NOT-SO-ORDINARY JUDGES IN ORDINARY COURTS: TEACHING *JORDAN V. DUFF & PHELPS, INC.*

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Everyone loves a brawl.

And all the more so when the brawlers are smart, biting, literate debaters who routinely take wildly out-of-fashion positions. For a casebook editor trying to maximize adoptions, that makes *Jordan v. Duff & Phelps, Inc.*[1] an easy call.[2]

Jordan juxtaposes at-will employment with corporate fiduciary duties. The plaintiff, employee-shareholder James Jordan, argued that his employer, Duff & Phelps, should have told him about its secret merger negotiations when he quit and sold his stock to the firm. Writing for the Seventh Circuit majority, Judge Easterbrook agreed. Fellow panelist Judge Posner dissented.

Judge Easterbrook wrote that denying recovery, as Judge Posner would have done, would effectively tell Jordan that Duff & Phelps could have declared:

> In a few weeks we will pull off a merger that would have made your stock 20 times more valuable. It's a shame you so foolishly resigned. But even if you hadn't resigned, we would have fired you, the better to engross the profits of the merger for ourselves. So long, sucker.[3]

Judge Posner gave as good as he got, saying of Judge Easterbrook's logic:

> This is the kind of legal half-truth that should make us thankful that our opinions are not subject to Rule 10b-5.[4]

To buttress his reasoning, Judge Easterbrook quoted Judge Posner's classic treatise for the proposition that:

> [T]he fundamental function of contract law . . . is to deter people from behaving opportunistically toward their contracting parties, in order to en-

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[1] 815 F.2d 429 (7th Cir. 1987).

[2] *See* WILLIAM A. KLEIN, J. MARK RAMSEYER & STEPHEN M. BAINBRIDGE, BUSINESS ASSOCIATIONS 651–63 (6th ed. 2006) (reprinting *Jordan*).

[3] *Jordan*, 815 F.2d at 437 (internal quotation marks omitted).

[4] *Id.* at 448 (Posner, J., dissenting).

> courage the optimal timing of economic activity and to make costly self-protective measures unnecessary.[5]

Judge Posner would have none of it:

> The inroads that the majority opinion makes on freedom of contract are not justified by its quotation from my academic writings . . . or

(my favorite one-liner in the entire corporate law casebook)

> by the possibility that corporations will exploit their junior executives, which may well be the least urgent problem facing our nation.[6]

The third judge on the panel? Judge Cudahy seems to have watched bemused from the sidelines. His colleagues "argue[d] lucidly and cogently (and ingeniously) their respective points of view," he wrote.[7] "The case [was] not easy," but he voted with Judge Easterbrook.[8]

I. THE CASE

Jordan worked as a securities analyst at Duff & Phelps's Chicago headquarters. In taking the job, he signed no employment contract. According to Duff & Phelps's policy, however, he could regularly invest in the closely held firm's stock. By late 1983, he owned about a one-percent stake.[9]

When buying the stock, Jordan signed a shareholders' agreement. Through it, he acknowledged that "nothing herein contained [would] confer on [him] any right to be continued in the employment of the Corporation."[10] He agreed that if he left the firm for any reason, he would resell the stock for its book value at the end of his last calendar year of employment.[11]

Jordan's wife and mother, who also lived in Chicago, did not like each other. To placate his wife, Jordan decided to look for work elsewhere. In November 1983, he obtained an offer from Underwood Neuhaus in Houston. He took the job and tendered his resignation to Duff & Phelps chairman Claire Hansen. Hansen accepted it, but let Jordan work until the end of the year to obtain a higher book value for his stock — a total of about $23,000.[12]

On January 10, 1984, Duff & Phelps announced a merger with Security Pacific at a price that would have let Jordan clear at least

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[5] *Id.* at 438 (majority opinion) (alteration in original) (quoting RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 81 (3d ed. 1986)) (internal quotation marks omitted).

[6] *Id.* at 449 (Posner, J., dissenting).

[7] *Id.* at 443 (Cudahy, J., concurring).

[8] *Id.*

[9] *Id.* at 432 (majority opinion).

[10] *Id.* at 446 (Posner, J., dissenting) (internal quotation marks omitted).

[11] *Id.* at 432 (majority opinion).

