

## THE FACES OF JUDICIAL NAIVETÉ

**REFLECTIONS ON JUDGING.** By Richard A. Posner.<sup>1</sup>  
Cambridge, Mass.: Harvard University Press. 2013. Pp. 366.  
\$29.95 (cloth).

*Kiel Brennan-Marquez*<sup>2</sup>

### I.

Richard Posner is disappointed in his colleagues.

As the technical complexity of the federal docket continues to ratchet upward, judicial competence is losing pace. When it comes to factually intricate cases, forget properly *resolving* them—in Posner’s view, judges often have difficulty *parsing* them. This is not terribly surprising. Causes of action today rest on more esoteric grounds than ever before: rapidly evolving technologies, “exotic” financial instruments, counterintuitive economic principles. Even federal judges, who tend toward the highly intelligent side, are liable to get confused. The deeper problem, and the one that truly motivates Posner’s critique in *Reflections on Judging*, is that judges are exerting little effort to catch up. More than that, actually: according to Posner, the issue today is not only that social and technological change outpaces judicial comprehension. It is that many judges have responded to such change by burrowing headfirst into the formalist sand, effectively entrenching their own ignorance. The results, in Posner’s view, have been disastrous: faux sophistication with a high-handed stride—sophistry.

Posner’s claim is simple and convincing. He argues that judges, bewildered by the involution of many cases today, have succumbed to a collective reaction-formation. Rather than grappling with the reality of factual and technological evolution—

---

1. Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School.

2. Resident Fellow, Information Society Project, Yale Law School. The author would like to thank Jack Balkin, Linda Greenhouse, Andrew Tutt, and Carly Zubrzycki for their insightful feedback.

what Posner calls the growing “external complexity” of law—judges have fixated on, and unwittingly multiplied, the law’s “internal complexity” (pp. 1–17). The latter has two guises, the first of which is doctrinal. Whether because judges have failed to define abstract legal terms, or just the opposite—because judges have tried too *hard* to define abstract terms, when plain language does the job more crisply—Posner suggests that contemporary doctrine often operates as an encumbrance rather than a guiding light. One example is “proximate cause,” a tortured idea that, for Posner, emblemizes the judicial “attempt to reduce a heterogeneous body of phenomena to a single term” (p. 65).

The second guise of internal complexity might be termed “stylistic.” Posner vociferously opposes legalese, and he despises the “hypertrophy” of citations (p. 96). A few years ago, Posner published an acerbic “review” of the *Bluebook* in the *Yale Law Journal*,<sup>3</sup> much of which has been woven into *Reflections on Judging* (Chapter 3). But the problem, in Posner’s eyes, reaches far beyond citation form. He sees the sprawling catastrophe of the *Bluebook*—591 pages!—as symptomatic of deeper illness. Along with other “barnacles of legal formalism,” it reflects an ethic of insularity that has seeped into, and overtaken, judicial practice of late (p. 104). The barnacles are numerous. Beyond “obsession with citation form,” they include “fear of math and science, insensitivity to language and culture, [the] mangling of history, superfluous footnotes, verbosity, excessive quotation, reader-unfriendly prose, exaggeration,” and (my favorite, I must say) “bluster” (p. 104).

The alarm of these developments may well be self-evident. For good measure, however, Posner elaborates a few reasons why we should be disturbed. The first is that the judicial focus on internal complexity necessarily diverts attention from its external counterpart. Cognitive resources are limited; choices of emphasis incur opportunity costs. And in Posner’s estimation, it is often more important to work carefully through external complexity—the actual facts—than it is to spend time hand-wringing over doctrinal and stylistic niceties. Another reason to be disturbed: in Posner’s view, doctrinal and stylistic niceties are not *only* distracting. They are fatuous, an active hindrance to interpretation. The overgrowth of doctrine, the artlessness of legal jargon, the winding paragraphs that consist of nothing more than string-citations; these and other sources of “internal

---

3. See Richard Posner, *The Bluebook Blues*, 120 *YALE L.J.* 850 (2011).

complexity” have combined to make judging, in reality a vanilla process, seem almost mythical in substance and scope. Obscurity has flourished in a realm where transparency ought to reign.

