

## Book Review

### Oral History and the Study of the Judiciary

FEDERAL JUDGES REVEALED by *William Domnarski*  
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#### *Introduction*

There is no shortage of books on judging. A nonexhaustive list from the past few years alone includes books entitled *Justice in Robes*,<sup>1</sup> *Judging Under Uncertainty*,<sup>2</sup> *Law and Judicial Duty*,<sup>3</sup> *Judges and Their Audiences*,<sup>4</sup> *The Judge in a Democracy*,<sup>5</sup> *Running for Judge*,<sup>6</sup>

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1 RONALD DWORKIN, *JUSTICE IN ROBES* (2006).

2 ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006).

3 PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008).

4 LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006).

5 AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2006).

6 *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* (Matthew J. Streb ed., 2007).

*Are Judges Political?*,<sup>7</sup> and *How Judges Think*.<sup>8</sup> Law journals are likewise filled with articles and symposia devoted to the judicial role.<sup>9</sup>

These works represent a broad variety of perspectives. Many of the countless thousands of words involved are not only about judges, but were written by judges. Those, we might imagine, are to be especially privileged as words that come from those who know of what they speak. Certainly only someone who is (or has been) a judge can fully understand what it is like to be a judge. Most of the remainder, and undoubtedly most of the entire total, were produced by academic commentators. The value of any given one of these latter contributions perhaps lies in the eyes of the beholder. But surely, as a general matter, the detached perspective has its virtues. As Judge Posner put the point, in confessing his feeling “a certain awkwardness in talking about judges”: “Biographies are more reliable than autobiographies, and cats are not consulted on the principles of feline psychology.”<sup>10</sup>

There is, then, much to be said for the diversity of viewpoints reflected in the cited works. For all that is different among these writings, however, there is a core similarity that should not be overlooked. What ties all these varying works together, aside from the underlying subject matter, is what we might call *stage management*. Books, articles, and lectures provide the author or speaker a considerable amount of control over content, phrasing, and other aspects of presentation. This is significant because academic and judicial authors alike have a purpose to advance. The nature of their purposes undoubtedly

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<sup>7</sup> CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006).

<sup>8</sup> RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

<sup>9</sup> See, e.g., LaDoris H. Cordell, *The Joy of Judging*, 43 HARV. C.R.-C.L. L. REV. 639 (2008); Eric M. Fink, *Liars and Terrorists and Judges, Oh My: Moral Panic and the Symbolic Politics of Appellate Review in Asylum Cases*, 83 NOTRE DAME L. REV. 2019 (2008); Dana M. Levitz, *So, You Think You Want to Be a Judge?*, 38 U. BALT. L. REV. 57 (2008); Diarmuid F. O'Scannlain, *Lawmaking and Interpretation: The Role of a Federal Judge in Our Constitutional Framework*, 91 MARQ. L. REV. 895 (2008); William H. Pryor Jr., *The Perspective of a Junior Circuit Judge on Judicial Modesty*, 60 FLA. L. REV. 1007 (2008); Edwin H. Stern, *Frustrations of an Intermediate Appellate Judge (and the Benefits of Being One in New Jersey)*, 60 RUTGERS L. REV. 971 (2008); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769 (2008); Stephen L. Wasby, *Looking at a State High Court Judge's Work*, 12 LEWIS & CLARK L. REV. 1135 (2008); Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1 (2008); Symposium, *The Intersection of Personal Convictions and Federal Judicial Selection*, 56 DRAKE L. REV. 587 (2008); Symposium, *Reflections on Judging: A Discussion Following the Release of the Blackmun Papers*, 70 MO. L. REV. 965 (2005); Symposium, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1037 (2006).

<sup>10</sup> POSNER, *supra* note 8, at 2.

varies, from earnest exploration of some difficult question to more-or-less naked advocacy for or justification of some contestable position. But all of them feel that they have something to say. Put differently, lurking behind each of these writings is an agenda. It may be grand or it may be modest, but it is there all the same.

The presence of some sort of agenda is perhaps unremarkable for academics, who have chosen a profession in which having something to say<sup>11</sup> is a bona fide occupational qualification.<sup>12</sup> Not so for judges. Judges must decide cases,<sup>13</sup> and generally must articulate their reasons for doing so,<sup>14</sup> but they otherwise work under no compulsion to (or expectation that) they will share their views beyond what is necessary to decide cases. Most judges thus generate many thousands of words over the course of their careers, but in a highly stylized format in which they go to great lengths to portray their decisions as products of the law rather than of their personal viewpoints and rarely discuss the processes of decisionmaking.<sup>15</sup> In addition, codes of judicial conduct place some constraints on judges' abilities to express their opinions.<sup>16</sup> Consistent with this, most judges seem content not to share their vision with the rest of the world.

When it comes to extrajudicial writings, then, there is some self-selection involved. Judges who expend the time and energy to write about the judicial process thereby signal their sense that they are different from many of their colleagues, at least in that they are willing to advance a particular vision of the judicial role, and undoubtedly often in that they perceive their colleagues as not measuring up to the author-judge's standard in some way.

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<sup>11</sup> Or at least feeling that one has something to say. Or wanting to have something to say.

<sup>12</sup> The appropriate contours and characteristics of a legal scholar's agenda are contestable. See, e.g., Daniel A. Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367, 375 n.27 (1987).

<sup>13</sup> Though precisely what that means is less than clear. See Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 124–25 (2005).

<sup>14</sup> Although here again the precise nature of the obligation is less than clear. See Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1289, 1342 (2007).

<sup>15</sup> Karl Llewellyn referred to this norm as that of the "one single right answer." KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 24 (1960). In doing so Llewellyn made it clear that he meant to "refer not merely to a manner of writing the opinion but to a frame of thought and to an emotional attitude in the labor of bringing forth a decision." *Id.* at 24.

<sup>16</sup> See, e.g., ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3, R. 3.1 & cmts. 1–4 (2007); JAMES J. ALFINI ET AL., *JUDICIAL CONDUCT AND ETHICS* § 9.02A (4th ed. 2007).

This presents something of a problem for those who want to understand judicial behavior. Judges themselves possess unique insights into the nature and character of the role, but there is reason to suspect that those judges who go out of their way to address the topic are not representative of their peers. Recent academic work has made some headway in accounting for the conduct of the judiciary as a whole. Political scientists, in particular, have focused their efforts on quantitative empirical study of judicial behavior,<sup>17</sup> and in recent years they have been joined by an increasing number of scholars within law schools.<sup>18</sup> This work is characterized by its focus on what judges have actually done (i.e., how they have voted in cases) versus what they say they are doing in their opinions. At roughly the same time, other scholars have brought the insights of other social sciences—primarily economics and psychology—to the quest to understand judicial behavior.<sup>19</sup>

All of this work has been valuable, much of it incredibly so. But there remains a sense in which the resulting picture is incomplete. Quantitative studies provide a picture of the judiciary as a whole, but speak only in generalities. Qualitative accounts are useful to round things out, but the self-selected nature of judicial writings on the judicial process suggests that such accounts provide an incomplete perspective as well. Judges who have chosen to write about the processes of judging may have different perspectives than those who have not, and it is consequently difficult to conclude that their insights apply broadly to other judges.

