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Judges and Judgment: In Praise of Instigators

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Judges and Judgment: In Praise of Instigators

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This essay celebrates judicial instigators, and Judge Richard Posner as instigator. It embraces a view of the judicial system as a system, one that can best achieve its myriad aims only if there is some variety in its constituent parts. Having some judges, some of the time, willing to ask hard questions about what the law is and should be is critical to ensuring the law achieves its intended aims. This essay illustrates this point by weaving together a single case about mutual fund fees with personal observations accumulated over a year as a clerk to Judge Posner and Posner's writings about how he judges. This analysis paints Posner as a jurist aware of his own humanity, attuned to the humanity of those before him, and willing to allow both to shape his judgment. This particular breed of pragmatism, and Posner's willingness to openly question a law's aims and effects, often enabled him to tee up issues in ways that enhanced the law. The judicial system would not be well served if all judges were carbon copies of Judge Posner, but it is far better off today because of his thirty-five years on the bench.

Introduction

This paper is about mutual funds. Because of that, it may put many to sleep long before we get to the heart of the matter. I encourage you right now to stay awake, or at least keep one eye propped open. For embedded in this story about mutual funds, rent seeking, the challenge of separating the good and the bad, and the even greater challenge of respecting autonomy in an environment where so many choices seem to be bad ones, is the story of a judge. That judge is the Honorable Richard A. Posner, aka RAP, Dick, Professor Posner, the one to be feared, the one to be revered, the one who inspires, the one who causes many to perspire, and the one who somehow gets it right even when he is wrong (and he is sometimes wrong). It is a story of how he judges. It is a story of curiosity and truth seeking. It is a story of respecting process and precedent while not being overly constrained by convention or rules. It is also a story of constantly seeing things anew, even when that requires letting go of views that seemed true when first embraced. It is a story of positionality and insight and law and humanity, and the perfection of embracing imperfection. It is a story of using stories to help others to see, and the power and limits of such methods.

Although this may all sound a little too new-agey to possibly be an account of Judge Richard Posner, let me assure you that there are reasons to use this type of language to understand who he is and how he judged. And let me further assure you that in the process of trying to uncloak something new about the brilliant and prolific Judge

* Professor of Law, Columbia University, ECGI. The author would like to thank John Coates, John Morley, and Quinn Curtis for helpful comments, Christian Ronald for excellent research assistance and Lawrence Lessig and Jesse Eisinger for inspiration. Mistakes are mine alone.

Posner, this paper will also seek to unmask something of how our legal system does and should work. For although there never will be another Judge Posner, his approach to judging holds lessons for all of us. I will suggest that much of Judge Posner's depth came not from his remarkable mind but his steadfastness in not allowing the legend that grew up around him to blunt his curiosity or contort his view of himself. Although not one for false modesty, he conscientiously, even if not consciously, avoided living on a cloud. The heart of what makes him a legend is less his brilliant intellect than his wisdom. And, fortunately for the rest of us, a mind need not be anywhere near as sharp as his to learn something from his capacity to hold tensions—humility enabled by utter self assurance; fairness through allowance for difference; transcendence that rests upon and is grounded in human fallibility. Most importantly, for purposes of this essay, was his treatment of the law as a corpus both greater than but inherently of the people who make it and in whose service it is deployed.

In a methodology that can be defended only by the meekness of the conclusions it supports, this paper weaves together the evolution of one case with Judge Posner's writing about judging and some personal observations to speculate on why the law needs more individuals like Judge Posner. Alongside doing right by litigants in any individual suit, producing "good" law is a critical function of the judicial system. Recognizing a particular court's position within a multi-tiered judicial system, and situating that system within a governance regime that imposes frictions on legislative and regulatory action, is critical to assessing what is and is not appropriate action for judges. Given ongoing learning, changing environments, and the potential for law to take form in the backwaters without anyone focusing on what it should be, the law should sometimes evolve. Judges that sit below the top of the hierarchy can aid this process by sometimes serving as instigators, flagging areas where the law is ill suited to the task at hand. This is but one role, and should not always triumph, but also should not be ignored. The occasional pragmatic instigator may stir up some trouble, but she can also play a critical role keeping the law alive. Allowing some judges, some of the time, to ask the tough questions about what the law and ought to be even when resolving a case does not so necessitate is critical to the health of the law. The core claim is thus a call to embrace instigators as an essential element of, rather than an affront to, an effective judiciary.

On the offhand possibility that you are wondering what any of this has to do with mutual funds, let me cut to the chase. The backbone of this paper is a case about whether a mutual fund investment advisor breached a fiduciary duty owed to its investors by charging too high of a fee for its services. This is a tricky area of the law, as most actively managed mutual funds charge fees in excess of what their returns can justify, and yet investors keep buying them. The case was decided by three of Judge Posner's colleagues on the Seventh Circuit Court of Appeals. Had it not been for Judge Posner, the case likely would have died there. But Judge Posner, never one to minimize his workload, decided to read that opinion when the lawyers took the often pro forma step of seeking a rehearing. And despite (or perhaps because) the unanimous opinion had been authored by Judge Easterbrook, Judge Posner decided that the reasoning was suspect and the case should be heard en banc. Four judges joined his dissent arguing that Judge Easterbrook had created a circuit split without so acknowledging and the case deserved the attention of the full Seventh Circuit. Although not enough to get the case heard en banc, the opinion did get the attention of the Supreme Court. The Court granted cert and soundly rejected Judge Easterbrook's approach, albeit in a narrow decision that largely reverted the law to where it stood before either Posner or Easterbrook got involved.

