
THE ROLE OF THE JUDGE IN THE TWENTY-FIRST CENTURY

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[I]n my youthful, scornful way, I recognized four kinds of judgments; first the cogitative, of and by reflection and logomancy; second, aleatory, of and by the dice; third, intuitive, of and by feeling or “hunching;” and fourth, asinine, of and by an ass; and in that same youthful, scornful way I regarded the last three as only variants of each other, the results of processes all alien to good judges.¹

I.

There are interesting ambiguities in the title of this symposium, and of my talk. “The role of the judge” could refer to the role that judges actually play or the role they should play, which might be different. It could refer to the role American judges play in particular American courts or to some more abstract conception of the judicial role. And is the reference in the title to the twenty-first century merely a throwaway or are the participants in this symposium expected to project changes in the judicial role?

I am happy to have the running room that these ambiguities, perhaps deliberately, create. I am going to talk about the roles that various schools of legal thought assign to American appellate judges, and to indicate which I think realistic as description and what changes might be desirable. I shall conclude by suggesting that our judges should be less formalistic and more pragmatic. I won’t try to predict the future, however, except to make three rather obvious points. The first is that the continued rapid advance in science is going to make life difficult for judges. We live in an age of breakneck technological change that will thrust many difficult technical and scientific issues on judges, for which very few of them (of us, I should say) are prepared, because of the excessively rhetorical emphasis of legal education and the weak scientific background of most law students.

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¹ Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274, 275-76 (1929).

Second, if the federal caseload continues to grow – and that is merely possible, not inevitable² – the strain on federal appellate courts, as they are now constituted, including the Supreme Court, may become acute, even unbearable. There are huge efficiency losses when appellate courts expand, there are only so many circuits into which the federal appellate judiciary can be divided, and the Supreme Court probably cannot be enlarged or divided at all. Consider the dilemma of the Ninth Circuit, twenty-four of whose federal appellate judgeships are in California alone.

When the breaking point is reached, the federal judiciary will perforce switch to the European model of specialized courts. For specialization enables an indefinite increase in caseload to be more or less effortlessly accommodated: one can have as many courts as there are fields of law, and with each having its own exclusive domain the multiplication of courts does not create overlaps and a resulting need for methods of resolving inter-circuit conflicts. There are significant costs to specialization, as I have argued elsewhere,³ but they are bearable if caseload pressures preclude a system of generalist courts with (as a consequence) overlapping jurisdictions.

And third, it seems likely that artificial intelligence, leaping forward at last after decades of false starts, will begin to alter judicial practices. We are all familiar with how Amazon.com creates and modifies reader profiles, and some of us are familiar with “data mining,” which is the same procedure writ large – the computer identifies patterns and updates them as new data are received. I look forward to a time when computers will create profiles of judges’ philosophies from their opinions and their public statements, and will update these profiles continuously as the judges issue additional opinions. The profiles will enable lawyers and judges to predict judicial behavior more accurately, and will assist judges in maintaining consistency with their previous decisions – when they want to.

II.

Enough about the future; there is plenty to think about concerning the present, though I feel a certain awkwardness in talking about appellate judges, because I am one. Biographies are more reliable than autobiographies, and cats are not consulted on the principles of feline anatomy. At the same time, I’m struck by how unrealistic are the conceptions of the judge held by people, including distinguished academic lawyers such as Ronald Dworkin – and the entire Harvard Law School faculty, except of course Charles Fried – who have never been judges.⁴ That problem is due in part to the fact that judges

² RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 53-64 (1996).

³ *Id.* at 244-70.

⁴ A notable example of the Harvard Law School faculty’s unrealism about judges is Henry Hart’s famous *Time Chart of the Justices*. Henry M. Hart, Jr., *The Supreme Court, 1958 Term – Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

deliberate in secret, though it would be more accurate to say that the fact that they don't deliberate very much is the real secret. Judicial deliberation is overrated. English judges traditionally did not deliberate at all, as that would have violated the ruling principle of "orality," whereby everything that judges did had to be done in public so that their behavior could be monitored;⁵ hence those seriatim opinions which baffle the American law student and perhaps the English one as well. That was carrying antipathy to deliberation too far. Judicial deliberation in the very modest sense of ascertaining the views of each judge before the decision is issued, in order to avoid redundancy and if possible incorporate the suggestions of each judge in a single document, is an advance over seriatim opinions. Judicial deliberation is overrated by those (mainly professors) who believe that protracted discussion among judges with strongly differing views is productive.

The principal conceptions of the judicial role are the points of an equilateral triangle. They are formalism, politics, and pragmatism. Formalism is the conventional, one might say the official, conception of the judicial role. It was expressed, I assume tongue-in-cheek, in an especially unconvincing form by that skilled advocate John Roberts at his triumphal confirmation hearing. He said that the judge, even if he is a Justice of the U.S. Supreme Court, is merely an umpire, calling balls and strikes.⁶ Roberts was updating, for a sports-crazed century, Alexander Hamilton's view of the judge as one who exercises judgment but not will,⁷ and Blackstone's view of judges as the oracles of the law.⁸

The formalist conception of judging crudely depicted by Roberts is fancied up in versions intended for academic audiences. No serious person thinks that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires. The rules are created by the judges themselves. They are created out of materials that include constitutional and statutory language and previous cases, but these conventional materials of judicial decision making quickly run out when an interesting case arises; in those cases the conventional materials may influence, but they do not determine, the outcome. To decide them the formalist needs a meta-principle, such as originalism or textualism, or Dworkin's moral

For criticism, see Richard A. Posner, *The Supreme Court, 2004 Term – Foreword: A Political Court*, 119 HARV. L. REV. 31, 34 (2005).

⁵ ROBERT J. MARTINEAU, APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS 101-03 (1990).

