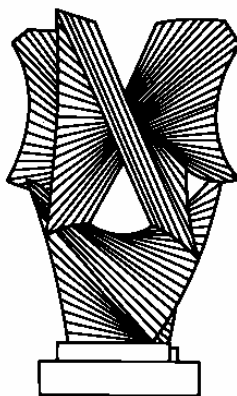


# CHICAGO

JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 331  
(2D SERIES)



## Judge Richard Posner on Civil Liberties: Pragmatic Authoritarian Libertarian

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February 2007, revised March 2007

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# Judge Richard Posner on Civil Liberties: Pragmatic Authoritarian Libertarian

Bernard E. Harcourt

## INTRODUCTION

How do you reconcile an opinion like Edmond v Goldsmith<sup>1</sup>—or any of those other streaks of libertarianism in areas ranging from drug control to human sexuality—with the anti-civil libertarian positions that Richard Posner advocates in his book Not a Suicide Pact: The Constitution in a Time of National Emergency?<sup>2</sup> The book itself is self-consciously directed against a civil libertarian framework. “The sharpest challenge to the approach that I am sketching,” Richard Posner knowingly anticipates, “will come from civil libertarians,” by which he means those “adherents to the especially capacious view of civil liberties that is often advanced in litigation and lobbying by the American Civil Liberties Union.”<sup>3</sup> In his book, Richard Posner argues in defense of the use of coercive interrogation techniques “up to and including torture”<sup>4</sup>; in support of the National Security Agency (NSA) program of warrantless electronic surveillance of American citizens<sup>5</sup>; in favor of criminally punishing the dissemination (including by the media) of classified material concerning national security<sup>6</sup>; and in defense of the constitutionality (though not yet the necessity) of prohibiting extremist speech.<sup>7</sup> By the end of the book, Richard Posner advances a novel judicial doctrine of “national security necessity” which would essentially extend a form of qualified immunity “to national security officials who violate a constitutional right in good faith in compelling situations of necessity,” as a better and simpler alternative to presidential pardons.<sup>8</sup>

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<sup>1</sup> 183 F3d 659 (7th Cir 1999), affd, City of Indianapolis v Edmond, 531 U.S. 32 (2000).

<sup>2</sup> Richard A. Posner, Not a Suicide Pact: The Constitution in a Time of National Emergency (Oxford 2006).

<sup>3</sup> Id at 41.

<sup>4</sup> Id at 152.

<sup>5</sup> Id at 99–100.

<sup>6</sup> Id at 105–11.

<sup>7</sup> Id at 152.

<sup>8</sup> Id at 155.

In the Edmond case, in contrast, Judge Posner enjoins the Indianapolis police department from setting up effective roadblocks to catch drug offenders.<sup>9</sup> The roadblocks, it seemed, had everything going for them: they distributed the costs of enforcement evenly across motorists, interfered as minimally as possible with their movement, invaded only slightly their privacy interests, and, according to everyone on the Seventh Circuit panel, produced very “high” rates of successful searches.<sup>10</sup> They were also randomly administered, which means that police officers could not individually discriminate against African-American drivers—or at least, less easily.<sup>11</sup> Despite this, Judge Posner reverses the lower federal court—which had not enjoined the police practice—and puts a stop to the roadblocks, resting the decision on the arguable notion that the police did not have any “individualized suspicion” to stop and question any motorist<sup>12</sup>—a legal fiction that really makes little sense to anyone, especially to an economist or a law-and-economics trained lawyer, who conceives of reasonable suspicion in probabilistic terms. As Judge Frank Easterbrook makes plain in his dissenting opinion, it is extremely easy to write the decision the other way,<sup>13</sup> in fact, the guiding federal precedent in roadblock cases seems to be that the government wins and the civil libertarians lose. Judge Posner nevertheless sides with the civil libertarians in a decision that is affirmed by the liberal wing of the Supreme Court.

How then do we reconcile Judge Posner the author of the Edmond opinion and other libertarian positions ranging from drug enforcement<sup>14</sup> to anti-sodomy statutes<sup>15</sup> with Richard Posner the author of Not a Suicide Pact?

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<sup>9</sup> Edmond, 183 F3d at 666.

<sup>10</sup> Id at 662.