A book like William Domnarski's *Federal Judges Revealed*<sup>20</sup> holds out the promise of filling this gap. The book is constructed around oral histories of roughly 100 federal judges at both the district- and circuit-court levels. Its raw material, in other words, consists of dis-

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<sup>17</sup> E.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); JEFFREY A. SEGAL ET AL., *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* (2005).

<sup>18</sup> E.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 9–10 (1997); SUNSTEIN ET AL., *supra* note 7, at 3; Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841 (2006); Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1151–52 (2004); Gregory Sisk, *Judges Are Human, Too*, 83 JUDICATURE 178, 178 (2000).

<sup>19</sup> E.g., Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PENN. L. REV. 1251, 1259 (2005).

<sup>20</sup> WILLIAM DOMNARSKI, *FEDERAL JUDGES REVEALED* (2009).

cussions in which a wide array of federal judges—not just those who have taken the initiative to address the matter in print—talk about the processes of judging. Here, then, we have the perspective of the average judge,<sup>21</sup> and we have enough of a sample size<sup>22</sup> to imagine that we might be able to engage in some generalization about the characteristics of the federal judiciary.

In focusing on oral histories, Domnarski has tapped into a source of information on judges and judging that has been largely overlooked. There are at least two reasons for thinking that this approach will yield worthy insights. First, because the interviews on which Domnarski draws were conducted orally, the judges lacked the ability to stage-manage to the same extent that they could in a lecture or written article. To be sure, the judges were undoubtedly still controlling the message. But an interviewer who establishes a good rapport with a judge can introduce a comfort level that perhaps leads the judge to be somewhat less guarded than she otherwise might. Second, the timing of these interviews is significant. The judges who sat for these interviews were almost uniformly at the end of their careers. For them, the battles had been fought, and any perceived need to position themselves for a potential promotion had passed. This, too, encourages candor. Domnarski is thus, to take just two examples, able to relate some revealing stories about the appointments process, and to provide as full and unguarded an account of the extent to which judges rely on their law clerks as is available anywhere.

Domnarski encourages these sorts of conclusions about the unique contributions of oral history. He contends that “the sources we would ordinarily expect to turn to have not produced anything resembling a critical mass of information to allow us to begin making judgments about the performance of the federal judiciary, either on an individualized basis or on the judiciary as a branch of government.”<sup>23</sup> Only oral histories, he suggests, can tell us “who the judges are and what they do.”<sup>24</sup>

My aim in this Essay is to explore these claims and intuitions, with an eye toward determining just how useful oral history is to the study of the judiciary. Part I examines oral history as a methodology,

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<sup>21</sup> Or, at least, the average *federal* judge, who is not likely to consider herself to be an “average” judge more generally.

<sup>22</sup> Domnarski claims to have read the oral histories of around one in every thirty-three judges ever to have served in the federal judiciary. DOMNARSKI, *supra* note 20, at 2.

<sup>23</sup> *Id.* at 1.

<sup>24</sup> *Id.*

on the understanding that we can appreciate the value of the products of oral history only after having a firm appreciation for oral history's methodological strengths and weaknesses. Part II reports the results of my review of three oral histories provided by the late Judge Thomas Fairchild of the Seventh Circuit, one of which was among those reviewed by Domnarski. Part III then turns to *Federal Judges Revealed*. It provides a brief overview of the book and an assessment of its contribution to the study of judges and the judiciary.

### I. Oral History Methodology

One of the things that is absent from *Federal Judges Revealed* is any sort of extended consideration of oral history as a methodology. As a result, before digging into the book's specifics it is worth taking a moment to think about the nature of oral history and how we might responsibly use the information that we glean from oral histories. That, in turn, requires some consideration of the nature of oral histories, their methodology, and the limitations that this methodology might impose on future uses of the material.

Oral history as a methodology, like all other methodologies, has its limitations. For one thing, the term "oral history" seems to have no defined content except at a relatively broad level. In the words of one historian, "[s]imply put, oral history collects memories and personal commentaries of historical significance through recorded interviews. An oral history interview generally consists of a well-prepared interviewer questioning an interviewee and recording their exchange in audio or video format."<sup>25</sup> As another historian put it, the "basic dynamic" involves simply "two people sitting and talking about the past."<sup>26</sup> The lack of a precise definition of oral history does not mean that anything goes. Professional oral historians have developed techniques and guidelines for the interviewing process, and a failure to follow these can result in a product of little or no usefulness.<sup>27</sup>

Within the discipline of history, oral history has been criticized both in terms of its overall usefulness as an approach and its reliability at a narrower level.<sup>28</sup> The former sort of critique arises to a large de-

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<sup>25</sup> DONALD A. RITCHIE, *DOING ORAL HISTORY: A PRACTICAL GUIDE* 19 (2d ed. 2003).

<sup>26</sup> See Rebecca Sharpless, *The History of Oral History*, in *HANDBOOK OF ORAL HISTORY* 19, 38 (Thomas L. Charlton et al. eds., 2006). Thus, "[d]espite the sophistication of analysis and interpretation, a middle-school student can still do a legitimate oral history interview." *Id.*

<sup>27</sup> See RITCHIE, *supra* note 25, at 84–109 (outlining techniques for conducting interviews); *id.* app. at 252–55 (reprinting the "Principles and Standards of the Oral History Association").

<sup>28</sup> See Sharpless, *supra* note 26, at 30.

gree out of the methodology's perceived inefficiencies. As practiced in recent decades, the taking and preservation of oral histories involved a great deal of audio (and sometimes video) tape, which is a somewhat expensive and cumbersome medium.<sup>29</sup> Those concerns have abated somewhat, as digital technology and the Internet have reduced concerns about both storage and accessibility.<sup>30</sup> A related concern is that the methodology is too inclusive in the sense that the taking of an oral history almost inevitably entails the gathering of more trivial than significant information.<sup>31</sup>

Even when performed properly, oral history has its limitations. When used as a means of inquiry into some general phenomenon (i.e., consideration of some general topic such as "what was law school like in the 1950s?"), the methodology runs the risk of generating only anecdote.<sup>32</sup> The problem of generating anecdotes is less acute when the inquiry concerns a specific historical episode in which the subject of the oral history was a key player. But in both cases oral history is evidence delivered from a vantage point that is susceptible to problems of memory, bias, and other symptoms of subjectivity.<sup>33</sup> Unsurprisingly, witnesses may simply fail to remember the specifics of the events they are asked to recall, may remember them in ways that are self-serving, or may succumb to the temptation to recount events in a way that casts themselves in a favorable light.<sup>34</sup> To counter this, interviewers must be well prepared, such that they are able to ask questions and follow up in a way that prompts recall and forestalls efforts to omit details or otherwise distort the past.<sup>35</sup> Efforts to avoid one risk, however, may create another. Oral history is unique in that the historian is involved in the creation of a portion of the historical record.<sup>36</sup> Letters, memos, diaries, and the like are subject to question arising out of the author's self-interest. But none of the flaws possible in such sources can be prompted by the historian in the way that is possible where the historian is the one asking the questions.<sup>37</sup> The

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<sup>29</sup> See *id.* at 30–31.

