

# JUDGE HARRY EDWARDS: A CASE IN POINT!

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Judge Harry Edwards dislikes empirical work that is not flattering to federal appellate judges. A few years ago Dean Richard Revesz published an empirical study of the United States Court of Appeals for the D.C. Circuit providing further support for the rather tame proposition that judges' political orientation has some effect on outcome in some politically charged cases.<sup>1</sup> A year later Judge Edwards published a criticism phrased in extreme terms.<sup>2</sup> Dean Revesz then wrote a devastating reply by which he demonstrated that Judge Edwards "is simply wrong with respect to *each* of the numerous criticisms that he levels."<sup>3</sup>

We believe that Judge Edwards, when he commented on our presentation at a recent conference,<sup>4</sup> preserved his batting average. Giving

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1. Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

2. Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998). Judge Edwards had earlier expressed his disdain for legal scholarship that did not meet his definition of "practical" research—namely, scholarship that proves useful to judges and lawyers by being prescriptive and doctrinal. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). For a rebuttal, see, e.g., Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEO. L.J. 173, 176-77 (2001); Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921 (1993) (part of symposium). For Judge Edwards' surrebuttal, see Harry T. Edwards, *Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession,"* 69 WASH. L. REV. 561, 567 (1994) ("I have been mostly amused by the critical articles (such as Judge Posner's) appearing in the Symposium edition of the Michigan Law Review."). The realm of his disdain must have expanded, because the article by Dean Revesz was eminently practical.

In fact, Judge Edwards does not seem opposed to empirical research that is not critical of federal judges. He himself took a stab at empirical work in Harry T. Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619 (1985). And when criticizing Lawrence M. Friedman, *Judging the Judges: Some Remarks on the Way Judges Think and the Way Judges Do*, at <http://law.wustl.edu/centeris/Conf2001/washuconf.htm>, Judge Edwards added an attack on Professor Friedman's lack of an empirical premise for questioning the objectivity of federal judges. See Harry T. Edwards, *Judicial Norms: A Judge's Perspectives*, at <http://law.wustl.edu/centeris/Conf2001/Edwards.html>.

3. Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805, 805 (1999) (emphasis in original); see *id.* at 849-50 (characterizing Judge Edwards' "inflammatory style" as "strident and tendentious rhetoric").

4. Institute for Law and Economic Policy Conference on Litigation in a Free Society at Hollywood, Fla. (Mar. 15, 2002). Unfortunately, the tape of our conference session went missing. See e-mail from Laura Stein, Special Counsel, ILEP, to Kevin M. Clermont (June 14, 2002) (on file with

no forewarning and employing an unjudicial tone, he lambasted a single paragraph of our thirty-five page paper,<sup>5</sup> a paragraph to which we had not so much as alluded in our oral presentation. That paragraph just happened to have summarized a series of our earlier articles<sup>6</sup> that had raised some doubts about the evenhandedness of federal appellate courts' treatments of plaintiffs and defendants. Even after delivering his oral comments, he refused to let us see the written version prepared by him and his co-author. He then used his considerable influence to persuade the law review against publishing in the symposium issue any form of reply whatsoever to his oral or written comments.

Now, upon its publication, we have finally been able to read his written remarks.<sup>7</sup> Suffice it to say, his Article exhibits none of the virtues or benefits that would have flowed from open discourse. And the tone, although turned down several notches, remains disturbing. We sadly realize that authors who reply to an attack never distinguish themselves unless they take the very high road. But that road looks steep when the attack goes to such extremes. Still, we shall try here at least to restrict our response to his principal line of argument. Respond to that argument we must, because allowing it to stand would undermine not only our appellate research but also much of current empirical work on the law.

## I. SPECULATION AND COUNTERSPECULATION

To focus the debate, the premise for our notorious paragraph was the direct observation in federal civil cases “that defendants succeed more than plaintiffs on appeal. For example, defendants appealing their losses after trial obtain reversals at a 33% rate, while losing plaintiffs succeed in only 12% of their appeals from trials.”<sup>8</sup> We had obtained this result from a database that we had created from data of the Administrative Office of the U.S. Courts on all federal appeals from fiscal year 1988 through fiscal

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authors).

5. Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 153 (2002) [hereinafter *Litigation Realities*].

6. Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125 (2001) [hereinafter *Defendant/Plaintiff I*]; Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128 (2000) [hereinafter *Defendant/Plaintiff II*]; Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. (forthcoming) (page proofs on file with authors) [hereinafter *Defendant/Plaintiff III*].

7. Harry T. Edwards & Linda Elliott, *Beware of Numbers (and Unsupported Claims of Judicial Bias)*, 80 WASH. U. L.Q. 723 (2002).

8. *Litigation Realities*, *supra* note 5, at 153.

year 1997.