<sup>11</sup> Id at 663.

<sup>12</sup> Id.

<sup>13</sup> See id at 666–71 (Easterbrook dissenting).

<sup>14</sup> Richard Posner, in his personal capacity, is substantially opposed to the war on drugs. Posner writes that, “If the resources used to wage the war were reallocated to other social projects, such as reducing violent crime, there would probably be a net social gain.” He adds that “we normally allow people to engage in such [self-destructive] behavior if they want; it is an aspect of liberty.” See, Richard Posner, The War on Drugs, The Becker-Posner Blog (Mar 20, 2005), online at [http://www.becker-posner-blog.com/archives/2005/03/the\\_war\\_on\\_drug.html](http://www.becker-posner-blog.com/archives/2005/03/the_war_on_drug.html) (visited Feb 23, 2007).

<sup>15</sup> Richard Posner favored decriminalization of homosexual sodomy before the Supreme Court’s decision in Lawrence v Texas, 539 US 558 (2003), striking down Texas’ homosexual sodomy statute. See Richard A. Posner, Sex and Reason 294–299 (Harvard 1992). Posner develops in his work, Sex and Reason, an economic theory of sexuality that, as a descriptive matter, embraces a rational choice perspective on sexual behavior and, from a normative perspective, adopts a libertarian position on sexual regulation—“not to be confused,” Posner emphasizes, “with either libertine or modern liberal.” Id at 3. See generally Bernard E.

In his book, Richard Posner offers a simple answer: the discontinuity merely reflects the need to recalibrate the weights associated with the conventional balance between personal liberty and public security in the case of national emergencies. All constitutional analyses of law enforcement programs, Posner explains, rest on a balancing between the competing constitutional values of liberty and security. In times of emergency, those values need to be recalibrated so that public safety is afforded slightly greater weight. Richard Posner writes:

I have argued that the proper way to think about constitutional rights in a time such as this is in terms of the metaphor of a balance. One pan contains individual rights, the other community safety, with the balance needing and receiving readjustment from time to time as the weights of the respective interests change. The safer we feel, the more weight we place on the interest in personal liberty; the more endangered we feel, the more weight we place on the interest in safety, while recognizing the interdependence of the two interests.<sup>16</sup>

A national emergency, such as a war, creates a disequilibrium in the existing system of constitutional rights. Concerns for public safety now weigh more heavily than before. The courts respond by altering the balance, curtailing civil liberties in recognition that the relative weights of the competing interests have changed in favor of safety. This is the pragmatic response, and pragmatism is a dominant feature not only of American culture at large but also of the American judicial culture.<sup>17</sup>

This explanation has the virtue of simplicity. What I would like to suggest, though, is that a close reading of the Edmond opinion reflects a slightly more complicated and technical framework than mere balancing—one that ultimately revolves around a choice concerning the proper level of analysis to review law enforcement programs. The framework derives from a libertarian origin and, under normal conditions, tilts ever so slightly in favor of civil liberties. At the same time, though, it is deeply pragmatic—it ensures, for ordinary criminal cases, the regular structure of constitutional analysis, including, for instance, the need for “individualized suspicion” to meet the standard of reasonable suspicion, but it carves out a massive exception for national

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Harcourt, Foreword: “You Are Entering a Gay- and Lesbian-Free Zone”: On the Radical Dissents of Justice Scalia and Other (Post-) Queers. [Raising Questions About Lawrence, Sex Wars, and the Criminal Law], 94 J Crim L & Criminol 503, 513–515 (2004).

<sup>16</sup> Posner, Not a Suicide Pact at 148 (cited in note 2).

<sup>17</sup> Id at 147.

security emergencies that operates predominantly by means of a procedural device that triggers a program-level cost-benefit analysis.

The complete framework operates as follows. In ordinary criminal cases involving traditional police functions, the reasonableness of a search is determined by the existence or non-existence of “individualized suspicion of wrongdoing.” The default position protects individual liberty, and this can only be overcome by the presence of individualized suspicion. This represents a libertarian framework insofar as it does not allow cost-benefit analysis or pragmatic considerations. In contrast, in the case of a national emergency, the reasonableness of a search turns on an evaluation—at the program level—of the costs and benefits of the program. This represents a social welfare calculus and it tends to favor the government.