[12] *See id.*

$450,000, and possibly as much as $646,000, for his stock.[13] What is more, the firm explained that Hansen had preliminarily tried to negotiate a merger the previous summer. Those initial talks had collapsed, but Hansen had renewed negotiations in December and finalized the deal's price and structure.[14]

Jordan refused to cash his $23,000 check from Duff & Phelps. Instead, he sued. While the suit was pending, the merger collapsed (again), this time because the Federal Reserve placed on it conditions that were too onerous. In December 1985, however, Duff & Phelps's senior managers decided to acquire the firm through an Employee Stock Ownership Trust in a leveraged buyout. Had he stayed at Duff & Phelps and sold his stock to the company, Jordan claimed, he could have cleared nearly $500,000.[15]

Jordan argued that Hansen violated the "disclose or abstain" rule at the heart of Rule 10b-5[16] by repurchasing Jordan's stock on the firm's behalf at book value without disclosing the summer merger talks.[17] If Hansen had disclosed the talks, Jordan never would have resigned (or so he said). Instead, he would have stayed through 1985 and sold his stock for $500,000.[18]

The district court apparently thought this a simple case. Duff & Phelps was a closely held company, it noted, but Security Pacific was not. The law excepted both parties from the duty to disclose material information about pending merger talks when they repurchased stock if either party was publicly traded and the parties had yet to reach an agreement in principle on the merger's terms.[19] Here, the firms had not yet agreed when Jordan tendered his resignation to Hansen, and Security Pacific was public. Accordingly, the district judge reasoned, Hansen owed no duty to disclose his merger discussions to Jordan.[20]

Yet simple the case was not meant to be. Judge Easterbrook granted that publicly traded firms need not disclose pending merger talks before they agree "on the price and structure of the deal."[21] But closely held firms must disclose all material information even before they reach such an agreement, and even if they merge with a public

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13 *See id.* at 433.

14 *See id.*

15 *Id.*

16 17 C.F.R. § 240.10b-5 (2006).

17 *See Jordan*, 815 F.2d at 445 (Posner, J., dissenting).

18 *See id.* at 433, 441 (majority opinion).

19 Jordan v. Duff & Phelps, Inc., No. 84 C 2428, 1986 WL 4190, at *2 (N.D. Ill. Mar. 17, 1987) (citing Greenfield v. Heublein, Inc., 742 F.2d 751, 756 (3d Cir. 1984); Reiss v. Pan Am. World Airways, Inc., 711 F.2d 11, 13–14 (2d Cir. 1983)).

20 *See id.* at *3.

21 *Jordan*, 815 F.2d at 431.

firm.[22] As a result, the district court's quick and dirty resolution simply got it wrong.

To reverse the lower court, Judge Easterbrook proceeded through several logical steps. First, the merger talks were material to Jordan. He had to decide whether to sell his stock to Hansen, and for that the possibility of a high-priced merger mattered.[23] Second, although Jordan could not hold his stock if he quit, he did not need to quit. Instead, he could have chosen to stay at Duff & Phelps and keep his stock.[24] Third, even though the Security Pacific deal eventually collapsed, Jordan might rationally have stayed at the firm in hopes that another buyer would eventually offer lucrative terms — as indeed one did.[25] Last, although Jordan had no *right* to stay at Duff & Phelps, Duff & Phelps had shown no inclination to fire him. What is more, Duff & Phelps could not have fired him just to increase senior management's gains in the buyout (what Judge Easterbrook called an "opportunistic" firing).[26] It could not, as Judge Easterbrook inimitably put it, have told him that "even if you hadn't resigned, we would have fired you, the better to engross the profits of the merger for ourselves. So long, sucker."[27]

Hence the decision: Jordan had the option of staying at Duff & Phelps and keeping his stock; in order to decide whether to exercise that option, he needed information that Hansen had but did not disclose; Hansen and Duff & Phelps stood in a fiduciary relation to Jordan as shareholder; and in repurchasing Jordan's stock without disclosing the information Jordan needed to decide whether to keep his stock (and stay) or sell it (and go), Hansen and Duff & Phelps violated the disclose or abstain duty of Rule 10b-5.[28]

Judge Posner focused on Judge Easterbrook's last point. He began by noting that Jordan, as an employee at will, had no legally recognizable right to stay at Duff & Phelps. If he had no right to stay, he had no right to keep his stock.[29] Although Rule 10b-5 mandates disclosure,

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[22] *Id.*

[23] *Id.* at 434–35.

[24] *Id.* at 437.

[25] *See id.* at 440–41.