Judge Edwards does not question these reversal-rate statistics showing an antiplaintiff effect—indeed, he expresses the surprising (and somewhat atypical<sup>9</sup>) reaction that he finds these asymmetrical results completely unsurprising.<sup>10</sup> What he chooses to attack instead is our subsequent speculation that appellate courts seem to be favoring the defendant, perhaps because like the rest of society they view the trial courts as being proplaintiff, or perhaps because their distance from the particular case's facts inclines them to discount harms to the plaintiff. Our thought was that sometimes appellate judges, though richly experienced even at trial work, can look at a case that they did not hear at trial and tend to see an undeserving plaintiff, thus creating a marginal effect that advantages defendants.<sup>11</sup> Our series of earlier articles had marshaled various kinds of indirect proof, both statistical and psychological but which we shall not rehearse here, in support of this speculation regarding appellate judges' being human and so probably having misperceptions or biases.<sup>12</sup>

Again, he does not really challenge the validity of our indirect proof—besides bristling at the use of the word “bias,” which we used only in its

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9. Most people find the results noteworthy. In addition to many online downloads and e-mail inquiries, a sign of this reaction was the relatively strong media interest in our appellate studies. *See, e.g.,* Jess Bravin, *U.S. Courts Are Tough on Job-Bias Suits*, WALL ST. J., July 16, 2001, at A2; Gail Diane Cox, *Those Appealing Defendants*, NAT'L L.J., Jan. 14, 2002, at A22; Jerry Crimmins, *U.S. Appeals Courts Tilt Toward Defendants in Civil Cases: Study*, CHI. DAILY L. BULL., Feb. 6, 2002, at 1; Reynolds Holding, *Good News and Bad News in Appeals Court Rulings*, S.F. CHRON., Feb. 11, 2001, at WB4; Susan Mandel, *Equal Treatment?*, A.B.A. J., Nov. 2001, at 24; Thomas Scarlett, *Federal Appellate Courts Tilt Toward Defendants, Study Finds*, TRIAL, Mar. 2002, at 17.

10. *See* Edwards & Elliott, *supra* note 7, at 724, 728, 732. *But see id.* at 732 n.35 (contradicting himself).

11. *See Defendant/Plaintiff I*, *supra* note 6, at 141-45; *Defendant/Plaintiff II*, *supra* note 6, at 132-34; *Defendant/Plaintiff III*, *supra* note 6, at 107-08; *cf.* James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 LAW & SOC'Y REV. 565 (2001) (showing that district judges sitting by designation act differently from appellate judges, by acting more diffidently and more neutrally); Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501 (1989) (showing that vantage point affects the observer's impressions, with emphasis on the differences between district and appellate judges).

12. *See Defendant/Plaintiff I*, *supra* note 6, at 146-55; *Defendant/Plaintiff III*, *supra* note 6, at 108-22. Our statement that federal appellate judges “remain human after all,” *Defendant/Plaintiff I*, *supra*, at 142, seemed to set Judge Edwards off, *see* Edwards & Elliott, *supra* note 7, at 731, 733. Indeed, he apparently considered it “worse,” *id.* at 731, than our “worst” mistake, *id.* at 729.

Similarly, our mild observation that federal appellate judges operate routinely “without any check” by review from above, *Defendant/Plaintiff I*, *supra* note 6, at 142, generated this response to our “cynical” and “self-serving” assertion: “[T]he essence of appellate judging is the principled application of legal rules. . . . Judges with whom we are familiar work very hard to apply the law, not personal biases, and they are ‘checked’ by the law, their oath of office, judicial codes of conduct, and one another.” Edwards & Elliott, *supra* note 7, at 731.

social-science sense of an inclination off the merits that might even be unconscious but is systematic, without any of the popular connotation of an invidious intention to prejudice.<sup>13</sup> What he instead targets specifically is the propriety of speculating at all when any alternative explanation of the data possibly exists.<sup>14</sup> If an alternative explanation exists, he insists, one cannot rely on quantitative data but must instead resort to in-depth consideration of the qualitative context of each of the thousands of datum points. By “flawed reasoning” we failed to perceive the alternative explanation, and our “deficient empirical research” then relied on conclusory numbers rather than on full cases.<sup>15</sup>

To destroy our speculation, he maintains that everyone who knows anything about the legal system—especially his fellow appellate judges but notably not us—knows that plaintiffs appeal on the facts (a sure way to fail), while defendants appeal on the law (a good-percentage bet, according to Judge Edwards’ oral comments, because district courts often wing it by leaving the law to appellate courts).<sup>16</sup> To his mind, he thereby provides an alternative explanation of our data that condemns, by its very existence, our speculation on favoritism.

Yet consider what his counterspeculation implies. After trial, the losing plaintiff or defendant may push one or more points on appeal. If the loser succeeds on any of these points, the court of appeals will normally reverse. Now, Judge Edwards is maintaining that the plaintiffs’ lawyers comb the records and come up mainly with factual errors, which of course meet a

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13. In opening and closing his Article, Judge Edwards claims that we accused federal appellate judges of an “unprincipled bias.” Edwards & Elliott, *supra* note 7, at 723, 734. We in fact never used that term. Indeed, his accusation raises the question of what would be a “principled bias.” At the least, as we shall try to show, the rest of his article provides multiple examples of biased principles. See *infra* text accompanying note 47.

