Since at least 1993, Richard Posner has proposed that judges should be viewed as “ordinary people responding rationally to ordinary incentives” and, thus, their behavior subject to explanation by economic analysis. He describes the costs and benefits that explain and account for judicial decision making by using an economist’s term—“judicial utility function.” Over the years, his formulation of the judicial utility function has become more nuanced and sophisticated, and it now provides a single theory for understanding judicial behavior, which takes into consideration the many theories, methodologies, and approaches that have been proposed previously by academics and judges. His model is of the judge behavior.

Epstein, Landes, and Posner, in their innovative new treatment of the judiciary, offer a new model of judges—the judge as careerist. In this model, the judge, like every other worker, is a participant in a labor market. There is much that is appealing in this model, and it is an improvement upon the traditional models of legalism and realism. Inevitably, however, there remain open questions both in terms of the specification of the model and the empirical tests that the authors use. Drawing on my experience from the state courts in Pennsylvania, I raise a couple of these questions.

by RENÉE COHN JUBELIRER

I thank Mitu Gulati, Jack Knight, and Janet M. Stafford for their comments.

as a participant in a labor market, subject to the same motivations, constraints, and self-interests as every worker—just wearing a robe. What his model has lacked, until recently, was the supporting empirical and statistical data to test the theory.

That has changed with the 2013 publication of The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice. Posner has teamed up with two other legendary scholars, Lee Epstein and William M. Landes, to propose the most comprehensive “realistic model of judges” to date, supported by statistical analysis and quantitative measures. The book asks, how do judges really decide cases, and what role do legalist reasoning and other factors play in producing judicial decisions? As a judge, although as an elected state court judge and not one of the federal judges about whom this book was specifically written, it is a subject I approach with both fascination and trepidation. The book does not disappoint, as it justifies both my interest and my concern.

“Almost all types of work involve a mixture of activities that can be observed and measured and activities that cannot be observed and measured.”3 This book uses measures of the judicial activities that can be observed, such as the number and nature of dispositional votes, dissenting opinions, characteristics of the judges’ in an effort to illuminate those that cannot. The empirical analysis is based on statistically significant numbers from which characteristics of judicial behavior are drawn. However, to the extent we cannot actually observe and measure the influences on judicial decision making and motivation, the illumination will be imperfect and behavioral shadows will remain.

The authors want this book to be helpful to judges and lawyers, correctly believing that it is important for thoughtful members of the bench and bar to evaluate and understand the factors that directly, and indirectly, influence judicial decision making. The richer measures and more developed tests do illuminate some shadows. The authors try not to frighten away readers, like me, who are not economists or empiricists, but who are intrigued by what economic models and regression analysis will produce in the hands of experts. Despite the authors’ intentions, I confess that this was not exactly an easy read. The methodology is not easily penetrable, and the amount of data collected, organized, and analyzed is overwhelming. That said, there is much to learn from this exhaustive compilation, and I have enjoyed engaging with it.

Reading scholarly literature about judicial behavior can be an “out-of-body” experience for me; I can’t help but wonder whether I or judges I know behave in the way described. Mindful of the authors’ caution about the questionable veracity of judicial self-reporting, it seems reasonable that, in addition to benefiting from the analysis provided, judges can, from their own experience and observations, suggest additional hypotheses and assumptions that might benefit from further study, which may further help illuminate the behavioral shadows. From my perspective, the resolution of two issues raised by the book, in particular, remain worthy of further consideration. The authors recognize that people who would choose to become judges, a job in which compensation and continued employment are not affected by job performance, would likely place greater value on non-monetized factors. Although there is a long list of factors set forth in the utility function formula, it is difficult to understand why a leisure preference would be weighted more heavily by judges than other non-monetized factors, such as the intrinsic interest of the work, prestige or pride, a sense of accomplishment or value in the work, or the social dimension of the work. The leisure preference does not explain why judges continue to work when they could retire with full compensation, and it neglects the other utility, common among artists and musicians, judges may receive from enjoying their work; there is no methodology to weigh the values of the various factors against each other. The authors’ evaluation of the role of these factors is also limited by a shortcoming in the otherwise extraordinarily voluminous empirical data contained in the book, which the authors use to test their model: The evaluation does not include data about over 80 percent of the cases decided by judges.