<sup>30</sup> See *id.* at 37.

<sup>31</sup> See *id.* at 30.

<sup>32</sup> Ronald J. Grele, *Oral History as Evidence*, in *HANDBOOK OF ORAL HISTORY*, *supra* note 26, at 43, 45.

<sup>33</sup> See Anna Green, *Oral History and History*, in *REMEMBERING: WRITING ORAL HISTORY* 1, 2 (Anna Green & Megan Hutching eds., 2004) (noting the objection that oral history relies too heavily on memories, which are "both unreliable and subjective, and frequently unverifiable").

<sup>34</sup> See RITCHIE, *supra* note 25, at 117–18.

<sup>35</sup> See *id.* at 98–100, 105.

<sup>36</sup> See Grele, *supra* note 32, at 49.

<sup>37</sup> At least not in any direct sense. No doubt many such authors view themselves as writ-

presence of the interviewer thus creates the possibility that her interests and biases will affect the nature of what the interviewee says. Indeed, in a trivial sense this is certainly true, in that no two interviewers would generate identical responses. But the risk seems real in a more significant sense as well. Historians recognize this problem, and sophisticated interviewers attempt to structure their interviews so as to minimize the effects.<sup>38</sup>

None of this necessarily makes oral history unduly suspect as evidence. No piece of historical information is flawless. Just as information gleaned from other sources must be cross-checked against the available record to assess its accuracy and significance, so must those who work with oral history steel themselves against easy acceptance of subjects' assertions.<sup>39</sup> Historians recognize this. Indeed, the initial movement toward the use of oral history in the United States was based in its potential as a replacement for the sorts of written materials—primarily letters and journals—that became less frequently available due to cultural and technological shifts.<sup>40</sup> On this view, oral history serves primarily as a supplement to other sources, aiding in the depiction, interpretation, and understanding of records and events rather than standing alone as an authoritative source.<sup>41</sup>

There is a use of oral history beyond that which focuses on its ability to illuminate historical events. This second use draws on oral history as evidence of interviewees' perceptions and understandings of their own history and culture. In this sense oral history functions not exclusively, or even primarily, as a conduit to the past, but "also provides insights into the *meaning* of the individual's experiences: not just what happened, but how it was understood and experienced by the narrator."<sup>42</sup> Here, of course, oral history's role may be less supplemental. In the case of some classes of interviewees, the oral history is likely to be the only evidence bearing on their personal understanding of their situation.<sup>43</sup> When that is the case, concerns about the potential for interviewer-induced bias are at their highest.

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ing for posterity and thus for historians in some general sense. But that is not quite the same as having a specific historian as a prominent part of one's audience.

<sup>38</sup> See Grele, *supra* note 32, at 54.

<sup>39</sup> See RITCHIE, *supra* note 25, at 27.

<sup>40</sup> See Grele, *supra* note 32, at 44–45.

<sup>41</sup> See RITCHIE, *supra* note 25, at 118–19.

<sup>42</sup> See Anna Green, 'Unpacking' the Stories, in REMEMBERING: WRITING ORAL HISTORY, *supra* note 33, at 9, 12; see also Green, *supra* note 33, at 2–3.

<sup>43</sup> Whether this is appropriate is the subject of some debate. "Some social historians have accused oral historians of swallowing whole the stories that informants tell them. They argue



The purpose for which the interview is conducted must accordingly guide the manner in which the interview is conducted. An interview designed to illuminate what a federal judge does in a general sense should be markedly different from one designed to explore a judge's role in specific cases, or even one focused on a judge's perceptions of her job (which might include inquiry into topics like the extent to which the judge perceives herself to be constrained by law, to have discretion, to be susceptible to cognitive biases, and so forth). The purpose of the interview must also inform the way in which the ultimate product of the interview is generated and presented. One question that arises concerns whether the interviewee should be provided with an opportunity to review the transcript of an interview.<sup>44</sup> Providing for such review allows for factual errors or misstatements to be corrected. But it also allows for greater monitoring of output by the interviewee and hence for self-interest to play a larger role in shaping the product of an oral history. If a skillful interviewer can lead a subject to say things that he otherwise would not, and if we assume that such things are likely to be true, then we would be justified in placing somewhat more faith in statements in a transcript that the interviewee did not have a chance to review.

In similar fashion, the method in which the materials are presented provides an important methodological check. Donald Ritchie's guide to doing oral history recommends inclusion of the questions along with the answers so as to provide context for evaluation. "By leaving as many of their questions in the text as feasible, oral historians not only show what questions elicited the responses but demonstrate that the interviewee did not necessarily volunteer the information and may even have had to be coaxed to reveal private and potentially embarrassing information."<sup>45</sup> He likewise calls for mindfulness in the editing and arrangement of interviews, and suggests that once an editor elects to present something other than the full text of an interview, the editor assumes a duty to provide a minimum level of characterization or analysis: "At the minimum, authors of oral-history collections should provide some background for their interviews to place the interviewees in context, offering suggestions about why they

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that a truer 'people's history' must be based on statistical analysis and other objective data rather than on subjective individual testimony." RITCHIE, *supra* note 25, at 27.

<sup>44</sup> See Megan Hutching, *The Distance Between Voice and Transcript*, in REMEMBERING: WRITING ORAL HISTORY, *supra* note 33, at 168, 171.

<sup>45</sup> RITCHIE, *supra* note 25, at 129.

said what they did and took certain positions and sometimes spelling out where interviewer and interviewee did not agree.”<sup>46</sup>

## II. *The Oral Histories of Judge Thomas Fairchild*

To get a better sense for what judicial oral histories have to offer, I took an independent look at the oral histories of Judge Thomas Fairchild, who served as a justice on the Wisconsin Supreme Court from 1957 until 1966, and then as a judge on the Seventh Circuit from 1966 until 2007.<sup>47</sup> As it turns out, Judge Fairchild sat for at least three such histories. The first was taken in 1985, by the Wisconsin Historical Society as part of its Wisconsin Democratic Party Oral History Project.<sup>48</sup> The second, which Domnarski read and references in his book, was conducted in 1992 by Collins Fitzpatrick, the Circuit Executive of the Seventh Circuit.<sup>49</sup> The third interview took place in 1998, in connection with the “Justice in Their Own Words” oral history project undertaken by the Wisconsin Supreme Court and Director of State Courts Office.<sup>50</sup> The 1992 and 1998 interviews are available only in the form of transcripts. The 1985 interview, by contrast, is available only via audiotapes held by the Wisconsin Historical Society.

