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Pragmatism Is as Pragmatism Does: Of Posner, Public Policy, and Empirical Reality

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PRAGMATISM IS AS PRAGMATISM DOES: OF POSNER, PUBLIC POLICY, AND EMPIRICAL REALITY

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Stanley Fish believes that my judicial practice could not possibly be influenced by my pragmatic jurisprudence. Pragmatism is purely a method of description, so I am guilty of the "mistake of thinking that a description of a practice has cash value in a game other than the game of description." But he gives no indication that he has tested this assertion by reading my judicial opinions.1

I. INTRODUCTION

Richard Posner, until recently the Chief Judge of the United States Court of Appeals for the Seventh Circuit, has been much studied; he is frequently controversial, hugely prolific, candid, and often entertaining.2 Judge Posner is repeatedly in the news, most recently as a mediator in the Microsoft antitrust litigation3 and as a critic of President Clinton.4 Posner’s shift over time, from a wealth-maximizing economist to a legal pragmatist (with wealth maximization as a prominent pragmatic goal), is by now well documented.5 This shift has been set forth most clearly in The Problematics of Moral and Legal Theory,6 as well as Overcoming Law7 and The Problems of Jurisprudence.8 The main features of his pragmatism include a Holmesian emphasis on law as a prediction of how a judge will rule.9 An important feature of law, then, is its ability to provide clear, stable guidance to those affected by it. Judge Posner’s pragmatism is strongly antiformalist; he believes that conventional tools of doctrinal legal

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2. See Maurice Possey, Prolific Judge Focuses Expertise on Microsoft, CHI. TRIB., Nov. 29, 1999, at § 2, p.1 (Posner has published 31 books; according to Michael Sandel: "Not since Oliver Wendell Holmes has there been a judge so prolific and influential in his scholarly writings. Posner seems to publish books at a faster rate than most scholars read books."); Linda Greenhouse, In His Opinion, N.Y. TIMES BOOK REV., Sept. 26, 1999, at 14; Ronald Dworkin, Philosophy and Monica Lewinsky, N.Y. REV. BOOKS, Mar. 9, 2000, at 48; Richard Posner, An Affair of State: An Exchange, N.Y. REV. BOOKS, Apr. 27, 2000, at 60.
3. See Possey, supra note 2.
reasoning neither compel results nor sharply limit the scope of rational argumentation. He is highly empirically oriented, with the goal of producing those legal rules and decisions that are best for society. Justice and morality are not defined by reference to an absolute standard, but rather by social norms and traditions. Posner’s pragmatism has its political roots in John Stuart Mill’s On Liberty and its emphasis on individual liberty.

He also retains his previous emphasis on economics as the policy science par excellence, along with its goal of wealth maximization, but subordinates that specific goal to the overall pragmatic goal of rendering decisions that improve society. In summary, by and large in his writings he remains faithful to his laissez-faire capitalist roots because it is pragmatically useful, and he will allow other goals to predominate when he believes it appropriate.

Posner’s philosophical shift is also reflected in his recent judicial decisions. The first of the most salient features of his pragmatism, as it plays out in practice, is his reliance on a variety of sources of factual evidence. Posner engages in a wide-ranging search for useful empirical information derived from an extremely broad array of sources. He frequently relies on extra-record fact, apparently discovered through his own independent research. The second distinguishing feature is the openness and candor of his writing. Aiming to provide clear guidance to future litigants and judges, he is unusual in revealing the policy bases of his decisions. His opinions are often exercises in practical reasoning about the consequences of various possible decisions. Third, Posner tends to decide cases and write opinions on broad, multiple grounds. Instead of resting decisions on the narrowest dispositive

10. See infra text accompanying notes 32-48. The legal pragmatism espoused and analyzed in recent legal scholarship cannot be reduced to a single definition. In fact, it probably has almost as many definitions as authors writing on the subject. But the various “pragmatisms” discussed by legal scholars share many common features. These would include an emphasis on legal and social action to achieve beneficial results for society (however variously defined). Consequences are stressed over doctrine and theory, truth and knowledge are seen as contingent and situated within a particular historical context, and formalist and foundationalist approaches are subjected to thorough critiques. See generally PRAGMATISM IN LAW AND SOCIETY (Michael Brint & William Weaver, eds., 1991).

It is not surprising that legal pragmatism would enjoy a revival at a time when postmodern theories were ascendant in the legal academy. The decline of certainty and authority—epistemic or otherwise—coincided with renewed interest in approaches that emphasized the partiality of knowledge and the ability to act constructively in the face of uncertainty.

11. See infra text accompanying notes 32-79.
12. See infra text accompanying notes 32-42.
14. See infra text accompanying notes 49-59.
15. See infra text accompanying notes 90-110.
16. It generally belongs in the category of legislative fact and thus is not subject to the strict requirements of judicial notice of adjudicative facts under FED. R. EVID. 201. The distinction between legislative and adjudicative facts, originally introduced by Kenneth Culp Davis, has been controversial. An Approach to Problems of Evidence in the Administrative Process, 55 HARV. L. REV. 364 (1942). Many now regard it as outdated or inapplicable in many litigation contexts. See, e.g., John Monahan & Laurens Walker, Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law, 134 U. PA. L. REV. 477 (1986). Cf. Berwick Grain Co., Inc. v. Ill. Dep’t of Agric., 116 F.3d 231, 234 (7th Cir. 1997) (Posner voted with the majority, which refused to allow introduction of new evidence on appeal, because it “not only would promote inefficient allocation of judicial resources, but also would deny non-movants fair notice of the record they are to confront on appeal.”).
17. See infra text accompanying notes 111-14.
18. See infra text accompanying notes 125-224 (the case studies).
ground, he casts a wide net, encompassing virtually all rational bases supporting resolution of a particular issue and discounting all rational counterarguments.  

This article employs selected opinions, written by Judge Posner since 1995, as a case study of the efficacy and utility of Posnerian legal pragmatism, using Posner himself as an exemplar of the pragmatic judge. This exercise can reveal his personal internal consistency but, more importantly, it can begin to test the viability of legal pragmatism itself, assuming his judging is representative of his philosophy. I analyze Posner's actual judicial practice as a pragmatic test of his jurisprudence; put simply, pragmatism is as pragmatism does. If Posnerian legal pragmatism does not work in practice for Judge Posner himself, the theory may need to be abandoned, or at least modified to account for these practical failures, assuming they are more than slight, occasional aberrations. If the foremost exponent of this form of legal pragmatism is unable to carry out his philosophy adequately, it is unlikely that other judges will be able to do so either.

I use a number of Judge Posner's decisions as empirical evidence, testing his theory in the laboratory of an appellate court's actual functioning. Does Posnerian pragmatism actually produce legal decisions that improve the legal system and society according to the standards Posner the theorist asserts, and according to external standards? Does a pragmatic judge's heavy reliance on empirical evidence help or hurt in this process? Do pragmatic judges too freely assert their own value preferences in fact interpretation so that their goals and results become more problematically subjective than the decisions of formalist judges? Is the Posnerian approach inherently too open-ended and porous to restrain judicial activism (which Posner himself concedes would be harmful)?

I weigh the costs and benefits of his approach in part by employing an internal standard, which considers Posner's opinions with reference to his own asserted methods and goals; I conclude that his methodology is generally constructive and useful. There are times, however, when Posner, the pragmatic judge, exceeds the bounds of proper judicial power that he has set forth in his works. That is, his writings repeatedly emphasize the need for judicial self-restraint, deference to other branches of government, and the prudence of generally following precedent, but his

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19. See infra text accompanying notes 115-19.  
21. The 1995 cutoff point for my review of Posner's decisions is somewhat arbitrary, but the 523 opinions that Posner authored during this period provide a more than adequate sampling of his approach and methods. Assuming his pragmatism is representative of legal pragmatism generally, but I believe it is. See generally PRAGMATISM IN LAW AND SOCIETY (Michael Brint & William Weaver, eds., 1991).  
22. The small number of decisions I discuss in depth precludes more than general observations, but the results of my study, however preliminary, are strongly suggestive of the results future research would yield.  
24. Although I frequently do not agree with his assessments of the relevant policies and goals in cases, that criticism raises a different set of issues concerning the substantive policies at stake.
own judicial practice can exhibit lack of restraint and an unwarranted arrogation of power. His use of empirical data can be undisciplined, and his opinions sometimes range well beyond the issues that are before the court. This "activism" or excessive judicial discretion—regardless of the judge's politics—is problematic if it is endemic to legal pragmatism, rather than just being a personal foible of Posner.  

In the course of my examination, I also step outside of the Posnerian framework to examine the success of Posnerian pragmatic judging from an external perspective. I argue that, at times, Judge Posner acts like a chancellor in equity, independently adjudicating facts and sometimes ignoring settled law, rather than as an appellate judge reviewing lower court decisions. The facts and methods he relies on can skirt the edges of appropriate means of establishing validity, and can undermine deference to the parties' role in presenting evidence. His method can also be used to speculate in a particularly unbounded fashion about the possible motives of parties and legislatures and the practical consequences of various legal rules. Moreover, Posner sometimes substitutes what can be characterized as empirical formalism for the legal formalism that he so trenchantly criticizes.

When the parties have no opportunity to develop or challenge the facts a pragmatic judge employs, and when the facts themselves may have questionable legal value, the decision-making process can readily be skewed. Unreliability is further compounded when extra-record facts become the basis of conjecture about the likely practical consequences of decisions. Finally, when Posner addresses issues that range far afield from those immediately presented, he may not only undermine the case system (and thus fairness to the individual litigants), but may engage in empirical speculation that is not disciplined or testable by actual circumstances. These weaknesses may be inherent in Posner's pragmatic philosophy, rather than just a feature of his own judging.

One potential corrective that I propose to these excesses of Posnerian legal pragmatism is to impose additional requirements of notice to the parties and opportunity to be heard when an appellate judge such as Posner intends to rely on extra-record scientific or technical data. That is, evidence that would be subject to

25. See Marcia Coyle, Campaign 2000 Focus is 'Judicial Activism' But Critics of Right and Left Disagree on Its Definition, NAT'L L.J., August 21, 2000, at A1. My position here is not that judicial activism is necessarily a bad thing, but that it needs to be limited by principles or practices of restraint that may be missing from Posnerian legal pragmatism's account of judicial decision making.

26. See infra text accompanying notes 125-224 (use of extra-record fact, as demonstrated by the case studies). While the question of whether the parties ought to have a role in introducing evidence of legislative fact is controversial, I believe that there are instances where it is prudent, if not required, to at least provide them with notice and an opportunity to be heard before relying on evidence that is likely to be dispositive of a case. See Paul R. Rice, The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary, 171 FED. R. DEC. 330, 404 (1997) (Project initiated by the ABA endorsed requirement of reasonable reliability of legislative fact and encouraged courts to give advance notice of intent to judicially notice a fact and opportunity to be heard); Peggy D. Davis, There is a Book Out...: An Analysis of Judicial Absorption of Legislative Facts, 100 HARV. L. REV. 1539 (1987) (urging restrictions and opportunity for input by parties); but see Ann Woolhandler, Rethinking the Judicial Reception of Legislative Facts, 41 VAND. L. REV. 111 (1988); see also George Marlow, From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process, 72 ST. JOHN'S L. REV. 291 (1998).

27. See infra text accompanying notes 125-224 (use of speculation, as demonstrated by the case studies).

28. See infra text accompanying notes 90-110, as well as the case studies in text accompanying notes 125-224.
Daubert scrutiny, if it arose in a trial court setting, should also require additional adjudicative safeguards when an appellate judge signals an intent to rely on it as extra-record legislative fact. 29

I don’t mean, however, to engage in wholesale criticism of Posner’s pragmatism—far from it. His reliance on empirical evidence is salutary when facts discipline his decisions. In many instances, Posner is remarkably and refreshingly candid about the policy bases of his decisions. This candor allows for open discussion and rational consideration of the factual and policy factors that are actually driving the decision. Given the inevitability of judicial legislating 30 and the need for factual information about how a decision will play out in the real world, the current conventional wisdom about the adversarial system and the proper role of a judge is not always adequate to the task. At his best, Posner breaks through artificial constraints that unduly limit an appellate judge’s ability to render good decisions; he assesses and incorporates relevant information from a diverse range of sources to produce decisions responsive to current empirical reality, and he explains his reasoning process candidly so that his factual assessments carry no more weight with future judges than they are worth.

The next section of this article elaborates on Posner’s legal pragmatic philosophy, focusing particularly on his treatment of facts. I then critique these aspects of his philosophy with respect to both his theory and his judicial practice. I weigh the costs and benefits with respect to each of the three salient features I have identified: empiricism, candor, and the broad scope of decisions. The remainder of the article examines these arguments in the context of a number of Seventh Circuit decisions authored by Posner between January 1, 1995, and August 1, 2000. Incredibly, in addition to his other writing, Posner drafted 523 opinions since 1995, including dissents and concurrences, virtually all of which were published. I have examined each of these opinions to assess his broad-ranging use of fact in openly elaborating the policy grounds and likely consequences of decisions. While the great majority of his opinions are quite conventional in both form and result, a significant number of opinions demonstrate Posner’s unusual treatment of facts, as outlined above. I highlight and analyze several of these cases—interspersing references to other opinions—in which he employs factual analysis in statutory interpretation to illustrate the thesis I have introduced here.