With respect to the law governing mutual funds, the Supreme Court's decision was a missed opportunity, but no great tragedy. Others have written, in great detail, on the mechanics of mutual fund fee litigation and the significance of the various opinions rendered in this case.[1] The account here addresses these issues, but only as a means rather than an end. The paper instead uses this dispute as a lens into lawmaking—the role of courts and particular judges on those courts, the role of lawyers who bring suits and those who defend against them, and the role of Congress, as both body and construct, in how judges apply laws that Congress adopts. Following in the spirit of Judge Posner, and hence exercising my prerogative to project onto Posner things he might never say himself, I will argue that Judge Posner embodies the importance of boldness and individualism to the law, and humble pragmatists may be particularly good in this role.

I. The Case

a. The Setup

We live in a world where many actively managed mutual funds are a scam. Not in a Bernie Madoff-type way. Most asset managers are not fraudsters and few regulated funds are Ponzi schemes. Many mutual fund advisors believe, quite fervently, in the value of the work they are doing. Some are even right to believe that they create value. Nonetheless, the overall picture is bleak. Herd behavior is common.[2] Eugene Fama and Kenneth French find that "on average, active mutual funds do not produce gross returns above (or below) those of passive benchmarks," which is bad news for investors given the higher fees for active funds.[3] Another recent study found that "over the 10-year investment horizon, 85.36% of large-cap managers, 91.27% of mid-cap managers, and 90.75% of small-cap managers failed to outperform" the relative benchmark, and the performance was almost as bleak when evaluating their performance over shorter time horizons.[4] And, even a recent study suggesting that mutual fund managers do create

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[1] See, for example, M. Todd Henderson, *Justifying Jones*, 77 U Chi L Rev 1027 (2010); John C. Coates IV, *The Downside of Judicial Restraint: The (Non-)Effect of* Jones v. Harris, 6 Duke J Const L & Pub Pol 58 (2010); John Morley and Quinn Curtis, *Taking Exit Rights Seriously: Why Governance and Fee Litigation Don't Work in Mutual Funds*, 120 Yale L J 84 (2010); Quinn Curtis and John Morley, *The Flawed Mechanics of Mutual Fund Fee Litigation*, 32 Yale J Reg 1 (2015); Lyman Johnson, *A Fresh Look at Director "Independence": Mutual Fund Fee Litigation and* Gartenberg *at Twenty-Five*, 61 Vand. L Rev. 497 (2008).

[2] Martijn Cremers, et al, *Indexing and Active Fund Management: International Evidence*, 120 J Financial Econ 539 (2016); Richard W. Sias, *Institutional Herding*, Rev. Fin. Studies 164 (2004).

[3] Eugene F. Fama and Kenneth R French, *Luck versus Skill in the Cross-Section of Mutual Fund Returns*, 65 J Finance 1915, 1916 (2010).

[4] Aye M. Soe and Ryan Poirier, *SPIVA U.S. Scorecard: Mid-Year 2016*, 1 (S&P Global 2016), http://media.spglobal.com/documents/SPGlobal_Indices_Article_15-September-2016_SPIVA+US+Mid-Year+Scorecard.pdf.

value, finds no evidence that the value created is passed onto investors rather than captured as rents.[5]

After the 2008 financial crisis, investors seemed to wake up these facts, as reflected in the rapid growth of lower fee index funds and passive ETFs.[6] Nonetheless, roughly $10 trillion remains invested in actively managed mutual funds. That's right: $10 trillion flowing through funds that charge fees that in nine of out ten cases swamp any value provided.[7] That market and those fees are what's at stake in this case.

Mutual funds sold to the public, whether open or closed, active or passive, are regulated as "registered investment companies," a status created by the Investment Company Act of 1940. This Act imposes a range of requirements on such funds, while largely exempting private funds, like hedge funds and private equity funds, sold only to institutions and very wealthy individuals. The notion that investment advisers have "a fiduciary duty *with respect to the receipt of compensation for services*," was added as Section 36(b) of the Act, in 1970.[8] A little more than a decade later, the Second Circuit held in *Gartenberg v Merrill Lynch Asset Management, Inc*[9] that this obligation included a duty not to charge excessive fees for the services provided and promulgated a six-factor test for determining whether fees are excessive.[10] Most courts subsequently confronted with a Section 36(b) claim have followed some version of the *Gartenberg* test.[11] Section 36(b) liability was thus a largely settled, even if not particularly satisfying, area of law until 2009.

b. The Seventh Circuit Debate

In 2009, Judge Easterbrook and two colleagues heard an appeal from Jerry Jones and other owners of Oakmark mutual funds claiming that the adviser to Oakmark funds had breached its Section 36(b) fiduciary obligations.[12] Judge Easterbrook agreed with the

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[5] Jonathan B. Berk & Jules H. van Binsbergen, *Measuring Skill in the Mutual Fund Industry*, 118 J. Fin. Econ. 1, 16 (2015) (finding that the average mutual fund manager does create value, but that "the average net alpha across all funds is not significantly different from zero, so there is no evidence that investors share in the fruits of this skill").