⁶ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

⁷ THE FEDERALIST NO. 78, at 412 (Alexander Hamilton) (J.R. Pole ed., 2005).

⁸ WILLIAM BLACKSTONE, 1 COMMENTARIES *69.

conception of the Constitution,⁹ or Ely's "representation-reinforcing" conception,¹⁰ or now Breyer's "active liberty."¹¹ These principles are not found in the orthodox materials (though that invariably is the pretense); they are imposed. And there is no metric for arbitrating among them, just endless contestation. That doesn't exclude the possibility that one of them is true, but if there is no way to determine which one that is, the choice among them is rationally indeterminate.

At the opposite extreme from formalism is "attitudinalism." At its crudest, this is the idea that judges and Justices simply vote their political preferences, so if you know whether they are Democrats or Republicans you can predict their decisions; a more refined version substitutes ideology for party affiliation.¹² It is unquestionably true that there are liberal and conservative judges and Justices and that if you know which camp a particular judge belongs to, you know a lot about how he or she is likely to vote.¹³ But you do not know everything; your predictions will fall well short of one hundred percent accuracy,¹⁴ if only because many cases do not involve large political or ideological stakes, even at the level of the U.S. Supreme Court. Yet it is striking to note that the outcome of Supreme Court cases can be predicted more accurately by means of a handful of variables, none of which involves legal doctrine or judgment, than by a team of experts on constitutional law.¹⁵

⁹ See generally RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

¹⁰ See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87-104 (1980).

¹¹ See generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

¹² See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86-97 (2002). For a thorough review and sympathetic but penetrating critique, see Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 279-309 (1997).

¹³ See, e.g., ROBERT A. CARP & RONALD STIDHAM, *JUDICIAL PROCESS IN AMERICA* 292-96 (2001); Cross, *supra* note 12, at 275-79.

¹⁴ See, e.g., CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 47-57 (2006); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1479-82 (2003); Cross, *supra* note 12, at 285-311; Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 496-98 (1975); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 240-43 (1999); C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88*, 35 AM. J. POL. SCI. 460, 473-77 (1991).

¹⁵ See generally 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 (2004). The variables were "(1) circuit of origin; (2) issue area of the case; (3) type of petitioner (e.g., the United States, an employer, etc.); (4) type of respondent; (5) ideological direction (liberal or conservative) of the lower court ruling; and

The third conception of the judicial role, and the one that seems to me the most descriptive of American appellate judges, is the pragmatic. In this conception, the judicial imperative is to decide cases with reasonable dispatch, as best one can, even in what I am calling the interesting cases – the ones in which the conventional materials of judicial decision making just won't do the trick. For the judge, the duty to decide the case and to do so, moreover, with reasonable dispatch is primary. One's political preferences will do the trick some of the time, as the attitudinalist school has demonstrated, but not always, because they are bound to be tempered by other concerns. These include the feasibility of a particular judicial intervention given the limited knowledge and powers of courts, the effect on the law's stability and the court's reputation if its attitude toward precedent and statutory text is seen as too cavalier, and the judge's desire for ideological consistency (which is different from, though often correlated with, political preference). Lindquist and Cross offer a judicious summary based on an empirical study of adherence to precedent:

Precedent appears to have a moderately constraining effect on judicial freedom. The associations of ideology and outcome in the cases provide measured support for the realist hypotheses, but the study of cases of first impression refute the most extreme claims of realism. Judicial decisionmaking is influenced by precedent, but also by ideology and other factors. The growth of precedent in an area does not appear to restrict judicial discretion; if anything, the development of the law may increase such discretion.¹⁶

Pragmatism includes formalism as a special case because when the conventional legal materials point strongly to a particular outcome (statutory text is clear, precedents numerous, recent, and "on point," etc.) there will usually be compelling pragmatic reasons to choose that outcome. In particular circumstances, a thoroughgoing formalism might be the best pragmatic strategy.¹⁷ There is almost always a zone of reasonableness within which a decision either way can be defended persuasively, or at least plausibly, using the resources of judicial rhetoric. But the zone can be narrow or wide – narrow when formalist analysis provides a satisfactory solution, wide when it does not. Within the zone, a decision cannot be labeled "right" or "wrong"; truth just is not in the picture. So pragmatism also embraces attitudinalism as a special case, because when the zone is wide ideological predilections will often and inevitably shape decision.

(6) whether the petitioner argued that a law or practice is unconstitutional." *Id.* at 1163. For a condensed, peer-reviewed version of the study, see generally Andrew D. Martin et al., *Competing Approaches to Predicting Supreme Court Decision Making*, 2 PERSP. ON POL. 761 (2004).

¹⁶ Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1205-06 (2005).

¹⁷ See RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 219-20 (2001).

Academic lawyers have great difficulty accepting the pragmatic conception of the judicial process. The judge does not choose his cases or the sequence in which they are presented to him and does not enjoy the luxury of a leisurely schedule for deciding them, and for all these reasons he must act without proof or certitude or warrant of truth. Law professors choose their topics and need not submit a book or article for publication until they are satisfied that they have it right. That is one reason so many law professors insist against all the evidence that judges really do decide even the difficult cases on the basis of the orthodox legal materials. Another reason is that those materials are what the law professor knows (usually much better than the judge knows them, because generally the law professor specializes in just one or two fields of law), and there is a natural reluctance to acknowledge (even to oneself) that one lacks the essential tools for understanding the objects of one's study.

So against Chief Justice Roberts' umpire analogy I set the story of the three umpires asked to explain the epistemology of balls and strikes. The first umpire explains that he calls them as they are, the second that he calls them as he sees them, and the third that there are no balls or strikes until he calls them. The law professor is the first umpire. The modest formalist judge, who has no illusions that his method yields demonstrable truth, is the second umpire. The judge deciding cases in the open area is the third umpire; his activity is creation rather than discovery.

