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UNDER THE ROBES

A JUDICIAL RIGHT TO BARE ARMS & LEGS & . . . ?

Erik M. Jensen

AS ONE OF THE STARS in the law-and-economics firmament, Judge Richard Posner is often characterized as unfeeling – unwilling to give you the shirt off his back. If that's true, it has to be because of economic efficiency. A gratuitous shirt-transfer would be economically suspect in any event, of course, but something else might be going on here as well. For economic reasons the judge might not be wearing a shirt to begin with – or much of anything else. If so, it would be a bit much, economically speaking, to expect the judge to go out, buy a shirt, put it on, and then give it to you.¹

What *do* judges have on under their robes?² This question has interested scholars (and voyeurs³) for years, both inside and outside the United States,⁴ and not only about jurists on the “judicial hot-

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¹ The reasonable thing for a judge to do, and this happens often, is to require the transfer of a shirt from *someone else's* back.

² I'm talking about clothing, or the lack thereof, not philosophical stuff – *cf.* Louis E. Newman, *Beneath the Robe: The Role of Personal Values in Judicial Ethics*, 12 *J.L. & Religion* 507 (1995-1996) – or general gossip. *Cf.* *Underneath Their Robes: News, gossip, and colorful commentary about the federal judiciary*, available at underneaththeirrobes.blogs.com/main/.

³ A category that, I've been told, has some overlap with “scholars.”

⁴ See Martha Neil, *Under UK Judges' Robes: Suits, Shorts, Jeans*, *A.B.A.J. Law*

ties” list.⁵ For example, Dean James Simon reports that Chief Justice Roger Taney, a hotties also-ran if ever there was one,⁶ nevertheless attracted sartorial attention:

When he took the center chair on the Court’s bench, Chief Justice Taney created a minor stir by wearing trousers under his black robe rather than knee breeches favored by his predecessor. Would this sartorial gesture to the common man be followed by a rash of opinions championing Jacksonian democracy?⁷

That’s a nice story, but I just don’t see how this could have happened. Yes, people in the Supreme Courtroom were rash-averse, but, if red spots had developed, how would anyone have made the connection to Taney? He might have been getting too big for breeches, but he was wearing a *robe*,⁸ and his trousers would have

News Now, May 21, 2008, available at www.abajournal.com/news/under_uk_judges_robos_suits_shorts_jeans/print/.

⁵ Cf. Christopher Buckley, *Supreme Courtship* 11 (2008) (describing judge “removing her judicial robes, revealing a bra, pantyhose, and high heels. It was a sight to induce infarction in the most hardened of male arteries, but in a husband of six years, barely a glance.”). When the *Times* characterized the Buckley book as “the Supreme Court disrobed,” *N.Y. Times*, Sept. 7, 2008, § BR, at 1 (book review), my hardened heart skipped a beat: I thought I’d been preempted. See also Will Bankruptcy Judges Get Power to Strip Down?, *Wall St. J. Law Blog*, Sept. 24, 2008, available at blogs.wsj.com/law/ (another possibly preemptive strike that – whew! – was not dealing with judicial attire at all).

⁶ He’d rank right down there with William Howard Taft, who broke the scales of justice. Taft was a one-man court-packing plan.

⁷ James F. Simon, *Lincoln and Chief Justice Taney* 27 (2006).

⁸ I’m reasonably sure it wasn’t a mini-robe or one with slits down the sides. Judicial attire is generally a matter of tradition, not law, but there’s nevertheless a lot of conformity. The authority on which I rely for almost everything notes that, although generally “judges of both state and federal courts are free to select their own courtroom attire[,] [t]he most common choice is a plain black robe which covers the torso and legs, with sleeves.” Wikipedia, *Court Dress*, available at en.wikipedia.org/wiki/Court_dress.

For the United States Supreme Court, “no rule requir[es] robes, though it is hard to recall any justice breaking from the tradition.” John Eligon, *Behind the Gavel, a Sense of Style*, *N.Y. Times*, Sept. 6, 2008, at B-1. Flexibility is only at

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been covered up.⁹ Taney didn't flash the crowd or, *a la* Monroe,¹⁰ walk over an airvent on entering the courtroom. (If anything like that had happened – which would have created a *real* stir – I'm sure Dean Simon would have told us.) As it was, Taney was covered by a virtual invisibility cloak, and no one should have been able to see his other attire.

Sure, robes don't cover everything. One writer commenting on the *Bag's* Justice Antonin Scalia bobblehead doll noted that it has "brown shoes clash[ing] with [Scalia's] black judicial robe to show his devil-may-care attitude toward fashion."¹¹ Even then, however, we wouldn't have noticed Scalia's shoes if we hadn't been provided the footnote. Footwear (or bare feet) might be seen if a judge is standing up, strutting for a photographer or modeling for bobblehead immortality,¹² but that's not the usual judicial pose, even for a judicial poseur. For a judge warming the bench, shoes make no devil-may-care statement,¹³ and trousers (or breeches) aren't going

the margins. In the mid-1990s, for example, Chief Justice William Rehnquist began wearing a robe with four gold braid stripes on each sleeve, apparently inspired by the Lord Chancellor in Gilbert and Sullivan's *Iolanthe*:

The Law is the true embodiment
of everything that's excellent,
It has no kind of fault or flaw,
And I, my Lords, embody the Law.