I interpret this framework, ultimately, as pragmatic libertarianism authoritarianism because it reveals a personal taste and inclination on Richard Posner’s part that favors law enforcement authority over civil liberties whenever the stakes are high. These terms—libertarian, pragmatic, and authoritarian—may seem hard to reconcile at first blush, but I hope to make their relation, or interdependence, more coherent over the course of this Essay.

Posner is brutally honest in his book and concedes that the weighing of liberty and security is a metaphorical process that is entirely subjective. “[T]he ‘weighing,’” Posner writes, “is usually metaphorical. The consequences judges consider are imponderables, and the weights assigned to them are therefore inescapably subjective.”<sup>18</sup> How and when to add weights in the case of a national emergency, it turns out, reveals more about the judge and his or her personality, than it does about national security needs. “Each judge brings to the balancing process preconceptions that may incline him to give more weight to inroads on personal liberty than to threat to public safety, while another judge, bringing different preconceptions to the case, would reverse the weights,” Posner concedes. “The weights are influenced by personal factors, such as temperament (whether authoritarian or permissive), moral and religious values, life experiences that may have shaped those

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<sup>18</sup> Id at 24–25.

values and been shaped by temperament, and sensitivities and revulsions of which the judge may be quite unaware.”<sup>19</sup>

What I would like to propose in this Essay, then, is to read closely Judge Posner’s opinion in Edmond against the backdrop of his book Not a Suicide Pact, in order to interpret—a bit as one would a Rorschach inkblot—the temperament, values, and sensitivities of a remarkable jurist and wonderful colleague, Judge Richard Posner, on the twenty-fifth anniversary of his accession to the federal bench.

#### I. INDIVIDUALIZED SUSPICION VERSUS PROGRAM-LEVEL REVIEW

In Edmond, Judge Posner, sitting as chief judge, was called upon to decide the constitutionality of police roadblocks intended to detect drug contraband.<sup>20</sup> On six occasions between August and November 1998, the Indianapolis police department had set up roadblocks on the city streets to catch drug offenders. The location of these roadblocks were determined weeks in advanced based on information regarding area crime statistics and traffic flow. The roadblocks were conducted during the daytime and were identified with signs that read: “NARCOTICS CHECKPOINT \_\_ MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP.”<sup>21</sup> At each site, approximately thirty police officers were present, and they would stop in total a predetermined number of vehicles. A group of vehicles would be diverted to the search area, and the other traffic would then be allowed to go through until the police had finished processing the group of stopped vehicles.<sup>22</sup> With regard to each stop, a police officer would approach the driver and request his or her driver’s license and car registration. The stopped cars and their passengers would then be subject to a plain view search of the interior through the car windows, and a dog-sniffing search of the exterior of the automobiles. According to the police, the entire process was designed not to exceed five minutes.<sup>23</sup>

Over the course of the six roadblocks, 1,161 vehicles were stopped. The stops produced 55 drug-related arrests and 49 non-drug related arrests (for offenses such as

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<sup>19</sup> Id.

<sup>20</sup> Judge Posner’s opinion was affirmed by the United States Supreme Court. See City of Indianapolis v Edmond, 531 US 32 (2000).

<sup>21</sup> Edmond, 531 US at 35–36.

<sup>22</sup> Id at 35.

<sup>23</sup> Id.

driving with an expired driver’s license), resulting in a 4.74 percent drug-arrest hit rate and an overall hit rate of 8.96 percent.<sup>24</sup>

The roadblocks were perceived as successful in detecting illicit drug and other criminal violations. Judge Posner repeatedly refers to the resulting hit rate as “high” and adds that it is “vastly higher than, for example, the probability of a hit as a result of the screening of embarking passengers and their luggage at airports.”<sup>25</sup> Judge Posner writes—though there is no factual basis in the record for this—that “the deterrence of drug offenses produced by these hits advances the strong national, state, and local policy of discouraging the illegal use of controlled substances.”<sup>26</sup> Judge Easterbrook similarly refers to the program in glowing terms: “The program is spectacularly successful as roadblocks go; 9.4% of those stopped are arrested, with the reason equally divided between driving and drug crimes.”<sup>27</sup> Citing the Martinez-Fuerte Border Patrol case and the Sitz sobriety checkpoint case—cases which involved hit rates of 0.12 and 1.6 percent respectively—Easterbrook notes that “[r]oadblocks with much lower rates of success have been held consistent with the fourth amendment.”<sup>28</sup>