On the view that I'm expounding, appellate judges when deciding cases in the open area are political actors – legislators operating under certain constraints that do not bind the official legislators, but also, depending on tenure and other factors, enjoying certain leeways that official legislators don't. (Supreme Court Justices, when deciding constitutional cases, are like legislators in a system in which there is no judicial power to invalidate statutes and legislators once elected cannot be removed.) An important difference is that as a practical matter the judges can't tell the government what to do; that is the lesson of regulatory decrees, such as those requiring school busing, now largely abandoned because judges have learned that they don't have enough levers to be able to administer government programs effectively. They can only tell the government what not to do. But that is a real power, especially when the government is stopped in its tracks by the Supreme Court in the name of our very difficult-to-amend Constitution.

The Supreme Court is of course not a typical American court. The federal courts of appeals and state courts have a more diverse and less political docket and are constrained by threat of reversal (though not state supreme courts when deciding state-law cases). Common law is an interesting case. Since it is judge-created, it ought to be even more "lawless" than constitutional adjudication, but it is not. It is more stable, more objective, and less like legislation than constitutional law is. The reasons are that it deals mostly with subjects on which there is a high degree of consensus in society and in the judiciary, and that there is a kind of competitive process at work – the same issues arise under the common law of each of the states, and while resolutions

often diverge at first, gradually consensus emerges as the uncommitted judges compare the different resolutions on offer.

The judicial role is also different in a career judiciary – the system in the Continental European countries, Japan, and indeed most countries in the world – in which a judge begins his judicial career right after law school and progresses, as in the normal civil service, to more and more responsible judicial positions. In fact, judges in those systems *are* civil servants. Their advancement depends on their satisfying their superiors' expectations, and the result is the kind of disciplined, docile, and modest decision making characteristic of civil servants. In our judiciaries, and particularly in the federal court system with its lateral entry into positions that carry lifetime tenure, the role played by the judge is bound to be different and freer, especially given the individualism that is so characteristic of Americans. Similarly, elected judges exhibit less political independence than non-elected ones.¹⁸

In suggesting that American appellate judges are constrained legislators, I do not embrace the view of H.L.A. Hart and others that judges legislate only after they have tried and failed to decide the case by reference to the orthodox legal materials of (mainly) text and precedent. No doubt many do proceed in this way, but many others reverse the sequence. They start by making the “legislative” judgment as to what decision would have good consequences – would be, in other words, good policy – and then see whether that judgment is blocked by the orthodox materials. Indeed, this corresponds better than Hart's view to how judges think about their job (though I would not put much weight on judicial self-awareness – to paraphrase the criticism of King Lear by one of his bad daughters, judges have ever but slenderly known themselves). They do not reach a point in a difficult case in which they say the law has run out and now I will do some legislating; what a judge does (short of palpable usurpation) is, by definition, law.

III.

But to say that appellate judges are legislators in many cases, and those the most interesting ones, tells us nothing about their legislative preferences, the policies they enact. The question of what determines the decisions and other behaviors of people whose jobs are structured in such a way as to eliminate the usual incentives that guide workers is baffling. Federal judges cannot, short of gross misconduct, be removed from office, and they cannot be docked pay, exiled to undesirable judicial venues, or paid bonuses. Their powers *vis-à-vis* each other (for example, to preside, to make opinion assignments, to be promoted to chief judge) are determined by seniority, and their promotion opportunities are so limited as to play virtually no role in the thinking of most of them (including all Supreme Court Justices, except insofar as a Justice

¹⁸ See, e.g., Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206, 1221 (1997).

might think himself a candidate to become Chief Justice). Objective evaluation of appellate judges, which would enable searing criticisms that might shame the judges into behaving themselves, is terribly difficult,¹⁹ in part because of their ability to hide behind their law clerks and in part because the criteria of a good judge are contested and evaluation is frequently contaminated by the politics of the evaluator.

Yet it doesn't follow that judicial behavior is not determined by incentives. Without incentives, there is paralysis; that is the sad tale of Buridan's (mythical) donkey, who standing equidistant between two stacks of hay of equal size and quality starved because he had no rational grounds for preferring one over the other.

Judges have a utility function, as economists refer to a person's system of preferences, just like everybody else;²⁰ it's just that the function is missing many of the usual "arguments," as economists call the preferences, that are found in the typical worker's utility function. Clearly one that remains is leisure, and in the age of the law clerk the opportunities for a leisured judicial career are abundant. Yet most judges work pretty hard, and many work very hard indeed – too hard, in a number of instances; think of Harry Blackmun. What are they working hard *for*? Some for celebrity, but most are content to labor in obscurity. I think most judges (I have in mind particularly federal appellate judges, the slice of the judiciary that I know best) are guided in their judicial performance primarily by two objectives that are different from and more interesting than a desire for leisure or a thirst for celebrity. One is a desire to change the world for the better (which to the cynical is simply a desire to exercise power – and the ability to exercise even modest power is indeed a perk of being a judge). The other is to play the judicial game.

Let me take the second point first. Most people who become federal judges do so because they think they'll enjoy judging, even in cases in which their decision is certain to have no significant social impact. To enjoy judging in such cases you have to enjoy a process, a protocol, that includes (for an appellate judge) reading briefs and listening to oral arguments (many of us enjoy the give and take with the lawyers), negotiating with other judges, formulating rules and standards, recognizing the political and institutional limitations and opportunities of adjudication, enjoying the human comedy revealed by cases, and writing (more commonly nowadays supervising the writing of) judicial opinions, which have to conform to certain rhetorical principles primarily involving the handling of orthodox legal materials and the unobtrusive weaving into them of policy concerns.