14. See *id.* at 728-29.

15. See *id.* at 723.

16. See *id.* at 724, 728, 730 & tbl.2. He states this alternative explanation repeatedly:

In particular, we would hypothesize that appeals brought by defendants more often involve viable legal issues than appeals by plaintiffs. Legal, not factual, issues are the principal work of the appellate courts, so if one group of litigants presents more viable legal claims than another, they will win reversals at a higher rate.

*Id.* at 724.

In our experience, defendant/appellants rarely challenge findings of fact. In contrast, our sense is that plaintiff/appellants, who almost always carry the burden of proof at trial, are more often forced to rely on what are essentially factual claims, although they may, at times, be artfully clothed as “legal error.” If we are right, defendants are likely to have a predictable advantage on appeal. Why? Because trial courts are owed great deference in their findings of fact, whereas viable legal arguments mandate de novo review and so are much more likely to capture the attention of appellate judges.

*Id.* at 728.

deferential standard of review and hence tend to fail. But the defendants' lawyers are bright enough to pick legal errors that get *de novo* review. Note that he is not saying that legal errors do not exist for plaintiffs' lawyers to pick—that would require him to claim that the district courts are showing an antidefendant bias, for which he has absolutely no proof and on which contrary proof actually exists.<sup>17</sup> He is instead saying that plaintiffs' attorneys consistently overlook the legal errors against their interest. Those plaintiffs' attorneys thereby throw away money (often the attorneys' own money) in case after case, year after year, never learning from their folly. In short, he implies that defendants' lawyers are competent, while plaintiffs' lawyers are incompetent.

Judge Edwards' position could be true to some extent. Being true to an extent that would be broad enough to explain the large antiplaintiff effect, however, is a tall and unfilled order. As we shall show in the next two sections, his position not only proves implausible as even a partial explanation but also reveals something telling about the attitudes of one appellate judge.

## II. REFUTATION OF COUNTERSPECULATION

### A. *Indirect Refutation*

In the series of earlier articles on appeal, we had considered a whole set of alternative explanations of the antiplaintiff effect in order to provide additional indirect proof of our speculation. In particular, we considered plaintiff/defendant competence differentials, rejecting them by sifting through our data and by referring to other empirical work.<sup>18</sup> Prominent among our points was that these “incompetent” plaintiffs' lawyers had managed to survive the pretrial dangers and then to achieve a 54% trial win rate.<sup>19</sup> In brief, no substantial explanatory role as to the antiplaintiff effect on appeal seems to exist for a difference in competence between the two sides' lawyers.

In a draft of the first in that series of articles, we also discussed the

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17. See, e.g., Richard Lempert, *Why Do Juries Get a Bum Rap? Reflections on the Work of Valerie Hans*, 48 DEPAUL L. REV. 453, 454-55 (1998); Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?*, 48 DEPAUL L. REV. 221, 229-30 (1998); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 868-71 (1998).

18. See *Defendant/Plaintiff I*, *supra* note 6, at 148-49; *Defendant/Plaintiff III*, *supra* note 6, at 108-09.

19. See *Defendant/Plaintiff I*, *supra* note 6, at 149.

possibility of plaintiffs being more factual in orientation than defendants. But after further exploring the data, we dropped that line of argument as being implausible.<sup>20</sup> In the articles as published, then, we did not expressly rebut Judge Edwards' factual/legal twist. But now that he has so strongly pressed it, do plaintiffs' lawyers massively appeal the unreviewable?

The data did not suggest any such behavior of plaintiffs' appealing the facts and defendants' appealing the law. Plaintiffs and defendants appeal at about the same rate, although his view might predict more appeals by plaintiffs because they could always notice factual errors, or at the least his view would predict different rates of appeal for such differently motivated parties.<sup>21</sup> The antiplaintiff effect shows up in appeals from pretrial rulings as well as from trial judgments,<sup>22</sup> although most pretrial rulings do not involve factual findings at all. Moreover, the antiplaintiff effect shows up in all the different kinds of case categories<sup>23</sup> and for both corporate and individual parties,<sup>24</sup> although competence differentials would presumably vary across these distinctions.

An indirect way to prove a speculation is to rebut the best alternatives.<sup>25</sup> A way to uncover the best alternatives is to let vigorous adversaries take their best shot. If this factual/legal theory is the best that the opposition has to offer, our favoritism speculation on the antiplaintiff effect becomes much more convincing.