Before turning to the substance of the interviews, it is worth reflecting on some matters of format and methodology that might have some bearing on the value of the interviews as resources. Each of the two interview transcripts follows the suggested practice of including the questions along with the answers, and each presents what appears to be the full (albeit cleaned-up) text of the interviews. But there is little adornment beyond that. One of the more striking features of all three of the histories is that each is presented in a way that suggests

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<sup>46</sup> *Id.* at 130.

<sup>47</sup> Basic biographical information on those who have served as federal judges is available on the Federal Judicial Center’s website. Fed. Judicial Ctr., Judges of the United States Courts, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Jan. 14, 2010).

<sup>48</sup> Interview by James A. Cavanaugh with Judge Thomas E. Fairchild, U.S. Court of Appeals for the Seventh Circuit, in Chi., Ill. (Mar. 12, 1985) [hereinafter 1985 Interview] (audio recording available at the Wisconsin Historical Society); see also *Courts’ Sesquicentennial Celebration Moves Forward*, THE THIRD BRANCH, Winter 1998, at 7–8, available at <http://www.wicourts.gov/news/thirdbranch/docs/winter98.pdf>.

<sup>49</sup> Interview by Collins T. Fitzpatrick with Judge Thomas E. Fairchild, U.S. Court of Appeals for the Seventh Circuit, in Madison, Wis. (Sept. 15, 1992) [hereinafter 1992 Interview] (transcript available at the University of Wisconsin Law Library).

<sup>50</sup> Interview by Trina E. Haag with Judge Thomas E. Fairchild, U.S. Court of Appeals for the Seventh Circuit, in Madison, Wis. (Feb. 25, 1998) [hereinafter 1998 Interview] (transcript available at the University of Wisconsin Law Library); see also WIS. COURT SYS., PUBLIC OUT-REACH AND COURT EDUCATION PROGRAMS (2008), <http://www.wicourts.gov/news/docs/outreachedu.pdf>.

that its creators regarded it as something that could stand alone. In the case of the two histories for which there are transcripts, the transcripts simply begin with the interviewer identifying him- or herself in a very basic way,<sup>51</sup> and then moving directly into the interview. The audiotaped history opens with a voice<sup>52</sup> noting that the interview is part of the Democratic Party Oral History Project and identifying the interviewer, but otherwise moves directly into the interview itself.

For the reader or listener, the effect is somewhat jarring. There is no introduction providing background concerning who the interviewers were or what they sought to achieve. Nothing on the face of the interviews tells us anything about the qualifications of the interviewer (whether measured in the sense of being professionally credentialed or in terms of the interviewer's level of familiarity with Judge Fairchild or his career) or the interviewer's goals in conducting the interview. Some of these things are, of course, somewhat apparent from evident cues, such as the title given to the interview or the way the interview was conducted. With respect to the 1985 interview, for example, its status as a part of the Wisconsin Democratic Party Oral History Project strongly suggests that the intent was to explore the more political portions of Judge Fairchild's career, and the interviewer's confusion over whether Chicago Mayor Daley could have influenced Fairchild's appointment to the Seventh Circuit<sup>53</sup> makes it clear that he had little familiarity with or interest in Judge Fairchild's career on the federal bench.

None of this is meant to suggest that the interviewers conducting these three oral histories actually were unprepared, or that they lacked any sense of what they hoped to accomplish. Indeed, Collins Fitzpatrick, who conducted the 1992 history, is specifically commended by Domnarski for the quality of the interviews he con-

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<sup>51</sup> The 1992 interview transcript opens as follows: "Today is September 15, 1992. I am in the chambers of Circuit Judge Thomas Fairchild, in Madison, Wisconsin, and we're starting an oral history. My name is Collins Fitzpatrick. I'm the Circuit Executive." 1992 Interview, *supra* note 49. The 1998 interview transcript contains even less of an opening: "This is Trina Haag interviewing Judge Thomas E. Fairchild on Wednesday, February 25, 1998." 1998 Interview, *supra* note 50.

<sup>52</sup> Which may or may not be that of the interviewer. The introduction seems to have been added later, as was a voice announcing the time that had elapsed on the tape each five seconds over the course of the interview. (When listened to through headphones, the interview comes solely through the left headphone, while the timekeeper's voice comes through the right.)

<sup>53</sup> The interviewer states, with regard to Judge Fairchild's appointment to the Seventh Circuit, "I guess the only curious thing that—the only question I have about that is that given the Daley machine in Chicago how did they permit someone from outside the state, outside the city to get that appointment?" 1985 Interview, *supra* note 48 (located on side 1 of tape 49, at 8:00).

ducted,<sup>54</sup> and the depth of his preparation and the level of skill he brought to the task is evident from a review of the transcript. Similarly, letters to Judge Fairchild from the person who conducted the 1985 history provide some sense of his level of preparation, though getting copies of those required going through Judge Fairchild's papers held by the Wisconsin Historical Society.<sup>55</sup> Materials available elsewhere similarly indicate that the 1998 history is part of a project in which the interviewers were advised by professional oral historians.<sup>56</sup> The resulting problem is not that the interviewers were in some general sense unprepared, but that the documents and tapes that ultimately became available to researchers provide no information that speaks to the point.

There are other pieces of information relating to the manner in which the history was taken that would be helpful to an assessment of the validity of an interview that are likewise not provided. It would be helpful to know, for example, whether and to what extent there was a pre-interview discussion of the subjects that would be covered. Here again, there are clues. The correspondence leading up to the 1985 interview includes "an outline of the areas of discussion" that the interviewer anticipated covering.<sup>57</sup> One of the questions in the 1998 interview references a discussion between Judge Fairchild and the interviewer that took place the preceding week.<sup>58</sup> Beyond that, however, there is no indication of the extent to which Judge Fairchild was primed for each discussion. Another missing piece of contextual information concerns whether Judge Fairchild had an opportunity to review the transcripts of the 1992 and 1998 interviews. Without a sense of whether Judge Fairchild knew what the questions would be or had an opportunity to edit his answers, it is difficult to fully assess those answers. Of course, neither prior knowledge of the questions nor an ability to review an interview transcript necessarily make the product

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<sup>54</sup> DOMNARSKI, *supra* note 20, at 2–3.

<sup>55</sup> Copies of these papers are on file with the author, obtained on October 15, 2009, from the Wisconsin Historical Society, located in Madison, Wisconsin. For more information on the Wisconsin Historical Society, visit <http://www.wisconsinhistory.org/>.

<sup>56</sup> See WIS. COURT SYS., *supra* note 50, at 4 ("Wisconsin State Historical Society oral historians advised Court staff on the project and court reporters volunteered to transcribe the interviews.").