[6] For why this raises new concerns, see Charles Stein, *Active vs. Passive Investing* (Bloomberg, Dec 4, 2017), https://www.bloomberg.com/quicktake/active-vs-passive-investing.

[7] In previous work, I've offered a novel explanation for the amount of money flowing into such funds, suggesting that we can best understand these decisions as influenced by stock brokers and other intermediaries who regularly help retail investors wade through the nearly ten thousand mutual fund choices available, and who earn extra when their clients buy expensive funds. See Kathryn Judge, *Intermediary Influence*, 82 U Chi L Rev 573 (2015); Kathryn Judge, *Fee Effects*, 98 Iowa L Rev 1517 (2013).

[8] 15 USC § 80a-35(b); Investment Company Amendments Act of 1970, Pub L No 91-547, 84 Stat 1413 (1970), codified in various sections of Title 15 (emphasis added).

[9] 694 F2d 923 (2d Cir 1982).

[10] Id at 928.

[11] See *Jones v Harris Associates LP*, 559 US 335, 343 (2010) (noting that "until the Seventh Circuit's decision below, something of a consensus had developed regarding the standard set forth over 25 years ago in *Gartenberg*").

[12] See *Jones v Harris Associates LP*, 527 F3d 627 (7th Cir 2008).

lower court that the case should be dismissed, but he also went out of his way to "disapprove" of the *Garternberg* standard relied on by the district court.[13] According to Easterbrook, "[a] fiduciary duty differs from rate regulation."[14] In his assessment, this means that Section 36(b) creates a robust disclosure requirement and outlaws chicanery, but otherwise leaves to market forces the task of limiting the fees that mutual fund advisers charge their clients. He buttresses this position by analogizing the process through which mutual fund adviser fees are set to the processes establishing executive compensation. And he concludes by pointing to evidence that hedge fund managers are paid far more than mutual fund managers, making it "hard to conclude that Harris's fees must be excessive."[15]

The opinion has many Posner-like characteristics. It is courageous. It raises questions beyond those presented by the parties. It opts for a sweeping holding when a more narrow one would suffice. And it does so in the spirit of improving the law. In Easterbrook's view, a fiduciary obligation, even one specific to compensation, is not sufficient to entangle judges in the messy business of second guessing a price set in a market that, at least in some dimensions, is exceptionally competitive.

Judge Posner disagreed. He disagreed with Judge Easterbrook's reading of earlier Seventh Circuit cases, he disagreed with Easterbrook's failure to circulate the opinion prior to creating a circuit split, and, most importantly, he disagreed with Easterbrook's assumption that market forces could be relied on to keep fees in check.

Before going too deeply into Posner's opinion, it's worth recalling the setting in which he was writing. It was 2009. This was the year after Bear Stearns and AIG were bailed out; after Lehman Brothers failed and markets went into a tailspin. It was also deep into the greatest recession the country had experienced since the Great Depression. Americans were losing jobs and facing record numbers of foreclosures. Occupy Wall Street was going strong, as was the narrative of the crisis that had spawned it. The system is rigged; the rich get richer as the poor get poorer. Wall Street gets saved while Main Street suffers. Bankers had brought the country to the brink with their greed and shenanigans, yet not one was going to jail for it. It was in this environment that Judge Posner read Judge Easterbrook's opinion about the power of market forces and the problems of judicial intervention. It was against this background that Posner set about crafting a very different narrative.

You want to talk executive compensation?, Posner asks, alright, let's look at executive compensation. Let's examine the "growing indications that executive compensation in large publicly traded firms *often is excessive* because of the *feeble incentives* of boards of directors to police compensation."[16] Note how much is packed into this sentence. According to Posner, executive compensation is broken. CEOs, Posner tells us, are "often" paid too much. This is not just an acknowledgment that markets are imperfect; it is a suggestion that they are flawed. And those flaws are evidenced in

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[13] Id at 632.
[14] Id.
[15] Id at 634.
[16] *Jones v Harris Associates LP*, 537 F3d 728, 730 (2008) (Posner dissenting from denial of rehearing en banc) (emphasis added).

research documented in works about "Pay without Performance" and "Cronyism," and summed in newspaper articles on "the Imperial CEO" and how "In the Boardroom, Every Back Gets Scratched."[17] Posner then goes onto explain why Easterbrook's assumptions, ones that Posner might once have shared, have been revealed to be so erroneous. He talks about boardrooms full of executives who have a greater interest in protecting a world order that allows for excessive compensation, and the way compensation consulting are used to let boards off the hook for those decisions.