The final section of the article ties together Posner’s theory, and his practice of finding and evaluating facts, and completes the critique I have developed throughout the piece. I conclude that Posnerian pragmatism’s benefits likely outweigh its costs, though it should be implemented somewhat more cautiously. Moreover, although Posnerian legal pragmatism’s open-endedness creates risks of overreaching, its candor is an important corrective. And, in any event, formalist judges are not, in practice, significantly more constrained than pragmatic ones;

29. See Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993) (trial court must determine whether proposed scientific evidence is scientifically reliable and valid before admitting it). See also infra text following note 106.
30. Judges, even formalist judges, simply cannot avoid applying their own value judgments when deciding cases.
accordingly, the danger of pragmatic judicial overreaching becomes much less frightening when compared to practically available alternatives.31

II. POSNERIAN LEGAL PRAGMATISM: THE ROLE OF FACTS, AND STATUTORY INTERPRETATION

A. Posner’s Basic Principles

Posner’s legal pragmatism bears a relationship to the American philosophical pragmatism of Peirce, James, Dewey, and their progeny,32 but his jurisprudence also has a number of unique characteristics.33 Because the pragmatism of different philosophers is so varied, it is difficult to render a single definition of pragmatism. Posner identifies himself with a pragmatism that

emphasizes the scientific virtues (open-minded, no-nonsense inquiry), elevates the process of inquiry over the results of inquiry, prefers ferment to stasis, dislikes distinctions that make no practical difference—in other words, dislikes “meta-physics”—is doubtful of finding “objective truth” in any area of inquiry, is uninterested in creating an adequate philosophical foundation for its thought and action, likes experimentation, likes to kick sacred cows, and—within the bounds of prudence—prefers shaping the future to maintaining continuity with the past. So I am speaking of an attitude rather than a dogma; an attitude whose “common denominator” is “a future-oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action.”34

His legal pragmatism is forward-looking in the sense that it is primarily concerned with the consequences of legal decisions in shaping future behavior:

[Pragmatism values] continuity with the past only so far as such continuity can help us cope with the problems of the present and of the future. “We create the past from a sense of what can be done in the present.” The pragmatist remembers Santayana’s dictum that those who forget the past are condemned to repeat it; but he also remembers T.S. Eliot’s admonition (in “The Dry Salvages”) “Not fare well/But fare forward, voyagers,” and Ezra Pound’s slogan, “Make it new!”35

It is futile—and even more importantly, not helpful—to search for unshakeable foundations. Instead, “legal certitudes are pragmatically rather than analytically
grounded. To borrow William James’s formula, we believe that [Brown v. Board of Education] is correct because it is a good, a useful, thing to believe.  

Posner’s reasoning process is a type of practical reasoning or “means-end rationality.” It involves “setting a goal...and choosing the means best suited to reaching it.” To elaborate, “[p]ractical reason in this sense is not a single analytical method or even a family of related methods. It is a grab bag that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker’s authority, metaphor, analogy, precedent, custom, memory, ‘experience,’ intuition, and induction....”

Judicial decision-making should, according to Posner, serve current social needs, rather than slavishly ensure consistency with precedent. Nor should constitutional or statutory interpretation attempt to adhere rigidly to a judge’s interpretation of the drafter’s original intent for its own sake. Rather, constitutional or statutory text must be interpreted so that constitutional or legislative purposes provide a framework within which to adapt and apply those purposes to changed circumstances. Similarly, precedent supplies an interpretive framework and general ordering principles, rather than authoritative rules demanding strict adherence. Consistency with evolving, underlying policies is more important than achieving exactly similar outcomes.

Grand theory with “correct” answers is eschewed in favor of useful, provisional, testable theories that generate constructive results.

Posner’s legal pragmatism is deeply anti-formalist; he understands that traditional analytical, logical reasoning is not sufficient to solve legal problems or compel legal conclusions. He argues for the “critical as distinct from constructive use of logic; for the idea that the judge’s proper aim in difficult cases is a reasonable result rather than a demonstrably right one; and for a concept of the judge as a responsible agent rather than as a conduit of decisions made elsewhere in the political system.” In fact, the closed system of formalist reasoning can only function when it remains insular:

The autonomy and objectivity of law are secured by confining legal analysis to the formal level, the level requiring only an exploration of the relations among

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36. Posner, supra note 8, at 308.
37. Id. at 105-08.
38. Id. at 71.
39. Id. at 73. In part because Posnerian legal pragmatism involves no overarching principle or method of analysis, some find it incoherent.
40. See infra note 45, text accompanying notes 74-79.
41. See infra text accompanying notes 74-79.
42. Posner, supra note 6, at 209.
43. Posner, supra note 8, at 26. A sophisticated formalist could find the dichotomy between the judge as responsible agent, and as a conduit for law made elsewhere in the system, a false one. Judges aware of their responsibilities can decide—as part of that responsibility—to defer to decisions made by another branch of government. See also OVERCOMING LAW, supra note 1, at 398-99.

Pragmatism remains an antidote to formalism. The idea that legal questions can be answered by inquiry into the relation between concepts and hence without need for more than a superficial examination of their relations to the world of fact is as unpragmatic as it is anti-empirical.... The desire to sever knowledge from observation, which is the formalist’s goal, is persistent.... The pragmatic approach... asks: What is the right rule—the sensible, the socially apt, the reasonable, the efficient rule...?
legal ideas. Autonomy and objectivity are threatened when the legitimate outcome depends on facts about the world, which might be the facts of a dispute or the social or ethical facts relevant to creating or interpreting a rule.44

Formalists, he contends, cannot even fall back on the defense that legal reasoning is logical, for the so-called analogical reasoning of law is not logically compelled, nor is it scientific.45 Fundamentally, reasoning by analogy is not logically-compelled reasoning because the determination of which factors are sufficiently like prior authority to require that the authority be followed is not automatic or self-evident; an act of interpretation and a choice are required.46

Instead, to the extent possible, Posnerian pragmatism suggests that judges ought to emulate the scientific approach, rather than continue to pretend that legal reasoning supplies correct answers to intractable legal problems. A major hurdle to adopting a scientific attitude in law, however, is the normative and inarguably authoritarian nature of law.47 Law, he acknowledges, will therefore never fully incorporate or follow the scientific ideal. But judges should remain open-minded and attuned to empirical realities. Judges should also be alert for empirical information that tests the hypotheses they have developed. A detached, objective focus on the relationship between legal decisions as causes, and potential consequences as effects, could greatly assist the quality and utility of judicial decisions.48

Economics, properly understood, argues the recent Posner, supplies the theoretical framework necessary for courts to gather and interpret useful empirical information relevant to the factual and legal issues before the court.49 Economics, in this sense, is not a method to maximize the fundamental goal of pecuniary wealth, but rather a method of rational inquiry that posits humans as rational creatures seeking to maximize their satisfaction by making choices and weighing the costs and benefits of alternative courses of action.50 Employing this assumption

44. Id. at 40.
45. Posner, supra note 6, at 123:
   Arguing from cases rather than from theory or facts, putting words ahead of things and mental states ahead of consequences, giving legal effect to unexamined verbal distinctions (such as act versus omission), reifying analogies—these are procedures remote from the mathematically or logically rigorous, and rigorously fact-tested, theorizing that is the scientific ideal.
46. Posner, supra note 8, at 92: "There is no metric for determining the social, political, or economic 'distance' between a prior, 'analogous' case and the present case." See also id. at 93: "Reasoning by analogy, even when it is not rhetorical—or enthymematic, or fallacious, or purely ornamental—is not actually a method of reasoning, that is, of connecting premises to conclusions."
47. See id. at 82-83:
   Justification in a scientific sense involves mounting, meeting, and overcoming challenges. Beliefs that are not challenged tend to be weakly grounded.... Systems of thought that emphasize hierarchy, tradition, authority, and precedent disvalue the kind of critical inquiry that tests belief and advances knowledge.... It is... true of law, and is one reason that the scientific attitude is not at home in the legal enterprise. To be blunt, the ultima ratio of law is indeed force—precisely what is excluded by even the most latitudinarian definition of rationality....
48. See Posner, supra note 1, at 15-19 (noting the scientific method provides a useful model for pragmatic judges); supra text accompanying notes 34-38.
50. Id.
assists in predicting behavior. It also promotes efficiency in human transactions by identifying optimal solutions—that is, those that maximize people’s preferences.  

Therefore, economics is more of a method to assist analysis of the satisfaction of goals, rather than a goal in and of itself, or a process that generates substantive goals.  

By and large, economic analysis helps actors efficiently reach independently set goals. The appropriate goals are primarily supplied by other means, such as legislative purposes in statutory cases, clearly discernible underlying policies in common law cases, or prevailing social norms.  

A judge is not free to provide his or her own definition of important social goals, unless other evidence is not available. One exception, however, that Posner adopts was originally explicated by Holmes: when confronted with conduct that is unquestionably outrageous, a judge may act in accord with that intuition.  

Economics does supply goals to the extent that certain conditions must exist in order for individuals to pursue their own self-defined ends. To a conservative economist such as Posner, those conditions include respect and support for individual freedom, as John Stuart Mill set forth in his classic essay, On Liberty, including protection of civil liberties; and promotion of small and efficient government, to avoid overweening bureaucracy and other impediments to the free operation of markets.  

After the relevant policy goals have been identified, judges must determine how best to reach those goals by searching out, and learning to interpret and employ, empirical evidence from disciplines other than law: “The pragmatist thinks that concepts should be subservient to human need and therefore wants law always to consider the possibility of adjusting its categories to fit the practices of the nonlegal community.” The relative unavailability of useful empirical studies on the consequences of various legal interpretations is a serious impediment, in Posner’s view, to rendering good decisions. Often, evidence that would be useful to a judge is not available. In fact, in Probleatics, he presents a cogent argument to the legal academic community concerning the responsibility of legal academics to produce

51. Id. at 15-16. See also Posner, supra note 8, at 360-62, 391. In fact, Posner believes efficiency may be the only goal judges can truly effectively promote. Posner, supra note 1, at 132.  
52. See supra text accompanying notes 49-50.  
53. See Posner, supra note 6, at 208; Posner, supra note 8, at 378, 382-87.  
54. Id. at 382; Posner, supra note 1, at 23-24.  
55. Posner, supra note 8, at 378-79.  
56. Id. at 387 (referring to the desirable “night watchman state”).  
57. Id. at 387 (referring to the desirable “night watchman state”).  
58. Id. at 387 (referring to the desirable “night watchman state”).  
59. See supra note 6, at 215. “What is particularly noteworthy about the sociology of law taken as a whole is its empirical cast and its refusal to take for granted that legal doctrines track legal practices.”  
60. See supra note 6, at 210. And sometimes, science itself comes up with “wrong answers” in its solutions to human problems.
more empirical scholarship related to the likely effects of legal decisions. Because judges do not have the resources to do independent empirical scholarship, he argues, the academic community should focus on fact-oriented scholarship that is actually useful to judges, rather than dwelling on abstract moral or legal theory that is not applicable to real cases. The current absence of good empirical evidence presents a real threat to the viability of Posner’s brand of legal pragmatism.

As a result of the considerations set forth in this section, pragmatic judges exercise a good deal of discretion and policymaking authority. This discretion is not untrammeled, however:

Judges are rulemakers as well as rule appliers. A judge is a different kind of rulemaker from a legislator. He does not write on a clean slate. An appellate judge has to decide in a particular case whether to apply an old rule unmodified, modify and apply the old rule, or create and apply a new one. A pragmatist will be guided in this decision-making process by the goal of making the choice that will produce the best results. To do this the judge will have to do more than consult cases... and other orthodox legal materials, but he will have to consult them, and a legislator will not.

That act of consultation itself produces restraint, particularly when combined with the advisability of generally following precedent. Posner adopts Holmes’ notion of law as a prediction of what a judge will decide. Unless judges normally adhere to precedent, prediction is extremely difficult. Judges should take a similar stance with respect to other legal authorities:

The social interest in certainty of legal obligation requires the judge to stick pretty close to statutory text and judicial precedent in most cases and thus to behave, much of the time anyway, as a formalist. Furthermore, the more that law conforms to prevailing moral opinions...the easier it is for lay people to understand and comply with law.

Posner elaborates, at some length, the social good created by the rule of law. Because pragmatic judges must consider the long-run, as well as short-term, consequences of their decisions, and must provide justice to individual parties when they decide cases, judges will often follow—and create—precedent. At the same time, though, they will maintain flexibility so that they can reinterpret legal authority to speak to new, unforeseen circumstances. When judges fail to follow precedent, and instead chart a new course, their opinions should be clear and

62. See generally id.
63. See id. at 211-39.
64. It is not likely, given the priorities of the legal academy and the sheer amount of time and expense entailed in conducting the necessary studies, that much useful legal scholarship of this nature will ever be produced.
65. Posner, supra note 6, at 208.
66. Id. at 248-49.
67. Id. at 248. See also id. at 207-08.
68. Id. at 209. See also id. at 263; Posner, supra note 1, at 11; Jackson v. Marion County, 66 F.3d 151, 153 (7th Cir. 1995). "Most judges are pragmatists, and will allow rules to be bent when the pressure is great. But 'bent' does not mean 'broken.'"
69. See Posner, supra note 1, at 20-21.
70. Id. at 400-01.
71. Id. at 401.
comprehensive enough to guide future judges and litigants. Finally, pragmatic judges, lacking secure philosophical grounding, should be “a little more tentative, cautious, and piecemeal in imposing their vision of the Good on society in the name of legal justice.” This self-restraint is Posner’s principal espoused means of limiting untoward expansions of judicial power.