<sup>57</sup> Letter from James A. Cavanaugh to Judge Thomas E. Fairchild, U.S. Court of Appeals for the Seventh Circuit (Mar. 1, 1985) (on file with the Wisconsin Historical Society). The two topics relating to Judge Fairchild's judicial career were labeled as "Supreme Court Election" and "Appointment to U.S. Court of Appeals." *Id.*

<sup>58</sup> 1998 Interview, *supra* note 50, at 20 ("I know you and I talked about this last week, but I just want to get it down on the record . . .").

of an interview more or less valuable. An interviewee who knows what topics will be explored will have more time to reflect on them, and in doing so may elicit memories and detail that would otherwise have remained buried. In similar fashion, an interviewee who reviews a transcript can pick out things that come across as incomplete or inaccurate, and can even provide supplemental detail. But there is value to spontaneity as well. Just as we are willing to admit hearsay evidence when the circumstances suggest that the declarant spoke spontaneously and without time to reflect (and thus without having the time to lie), we might imagine that an interviewee confronted with an unanticipated question might give a less practiced, and thus more accurate, response. Without an understanding of the parameters of the interview, however, it is difficult to know which is the better conclusion.

Substantively, my sense is that the Fairchild histories are of limited value in terms of providing insights into the judicial process. Some of this may be a product of his career. Judge Fairchild had a relatively lengthy political career—among other things, he ran for and served as Attorney General of Wisconsin, and ran for the United States Senate twice—and it is accordingly unsurprising that significant portions of all three histories are devoted to the parts of his career that preceded his time on the bench. Still, Judge Fairchild makes four appearances in *Federal Judges Revealed*, which seems to make him roughly average among the judges considered in terms of the number of times that Domnarski refers to him. The first concerns his educational background.<sup>59</sup> The second relates to the circumstances of his appointment.<sup>60</sup> The third deals with an administrative issue that arose when Judge Fairchild was Chief Judge of the Seventh Circuit and that involved a pair of senior judges whose capacities had declined somewhat.<sup>61</sup> The fourth is a discussion of the processes of opinion-writing.<sup>62</sup>

Only the first two of these topics appear in all three histories, and only the second relates directly to the study of judicial institutions. Because Judge Fairchild discusses his appointment to the Seventh Circuit in each of these histories, more detailed consideration of those

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<sup>59</sup> Judge Fairchild was unique among the judges Domnarski considered in that he attended Deep Springs College, which Domnarski characterizes as “an experimental college.” DOMNARSKI, *supra* note 20, at 21–22; *see also* 1992 Interview, *supra* note 49.

<sup>60</sup> DOMNARSKI, *supra* note 20, at 99–100.

<sup>61</sup> *Id.* at 173.

<sup>62</sup> *Id.* at 183–84.

discussions offers a sense for what oral histories actually provide. The three recountings Judge Fairchild gives of his appointment are largely consistent. From the 1985 history:

Q. Was there [sic] other people interested in the appointment or were you just a logical person because of your service on the supreme court?

A. I don't know of any other interest in it. It was a very—as I've seen other people sweat through appointments—the appointment process—and wait sometimes months and longer—it was about as easy as anything that ever occurred. Bear in mind that the two senators from Wisconsin were Proxmire and Nelson and that both of them had gotten there through the same process that I had gone with them and that I had, as you mentioned, the credential of being an appellate judge by reason of being on the Supreme Court of Wisconsin. There was as little difficulty in getting appointed as I have ever seen in any particular instance.<sup>63</sup>

One thing that comes across from listening to the audiotape of this interview, and that would not be evident from a transcript alone, is that Judge Fairchild slowed down and seemed to choose his words more carefully when discussing his appointment.<sup>64</sup>

During the 1992 history, which is the one referenced in *Federal Judges Revealed*, Judge Fairchild gave a more expansive answer:

[Q.] Judge, we were just starting to talk about your appointment to the United States Court of Appeals to the Seventh Circuit. Maybe you can give us some of the background on that.

[A.] Well, you might say I had it the easy way. The two Democratic Senators in Wisconsin, in 1966, were William Proxmire, the senior Senator, and Gaylord Nelson, the junior Senator. I had been very close to both in Democratic politics as the revitalization of the state Democratic Party was underway. And both, in a sense, may have felt a little politically indebted to me. Of course, Lyndon Johnson was President, and he was a Democrat. This job opened up, and I don't know of any real chance that anybody else had at this ap-

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<sup>63</sup> 1985 Interview, *supra* note 48 (located at 9:30–11:00).

<sup>64</sup> The period from 10:00 to 11:00 on the tape, during which only Judge Fairchild is speaking and which relates solely to his appointment, includes 82 words. By contrast, each of the surrounding minutes (most of which include speaking by both Judge Fairchild and the interviewer) includes over 100 words: 8:00 to 9:00 (134 words); 9:00 to 10:00 (118); 11:00 to 12:00 (102); 12:00 to 13:00 (117); 13:00 to 14:00 (102). *See id.*

pointment. In fact, my big problem was deciding whether I wanted to take it. I had just been re-elected in April for a ten year term on the Supreme Court. I would have been Chief Justice in about two years. . . . [M]y thinking at the time was limited by the idea that I would have to quit at age 70. There was my possible tenure of some 14 years a [sic] Chief Justice. It was hard to turn down, hard to leave. And I made quite a canvass of people asking their opinion on the subject, should I or shouldn't I? I talked to Justice Walter Schaefer on the Illinois Supreme Court, and Chief Justice Roger Traynor of the California Supreme Court, and people that I knew in Wisconsin. One had briefly been a colleague on our Court, but had been defeated. I talked to Willard Hurst, who was on the Law School faculty at Madison. I talked to Leon Feingold, who had contributed greatly to any political success I had had. I didn't want to leave the Wisconsin Court without at least talking to Leon, who had a lot to do with my getting there. And certainly Jim Doyle, who was a district judge in Madison then and had been very instrumental in the whole reorganization of the Democratic Party, and had helped me in all my campaigns.<sup>65</sup>

Fairchild continues to discuss the difficulty he had in deciding whether to jump from the state supreme court to the federal court of appeals:

I had a heck of a time deciding to come to the Court of Appeals. I enjoyed doing the work of the Supreme Court and the collegial way in which we did it. I had the highest respect for my colleagues and enjoyed the association with them. Yet almost all the people I've named urged taking the federal judgeship. It pays better. You are assured of the job as long as you live, and it can be chancy on the state court.

Bill Wingert was the justice that I referred to who had served with me on the state court, but had been defeated. He had a little different view about the interesting nature of our work. . . .