Posner goes on to explain: "Competition in product and capital markets can't be counted on to solve the problem because the same structure of incentives operates on all large corporations and similar entities, including mutual funds."[18] He quotes research on mutual funds finding that "business connections can mitigate agency conflicts," but they can also function as "channels for inefficient favoritism."[19] This is Posner not just giving voice to the plaintiffs in the suit, but speaking to the frustrations with finance that permeated public discourse of the time. And he's frank about the importance of the timing. As he explains, "[m]utual funds are a component of the financial services industry, where abuses have been rampant," and are "more evident now."[20] He is talking about finance as a site of bad behavior, a domain where market processes and participants cannot be trusted. He is implicitly invoking the crisis to say that we *now* know better. Market forces are not just imperfect, as Easterbrook concedes, they are flawed. "The governance structure that enables mutual fund advisers to charge exorbitant fees is industry-wide."[21] Exorbitant fees. Exorbitant.

Posner need not have gone this far. He could have noted that Easterbrook's approach created a circuit split, and merited further consideration accordingly. Instead, Posner took Easterbrook's narrative as his starting point, and he flipped that narrative on its head. Like the good pragmatist he purports to be, Posner used experience rather than theory as his starting point. And he tells us that experience shows the system is corrupt. Executives are overpaid; finance full of tricksters. So maybe, just maybe, there is role for the judiciary after all.

To be sure, Posner does not provide a satisfying explanation of what Section 36(b) obligations ought to entail, or the appropriate role of courts in adjudicating excessive fee claims. In taking Easterbrook's opinion as a starting point, he also reiterates a range of institutionally flawed analogies. There may be agency costs and other flaws in both the

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[17] Id (citing Lucian Bebchuck and Jesse Fried, *Pay without Performance: The Unfulfilled Promise of Executive Compensation* 23–24 (2004); Ivan E. Brick et al, *CEO Compensation, Director Compensation, and Firm Performance: Evidence of Cronyism*, 12 J Corp Finance 403 (2006); Gary Wilson, *How to Rein in the Imperial CEO*, Wall Street Journal A15 (July 9, 2008); Ben Stein, *In the Boardroom, Every Back Gets Scratched*, NY Times B9 (Apr 6, 2008)).
[18] Id.
[19] Id (quoting Camelia M. Kuhnen, *Social Networks, Corporate Governance and Contracting in the Mutual Fund Industry* (Mar 1, 2007), http://ssrn.com/abstract=849705 (visited on July 28, 2008), subsequently published as *Business Networks, Corporate Governance and Contracting in the Mutual Fund Industry*, 64 J Finance 2185 (2009)).
[20] Id.
[21] Id at 732.

processes through which executive compensation and mutual fund fees are established, but those processes are sufficiently different that the comparison probably adds more confusion than clarity to the matter. Nonetheless, putting the opinion—or rather dissent—in context, excuses at least some of these flaws. Not all opinions can or should fill the same function. Posner doesn't have the votes to make law. All he has is the option to explain why the case merits further attention; why the opinion, as decided, is wrong. And knowing full well that his court sits one step down from the top of the federal judiciary hierarchy, his aim seems clear: Explain to those up above why they should agree to hear the case.

c. SCOTUS Chimes In

The Supreme Court did indeed grant certiorari in *Harris* to resolve the question of the fiduciary obligations that a mutual fund adviser owes pursuant to Section 36(b). Consistent with Supreme Court Rule 10, and the structural understanding of the judicial system underlying this essay, that decision reflected a view by at least four members of the Court that the state of the law, not the correctness or incorrectness of the decision below, justified the Court's attention.[22] In further recognition of the distinct role of the Supreme Court, academics, industry groups and others, including the Solicitor General, submitted fourteen amici brief in which they provided thorough analyses of the issues at stake.[23] As one of these briefs, submitted by a group of law professors, explained: "By declining to define 'fiduciary duty' in Section 36(b), … Congress ceded to the federal courts *the duty* of imbuing this concept with operational meaning."[24] Judging by the Court's opinion, this exhortation fell largely on deaf ears.

In a unanimous opinion authored by Justice Alito, the Court rejected Judge Easterbrook's approach.[25] The Court concluded that *Garternberg* "has provided a workable standard for nearly three decades," and should be affirmed as the appropriate standard accordingly. It did so despite the fact, acknowledged by Justice Thomas in concurrence, that in those three decades, "no excessive fee suit has ever produced a verdict for plaintiffs."[26] As further pointed out by Justice Thomas in concurrence, the Court also failed to address directly the tension between the language in *Garternberg*, which seems to empower courts to exercise significant judgment with respect to the fairness of fees charged, with many subsequent lower court decisions take a much narrower approach despite paying lip service to *Garternberg*.

The vagueness that permeates much of the opinion gives way to clarity on one point. The Supreme Court disapproved of the back and forth between Easterbrook and Posner below. In Alito's view: "The debate between the Seventh Circuit panel and the

[22] Rules of the Supreme Court (2013).
[23] See generally *Jones v. Harris Associates: SCOTUSblog Coverage* and *Jones v. Harris Associates: Amicus Briefs*, SCOTUSblog (2009), http://www.scotusblog.com/case-files/cases/jones-v-harris-associates/.
[24] Brief of Amici Curiae Law Professors in Support of Petitioners, *Jones v Harris Associates LP*, No 08-586 9 (US filed June 15, 2010).
[25] *Jones v Harris Associates LP*, 559 US 335, 343.
[26] Quinn Curtis and John Morley, *An Empirical Study of Mutual Fund Excessive Fee Litigation: Do the Merits Matter?*, 30 J L Econ & Org 275, 277 (2014).

dissent from the denial of rehearing regarding today's mutual fund market is a matter for Congress, not the courts."[27] In his view, it seems, examining the mutual fund marketplace in order to understand the context in which mutual fund fees are set the effect of excessive fee litigation on that process is not a matter for judges, or at least not in the way Easterbrook and Posner approached it.