Posner applies his principles in the statutory interpretation context first, by requiring a judge “to extract the concept from the statute—that is, interpret the statute.” The “concept” he refers to includes the principles, policies, or goals the statute encapsulates. Interestingly, Posner agrees substantially with the Holmesian positivist view of statutes as the command of the sovereign, so the judge is interpreting the statute’s communication of that command. That interpretation will often require an act of “imaginative reconstruction,” which can be quite difficult.

When confronting unclear statutes, judges, like junior officers confronting unclear commands, have to summon all their powers of imagination and empathy, in an effort—doomed to frequent failure—to place themselves in the position of the legislators who enacted the statute they are being asked to interpret. They cannot only study plain meanings; they must try to understand the problem that the legislators faced.

Once having deciphered or intuited that purpose, “judges use consequences to guide their decisions, always bearing in mind that the relevant consequences include systemic ones such as the risk of debasing the currency of statutory language.” Because consequences are dispositive—not statutory language standing alone—the text becomes yet another piece of data, albeit an important one, for a judge to consider in rendering a decision.

B. Critique of Posner’s Legal Pragmatism, as Reflected in, and Tested by, His Judicial Practice

Posner’s approach has significant costs and benefits. This section considers both, addressing each of the most salient characteristics of his jurisprudence in turn, with a particular focus on the efficacy of his theories as demonstrated by his practice. I have identified three basic features to Posner’s jurisprudence as it is reflected in his opinions. The first feature is his broad search for empirical information that can usefully inform decision making. (In this regard, I propose certain procedures that could restrain Posner’s excessive reliance on extra-record legislative fact.) His openness and candor are the second feature; Posner’s jurisprudence emphasizes the importance of providing clear guidance on the law and his reasoning process to future litigants and judges. The third aspect, largely an outgrowth of the second,
is the wide scope of issues he believes to be appropriately addressed in legal decisions. A pragmatic judge need not take a minimalist position, confined to the facts of the case before the court; he or she may range well beyond the immediate facts of a case in order to support decisions with practical reasoning that provides clear guidance and principles. Finally, I compare certain features of Posner's approach to a formalist approach. One's position in the pragmatism versus formalism debate strongly informs one's perspective on whether Posner's approach is a good one.

In large part, I find Posner's actual judicial practice consistent with his principles. He frequently searches conscientiously for, and relies on, empirical evidence to reach and justify decisions. Weighing costs and benefits, he examines the potential effects of various decisions. His opinions rely on a range of methods, from intuitive notions of commonsense (including speculation on, and prediction of, likely outcomes and consequences), sociological references to cultural norms and consensus values, political references to principles of democratic legitimacy and the proper role of courts, and empirical evidence from social science and scientific (particularly medical) studies and treatises, to economic approaches including cost/benefit analysis and other standard tools of microeconomic analysis. In addition, his opinions generally display the openness and candor that are the hallmarks of his jurisprudence, as he broadly addresses the issues in cases by setting forth principles that apply to a wide array of situations. At their best, these efforts can produce strongly reasoned decisions that are supported by a

of clarity and stable guidance that a constantly evolving pragmatic decision-making style can contribute to.

81. See infra text accompanying notes 115-19.
82. See infra text accompanying notes 144-56, 179-81, 214-20.
83. See, e.g., Ayres v. City of Chicago, 125 F.3d 1010 (7th Cir. 1997) (preliminary injunction in first amendment case).
84. See In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) (holding partial class certification should be rescinded on mandamus rather than after trial to avoid putting undue settlement pressure on drug companies, which could force them into bankruptcy); Rossetto v. Pabst Brewing Co., Inc., 217 F.3d 539 (7th Cir. 2000) (in determining whether pension benefits vested, Posner examined likely effects on future collective bargaining contracts and on workers' families); see also Davenport v. DeRobertis, 844 F.2d 1310, 1316 (7th Cir. 1988) (in prison conditions suit, Posner overturned district court's finding that prisoners need three showers per week-stating, "No doubt Americans take the most showers per capita of any people in the history of the world, but many millions of Americans take fewer than three showers (or baths) a week without endangering their physical or mental health....").
85. See, e.g., United States v. Wilson, 159 F.3d 280, 293 (7th Cir. 1995) (Posner, J., dissenting) ("It is wrong to convict a person of a crime if he had no reason to believe that the act for which he was convicted was a crime, or even that it was wrongful. This is one of the bedrock principles of American law. It lies at the heart of any civilized system of law.") See also Milner v. Apfel, 148 F.3d 812, 815 (7th Cir. 1998) "The moral difference between the criminally insane and the noncriminally insane, though a difference based on consequences rather than state of mind, reflects a moral intuition that is deeply rooted in the traditions of the American people....And being so rooted, it furnishes a rational basis for Congress's being less generous toward insane criminals...."
86. See People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 536 (7th Cir. 1997) ("Lawyers and judges are not competent to resolve the controversy [regarding "tracking" of children in school]").
87. See, e.g., People Who Care, 111 F.3d at 536 (citing studies and other authorities on costs and benefits of "tracking" children in school as it pertains to school desegregation).
88. See Ayres v. City of Chicago, 125 F.3d 1010 (7th Cir. 1997) (Posner performed cost-benefit analysis relative to granting preliminary injunction in First Amendment case to allow peddling of T-shirts by Marijuana Political Action Committee). Note that it is not my intent here to generate a fully elaborated taxonomy of types of factual evidence, but rather to set forth some of the categories of fact that Posner draws from.
89. See infra text accompanying notes 125-224.
combination of logic, good policy, relevant factual information, and, where appropriate, precedent and applicable text. The decisions lay out clear principles that can provide useful guidance to future litigants, judges, and other persons affected by the law. The costs of his approach, however, on both theoretical and practical levels, can include a lack of restraint that might give the pragmatic judge more power than a formalist judge, or at least substitute empirical formalism for analytical formalism.

1. Empiricism

The benefits of Posnerian legal pragmatism include its heavy emphasis on researching all useful information bearing on a particular issue. It also eliminates artificial impediments to using this information. Empirical information can provide positive explanatory and predictive power to a decision. From a pragmatic standpoint, Posner’s emphasis on culling all available sources of evidence to reach better, more workable decisions is laudable, whether or not one agrees with him about what constitutes a better result. The limitations of doctrinal argument impel judges to avail themselves of independent sources of information bearing on the likely consequences of particular decisions. That is, the abstract nature of formalist argument precludes it from testing the real-world efficacy of “correct” decisions. The strict formalist paradigm cannot answer empirical questions concerning consequences, detached as it is from social reality (though, of course, social reality cannot be ignored and ends up affecting all decisions).

90. In practice, though, formalist judges may rely heavily on empirical evidence. See, e.g., Judge Easterbrook’s majority opinion in Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999) (en banc). In Hope Clinic the entire Seventh Circuit considered and upheld the constitutionality of the Illinois and Wisconsin partial-birth abortion statutes. Id. at 861. Judge Easterbrook wrote the majority opinion for five members of the court, while Judge Posner authored the four-judge dissent. (The Supreme Court did not decide Stenberg v. Carhart, 530 U.S. 914 (2000), the partial-birth abortion case from the Eighth Circuit that reversed Hope Clinic, until almost a year later. The Carhart majority opinion confirmed Posner’s approach in Hope Clinic and quoted him approvingly. See infra note 120.

Judge Easterbrook engaged in the very pragmatic exercise of analyzing “a natural experiment” in the consequences of a partial-birth abortion statute on the incidence of second-trimester abortions. The plaintiffs had argued that the vague language of the statutes would deter physicians from providing even constitutionally permitted methods of abortion, or cause them to substitute a medically inferior procedure, thus unduly burdening the right to choose. Easterbrook attempted to put this contention to the test, reasoning that the incidence of late-term abortions would decline in such a state. Using as an example Indiana, which had enacted a statute fundamentally similar to that in Illinois and Wisconsin effective July of 1997, he examined recent statistics and determined that no decline occurred: “These data are incompatible with plaintiffs’ a priori belief that the partial-birth-abortion statutes will discourage the performance of the [permissible] procedure or cause the physician to substitute an inferior procedure.” Id. at 871.

Posner’s dissenting opinion also considered whether instances exist in which women were actually endangered by the statutes. No such cases were presented in the record, but Posner conjectured that such women might have gone out of state to receive abortions. Id. at 884. Referencing the majority’s informal study of Indiana abortion statistics before and after passage of its partial-birth statute, he noted approvingly that such extra-record evidence should be considered and treated as a legislative fact to avoid inconsistent results in various appellate cases. Id. However, “we should hesitate to play statistician. It is incongruous for this court to brush aside the findings of district judges in other cases while bolstering [the district judge’s] inadequate findings with extra-record evidence of its own.” Id. One could question whether Posner’s liberal use of extra-record evidence in other cases to supplement or overcome a weak trial court record disqualifies him from making this particular criticism. Moreover, the very limited Indiana evidence does indicate a less than dire problem, and it could have been analyzed head-on rather than elided. Easterbrook’s “study” should be addressed on its own terms, as it exemplifies the empirical approach Posner endorses. Instead, Posner engaged in a rhetorical two-step that led him back on the
In good pragmatist fashion, Posner is acutely aware of the factual contexts in which cases arise. Some of the most salient facts often are not addressed in standard legal presentations of adjudicative evidence. The tiny universe of a single case traditionally has not allowed, for example, social scientific evidence concerning the likely consequences of a particular holding on the group of people affected by it. It also has not condoned, on the appellate level, consideration of broad policy issues, even though policy often inchoately drives decision making.

On the other hand, Posnerian legal pragmatism's empirical emphasis has a number of pitfalls or costs. It tends to be undisciplined by both legal and scientific constraints. On the purely legal level, it is constrained by constitutional or statutory text, or precedent, only when the pragmatist judge chooses to be constrained in order to achieve optimal social consequences. While a Posnerian pragmatist judge considers stability of the legal system, legal tradition, and deference to other branches of government to be important legal virtues, the service of other social needs frequently will trump them, according to notions of good policy, shaped by reference to economic or other social theory. Aside from self-restraint and fidelity to achieving good policy results, the possibilities of Supreme Court reversal or being outvoted by colleagues provide the only serious limitations on pragmatic judging. With the Supreme Court deciding merely eighty-one cases last Term, reversal is no more than remotely likely.

With respect to fact finding in particular, Posner sometimes arrogates to himself fact finding powers that normally do not belong to appellate judges, presumably out of a concern for finding all relevant, useful information—including information the parties have failed to introduce. While Posner's scholarly writing does not explicitly endorse reliance on extra-record evidence, its emphasis on finding the most relevant information bearing on social consequences implicitly condones the practice, and Posner the judge engages in it. Put simply, Posner does not always play by the rules of the game in fact finding. He sees himself as a seeker of truth, rather than as a player in a system that arrives at truth. This method can sometimes

attack against the Wisconsin district court.

91. See infra text accompanying notes 125-224.
92. It is Posner's extremely strong commitment to economics as a model for policy analysis that allows him to believe his approach is not inappropriately unconstrained.
93. Formalists thus easily conclude that legal pragmatism is dangerous and overly activist, because they believe the rules of the legal game, i.e., doctrinal reasoning and its attendant principles, themselves compel—or at least tightly constrain—results. See generally Frederick Schauer, Formalism, 97 YALE L.J. 509 (1988); Ernest J. Weinrib, Legal Formalism: On the Immanent Rationality of Law, 97 YALE L.J. 949 (1988). The standard jurisprudential approach, argue formalists, constrains idiosyncrasy and arrogation of judicial power in the hands of rogue judges. In contrast, pragmatists believe legal rules often do not and cannot determine outcomes. From this perspective, the actual, effective constraints offered by formalism are minimal, and formalist approaches often obfuscate analysis by their specious air of inevitability. Formalist decisions' abstract reasoning can also fail to provide appropriate incentives or guidance to future potential litigants or other persons affected by the law. Moreover, pragmatists observe that judges must frequently act legislatively, at least when filling in gaps in the law, such as in addressing unforeseen or unusual fact situations, if not more broadly. See, Posner, supra note 6, at 248-49. The inevitability of judicial policy choices should be accepted and dealt with realistically. Useful empirical studies can improve the quality of decisions.
94. 69 U.S.L.W. 3134 (August 15, 2000).
95. See infra text accompanying notes 144-56, 179-81, 214-20.
96. Id. (citing cases decided by Judge Posner).
result in more accuracy, but at other times it can undermine both accuracy and fairness.

This lack of restraint can lead to a lack of accuracy and fairness in several ways: first, Posner often engages in a sua sponte fact-finding process that does not allow input from the parties. Without notice, he may research extra-record evidence from a multitude of disciplines that is often critical to the result he reaches, as well as its justification. Often Posner independently assesses the quality of testimony given by experts from other disciplines. At other times, he acts as the expert himself. While his own assessment of factual evidence and experts from other disciplines usually appears quite accurate, other judges following the same practice in the future will not necessarily be as well-versed in making unilateral fact assessments. Since extra-record scientific evidence is not subject to the Daubert standards for admissibility of expert testimony, outside constraints do not ensure its quality. Although the same can be said for traditional, formalist judging, what distinguishes Posner’s approach in this regard is the much broader range of facts he treats as legislative. As a pragmatist, he scrutinizes a wide array of facts relevant to the potential consequences of a decision.

In general, evidence that has not been submitted to litigation, but instead has been researched independently by an appellate judge, may well be unreliable. A failure to submit facts to the crucible of the litigation process can increase unreliability because the process itself contains checks and balances to promote reliability, such as placing most fact finding in the hands of trial courts and judges who have heard testimony. The parties can challenge facts introduced by the opposing party, or at least put them into context. The process of litigated fact finding is considerably less than perfect, but it does seem to inhibit the effects of bias.

