conscious decision that an issue is so important that it "deserves" acrimony, an attempt to pound colleagues into submission, or simply "sport"—like scoring debating points? Whatever its motivation, it contrasts to the collegial, respectful style so effectively employed by Chief Justice John Marshall, as examined in James Edward Smith's recent, *John Marshall: Definer of a Nation.*[35] Chief Justice Marshall's careful consensus building and regard for his colleagues (even those considerably less able than he) resulted in unanimous opinions in some of the most important cases in our nation's history. The diatribes in some of today's fractured appellate

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33 POSNER, *supra* note 1, at 353.

34 *Id.* at 354.

35 JAMES E. SMITH, JOHN MARSHALL: DEFINER OF A NATION (1996).

opinions make the law less certain and seem to serve no purpose except to vent the author's anger. Such diatribes certainly seem a poor way to craft the country's jurisprudence.

It may be argued that one judge's or justice's "abuse" is another's principle-driven "hard-fought battle." But there is a basic difference between respectfully saying a colleague is wrong, and attempting to convince the world that your colleague is either a raving loon or the village idiot. I have no problem with disagreement as to rationale. After all, appellate courts do deal (not always and not even usually, but occasionally) with the nation's most difficult legal questions; it would be surprising if conscientious, intelligent persons could always agree on how those questions should be resolved. Moreover, a healthy debate between a majority and dissenting opinion can strengthen both opinions and enrich the legal discourse. My problem arises when an opinion turns vitriolic, and the nuances of the legal argument are lost to overblown rhetoric and personal attacks on a colleague.

The genesis of the current trend is unclear. The judiciary as a whole appears to be going through a period of political attack, from calls for the impeachment of judges who make decisions unpopular with legislators, to presidential campaigns run against "judicial activism," to the contentious confirmation hearings of Supreme Court and even some circuit court nominees. Yet, from its onset, the judicial branch has been attacked by politicians, press, and occasionally the people. Witness the outcry against federal judges in Chief Justice Marshall's time and the more recent calls to impeach Chief Justice Earl Warren and Justice William O. Douglas.

Thus, the federal judiciary has never been wholly free from political onslaught. Nor is the connection between elected officials and judges a new phenomenon. Many (if not most) judges are appointed because of political connections, and this necessarily creates some sense of political or ideological connection with the appointing administration or recommending senator. This connection is reinforced by the ambitions of some judges; it may be that some state their positions in the strongest possible language in order to attract the attention of political supporters for a possible Supreme Court nomination. There is an old joke about the senator who looks into the mirror each morning greeting himself with: "Good Morning, Mr. President." If that is the case for senators, it is probably equally true that some judges (at least appellate judges) harbor Supreme Court aspirations. Such aspirations cannot help but affect the tone of their opinions and encourage them to state (or overstate) their objections to any and all

opposing viewpoints. But judicial ambition is hardly a modern phenomenon either.

If judges of old were no less criticized or ambitious than those of today, what led them to refrain from uncivil discourse? Perhaps it was respect for the judiciary as an institution that counseled them to avoid publishing nasty, personalized attacks on colleagues—regardless of their private views. That judgment clearly seems appropriate, so why have modern judges abandoned it? I just don't know. But, whatever the cause of the uncivil discourse, I agree with Judge Posner that the Supreme Court itself has exacerbated the problem. Increasingly, the Court's opinions are virulent and hyperbolic. This disappointing tendency has a ripple effect far beyond the Court itself. The lower courts look to the Supreme Court not only for legal guidance, but also for, I am convinced, examples of judicial demeanor. Similarly, the bar as a whole looks to the judiciary to delineate appropriate professional behavior; increasingly, appellate briefs and arguments have adopted the contentious and disrespectful tone of certain judicial opinions.

In sum, like Judge Posner, I believe that the increasing trend of castigating in a shrill and degrading manner a colleague with whom one differs is disturbing. This practice affects the public's perception of the judiciary and of the legal profession as a whole. And it has a deleterious affect on the quality of appellate opinions and decision-making, to say nothing of the professional relationships among judges. For, after all, an appellate judge can act only with his, or her, colleagues. As Judge Posner puts it, "[t]o be an appellate judge is a little like being married in a system of arranged marriage with no divorce."[36]

Judge Posner offers little in the way of a solution, except to point out the problem and suggest that judges should be more considerate. I also have no solution, only a hope for a more civil judicial dialogue.

VII

As the above reactions to *Challenge and Reform* suggest, Judge Posner's latest work, as might be expected, is filled with ideas, insights, and thoughtful analysis that will inspire further thought and reflection by anyone interested in the problems facing the federal courts.

36 POSNER, *supra* note 1, at 355.