Posner’s solution is as straightforward as the problem he diagnoses: “realism.” A realist judge, on Posner’s account, is one who pays keen attention to facts, no matter how confusing they are, and who asks, at every turn, what actually happened, what is actually at stake. “The realist,” in short, “wants to impose a simple style of legal analysis on a sure understanding of the scientific or commercial complexities, factual rather than legal, out of which cases arise” (p. 4).

By “simple,” Posner means not just stylistically simple, but also *analytically* simple. For law, he writes, is not the “profound” enterprise that we often imagine it to be; in fact, it is “one of the simplest professional fields” (p. 354). The reason young judges are rare is not that nascent legal minds are fallow compared to older legal minds. The opposite may well be true (p. 255). The reason young judges are rare is that conceptual dexterity is not equivalent to sound judgment. While youth often brims with the former, the latter, by nature, can only be honed with experience. In this respect, Posner styles his “realism” explicitly in the vintage of Holmes’ quip that “law is not logic but experience” (p. 6).<sup>4</sup> This inspires Posner to criticize formalism and grand academic theory with equivalent fervor. He spends an entire chapter putting Justice Scalia—the embodiment of judicial formalism—and Akhil Amar—the embodiment of intellectual “dreaming”—equally to the lash (Chapter 7).

The upshot is that judges today could stand to ease up on professional technique—a major culprit of internal complexity—and focus instead on cultivating practical wisdom. A key attribute of realist judging, in this vein, is the ability to *pare down*. For Posner, a successful realist opinion is one that begins with complicated facts, reconstructs them in crisp, easy-to-understand language, and efficiently conveys their legal significance. Posner illustrates this point by an amusing show-and-tell. To punctuate Chapter Eight—the “opinion writing” chapter—he takes the liberty of rewriting *United States v. Morris*, a D.C. Circuit case about the sufficiency of evidence to sustain a conviction for cocaine possession.<sup>5</sup> The

---

4. See OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881) (“[t]he life of the law has not been logic: it has been experience.”).

5. *United States v. Morris*, 977 F.2d 617 (D.C. Cir. 1992).

published opinion spans 3,237 words; Posner's revision, far clearer than the original, is slightly north of 600 (pp. 276–86).

In fact, the connection between realism and clear writing runs deeper than first appearances might imply. To readers who “may think it puzzling” that Posner emphasizes writing style alongside “the ‘scientific’ approach that [he seems] to be urging on judges,” he admonishes, in a lovely little passage:

There is no inconsistency. For I'm not trying to turn judges into scientists communicating in symbols and jargon. I'm urging greater judicial recognition of the ever-increasing complexity of the factual underpinnings of modern federal litigation. That makes good judicial writing more rather than less important. . . . Law must come to terms with modernity but will remain a humanity, and should (p. 355).

And in hands deft as Posner's, I daresay it will.

## II.

A prevalent theme of *Reflections on Judging* is the importance of simplicity and concision in legal argument. In veneration of this ideal, and Posner's propensity for upholding it, I won't waste time or ink going on about what *Reflections on Judging* gets right. The answer is almost everything, and certainly the most important things. The argument is spare and tight, weaving nimbly between abstract propositions and concrete examples. More than anything, though, what I find remarkable, and admirable, about the book is the degree of exasperation that Posner allows to simmer below the surface. It never becomes pronounced enough to frustrate the book's conceptual ambitions. But the exasperation is also unrelenting. And rightly, for if Posner's account is correct, judges are essentially flying blind, indeed, willfully *multiplying* their own blindness. The urgency of this point is hardly a matter of taste or ideological preference. It is a matter of professional obligation. Posner's effort deserves unqualified applause.

All of that in mind, I have two points to make about *Reflections on Judging*: two criticisms, one could say, though the term is not precisely apposite. More than anything, the points are meant to supplement Posner's already-deft analysis, not to subtract from its accomplishments.