One can also question the fairness, in an adversarial system, of a judge’s reliance on facts and evidence that have not come to the attention of the parties. (Again, while all judges follow this practice to an extent, Posner does so to a much greater extent.) When the ordinary principles of litigation and introduction of evidence are thus upended, parties’ expectations are also overturned. The results, on a procedural level, are the opposite of Posner’s asserted objective of providing clear guidance and stable rules of conduct. Accuracy and fairness are again undermined. Although a chancellor in equity can make independent factual determinations based on recommendations from a master, an appellate judge is more constrained in the range of facts she can legitimately consider.

97. Id.
98. See Sheehan v. Daily Racing Form, 104 F.3d 940, 942 (7th Cir. 1997) (Posner discounted statistician’s testimony because he failed “to exercise the degree of care that a statistician would use in his scientific work....”); Tyus v. Urban Search Mgmt., 102 F.3d 256, 263 (7th Cir. 1996) (Posner applied Daubert to gauge reliability of social scientists’ expert testimony).
99. See infra text accompanying notes 142, 152, 219-20.
100. Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993) (trial court must determine whether proposed scientific evidence is scientifically reliable and valid before admitting it).
101. At these times, Posner may also appear to be acting as a judge in an inquisitorial system.
On the scientific level, Posner's pragmatism can cause analogous problems. A Posnerian pragmatist judge's use of scientific evidence is not constrained by the self-policing of the scientific community and instead is disciplined primarily by the judge's self-education in science and the judge's self-restraint. There is therefore no community standard to assess either the quality or the sufficiency of empirical information. Nor are interpretive efforts constrained by a professional community's standards. As a result, scientific language can be used rhetorically to justify results reached on other, less agreed-upon grounds. Although he is aware of this danger, which may enable him often to avoid it, the general point remains.

The implications of this failure are several. First, it is difficult to determine when Posner, or another pragmatic judge, is using information that is of poor quality—or just plain wrong. The problem is compounded by Posner's use of conjecture, based on intuition, common sense, or personal experience. In the absence of empirical studies, he frequently engages in common sense speculation about potential consequences of particular decisions, or about legislative intent in statutory cases. One of the most trenchant criticisms that can be leveled against his approach is the empirical weakness and uncertainty of much of this speculation. Again, though Posner is aware of this danger and frustrated by it, he sometimes falls into its trap. Regardless of who bears the blame for the absence of quality empirical studies, the fact remains that decisions premised upon one individual's conjecture—even Posner's, and certainly other pragmatic judges'—often will not be reliable. Nor do the results of conjecture lead to predictability and stability in the law; speculation is more likely to lead to the opposite result. Intuition and commonsense are integral to all judgment, but when they are supported by publicly acceptable and established facts, they are safeguarded from subjectivity and the limits of private experience. But the combination of personal conjecture and shaky facts easily can lead to unverifiable, unreliable conclusions.

Therefore, judicial expansion of both the universe and the role of legislative facts—such as Posner's—should require additional adjudicative procedures and restraints. Those procedures could include a requirement that an appellate judge notify the parties when he or she intends to rely on technical or scientific evidence that would be subject to Daubert scrutiny in a trial court. The parties would then have an opportunity to be heard in the form of an additional oral argument or written submissions testing the reliability of the proposed evidence. These additional safeguards could begin to ameliorate some of the problems I have enumerated here.

Further problems can occur when pragmatic judges use scientific studies to reach or to justify legal conclusions. Scientific categories do not necessarily translate into legal categories that compel legal conclusions. To equate one too readily with the

102. As does Posner, I include social science within my definition of science and bracket concerns about its status as science. See Tyus, 102 F.3d at 263.
104. Posner, supra note 6, at 255 (quoting Brandeis and Holmes).
105. See In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) (class action status of tort suit should be rescinded on mandamus before trial, rather than awaiting trial and a conventional appeal, because continuation of the litigation would put undue settlement pressure on defendants).
106. See Posner, supra note 6, at 255.
other can create a form of sleight-of-hand or epistemological slippage. This is a type of empirical formalism that then masquerades as pragmatic analysis. The slippage and translation issues arise because scientific knowledge is intended to be used according to the scientific method. It is positive (i.e., descriptive) and part of a process striving for descriptive accuracy with predictive power, as tested by principles of Popperian falsifiability.\textsuperscript{107} It is necessarily tentative and exploratory, always subject to revision in light of new discoveries.\textsuperscript{108}

In contrast, legal rules and categories are normative, or at least have a substantial normative component; they are, thereby, more socially constructed, political, and rhetorical, on a spectrum of knowledge types.\textsuperscript{109} Simply put, the observation, hypothesis-generation, and empirical testing of science do not automatically or necessarily have a bearing on legal results. Posner is well aware of the fundamental differences between law and science and the impediments that can arise to useful assimilation of science into law.\textsuperscript{110} But, Posner’s three main jurisprudential works on pragmatism do not mention the related problem of conferring unwarranted legitimacy on factual findings that seem to be, but are not fully, supported by scientific studies.

2. Candor

As explained above, Posner bases his decisions on a broad range of factual data. Another essential part of his pragmatic approach concerns his communication of those decisions: his opinions lay bare the means by which he reached the result, and the elements of his reasoning process. In that sense, both Posner’s reasoning process and his decision constitute the “result” in a case.

Pragmatists believe that once the open-endedness of judging is revealed, judges can elucidate the real concerns that drive their decisions. This is where Posner


\textsuperscript{108} The principal similarity between social science research and fact is that both are positive—both concern the way the world is, with no necessary implications for the way the world ought to be. Both refer to the empirical reality that we infer from our senses, rather than to the value we impute to that reality. Law, in contrast, is normative. It does not describe how people do behave, but rather prescribes how they should behave.

\textsuperscript{109} Id. at 489. See also D. Michael Risinger, Mark P. Denbeaux, Michael J. Saks, Brave New “Post-Daubert World”—A Reply to Professor Moenssens, 29 SETON HALL L. REV. 405, 435-38 (1998).

\textsuperscript{110} See Daubert, 509 U.S. at 590 (quoting Brief for Nicolaas Bloembergen et al. as Amici Curiae 9: “Indeed, scientists do not assert that they know what is immutably ‘true’ — they are committed to searching for new, temporary, theories to explain, as best they can, phenomena.”); Brief for American Ass’n for the Advancement of Science et al. as Amici Curiae 7-8: (“Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a process for proposing and refining theoretical explanations about the world that are subject to further testing and refinement....”); Risinger, et al., supra note 107.

\textsuperscript{109} Monahan & Walker, supra note 16, at 489.

\textsuperscript{110} Posner, supra note 8:

[If science does establish certainty, still its methods and domain are so different from those of law that the exactitude of science cannot be translated into exactitude in law, while if science does not establish certainty, then it cannot be used as a foundation for or model of legal certainty. In either event we must look elsewhere for the grounds of that certainty.

\textsuperscript{Id. at 67. Posner neglects a third possibility here—that scientific knowledge can increasingly approach certainty as it is verified experimentally, though it can never demonstrate more than a probability of an occurrence.
New Mexico Law Review

excels in both theory and practice: he endorses candidly setting forth the bases of opinions and explaining how particular decisions will produce—in the court’s estimation—the best practical results in the real world, and his judicial practice is largely consistent with his theory.111 This candor is a particularly constructive—in the sense of being pragmatically useful—and refreshing aspect of Posnerian pragmatism. It can provide sound, clear guidance to future judges and litigants in both reasoning processes and results.112 And even when a candid decision is apparently “wrong” (on whatever scale one judges correctness), the very openness of its reasoning creates the conditions for a direct corrective response in future decisions. For instance, when Posner relies on his own intuitions, or speculates on likely results, he usually does so quite openly and candidly—thus inviting the response that additional empirical evidence undermines his conclusions.113 By contrast, formalist reasoning often ignores underlying policy concerns that drive decision making, pretending instead that proper analysis will reach analytically “correct” decisions.

On the other hand, Posner’s candid, fact-based reasoning can have an uneasy relationship with conventional legal reasoning. When he makes no pretense of reliance on precedent, and instead uses a scientific study to justify a conclusion, a future court or litigant may be perplexed, given expectations that more conventional methods will be employed.114 And Posner’s heavy reliance on scientific facts can itself undermine the candor he endorses. Citing to scientific evidence can provide a false sense of objectivity to a result that is actually driven by political or other motives. For the reasons discussed herein, judicial citation to scientific sources can appear much more reliable than it is.

3. Broad Holdings and Extensive Use of Dicta

Posner at times ranges far beyond the case at hand in his analysis of factual and legal issues.115 As if intent on discussing every conceivable basis for a decision and

111. See Posner’s dissent in Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999).
112. See e.g., Bartlett v. Heibl, 128 F.3d 497, 501-02 (7th Cir. 1997) (in Fair Debt Collection Practices Act case, Posner wrote and included in the opinion a model collection letter intended for future use by collection lawyers). See also Hermann v. Cencom Cable Assoc., 999 F.2d 223, 226 (7th Cir. 1993) (“We’re all for pragmatism, but pragmatism is not an operational legal standard. Litigants and their lawyers are entitled to clearer guidance in an area where a false step can result in the forfeiture of valuable legal rights than generalities about practicality, convenience, similarities, and expectations can furnish.”).
113. See infra text accompanying notes 210-13.
114. See infra text accompanying notes 179-85.
115. See, e.g., Rodriguez v. City of Chicago, 156 F.3d 771 (7th Cir. 1998) (Posner, J., concurring): It is a matter of judgment whether to base the decision of an appeal on a broad ground, on a narrow ground, or on both, when both types of ground are available. If the judges are dubious about the broad ground, then they will do well to decide only on the narrow ground; but if they are confident of the broad ground, they should base decision on that ground...in order to maximize the value of the decision in guiding the behavior of persons seeking to comply with the law. One of the most important things that appellate courts do is to formulate rules of law. They would formulate very few rules, and leave the law in a state of considerable and avoidable uncertainty, if they always chose to decide a case on the narrowest possible ground. It is true that the broader the ground, the more likely it is to sweep in cases that judges cannot perfectly foresee, and this argues for caution in deciding cases on broad grounds, because there is greater risk of error, and for a willingness to carve exceptions as new cases imperfectly foreseen arise. Id. at 778.
discovering all relevant factual information that bears on real-world consequences of the decision, he relentlessly examines many issues unnecessary to immediate resolution of a particular case.\textsuperscript{116} Posner’s intense focus on expounding rational, policy-based principles, supported by empirical evidence, to guide future conduct explains this method. His elaboration of the necessary principles often sets the parameters of his opinions, as opposed to a more conventional adherence to the facts of the case on appeal.\textsuperscript{117}

The benefits of this practice overlap some of the benefits of Posner’s candor. These include the clarity produced by a full, complete explanation of a decision’s grounding. Explication of multiple grounds of a decision also can provide strong justification of a result, which can in turn create a compelling basis for future decisions. Future litigants and judges can readily gauge their conduct with reference to the decision, as well as reference to the methodology and reasoning process.

The broad reach of Posner’s decisions also has its costs. His consideration of all relevant facts and principles, both explanatory and justificatory, can cause his opinions to become unmoored from the underlying case. The concerns of those who rail against judicial activism include just this sort of broad reaching-out to declare principles that encompass a multitude of fact situations not presented by the immediate case.\textsuperscript{118} When judges decide policy questions rather than individual cases, the risk of usurping the democratic process can arise. Or at the least, this maximalist approach can convert the pragmatic judge into a functional Supreme Court Justice.

Another cost of Posner’s sometimes broad pronouncements is methodological. Legal pragmatism should be concerned not just with producing sound, workable decisions and strong guidance for the future, but also with methodology that is faithful to, and constantly tested by, empirical reality. Confining decisions, even loosely, to the case at hand helps ensure that discipline. It also helps ensure that unique factual contexts remain important to resolution of an issue. Posner at times diverges from the discipline of the case method. A supreme court has more discretion to range further afield, but an appellate judge should be observant of role limitations.\textsuperscript{119}

III. SCIENCE, SOCIAL SCIENCE, STATISTICS, AND SPECULATION: TWO CASE STUDIES

In order to demonstrate precisely how Posnerian legal pragmatism, as practiced by Judge Posner, plays out in practice, this section presents two case studies—involving three cases—of Posner’s use of fact, particularly in statutory interpretation, to illustrate the theses I have introduced. The cases display the

\begin{itemize}
  \item \textsuperscript{116} See infra text accompanying notes (case studies). Cf. CASS SUNSTEIN, ONE CASE AT A TIME (1999) (elaborating a theory of judicial minimalism); see also Michael Novick, Case Note, Narrow Clauses and Trial Balloons, 110 YALE L.J. 543 (2000). From a modified minimalist position, the author criticizes the breadth of Posner’s decision in Club Misty v. Laski, 208 F.3d 615 (7th Cir. 2000).
  \item \textsuperscript{117} See infra text accompanying notes 125-224.
  \item \textsuperscript{118} See Nat’l L. J., supra note 25, at 1,10.
  \item \textsuperscript{119} These limitations can be countered, however, by awareness of the need for future exceptions that narrow the rule as applied. Candor of the Posnerian variety also facilitates an ongoing narrowing process by other courts and open debate concerning the merits of alternative approaches.
\end{itemize}
entirely devoid of a legitimate purpose; the purported statutory distinction between the two procedures is formal
constructions to render the statutes constitutional.

in late-term abortions, and both conceivably could be prohibited unconstitutional.