The Judicial Utility Function—What Factors Influence The “Careerist” In Robes?

For me, the force of the judicial utility function, as expressed in economic terms and supported with empirical evidence, is that it focuses attention on the variety of factors that affect judicial decision making. The model includes legalistic factors involved in decision making, as well as elements that involve judicial self-interest, such as “effort aversion, leisure preference, promotion seeking, collegial phenomena” and avoidance of criticism. The main elements are time constraints, job satisfaction (based on hours of work and internal satisfaction), external satisfactions (including reputation, prestige, power, influence, and celebrity, which are related to the time spent on judicial and nonjudicial activities), leisure, salary and other income, and all other variables. These factors are set out in a formula that shows they have a relationship to each other, although what that relationship is not entirely clear. The authors caution that the effect of the “realistic factors” on a given judge depends on the relative weight the judge personally gives to leisure, power, collegiality, and other factors of her judicial utility function, as well as the judge’s psychology and position in the judicial hierarchy. However, while the book directs our attention to nonlegalistic factors so...
we can try to understand the extent to which they actually influence a particular judge, I did not find a persuasive methodology for calculating the relative weight of the factors to predict what influence they are likely to have. The weight, or relative importance of the factors in relationship to each other, and how they may overlap with one another, and not just their mere existence, are essential to understanding judicial behavior.

This measurement may also be the source of conflict between different schools of thought about the nature of judicial decision making. Although varying by the individual, the weight that judges as a group are likely to give non-monetized factors may be greater than the weight given to those factors, in general, by other workers; if so, this might lead the authors to undervalue collegial deliberations and “legalistic tools,” and overvalue what they refer to as judges’ “effort aversion,” which is based on their preference for leisure.

The book describes a sharp dichotomy between legalism and traditional realism. On one side are legalists who believe “careerism and ideology” play no role in judicial decision making; judges are seen “merely to apply law that is given to them to the facts.” On the opposite side is a “skeptical theory of judicial behavior,” in which adherents believe judges are “merely politicians in robes.” Yet, it is commonly recognized that, because judges are humans, they will encounter influences common to all humans when they listen, read, analyze, understand, and make decisions. So, although the authors tap Judge Harry Edwards to be the face of an unrealistic formalist in the extreme (or “antirealism personified”), I am not sure there are many judges today who do not admit that temperament, personal and professional experiences, and characteristics of personal identity are present within themselves and how they view the law. However, that is not to say that judges, “when they don their robes,” do not want to be independent and “set aside their passions, prejudices and interests and follow the law.” I believe most judges do want to act in accordance with the “traditional conception of the role that the judiciary plays in American government.” Thoughtful judges struggle with the aspiration to achieve an ideal of objective adjudication while living in “every day reality.” Recognizing and acknowledging that these factors do exist is one important step. The outcome of the struggle in how judges balance those factors is, to a large extent, what the book tries to illuminate. What factors appear to be more influential, in what situations, and why? And, if we can understand that, we can answer the important question of whether any legalistic or economic constraints—such as procedures, formal rules, panel compositions, compensation, collegial deliberation, informal norms, and institutional design of the courts—can moderate or neutralize the influence of subjective factors in judicial decision making.

The careerism proposed by the judicial utility model includes factors deriving from both legalism and realism, and it appears that Judge Edwards and the authors might calculate the relative weight of the factors on decision making very differently. Judge Edwards would weight more heavily the importance of legalistic factors, such as the constraints imposed by following rules, precedent, the reasoning and justificatory requirements of judicial opinion writing, and the collaborative deliberations of a collegial court. The authors appear to weight more heavily the factors arising when employment and compensation are not affected by job performance, as in the federal judiciary, such as a leisure preference, judicial workload, and the ability to effectuate ideology. The authors recognize that people who would be attracted to a job, like a judgeship, when they might earn more money in a different position for which they qualify, would by that very decision be motivated more by non-monetized benefits. They reference the role of creativity, power, desire for a good reputation, and psychological factors might have and acknowledge that most federal judges will have had a substantial career and a demonstrated work ethic, knowledge, and proper character traits before being appointed.