To begin with, a continual source of ambiguity in *Reflections on Judging*, as in much of Posner's previous work, is how much confidence, and what *sort* of confidence, judges are supposed to

inspire. In one sense, Posner wants to demystify the judicial role. He dislikes the symbolic pedestal that judges occupy in our society: it obscures what he understands to be the essentially human, essentially political character of judicial decisions. Posner is well known for holding the view that judging in our legal system has an essentially “legislative character,”<sup>6</sup> and for his avowed commitment to “pragmatic,” which is to say, policy-based and consequentialist, reasoning.<sup>7</sup> More interesting than the merits of this view—a subject of endless debate, to which I have nothing of specific insight to add—is how it combines with what *else* Posner says about judging. In Posner’s cosmos, judges are run-of-the-mill public servants, pragmatic in both the colloquial and philosophical sense, striving to bring about favorable policy outcomes. Yet they are *also* prodigious intellects, virtually omniscient—perhaps “clairvoyant” is the better term—about what consequences their rulings hold in store. What the Posnerian judge lacks in symbolic grandness is well compensated for in epistemic grandiosity.<sup>8</sup>

Take, for example, Posner’s views on administrative law. He sees *Chevron* deference as a mechanism that judges use, essentially at their convenience, to pass the buck on difficult questions by indulging the “fiction” that “agencies have ‘expertise,’” when in fact “their adjudicators are poorly trained, horribly overworked, highly politicized, or all of these things at once” (p. 86). Later, doubling down on the same point, Posner writes that the “strong norm of deference to the decisions of administrative agencies,” as it currently operates in administrative law, is “the fossil remnant of an era in which . . . progressives had boundless faith in the potential of agencies as agents of reform” (p. 123). There, Posner cannot agree with the progressives. Lamenting the fact that *Chevron*, as an interpretive framework, lumps all agency decisions together, Posner asks, “Must we . . . accord equal deference to all administrative decisions? The realist judge thinks not. The realist judge thinks that deference is earned, not bestowed” (p. 123).

The swerve back to realism here is intriguing. What is the relationship between (1) the proposition that judges should be

---

6. RICHARD POSNER, *HOW JUDGES THINK* 15 (2008).

7. See *id.*, ch. 9. For an excellent reconstruction and critique of Posner’s “pragmatist” commitments, see Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think*, 108 MICH. L. REV. 859, 864–67 (2010).

8. See, e.g., SCOTT SHAPIRO, *LEGALITY* 331–353 (2011) (describing the immodest epistemology on which Posner’s theory of “pragmatic” judging rests).

realists, and (2) the “deference is earned” thesis? Truth to tell, I see none. To be a realist is not automatically to share Posner’s faith in the prowess of judicial intellect. One can easily imagine a judge who approaches legal interpretation realistically, in Posner’s sense, and also believes that judges should defer to agencies in precisely the manner *Chevron* prescribes. In fact, the most compelling variant of the antithesis to Posner’s view—the idea that deference *is* bestowed, not earned—rests precisely on realist grounds. The whole point of a critique like Adrian Vermeule’s, say, is that *realistically*, judges have far less facility with specialized or technical areas of law than we commonly take for granted.<sup>9</sup>

The point is not that realism is incompatible with the “deference is earned” thesis. Of course the commitments can be reconciled. Posner is a walking example of a judge who reconciles them. The point is that compatibility, as such, entails no deeper relationship. One axis—realism v. formalism—is about how judges should approach the cases they are institutionally empowered to resolve. The other axis—deference v. non-deference—is about which cases those are.

So, on the assumption that Posner’s general call for “realism” is well-founded, the question is: What should we realistically expect from realist judges? An example of Posner’s own fashioning underscores the difficulties of this question. Decrying what he calls “judicial insouciance about the real,” Posner invokes the well-known case of *PGA Tour v. Martin* (pp. 78–80).<sup>10</sup> The question presented in *PGA Tour* was whether the Americans with Disabilities Act required the PGA Tour to permit a handicapped golfer, Casey Martin, to compete, despite the Tour’s determination that Martin’s use of a golf cart would “fundamentally alter” the sport. The Court held for Mr. Martin. Of the opinion, Posner had this to say:

Illustrative of judicial insouciance about the real is the Supreme Court’s decision that allowing [Martin to use a golf cart] would not “fundamentally alter the nature” of the PGA’s tournament competitions, and therefore prohibiting him from riding violated the Americans with Disabilities Act. The

---

9. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006) (developing a “second-best” theory of administrative law, focusing on the comparative advantage that agencies have over courts, rather than the absolute competency of courts). See also Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).