II. Putting *Jones* in context

As he extensive briefing reflects, there were a number of important issues before the Court in *Jones*. The Court's opinion answered few of them. In a piece summed up in its title, *The Downside of Judicial Restraint: The (Non-)Effect of* Jones v. Harris, John Coates bemoans that in "cho[osing] to give little additional meaningful guidance to lower courts on what factors to use," when evaluating a Section 36(b) claim, the "primary beneficiaries" of the Supreme Court's decision are likely to be lawyers who bring and defend against such claims.[28] In other subsequent work, Quinn Curtis and John Morley, explain the myriad reasons that even after *Jones*, "[e]xcessive fee liability has been implemented so poorly that the questions about its abstract value are almost beside the point."[29] In companion empirical work, they find that the size of a fund adviser is a more powerful predictor of whether it has faced suit than the relative size of the fees it charges. "[A]nd perhaps most importantly," they "found no evidence that fees declined in funds after they had been targeted by section 36(b) suits. This is disappointing," given that one "goal of section 36(b) is … to reduce fees going forward."[30]

Given how little impact *Jones* seemed to have on Section 36(b) litigation, it might be tempting to dismiss the case, and Posner's role in it, as having little import. Why bother writing a heated dissent from a petition that is usually denied as a matter of course? Why anger colleagues and invite censure from the Supreme Court? The remainder of this paper explores why, for Posner, there was no other way. And, by examining the three opinions in *Jones* in context, it suggests that the law is better off because of it.

a. An aside

I do not write as a dispassionate observer of Judge Posner. I write, instead, as a former clerk, one who can still vividly recall where I was sitting in the Stanford Law library when I opened an email from Judge Posner inviting me to come to interview for a clerkship in his chambers. Time froze. And in ways that I could not have fathomed at the time, my response to that email set off a chain of events that transformed the life that followed. Although I will not recount here the many reasons I am forever indebted to Judge Posner, that gratitude inevitably colors my analysis. I smile whenever I read his words, never quite sure if it is because of the beauty of his prose or the way those words bring him to life before me. I raise this not only to admit my biases, but because specific experiences I had as a clerk shape my understanding of Judge Posner, and sharing a few such moments can shed helpful additional light on who he is and how he judged.

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[27] *Jones*, 559 US at 353.
[28] Coates, 6 Duke J Const L & Pub Pol at 59–60 (cited in note 1).
[29] Curtis and Morley, 32 Yale J Reg at 12 (cited in note 1).
[30] Id.

By the time I received that fateful email, Posner was a legend. He was a larger than life figure who could loom across continents. This meant that when Posner the man walked into a room, he also had to grapple with the presence of Posner the Legend. He might well have enjoyed this at times, but for someone so eager to learn and engage, legendary status can also take away the fun. The last thing he wanted was to spend time with otherwise intelligent people rendered moot by his glow. So, consciously or not, Judge Posner had devised a set of tools to help ensure that Posner the Legend remained life-sized in conversation, at least when it suited him. I still recall how witty I felt when he seemed to laugh heartily during my interview. Any self satisfaction disappeared quickly after I joined chambers, as I observed him use that same laugh time and again to put others at ease, in hopes they might then become more interesting. I told myself that if I were ever to write a biography of Richard A. Posner, which I won't, I would title it, "Dick's Laugh," for that laugh, and his unusual insistence that his clerks address him by his first name, and a nickname at that, embody his unique approach to judging. He was a pragmatist and a visionary, as all know, but he was a particular breed of pragmatic visionary—one who knew where he stood, or at least had some sense of those contours.

b. Three opinions, three approaches to judging

With this background, we can revisit the three opinions in *Jones*, stylizing each approach just a bit, and putting each in context, to consider the role of different actors in the judicial system given the aim of "good" law. The claim is that the occasional instigator is a good thing for the law.

a. The Initial Instigator

In *Jones*, Judge Easterbrook plays a role that Posner often plays—instigator. Confronted with a case that could easily be resolved without stirring any feathers, Easterbrook used the case as an opportunity to step back and consider was at stake and how the law had gotten to where it had. To paraphrase, he said, I recognize the word "fiduciary," and based on my three decades on the bench, I don't think it can bear the load that *Gartenberg* places on it. I also know something about markets, and something about judges, and those experiences suggest that markets are far better than judges at determining the appropriate price to pay for mutual fund advisory services. Congress does seem to want courts to play a role, but that role is best understood as complementing a market-based regime by ensuring advisers disclose what they charge and don't engage in tricks. So I will uphold the decision of the district court, but I will also use the case to promulgate a new view of the law.

There are weaknesses to a judge instigating in this fashion. There is a risk of disruption and distraction, particularly if there are too many trying to play this role. The law often exists as it does for a reason. But put in the context of a multi-layered legal system, there are also real benefits to judges occasionally playing this role. In purporting to provide answers, Easterbrook was asking questions central to Section 36(b) yet relatively unaddressed in the decades of litigation invoking it.