Yet, the influence that is highlighted most throughout the book is the leisure preference, and it looms large as the reason for effort aversion and dissent aversion. The authors do not explain why those factors are more important than other non-monetized factors, such as the intrinsic interest of the work, prestige or pride, a sense of accomplishment or value in the work, or the social dimension of the work. And the disagreement about these weights can lead to differing conclusions about what most influences judicial decision making.

For example, the social dimension of the work and the appellate courts’ institutional design are geared to affect judicial behavior. The book states that there is more ideology involved in decisions as you travel up the judicial hierarchy. Interestingly, the way courts are structured, more judges sit together to decide cases as you travel up the judicial hierarchy. This is not a coincidence. The design is "specifically struc-

5. Id. at 2.
6. Id. at 53. Posner and Edwards have engaged in an animated dialogue in the literature, and there is a sense of walking in late to the third act of a play in which these scholars of judicial decision making have starring roles.
7. Dean Levi “would say that most judges are more than aware that they are ‘making law,’ in the sense of amplifying it, when they apply precedents or statutory language to particular factual settings...[and] would also contend that most judges, particularly the very best ones, are acutely aware of the potential of personal factors, including judicial philosophy, life experience, and personality, to affect how judges approach and then decide legal issues.” David F. Levi, Autocrat of the Armchair, 58 Duke L.J. 1791, 1795–96 (2009).
9. Id. at 193.
11. ELP, supra n. 4, at 31.
tured to promote a collaborative form of decision making,” which is presumed to improve the quality of decisions or opinions. One reason for this presumption is the idea that increasing the number of judges increases the probability of reaching a correct decision. Another reason is based on the deliberative process, which is one of “dialogue, persuasion and revision.” Empirical data suggests that judges voting on a panel vote differently depending upon the panel composition and “appear to be influenced by the preferences of the other judges with whom they sit when deciding a case,” what is referred to as “panel effects.” Panel effects may support the presumption that collaborative decisions improve quality.

The authors’ analysis of panel effects is largely premised on the heavy weight they place on a leisure preference. Strong group effects “may mainly reflect effort aversion.” They find a significant conformity effect (“a tendency of judges in the minority to go along with judges in the majority”) and significant panel composition effects, but no polarization. They assume that the high rate of affirmation results from effort aversion because it is easier to write an opinion affirming the trial court. Unanimous decisions are explained as resulting from “dissent aversion,” which is caused by judges not wanting to put in the effort required to write a minority opinion (effort aversion), by future costs (because other judges will write dissents to their majorities, which will cause them extra effort at that time), and by judges wanting to maintain good relationships with their colleagues. Because judges do not choose their colleagues, the authors assume that what their colleagues say or think may have little influence on their votes; they were surprised that, even when there is a majority on the panel, the judges will have a tendency to bend in the direction of a judge with a different ideology—which they refer to as a “wobbl er effect.”

As with many of the topics in the book, there has been an ongoing debate among scholars about the relative importance of judicial deliberative collaboration, or collegiality, in judicial decision making. I suggest that these group effects could reflect, instead of effort aversion, the result of collaborative deliberation, defined by Judge Edwards not as judicial friendship.