10. *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

Court's opinions arbitrarily distinguished, without misgivings, between "essential" and "inessential" rules of golf tournaments. Yet how could such a determination be thought within judicial competence? (p. 80).

In a sense, Posner is right: the inquiry of what makes for an "essential" rule of golf *does* exemplify "judicial insouciance." But as far as Posner's broader point is concerned, the example seems misaimed by 180 degrees. For Posner, the observation of "judicial insouciance" invites the inference that insouciance ought to be overcome—if judges don't understand how golf works, they should learn. But another inference is possible and, in my view, more natural. From the observation of "judicial insouciance," one could more simply conclude that the relevant subject matter is ill-suited for judges. Posner may be *right*, in other words, that determinations of "essential" versus "inessential" rules of golf fall beyond "judicial competence." But perhaps this speaks to the boundaries of judicial competence, not to the importance of having judges wise up about golf. One imagines that Justice Scalia, who dissented in *PGA Tour v. Martin* largely on the basis of how silly he found the "essential features of golf" inquiry,<sup>11</sup> would wholeheartedly *agree* with Posner's lament about "judicial insouciance." For Scalia, however, the obvious next step would be deference to the PGA's determination—just the opposite of Posner's call-to-judicial-arms.<sup>12</sup>

Posner, to his credit, is aware of this indeterminacy. After thoroughly expounding the view that judges ought to learn more about fields they do not understand—like golf—he back-pedals somewhat, acknowledging that some questions do, in fact, fall beyond the scope of judicial competence. In Posner's words:

Responsible realist judges who acknowledge and embrace a legislative function for the judiciary will confine its exercise to areas not only in which formalist methods fall short, but which judges understand. They must avoid the temptation to legislate from the bench in a field about which they know little, whether the field is gun control, legislative apportionment, the administration of public schools, or public finance. These are examples of areas in which a dose of "judicial self-restraint" would be salutary (pp. 122–23).

A sensible caveat. My purpose is not to fault Posner for conceding the limits of his position—very much to the contrary.

---

11. *Id.* at 699–703 (Scalia, J., dissenting).

12. *Id.* at 704.

But the question is what it means, in practice, for realist judges to be “responsible.” How are we supposed to distinguish between domains in which judicial ignorance ought to be overcome, and domains in which the same ignorance militates, instead, in favor of “judicial self-restraint”? In other words: where did Posner come up with this list? Is it supposed to be self-evident that gun control is a field about which judges “know little,” while “complex financ[e]” — to take an example of Posner’s own (p. 72) — is a field that judges should strive to educate themselves about? The point, of course, is not that it is *impossible* to distinguish between gun control and financial engineering, or, more broadly, between domains that are conducive to judicial expertise and those that are not. Clearly the distinction can be drawn. In fact, it seems like an appealing distinction. In some domains, judges should take care to learn all they can; in other settings, judges are wiser to stay away. But when it comes to navigating the distinction in practice, the final chord of *Reflections on Judging* is disappointingly faint. Posner concludes in equipoise.

### III.

All of this is easy enough to forgive. Or better yet, no forgiveness is necessary. Posner has taken up a far-reaching problem — to call his solution partial hardly undermines the effort. It just means that more work lies in store. Books, after all, are finite artifacts. And if the problem has been well posed, that, surely, is forward intellectual motion unto itself.

I am not sure, however, that Posner has the problem quite right — at least, not *exhaustively* right. I agree with Posner that insofar as judges are disavowing the existence of external complexity, and erecting artificial forms of internal complexity in its stead, adjudication suffers. Miscomprehension of facts, Posner rightly points out, “retards” the enterprise of legal interpretation (p. 8). I fear, however, that while Posner bangs the realist war-drum, an important distinction gets lost amid the clamor. It is one thing to argue that factual comprehension is a necessary predicate of legal interpretation. That seems virtually undeniable. If one does not understand what happened, it is impossible to make legal sense — or, really, any sense — of what it was that happened. Yet it is quite another thing to claim that deeper familiarity with social and technology complexity tends to inspire better interpretation. This claim is normative, not just descriptive, in character. If we imagine “judging” as a function — facts go in, holdings come out — Posner wants to argue that judges immersed in contemporary



technology have greater purchase not only on the factual *inputs* of the function, but also on the function itself.