U.S. 833 (1992) declared that prohibiting the dilation and evaluation (D & E) abortion procedure would be
criminalized. For instance, the Supreme Court in statutes were unconstitutionally vague, giving a physician insufficient notice about which abortion procedures were
medical term and does not clearly designate a particular type of procedure. Id. This raised the possibility that the
statutes were unconstitutionally vague, giving a physician insufficient notice about which abortion procedures were
criminalized. For instance, the Supreme Court in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505
U.S. 833 (1992) declared that prohibiting the dilation and evaluation (D & E) abortion procedure would be
unconstitutional. Id. at 861. However, a variant of this method entitled dilation and extraction (D & X) had not yet
been held by the Supreme Court to be constitutionally protected. Id. at 861-62. Both methods are only employed
in late-term abortions, and both conceivably could be prohibited by the statutes.

The Seventh Circuit majority, refusing to strike down the statutes on their face, held that the state courts in Illinois and Wisconsin were entitled to construe their own statutes, and that they could issue limiting
constructions to render the statutes constitutional. Id. at 864-69. One way to do this would be to assimilate the
medical definition into the legal definition. In dissent, however, Posner declared the statutes facially arbitrary and
entirely devoid of a legitimate purpose; the purported statutory distinction between the two procedures is formal and
metaphysical, supported by no rational ground. Because the constitutional D & E method and the D & X
method are so similar, and because the statutes contain no maternal health exception,

[n]o reason of policy or morality that would allow the one would forbid the other. We should
consider therefore why any state would pass such a law....The states want to dramatize the
ugliness of abortion....Circumstances conspired, as it were, to produce a set of laws that can
only be described as irrational....[These statutes] are concerned with making a statement in an
ongoing war for public opinion....The statement is that fetal life is more valuable than women's
health.

Id. at 879-81. In Stenberg v. Carhart, Justices Stevens and Ginsburg agreed with Posner on this point and referred
to his dissenting opinion in their own concurring opinions striking down a similar Nebraska statute. Justice Ginsburg's concurring opinion states: "[A]s Chief Judge Posner commented, the law prohibits the procedure
because the State legislators seek to chip away at the private choice shielded by Roe v. Wade, even as modified by
Casey." Id. at *66-*67. Justice Stevens stated, "Justice Ginsburg and Judge Posner have, I believe, correctly
diagnosed the underlying reason for the enactment of this legislation...." Id. at *56-*57.

Again, Posner seems to be devising legislative intent by imagining a legislature full of legislators much like
himself. He could not discern a pragmatic difference between abortions performed before the fetus enters the cervix
(the permissible D & E) and afterwards (the D & X); therefore, he refused to believe that the legislative intent was
to make that metaphysical—and to Posner, meaningless—a distinction. Because the legislature could not rationally
distinguish between the D & X and the D & E, its true intent must have been to send a policy message.

Finally, for the reasons stated above, Posner determined that the statutes would deter physicians from
performing late-term abortions, which he revealed to be the state legislatures' true motivation:

[L]et us be realistic, and not only about the possibility of legal error. The physician is not the
real target of the statute; the pregnant woman is. It is not the physician's pregnancy that is to be
terminated. He has no incentive to undergo the agony of a criminal prosecution merely in order
to perform an abortion in a particular way. Better for him . . . to abandon late-term abortions
altogether....The in terrorem effect of these statutes...is likely to induce physicians in these
states to steer well clear of the forbidden zone.

Id. at 889. Once again, Posner zeroed in on the assumed real-world incentives and consequences of a statute.
Altogether, what makes this opinion stand out is not so much the strength of the legal analysis and Posner's skillful
rhetorical techniques, but his relentless insistence on examining the motives of the actors, the incentives provided
by the law, and the likely consequences of their actions. In addition, the candor of the opinion is striking, even for a
dissent.
The first case study is a pair of decisions, written by Posner, raising the question whether statutory rape is a violent crime for purposes of sentence enhancement under the U.S. Sentencing Guidelines. Relying on medical and social scientific evidence, Posner held, in the earlier case, that the statutory rape of a thirteen-year-old is a violent crime; in the second case, he decided that the statutory rape of a sixteen-year-old is not a violent crime, disregarding case law from other circuits and diverging from his previous decision.

The second case study addresses an issue of potential disability discrimination against HIV-positive holders of insurance policies. Compensation under the policies was capped at much lower amounts for AIDS-related illnesses than for other ailments; these caps were challenged under the Americans with Disabilities Act (ADA). Relying on medical evidence and speculation about congressional intent in passing the ADA, Posner upheld the disparity, on the ground that Congress could not have intended to regulate the content of insurance policies, because it would have deleterious consequences for the insurance industry.

A. United States v. Thomas and United States v. Shannon

Judge Posner’s opinions, in this pair of statutory rape cases, illustrate his elevation of current factual realities, such as social, scientific, and medical evidence, over formalistic legal categories. These opinions also exemplify his reliance on evidence of evolving social norms to buttress decisions that contravene long-established, but arguably anachronistic, legal principles. Relatively, they demonstrate his frequently used method of converting moral questions to empirical questions. The opinions range broadly to reach policy questions not immediately raised by the case on appeal. Additionally, Posner’s principles of statutory interpretation are apparent in that he pragmatically searches all available evidence to unearth the policies and purposes underlying the text.

The significance of this pair of cases to the thesis of this article is that they exemplify both the costs and benefits of Posnerian pragmatism in action. On the plus side of the ledger, focusing on legislative purposes and social norms—as Posner did here—leaves room for the law to develop flexibly in relation to changing social realities. Addressing the potential consequences of decisions, by emphasizing critical empirical questions, can avoid some of the more obvious snares of the conventional moral and factual assumptions enshrined in existing law. The issues of statutory rape and adolescent sex raised here are particularly susceptible to these pitfalls.

121. See infra text accompanying notes 126-69.
122. See infra text accompanying notes 170-85.
123. See infra text accompanying notes 186-224.
124. Id.
125. 159 F.3d 296 (7th Cir. 1998).
126. 110 F.3d 382 (7th Cir. 1997) (en banc).
127. See infra text accompanying notes 132-85.
128. Id.
129. See, e.g., infra text accompanying notes 132-47.
130. See infra text accompanying notes 132-85.
131. Id.
On the other hand, judges must be cautious, when charting a new course, to provide the parties and future litigants with sufficient notice of the change, allowing them to act accordingly. Abrupt changes in course—particularly broad ones—not only contribute to unpredictability in law, but in fact finding as well. When a judge such as Posner declares facts important that previously were considered unimportant or irrelevant, and then compounds the problem by engaging in unfettered judicial fact finding, boundaries can be crossed in the name of pragmatism that otherwise would have been inviolable. One can observe that phenomenon in these opinions; whether one considers it a positive development likely will depend on whether one’s values accord with Posner’s.

In United States v. Shannon, the seventeen-year-old defendant had been convicted of second degree sexual assault of a child for having sexual intercourse with a thirteen-year-old girl. If deemed a “crime of violence” under the U.S. Sentencing Guidelines, that conviction would significantly increase his sentence for a later conviction for being a felon in possession of a firearm. The relevant section of the Guidelines defines a “crime of violence” as one presenting “a serious potential risk of physical injury to another.” The precise legal issue was whether, assuming the thirteen-year-old girl’s consent, the mere violation of the statutory rape statute made the crime “violent.”

The government advanced two relatively abstract analytical principles, arguing somewhat formalistically that “any felonious sexual act with a minor should be deemed either to involve force, because the minor is incapable of giving legally recognized consent, or to involve conduct that presents a serious risk of physical injury.” Judge Posner dismissed both arguments: first, he pointed out that lack of legal consent in itself does not imply violence; and second, that one cannot categorically deem all statutory rapes to involve a risk of physical harm.

Posner then considered other sources of information relevant to understanding the legislative intent, and to determining how best to implement that intent. He first looked to the underlying state statutes. Posner determined that when the conduct punished by the particular statute at issue involves a serious risk of physical injury (such as when the legislature expressed particular concern with the physical consequences of sex for young adolescents), the crime could reasonably be considered violent. Otherwise, he reasoned, a concern with physical injury cannot

132. 110 F.3d 382 (7th Cir. 1997) (en banc).
133. Shannon, 110 F.3d at 384 (citing Wis. STAT. § 948.02 (2) (2001)). The Wisconsin statute punished sex with juveniles of less than sixteen years.
134. Id.
135. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(1) (1998) defines a crime of violence as a state or federal offense that is punishable by imprisonment for more than a year that either “(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”
136. Shannon, 110 F.3d at 385.
137. Id.
138. Id. at 386.
139. Id. at 385.
140. Id. at 386.
be automatically inferred. He was animated by a concern for deference to the states' legislative judgments, not by an overarching concern with statutory rape as a pre-existing moral category. Rather, he attempted to discover what the legislatures actually meant by examining the reach and operation of the actual statutes.

The Wisconsin statute applicable in this case made sixteen the age of consent; the opinion tentatively surmised that the state legislature may have been concerned about physical injury because it set the age relatively high, and

[t]he likelihood of physical injury as a consequence of sex is greater with a 15 year old than with a 17 year old. The younger child is likely to have poorer judgment, less knowledge about sex, and less money, all of which deficits will make it less likely that she will use or insist that her partner use effective measures to prevent pregnancy and disease.

While these assertions seem intuitively correct, Posner cited no sources of authority. And he next refuted the tentative implications he had just drawn in this passage by observing that the statute punishes all forms of sexual contact, not just intercourse, undermining the implication that the legislature had a primary concern with the potential for physical injury arising from intercourse with a younger child.

Broadening his perspective, Posner then surveyed numerous states' statutory rape statutes to determine if a national consensus, or strong majority norm, existed; he determined that the statutes have a variety of purposes, and disparate ages of consent. In Pennsylvania, for instance, the age of consent is thirteen. Therefore, the statutes supplied no basis for a uniform decision:

To make the answer to the question whether felonious sex with a minor is a crime of violence a mechanical function of the laws of the different states would be arbitrary because it would make distinctions unsupportable on the basis of the risk of physical injury, that risk being a constant across states....

He thus did not read Congress, in enacting the Sentencing Guidelines, to have delegated to each state the moral decision about the meaning of "violence." Instead, the issue was one of empirical fact that could not reasonably vary by state. Posner, in fact, favors ferreting out empirical questions embedded in ethical dilemmas and, to the extent possible, determining the neutral factual questions before addressing the more difficult, residual questions of values.

141. Posner's search for underlying statutory goals comports with his preferred method of statutory interpretation and provides a standard that allows him to analyze the costs and benefits of a decision.
142. Id. at 387.
143. Id. (citing Wis. Stat. § 948.01 (5)(a) (2001)).
144. Id. at 386.
146. Id.
147. See Posner, supra note 6. When moral claims are founded on testable hypotheses—when, in other words, they are defended as functional—a space is created for moral criticism based on empirical investigation. We can then employ the moral premises of the culture whose morality is at issue, and reasoning from common premises reach a conclusion that our local interlocutor may be forced as a matter of logic to accept (if he is logical).
Id. at 21-22.
In sharp distinction to Posner’s empirical approach, most other circuits addressing the issue have used a version of the formalistic approach urged by the government to hold that statutory rapes, by definition, involve a risk of physical injury.\(^{148}\) Posner was able to distinguish most, but not all, of these cases on their facts, as involving aggravating factors such as incest or very young children.\(^{149}\) But the fundamental schism between his approach and the rest of the cases is that the others appear to be classical formalist decisions. Those courts held that the mere subject matter of the statutes, and the ordinary classification of statutory rape as sexual assault, sufficed to imply a concern with physical injury—albeit formalistic, rather than pragmatic.\(^{150}\) Posner, with his usual concern for evidence of the actual, empirical reality, inquired further into the practical connection between violence and consensual intercourse with a thirteen-year-old.

The opinion proceeded to examine the historical origins of statutory rape laws. Citing law review articles, Posner noted that “[t]heir original purpose was to protect the virginity of female minors in order, in turn, to protect their marriageability....”\(^{151}\) Summing up, he then concluded: “The extraordinary variety of state statutory rape laws, and the well-known failure of state legislatures to keep their sex laws up to date with the changing sexual mores of the American people, make it difficult to impute a single goal to statutory-rape laws, let alone a goal centering on the risk of physical injury.”\(^{152}\)

Finally, characteristically tacking back against the course of his prior ruminations, Posner concluded that notwithstanding his inability to draw a general conclusion from statutory-rape laws, he could conclude that sexual intercourse with a thirteen-year-old presents a risk of physical injury.\(^{153}\) Adolescents that young are “unlikely to have a full appreciation of the disease and fertility risks of intercourse, an accurate knowledge of contraceptive and disease-preventive measures, and the maturity to make a rational comparison of the costs and benefits of premarital intercourse.”\(^{154}\) He cited to sociological journals supportive of these assertions.\(^{155}\) The opinion continued by recounting the adverse consequences of pregnancy for thirteen-year-olds, again citing to medical sources.\(^ {156}\) Finally, Posner turned to the language of the Sentencing Guidelines themselves. The Guidelines list burglary and extortion as examples of crimes presenting a risk of physical injury, thus leading him to conclude that the applicable test is a liberal one and that “risk of physical

\(^{148}\) See United States v. Sacko, 178 F.3d 1 (1st Cir. 1999); United States v. Coronado-Cervantes, 154 F.3d 1242 (10th Cir. 1998); United States v. Meader, 118 F.3d 876 (1st Cir. 1997); United States v. Velazquez-Ovete, 100 F.3d 418 (5th Cir. 1996); United States v. Taylor, 98 F.3d 768 (3d Cir. 1996); United States v. Wood, 52 F.3d 272 (9th Cir. 1995); United States v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993); United States v. Bauer, 990 F.2d 373 (8th Cir. 1993); United States v. Rodriguez, 979 F.2d 138 (8th Cir. 1992).