Bill Wingert spoke strongly about our supremacy on state law and the challenge in making these choices. On the other hand he pointed out that he had been defeated and forced to start law practice again. He said, "I am sure that come 70 it must be awfully nice to be paid the full federal salary instead of the meager retirement benefits the state would give." I

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<sup>65</sup> 1992 Interview, *supra* note 49, at 73.

thought of my wife and family and how much better I would do for them over time as a federal judge. I made the decision I made and took the job. There were times of regret, even with better pay and security, but by then it was over the dam. Both Gaylord and Prox supported me. Once, jocularly, Gaylord put it[,] “[t]his was one of the few things Prox and I ever agreed on.” So maybe I solved a problem for them, too.<sup>66</sup>

In the 1998 history he gives an answer that is consistent, but which features different details:

Q. You were on the [Wisconsin Supreme Court] for ten years. Did you enjoy this kind of work? Did you feel isolated?

A. It was delightful. I enjoyed it. It was a much more fun experience than the Court of Appeals has been. I went through quite a turmoil of whether I should try for the Court of Appeals. There was the mundane consideration, which may [have been] the largest. In those days, the constitution froze the salary at what you got when you went on the bench.

Q. The Supreme Court bench?

A. Or any bench. So I had been stuck for nine years at \$14,000 per year. The highest paid brother of mine on the bench was getting \$24,000. That’s not a king’s ransom either, but in those days, it was quite a difference. . . . I think I was the second justice to get the \$14,000. But I was stuck at it. A Court of Appeals judge got paid \$33,000, more than double what I was getting. I had just been re-elected, without opposition, so I was good for another ten years, and I was going to begin a new term in January 1967, and I would have been chief justice in about three years after that as I was number two on the court next to Chief Justice Currie. Currie was going to hit the age limit of 70. We didn’t know then that he was going to get defeated and cease being Chief in 1968. Either way, I would have become Chief.

Q. That’s a big decision.

A. It was and what to do? I talked to an awful lot of people. I happened to be on a group with Chief Justice Traynor of California. I talked to him. Later, I talked to Justice S[c]haefer of Illinois. I talked to former Justice Emmert (Bill) Wingert, with whom I had served. He thought it was in many ways more interesting on the Supreme Court of Wis-

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<sup>66</sup> *Id.* at 74.



consin. You mold the common law, and except on federal questions, you are really Supreme. But he said, “I can tell you, that it would be nice come 70 to know that you can go on for life at a higher salary.” He was or would be getting a fairly modest pension from Wisconsin, so that’s the nitty-gritty money side. It weighed heavily, but I was also trying to compare the satisfaction in the work, the relative importance of the two courts and all that. Oh, Willard Hurst. I talked to him. A lot of people feel that the federal court is a higher court. In a way it isn’t. It has a different feel and considers different questions. There are some like habeas corpus in which the decision of a federal court of appeals supersedes that of a state supreme court. But there are other areas, such as cases between persons who are citizens of different states where the federal courts must follow the rulings of the state supreme court. There is no more real prestige there except in the public mind. I struggled hard, but finally chose the federal court.<sup>67</sup>

There are three primary pieces of information relating to the judicial process that we can extract from these excerpts. The first is that political connections coupled with a certain amount of serendipity led to Judge Fairchild’s appointment. The second is that the conditions of a federal judgeship—particularly salary and life tenure—played a significant role in his decision to take the position. These are hardly surprising revelations. The third thing we learn, which is a unique piece of information, is that Judge Fairchild seems to have preferred his work on the Wisconsin Supreme Court to that on the Seventh Circuit. As he notes, most observers would regard appointment to the federal court as a promotion. And he does not say that the Supreme Court was a better job—among other things, it brought a lower salary and the need to worry about reelection—but it is clear that he found it more enjoyable.

There are other interesting bits of information in the 1992 oral history that did not make *Federal Judges Revealed*. In responding to a question about a law review article he wrote,<sup>68</sup> Judge Fairchild notes that he “was certainly brought up to believe that when a court overruled a prior decision, it was just making itself right where it had been wrong before, that the law had always been there, and just misperceived before, and therefore all the current law is completely retro-

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<sup>67</sup> 1998 Interview, *supra* note 50, at 18–19.

<sup>68</sup> Thomas E. Fairchild, *Limitation of New Judge-Made Law to Prospective Effect Only: “Prospective Overruling” or “Sunbursting,”* 51 MARQ. L. REV. 254 (1967).

active.”<sup>69</sup> This is interesting in the trivial sense that Judge Fairchild graduated from law school in 1938,<sup>70</sup> which is of course the year that *Erie Railroad Co. v. Tompkins*<sup>71</sup> broke with the “brooding omnipresence” conception of law to which Judge Fairchild alludes.<sup>72</sup> It is also interesting in that it confirms that the notion of judges “finding” rather than “making” law persisted in the judicial mind well past the time this conception of law was abandoned as a matter of theory or academic perspective.<sup>73</sup>

In discussing the process by which responsibility for cases was divided up on the Wisconsin Supreme Court—which Judge Fairchild noted was “often criticized as producing one-judge opinions”<sup>74</sup> because one justice would have primary responsibility for each case—Judge Fairchild provided some insight into the level of attention that cases received at the Seventh Circuit:

I don’t think it really produces any more one-judge opinions than our system here, where the conferences are very short, not very meaningful, without much discussion. Three people vote, writing of an opinion is assigned, and I think the one-judge opinion criticism is valid in as many cases here as it was in the seven-judge court that had the other system.<sup>75</sup>

This is a striking statement in that, as much as anything else, it seems to confirm the suspicion that much of what purports to be the product of multimember courts is in reality the product of a single judge. Indeed, a more accurate description is seemingly that the work is a product of a single chambers. In a later passage in the 1992 interview (which Domnarski quotes in *Federal Judges Revealed*), Judge Fairchild draws a connection between increased caseloads and the nature of the work, particularly in that, over the course of his career, it became necessary to rely to a greater extent on his law clerks.<sup>76</sup>

In the end, if the Fairchild histories are representative of what oral histories contain, then they provide little basis for concluding that oral history will serve as a uniquely valuable window into the nature of judging. While Judge Fairchild’s perspectives on the nature of law

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<sup>69</sup> 1992 Interview, *supra* note 49, at 66.

<sup>70</sup> See Fed. Judicial Ctr., *supra* note 47.

<sup>71</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>72</sup> *Id.* at 79.

<sup>73</sup> *Id.*

<sup>74</sup> 1992 Interview, *supra* note 49, at 69.

<sup>75</sup> *Id.* Judge Robert Bork likewise expressed the view that the deliberations that take place among appellate judges are often quite abbreviated. DOMNARSKI, *supra* note 20, at 149.