¹⁹ See generally Symposium, *Empirical Measures of Judicial Performance*, 32 FLA. ST. U. L. REV. 1001 (2005).

²⁰ RICHARD A. POSNER, *OVERCOMING LAW* 109-44 (1995); Gordon R. Foxall, *What Judges Maximize: Toward an Economic Psychology of the Judicial Utility Function*, 25 LIVERPOOL L. REV. 177, 182-85 (2004).

An extremely important, even a defining, element of the judicial protocol is what Aristotle called corrective justice. That means judging the case rather than the parties,²¹ an aspiration given symbolic expression in statues of justice as a blindfolded goddess and in the judicial oath requiring judges to make decisions without respect to persons. It is also the essential meaning of the “rule of law.” It means abstracting from the particular characteristics of the litigants – their personal attractiveness, their standing in the community, their wealth or poverty, their political affiliation, their race, sex, ethnicity, and so forth – and seeing them rather as representatives of abstract positions or interests: the careless victim, the reckless driver, the copier of copyrighted work, and so forth. In the Roberts analogy, the judge, like the umpire, does not have preferences between contenders, that is, between the individual litigants. That part of the analogy is sound; where it fails is in implicitly denying that the judges have and can (often must) implement preferences between rules, or between litigants viewed as representative parties (the prosecutor, not Mr. X; the criminal defendant, not Mr. Y), as umpires cannot do (actually they can, and do, a little).

If you don’t like the protocol that I have described, or if the Senate doesn’t think you like it, you are unlikely to become a federal judge. Another important function of the confirmation process in today’s highly politicized environment²² is to lop off the ideological extremes. The effect is to limit the judiciary’s political scope. Imagine how different the composition and output of Congress would be if only persons in a certified political mainstream were permitted to run for Congress.

This by the way is an interesting example of how courts are constrained by means other than “the law”: the more adventurous the courts, the narrower the range within which Congress will confirm a judicial nominee. That example in turn enables us to glimpse the theory of *strategic* judging, a theory explored by economists and political scientists drawn to game theory (*not* the theory of the rules of the judicial game that I have been discussing). They model the judicial process as a contest with the legislature and the executive, with judicial colleagues, and with other courts.²³ For example, they expect judges to be

²¹ RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 284-86 (2003). Efforts to give corrective justice a substantive meaning are recent and in my view unsuccessful, and in any event irrelevant to this discussion.

²² It is highly politicized, in the setting of judicial confirmations, because of the Supreme Court’s insistence on involving itself in highly emotional controversies, and in doing so as provocatively as possible through aggressive rhetoric, violent dissents, and, lately, promiscuous citation of foreign decisions.

²³ See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 10-18 (1998); Daniel B. Rodriguez & Mathew D. McCubbins, *The Judiciary and the Role of Law: A Positive Political Theory Perspective*, in *HANDBOOK ON POLITICAL ECONOMY* (Barry Weingast & Donald Wittman eds., forthcoming 2006), available at <http://ssrn.com/abstract=875025>; Cross, *supra* note 12, at 320-21; Andrew F. Daughety & Jennifer F. Reinganum, *Speaking Up: A Model of Judicial Dissent and Discretionary Review*, 14 *SUP.*

bolder when the legislature is in the hands of their ideological allies because then their initiatives are less likely to be nullified by statutory enactments or amendments. I don't consider this element of the judicial utility function to be as important as the strategic school argues; most judges don't know or think much about legislative reactions to their decisions.²⁴ But it is *an* element and one that is consistent with the power factor in judging – the fact that judges do want to change the world for the better, as they understand the better, within the leeway that the loose and undisciplined American judicial system gives them.

What I'm calling a protocol could equally be called a game. You don't play chess unless you're prepared to play by the rules. The rules I'm speaking of with reference to the judicial process are not legal rules; I'm not echoing John Roberts. They are rules of articulation and deportment.

IV.

But I have yet to confront the really difficult question. For even wholehearted compliance with the rules of the game leaves appellate judges with broad discretion in many cases.²⁵ The question is what determines the judge's discretionary judgment. The fact that he's going to have to make a legislative determination, though with awareness that his legislative scope differs from that of the official legislators (narrower in some respects but broader in others), does not tell him or us what determination among the possible choices he's going to make. Within the discretionary zone, moreover, the judge's twin objectives of improving the world and playing the judicial game merge. But it is not a happy merger; rather it is a marriage of convenience, because the rule that permits (or maybe commands) the judge to legislate in the open area makes an uneasy fit with the other rules of the game, which seek to distinguish the judicial from the legislative role on the basis of the distinctive judicial protocol sketched above.

Senatorial confirmation narrows the range of discretionary choices that are likely to be made, but perhaps not greatly, because a court invariably is composed of judges appointed at different times and therefore often in different political circumstances. The mainstream changes over time, and this tends to expand the ideological distance between the most extreme judges on a

CT. ECON. REV. 1, 2-7 (2006); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 372-89 (1991); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 280-329 (2005); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1632-33 (1995).

²⁴ For empirical evidence against another prediction of the strategic school, see Frank Cross, *Appellate Court Adherence to Precedent*, 2 J. EMPIRICAL LEGAL STUD. 369, 398-404 (2005).

²⁵ In the case of trial judges, the more relevant discretion is fact discretion, given limited appellate review of findings of fact. I do not discuss fact discretion here.

court. Each judge may have been well within the mainstream when he was appointed, yet may not be within the current mainstream.