\(^{149}\) See United States v. Shannon, 110 F.3d 382, 386 (7th Cir. 1997).

\(^{150}\) See id.

\(^{151}\) Id. at 387.

\(^{152}\) Id.

\(^{153}\) Id. at 387.

\(^{154}\) Id. at 387-88 (citations omitted).

\(^{155}\) Id.

\(^{156}\) Id. at 388 (citations omitted).
injury" is a term of art. Therefore, he held that sexual intercourse with a thirteen-year-old is a "crime of violence" for sentencing purposes.

Posner exhibits many of his characteristic tendencies in the Shannon opinion. Rather than relying on precedent or on the underlying statute, he turned to common sense, medical and sociological evidence indicative both of actual risk to young adolescents and to shifts in social norms. He speculated about the legislative intent behind various statutory rape provisions and conducted an independent national review, even though only a Wisconsin crime was at issue. He refused to defer to the states in their setting of the age of consent. Interestingly, the opinion referred explicitly only to thirteen-year-olds, meaning that cases involving fourteen, fifteen, and sixteen-year-old victims could conceivably come out differently.

Posner’s caution may well have been a product of discomfort with the Sentencing Guidelines and the large differences in sentence length that can occur as a result of relatively metaphysical classifications. His future-oriented consequentialism is manifested in his concern for basing significant sentence enhancement on conduct that he believes society as a whole may no longer consider seriously criminal. The opinion is cautious in not extending its legal conclusions, drawn from ultimate facts, beyond the age of the immediate victim. It is far from cautious, however, in considering statutory rape laws in general, from every conceivable angle. Rather than deferring to the states’ statutes or relevant case law, he independently decided the issues.

Judge Coffey’s partial dissent in Shannon challenged Posner on his pragmatic methodology and disagreed with him on certain substantive points. Coffey emphasized what he viewed as the arbitrary nature of the age cutoff, characterizing the majority as holding “without either medical or legal support, that the second-degree sexual assault of a child is only a ‘crime of violence’ if the victim is thirteen years and ten months of age or younger,” as the victim was in that case.

He further characterized the majority opinion as involving “gratuitous commentary” and taking a “circuitous route” to reach a result not authorized by the Wisconsin statute or other authority. The contrast between Coffey’s conventional view of legal authority, and of the scope of evidence relevant to a case, and Posner’s wide-ranging search for all relevant sources of information highlights the unusual nature of Posner’s sweeping judicial eye, and uncovers the uncertain grounding of some of his factual conclusions. It is not surprising that Coffey, as a more traditional

157. Id. at 388-89.
158. Id.
159. Posner apparently wanted to limit the holding to research an avenue for a different outcome in a subsequent case. The distinction between older and younger adolescents was not compelled by the medical evidence. The medical literature Posner cited discusses adolescents in general, not limiting its conclusions to thirteen-year-olds, or younger teenagers. See id. at 405, n.18.
160. See id. See also Posner, supra note 6, at 258-60 (indicating opposition to disproportionately long sentences for relatively minor crimes, using the example of a life sentence for a sixteen-year-old’s sale of a small amount of marijuana).
161. Id. at 391.
162. Id. at 404. Analogous federal statutes apply to all adolescents under eighteen. Id. at 406-07.
judge, was vehemently opposed to Posner's ventures into sociology to resolve a legal question.\footnote{163}

The dissent continued by referring disparagingly to legislative fact finding and judicial policy making that fail to defer to state law,\footnote{164} but it then joined issue with Posner on the basic practice of legal pragmatism. Because characterization of a crime under the Guidelines is a question of federal law,\footnote{165} deference to the state statutory definitions is not automatic.\footnote{166} Posner could justify his multi-state review of statutory rape laws on the ground that discerning even the hazy outlines of a national consensus on the appropriate age of consent would justify a consistent result. Absent that, he apparently believed he had no choice but to conduct his own research—albeit limited—and reach the best conclusion he could, even if based on limited information and his own intuitions (and those of the majority of his colleagues).\footnote{167} Disagreeing with many other courts, Posner rejected the state's statutory rape law as the proper benchmark for determining violence.\footnote{168}

Judge Coffey apparently would forbid judicial speculation that does not build on an existing, solid legal foundation, such as underlying legislation. But Posner's speculation, supported by evidence from non-legal disciplines, is his stock-in-trade.

\footnote{163}{Coffey continued by joining issue with Posner on the appropriate scientific evidence to consider. His partial dissent cited authorities recounting the various risks of physical harm inherent in underage sex, including psychological harms that can lead to physical symptoms. \textit{Id.} at 409. At several points, he became almost apoplectic in describing the majority opinion as involving nothing more than Posner's "personal views about this general class of legislation...." \textit{Id.} He also took issue with Posner's opinion of social norms, characterizing Posner's references to changing American sexual mores as belonging to "pockets of so-called 'progressive' sexual morality...." \textit{Id.} at 412. Further, "the trendy mores of these locales bear little, if any, resemblance to the more traditional views of the majority of Americans. Average citizens (and particularly those in the Midwest) thankfully have not abandoned the basic moral precept that children must be protected from sexual exploitation...." \textit{Id.}

This attack meets Posner on the pragmatic battleground of examining social norms in a changing culture, the subject of the ongoing culture wars. Our diverse society comprises the entire spectrum of views on sexual morality. Analysis of adolescent sexuality raises highly polarizing issues whose resolution is often more dependent on one's ultimate views of ethics and religion, than on actual risk of physical injury.

If both sides conceded that the outcome should coincide with the values and norms of the majority of Americans, the issue would transform into an empirical question. It could then be resolved by use of social science techniques such as polling, once again alchemizing a moral issue into an empirical issue. \textit{See Posner, supra note 6, at 21-22. But the precise nature of the current norm is difficult to determine. Judge Coffey's profound disagreement with Judge Posner, however, probably derives more from personal values than from empirical disagreement.}

\footnote{164}{Finally, Judge Coffey urged more deference to state legislatures, as sexual morality (like insurance) has traditionally been a matter for state regulation. \textit{Id.} at 413. He once again referred to those "social theorists and revisionists" who agree with the majority, and take a dim view of morals offenses noting, "These 'new age' theorists would be better off preaching their sermon in Las Vegas, New York City, San Francisco, or in other isolated pockets of sexual permissiveness...." \textit{Id.} at 414. He observed that setting the age of consent is "a legislative and not a judicial determination." \textit{Id.} Courts have neither citizen input nor trained staffs to make complex policy judgments. \textit{Id.} Thus, in his estimation, the majority decision is presumptuous and ill-informed in its extra-record survey of state statutes other than Wisconsin's, which clearly outlawed intercourse with a thirteen-year-old. Thirteen-year-olds cannot consent to intercourse in Wisconsin, and thus intercourse with a thirteen-year-old is a violent crime. Posner's ruminations about pregnancy, venereal disease, and poverty were fundamentally beside the point.

\footnote{165}{\textit{Id.} at 385.}

\footnote{166}{Although most other federal courts considering the issue deferred to state law, Posner chose to reject those decisions. \textit{See cases cited supra note 148.}

\footnote{167}{Judge Coffey was the only member of the court to dissent, even in part (though he agreed with the result). The entire Seventh Circuit joined Posner's opinion except for Coffey, with Judge Manion penning a short concurrence, which Judge Kanne joined. \textit{Id.} at 389.}

\footnote{168}{\textit{See supra note 148.}}}
He resorts to the technique frequently when other available evidence fails to assist him in reaching the result he believes will produce optimal real world consequences.\textsuperscript{169} Adopting the additional procedural protections I propose herein could have established a more solid factual foundation for the decision. If the Seventh Circuit had notified the parties of its intent to rely on extra-record evidence of, for example, changing social mores, the parties could have contributed to establishing a more fact-based, less speculative record, or at least could have tailored their arguments closer to the court’s approach.

The following year, Judge Posner confronted a strikingly similar issue in \textit{United States v. Thomas}.\textsuperscript{170} \textit{Shannon} had held that intercourse with a thirteen-year-old was a crime of violence. In \textit{Thomas}, he decided that the statutory rape of a sixteen-year-old girl was not a “violent felony.”\textsuperscript{171} Like the Sentencing Guidelines, the applicable statute provides for significant enhancement of a sentence for a subsequent crime if the defendant has certain prior violent felony convictions.\textsuperscript{172} \textit{Thomas}’s burglary sentence had been enhanced, by fifteen years, when the district judge ruled that the prior statutory rape of a sixteen-year-old qualified as a “violent felony.”\textsuperscript{173} \textit{Thomas} had been convicted, under an Illinois statute, of aggravated criminal sexual abuse that punishes a man who has sexual intercourse with a woman who is both under the age of seventeen and more than five years younger than he.\textsuperscript{174} Assuming the sixteen-year-old young woman’s consent, the issue was the same as in \textit{Shannon}, but with a different number: whether statutory rape of a sixteen-year-old is, by its very nature, a violent felony, triggering a sentence enhancement.\textsuperscript{175}

The \textit{Thomas} opinion, even more than \textit{Shannon}, illustrates Posner’s tendency to address issues on broad policy grounds, exceeding the boundaries of the conventional legal dispute before the court. In fact, the \textit{Thomas} case could have been decided on burden of proof grounds with no further examination of issues.\textsuperscript{176} Despite \textit{Shannon}’s earlier reliance on medical literature to support the proposition that sexual intercourse itself posed a risk of physical injury to a thirteen-year-old girl, neither the government nor the district court in \textit{Thomas} had cited any medical authority demonstrating a similar risk of physical injury to sixteen-year-olds.\textsuperscript{177} In the absence of this evidence, Posner indicated reluctance to enhance the sentence by fifteen years, given that the government had not met its burden of proof.\textsuperscript{178}

Although the decision could have rested solely on this burden of proof issue, Posner explored further the relationship between prevailing social norms, scientific

\footnotesize{169. See supra text accompanying notes 95-101, 113. 
170. 159 F.3d 296 (7th Cir. 1998). 
171. \textit{Id.} at 298, 300. The purpose was to sentence the defendant for a later drug offense. 
173. 18 U.S.C. § 924(e)(2)(B)(ii). In pertinent part, the statute defines the term as a felony “that presents a serious potential risk of physical injury to another.” 
175. The victim’s age was unavailable, but Posner assumed the facts most favorable to the defendant. \textit{Thomas}, 159 F.3d 296, 299. 
176. See \textit{id.} at 300. 
177. \textit{Id.} at 299. 
178. \textit{Id.} at 300. It is more likely, however, that Posner was unwilling to increase the sentence so severely than that he was reluctant to proceed without guidance from a party or the district court, given his proclivity for researching scientific evidence himself.
evidence of adolescent physical and psychological development, and the law. He cited two medical articles to support the proposition that the Shannon case is distinguishable from Thomas because the physical risk from sex is greater to a thirteen-year-old than to a sixteen-year-old. He also relied, again, on shifting social mores to distinguish sixteen-year olds from thirteen-year olds, referring to the current incidence of sexual activity among teenagers:

More than 40 percent of the 16 year old girls in our society have had sexual intercourse; 45 of the 50 states permit marriage at 16—including Illinois—and in a majority of states 16 is the age of consent, rather than 17 as in Illinois. In light of these legal and sociological facts, it is difficult to maintain on a priori grounds that sex is physically dangerous to 16 year old girls. This may be wrong, but a 15-year sentence enhancement ought not to turn on sheer conjecture.

Again, it is interesting to observe Posner remarking on the conjectural nature of the practical distinction between thirteen-year-olds and sixteen-year-olds, eliding the fact that he was the one who had conjured up the presumption of violence as to thirteen-year-olds in the first place.

Continuing to explore the social realities underlying the age distinction he had posited, Posner next cited to further sociological and medical evidence documenting physical problems and issues of force inherent in sexual relations between older men and adolescents. Immediately afterwards, however, he repudiated the inference that sex is necessarily physically dangerous to sixteen-year-old girls by stating, without a hint of irony: “The difficulty with using this evidence as a basis for classifying Thomas’s crime as a crime of violence is that it requires an essentially legislative judgment in a field in which the responsibility for making such judgments rests with Congress and the U.S. Sentencing Commission.”

While Posner is normally not shy about making legislative judgments, it is likely that here he was not only aware of the ambiguity and difficulty of the issue, but also of the severe practical consequences of finding a substantial risk of physical injury. He may well believe that proportionality should require explicit support for the seriousness of the offense before adding fifteen years to a sentence. His citations to medical and sociological sources, supporting both sides of the issue, also rhetorically emphasize the injustices that eliminating judicial discretion in sentencing can create. The fact that Posner took the same approach in Shannon, arriving at the opposite result, only reinforces this conclusion.