<sup>76</sup> 1992 Interview, *supra* note 49, at 85.

and the processes by which the work of appellate courts takes place are useful and illuminating, they do not amount to information that is not available elsewhere. That is not to say that there is no value here, or that judicial-process scholars can comfortably remain oblivious to oral history. Far from it. As the discussion in the next Part reveals, there is a great deal of information in judicial oral histories that can be put to scholarly use. What is more, many of the limitations on the usefulness of oral history exhibited by the Fairchild interviews are potentially remediable in future judicial oral histories if the interviews take a more focused approach. The interviews here—particularly the 1992 and 1998 interviews—read as efforts to generate a comprehensive, though brief, oral autobiography. The risk of trying to cover everything, of course, is that one develops very little depth on any single topic. This is compounded by the oral nature of the discussion, which makes it more difficult to develop complex ideas.<sup>77</sup> For all the biographical information provided to the reader of the Fairchild oral histories, one comes away with very little sense of how he decided cases. The 1992 history references the fact that he read the full record in cases more often than his colleagues, and that he “put a high value on gaining a thorough knowledge of the whole case.”<sup>78</sup> It also includes his statement that he did not find deciding easy, and that “[his] own insistence on seeing both sides has often made [him] agonize over them.”<sup>79</sup> This is useful, but would be even more so had there been follow-up questions seeking to develop these answers and exploring why it was that Judge Fairchild felt his approach was necessary or appropriate.

### III. Federal Judges Revealed

The raw material for *Federal Judges Revealed* consists of oral histories provided by federal judges. Domnarski read “more than 100” such histories, which he found via a list compiled by the Federal Judicial Center coupled with a search of its biographical database.<sup>80</sup> Of these, 75 are quoted in the book, with the bulk of the judges having

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<sup>77</sup> See Oldfather, *supra* note 14, at 1304.

<sup>78</sup> 1992 Interview, *supra* note 49, at 81.

<sup>79</sup> *Id.* at 87.

<sup>80</sup> DOMNARSKI, *supra* note 20, at 2. Domnarski makes no claim to comprehensiveness. The Federal Judicial Center’s list includes about 300 oral histories. See Fed. Judicial Ctr., List of Oral Histories, [http://www.fjc.gov/history/oral\\_history.pdf](http://www.fjc.gov/history/oral_history.pdf) (last visited Jan. 14, 2010). Both it and the biographical database are undoubtedly incomplete. For example, neither the list nor the biographical database reference the two additional Fairchild histories that I examined.

been appointed in the three decades beginning with the 1960s.<sup>81</sup> This represents roughly one thirty-third of all the federal judges in history.<sup>82</sup> It is not, however, a representative sample. The Seventh and Ninth Circuits dominate, while others have little or no representation.<sup>83</sup> Even so, Domnarski assures the reader, without elaboration, that the statistical profile of his judges “varies only a bit from the statistical profile of the entire population of Article III judges.”<sup>84</sup>

The result is a very readable and enjoyable collection of insights and perspectives not only on judging and judicial institutions, but ranging as well across topics including the judges’ childhoods and law school experiences. Domnarski relates that the histories consistently take the mini-autobiography approach that characterized the Fairchild interviews, starting “with questions about the judge’s family tree before moving on to childhood, youth, college, and law school”<sup>85</sup> and then moving through the judge’s career up to the time of the interview. The book represents the distillation of a tremendous amount of information, and much of what Domnarski has uncovered will be quite helpful in illuminating judges’ perspectives on what they do.

Still, there are limitations. This is not a systematically gathered body of data that conforms with some social-scientific ideal. Interviewers varied in terms not only of their approaches in conducting interviews, but also in terms of their training and familiarity with the judges.<sup>86</sup> If the histories that he read are generally consistent with the Fairchild histories that I reviewed, Domnarski had no concrete basis for assessing the particulars of the methodologies used or the preparation or skill level of the interviewers apart from whatever came across in the way they conducted their interviews. As I have suggested above, the lack of this information hinders the reader’s ability to assess the reliability of the oral histories. One of the apparent benefits of oral history is that it potentially affords the subject less opportunity to control the specifics of her message than exists in writing. It would be helpful to know whether the conditions of the interviews were such as to generate relatively more or less candor. Domnarski cannot be faulted for failing to include this information, because it most likely

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<sup>81</sup> DOMNARSKI, *supra* note 20, at 3.

<sup>82</sup> *Id.* at 2.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 3.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 3–4.

was unavailable. Still, I wish that Domnarski had confronted these methodological issues more directly.

It would likewise be useful to know more about Domnarski's own methodology in selecting material for inclusion. That he quotes less than seventy-five percent of the interviews he read suggests that he encountered a great deal that he determined was not of interest, but it is hard to know why. He asserts that his aim was to "follow the topics that come up and propel the conversation,"<sup>87</sup> which suggests that his search was for consistently appearing themes or highlights. But a reader of *Federal Judges Revealed* otherwise lacking familiarity with judicial oral histories might wonder about what it is that was not included. Based on my review of the Fairchild interviews, the answer seems to be a lot, most of which would be of slight aid in gaining an understanding of the federal judiciary in some general sense. Traces of Domnarski's approach, and his accounting for the methodological difficulties of oral history, are evident in the material that he presents. Whether it was the product of mindful implementation of historians' methodological prescriptions or simply a lawyerly sense of what constitutes reliable evidence, very little of what he quotes comes across as obviously self-serving. Indeed, much of it is enough against interest that it falls within the spirit, if not the precise letter, of what counts as admissible hearsay.<sup>88</sup>

In terms of subject matter, *Federal Judges Revealed's* coverage is as expansive as the interviews that it reflects. The first chapter is entitled "Life Before Admission to the Bar," and that its first subheading is "Childhood, School, Jobs" gives a sense of just how far back Domnarski is willing to follow his subjects.<sup>89</sup> The second chapter covers their lives as practicing lawyers.<sup>90</sup> As Domnarski anticipates,<sup>91</sup> what appears in these first two chapters will be of comparatively little interest to most scholars of the judiciary. That is not to say that there is nothing of use here. We learn, for example, that at least some federal judges come from relatively humble beginnings as welfare recipients<sup>92</sup> or farm kids,<sup>93</sup> but the stories come as a string of anecdotes rather than as part of any larger effort to characterize the overall nature of the judges' backgrounds. It seems likely that the stories

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<sup>87</sup> *Id.* at 6.

<sup>88</sup> See FED. R. EVID. 804(b)(3).

<sup>89</sup> DOMNARSKI, *supra* note 20, at 11.

<sup>90</sup> *Id.* at 53.

<sup>91</sup> *Id.* at 8–9.

<sup>92</sup> *Id.* at 12 (quoting from the oral history of Judge Abner Mikva).

<sup>93</sup> *Id.* at 15 (quoting from the oral history of Judge Samuel Dillin).

Domnarski relates are anomalies and that the remainder of the judges whose histories he reviewed came from privileged backgrounds, but it is impossible to tell.

The material most likely to be of value to legal scholars begins to appear in the third chapter, and from there the book relates Domnarski's findings relating to the appointment process, the judges' transitions to the job, and various aspects of the job of being a judge.<sup>94</sup> Among the material that might interest researchers is that relating to the dynamics of the appointment process,<sup>95</sup> internal court processes,<sup>96</sup> the effects of interpersonal conflict on court dynamics,<sup>97</sup> judges' expressions of concern that increasing the size of the judiciary would dilute the prestige of the position,<sup>98</sup> the stress that sentencing places on judges,<sup>99</sup> judges' differing perceptions of the appropriate length of opinions and when it is appropriate to publish them,<sup>100</sup> and trial judges' varying perspectives on the prospect of being reversed.<sup>101</sup> All of these topics arise in debates concerning the judicial process,<sup>102</sup> and while none of the viewpoints related are novel to those debates, let alone insights that would change the terms of the discussions, the fact that they come from judges is significant.