The law can stagnate when no one is willing to stick his neck out and ask the tough questions. Sometimes the role of instigators is to draw attention to the ways new developments, new insights or changing mores render the state of the law ill suited to the tasks at hand. Other times, the role of an instigator is to question whether there was ever a method to the madness embodied in established doctrine. Law is sometimes the byproduct of thoughtful reflection and application, but it can also spread through inadvertence and inattention. Judges are busy. Dicta in one case can become a holding in the next and all that follow without anyone raising the first-order questions that animate Easterbrook and Posner in *Jones*. In an imperfect system, instigators can make it more likely that there is a method to the madness. The extensive secondary literature on Section 36(b) suggests that excessive fee litigation was imposing real costs on large mutual funds without having much of a beneficial impact on fee levels. Given the massive growth of mutual funds and other developments since 1982 when *Gartenberg* was decided, the appropriate contours of Section 36(b) liability merited more consideration than it had received.[31]

ii. Posner as Instigator

Let's now turn to Posner, and what makes him such a valuable instigator. Posner was not the initial instigator in *Jones,* but he was an instigator. He exercised his vote and voice in a procedural setting when such tools are rarely used. He was not assigned to *Jones.* He had the option of staying out of the matter completely. But he didn't. Instead, he authored an opinion that had no legal force for little reason other than to explain why the case mattered, and why the opinion should not stand. This took time, attention, and the willingness to offend a colleague. We can never know the counterfactual, but we do know that his gambit worked. His opinion helped get the attention of the public and the Supreme Court, and led to Easterbrook's opinion being reversed.

Although speculative, it is possible that Posner's gambit may had other payoffs as well. Academics are again taking up the question of the appropriate role of law in checking mutual fund fees.[32] Moreover, since 2009, there has been a significant shift from actively managed mutual funds and into more cost effective alternatives like index funds. The crisis surely helped spur this shift and the trend started before *Jones*, so other forces are at play.[33] Nonetheless, the trend is more pronounced in the United States than elsewhere, leaving open the possibility that *Jones* may have played a contributory role in drawing the public's attention to the mismatch between the fees they were paying and the value they were receiving.[34]

Returning to his influence inside the judicial system, Posner is a self identified pragmatist. For him, pragmatism is "an approach to decision making that emphasizes

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[31] See Morley and Curtis, 120 Yale L J at 84 (cited in note 1); Curtis and Morley, Yale J Reg at 1 (cited in note 1); Coates, 6 Duke J Const L & Pub Pol at 58 (cited in note 1); John C. Coates IV and R. Glenn Hubbard, *Competition in the Mutual Fund Industry: Evidence and Implications for Policy*, 33 J Corp L 151 (2007); William A. Birdthistle, *Investment Indiscipline: A Behavioral Approach to Mutual Fund Jurisprudence*, 2010 U Ill L Rev 61 (2010); Brief for Amici Curiae, Professor Deborah A. DeMott and Professor Mark L. Ascher, in Support of Petitioners, *Jones v Harris Associates LP*, No 08-586 (US filed June 17, 2010); Brief of Law and Finance Amici Curiae in Support of Respondent, *Jones v Harris Associates LP*, No 08-586 (US filed Sept 3, 2009).
[32] See notes 1, 30.
[33] Sushko and Turner, *Implications of Passive Investing* at 114 (cited in note 2).
[34] Id at 116.

consequences over doctrine"[35] and pragmatic judges are "[j]udges who don't insist that a legalistic algorithm will decide every case."[36] Pragmatism as he practiced it thus means *both* a way of judging and a way of owning those judgments. One cannot be separated from the other.

This understanding of what judges ought to do goes to the core of Posner's, sometimes harsh, exchanges with Justice Scalia. In Posner's view, the law does not just allow, but requires judges to exercise judgment. This does not mean ignoring text or precedent. It is about the need for law, statutory or otherwise, to be interpreted, brought to life, and given meaning by judges. It is about a legal system that relies on judges who are human and who see the humanity of those before and around them. It is about being willing to exercise judgment, and being frank about those judgments.

Posner doesn't engage in subterfuge, well-meaning or otherwise, when deciding a case. He makes his rationales plain, allowing other judges, other lawmakers, and anyone else who might be interested, to assess for themselves the issues at stake. This comes through in *Jones*, in Posner's embrace of what the crisis revealed regarding the pervasive problems plaguing finance. It also comes through in his willingness to look to recent work on the myriad reasons that market forces cannot be trusted as fully as he himself once believed. He was capable of having his thinking evolve in light of new evidence, and his assessment of thee issues before him shaped by the *zeitgeist* of the moment, because that is part of what he assumes a good judge does. He looks at the text, but he does not blind himself to realities apparent only by looking away from the text to the litigants before the court and the world that surrounds them all.

To be sure, there are plenty of risks in allowing Easterbrook, Posner or others to instigate in this manner. The most pressing may be that in embracing some judicial diversity, similar litigants may face different outcomes, undermining one sense of fairness that is obviously core to the judiciary. Instigating, however, need not affect outcomes. At least some of the time when Posner took on this role, and the law as it stood was at odds with what he thought it ought to be, he followed precedent while flagging (sometimes successfully) why the law was suboptimal.[37] Similarly, here, the plaintiffs would have lost regardless of the test used to dismiss their claims.