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13. Id. at 1321, citing Lewis A. Kornhauser and Lawrence G. Sager, Unpacking the Court, 96 YALE L. J. 82, 98 (1986).
15. Id., supra n. 4 at 199. Although I highlight the authors’ emphasis on effort aversion, chapters 6 & 7 on dissent and oral arguments do describe the collegial aspects of these activities.
16. Id. at 154.
17. Id. at 193-194. It is also easier to write a dissent when the panel is reversing.
19. Id. at 192.
opposed to a “deliberation hypothesis.” 24 Under the “dissent hypothesis,” a judge would moderate views that disagree with her panel members to avoid having to write a dissenting opinion. 25 Under a “deliberation hypothesis,” judges on a divided panel change each other’s sincere views in the course of reaching a consensus. 26

It may be that judicial deliberations are underutilized in some appellate courts. Judge Patricia Wald wrote that, when she joined the District of Columbia Circuit Court, she imagined that “conferences would be reflective, refining, analytic, dynamic. Ordinarily they are none of these.” 27 Perhaps she imagined that conferences would allow for collective reflection, refinement of legal doctrine, and analysis of precedent because there would be utility in that form of a collegial deliberative process. Although this might not have occurred ordinarily for her, others, such as Judge Edwards, have written about courts in which this does occur, and I can believe them because mine is one. Depending on the court dynamics, a lack of dissent can be explained as easily by collaboration as effort aversion.

Certainly, judges are not all effort averse. Posner, himself, certainly does not appear to be so as he must expend great effort if the number and quality of his judicial opinions, books, articles, and lectures are any indication. If anything, he appears to attach a negative value to leisure; he also appears to attach very little value to money or the possibility of promotions or status (as evidenced by his willingness to regularly offend those in positions of power). But I don’t think Posner is alone. The judges on my court also work exceptionally hard and, as best I can tell, attach little value to achieving status or promotions. Every one of the nine elected commissioned judges votes on every case, whether the judge was on the panel or not. At least nine times per year the judges, who live in different geographical regions of the state, get together during argument week, sit around the table, after breakfast, and engage in a spirited and informed discussion of the cases on which at least four of them could not agree after the opinions had been circulated and voted upon by all judges. Judges are candid, often animated, but respectful and will bring concerns about the opinion to the other judges, who can change their votes after the discussion—I believe this is the type of conference Judge Wald imagined. In essence, the Court has created two panels for every case: (1) the three-member panel (or seven-member en banc panel) that is assigned the case; and (2) the entire court of nine commissioned judges, who also participate in each decision. With this “two-tiered” approach, the decision may benefit from the diversity of a small panel, while the court’s jurisprudence benefits from the consistency and measured developments of legal precedent provided by the oversight of the full court. 28

While I might initially have a sinking feeling when a dissent is circulated to a majority I wrote, I appreciate their input and perspective; ultimately, objections, comments, and dissents will test my opinion, much as the empirical studies test the authors’ assumptions. 29 These procedures for doing our work were not created by or for the “effort averse” or the leisure-seekers. Posner has previously predicted that “judges elected for a term [as I am] work harder than appointed judges . . . .” 30 I am not sure that is true, but I do find the description of “effort aversion” as a prominent explanation for judicial behavior inconsistent with my experience.

Although the authors believe effort aversion will “play a particularly large role in the utility function of a securely tenured worker—such as a federal judge—who can slack off without paying a heavy penalty,” 31 there are judges who continue to work after they have worked long enough to retire with pension on both federal and state courts. It appears that most, if not all, of the factors set out in the utility function formula are present most of the time in some amount, and there may be overlap where an activity or benefit or cost can be found in more than one factor and that could give that quality greater weight. For example, a judge may get great satisfaction and enjoyment from the challenge of wrestling with and resolving a

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25. Id. at 1112.

26. Id.

27. Quoted in Posner, supra n. 3, at 2 n. 5.


31. ELP, supra n. 4, at 31.
difficult legal question, or learning something new. Perhaps the joy of work can transform it, in part, into a leisure activity. Justice Holmes eloquently described what many judges feel: “demanding of my philosophy simply to show that I am not a fool for putting my heart into my job.”

However, enjoying one’s job does not imply effort aversion; rather, it is just a different motivation for an effort preference.

The authors describe the “self-expressive character” of judicial opinions and also, at one point analogize judges to T.S. Eliot, perhaps implying that sometimes crafting opinions can be an art akin to poetry. As Justice Holmes explained, through the law a judge can “connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of universal law.”