Within the open area, a judge's votes are determined, I believe, by two sorts of preference. One is systemic, and the other individual. The judge has an overall judicial approach, or more grandly a judicial philosophy (originalism, liberal activism, states' rights, natural law, etc.), but he also reacts to the particular circumstances of each case. Judges who do not want to be called willful or "result oriented" pride themselves (none more so than Justice Scalia) on being guided by an approach that overrides their reactions to the "equities" of an individual case. The approaches, however, are so malleable that it is difficult to know whether they are much more than rationalizations of decisions reached on other, unacknowledged grounds. One can identify cases in which Justice Scalia voted for a result for which he would not have voted as a legislator. In general, however, his votes conform closely to his political preferences, and this seems to me even truer for several of the other Justices.

So we have narrowed our inquiry to the cases in which the judge's vote is determined not by his judicial philosophy, and not by the orthodox materials of decision, but by – what? "Politics" is not quite right, because it implies partisanship, contrary to the principle of corrective justice. In addition, most of our judges do not identify with a political party, except perhaps in some reapportionment cases and *Bush v. Gore*.²⁶ "Ideology" is better. Ideology is a body of more or less coherent bedrock beliefs about social, economic, and political questions, or, more precisely perhaps, a worldview that shapes one's answers to those questions. Our principal political parties are coalitions and so lack coherent ideologies. A judge may lean more toward the set of policies associated with the Democratic Party or more toward the set associated with the Republican Party, but neither party is ideologically consistent; that is why party affiliation has only limited value in predicting judicial decisions even in the open area.

Ideology does better at predicting, as one would expect, than party affiliation. This is shown in a study by Ward Farnsworth.²⁷ In a sample of federal court of appeals judges he finds a high positive correlation between how often a judge votes for the government in non-unanimous (hence "close") constitutional criminal cases and in non-unanimous statutory criminal cases, but a low correlation between the votes of different judges. Some judges have a pro-government leaning, others a pro-defendant leaning, and this drives their votes in close cases, whether the case arises under the Constitution or under a statute, even though from a formal legal standpoint the text of the enactment being applied ought to drive the outcome and there are huge textual differences between the Constitution and statutes.

²⁶ 531 U.S. 98 (2000).

²⁷ Ward Farnsworth, *The Role of Law in Close Cases: Some Evidence from the Federal Courts of Appeals*, 86 B.U. L. REV. 1083 (2006).

Given the importance of ideology in the decisions of appellate judges even below the Supreme Court level,²⁸ I must consider the sources of judges' ideologies, a fascinating and understudied question. The main sources, I conjecture, are moral and religious values. These in turn are a product of upbringing, education, salient life experiences, and personal characteristics (which may determine those experiences) such as race, sex, and ethnicity; and also of temperament, which shapes not only values but also dispositions, such as timidity and boldness, that influence a judge's response to cases. At bottom, then, the sources of ideology are both cognitive and psychological, but I think the psychological dominates, because psychology exerts such a great influence on our interpretation of our experiences,²⁹ including the weights assigned to the possible consequences of deciding a case one way or the other.

The nature of the quest on which I am embarking was explained many years ago by Jan Deutsch:

The Court, unlike Congress, is not a social system; the task of a Justice is far more an individual than a group endeavor; and the influence of other Justices and of the institution on a new member of the Court is correspondingly limited. To a far greater extent than is true in the case of a Congressman, therefore, the search for factors that effectively impose restraints on the discretion of the individual Justice must be carried beyond the realm of his work experience to that of his schooling, both formal and informal. Such an investigation, a branch of the study of political "socialization," might profitably begin with an examination of the impact of their professional training on given Justices. For example, to what extent can a particular Justice's perception of the range of discretion he can legitimately exercise be ascribed to a professional training that was primarily "policy-oriented"?

....

As the decisions of the Court increasingly lose the appearance of "logic" that has historically constituted the basis for their public acceptability, studies of the institutional differences between Congress and the Court and of the extent to which the Justices have internalized the constraints on their power implicit in those institutional differences could thus gradually serve to replace appearance with reality, could in time

²⁸ An earlier study by Farnsworth reached virtually identical results for votes of U.S. Supreme Court Justices. Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court's Criminal Docket*, 104 MICH. L. REV. 67, 69-73 (2005).

²⁹ For an illuminating discussion, see generally MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS* (1982).

make possible the discarding of those symbols in terms of which the Court's authority has historically been accepted by the public.³⁰

One might seek guidance to the springs of judicial action in influential books of more than half a century ago by Theodor Adorno (and his colleagues),³¹ and by Gordon Allport,³² which distinguished between authoritarian and non-authoritarian personalities, spawning a huge literature in social psychology.³³ Adorno and Allport were curious whether prejudice had underlying psychological causes. They thought it did – that it was a product of maladjustment. Even earlier, the “legal realist” Jerome Frank had in like vein attributed legal formalism to arrested psychological development.³⁴ The conclusion of these forays into the psychological roots of ideology was, roughly, that rigid, dichotomous, conventional thinking associated with deferential and hierarchical attitudes toward political and other forms of authority was rooted in infantile troubles with one's parents. And this authoritarian personality formed in childhood predisposed a person either to irrational prejudices (Adorno and Allport) or to an unwillingness to interpret law flexibly so that it would keep pace with changing social conditions and understandings (Frank).

After decades of further research, the link between the authoritarian personality and maladjustment has largely been severed.³⁵ People do vary in their attitude toward authority, but the variance is not correlated with differences in mental health or in the infant's relations with his parents. The different attitudes largely reflect different beliefs, and different beliefs largely reflect different learning (as Deutsch surmised) – from parents, from teachers, from peers, from personal experiences, and so forth.³⁶

This “social learning” approach is not fully convincing, however. The reason is that people exposed to similar information and arguments often react differently. Personality, rather than just different learned beliefs, influences where along the liberal-conservative ideology spectrum a judge is likely to be

³⁰ Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 260-61 (1968) (footnotes omitted). I would put more weight on “informal schooling,” temperament, and experience than I would on formal schooling or professional training, if by the latter Deutsch means law school.