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20. We also pondered a related but cleverer explanation: perhaps defendants after trial are appealing pretrial rulings more than plaintiffs do, and hence are appealing law more than fact. Cf. Paul W. Mollica, *Employment Discrimination Cases in the Seventh Circuit*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 63, 72 (1997) (using this argument to explain rates of appeal). This explanation too is unconvincing. Plaintiffs also have some pretrial rulings to complain about after trial, and they do actually appeal from legal rulings made during trial; as shown below, their appeals are at least equally legal in nature. See *infra* text accompanying notes 26-37. Indeed, examining a sample of legal appeals by defendants after trial, as described below, reveals that only three of eleven such appeals turned in part on pretrial rulings (and one of those three ended in affirmance).

Moreover, this pretrial/trial twist does not explain the observed patterns in the data as well as our attitudinal explanation did. First, the antiplaintiff effect shows up in immediate appeals from pretrial rulings as well as in appeals from trial judgments. See *infra* text accompanying note 22. Second, the antiplaintiff effect is at its greatest in cases that fit the format of little victim versus big defendant and in cases tried by a jury. See *Defendant/Plaintiff I*, *supra* note 6, at 138-41; *Defendant/Plaintiff III*, *supra* note 6, at 106-07, 109-11. The pretrial/trial twist—the explanation that defendants are appealing pretrial rulings while plaintiffs are stuck with only trial rulings—would not predict these patterns.

21. See *Defendant/Plaintiff I*, *supra* note 6, at 134-35; *Defendant/Plaintiff III*, *supra* note 6, at 105-06.

22. See *Defendant/Plaintiff I*, *supra* note 6, at 153-55; *Defendant/Plaintiff III*, *supra* note 6, at 117-19.

23. See *Defendant/Plaintiff I*, *supra* note 6, at 149.

24. See *Defendant/Plaintiff III*, *supra* note 6, at 109.

25. See Edwards & Elliott, *supra* note 7, at 724 (“[I]n empirical research, challenging a theory with the best possible opposing arguments is what makes the strongest case for a theory.”) (quoting Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 10 (2002)).

### B. *Direct Refutation*

Logic is not the only weapon against the factual/legal theory. Data wound as well.

We can now provide new data directly applicable to that theory, and they are data of the sort Judge Edwards prefers. He accused us of irresponsibility in speculating on the meaning of our numerical data without systematically reading the thousands and thousands of appellate opinions, briefs, and records that supposedly explain our datum points.<sup>26</sup> Yet he apparently felt no obligation to read systematically even his own opinions before engaging in counterspeculation.<sup>27</sup> Nevertheless, on very short order in the vain hope of being permitted to make a contemporaneous reply, we did his work for him.

To get a quick idea of the case flow that is shaping Judge Edwards' view of the legal world, we immediately performed a rough Westlaw<sup>28</sup> search for appeals heard by him from 1987 to now, in job discrimination-type cases appealed after apparently completed trial. This process produced a sample comparable to our trial-appeal database in a common type of case that typically shows a strong antiplaintiff effect.<sup>29</sup> Twenty-one cases showed up, eight of which were plaintiffs' appeals and thirteen of which were defendants' appeals. In this small sample, the plaintiffs obtained reversals at a 38% rate, while the defendants achieved an incredible 85% reversal rate. So far, the results fit the pattern we usually observe by showing a stark antiplaintiff effect, albeit with rates skewed toward reversal.<sup>30</sup> Now, as to arguably factual appeals,<sup>31</sup> three of the eight

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26. See Edwards & Elliott, *supra* note 7, at 729-31.

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The authors' failure to consider this possibility is particularly puzzling given the ease with which it can be empirically tested. Briefs and opinions (both "published" and "unpublished") furnish a readily available bank of information that can be coded and analyzed to determine the degree to which defendants rely on legal claims and plaintiffs rely on factual arguments, as well as the degree to which each controlled in the rendering of particular decisions.

*Id.* at 730. We note that another researcher who observed the antiplaintiff effect on appeal has actually proceeded to do the kind of coding that Judge Edwards calls for; it turned out to involve a lot of work, and it confirmed the earlier observation. See Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001) (confirming, by an in-depth consideration of ADA employment discrimination opinions on Westlaw, the antiplaintiff effect on appeal that the author had earlier reported from bare outcome data). Incidentally, her research revealed that factual appeals are rare. *Id.* at 244.

28. Since 1988, Westlaw has included the D.C. Circuit's published and unpublished dispositions in full text. See Revesz, *Ideology*, *supra* note 3, at 809-12.

29. See *Defendant/Plaintiff III*, *supra* note 6, at 109-11 (showing, for the jobs case category nationwide, plaintiff and defendant reversal rates of 6% and 44% respectively).

30. The analogous plaintiff and defendant reversal rates for the jobs case category in the D.C.

plaintiffs' appeals were of that nature (38%), and only one of the three succeeded. However, nine of the thirteen defendants' appeals were arguably factual (69%), and seven of the nine succeeded. While not rigorous, these results clearly lend no support to a view that plaintiffs appeal the facts while defendants appeal the law. Nor do the results support even a view that factually oriented appeals tend to be losers.