There are occasions now when the hours fly by while I am wrestling with the law and the factual and procedural posture of a case, trying to craft the best opinion possible, and I can almost hear the echo of the infinite that Justice Holmes described. I understand that it is important for the authors to justify a judicial utility function using economic terms to describe judicial behavior and that standard economic analysis might presuppose an aversion to work. However, I think more attention needs to be given to the nonmaterial benefits judges enjoy from their judicial efforts, such as would cause judges to continue to work after they have worked long enough to retire with pension. While the nonmaterial benefits may be difficult to quantify, they are essential to understand the reality of judicial behavior. I believe that the judicial utility model can show that given the right incentives, a rational, pragmatic judge can be motivated to invest additional effort in decision making within the institutional norms of a “collegial court.”

What Really Happens in the Unpublished Cases?

Another challenge to the authors’ emphasis on effort aversion and leisure preference is the fact that the book does not include empirical data regarding opinions in over 80 percent of the cases before the federal courts of appeals. These are referred to somewhat confusingly as “unpublished opinions,” although most court opinions are currently available to the public online and are thus “published” in a broad sense. The authors acknowledge that “[m]ost court of appeals decisions are ‘unpublished’” but do not include them because they believe that the majority are affirmances, reflecting that most cases filed in federal district courts are meritless, and because the cases are “losers”—i.e., the opinions have little impact on the law. I find this categorical dismissal surprising in a book that otherwise says, “show me the data.”


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According to data from the Administrative Office of the United States Courts’ Annual Reports of the Director for 2012, on average, 81.4 percent of the circuit court of appeals’ opinions were unpublished. These were unpublished opinions and orders that expound on the law as applied to the facts of each case and include detailed judicial reasoning. In the 2011 Annual Reports, the percentage was 85 percent. Therefore, the data relied upon in the book likely involves, on average, less than 20 percent of the opinions issued by the courts of appeals.

Without testing the data from these unpublished cases, there are aspects of judicial behavior that remain unknown.

Whether the authors are correct in their assumption that studying the data from these unpublished opinions would not illuminate any aspects of judicial behavior worth seeing is questionable. The reasons they give to support their assumption echo past reasons for not permitting the citation of these opinions. Currently, these unpublished opinions can be cited to the courts, not as precedent, but as persuasive authority. However, in the recent past, there was a lively debate about the role unpublished opinions do, or should, play in the decision making of courts of appeals. Those who were opposed to creating a federal rule, such as Judge Koziński of the Ninth Circuit Court of Appeals, argued that the opinions are not worthy of consideration; they are easy, they do not contain analysis, judges do not write these opinions, and having to read them would create extra work for lawyers. Those who were in favor of a national rule permitting such citations, such as Judge Becker of the Third Circuit Court of Appeals, argued that these opinions can shed light on the thinking of previous panels, identify issues on which precedential opinions should be written, and that, even though not precedential, they could assist other tribunals, such as district judges, in applying the law. Importantly, there

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33. ELP, supra n. 4, at 257.

34. Oliver Wendell Holmes Jr., The Path of the Law, in COLLECTED LEGAL PAPERS 167, 202 (1929).

35. Posner previously described as “an embarrassment” an earlier inability to explain judicial behavior in economic terms, which his judicial utility model was designed to remedy. Posner supra n. 1, at 1.


37. ELP, supra n. 4, at 155.


40. I am aware that the comprehensive study in the book spans decades and, therefore, the percentages of unpublished opinions will vary each year. I am using these figures just to illustrate my point.

41. Alex Koziński and Stephen Reinhardt, Please Don’t Cite This! Why We Don’t Allow Citation to Unpublished Opinions, CALIFORNIA LAWYER, June 2000, at 43.
was a difference of opinion as to whether the unpublished opinions actually “set forth the ratio decidendi of the opinion,” or whether they were just cursory.\textsuperscript{42} Scholars also entered the debate, questioning whether rational judges would have an incentive to decide difficult cases with unpublished opinions, as a way to save on effort, at least in “a fraction of the hardest cases.”\textsuperscript{43} The reality of the murky world of unpublished dispositions may be that it is largely a black box. We simply do not know what goes on there. The resolution of these questions about unpublished opinions could benefit from analysis. Scholars, like the authors, have demonstrated that, in trying to illuminate unobservable judicial behavior, judges’ own description of what they do should be tested empirically. Yet, it appears that the authors readily accept that 80 percent of the opinions that are written have no relevance to judicial behavior, without explaining as a theoretical matter why they are willing to trust the assertions of some judges on this matter, but not others.