Quoted in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 604 (1980) (Rehnquist, J., dissenting); *see* Can you explain the 4 gold stripes on the sleeves of Chief Justice Rehnquist's judicial robe?, C-Span.org (2000), available at www.c-span.org/questions/week136.asp.

⁹ Predecessor John Marshall's legs would also have been covered, whether or not he was wearing breeches of good taste. *Cf. infra* note 27 and accompanying text.

¹⁰ That's Marilyn, not James.

¹¹ Heather Gehlert, Bobblehead Justices Help Journal Promote the Lighter Side of Law, L.A. Times, July 3, 2006, at A16.

¹² Photographic portraits of the recent Court show some mismatched shoes and pants on male justices sitting in the front row. Now retired Justice O'Connor showed a little leg (indeed, a matched pair), as does her bobblehead.

¹³ Maybe a hard-to-hide Mohawk haircut would do it. (I like to imagine Justice Ginsburg with a spiked purple 'do.)

to show in the courtroom either. Shirts or blouses? No way they'll be visible, except (maybe) at the collar.¹⁴

Because what is under the robes doesn't show, all we can do is speculate. Fortunately Judge Posner has helped us here, providing an intellectual construct to analyze fashion trends. In his book *Public Intellectuals*, he ridiculed Jacques Barzun, who had written that "[t]o appear unkempt, undressed, and for perfection unwashed, is the key signature of the whole age."¹⁵ Wrote the judge, "This is absurd, and not only because Americans, however casually they dress, remain fanatical about hygiene."¹⁶ As long as everyone bathes periodically and economically efficiently, all's right with the world.

Judge Posner of course applied economic analysis:

What the movement to casual dress may signify is a recession of theatricality as a mode of organizing social interactions,¹⁷ together with a rising cost of time (it takes longer to select, dress in, and undress from formal dress). . . . We would . . . expect a movement to casual dress because formal dress is less comfortable and generally more expensive, especially when time costs are figured in.¹⁸

I've criticized Posner's casual causality on substantive grounds: "[A]s critics of casual days have emphasized, deciding what to wear takes more time, and is more stressful, when guidelines are gone."¹⁹ But I also extended Posner's substance-over-formality argument to

¹⁴ Each of the male justices shows what appears to be a tie-and-collar poking through that V-cut in the neck of the robe, but, as far as we know, it could all be phony – a clip-on or something. A female justice wears a weird doily-type thingie hanging from her neck – a judicial cover-up, see Eligon, *supra* note 8 (quoting New York Judge Judith Kaye: "If you wear an open blouse or something, you look strange.") – but it gives no hint of what is worn (or not) underneath.

¹⁵ Jacques Barzun, *From Dawn to Decadence: 500 Years of Western Cultural Life: 1500 to the Present* 781 (2000).

¹⁶ Richard A. Posner, *Public Intellectuals* 308-09 (2001).

¹⁷ I have no clue what this means, but it sure sounds good.

¹⁸ Posner, *supra* note 16, at 309.

¹⁹ Erik M. Jensen, *Law School Attire: A Call for a Uniform Uniform Code*, 33 Okla. City U. L. Rev. 419, 439 n.116 (2007).

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its logical conclusion:²⁰

If questions of propriety don't matter, wouldn't we expect a movement to nudity in the workplace because, other than to keep warm and maybe to avoid sunburn, clothing makes no economic sense? Dressing takes longer than not dressing, and it's much more expensive. Hm-m-m, now I really do wonder what is under those judicial robes (At least we know the judge wears shoes, unless his robe is really long.)²¹

When I wrote those words, I was joking.²² No more. Now Professor Paul Horwitz, in reviewing Judge Posner's most recent book,²³ comments that, "[g]iven his druthers, Posner would criticize the cut of [Lady] Justice's robes, scoff that they are not warm enough to have any useful function, and digress to note that the taboo against nudity is itself a historically contingent and only locally applicable social norm."²⁴

Great minds . . . well, you know. Horwitz focuses on the lack of utility of *robes*, not what is under them, but he too derives from the Posnerian corpus the idea that in temperate climes we would all efficiently cavort buck- (or, as inappropriate, doe-) nekkid. On the bench, judges sort of have to wear robes – the conventions are strong²⁵ and occasionally the law requires them to do at least that

²⁰ I made the alterations with no additional charge.

²¹ Jensen, *supra* note 19, at 439 n.116 (citation omitted).

²² I'm joking when I write almost anything, except checks.

²³ Or what was Posner's most recent book as of this writing, in mid-2008. Two or three more Posner books will have hit the streets by the time you see this in print.

²⁴ Paul Horwitz, Book Review (Richard A. Posner, *How Judges Think* (2008), & H. Jefferson Powell, *Constitutional Conscience: The Moral Dimension of Judicial Decision* (2008)), Engage, June 2008, at 155, 156.