³¹ T.W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* (1950).

³² GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954).

³³ See generally ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT (John F. Dovidio et al. eds., 2005); STRENGTH AND WEAKNESS: THE AUTHORITARIAN PERSONALITY TODAY (William F. Stone et al. eds., 1993).

³⁴ JEROME FRANK, *LAW AND THE MODERN MIND* 18-20 (1930).

³⁵ John Duckitt, *Personality and Prejudice*, in ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT, *supra* note 33, at 395, 401-02; BOB ALTEMEYER, *RIGHT-WING AUTHORITARIANISM* 112-15 (1981).

³⁶ BOB ALTEMEYER, *THE AUTHORITARIAN SPECTER* 76-92, 146-66 (1996).

found. What we can call, for want of a better term and without pejorative intent or attribution to a psychological deformity, the authoritarian personality is repelled by disorder, prizes hierarchy and hence fears loss of control, dislikes ambiguity and ambiguous relationships (such as departures from the conventional nuclear-family organization of the family), tends to religiosity (because of his concern with maintaining moral order), believes in discipline, punishment, and the use of force, and is keen to spot symptoms of a social slide toward anarchy. If he was at an impressionable stage in his development during the disorders of the Vietnam era, the authoritarian's proclivities will probably have driven him into the Republican camp, though this would not commit him to all the planks of the Republican platform. If on the contrary he is a natural rebel – a contrarian who hates authority whether it is intellectual or political and so is a skeptic in the ordinary-language as distinct from the philosophical sense of the word and revels in contingency and ambiguity – he is likely to be a liberal judge.

I am describing extremes exaggerated to the point of caricature, as well as ignoring other ideological axes along which judges might fall – libertarian free marketers are unlikely to be authoritarian, and economic collectivists and “political correctness” police are likely to be. But probably most judges today can be located somewhere along the spectrum that runs from authoritarian/conservative to non-authoritarian/liberal (though rarely at the ends) and it is likely that a judge's location is predictive of his votes in indeterminate cases – and the more indeterminate, the more predictive value the judge's location on the spectrum is likely to have.

I must not exaggerate that predictive value, however. Even at the level of the U.S. Supreme Court, not all cases are found in the area where the conventional materials and norms of adjudication run out. In other cases – an increasing fraction of cases as one moves down the judicial hierarchy – the “rules” of the judicial game (other than the rule allowing the judge to exercise discretion in the open area) exert increasing force. But this brings another factor into play: the relative weight that particular judges give to the power motivation relative to the game-playing motivation in the judicial utility function. A judge can have strong ideological convictions but attach great weight to the rules of the game that distinguish the judicial from the legislative role, or weak ideological convictions but a degree of disdain for those rules.

This possibility creates a potential dilemma for the authoritarian/conservative. To the extent that his temperament and (closely related to or determined by it) his ideology predispose him to value order, compliance with the rules of the judicial game may push against his desire to move the law in the direction of his ideology. The judge who wants people to accept authority may feel drawn to accepting the authority of text and precedent even when they block otherwise ideologically appealing results. Robert Bork, Antonin Scalia, and like-minded members of the Federalist Society have found the solution: the elevation of constitutional text to the supreme principle of order, corresponding to the Bible or the Koran, with all

these sacred texts sharing the fortunate property to the ideologically ambitious of profound ambiguity. This ambiguity is due in part to their antiquity, which makes them fit modern conditions poorly, requiring aggressive “interpretation” represented as obedience.

Their doctrine (“originalism”) is the extreme instance of a more general tendency to reach back. The Justice who is out of step with the current precedents can go behind them, to some earlier body of case law (or constitutional text) that he can describe as the bedrock, the authentic Ur-text that should guide decision.

This is an example of bad faith in Sartre’s sense, and is matched at the liberal end of the ideological spectrum by insistence, most recently in Justice Breyer’s book, that liberal judges too are interpreters, not creators.³⁷ The articulation of judicial philosophies by judges is, perhaps inescapably, at root hypocritical. Apart from the obvious political attractions of a rhetoric of judicial certitude, we are psychologically predisposed, as has been argued in an interesting article by law professor Dan Simon, to exaggerated confidence in the soundness and coherence of our beliefs even if we cannot defend them.³⁸ An even more important factor at work is simply that emotional commitments are as or more binding than intellectual ones. Ask yourself your reaction to the famous line in which Rudyard Kipling expresses his contempt for people who despise soldiers and police by saying that they make “mock o’ uniforms that guard you while you sleep.”³⁹ You are likely to have a strong reaction, either of agreement or disagreement, with Kipling without being able to establish the soundness of your view. If you are highly sophisticated intellectually, you may recognize that your conviction, however strong, cannot be shown to be “right,” but (at most) reasonable; and yet that recognition will not weaken your conviction’s hold over you or cause you to reject it as a ground of decision. A judge will suppress some of his emotional reactions because they are not permitted moves in the judicial “game,” such as a personal liking for a litigant or his lawyer. But the character, at once gripping and inarticulate, of an emotional reaction doesn’t make emotion always an illegitimate or even a bad ground for a judicial decision. Remember that the judge has to decide the case, even if he cannot reach a decision by syllogistic or other algorithmic means not because he is intellectually incompetent but because he is dealing with irreducible uncertainty. Emotion is a form of thought, though compressed and inarticulate, because it is triggered by, and more often than not produces rational responses to, information.⁴⁰ (A child runs in front of your car and you

³⁷ BREYER, *supra* note 11, at 115-20. For criticism, see generally Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699 (2006).

³⁸ See generally Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1 (1998).

³⁹ RUDYARD KIPLING, *Tommy*, in BARRACK-ROOM BALLADS AND OTHER VERSES 6, 7 (Methuen & Co. 1946) (1892).