Maybe a specific case from the sample would give more of a flavor while also acknowledging Judge Edwards' demand that we supplement quantitative methodologies with close, contextual reading of cases. *Palmer v. Barry*<sup>32</sup> is one interesting case that Westlaw turned up, and which we classified as a successful defendant's appeal on legal grounds. Palmer was a white firefighter who had brought a Title VII action against officials in the District of Columbia for racial discrimination in failing to promote him. A two-day bench trial awarded relief to the plaintiff. The defendants appealed. The D.C. Circuit, in an opinion by Judge Edwards, looked hard

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Circuit as a whole, specially computed from Administrative Office data for the comparable time period of fiscal years 1988-2000, were 2% and 67% respectively.

31. This coding of opinions was, by necessity, disturbingly subjective. The questions on appeal were almost all largely legal in some technical sense, not too surprisingly. Parties in fact do not appeal on the ground, say, that the jury got it wrong on the facts. Represented parties are capable of phrasing their points as legal errors. Accordingly, what we tried to do was distinguish between factually loaded appeals and more purely legal appeals, an impressionistic distinction that correlates with the one between deferential and nondeferential standards of review.

Moreover, clearly one would have to study also the appellants' briefs to see the grounds of appeal. The appellate opinions are, of course, a filtered account, and often a very abbreviated account at that.

The optimist might see the multiple biases in this sort of research as canceling each other out. But the realist would counter that, at the least, these biases are not fanciful, citing the nice example of *Barnes v. Small*, 840 F.2d 972 (D.C. Cir. 1988) (Edwards, Silberman & D. Ginsburg, JJ.).

The *Barnes* case involved a challenge to discharge from a federal civil service position with the Military Traffic Management Command. The appellate court's description of the case and its reasoning were sufficiently factual to cause us to classify it for the text above as an unsuccessful plaintiff's appeal on arguably factual grounds. But a look at the summary of argument in the Appellant's Brief at 9 gave us pause: "Appellant was unlawfully removed because his conduct in writing six [supposedly defamatory] letters to the MTMC Commander—which is the sole basis of his removal—is protected under various laws, the governing collective bargaining agreement between the union and MTMC, and the First Amendment." The appellees' brief did its best to rephrase Thomas Barnes' appeal as a factual one, although it also forwarded a jurisdictional argument. His reply brief insisted on the legal grounds. After reading the briefs, we reread the court's opinion and realized that perhaps we should have classified this appeal as a legal one. Nevertheless, we did not reclassify it because we were not systematically considering the parties' briefs in this way.

The point of the *Barnes* example is that the coding of any appeal as factual is rather suspect. Moreover, the appellate court's opinion is not necessarily a reliable indicator of the factual nature of the appeal.

32. 894 F.2d 449 (D.C. Cir. 1990), *on remand*, 794 F. Supp. 5 (D.D.C. 1992), *aff'd sub nom.* *Palmer v. Kelly*, 17 F.3d 1490 (D.C. Cir. 1994). Because the case later reappeared in the court of appeals, we had dropped this first appeal from our trial-appeal database. Indeed, such reasons, as well as the constraints of Westlaw searching and the different time periods studied, produced only a modest overlap between our Westlaw and Administrative Office samples of Judge Edwards' cases.



at the facts before concluding that the trial judge had seemed to focus on obvious discrimination early in the period under scrutiny and so perhaps the plaintiff's EEOC filing had come too late to be timely. The court reversed and remanded. On remand, the district court found again for the plaintiff, and a different panel of D.C. judges finally affirmed. The power of the *Palmer* example lies in that Judge Edwards seemed quite ready to dive into the facts on behalf of the defendants, in order to reverse the plaintiff's rightful victory below.<sup>33</sup>

To get a more systematic understanding, we next looked at all categories of cases, not just job cases in which the appellate opinion was expansive enough to use the chosen Westlaw search terms. For this, we turned to our trial-appeal database, compiled from Administrative Office data and used in our earlier articles. We considered only tried cases with a judgment below for either plaintiff or defendant and with a decisive outcome on appeal, and Westlaw enabled us to narrow the data to those appeals heard by Judge Edwards.<sup>34</sup> Thirty-seven cases showed up, of which twelve remarkably were from the case category of jobs.<sup>35</sup>

	Number	Reversals	Reversal Rate
plaintiff appeals	25	6	24%
—“factual” B appeals	16	5	31%
defendant appeals	12	6	50%
—“factual” ) appeals	4	2	50%

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33. There is nothing unique about *Palmer*. An equivalent point could be made with other cases in the sample. *E.g.*, *Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180 (D.C. Cir. 1996) (Edwards, C.J. & Silberman & D. Ginsburg, JJ.) (reversing a similar discrimination judgment on the defendants' factually oriented appeal after bench trial, because the appellate court considered the evidence insufficient to prove the plaintiff's case).