[26] *Id.* at 438. The "opportunistic" firing to which Judge Easterbrook objected was opportunistic only because it let Duff & Phelps force Jordan to sell his stock at book value and abandon the gains attributable to the merger. Firing him was "opportunistic," in other words, only because it forced him to sell his stock, not because it took away his job.

[27] *Id.* at 437 (internal quotation mark omitted).

[28] *See id.* at 436. Other cases stemming from the Duff & Phelps sale took Judge Easterbrook's position. *See* Smith v. Duff & Phelps, Inc., 891 F.2d 1567, 1572–75 (11th Cir. 1990), *overruling on other grounds recognized by* Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567, 1575 (11th Cir. 1992) (Wellford, J., dissenting); McLaury v. Duff & Phelps, Inc., 691 F. Supp. 1090, 1095–97 (N.D. Ill. 1988); Guy v. Duff & Phelps, Inc., 672 F. Supp. 1086, 1089–92 (N.D. Ill. 1987).

[29] *Jordan*, 815 F.2d at 446 (Posner, J., dissenting).

disclosure is necessary only when an investor can respond to any information he obtains. Without a right to hold stock as a Duff & Phelps employee, Jordan lacked a right to respond to any news of a merger.[30]

Second, although Duff & Phelps showed no inclination to fire Jordan, the law should not penalize firms for being nice. The firm could have fired him, and for any reason whatsoever. If it had, then Jordan could not have kept his stock — and could not have sold it at the higher buyout price.[31]

Last, even if corporate law imposes fiduciary duties to minority shareholders on directors, Judge Posner argued, Jordan waived any resulting rights. Through the shareholders' agreement, he specifically agreed that "nothing herein" would "confer on [him] any right to be continued in the employment of the Corporation."[32] He had a right to the information only if he had a right to stay at Duff & Phelps; as an at-will employee, he had such a right only if he obtained it as an adjunct to any right he might acquire as a minority shareholder; and through the shareholders' agreement, he waived all such rights.[33]

But there was a potential catch. In the early 1980s, Hansen had had an affair with Carol Franchik. When fired, she had threatened suit. In response, the board adopted a resolution allowing anyone who had been fired to keep his or her stock. Suppose Jordan wanted to stay and refused to quit. To rid itself of him, the firm would have needed to fire him. Yet if it fired him, by the terms of the resolution he acquired a legal right to keep his stock. Would that not destroy Judge Posner's argument? Apparently, the requirement that departing employees sell their stock stemmed from the shareholders' agreement, and the agreement was subject to change only by unanimous shareholder vote. As a result, the "Franchik Resolution" was invalid on its face.[34]

II. TEACHING *JORDAN*

So did Judge Posner get it right? More specifically, as a federal judge ruling on a state law issue, did he apply the rule a state court judge would have applied? To my mind, the answer is no, and shows the risk inherent in appointing judges too creative and independent for the job. Did he nonetheless take an approach that made sense? The

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[30] *See id.* at 448.
[31] *See id.* at 449–50.
[32] *Id.* at 449 (internal quotation marks omitted).
[33] *Id.* at 446.
[34] *Id.* at 434 (majority opinion).

answer is yes, and illustrates the second-best principles that ought to determine the rules real-world courts apply.

Typically, I teach *Jordan* two-thirds of the way through the semester, after the well-known case of *Wilkes v. Springside Nursing Home, Inc.*[35] By then, I find it hard to claim that Judge Posner applied anything close to the rule a typical state court judge would have applied.

In *Wilkes*, the Massachusetts Supreme Judicial Court faced a conflict among four 25% shareholders of a nursing home in Pittsfield, Massachusetts.[36] According to the court, three of the shareholders violated their fiduciary duty to the fourth (Wilkes) when they fired him from his job as the home's maintenance man.[37] Shareholders traditionally owe no fiduciary duties to each other, the court explained, but partners do. Yet close corporations are much like partnerships. As a result, shareholders in close corporations *should* owe duties similar to those of partners.[38] Although the four *Wilkes* shareholders deliberately chose the corporate form, under the opinion they incurred fiduciary duties close to those they would have owed had they chosen a partnership instead.