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[35] Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 Cal L Rev 519, 539 (2012), online at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2815&context=journal_articles.

[36] Id.

[37] See, for example, *Khan v State Oil Co*, 93 F3d 1358, 1363 (7th Cir 1996) (adhering to Supreme Court precedent in *Albrecht v Herald Company*, 390 US 145 (1968), despite criticizing *Albrecht*'s "increasingly, moth-eaten foundations"—an approach praised by the Supreme Court when it subsequently overruled *Albrecht*, see *State Oil Co v Kahn*, 522 US 3, 20 (1997)); *Planned Parenthood of Wisconsin v Doyle*, 162 F3d 463 (7th Cir 1998) (holding unconstitutional a Wisconsin law criminalizing partial-birth abortion under the Supreme Court's settled "undue burden" standard but nevertheless noting aspects of the law that would fail rational basis review—reasoning adopted in part by a Supreme Court majority in *Stenberg v Carhart*, 530 US 914 (2000)).

More importantly, ensuring comparable outcomes in comparable cases is but one measure of fairness. Ensuring that all litigants receive outcomes consistent with the aims and design of the law governing their actions is another. Recognizing the many reasons the law on the books can vary from this notion of "good" creates a space, a need, for instigators even if it does mean some variation in outcomes. The analysis here further suggests that because no judge has omniscience regarding a law's aims or effects, a pragmatist who openly questions a law's aims and effects, and who does so from a position that is grounded in experience rather than purporting to derive legitimacy from on high, may play a particularly important role instigating reconsideration of current doctrine.

iii. Why stick my neck out when there's a nice hole in front of me?

The increasingly normalized sense that judges should not to exercise judgment comes through in Alito's chiding of both Easterbrook and Posner. Neither suggests a reading of Section 36(b) that ignores the text. They were offering alternative readings of that text. Even Easterbrook, who was closer to the line, grounds much his analysis on the meaning of a term—fiduciary—which has long been brought to life through judicial lawmaking. It is also a term, as Alito's opinion otherwise highlights, that has been given different meanings depending on the context, leaving courts no way to avoid the task of making meaning in interpreting it. To be sure, both looked beyond the text, and to factors that Alito viewed as inappropriate, but whether judges should ever look up from the page is the question at stake in the analysis here.

True to his critique, Justice Alito shows little indication that his attention has strayed too far from the text. And, rather than forging new ground, Alito hews closely to an unsatisfying and ambiguous status quo. This is different than Sunstein-style minimalism, though it might be taken for such. Minimalism is about scope. The compromises that degrade Alito's opinion arise not from its narrowness, but from its vagueness. As John Coates nicely summarizes: "In enacting section 36(b), Congress gave the federal courts an unappetizing job: to discern limits based on a vaguely stated standard on compensation in what is clearly both a conflicted but also competitive context. That job necessarily involves exercise of judicial discretion."[38] The Court's opinion was deficient because it "punt[ed] the entire shapeless mess of section 36(b) back to the federal district courts" and "squashed the nascent effort by the Seventh Circuit to begin th[e] process" of "attempt[ing] to put some order on the chaos invited by the statutory standard."[39]

Whatever Congress intended Section 36(b) to achieve, it cannot fulfill that role unless it has sufficient flesh for its limits to be cognizable to courts and, more importantly, to the boards of directors of mutual funds. For it is in the boardroom that Section 36(b) will succeed or fail in having some impact on the fees that mutual funds, and investors in those funds, pay for advisory services. This is the why Coates is so frustrated. And empirical work, by Coates and others, suggests reason for concern. Recall, Quinn and Morley's findings suggest that Section 36(b) hasn't been helpful in reducing fees even at those funds that are sued. Section 36(b) may never be a panacea for mutual fund

[38] Coates, 6 Duke J Const L & Pub Pol at 64 (cited in note 1).
[39] Id.

investors, and excessive fee litigation is not suited to be the primary tool for ensuring that mutual fund advisers charge reasonable fees, but Congress added the section for a reason. Although Alito rejected Easterbrook's effort to read it out of the scheme, Alito also turned away from the opportunity—recognized as such by amici on both sides of the issue—to provide much needed guidance regarding how Section 36(b) ought to function.

In trying avoid exercising the judgment required to provide meaningful guidance regarding when the fees a fund adviser charges are so high as to violate Section 36(b), Justice Alito is like a worker saving for retirement who refuses to place his money in anything other than a savings account at his local, FDIC insured bank. He may be protected from bank failure and the vagaries of the market, but he is ultimately setting himself (but in this case, the law) up to fail. He is allowing inflation to eat away at his spending power and foregoing an opportunity to diversify into assets that, while risky individually, have over time consistently provided the much higher returns most workers need in order to aggregate the wealth needed to enjoy retirement. Sometimes what seems like the safe path is actually a path toward a slow death. Posner and Easterbrook took positions that recognized this.

The Court sits at a different place in the legal system, and greater modesty may be warranted accordingly. But modesty can mean many things, and the type of modesty that the Court increasingly insists on exercising may in time do more harm than good. Congress sometimes wants judges, and regulators, to exercise judgment. There is no reason *a priori* that avoiding such commands is any less disrespectful of Congress than decisions to ignore the text altogether.