Scattered throughout the book are the occasional perspectives that are not readily available elsewhere, or that are not as well developed elsewhere. The discussions of the nature of the transition into the judicial position, for example, include the expression of impressions that I, at least, had only heard informally. The oral histories reveal judges who struggled not only with easily anticipated consequences such as a change in income, but also with the need to master

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<sup>94</sup> The chapter titles are: "Judicial Appointments Recounted" (Chapter 3); "Once Appointed, Transition to the Job" (Chapter 4); "Nature of the Job" (Chapter 5); "In Chambers, in Court, and Getting Along with Others" (Chapter 6); "Judicial Opinions" (Chapter 7); and "Judges on Lawyers and Other Judges" (Chapter 8). Unfortunately, these chapters represent less than two-thirds of the book. The introduction and first two chapters occupy 82 pages, while the last six chapters take up only 135.

<sup>95</sup> *Id.* at 83–128.

<sup>96</sup> *Id.* at 169–72.

<sup>97</sup> *Id.* at 173–78.

<sup>98</sup> *Id.* at 178.

<sup>99</sup> *Id.* at 150–56.

<sup>100</sup> *Id.* at 180–83, 192–95.

<sup>101</sup> *Id.* at 197–203.

<sup>102</sup> For a general sense of those topics, see RUGGERO J. ALDISERT, *THE JUDICIAL PROCESS* (2d ed. 1996); DANIEL J. MEADOR ET AL., *APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL* (2d ed. 2006); Chad M. Oldfather, *Course Materials for Judging and the Judicial Process* (Marquette Law Sch., Legal Studies Paper No. 08-28, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1297423](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1297423).

unfamiliar subject matter and to adopt a new style of thought. One judge remarked, “I don’t care where you have been. I don’t think anyone is qualified to be a federal district judge. . . . You simply cannot believe for starting what you don’t know.”<sup>103</sup> Another offers the view that it takes “between five to seven years” to become comfortable with the work.<sup>104</sup> Another significant aspect of the transition involves the social dynamics. The judicial role involves isolation, an effect that is magnified by past acquaintances’ perceived need to treat the new judge differently than they did before.<sup>105</sup> *Federal Judges Revealed* includes extensive quotes from the oral history of Judge Milton Schwartz concerning the transition to the bench, in which he relates, among other things, the change in his relationships with his lawyer friends and the solitude of the job:

There’s nobody to come to visit and you’ve just got your two law clerks and your secretary and the court reporter and the courtroom clerk. That’s all you can have to talk to. And it does get very lonesome. Lonely. And you don’t have this great collegiality of being able to trade thoughts and ideas back and forth.<sup>106</sup>

The materials in *Federal Judges Revealed* likewise demonstrate the divergent approaches that judges take to their task, especially at the trial-court level. Some judges characterize the position as being mostly passive and reactive, with the focus on making decisions and getting to the next case.<sup>107</sup> Others strive to be more of a presence and to take a more active role in shaping the matters before them.<sup>108</sup> Some judges run a formal courtroom,<sup>109</sup> while others prefer to give a looser rein to the lawyers,<sup>110</sup> and some come across as borderline sadistic.<sup>111</sup>

Some of the more noteworthy anecdotes relate to the role that law clerks play. Although the depth of clerks’ involvement in the judi-

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<sup>103</sup> DOMNARSKI, *supra* note 20, at 129 (quoting from the oral history of Judge Gene Brooks).

<sup>104</sup> *Id.* at 130 (quoting from the oral history of Judge Leon Higginbotham).

<sup>105</sup> *Id.* at 147–50.

<sup>106</sup> *Id.* at 140 (quoting from the oral history of Judge Milton Schwartz).

<sup>107</sup> *Id.* at 143–44.

<sup>108</sup> *Id.* at 163–69.

<sup>109</sup> *Id.* at 163–64 (quoting from the oral histories of Judges Myron Gordon and William Justice).

<sup>110</sup> *Id.* at 162–63 (quoting from the oral history of Judge William Beatty).

<sup>111</sup> *Id.* at 167–69 (quoting from the oral history of Judge Andrew Hauk), 213–16 (quoting from the oral histories of Judges James Moran and Luther Swygert (each of whom was speaking about the traits of other judges)).

cial process is hardly a secret, *Federal Judges Revealed* provides valuable testimony from judges regarding how they use their clerks and how much they depend on them. We see judges outlining clerks' roles in the preparation of judges for oral argument and decision,<sup>112</sup> as well as in the drafting of opinions.<sup>113</sup> This collection of excerpts is remarkable for its extensiveness, as well as for judges' acknowledgements that, at least occasionally, clerk-drafted opinions are issued with no editing by the judge at all.<sup>114</sup> More generally, judges repeatedly emphasize the importance of clerks to their ability to do their jobs. Judge Otto Skopil opines, "[T]he importance of a law clerk has increased so tremendously in the last thirty years that it is almost unbelievable."<sup>115</sup> Judge James Buckley is "able to hire very able clerks, and many of them have an ability to grasp technical details and relationships that entirely escape me. Let's face it; I try to get clerks who are significantly brighter than I am."<sup>116</sup> One judge, when asked about what makes a good judge, responded "that number one is if you want to look good have some good law clerks and secondly enjoy your work."<sup>117</sup>

### Conclusion

*Federal Judges Revealed* stands as a valuable addition to the literature on judges and judging. It provides a useful introduction to, and overview of, a previously overlooked resource for studying how a broad range of judges understand their role. Consistent with most oral history, it will best serve to supplement, rather than supplant, other modes of inquiry. The ground broken here is that of providing new perspectives on previously identified aspects of the judicial function. Moreover, oral history has its methodological limitations, and the depiction of the federal judiciary that would result from reliance on it alone is that of a limited pointillism; we have a sense of the whole, but not a firm grasp. As a consequence, the revelations that *Federal Judges Revealed* contains will best serve as support for and illustration of analyses and arguments grounded primarily in other methodologies. But they are valuable nonetheless, and should play a role in any appropriately eclectic account of the judicial process.

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<sup>112</sup> *Id.* at 169–72.

<sup>113</sup> *Id.* at 183–91.

<sup>114</sup> *Id.* at 184, 186, 190–91 (quoting from the oral histories of Judges William Justice, Luther Swygert, and Milton Schwartz).

<sup>115</sup> *Id.* at 188 (quoting from the oral history of Judge Otto Skopil).

<sup>116</sup> *Id.* at 172 (quoting from the oral history of Judge James Buckley).

<sup>117</sup> *Id.* at 211 (quoting from the oral history of Judge Andrew Hauk).