In effect, the *Wilkes* court faced investors who could have selected strict fiduciary duties but opted for laxer duties instead, and then imposed on them rigid and demanding duties anyway.[39] It faced investors who deliberately tried to waive fiduciary duties, and refused to let them. This rule is not peculiar to Massachusetts. Both Indiana and Illinois courts have explicitly adopted the *Wilkes* formula as well.[40]

As a result, if the *Wilkes* court had faced the *Jordan* facts, I find it hard to believe it would have dismissed Jordan's claim. To be sure, Jordan worked under an at-will contract — but then so did Wilkes. Judge Posner would have let Hansen fire Jordan as stock analyst. The *Wilkes* court refused to let the ruling trio fire Wilkes as maintenance man.

Fundamentally, both Judge Easterbrook and Judge Posner explicitly treat corporate law (and its constituent fiduciary duties) as a waivable default contract.[41] In part because of pioneering work by Judge Easterbrook and Professor Daniel Fischel, this approach has become

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[35] 353 N.E.2d 657 (Mass. 1976).

[36] *Id.* at 659–60.

[37] *Id.* at 661.

[38] *Id.*

[39] Actually, the four were also directors as well as shareholders, *id.* at 660, and owed fiduciary duties in that capacity.

[40] *See, e.g.*, Hagshenas v. Gaylord, 557 N.E.2d 316, 323–34 (Ill. App. Ct. 1990); W & W Equip. Co. v. Mink, 568 N.E.2d 564, 574 (Ind. Ct. App. 1991).

[41] *See, e.g.*, Nagy v. Riblet Prods. Corp., 79 F.3d 572, 576 (7th Cir. 1996) (Easterbrook, J.) ("[T]he corporate charter is a species of contract, and selecting a state of incorporation then is no different from putting a choice-of-law clause in a complex commercial contract.").

the law and economics orthodoxy.[42] Indeed, it constitutes the basis from which most modern corporate legal scholarship proceeds, and for good reason: it makes sense.

Yet this scholarly enthusiasm for the fiduciary-duties-as-default approach is not one that state court judges necessarily share.[43] As in *Wilkes*, state judges often treat fiduciary duties as sacrosanct and resist any attempt to loosen them. While on the New York state bench, Justice Cardozo famously immortalized that reverence in *Meinhard v. Salmon*[44] with his inimitable purple prose:

> Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior [for fiduciaries]. . . . Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. . . . [This standard for fiduciaries] will not consciously be lowered by any judgment of this court.[45]

Although now nearly eighty years old, *Meinhard* embodies a reverence toward fiduciary duties that state judges routinely still display. From 2001 to 2005, judges cited *Meinhard* eighty times, the majority of those instances in state courts. Indeed, in another case arising out of the same Duff & Phelps sale, the Eleventh Circuit held it "a violation of fiduciary principles . . . to require employees to contract away their right to make a return on their investment."[46] Hence the dilemma: state judges often reject the Easterbrook-Posner framework and apply instead a distinctly moralistic approach; *Erie*[47] requires Judges Easterbrook and Posner to apply state law; but they recoil at the idea of doing so.

Let me suggest the locus of the problem: judging is not a job for unconstrained, innovative minds. Judges are government bureaucrats. Their job is to be honest, to unravel a set of facts, to decide what law

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[42] *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 1–40 (1991).

[43] Some scholars are more optimistic. Professor Stephen Bainbridge, for example, argues that courts *do* generally let people waive their fiduciary duties. *See* STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 823–25 (2002).

[44] 164 N.E. 545 (N.Y. 1928).

[45] *Id.* at 546 (citation omitted) (quoting Wendt v. Fischer, 154 N.E. 303, 304 (N.Y. 1926)). This point about Justice Cardozo does not say something that Judges Posner and Easterbrook do not recognize. Judge Posner himself describes *Meinhard* as the "most famous of Cardozo's moralistic opinions" and implies that "the moralistic streak in Cardozo may have led him astray." RICHARD A. POSNER, CARDOZO 104 (1990). "The characteristic analytic flaw" to Justice Cardozo's opinions, Judge Posner aptly quips, "is the substitution of words for thought." *Id.* at 119. For Judge Easterbrook's perspective on *Wilkes*, see EASTERBROOK & FISCHEL, *supra* note 42, at 247–48.

[46] Smith v. Duff & Phelps, Inc., 891 F.2d 1567, 1575 (11th Cir. 1990), *overruling on other grounds recognized by* Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567, 1575 (11th Cir. 1992) (Wellford, J., dissenting).

[47] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

applies, and not to think too hard about it all.[48] Despite our attempts to cow first-year students over the ambiguities involved, applying legal rules to facts is rarely rocket science.