Justice Alito seems to suggest that Posner crossed a line in looking beyond the text to understand the text. The opinion echoes a seemingly growing consensus that judges can and should be dispassionate, distant and objective to the point of removing who they are from the judicial process. There is something appealing about this in the abstract. Wouldn't the law be more fair, after all, if all those applying it did so uniformly, in a manner more akin to a robot than a man?

The Judge Posner I got to know as a clerk never clung to such illusions. He may have appeared cold to those paying heed to the wrong cues, and, like most members of the federal judiciary and most educated white males of his generation, he enjoyed privileges of the kind that can blind. But this is where Judge Posner the judge cannot be divorced from Dick Posner the person. Both were constantly observing, and remarkably attuned to what they saw. When deciding a suit challenging a health insurer's refusal to cover bariatric surgery for an insured, Judge Posner rendered a short opinion applying established law and deferring to the insurer's determination.[40] But, if I may, he did so only after he contemplated and allowed himself open up to what the decision may mean for the insured. He reflected on the gait and possible discomfort of some of the larger individuals that he saw walking along the beach in Michigan where he spent many a weekend. He followed the law but not blindly.

[40] See *Manny v Central States, SE and SW Areas Pension and Health and Welfare Funds*, 388 F3d 241, 246–47 (7th Cir 2004).

In addition to seeing those before him, Posner saw himself. Although no one would ever accuse Judge Posner of being a man of the people, he was at least aware that he was not. I recall him discussing over lunch the bubble in which he and his colleagues lived. He saw it symbolized in how they moved from home to work. As he explained it, in contrast to most who worked in the Dirksen Building who relied on public transportation, most judges drove. They did so because they had the privilege of parking in lot directly underneath the building. Upon exiting their autonomous vehicles, they were then shuttled up the building in an elevator reserved just for the judiciary. They could thus move from the comfort of their homes to chambers without interacting with anyone, except the guards who ensured their safety, or taking so much as a breath of fresh air. He told the story with the express point of conveying just how insulated a life it is to be a federal judge. He was the butt of the story.

Judge Posner may have said more absurd things than any other member of the federal judiciary during his time on the bench. As closely as he looked at the world, and as much as he saw, there was a lot he didn't understand. He too is human and has biases that do not always serve. But he never invoked use the illusion that any man-made institution, be it Congress or the judiciary, could be anything other than flawed and human to obscure the fact that in each and every case, he was a human being applying man-made law in a way that would affect human beings and the evolution of the law.

It has become trendy for people of power to deny that they have it. CEOs blame shareholders and a skewed interpretation of the law to pretend that they lack agency when making decisions that harm workers or others.[41] The President blames Congress when carrying out an enforcement policy that separates children from their parents at the border. The Treasury Secretary and Chair of the Federal Reserve blame a lack of legal authority for the decision to allow Lehman Brothers to fail, despite the flexibility they found in the law to save other institutions. A decade passes, and no top executive is prosecuted for actions taken leading up to the 2008 financial crisis.[42]

Alito's decision here is less extreme than these examples. The *Jones* decision was no great injustice. But that doesn't render it harmless. When courts, again and again, duck the opportunity and obligation to forge law and provide useful clarity, they may shield themselves from protests but they also may contribute to a slow erosion of trust in the judiciary.[43]

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[41] Multiple CEOs of drug companies have recently explained massive increases in the pricing of critical drugs as obligated by duties to their shareholders. Chris Matyszczy, Move Over, Martin Shkreli. This CEO Says It's His 'Moral' Imperative to Raise a Drug's Price By 400 Percent, Inc., Sept. 11, 2018, https://www.inc.com/chris-matyszczyk/move-over-martin-shkreli-this-ceo-says-its-his-moral-imperative-to-raise-a-drugs-price-by-400-percent.html.
[42] Jesse Eisinger, The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives (2017).
[43] As Lawrence Lessig has explained, we are at a historical moment when the public's trust in institutions is faltering, in significant part because of a slow erosion, or "corruption," of institutions that are meant to play important public roles. The combination of judicial avoidance with an exacerbated tendency to disguise the rationales

Conclusion

Small-c conservatism has an important role to play in the process of judging. Continuity and consistency in the law requires respect for text and adherence to precedent. We should all be grateful that the judiciary is not constituted of carbon copies of Judge Posner. But it is possible that we are locking up too much of the law in a savings account, only to have it diminish in stature and meaning over time. I am fearful that the tendency of so many, in and outside the law, to defer to institutions and commands as somehow outside themselves, is contributing to a slow decay that is eating away at the social core of these bodies.

Judges are not and should not be robots. What they do is not and cannot be rote. Judges at their best respect their role as something larger than themselves, deferring to text, precedent and other constraints accordingly, but also embracing the humanity, quirks, and even warts of all of the constituents whose collective actions contribute to this corpus we call law. There will never be another judge like Judge Posner, but for the sake of the law, I hope that a few more life-sized, larger than life figures come to the fore.

for that avoidance may be contributing to this institutional corruption. Lawrence Lessig, America Compromised (2018).