I do not resist this normative move full-stop. But it merits qualification. Sometimes—certainly not in all circumstances, but sometimes—it seems to me that what makes for sound interpretation is not comfort and familiarity with the object being interpreted, but critical *distance* from the object. Call it the “wisdom of alienation.” It is far from self-evident that judicial alienation from contemporary technology is, in every measure, a bad thing. If the judicial role is, as I think it ought to be, partially about helping to ensure that we live up to our own commitments as a polity, a healthy dose of alienation may be just the ticket.

A pair of concrete examples will help to shore up the point. Consider, first of all, *United States v. Seiver*, a Seventh Circuit case that Posner takes to exemplify the perils of judicial estrangement from technology (pp. 91–92).<sup>13</sup> *Seiver* concerned the scope of probable cause when evidence has become “stale.” After determining that the defendant had uploaded child pornography seven months prior, the police sought—and obtained—a warrant to search his computer. The search yielded a cache of child pornography, and the defendant was convicted of possessing child pornography and sexually exploiting a child. On appeal, the defendant argued that no probable cause existed for the warrant, because it was unreasonable “to believe that seven months after he had uploaded child pornography there would still be evidence of the crime on his computer.”<sup>14</sup> The state conceded the defendant’s threshold argument—agreeing that the upload was “stale” evidence—but it maintained that probable cause existed anyway, because a single upload of child pornography reasonably leads to the inference that the suspect is a “collector.” The state’s position, in other words, was that even if the seven month time lapse extinguished probable cause with respect to the uploaded video, there was still probable cause to search for other child pornography.<sup>15</sup>

In Posner’s view, the state’s position in *Seiver* (as well as the defendant’s view) “reflect[ed] a misunderstanding of computer technology.” As Posner explained:

When you delete a computer file it goes into a ‘trash’ folder; and when you ‘empty’ the folder . . . the contents, including the

---

13. *United States v. Seiver*, 692 F.3d 774 (7th Cir. 2012).

14. *Id.* at 775.

15. *Id.*

deleted file in question, disappear. But the files in the trash folder have not left the computer. They have just been placed in a part of the computer's hard drive that you can't [easily] access . . . [but] [c]omputer experts employed by the FBI and other law enforcement agencies can easily recover a deleted file unless it has been overwritten [which is rare.] 'Staleness' is relevant to probable cause when the object searched for is perishable or consumable, like cocaine, but not when it is a computer file (p. 92).

*Seiver* elegantly illustrates Posner's point. Before one understands the ontology of computer files, it may seem intuitive for the "staleness" doctrine to apply to them (I confess it did for me!). But once technological enlightenment dawns, it becomes clear that the "staleness" doctrine applies, if at all, awkwardly, and probably not at all.

No disagreement so far. What I want to stress, however, is that *Seiver* encapsulates Posner's view so easily because widespread agreement exists about the purpose *behind* the "staleness" doctrine. The situation would be quite different if "staleness" represented a point of significant normative dispute. To see why, consider another technologically imbued Fourth Amendment case: *United States v. Warshak*, in which the Sixth Circuit addressed whether criminal suspects enjoy a reasonable expectation of privacy in the content of their email, even when that email is stored on, and has thus been "disclosed to," third-party ISP providers.<sup>16</sup> Presenting this question, *Warshak* touched a constitutional nerve: it asked, in essence, whether the "third-party doctrine," a longstanding fixture of Fourth Amendment law, could survive the digital age.<sup>17</sup>

Doctrinally, *Warshak* resolved into two warring analogies: Is email storage more like sending a letter through the postal service or more like disclosing information about one's finances to a bank? If email storage is like sending a letter, a suspect's expectation of privacy should stay intact. The government cannot seize mail with impunity simply because the sender has turned it

16. *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010).