Consider a parallel from the other legal system I know, that of Japan. By all accounts, Japanese judges are relentlessly honest, and among the smarter members of the bar. Yet they work within a judicial bureaucracy that rigidly rewards conformity — and conform they do.[49] Hired in their late twenties, Japanese judges are regularly evaluated by senior judges in the judicial personnel office.[50] Those senior judges then decide which judges to promote, which to stall, and when necessary (it rarely is), which to fire.[51] Judges who work hard, who clear their dockets quickly, and who do not make waves earn regular promotions. They climb the pay scale quickly and obtain postings in the most desirable cities.[52] The heterodox wallow in undesirable posts at low pay.

The result is an institution that does not work perfectly but that does facilitate dispute resolution more effectively than American courts do.[53] The courts do not attract or encourage creative minds, but that is the point. In the vast majority of real and potential disputes, the law that applies would be easy to predict if judges did not — and in Japan they do not — try too hard to improve the world. And if parties could predict it, they could and would — and in Japan they can and do — settle their disputes out of court in the law's shadow and pocket the fees they would otherwise pay their lawyers. If parties to contractual arrangements did not like the rule, they could and would — and in Japan they can and do — simply adjust the contractual terms and price accordingly ex ante.

Under *Erie*, the job of a federal judge applying state law is similarly mechanical: to mimic the state court. The federal judge is not to reinvent corporate law on a more sensible plane. Indeed, he is not to

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[48] Professor Eric Rasmusen and I develop this point more fully in J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN 122–68 (2003), and J. Mark Ramseyer & Eric B. Rasmusen, *The Case for Managed Judges: Learning from Japan After the Political Upheaval of 1993*, 154 U. PA. L. REV. 1879 (2006).

[49] For empirical evidence of these claims, see RAMSEYER & RASMUSEN, *supra* note 48, at 122–68. True, the Japanese legal system is a "civil law system," but the distinction is for present purposes a red herring.

[50] *See id.* at 8–9.

[51] *See id.* at 9–13.

[52] *See id.* at 13–15.

[53] For empirical evidence of this phenomenon in the context of traffic accident disputes, see J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263 (1989). For an intriguing dissent to the notion that judges should be making law, see Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006).

reinvent any law at all. He is to apply it. If citizens want their world to go to hell, Justice Oliver Wendell Holmes memorably remarked, a judge's job is to help them.[54] If state courts want to send it there too, a federal judge's job is to help them as well. Fundamentally, designing better legal rules is not a judge's job.

Judges may enjoy creating better rules, but judicial experimentation necessarily makes it harder for disputants to predict what judges will do. An efficient legal system is one that disputants can avoid through settlement. To do so, they need courts that operate rigidly and mechanically — and judges who abandon any intellectual ambitions and resign themselves to working as lower-level bureaucrats. For that to happen reliably, judges need to suffer career penalties for deviating from established rules. We lack ways to impose such penalties in the United States. But appointing judges with the intelligence and creativity of Judges Easterbrook and Posner is — not to mince words — exactly what we should not be doing. As judges, they simply do too much: they muddy the law by trying to fix it, and they worsen the law by encouraging (through example) their less talented peers to do so as well.

On the second question — whether Judge Posner took an approach that makes sense — I find it easy to sympathize. Again, consider the Japanese parallel. Japanese judges routinely dismiss claims that American judges would entertain.[55] They recognize, in effect, that real-world courts do not handle some disputes well. Rather than try to right every wrong, they understand that for many wrongs in this world, the courts cannot reasonably provide a remedy.

An approach, like this one, that recognizes the inherent limitations of the court has much to say for it. Scholars generally prefer legal systems that try to fix every problem, of course. On that score, the Japanese professoriate matches the American academy measure for measure. But the more limited approach has its roots in the basic distinction between first- and second-best legal rules.

Legal scholars typically start by asking whether the plaintiff suffered a loss. They then ask — depending on the policy preferences of the scholar — whether making the plaintiff bear the loss seems unfair, whether the defendant has the resources to bear the risk more easily, or whether judicial intervention would facilitate more efficient economic decisions. If they answer yes to the question they ask, they rea-

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[54] Letter From Oliver Wendell Holmes, Jr., to Harold J. Laski (March 4, 1920), *reprinted in* 1 HOLMES-LASKI LETTERS 248, 249 (Mark DeWolfe ed., 1953).