34. Judge-specific research is fairly difficult, requiring this resort to Westlaw, because of the restrictions on access to the government's federal court data. The government excises the presiding judges' identities from the data given to the public. *See* Lynn M. LoPucki, *The Politics of Research Access to Federal Court Data*, 80 TEX. L. REV. 2161 (2002).

35. The jobs case category dominated the appellate docket for the whole D.C. Circuit, accounting for 39% of its docket in our trial-appeal database. The oddities of the D.C. docket help to explain our early result—of which Judge Edwards makes much, *see* Edwards & Elliott, *supra* note 7, at 727—that the D.C. Circuit did not exhibit the usual prodefendant pattern. *See Defendant/Plaintiff I*, *supra* note 6, at 142 n.32. When we expanded our study from tort and contract categories to all case categories, the prodefendant pattern came to prevail in the D.C. Circuit. *See Defendant/Plaintiff III*, *supra* note 6, at 107. Although we gave Judge Edwards access to that later and bigger study, he chose to ignore it.

What do the results, tabulated above, mean? All observers should agree that they show the factual/legal theory faltering. But perhaps for some observers a first glance might hint that Judge Edwards' theory retains some small bite. We must admit that as we read these thirty-seven decisions, we felt we were seeing multiple dispositions that suggested weak factual appeals by plaintiffs. Looking a little more closely, however, revealed that the effect stemmed from this sample's many cases in the jobs category. In these particular jobs cases (which were minor cases that failed to produce an opinion that showed up in the Westlaw search), the plaintiff was invariably the appellant; at least in the appellate court's view, the plaintiff never appealed on legal grounds in this fact-intensive sort of case; and the plaintiff always met affirmance via a short *per curiam* burial. Subtracting these jobs cases from the sixteen plaintiffs' appeals that verifiably were factually oriented<sup>36</sup> leaves only seven nonjobs appeals. Amazingly, five of these seven achieved reversals, meaning that they were appeals of good quality. Closer examination thus reveals that, other than for certain jobs cases, plaintiffs' appeals on the facts are comparatively neither common nor frivolous.

In sum, we can say that Judge Edwards is operating under a misperception that generally plaintiffs appeal the facts while defendants appeal the law. We can speculate that his court's heavy exposure to jobs cases has inordinately shaped this mistaken view of the legal world. Regardless of cause, appellate misperceptions exist, and they may affect appellate outcomes.

### *C. Alternative Counterspeculation*

Judge Edwards' perception that generally plaintiffs appeal the facts while defendants appeal the law is so wrong that its refutation implies the opposite theory: maybe, in general, defendants appeal the facts while plaintiffs appeal the law. At least this theory has the merit of being plausible. Suppose plaintiffs are flooding the courts with weak cases that nevertheless make it to trial, so that losing defendants will often be arguing on appeal that the trial court should have knocked the plaintiff out

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36. The appellate court did not state the grounds of appeal in summarily affirming six of the plaintiffs' appeals from the earlier years, and three of the six were jobs cases. Possibly, albeit not verifiably from the court's short opinions, these ambiguous appeals were factually oriented. However, we know that not all of them were factual. Our library held the appellate briefs in one of these six minor cases, *Huntley v. Hartford*, 888 F.2d 898 (D.C. Cir. 1989) (*per curiam*). Although James Huntley acted *pro se* in this insurance contract case, he certainly managed to formulate his grounds for appeal as legal questions.

for insufficient evidence, while any losing plaintiffs are stuck with forsaking their weak facts and having to argue the law. Because the cases are so weak, the losing defendants' factual arguments are easier to make than the losing plaintiffs' legal arguments, and so we consequently see defendants faring better than plaintiffs on appeal.

The above-discussed two sets of cases drawn from Westlaw and Administrative Office data lend some support to this alternative conjecture. Among those opinions, we can examine the relatively numerous factual appeals by defendants to see how many were based on insufficiency of the plaintiffs' evidence. First, as we already recounted, nine of the thirteen defendants' appeals in job discrimination-type cases were factual, and seven of the nine succeeded. Of the nine, seven appeals were for insufficient evidence, and five of these seven succeeded. Second, only four of the twelve defendants' appeals in nonjobs cases were factual, but two of the four succeeded. Of the four, one appeal was for insufficient evidence, and it succeeded in that civil rights case. Thus, it appears that at least in discrimination cases, defendants on appeal are actually enjoying considerable success in arguing insufficient evidence.

This observation establishes the alternative conjecture as worth pondering. But the more questionable step in the conjecture is the contention that the defendants' factual appeals are easier to win than the plaintiffs' legal appeals. It seems odd that defendants should have an easier time when invoking a deferential standard of review than plaintiffs manage with *de novo* review: defendants are supposedly finding it easy to overturn plaintiffs' victories after trial on the ground that the case should never have gone to the jury or was insufficiently proved to the judge; that is, defendants are supposedly often getting the appellate courts to hold that the jury verdict was irrational or that the trial judge's findings were clearly erroneous.<sup>37</sup> As we say, it seems odd that defendants could develop such a stark difference of outlook between trial and appellate courts and exploit it often enough to create the lopsided defendants' appellate advantage that we have found in the data.