The opinions are ambitious in their attempt to provide guidance to future courts reaching for national uniformity, and to put pressure on the Sentencing Commission for more explicit guidance. In their refusal to defer to the states’ statutory

179. Id. In Shannon, Posner had done extensive extra-record medical research to document the physical risks of sex to thirteen year olds, but that literature itself referred only to adolescents, not distinguishing younger adolescents from sixteen or seventeen year olds, though the opinion did not mention this fact. See United States v. Shannon, 110 F.3d 382, 387-88 (7th Cir. 1997).
180. United States v. Thomas, 159 F.3d 296, 299 (7th Cir. 1998).
181. Id.
182. Id. at 300.
183. See supra text accompanying notes 152-56, 179-81.
184. See supra text accompanying notes 160, 182.
definitions of the underlying crimes, the opinions federalize important areas of criminal law, cutting against Posner’s general views of limited federal court jurisdiction and of deference to state legislative judgments.

Paired with the Shannon opinion, Thomas provides multiple justifications for differentiating between younger and older adolescents when defining statutory rape as a “crime of violence” for sentencing purposes. But because the distinction between thirteen-year-olds and sixteen-year-olds is apparently not strongly supported (or contradicted) by the medical evidence he cites, and because nothing in the applicable law itself supports this distinction, it creates what seems to be a rather tenuous basis for a legal distinction. His lightly constrained gut sense will appear intuitively correct to many people—including me—but is that pragmatic intuition an appropriate basis for a result in resolving issues of federal law?

B. Doe v. Mutual of Omaha Insurance Co. 186

This case raised the issue of whether the public accommodations provisions of the Americans with Disabilities Act (ADA) are violated by a health insurance policy that caps payment for treatment of AIDS and AIDS-related conditions (ARC) at levels many times lower than those for non-AIDS related medical conditions. 187 The two Mutual of Omaha policies at issue limited lifetime benefits for AIDS or ARC to $25,000, in one policy, with the other limiting them to $100,000. 188 For medical conditions unrelated to AIDS or ARC, the policy limit was $1,000,000, with benefits re-instatable after two years if no claims were made in the interim. 189 The issue of whether these divergent limits afforded those disabled by AIDS inferior access to insurance was one of first impression on the appellate level.

In this opinion, Judge Posner speculated about congressional intent, based primarily on his views of good policy, ostensibly supported by medical evidence. 190 The costs and benefits of Posnerian pragmatism appear from a different perspective in this opinion than in the statutory rape cases in the last section. Here, he focused more on policy as encapsulated in legislation than on general social norms. Again, though, one’s view of the utility of Posner’s approach will likely vary with one’s own view of the outcome. A search for underlying statutory purposes can, in some instances, reduce the subjectivity of judicial interpretation of ambiguous statutory passages; but, in other instances, that subjectivity reappears clothed in the language of legislative purpose. Whether or not Congress actually intended the ADA to cover the content of insurance policies remains unclear. 191 Likewise, the medical evidence that is apparently cited accurately in the opinion may not compel the legal conclusion that Posner reaches; in fact, it may lend legitimacy to the holding by problematically transferring the prestige of scientific knowledge to law. 192

185. See supra text accompanying notes 142, 153-56, 179.
186. 179 F.3d 557 (7th Cir. 1999).
187. Id. at 558.
188. Id.
189. Id.
190. See infra text accompanying notes 207-20.
191. See infra text accompanying notes 193-212, 221-22.
192. See infra text accompanying notes 218-21.
Title III of the ADA, in the general rule contained in section 302(a), provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation" by the owner, lessee, or operator of that place. In pertinent part, section 302(b), one of several corollary prohibitions, provides the following:

It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class...with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

In their complaint, the plaintiffs alleged that, as a class of AIDS-disabled insureds, they were discriminatorily denied the opportunity to participate in or benefit from the $1,000,000 lifetime maximum policy benefit and the potential reinstatement of benefits provided to the insured with other medical conditions.

The district court refused to dismiss the complaint for failure to state a claim upon which relief can be granted, holding that the plaintiffs stated a claim for discriminatory denial of participation in policy benefits.' The court held that the ADA requires more than merely equal formal access to insurance policies for the disabled and non-disabled; the ADA regulates the content of those policies to the extent that unjustified differential treatment of the disabled, vis-à-vis the non-disabled, also violates the Act. The court further reasoned that the statutory language would be meaningless if the ADA covered only the bare right to buy some health insurance policy. The district court then determined that the Mutual of
Omaha policies at issue violated the Act because they treated AIDS and ARC patients—disabled under the ADA—worse than non-disabled individuals. For instance, “if... pneumonia presents itself as a complication of AIDS, it is deemed an aids-related condition (ARC) and subject to the AIDS/ARC caps....A non-disabled individual who had not reached the $1 million dollar cap would not be denied coverage” for the same course of pneumonia.

On appeal, the Seventh Circuit’s majority opinion, by Judge Posner, reached the opposite conclusion, reversing the judgment below. Posner’s opinion held that Title III of the ADA covers only equal access to purchasing any health insurance policy, not the content of those policies. Although the two policies at issue were beyond mere access or availability of a good or service.”; Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1321-22 (C.D. Cal. 1996); Anderson v. Gus Mayer Boston Store of Delaware, 924 F. Supp. 763, 779 (E.D. Tex. 1996); Baker v. Hartford Life Ins. Co., No. 94 C 4416, 1995 WL 573430, at *3 (N.D. Ill. 1995).

Mutual of Omaha relied on the following cases narrowly constraining the ambit of Title III: Parker v. Metropolitan Life Ins. Co., 121 F. 3d 1006 (6th Cir. 1997) (en banc), cert. denied, 118 S. Ct. 871 (1998) (ADA covers access to goods and services, not content); Leonard F. v. Israel Discount Bank of New York, 967 F. Supp. 802 (S.D.N.Y. 1997) (rejecting argument that ADA applies to more than access to buildings).

The district court also considered the implications of the “safe harbor” provision of the ADA, contained in Title IV of the Act, § 501(c). This section provides an exemption from the Act to an insurer as follows:

[T]his Act shall not be construed to prohibit or restrict—(1) an insurer...from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.... Paragraph (1) shall not be used as a subterfuge to evade the purposes of title I and III.

42 U.S.C. § 12201. (This section had been interpreted to exempt practices that accord with “sound actuarial principles, reasonably anticipated experience, or bona fide risk classification” and do not otherwise constitute subterfuges of the Act. Mutual of Omaha, 999 F. Supp. at 1195 (quoting World Insurance Co., 966 F. Supp. at 1208, 1209 n.6). Since that time, however, most courts have focused on the “subterfuge” exemption and eliminated the actuarial principles’ prong. E.g., Pallozzi v. Allstate Life Ins. Co., 204 F.3d 392 (3d Cir. 2000)).

The district court concluded that Congress must have intended Title III to cover the content of insurance policies or it would not have included the safe harbor exception. Id. The court relied on Chabner, 994 F. Supp. at 1190 and Kotev, 927 F. Supp. at 1322 to interpret the safe harbor exception and concluded that insurance companies are subject to the full scope of the ADA; and therefore the content of policies can be regulated.


202. Id. The court also discussed the applicability of the McCarran-Ferguson Act and Illinois insurance law, but those aspects of the opinion are not relevant to my arguments here and are therefore not included.

203. Doe v. Mutual of Omaha, 179 F.3d 557 (7th Cir. 1999). Judge Eastbrook joined Judge Posner in the decision, with Judge Evans dissenting. The opinion addressed only section 302(a) of the ADA (general rule requiring “full and equal enjoyment” of services) and did not address other prohibitions such as section 302(b) (subsection prohibiting denial of a benefit “not equal to that afforded to other individuals”).

204. See id. at 563. In support of his conclusion that the ADA does not regulate the content of goods or services, Judge Posner relied on: Lenox v. Healthwise of Kentucky, Ltd., 149 F.3d 453, 457 (6th Cir. 1998) (bookstore does not have to stock books in Braille in order to comply with ADA); Vaughn v. Sullivan, 83 F.3d 907, 912-13 (7th Cir. 1996) (ADA does not require state to provide identical benefits to disabled and non-disabled employees; states have substantial discretion to choose proper mix of amount, scope, and duration limitations on coverage); Rogers v. Dept. of Health and Environmental Control, 174 F.3d 431 (4th Cir. 1999) (ADA does not require that state provide same level of benefits for mental and physical disabilities); Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1010-14 (6th Cir. 1997) (en banc) (ADA does not prohibit employer from providing long-term disability plan with greater benefits for employees with physical disabilities than with mental disabilities); Ford v. Schering-Plough Corp., 145 F.3d 601, 612-14 (3d Cir. 1998) (disparity in employer’s insurance benefits for mental and physical disabilities did not violate ADA); Modderno v. King, 82 F.3d 1059 (D.C. Cir. 1996) ($75,000 lifetime cap for mental health benefits was not a “subterfuge” to avoid requirements of ADA, as exception to ADA safe-harbor).

The Seventh Circuit’s holding was later criticized in Baus v. Northwestern Mutual Life Ins. Co., 77 F. Supp.2d 211, 215 (D.N.H. 1999), in which the court found fault with the Seventh Circuit’s clear distinction between access and content. The court also pointed out Posner’s “misuse” of Bragdon v. Abbott, 524 U.S. 624 (1998). Posner had used Bragdon as an example of a case in which the ADA was violated by an outright refusal.
significantly less valuable to the disabled plaintiffs than to the non-disabled, “section 302(a) does not require a seller to alter his product to make it equally valuable to the disabled and to the nondisabled, even if the product is insurance.”

In part because non-AIDS-related conditions were covered by the policy, Judge Posner held, the policies had value to the plaintiffs.

Three aspects of the opinion, concerning Posner’s treatment of facts, are particularly noteworthy for purposes of this article: first, the opinion illustrates Posner’s factual speculations and the conclusions he draws from relatively unsupported conjecture; second, his future-oriented consequentialism is apparent in the slippery-slope arguments raised; and third, the opinion evidences his use of apparently extra-record medical facts to support legal conclusions. With respect to speculation, the driving force of the opinion is Posner’s suppositions about congressional intent in enacting the public accommodations provisions of the ADA.

Consistent with his own policy preference for allowing business the latitude to operate freely without federal court intervention, Posner opined that Congress could not have intended to, and thus did not, cut a wide enough swath with the ADA to regulate the content of insurance policies, or other goods or services.

Although some of the specific statutory provisions and the legislative history might indicate otherwise, neither the statutory language nor the legislative history determined whether the Act regulates the content of insurance policies.

Accordingly, the opinion turned to speculation concerning Congress’s purpose. Posner concluded that the Act should be narrowly construed because regulating the content of insurance policies would create an unstoppable juggernaut that would impose federal court scrutiny of every business or service in the economy.

The common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated. A camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specially designed for such persons. Had Congress purposed to impose so enormous a burden on the retail sector of the economy and so vast a supervisory responsibility on the federal courts, we think it would have made its
intention clearer and would at least have imposed some standards. It is hardly a feasible judicial function to decide whether shoestores should sell single shoes to one-legged persons... There are defenses to a prima facie case of public-accommodation discrimination, but they would do little to alleviate the judicial burden of making standardless decisions about the composition of retail inventories.\footnote{Id. at 560. Later in the opinion, Posner again adverted to supposed congressional intent when refuting the plaintiffs' contention that the safe harbor section would not explicitly refer to an insurance company's exemption for underwriting, administering, or classifying risks if the Act did not cover policy content: If [the plaintiffs were correct] it would imply that section 302(a) regulates the content not only of insurance policies but also of all other products and services, since the section is not limited to insurance. The insurance industry may have worried that the section would be given just the expansive interpretation that the district court gave it in this case, and so the industry may have obtained the rule of construction in section 501(c) just to backstop its argument that section 302(a) regulates only access and not content. Or it may have worried about being sued under section 302(a) for refusing to sell an insurance policy to a disabled person. Id. at 562. In neither instance did Posner consider the safe harbor exemption sufficient to stop the onslaught of federal oversight. At other points in the opinion, he continued to advert to the specter of federal courts encroaching upon the traditional state jurisdiction over insurance matters. See id. at 562.}

Thus, notwithstanding the lack of direct evidence of congressional intent to restrict the scope of the ADA, Posner's "common sense" chains of inference easily (and logically, assuming one accepts their factual premise) lead to the conclusion that the scope of the ADA's public accommodations sections is quite limited.\footnote{Id. at 562. In neither instance did Posner consider the safe harbor exemption sufficient to stop the onslaught of federal oversight. At other points in the opinion, he continued to advert to the specter of federal courts encroaching upon the traditional state jurisdiction over insurance matters. See id. at 562.} He may be correct about congressional intent, and courts frequently resort to a certain amount of speculation when divining an ambiguous statutory purpose, but his reasoning exceeds the standard degree of conjecture. Very little evidence exists to support his conclusion, other than congressional failure to impose standards governing content regulation.\footnote{Posner did not even mention the explicitly broad remedial purpose of the ADA, which Judge Evans raised in the dissent. See infra text accompanying notes 221-22.} Posner seems to be divining congressional intent, not by looking to what Congress actually intended, but rather by looking through the lens of what Posner himself believes to be wise and practicable.

Moreover, the openness of Posner's reliance upon the supposed consequences of upholding the ADA's applicability to the content of insurance policies also distinguishes this opinion from more standard forms of legal reasoning cloaked in doctrinal garb. Posner is unusual in exposing his pro-business orientation, which he believes will help maximize wealth and thus, in his estimation, increase the total societal good.\footnote{See supra text accompanying notes 193-210.} It is probably the candor of his opinion that most redeems it from the criticism that his reasoning process is largely rhetorical. That is, because his true purposes are not concealed, it is difficult to charge him with attempting to persuade with ostensibly neutral arguments.