[55] To be sure, they also entertain many suits that American courts rightly dismiss. Landlord-tenant and employment claims are perhaps the most disastrous examples. For an overview of landlord-tenant law in Japan, see J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW 37–42 (1999).

son that a court should entertain the case. The disasters resulting from the first two approaches are of course the stuff on which the young Professor Posner made his name.

After forty years of law and economics, we now opt routinely for the third approach instead. In torts, for example, the plaintiff should collect if, but only if, the defendant could have avoided the loss more cheaply than the plaintiff. In contracts, courts imply a term if, but only if, as Judge Easterbrook put it in *Jordan*, "the parties would have bargained for [it] if they had signed a written agreement."[56]

Unfortunately, this law and economics formula rests on a first-best approach. Suppose, however, that lawyers are expensive and often dishonest; that courts are slow and cumbersome; that judges (decidedly *not* the panel in *Jordan*) are only modestly intelligent, frequently wrong, badly harried, and in the pockets of the lawyers who funded their reelection campaigns; or that juries only randomly determine the facts correctly. Suppose, in short, that we live in the world that we do. If so, then the right legal rule may not be the one that places the loss on the cheapest cost avoider. It may be the one that forthrightly dismisses the claim.[57]

In a second-best world, the right legal rule is not one that tries to get the right result every time.[58] It is the rule Professor Richard Epstein attributes, in casual conversation, to the late Professor Walter Blum: a simple, easily implementable rule that gets the right result 95% of the time. In fact, even that approach may overestimate the abilities of real-world courts. In our badly flawed legal system, perhaps the right legal rule is not one that tries to get the right result 95% of the time. Perhaps it is a rule that leaves courts satisfied with a decent result 60% or 70% of the time. In either case, the easiest such rule to implement is the one Judge Posner adopted in *Jordan*: tell the plaintiff to get lost.

Because Jordan waived any right based on the shareholders' agreement to stay at Duff & Phelps, Judge Easterbrook relied heavily on what he saw as the limitations on Duff & Phelps's ability to fire him. In particular, he reasoned that the firm should not be allowed to fire him for opportunistic reasons — to prevent his obtaining the higher market price for his stock. Necessarily, this approach takes

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[56] *Jordan*, 815 F.2d at 438.

[57] *See, e.g.*, Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does — Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 118–38 (2002).

[58] *See* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 37–49 (1995). If the judicial process involved no transaction costs, of course, a rule that plaintiffs always win a given type of case would be every bit as efficient as a rule that plaintiffs always lose. Real-world judicial processes, however, are never free.

courts into the business of asking why firms fire their at-will employees and whether those reasons are "opportunistic." Ex ante, Judge Easterbrook's rule plausibly encourages parties to avoid devious strategies and behave honestly. Presumably, such is what most (or virtually all) parties would want of their partners, whether or not they drafted a contract. In a first-best world, the rule makes eminently good sense.

But we do not live in a first-best world, or anything close to it. In our world, perhaps the right approach is to ask whether Jordan negotiated a contractual right to keep his job. If he did not — if he accepted an at-will contract — then he had no right to continued employment. Given that he could have kept his stock only if he kept his job, he had no right to hold his stock either. And if he had no right to hold his stock, he had no claim to assert. End of story. If firms and employees dislike the result, they can write a contract to the contrary at the outset.

Such is the opinion Judge Posner wrote. Harsh, perhaps; it made no attempt either to encourage "fair" deals (as earlier generations urged) or to discourage "opportunistic" behavior (as Judge Easterbrook urged). Given our imperfect legal system, however, perhaps those are precisely the aims to which we should not aspire.

III. CONCLUSION

By juxtaposing at-will employment with corporate fiduciary duties, *Jordan* creates something of a classroom brain twister. Yet the exchange between Judges Easterbrook and Posner also illustrates two fundamental but seldom recognized principles of real-world courts. First, the bench is properly a place for honest jurists of moderate talent who are, ideally, monitored for their work. It is not a place for men and women with the independence and sophistication of these two men. Such judges can muddy the law by trying to fix bad precedent, and worsen the law by setting interventionist examples for their far less talented peers.

Second, by basic second-best principles, the right legal rule for a substantial fraction of contractual disputes is not a rule designed to facilitate efficient deals. It is a rule that dismisses a plaintiff's claim forthwith. We live in a world with imperfect judges, costly and dishonest attorneys, and only moderately intelligent juries. As Judge Posner implicitly recognized in *Jordan*, but other judges rarely do, many cases are simply beyond the capacity of most real-world courts to handle cost-effectively.