Imagine nonetheless that this alternative conjecture is true. It would then appear more consistent with our speculation than inconsistent. Such a stark difference of outlook between trial and appellate courts would be the kind of difference that we are supposing. Clearly, appellate courts being so activist in supervising the facts for the defendants' benefit must think that

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37. See FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, *CIVIL PROCEDURE* 769-75 (5th ed. 2001) (explaining standards of review).

the trial courts have lost their way and that they need to intercede against too many plaintiffs' victories. And the motivating preconception that plaintiffs' cases are especially weak—apparently a preconception more strongly held by the appellate courts than by the trial courts—would be just the sort of appellate attitude that fueled our speculation in the first place.

### III. RIGHT AND DUTY TO SPECULATE ABOUT DATA

In writing our appellate articles, we had not felt that we had to do systematic opinion-reading research in order to rebut in advance an implausible counterspeculation such as Judge Edwards'. After his oral presentation at the ILEP Conference, during the panel discussion, he abandoned his refrain of *argumentum ad ignorantiam*<sup>38</sup> to make a new and astonishing argument. He asked us to imagine that someone had empirically observed that over the years we had given consistently lower grades to overweight students—how would we feel if the observer, without actually reading exam papers and the like, then suggested that bias might be at play? Assuming the response to be obvious, he argued that therefore no one should speculate about bias merely by looking at a string of decisions. However, we rejected the assumed response, saying that the observer's suggestion about our grading, if based on sound statistics of disparate impact, would be entirely proper to express. Such impact on the overweight should indeed be a cause for concern, one that justifies revelation by the observer and that invites a nondiscriminatory explanation from us. Thus, rather than cornering us, his attempt at *reductio ad absurdum* proved to us the propriety of our speculating.

The motive behind statistical analysis of case outcomes is to enable seeing patterns invisible to those who study appellate opinions. Opinions may look unassailable when read one-by-one, but overall patterns of data may reveal judicial decisionmakers' systemic attitudes, misperceptions, or biases—which, after all, can be seriously pernicious. That is, opinion-reading and data-mining can reveal different things, and both are independently worth doing.<sup>39</sup>

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38. See IRVING M. COPI, INTRODUCTION TO LOGIC 76 (4th ed. 1972) (defining this fallacy to exist “whenever it is argued that a proposition is true simply on the basis that it has not been proven false, or that it is false because it has not been proven true”); cf. *id.* at 74-76 (describing *argumentum ad hominem*).

39. For a fuller defense of this kind of research on judicial decisions, see Revesz, *Ideology*, *supra* note 3, at 844-49, 850-51; *id.* at 848 (“By exposing what may be unconscious biases, such studies may have the effect of narrowing the apparent gap between judges’ perceptions of how they carry out their

Once patterns emerge from the data, a researcher can study opinions, case files, and other sources to test alternative explanations for which the data failed to provide the necessary codes. Yet practicality demands that before doing so, the researcher have a plausible theory in mind, such as that defendants appeal on the law and plaintiffs appeal on the facts. The researcher can form such a theory informally by drawing on a career-long project of reading cases, and then dip systematically into the primary sources to learn if the theory holds true. In our statistical research project, we have indeed engaged in such a process all along, but so far this process has uncovered no better explanation of the antiplaintiff effect than our speculation regarding the defendants' advantage.

Another approach would be to take a sampling of the appellate opinions (and the briefs and the records, and also the cases that did not reach appellate disposition or went unappealed altogether), and code for everything that one can think of (which turns out to be an extremely difficult and subjective enterprise). Then a new database would be available for restarting the analysis of plaintiff/defendant asymmetries. Such nondirected and in-depth research might be a worthwhile project. Whether the return would be commensurate with the effort is not certain, however. The first steps, taken in the course of this reply, do not suggest that some magical explanation will emerge to vaporize our concern about the antiplaintiff effect.

In any event, we thought that our discovery of disparate impact on appeal was worthy of report, even though we could offer no complete explanation and even though the data naturally prompted a troubling speculation. We still do not believe that we acted irresponsibly—or that we were leveling a “highly inflammatory” charge.<sup>40</sup> What we were doing was only social science, an approach that Judge Edwards appears not to apperceive.<sup>41</sup>

As we have previously explained,<sup>42</sup> we did not pursue this statistical research project to support a preconception. We certainly were not on the prowl for appellate bias, as we had reported previous results showing

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work and the reality of their output.”) (footnote omitted).