Though admittedly important to a cost-benefit analysis, Judge Posner’s opinion does not turn on the rate of successful searches, but rather on the level of the reasonableness assessment—on whether the reasonableness of any search is to be decided at the level of the entire roadblock program or at the level of an individual motorist stop. Judge Posner makes this clear in the very first paragraphs of the opinion: if the court were to adopt a program-level analysis, Posner suggests, then the court would perform a cost-benefit analysis and the outcome would most certainly favor law enforcement. Most program-level evaluations of costs and benefits do. But if the court were to adopt an individual-level assessment focused on the individual stop, the outcome would likely differ. Posner writes:

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<sup>24</sup> Edmond, 183 F3d at 661.

<sup>25</sup> Id at 662.

<sup>26</sup> Id (emphasis added).

<sup>27</sup> Id at 666 (Easterbrook dissenting). I’m not sure how Judge Easterbrook got to the 9.4 percent figure. Both Judge Posner and Justice O’Connor report similar search success rates of 104 motorists of a total pool of 1,161, or 8.96 percent. See Edmond, 531 US at 35; Edmond, 183 F3d at 661 (majority).

<sup>28</sup> Edmond, 183 F3d at 666 (Easterbrook dissenting), citing United States v Martinez-Fuerte, 428 US 543 (1976) and Michigan Department of State Police v Sitz, 496 US 444 (1990).

Whether the seizures effected by Indianapolis's drug roadblocks are reasonable may depend on whether reasonableness is to be assessed at the level of the entire program or of the individual stop. If the former, these roadblocks probably are legal, given the high "hit" rate and the only modestly intrusive character of the stops.<sup>29</sup>

In this sense, the distinction between program-level and individual-level analyses is outcome determinative. The program-level assessment triggers a cost-benefit analysis which, in practically all cases, favors law enforcement. The major cost in the case of the Indianapolis roadblocks is the waste of time and invasion of privacy suffered by each person stopped and questioned; other costs include the opportunity cost of using those police officers on more pressing police business—such as solving or preventing serious crimes like murder or robbery—the equipment costs associated with setting up a barricade, and the costs of publicizing and justifying the intervention (maybe the police department had to issue a press release and conduct a press hearing, etc.). The benefits of the program include the detection of drug contraband, the detection of derelict drivers who either have no registration or no licenses, and the deterrent effect on illicit drug consumption associated with the publicity surrounding the program—what Judge Posner refers to, earlier, as “the deterrence of drug offenses produced by these hits.”<sup>30</sup> A program-level cost-benefit analysis would compare the aggregated costs and benefits. As Judge Posner suggests, at the program-level the equation would likely favor the roadblocks because of the supposedly large deterrent effects.

But an individual-level assessment would likely go the other way, especially in cases involving randomized searches where there is no witness identification or police intelligence. The individual-level assessment requires a showing of some “individualized suspicion of wrongdoing,” and that will only exist in certain cases, such as those where there are identifications or observations by the police. The requirement of individualized suspicion does not trigger a cost-benefit analysis and therefore does not allow for pragmatic considerations involving the needs of law enforcement.

Judge Posner acknowledges that the program-level analysis is a pro-government standard. Posner writes:

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<sup>29</sup> Edmond, 183 F3d at 661 (majority).

<sup>30</sup> Id at 662.