17. This question has preoccupied recent scholarly writing on the Fourth Amendment as well. See *United States v. Jones*, 132 S.Ct. 945, 957 (2011) (Sotomayor, J., concurring) ("[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."). Compare Stephen E. Henderson, *The Timely Demise of the Fourth Amendment Third-Party Doctrine*, 96 IOWA L. REV. BULL. 39 (2011), with Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009). The question has also come to the attention of the Supreme Court.

over to a courier service; that holding is among the Fourth Amendment's foundational cases.<sup>18</sup> If, on the other hand, email storage is like disclosing financial information to a bank, the decision to keep email stored on an ISP server would vitiate a suspect's expectation of privacy in its content. Individuals have the choice, the logic goes, to maintain a bank account, and by so choosing, they lose Fourth Amendment protection over "revealed" financial information.<sup>19</sup> Ultimately, the Sixth Circuit favored the postal service analogy, a determination supported by, among other things, "common sense," common sense that the court thought would be "def[ied]" if "emails [carried] lesser Fourth Amendment protection [than traditional mail]."<sup>20</sup>

Common sense is one thing; inattention to technological reality, quite another. A serious problem freights the Sixth Circuit's opinion: although it refers, in one swoop, to a defendant's "reasonable expectation of privacy in the contents of emails that are *stored with, or sent or received through*, a commercial ISP,"<sup>21</sup> there is an important difference between *sending* an email and *storing* an email. In one case, the ISP plays a courier role; it serves as "the intermediary that makes email communication possible,"<sup>22</sup> just like the postal service serves as the intermediary that makes traditional mail possible. When email is stored, however, the ISP's role changes. No longer a courier, it serves a function much more like a bank: one less about communication with other people, more about allowing users to keep track of their own affairs; and also one that depends, just like bank records, on users' "voluntarily convey[ed]" information.<sup>23</sup>

Indulging some poetic license, imagine what Posner, donning his realist cap, might have to say about the technological ambiguity in *Warshak*. I am not trying to imply that Posner necessarily *would* say this—only that it would be perfectly in keeping with the logic and rhetorical pattern of his broader argument:

*Warshak* is a good example of what happens when judges fumble over computer technology. What the *Warshak* court

---

18. See *Ex parte Jackson*, 96 U.S. 727 (1877).

19. *United States v. Miller*, 425 U.S. 435, 443 (1976) ("The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.").

20. *Warshak*, 631 F.3d at 285–86.

21. *Id.* at 288 (emphasis added).

22. *Id.* at 286.

23. *Id.* at 288.

neglected to consider—because it did not really understand how ISPs work—is that users have the choice to store email on servers, and the typical user agreement, including the one in this case, authorizes ISPs to access stored email at their discretion. Therefore, by availing himself of email storage service, a user opens himself to the risk that the holders of his stored information will disclose it to police; just like someone who takes advantage of banking services opens himself to the risk that the bank will disclose account information to the police. The court in *Warshak* makes much ado about “the prominent role that email has assumed in modern communication.” True enough, but this can’t be the feature of email that carries the day. Storing money in a bank also plays a “prominent role” in modern financial practice. But that does not change its status under the Fourth Amendment.

My point is not that the Sixth Circuit got the Fourth Amendment question wrong. To the contrary, like many commentators, I regard *United States v. Warshak* as a lodestar of constitutional privacy in the internet age.<sup>24</sup> The point is that *Warshak* differs in kind from Posner’s keystone example, *United States v. Seiver*, despite their common foundation in the Fourth Amendment. In *Seiver*, the relevant legal principle was the subject of little to no controversy. Reasonable minds agree about why the “staleness” doctrine exists—to ensure that evidence procured in the past furnishes a basis for individualized suspicion in the present—and the question was when, as a matter of fact, computer files go “stale.” In *Warshak*, by contrast, observers disagree intensely about how the relevant legal principle—the third-party doctrine—should operate, and in some instances, whether it should even exist.<sup>25</sup> Approaching *Warshak* from a purely doctrinal perspective yields two colorable analogies, and the case seems a close question of Fourth Amendment law. But approach *Warshak* from a more sharply normative vantage point, and suddenly the case no longer seems all that close. It starts to seem more like a paradigm case of what the Fourth