⁴⁰ See POSNER, *supra* note 17, at 225-51.

swerve without conscious thought.) It is no more to be despised as a ground of decision than intuition, which it resembles, both being preverbal forms of cognition.

Many of our decisions are intuitive, and some people are rightly credited with “good” intuition – which is an acknowledgement of its cognitive nature and value. As judges become more experienced in their job, they have greater confidence in their intuitive reaction to a case, and I do not think that this confidence, though often misplaced, is delusional. Intuition, exploiting the fact that the unconscious mind has greater capacity than the conscious mind,⁴¹ frequently encapsulates highly relevant experience. It thus produces tacit knowledge⁴² that may be a more accurate and speedier alternative in particular circumstances to analytical reasoning,⁴³ even though, being tacit, it is inarticulate. A person who knows how to ride a bicycle cannot convey his know-how in words to another person in a way that a person who knows how to bake a cake can convey his know-how by handing the other person a detailed recipe. Especially when you have to make a decision that depends on several factors, as is so common in law, you may make a better decision by relying on your intuition than by trying to evaluate each factor separately and combining the evaluations to form an ultimate assessment.⁴⁴

Notice how this approach inverts the normative evaluation of the unconscious offered by Adorno, Allport, and Frank. All three thought the unconscious exerted a malign influence on people’s views unless subjected to psychiatric therapy. But we must not go to the opposite extreme and suppose intuition a sure guide to sound decision making. An intuitive decision may ignore critical factors that lie outside the range of the person’s experience that informs his intuition. Kahan and Braman point out that “cultural commitments are *prior* to factual beliefs on highly charged political issues. . . . Based on a variety of overlapping psychological mechanisms, individuals accept or reject

⁴¹ Ap Dijksterhuis et al., *On Making the Right Choice: The Deliberation-Without-Attention Effect*, 311 SCI. 1005, 1005-06 (2006).

⁴² See, e.g., MICHAEL POLANYI, *The Logic of Tacit Interference*, in KNOWING AND BEING 138, 140-46 (Marjorie Grene ed., 1969); Richard N. Langlois & Müfit M. Sabooglu, *Knowledge and Meliorism in the Evolutionary Theory of F.A. Hayek*, in EVOLUTIONARY ECONOMICS: PROGRAM AND SCOPE 231, 232-41 (Kurt Dopfer ed., 2001).

⁴³ See, e.g., ADRIAAN D. DE GROOT & FERNAND GOBET, PERCEPTION AND MEMORY IN CHESS: STUDIES IN THE HEURISTICS OF THE PROFESSIONAL EYE 4 (1996); POLANYI, *supra* note 42, at 144-45; ARTHUR S. REBER, IMPLICIT LEARNING AND TACIT KNOWLEDGE: AN ESSAY ON THE COGNITIVE UNCONSCIOUS 45-50 (1993); Ido Erev et al., *The Negative Effect of Probability Assessments on Decision Quality*, 55 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 78, 90-91 (1993); Baljinder Sahdra & Paul Thagard, *Procedural Knowledge in Molecular Biology*, 16 PHIL. PSYCHOL. 477, 491-93 (2003).

⁴⁴ Pawel Lewicki et al., *Unconscious Acquisition of Complex Procedural Knowledge*, 13 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 523, 529 (1987); Timothy D. Wilson & Jonathan W. Schooler, *Thinking Too Much: Introspection Can Reduce the Quality of Preferences and Decisions*, 60 J. PERSONALITY & SOC. PSYCHOL. 181, 191 (1991).

empirical claims about the consequences of controversial policies [sic] based on their vision of a good society.”⁴⁵ In the case of educated people such as judges, these mechanisms operate more powerfully the more difficult it is to verify (or falsify) empirical claims by objective data. And often in law it is very difficult, as in the case of claims concerning the deterrent effect of capital punishment or the risk to national security of allowing suspected terrorists to obtain habeas corpus. The judges perforce fall back on their emotions or intuitions. They practice, in Kahan and Braman’s term, “cultural cognition.”⁴⁶

Algorithmic decision-making methods, by forcing the decision maker to bring the full range of relevant factors to the conscious level and integrate them rationally, may, by expanding the analytic capacity of the conscious mind, overcome the limitations of consciousness that make intuition frequently a superior substitute. Maybe what judges need in order to make good decisions, and specifically to escape being blindsided by considerations that intuition has failed to grasp, is intuition disciplined by algorithms, rather than “legal reasoning.” But maybe judges already have, if not formal algorithms designed to prevent blindsiding, at least crude substitutes in the form of the adversary process and the right of dissent. The lawyer on each side of an appeal has a strong incentive to bring to the judges’ attention any consideration that favors his side, and likewise a dissenting judge. The danger of blindsiding is thus a further argument for a diverse judiciary. The broader the range of experiences found in an appellate panel, the less likely the panel is to overlook relevant considerations.

The role of emotion and intuition as important but inarticulable grounds of a judicial decision is concealed by the convention that requires a judge to explain his decision in an opinion. All the obvious reasons for the judge’s not offering an explanation in terms of an emotion or a hunch to one side, a judicial opinion couched in such terms would not provide helpful guidance to bench or bar. Explaining – not perhaps the way in which the judge actually reached his decision but a way in which the decision could be made to seem the product of an analytical process even if the opposite result could equally have been made analytically respectable – facilitates the decision of future cases. The first decision in a line of cases may be the product of an inarticulable emotion or hunch, but once it is given articulate form that form will take on a life of its own – a valuable life that may include binding the author and thus imparting stability to law, or a death grip if subsequent judges ignore changed circumstances that make the decision no longer a sound guide.

V.