Because it is infeasible to quantify the benefits and costs of most law enforcement programs, the program approach might well permit deep inroads into privacy. In high-crime areas of America's cities it might justify methods of policing that are associated with totalitarian nations. One can imagine an argument that it would be reasonable in a drug-infested neighborhood to administer drug tests randomly to drivers and pedestrians.<sup>31</sup>

Knowing this, Judge Posner nevertheless declares that, in conventional criminal law enforcement settings, an individual-level assessment is ordinarily appropriate: “courts do not usually assess reasonableness at the program-level when they are dealing with searches related to general criminal law enforcement.”<sup>32</sup> Or at least, “ordinarily” so.<sup>33</sup> Judge Posner, reviewing prior cases, finds four exceptions to the ordinary situation. Those exceptions include, first, the case where police officers have information that a dangerous criminal is escaping along a certain route. Here, there is heightened risk that allows for preemption in favor of program-level review.<sup>34</sup> Second, and this is perhaps the most important in relation to Posner's book Not a Suicide Pact, there is an exception when law enforcement faces a terrorist threat. Posner offers the following example: “if the Indianapolis police had a credible tip that a car loaded with dynamite and driven by an unidentified terrorist was en route to downtown Indianapolis.”<sup>35</sup> In this case of national emergency, the court should switch to the program-level review. Judge Posner identifies a third exception for regulatory measures, such as sobriety checkpoints or other randomized search programs involving drug testing for law enforcement officers or railroad engineers; and a fourth exception for immigration checkpoints searching for illegal immigrants or contraband crossing the borders.<sup>36</sup>

In all these exceptional cases, Judge Posner declares, courts reviewing police practices should and do properly adopt a program-level cost-benefit analysis—which, not surprisingly, results in their being found constitutional. Thus, by sorting police practices along the lines of traditional criminal law enforcement versus emergency and regulatory

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<sup>31</sup> Id

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Id at 662–63, citing United States v Harper, 617 F2d 35, 40–41 (4th Cir 1980).

<sup>35</sup> Id at 663.

<sup>36</sup> Id.

enforcement, Judge Posner is in effect using the choice of the level of review to allow some roadblocks, but not others. The alternative, Posner suggests with a slip of the pen, is to either ban all or allow all roadblocks: “The alternative would be to rule that either all roadblocks are illegal or none are, which would be akin to punishing all killings identically because the ‘objective’ fact is that someone has died.”<sup>37</sup> I say “slip of the pen” because those are not really the two “alternatives,” naturally. The real alternatives are either an individual- or a program-level review. It’s only if that choice is entirely outcome determinative that the existing alternatives become an all-or-nothing proposition.

In contrast to Judge Posner, Judge Frank Easterbrook, writing in dissent, adopts precisely the kind of program-level analysis that inescapably favors law enforcement. What is required, Judge Easterbrook writes, is an analysis of the costs and benefits of the program. There is no distinction between traditional criminal law enforcement or regulatory programs, and no special exception carved for terrorism or other extraordinary circumstances: the program-level analysis applies, and it applies across the board to all roadblock cases.<sup>38</sup>

## II. PERSONALITY, VALUES, AND SENSIBILITIES

The first point to make, then, is that Judge Posner displays a slight libertarian tendency. In ordinary criminal cases, where the purpose of the police intervention is the traditional enforcement of the criminal law, police practices are to be evaluated using an individual-level assessment and require a finding of individualized suspicion. In contrast to a program-level review, the individual-level assessment rests on a libertarian framework, in the sense that the default position favors individual liberty. That default can only be overcome under very strict and precise conditions involving the existence of “individualized suspicion.” No cost-benefit weighing, nor any pragmatic considerations can overcome the liberty presumption. This in itself is libertarian-leaning.

But even more importantly, Posner embraces in Edmond the libertarian-style fiction that “individualized suspicion” operates in a binary, on-off manner, rather than

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<sup>37</sup> Id at 665.

<sup>38</sup> Id at 668 (Easterbrook dissenting).

along a continuum of degrees. The truth is that suspicion is a probabilistic notion. Suspicion is measured along a probability scale. We know, for instance, that the average level of suspicion for individuals traveling on the roads that were blocked by the Indianapolis police was 4.74 percent for drug contraband.<sup>39</sup> We know this after the fact, but we know it nonetheless. It would be entirely fair to say that for each and every one of those automobile travelers, we had “individualized suspicion” of 4.74 percent. Richard Posner writes that “here the roadblock is meant to intercept a completely random sample of drivers; there is neither probable cause nor articulable suspicion to stop any given driver.”<sup>40</sup> But that, of course, is a legal formalist statement that is substantially inaccurate: for each driver, there was a 4.74 percent chance that they were carrying drugs. That is a very specific and articulable level of suspicion.