²⁵ Conventional behavior is varied, however. I've been told that at many conventions folks are regularly disrobing and wandering around wearing lampshades and little else.

And that sort of conventional behavior is affecting the judiciary, with New York leading the way. These days "it is common to see judges on the bench with unzipped or unbuttoned robes; accessories like scarves, jewelry or collars hanging

much²⁶ – but, when it comes to undercover attire, Posner’s economic arguments point toward . . . *nothing*.

Surely Judge Posner wouldn’t reject the economic implications of his own arguments. We would thus expect him to be scantily clad under his robes. And there’s precedent for spare attire. Chief Justice John Marshall’s knowledge of economics was rudimentary compared to Posner’s, but Marshall seemed to understand the basics. We are told that he “eschewed this formality [‘red robes with ermine trim and full-bottomed wigs’] and began the practice of *only* wearing a black silk robe.”²⁷

Only a robe! If minimalism was good enough for John Marshall, it has to be good enough for today’s judiciary, including Richard Posner.

Besides, if the robes are paid for by the government,²⁸ the economic case for quasi-nudity is even stronger. Why wear out a good pair of pants, or a good skirt, squirming on the bench, when you

outside of a robe; and, in some cases, no robe at all.” Eligon, *supra* note 8. Criminal Court Judge ShawnDya L. Simpson recently “wield[ed] the gavel in a lime-green suit.” *Id.* Better lime than slime, I guess. Justice Bruce Allen of the N.Y. Supreme Court wears his robe – “‘a funny piece of clothing’ that ‘gets in the way’” – only before a jury. *Id.* “If you can’t pull it off without a robe,” he adds provocatively, “you can’t pull it off.” *Id.*

In Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (2008), Justice Scalia – no conventionalist he – notes the slope we’re slipping down. Lawyers offend the dignity of courts by using contractions in filings – the time between contractions is contracting – and “next, to ensure a more ‘conversational’ environment, th[e] cheeky fellow[s] will have us shed our robes, and start calling us by our first names!” *Id.* at 118. Whatever he has on under his robes, *see supra* note 11 and accompanying text, the Justice certainly expects advocates to be suited for the case. *See* Scalia & Garner, *supra*, at 162 (“[U]nless it’s part of your special cultural heritage, we don’t recommend this coiffure [*i.e.*, men’s hair in a ponytail] if advocacy before elderly judges is your day job . . .”).

²⁶ *See, e.g.*, N.H. Rev. Stat. Ann. § 502-A:23 (“The justice of a district court shall wear an appropriate black judicial robe whenever his court is convened in criminal or civil session. Such robes shall be paid for by the state.”).

²⁷ Wikipedia, *Court Dress*, *supra* note 8 (emphasis added).

²⁸ In New Hampshire they are. *See supra* note 26. In New York in 1884, they weren’t. *See* Eligon, *supra* note 8.

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can wear out a government-issue robe instead? Always subject to criticism, judges will often be scarred, but they should never be frayed.

Even if a judge today were inclined to push economic considerations to the side and take some notions of propriety into account²⁹ (like “No nudes is good nudes”), it wouldn’t matter in this context. Economic efficiency and propriety can coexist: as I have noted, a robe covers just about everything anyway.³⁰ A judge can don a robe and not scare the horses while satisfying an economic preference for nudity *sub roba*.³¹ And silk, if that’s what the robe is made of, feels so-o-o good.³² It might be *better* than nothing.³³

The bottom line in all of this? If you lift up many judges’ robes, I predict you’ll see lots of bottoms (before you’re carted off to jail).



²⁹ No one should ever do that, of course, but just in case.

³⁰ That can be useful. See John Grisham, *The Appeal* 163 (Bantam Dell ed. 2008) (“[T]hat’s why I love these [robes]. They can hide twenty pounds.”).

³¹ Adam and Eve would have saved themselves some trouble if they’d worn their gardening robes rather than opting for casual wear. Justice Scalia might think his shoes evidence a devil-may-care attitude, see *supra* note 11 and accompanying text, but in the Garden of Eden the devil wasn’t focused on footwear. He had higher goals in mind.

³² Cf. Working Judge Turns 99, Third Branch: Newsletter of the Federal Courts, July 2006 (interviewing Judge Wesley Brown on his 99th birthday: “How do you get used to wearing the robe? . . . You find out it’s just like your underwear.”), available at www.uscourts.gov/ttb/07-06/working/index.html. But see Eligon, *supra* note 8 (noting that the “Gucci of robes,” in New York at least, costs \$400 and is “made from a high-end polyester”). Polyester, yuk. But as bad as polyester is, especially with oil prices spiking, I’ve been told that the comfort level was even lower for judges in King Arthur’s time. Those participating in knight court were subject to an iron-clad dress code.

³³ Then again, it might not. Hear James K. Logan & Monroe G. McKay, *Too Sexy for Our Robes* (1994) (two Tenth Circuit judges rapping about why they had taken senior status, as part of judges’ skit at dedication of Byron White U.S. Courthouse, Denver, Colorado) (DVD – under judicial seal – on file with author).