The other distinctively pragmatic feature of the opinion is Posner's heavy reliance on medical evidence to reach a legal conclusion. The precise issue was whether the insurance policies discriminated by treating HIV-positive disabled policyholders differently than non-disabled policyholders, when they contracted the same medical condition.\footnote{See id. at 560.} The legal significance of the question arises because,
even if the ADA does not regulate the content of insurance policies, it does prohibit
differential treatment of the disabled and non-disabled with respect to the provision
of identical services.\textsuperscript{215} That is, the policies should provide non-AIDS-related
treatment equally, so that a broken leg, for example, is covered under the
$1,000,000 cap for both classes.\textsuperscript{216}

The policies treated pneumonia as subject to the AIDS cap, so that an AIDS or
ARC patient who contracted pneumonia was subject to the $25,000 or $100,000
cap, while a non-AIDS patient who contracted even the same strain of pneumonia
was subject to the $1,000,000 cap with further benefits re-instatable after two
years.\textsuperscript{217} On its face, this differential treatment seems flatly prohibited, in that
identical ailments are being treated differently on the basis of disability. Posner
reasoned, however, that an AIDS patient’s case of pneumonia is actually a different
disease than the pneumonia contracted by a non-disabled patient—even if it
involves the same virus or bacterium—and, therefore, the two situations are not
comparable.\textsuperscript{218} He explained that AIDS patients frequently contract pneumonias that
are rarely seen in people without HIV infection:

The essential point to understand is that HIV doesn’t cause illness directly. What
it does is weaken and eventually destroy the body’s immune system. As the
immune system falters, the body becomes prey to diseases that the system
protects us against. These “opportunistic” diseases that HIV allows, as it were,
to ravage the body are exotic cancers and rare forms of pneumonia and other
infectious diseases [citation to medical treatise omitted]. To refer to them as
“complications” of HIV or AIDS is not incorrect, but it is misleading, because
they are the chief worry of anyone who has the misfortune to be afflicted with
AIDS. An AIDS cap would be meaningless if it excluded the opportunistic
diseases that are the most harmful consequences of being infected by the AIDS
virus.

What the AIDS caps in the challenged insurance policies cover, therefore, is
the cost of fighting the AIDS virus itself and trying to keep the immune system
intact plus the cost of treating the opportunistic diseases to which the body
becomes prey when the immune system has eroded to the point at which one is
classified as having AIDS. The principal opportunistic diseases of AIDS, such
as [listing conditions, including an unusual pneumonia], are rarely encountered
among people who are not infected by HIV—so rarely as to be described
frequently as “AIDS-defining opportunistic infections.” [citation to medical
treatise omitted].\textsuperscript{219}

These assertions appear factually accurate, but the evidence was apparently extra-
record and discovered through Posner’s independent research.

Posner continued by analyzing the closer case in which an AIDS patient contracts
a garden-variety type of pneumonia:

\textsuperscript{215} See supra notes 193, 194 [relevant portions of ADA text] and accompanying text.
\textsuperscript{216} See id. at 561. An HIV positive insured’s broken leg would only be subject to the $1,000,000 cap if it
was not deemed AIDS-related. Query whether the insurance company would consider an AIDS patient’s infected,
slow-to-heal broken leg as AIDS-related.
\textsuperscript{217} Id. at 560.
\textsuperscript{218} Id. at 560-61.
\textsuperscript{219} Id.
It is true that as the immune system collapses because of infection by HIV, the patient becomes subject to opportunistic infection not only by the distinctive AIDS-defining diseases but also by a host of diseases to which people not infected with HIV are subject. Even when they are the same disease, however, they are far more lethal when they hit a person who does not have an immune system to fight back with. Which means they are not really the same disease.  

The opinion quoted no source for these statements. It is therefore not possible for a reader to determine whether or not Posner’s point is medically accurate, though common sense and lay medical knowledge could support the conclusion. When no authoritative source is cited, and the parties are not allowed to contribute to building the record and introducing testimony, there is a risk of error that could have been mitigated by the adversarial process. Reliance on this sort of unestablished evidence also does not provide the strong judicial guidance that Posner endorses; his version of pragmatism can unintentionally endorse a relaxation of procedural standards to reach beneficial conclusions.

In addition, when unverified evidence is used to support—and, ostensibly, even to establish—a legal conclusion that accords with a judge's clear policy preferences, it raises suspicions that the evidence is being used for other purposes. Normal English usage and common sense would indicate that two cases of pneumonia from the same bacterial strain do involve the same disease. For example, chicken pox runs a sharply different course in children and in adults, but it seems self-evident that it is still the “same disease.” Because defeating the differential treatment argument was instrumental to the result he wished to reach, Posner needed to address it, but it is, indeed, a questionable basis for a holding. Posner’s use of an ostensibly medical point (that a common type of pneumonia, contracted by an AIDS or ARC patient, is not the same disease as that contracted by an otherwise-healthy patient with the same pneumonia) to reach a purely legal conclusion (that the challenged insurance policies do not, therefore, discriminate) well illustrates the slippage that can occur when scientific points metamorphose into legal conclusions. This sleight-of-hand can undermine the legitimacy of both types of knowledge.

In dissent, Judge Evans pointed out that, even if Judge Posner’s conclusion that AIDS and ARC encompass a broad but unique set of related medical conditions is correct, the insurance policies themselves did not define the terms AIDS and ARC and, therefore, provided no limitations on the company’s ability to construe the policies narrowly:

[Posner’s] analysis—charitable to Mutual of Omaha to be sure—may very well be medically sound. But it doesn’t come from the insurance policies. The policies don’t even hint at what illnesses or afflictions might fall with the ARC exclusion. Nor has the medical community embraced an accepted definition for what “conditions” are “AIDS-related.” The practical effect of all this, as Mutual of Omaha concedes, is that coverage for certain expenses would be approved or denied based solely on whether the insured had AIDS. Given that the ADA is

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220. Id. at 561.
supposed to signal a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," see 42 U.S.C § 12101(b)(1), I would use the statute to right the wrong committed by Mutual of Omaha.221

Evans thus confronted Posner on his own pragmatic territory. Because the insurance company apparently admitted that it might well construe definitional ambiguities against the insured, he determined that the ADA's broad remedial mandate supported the opposite conclusion from the majority.222 The practical consequences of the majority's narrow reading of the statute would be a broad denial of coverage to persons with HIV.

These diametrically opposed opinions highlight both some of the benefits, and some of the costs, of Posnerian legal pragmatism. First, because the statutory language and congressional purpose are not entirely clear, the ordinary techniques of formalist reasoning cannot alone resolve the issue. Second, to join issue over the consequences of the decision places the debate on a useful level, particularly for a relatively recently enacted remedial statute without a long history of judicial construction. The more discretionary and precedent-setting the decision, the more real-world consequences matter, as fewer pre-existing legal restrictions are in place. An open, rational discussion of the likely results is a positive development.

On the merits, it is not apparent that the negative consequences Posner prognosticated as arising if the ADA were read to cover the content of insurance policies would likely eventuate; the Achilles Heel of Posner's pragmatism is its reliance on unsubstantiated conjecture. Although it is possible that an expansive interpretation of the ADA could lead to unwarranted federal court intrusion,223 it is also entirely possible that the court—and future courts—could limit the harmful effects of a decision that the ADA addresses the content of insurance policies. For example, the court easily could have restricted the holding to instances in which identically-situated disabled and non-disabled persons are treated differently. Furthermore, fears of starting down a slippery slope, leading from regulation of insurance to regulation of all sectors of the economy, are also overstated, as insurance is distinguishable from other businesses on many pragmatic grounds, and the court could have so held.224

This opinion demonstrates some of the excesses of Posner's empirical approach in its use of speculation and empirical formalism. He is correct about the need for a pragmatic judicial response to an unclear statute in a novel case, though his form of legal pragmatism can only be considered successful if it exhibits restraint and self-correcting features.

221. Id. at 565-66. Note that Judge Evans also relied on the unsupported statement that the medical community has no agreed-upon definition of ARC.
222. Id.
223. Of course, what constitutes "unwarranted" intrusion is a highly contested issue.
224. Arguably, the safe harbor exemption for insurance companies distinguishes the insurance industry from other businesses and industries. See supra note 200.
IV. CONCLUSION

This article has sought to identify and analyze both the costs and benefits of Posnerian legal pragmatism. I have identified its three most salient features, as exemplified in Judge Posner’s actual judicial practice, and have provided examples of these features in case studies of his opinions involving fact finding and statutory interpretation, and in numerous footnotes scattered throughout. The cited opinions demonstrate that Posner largely abides by his espoused pragmatic principles, and therefore that Stanley Fish may well be incorrect—pragmatic theory and principles apparently do have value for Posner’s judicial practice. This consistency between Posner as theorist and Posner as judge has allowed me to test whether his pragmatism is beneficial by examining how it plays out.

The most significant failing of Judge Posner’s practice of legal pragmatism is that he, at times, fails to abide by the principle of self-restraint. His frequent conjecture and speculation about facts critical to outcomes can lead to results that may be unwarranted and insufficiently undergirded by legitimate factual justifications. These problems are exacerbated when he reaches beyond the issues presented in a case to issue pronouncements ranging well beyond the immediate case under consideration.

Together, the case studies reinforce my conclusion. On the benefit side, for instance, the statutory rape cases exemplify Posner’s future-oriented consequentialist focus and his flexible decision-making style in adapting to changing social conditions and mores. Further, the case studies reveal that his empirical emphasis can, though it need not, contribute to decisions grounded in fact rather than intractable legal categories. They also demonstrate that his openness and exploration of all potential grounds for decisions—both pro and con—can facilitate the assimilation of legal pragmatism into conventional legal reasoning.

The candor and breadth of Posner’s reasoning frame issues in a manner conducive to an ongoing judicial debate on the merits of the factual and policy grounds of those decisions. The dissenting opinions in the ADA and statutory rape cases provide examples of the constructive dialectic that Posner’s approach engenders. His approach often successfully removes artificial conventions from legal reasoning, forcing those who disagree with him into the realm of useful fact and policy argument.

On the debit side of the ledger, however, the sudden abandonment of normal conventions of legal argument can leave readers bewildered by the meaning of certain Posner decisions. His free-wheeling style can leave litigants stranded in its wake; when they are unable to predict his lines of argument and analysis, it is difficult to respond appropriately. For instance, his treatment of the statutory rape issue in the Shannon case would have been difficult to predict, given the weight of opposing authority. Moreover, the result in Thomas would have been difficult to predict, given Shannon. Such problems are compounded when Posner relies on extra-record facts he has researched himself. Again, Posner’s nationwide analysis

225. See the quotation at the beginning of this article, supra page 455.
226. As well as the majority opinion in Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999).
of statutory rape laws and the medical evidence he unearthed concerning the progression of AIDS provide good examples.

These problematic aspects of Posnerian legal pragmatism are further compounded when conjecture, speculation, and uncorroborated personal values appear to drive his decisions. The ADA case, for example, exemplifies his frequent use of conjecture.\textsuperscript{227} Additionally, when Posner announces seemingly definitive decisions on issues far afield from those immediately before the court, the problems catalogued above can be magnified. Both the ADA and statutory rape cases present this potential. Finally, difficulties sometimes arise when he transmutes even legitimate scientific facts into legal conclusions without identifying translation difficulties, as in the ADA case. And even when Posner himself is able to successfully negotiate the shoals between law and science, future judges emulating his methods may not be so successful. My proposal, that litigants be provided further opportunity for input when appellate courts signal an intention to rely on scientific or technical evidence, could help mitigate the consequences of such wide-ranging use of extra-record evidence.

In sum, then, Posnerian pragmatism's strong focus on social utility presents a challenge to formalism. It also threatens to become highly activist, insofar as upsetting the formalist applecart could lead to abandonment of traditional, agreed-upon limitations on judicial conduct. When rendering useful decisions that will produce beneficial results is the central goal of judging, other goals of the system, such as fairness to parties and maintaining appropriate checks and balances between the branches of government, can be usurped. The counterargument, however, is that temptations to judicial arrogation of power are always present, and Posnerian pragmatism's transparency makes surreptitious power grabs less likely—or at least less likely to succeed in the long run. Formalist judges are subject to the same exigencies as pragmatist judges, though their manipulation of the law tends to be cloaked in conventional doctrinal garb that prevents a future litigant or judge from arguing or deciding that the emperor has no clothes.

An important corrective to many of the problems enumerated above could be to proceed more slowly in implementing aspects of the pragmatist agenda. In particular, expansion of the use of empirical evidence could progress cautiously. Introduction of extra-record evidence could be limited by imposition of explicit quality-control restrictions such as those of the \textit{Daubert}\textsuperscript{228} standards. Advance notice to the parties and an opportunity to be heard could also be required before judges could rely on extra-record evidence.\textsuperscript{229} Discretionary self-restraint cannot, by itself, avoid idiosyncratic excess; only a community of practicing pragmatic judges can do that. Until that time comes, the truly pragmatic approach is to exercise genuine restraint and accede, in many cases, to the current conventions of legal culture.

\textsuperscript{227} Weak empirical grounding for decisions does not produce the sort of clear and stable guidance that Posner endorses. The weak grounding criticism can apply to either legal or scientific factors: that is, the facts have not been validated by either the litigation process or scientific peer review.

\textsuperscript{228} \textit{Daubert v. Merrell Dow Pharm.}, 509 U.S. 579 (1993).

\textsuperscript{229} \textit{See Rice, supra note 26.}