This notion of an “articulable level of suspicion” is no different than in the classic case of witness identification. So, for instance, if a victim testifies that the perpetrator was a University of Chicago graduate student who spoke French, and there are, say, 450 graduate students at the University of Chicago who are French speakers out of a student body of 9,000, then we can easily conclude that our “individualized suspicion” to question fluent French-speaking grad students reaches 5 percent. We can quantify and establish before questioning our exact level of “individualized suspicion” and determine whether it meets some minimum threshold to justify detaining and questioning any graduate students.

The only difference between these two cases is a temporal one: we do not know the level of individualized suspicion in the roadblock case until *after* we have begun to conduct some stops and visual and canine searches at the roadblocks. (And even here, since this involves a random sample of motorists, we can be pretty confident that we will have similar levels of suspicion at similarly selected sites in the near future; we could also obtain this information through research or surveys). In the second case, we know from the witness identification the level of suspicion and can use that to justify our stops and questioning. In both cases, we can easily determine the level of suspicion. In each case, we can find the actual level of “individualized suspicion.”

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<sup>39</sup> Id at 661 (majority) (reporting 55 drug-related arrests out of 1,161 vehicles stopped, or 0.0474).”

<sup>40</sup> Id at 663.

In other words, there was “individualized suspicion” in the Edmond case and Judge Posner could have found that the individual-level standard was satisfied. What he meant to say, of course, is that there was not enough individualized suspicion, but here too he could easily have found that there was. The courts have never established a percentage requirement for individualized suspicion or probable cause, and as Judge Easterbrook notes in dissent, individualized suspicion has been found at far less than 4.74 percent. Judge Posner’s refusal to find it here reflects a libertarian bias.

As Judge Posner himself must recognize, conclusions about the sufficiency of the evidence of individualized suspicion, just like conclusions about the costs and benefits of law enforcement initiatives, are purely metaphorical. Posner concedes that “it is infeasible to quantify the benefits and costs of most law enforcement programs.”<sup>41</sup> Judges in these types of cases have no real clue how search success rates compare, what level of success should be expected, or what the benefits of these law enforcement programs are. They have no good evidence to assess hit rates, nor do they know what the hit rates really mean in terms of the quality of the searches, or more importantly whether the searches have any deterrent impact.

So, for instance, it is worth noting that the 4.74 percent drug hit rate—or, for that matter, the 8.96 percent overall hit rate including minor traffic violations<sup>42</sup>—is not really “spectacular,” as Judge Easterbrook suggests.<sup>43</sup> Hit rates from other law enforcement interventions have been far greater. For example, the Maryland state patrol between January 1995 and January 1999 achieved drug hit rates along Maryland’s I-95 corridor of 32 percent with regard to white drivers and 34 percent with regard to African-American drivers.<sup>44</sup> In Missouri for the year 2001, police traffic stops achieved drug hit rates—that’s drugs only, not including faulty drivers’ licenses—of 19.7, 12.3 and 9.8 percent respectively for whites, African-Americans, and Hispanics.<sup>45</sup> A 1982 Department of Justice study of airport searches using a drug-courier profile reported forty-nine

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<sup>41</sup> Id at 662.

<sup>42</sup> Id at 661 (noting a total of 104 arrests out of 1,161 stops, or a rate of 0.0896).

<sup>43</sup> Id at 666 (Easterbrook dissenting) (suggesting that the hit rate is “spectacularly successful”).

<sup>44</sup> Bernard E. Harcourt, Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally, 71 U Chi L Rev 1275, 1292 (2004).

<sup>45</sup> Id at 1293.

successful searches based on ninety-six total searches, for a hit rate of 51.04 percent.<sup>46</sup> A government report analyzing New York City stop-and-frisks, prepared in 1999, revealed average hit rates (stop-to-arrest) of approximately 13.7 percent in situations found to present reasonable suspicion.<sup>47</sup> In the abstract, devoid of any comparative evidence about search success rates in other contexts, the 4.74 percent drug hit rate may well seem “high” or even “spectacularly successful”; however, that may be an artifact of judicial decision-making with no data, a perennial problem in constitutional criminal procedure.<sup>48</sup>

Second, the judges in the Edmond case have no idea what the quality of the successful searches was at those roadblocks. The Maryland data from the 1990s are revealing in this regard. Though the hit rates there seem high—seven times higher than in the Edmond case—it turns out that 84 percent of the successful searches revealed only trace or personal-use amounts of drugs. Even worse, 68 percent of the successful searches were for trace or personal-use quantities of marijuana only.<sup>49</sup> That’s hardly impressive, and for all we know, the same type of “success” is being achieved at the Edmond roadblocks.