Whether these unpublished opinions are “important” depends on how one defines the term. Assuming that these are not the difficult cases, because they “tend not to be the cases that shape the law;” they are still important to the litigants and the lawyers who appealed their case. Whether this large number of cases is receiving impartial, well-informed, individualized, and thorough attention by judges may be even more important in some ways. Unpublished opinions may be written with full case details and analysis as we do on the [c]ourt on which I sit. Even short memorandum opinions, which contain little or no reasoning, may nonetheless reflect on some qualities about judging and decision making. For example, the authors say that “procedural doctrines… are not always applied neutrally” and that “court of appeals judges in ideologically heterogeneous circuits are more likely to invoke procedural limitations to avoid having to rule on the merits of disputes.”\textsuperscript{44} However, it is difficult to rely on the data in the book to support these statements if there is no review of unreported opinions (or orders) where motions to grant or deny a motion to dismiss might be made. The authors do not believe that deciding these cases is the dominant activity of federal judges—although it “may be what they spend a majority of their time on…, it is not their principal work.”\textsuperscript{45} Yet, whether or not it is dominant or principle, the effect of what the authors refer to as “drudge work” on the other utility factors, such as time and job satisfaction, must be understood. As Helen Keller reportedly said, “I long to accomplish a great and noble task, but it is my chief duty to accomplish humble tasks as though they were great and noble.” Even if these opinions are not the ones “for which judges are remembered,” given their large number and the competing theories about what these decisions contain and what they do, the “utility” of the judicial utility function to illuminate the real way judges are deciding cases is compromised if this issue is not resolved.\textsuperscript{46} Furthermore, if there are some judges who are not deciding the cases at all but delegating the entire enterprise to a law clerk or central legal staff attorney, without review or oversight (even though that might not be the kind of behavior expected of judges), it nonetheless would be “judicial behavior” that should be illuminated under the harsh empirical light.

Of course, it appears that there is a variety of unpublished opinions, and to study them empirically could be very difficult. Empirical studies, in general, have been limited in their ability to evaluate the “rhetoric” of judicial opinions, to get to the language, the explanation for who lost or won and why, and how the opinion wrestled with precedent.\textsuperscript{47} These complications may make it easier to avoid a systematic inquiry into the unpublished opinions. However, even if the authors are ultimately found to be correct that including this data does not tell us anything, that there has been so much debate about the subject has already told us something.

**Conclusion**

In this book, the authors have helped move forward our understanding of judicial decision making by focusing attention on areas that need further study. When I first began studying judicial behavior, I naively remarked that I knew how judges decide cases—after all, that is what I do every day—but there are important lessons here, and the book leaves us with some important questions. I agree with the authors that “[t]he better that judges are understood the more effective lawyers will be…[a]nd [that] judges who understand their motivations and those of other judges are likely to be more effective judges.”\textsuperscript{48} The book has given me a vocabulary and framework within which to think about my work, my motivations, and my role, and I believe that understanding how judges make decisions and the effects of “extrajudicial” factors can enable us to develop and test methods of limiting unwanted influence.

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\textsuperscript{44} ELP, supra n. 4, at 41-42.

\textsuperscript{45} Id. at 56.

\textsuperscript{46} I note that the circuit breakdown in the Annual Reports show that the caseloads and percentage of unpublished opinions vary widely between the circuits. Arguably there could be something learned in trying to discover why those differences exist. For example, the percentage of unpublished opinions in the seventh circuit is significantly lower than average: 55.7% in 2012 and 54.2% in 2011.


\textsuperscript{48} ELP, supra n. 4, at 6.