The area within which the judge exercises discretion will vary by judge. A judge’s “zone of reasonableness” (the area in which he feels free to decide a

⁴⁵ Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 *YALE L. & POL’Y REV.* 149, 150 (2006); see also DOUGLAS & WILDAVSKY, *supra* note 29, at 67-82.

⁴⁶ Kahan & Braman, *supra* note 45, at 150 (emphasis omitted).

case either way) is likely to widen with his judicial experience, as more and more knowledge becomes embodied in intuition, but to have a U-shaped relation to his intellectual ability. Both the ablest and the least able appellate judges are likely to stretch the zone – the ablest because of their facility in manipulating the orthodox legal materials that might stand athwart sensible policy and their confidence in their own ability, the least able because of susceptibility to emotional appeals by counsel or inability to understand the rather abstract virtues of such systemic considerations that limit idiosyncratic judging as legal stability and predictability.

The zone of reasonableness will tend to be narrow in fields of ideological consensus, for example, contract law, for in those fields judges do not need to rely on intuition; sharing common premises, they can reason to a result. Furthermore, the importance of stability in contract law is obvious and widely recognized. Most contract rules are default rules, that is, rules the parties can contract around, so it is important that they know what the rules are so that they can draft accordingly. Thus another factor tending to narrow the zone is realization that legal stability is a paramount value in some fields of law.

The zone of reasonableness is widest in constitutional cases in which the judges' emotions are engaged, because the constitutional text provides little guidance and emotion opposes dispassionate consideration of the systemic factors that induce judges to rein in their discretion. Rather than think that judges can be bludgeoned into agreeing to adopt one of the constitutional theories to channel their discretion, we should bow to the inevitable, and thus if troubled by the exercise of a free-wheeling legislative discretion by Supreme Court Justices we should insist on diverse appointments in order to make the Court at once more representative and, because of its diversity, less likely to legislate aggressively. The analogy is to reducing risk by diversifying one's portfolio; here it is a portfolio of judges to be diversified in order to reduce variance in outcomes.

VI.

If I have described the judicial process accurately, the remaining question is what if anything should be done to improve it. Jerome Frank thought judges should undergo psychoanalysis, as he had done; this is a ridiculous suggestion.⁴⁷ Professor Simon suggests techniques of debiasing, which sound a little ominous.⁴⁸ I have a simpler suggestion. Since judges in our system are going to be legislators as well as adjudicators, they ought to take a greater interest in facts; and lawyers ought to make a greater effort to put the facts before them. I don't mean the facts of the case, the adjudicative facts. I mean the kind of background or general facts that influence a legislative decision. I have pointed to life experiences as a factor shaping judicial choices in what I call the open area. Those life experiences prominently include encounters with

⁴⁷ See FRANK, *supra* note 34, at 143-47.

⁴⁸ Simon, *supra* note 38, at 138-40.

large, brute facts. Who would deny the impact on judicial thinking of such facts as the ignominious collapse of communism and with it socialist ideology, the successes of deregulation, or the emergence of homosexuals from the closet and the resulting discovery that they are really quite like other people? Rather than beating appellate judges over the head with cases, which is the standard technique of appellate advocacy, appellate lawyers would be more effective if, recognizing the essentially legislative character of much appellate adjudication and the essentially pragmatic disposition of most American judges, they instead emphasized the practical stakes in the case and thus the consequences of the decision.

I don't think we need worry too much that such background facts are pallid compared to the "equities" of the individual case, so that the non-formalist judge is bound to do short-sighted justice. The value of a system of precedent is that it compels, or at least invites, judges to think about the impact of a case on future litigants. Moreover, most judges are (surprisingly to non-judges) unmoved by the equities of the individual case. As Hamlet said, "The hand of little employment hath the daintier sense." Just as doctors tend to be callous about illness, judges tend to be callous about pathetic litigants. This is true of liberal as well as conservative judges, because it is part of playing the judicial "game." Judges internalize the slogan "hard cases make bad law," in which "hard" bears the meaning "tugs at the heartstrings," not "difficult." Judges realize that succumbing to that tug is what can make bad law.

In *Law and the Modern Mind*, Jerome Frank pronounced Oliver Wendell Holmes the "completely adult jurist,"⁴⁹ meaning simply that Holmes recognized that "[c]ertitude is not the test of certainty."⁵⁰ This was Holmes' famous detachment, thought callous by his detractors. I think Holmes' relevant personality trait is rather different. I think that surprisingly, given his distinguished lineage, his professional success, his commanding presence, and his wartime prowess – he didn't take himself very seriously. He was a famous wit, and wit implies a lively sense of incongruity, which can include recognition of the incongruity between one's own pretensions and achievements. And if you don't take yourself very seriously you are apt not to fool yourself into thinking you have all the answers. And if you are a judge who doesn't think you have all the answers you are less likely to challenge the decisions of the other branches of government. Frank, writing in 1930, at a time when the Supreme Court was quick to invalidate just the kind of social legislation that he favored, wanted judges to be more deferential, more modest. He thought this meant more adult, but I'm content to say more self-aware.

I share Frank's desire for our courts to loosen the reins on the other branches. I cannot defend that position here.⁵¹ What I can suggest is that more judges would adopt that position if they were more conscious that the

⁴⁹ FRANK, *supra* note 34, at 253.

⁵⁰ Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).

⁵¹ For a recent discussion, see generally Posner, *supra* note 4.

decisions which shape the law are rarely the product of an analytical process that can be evaluated in terms of truth and falsity, or right and wrong. They are personal in a broad sense that precludes objective assessment. As I said earlier, recognition of the role of the personal, the emotional, and the intuitive in our decisions will not weaken the force of these factors, but may induce hesitation to impose the decision on the nation in the name of the Constitution. One can feel something very strongly without believing that one's feeling is an adequate basis for constraining other people's behavior.