Third, there is no good evidence that detecting trace or personal use quantities of drugs on drivers—especially marijuana—is going to have any effect on drug markets and drug dealing. Posner’s finding mentioned above—that “the deterrence of drug offenses produced by these hits advances the strong national, state, and local policy of discouraging the illegal use of controlled substances,”<sup>50</sup>—is entirely speculative, perhaps even fantastic. There is really no good reason to believe that catching trace amounts of marijuana in automobile ashtrays in Indianapolis is going to discourage drug use at the national level.

Judge Posner acknowledges that the weighing process he and other judges engage in is purely subjective, and will vary widely depending on the decision maker, his or her temperament, tastes, and sensibilities. In this sense, Posner’s conclusion in Edmond

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<sup>46</sup> Bernard E. Harcourt, Against Prediction: Profiling, Policing and Punishing in an Actuarial Age 15–16 (Chicago 2007).

<sup>47</sup> Tracey L. Meares and Bernard E. Harcourt, Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure, 90 J Crim L & Criminol 733, 789 (2000).

<sup>48</sup> For an argument proposing increased use of social science evidence in constitutional criminal procedure, see generally *id.*

<sup>49</sup> Harcourt, 71 U Chi L Rev at 1320 (cited in note 44).

<sup>50</sup> Edmond, 183 F3d at 662 (emphasis added).

reveals a subjective libertarian orientation. This is clear by contrast to Judge Easterbrook. In his dissent, Easterbrook deploys the type of program-level analysis that necessarily weighs against the civil rights claim. Easterbrook would have ruled against the constitutional claim based on this simple, four-part syllogism: (1) “First, the privacy interest of drivers is diminished relative to the interests of people at home or in the office;” (2) “Second, the invasion of privacy at a roadblock is slight;” (3) “Third, a small invasion can be justified by aggregate success. . . . Martinez-Fuerte holds a probability under 1% will do for a roadblock, and in Indianapolis the probability is much greater”; and fourth, “the principal risk in allowing stops of vehicles without person-specific cause is that the officers will abuse the discretion thus conveyed.”<sup>51</sup> The overwhelming precedent in this area of the law, Easterbrook argues, is that the civil libertarian loses. Judge Posner, however, refuses to move the analysis to the program-level. It would require an exception or an emergency, and, Posner finds, “no such urgency has been shown here.”<sup>52</sup>

#### *Pragmatic and Authoritarian*

In sum, Judge Posner displays a libertarian bias, however slight. At the same time, Judge Posner is avowedly pragmatic: his libertarian streak may well hold in the case of ordinary criminal law enforcement, but not in times of national emergency. Urgent times call for urgent measures: “When urgent considerations of the public safety require compromise with the normal principles constraining law enforcement, the normal principles may have to bend,” Judge Posner declares. “The Constitution is not a suicide pact.”<sup>53</sup>

This represents the pragmatic or practical-minded approach that Judge Posner advocates for constitutional analysis writ large. Rather than treat the constitution as wooden and inflexible, Posner uses devices, such as the state of exception, to try to protect society. Posner regards himself as a “practical-minded judge”—a pragmatist—

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<sup>51</sup> Id at 669–70 (Easterbrook dissenting) (citations omitted). Easterbrook considers one other factor—the likelihood for abuse of discretion, but finding that it is not present here, concludes that “the concern that led to Prouse is missing, and the first three considerations show that the roadblock is reasonable.” Id at 670.

<sup>52</sup> Id at 663 (majority).