40. Edwards & Elliott, *supra* note 7, at 734.

41. Medicine is another field that has long relied on intuition and so now deploys a *derrière-garde* action against data. See Kevin Patterson, *What Doctors Don't Know (Almost Everything)*, N.Y. TIMES, May 5, 2002, § 6 (Magazine), at 74, 76 (describing the contentious movement from Marcus Welby to so-called evidence-based medicine: “The point is that the conclusions doctors reach from clinical experience and day-to-day observation of patients are often not reliable.”).

42. See *Defendant/Plaintiff III*, *supra* note 6, at 102-03.

judicial neutrality.<sup>43</sup> Instead, we were studying judge/jury differences when we happened to observe the plaintiff/defendant asymmetries on appeal. We were not happy to encounter an unexpected pattern that was both distracting and disquieting. We had to explore those asymmetries fully before speculating, which entailed constructing sophisticated models of not only the appellate court's decision but also the party's choice to appeal. We had no axe to grind, and there was no rush to judgment.

Note that our bottom line was merely that "the data suggesting that appellate judges lean in favor of the defendant become a cause for concern."<sup>44</sup> Although we did speculate that bias was possible, we certainly were not saying that Judge Edwards and other appellate judges are consciously out to get plaintiffs in particular cases, but only that they may harbor unconscious biases that disparately impact plaintiffs in the long run of cases.<sup>45</sup> We granted that this speculation was not air-tight, as we had no direct proof of appellate bias.

So, what kinds of appellate judges' attitudes were we supposing when we speculated? Perhaps appellate judges view plaintiffs' appeals as tending to be weak because of incompetent counsel, while they view

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43. See, e.g., *Defendant/Plaintiff I*, *supra* note 6, at 143 & n.36 (citing *inter alia* Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995) (reporting results exactly of the kind that presumably would meet Judge Edwards' approval: no evidence of judicial politics' influencing outcome in the mass of cases)); *supra* note 17. One might think that a judge, who must constantly choose between arguments of interested parties, would be more receptive to research by those with no axe to grind. Such disinterested research seems especially important in light of continuing efforts by interested parties to fund research in the hope of shaping research results. See, e.g., Kevin A. Schulman et al., *A National Survey of Provisions in Clinical-Trial Agreements Between Medical Schools and Industry Sponsors*, 347 NEW ENG. J. MED. 1335 (2002) (academic institutions routinely engage in industry-sponsored medical research that fails to comply with international guidelines regarding trial design, access to data, and publication rights); Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1, 43 ("When data become a commodity—purchased, packaged, and sold to a willing public under a university imprimatur by those who profit from its distribution—then empirical work becomes little more than cheap ad copy."). As an example of the trend, we need not resort to some tired offense such as tobacco research, but can cite a current book by leading academics critical of punitive damages, which they based on research funded by ExxonMobil Corporation after its predecessor corporation suffered an adverse punitive damages award. CASS R. SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* (2002).

44. *Litigation Realities*, *supra* note 5, at 153. In his personal "concluding note," Judge Edwards rephrases our bottom line as "appellate judging is largely a lawless enterprise rather than a reflection of the legal merits of particular claims." Edwards & Elliott, *supra* note 7, at 734.

45. Moreover, in our appellate research we are not using disparate impact statistics to propose the imposition of civil liability for bias, but only to pursue the beneficial effects of sunshine on possibly worrisome behavior that is important and otherwise unreviewable. *But cf.* Segar v. Smith, 738 F.2d 1249, 1303 (D.C. Cir. 1984) ("I am in complete agreement with the expressed view in the majority opinion indicating that a court can conclude that an unlawful disparate impact has been established [by statistics].") (Edwards, J., concurring in a discrimination case by black DEA agents).

defendants' appeals as tending to be strong because of frequent district court errors of law against defendants' interests.<sup>46</sup> In other words, we were supposing the kinds of attitudes to which Judge Edwards vehemently admitted in trying to explain our data. Therefore, by observing that he holds the kinds of biased principles that we hypothesized, we can take one small step toward meeting his demand that we "ascertain whether appellate judges actually hold the view that trial courts inappropriately favor plaintiffs."<sup>47</sup> He allows us now to supplement our dry data and indirect proof with an illustrative case in point that helps to explain the antiplaintiff effect.

### CONCLUSION

In the article that originally attracted Judge Edwards' ire, we parsimoniously concluded, "Data are good."<sup>48</sup> In closing here, we might observe, "Anecdote is not necessarily bad." Judge Edwards has given us an anecdote in support of our research on appellate courts.

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46. For more discussion of the kinds of attitudes hypothesized, see *supra* note 13 and text accompanying note 37.

47. Edwards & Elliott, *supra* note 7, at 732.

48. *Litigation Realities*, *supra* note 5, at 154. A recent book, JOHN ALLEN PAULOS, *ONCE UPON A NUMBER* 7-8 (1998), observed "that first, we tell stories, and then—in the blink of an eye—we cite statistics," but the thrust of the book was that both data and anecdotes have proper roles to play.