24. See, e.g., Susan Freiwald, *Cell Phone Location Data and the Fourth Amendment: A Question of Law, Not Fact*, 70 MD. L. REV. 681, 700–01 (2011) (using *Warshak* as an example of the way the third-party doctrine could “short cut” Fourth Amendment values); Nicole Friess, *When Rummaging Goes Digital: Fourth Amendment Particularity and Stored Email Surveillance*, 90 NEB. L. REV. 971, 973–76 (2012) (using the *Warshak* facts as a keystone example of the “privacy invasions that result when particularity is lacking in the context of [searches of] stored e-mails.”); Daniel Pesciotta, Note, *I’m Not Dead Yet: Katz, Jones, and the Fourth Amendment in the 21st Century*, 63 CASE W. RES. L. REV. 187, 243 (2012) (lauding the *Warshak* opinion’s “demonstra[tion] [of] . . . why third-party doctrine fails to frustrate citizens’ reasonable expectation of privacy in their e-mail.”).

25. See, e.g., Henderson, *supra* note 17.

Amendment, updated for the 21st century, ought to protect—like an invitation to *transform* doctrine, rather than following carefully in its tread.

I take it as axiomatic that we would prefer a legal order in which judges are inclined toward this sort of “critical turn”—the crying-foul exemplified in *Warshak*—than a legal order in which that inclination has vanished. This is an axiom not because I expect all readers to agree (though I hope many do), but because I am not embarking on a full justification here. I will settle, instead, for the conditional claim. *If* we think that it is important for judges, especially federal judges, to play skeptic in the face of social and technological changes, especially when those changes rework the basic interface between state power and individual liberty, it can be valuable for judges to have distance from the immediacy of the social world. Where a layperson might acclimate effortlessly to social and technological evolution, it seems to me that we want, and should be able to expect, a greater threshold of reluctance from judges. Ultimately, the Sixth Circuit judges in *Warshak* did not appear very well versed in the intricacies of commercial ISP providers. In truth, they did not even seem all that familiar with how email works. But the result of this unfamiliarity was not paralysis or poor judgment. It was well-founded dismay. Factual naiveté coalesced with constitutional wisdom.

Here, Posner could reasonably object that nothing in my account actually disrupts his position. Is there any real *tension*, one might ask, between the call for judges to become familiar enough with existing technology to perform coherent legal analysis, and the idea that judicial skepticism in the face of changing technology can serve important normative ends? In theory, I suppose the answer is no: the two claims are not *analytically* irreconcilable. One can imagine a judge who is at once attuned to the realities of technological change *and* sensitive to the disquiet that new technology can, and often should, inspire. Perhaps Posner himself is such a judge. On the margins, however, I remain dubious that the boundary between familiarity and desensitization can be so readily navigated.

The danger of poor navigation is a stark one. It is the danger of technocratic competency overshadowing normative judgment—a live danger in a world where repression often steps softly, buttressed by little fanfare but copious memoranda. Little wonder that legal skepticism in the face of technological change

often adopts an overt vocabulary of totalitarianism.<sup>26</sup> We worry, and rightly, about the ease with which the abuses of today metamorphose into the norms of tomorrow. Ultimately, the point is not that realism should be rejected, just that it cannot fully account for what is worthwhile about the judicial role. Judges should be familiar with social and technological reality, just not *too* familiar. If realism is a judicial virtue, so is discomfort. And should the two ever come to clash, I have little doubt about which ought to prevail.

---

26. In the Fourth Amendment setting, *see*, for example, *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979) (comparing the deterioration of the Fourth Amendment to the onset of “totalitarian” conditions); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1084 (2002) (arguing that “[t]he increasing amount of personal information flowing to the government poses significant problems . . . [and could] result in the slow creep toward a totalitarian state.”); *cf.* Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 104 (2008) (using the “totalitarian” specter of “the ubiquitous deployment of secret police spies” as a plea for retooling the conceptual foundations of Fourth Amendment law). For examples in the Fifth Amendment setting, *see*, for example, William Federspiel, *1984 Arrives: Thought(crime), Technology, and the Constitution*, 16 WM. & MARY BILL RTS. J. 865, 900 (2008) (“Orwell may have missed the mark by a few decades, but the technology that he feared would lead to unbreakable totalitarian society is now visible on the horizon.”).