<sup>53</sup> Id.

putting forward “a more flexible, practical approach.”<sup>54</sup> His book, Not a Suicide Pact, he tells us, reflects just this approach. The book is “about the marginal adjustments in [constitutional] rights that practical-minded judges make when the values that underlie the rights—values such as personal liberty and privacy—come into conflict with values of equal importance, such as public safety, suddenly magnified by the onset of a national emergency.”<sup>55</sup>

In this regard, the individual structure of Posner’s arguments in Not a Suicide Pact is similar to the form of analysis in Edmond: times of national emergency create an exception to normal constitutional review and, in such times, judges and public citizens must assess enforcement measures using a program-level cost-benefit analysis, rather than an individual stop assessment. Thus, in Not a Suicide Pact, Richard Posner adopts a program-level analysis when he reviews the constitutionality of random searches of subway riders’ bags in New York City, dragnet police stops in the case of a terrorist threat, warrantless eavesdropping outside the FISA framework, and other counter-terrorism measures.<sup>56</sup>

Pragmatic libertarianism may strike many as an oxymoron—especially more staunch civil libertarians on both the Left and the Right. This is understandable: to many libertarians, civil liberties protections are most needed during times of crisis. During ordinary or normal periods of democratic existence, we can rely more easily on reasonable public discourse or even educated public opinion. It is when the public imagination is enflamed by national crises that we need, more than ever, a civil liberties framework.

But the introduction of pragmatic concerns does not necessarily vitiate the libertarian perspective. The key question becomes: What flavor of pragmatism? The fact is, the pragmatic impulse can come in two very different tastes: one that still puts law enforcement measures to a serious test—in other words, one where the outcome is not predetermined from the turn to program-level analysis—and another, more authoritarian approach, where the mere placement of the measure within the category of the national emergency by necessary implication produces a foreseeable result. If that foreseeable

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<sup>54</sup> Posner, Not a Suicide Pact at 9 (cited in note 2).

<sup>55</sup> *Id.* at 1.

<sup>56</sup> *Id.* at 90–93.

result always favors law enforcement, I would label the approach “pro-government.” Posner calls it “authoritarian,” as when he writes that “[t]he weights are influenced by personal factors, such as temperament (whether authoritarian or permissive) . . .”<sup>57</sup> Following Posner’s lead, then, I will call this style “authoritarian.”

This, then, is what makes Richard Posner a pragmatic libertarian authoritarian. It should come as little surprise that Judge Posner, in his capacity as author of Not a Suicide Pact, essentially finds for the government across an array of law enforcement techniques—ranging from unwarranted wiretaps to the use of coercive interrogation including torture. As long as the program has some conceivable benefit, given the extraordinary costs associated with a terrorist attack, the measures become appropriate.

#### CONCLUSION

Richard Posner’s unique brand of libertarianism—pragmatic and authoritarian—combines, in a curious way, deep distrust of government intervention in economic matters, sincere belief in government incompetence, and yet unbounded trust that the government will not abuse or mismanage its augmented enforcement responsibilities during a time of national security emergency. In contrast to pragmatic libertarians on the Left, it is not skeptical of the government’s ability to properly safeguard sensitive or personal information, to limit the use of excess force, or to avoid abusing these newfound powers. It sides, ultimately and almost unquestioningly, with the government and its law enforcement apparatus in difficult times.

It is possible, on this view, that civil liberties are only left safeguarded when it hardly matters. And that, even there, the protections may be extremely precarious. Judge Posner observes, in the final paragraph of the Edmond opinion, that the roadblocks in Indianapolis could have been justified under the national emergency exception:

The high hit rate of Indianapolis’s roadblock scheme suggests that Indianapolis has placed the roadblocks in areas of the city in which drug use approaches epidemic proportions; and if so the roadblocks might be justified by reference to the second exception, as illustrated by such cases as Maxwell (involving a flurry of drive-by shootings), Norwood (threat of

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<sup>57</sup> Id at 25.

violence at a rally of motorcycle gangs), and Williams (Indian insurrection).<sup>58</sup>

In other words, the situation in Indianapolis (with hit rates about seven times *lower* than in Maryland) was apparently approaching crisis proportions, similar in scale to the present terrorist threat, and Judge Posner may well have approved the roadblocks on those grounds.

But still, Judge Posner did not do that. He could have, but he didn't. Which leaves Richard Posner, on this Rorschach inkblot test, still a bit of a libertarian, always pragmatic, and staunchly authoritarian.

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<sup>58</sup> Edmond, 183 F3d at 666.

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