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The Realism of Judges Past and Present

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THE REALISM OF JUDGES PAST AND PRESENT

BRIAN Z. TAMANAHA*

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I. INTRODUCTION

“Judges as Liars” was the title of an essay by Martin Shapiro, a leading political scientist who studies courts. He argued that courts “occasionally make public policy decisions or law,” but judges cannot admit that they do this because they are supposed to apply pre-existing law.¹ “Such is the nature of courts. They must always deny their authority to make law, even when they are making law. One may call this justificatory history, but I call it lying. Courts and judges always lie. Lying is the nature of the judicial activity.”²

Political scientists regularly assert that judges are deluded or deceptive when they speak about judging. David Klein, for example, observed that “[j]udges cannot be expected to understand their own motivations perfectly or to report them with undiluted candor.”³ Lawrence Baum remarked that “[j]udges usually speak and write with audiences in mind, and they ordinarily present themselves in a way that they think will be received favorably. Further, they do not always understand their goals fully, and they may mislead themselves as well as their audiences.”⁴ Political

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¹Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL’Y 155, 155 (1994).

²*Id.* at 156.

³DAVID E. KLEIN, *MAKING LAW IN THE UNITED STATES COURTS OF APPEALS* 138 (Cambridge Univ. Press 2002).

⁴LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 19 (Univ. Michigan Press 1977).

scientists mean more than that everyone speaks and writes with audiences in mind and that everyone is self-deluded in various ways; they mean that judges, in particular and characteristically, put up false fronts and labor under self-delusions. Even scholars who more generously credit judges with honesty about judging nonetheless assert that “judicial self-reporting . . . is unreliable.”⁵

Political scientists and law professors are not alone in expressing this view of judges. In a recent book, *How Judges Think*, Judge Richard Posner wrote that “most judges are cagey, even coy, in discussing what they do. They tend to parrot an official line about the judicial process (how rule-bound it is), and often to believe it, though it does not describe their actual practices.”⁶

Judges bear some responsibility for perpetuating the belief that they are deluded or deceptive. They occasionally say things that ring false, like Justice John Roberts’ claim in his Senate confirmation hearing that judging on the Supreme Court is like calling balls and strikes. But such statements by judges, though memorable and often repeated, are relatively infrequent. For over a century, long before the emergence of the legal realists, judges generally have been remarkably candid about the limitations and uncertainties of law and the complexities of judging.

This Article has a single objective: to dispel the notion that judges are deceptive or deluded about judging. These unwarranted assumptions about judges distort theoretical and empirical debates about judging. Ordinarily the participants in any activity are presumed to possess valuable insights about the nature of that activity. Owing to the assumption that judges are deluded or dishonest, what they say on the subject of judging is often regarded with skepticism, discounted at the outset.

II. JUDGES HAVE LONG ADMITTED THAT THEY MAKE LAW

An accusation frequently leveled against judges must be dispelled at the outset. As quoted above, Shapiro roundly condemned judges for falsely denying that they make law. The vehemence of his charge is peculiar given that in a footnote he quotes Justice Antonin Scalia’s assertion that “courts have the capacity to ‘make’ law.”⁷ In a judicial opinion, Scalia openly declared that “[j]udges in a real sense ‘make’ law.”⁸ Scalia has repeated a number of times that judges “*make* the law,” resolving policy issues in the process.⁹ “Indeed, it is probably true that in these [common law] fields judicial lawmaking can be more freewheeling than ever,” Scalia wrote, “since the doctrine of *stare decisis* has appreciably eroded.”¹⁰

This was not the first time a political scientist accused judges of denying that they make law. Charles Grove Haines is a celebrated pioneer in the political science

⁵FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (Stanford Univ. Press 2007).

⁶RICHARD A. POSNER, *HOW JUDGES THINK 2* (Harvard Univ. Press 2008).

⁷Shapiro, *supra* note 1, at 155 nn.3-4 (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176-77 (1989)).

⁸James B. Beam Distilling Co. v. Ga., 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

⁹Antonin Scalia, *Common Law Court in a Civil Law System*, in *A MATTER OF INTERPRETATION* 3, 6, 9, 12 (Amy Gutmann ed., Princeton Univ. Press 1997).

¹⁰*Id.* at 12.

study of courts.¹¹ His 1922 article, “General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges,” is considered a seminal piece in the field.¹² Haines claimed that judges widely believe in this set of views: “The mechanical theory which postulates absolute legal principles, existing prior to and independent of all judicial decisions, and merely discovered and applied by courts, has been characterized as a theory of a ‘judicial slot machine.’”¹³ Contemporary legal historian G. Edward White has labeled this the “oracular” theory of judging: “the dominant understanding of judicial decision-making treated it as an exercise in ‘finding’ rather than ‘making’ law, with ‘law’ being conceived as a body of finite and immutable principles that existed independent of its interpreters.”¹⁴ Legal historians and theorists attach the label “legal formalism” to this set of ideas, asserting that it dominated the legal culture from the 1870s through the 1920s.¹⁵

The problem with these claims is that judges at the time frequently said the opposite—openly admitting that they make law. Haines’ own article quotes Lord Mellish for writing in an 1875 judicial opinion that “[t]he whole of the rules of equity and nine-tenths of the rules of common law, have in fact been made by the judges.”¹⁶ Lord Mellish made this statement almost fifty years before Haines asserted that courts “clung to” the belief that they merely declared preexisting law. Judge Benjamin Cardozo’s celebrated book, *The Nature of the Judicial Process*, which came out a year before Haines’ article, included a chapter entitled “The Judge as Legislator.” Cardozo wrote that “[o]bscurity of statute or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retroactively in the exercise of a power frankly legislative in function.”¹⁷

Prominent judges had said this decades earlier (as the quote from Lord Mellish attests to). Judge Thomas M. Cooley, one of the nation’s most renowned judges, asserted in 1886 that “[t]he decisions continue to accumulate as causes arise which present aspects differing at all from any which preceded; and a great body of laws

¹¹Nancy Maveety, *The Study of Judicial Behavior and the Discipline of Political Science*, in THE PIONEERS OF JUDICIAL BEHAVIOR 1, 2-3 (Nancy Maveety ed., Univ. Michigan Press 2003).

¹²*Id.* at 8.

¹³Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96, 97 (1922).

¹⁴G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* viii-ix (3d ed. Oxford Univ. Press 2007).

¹⁵In other works, I have argued that this accepted conventional view of the period is flawed. See, e.g., Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. (forthcoming 2009); Brian Z. Tamanaha, *The Bogus Tale About the Legal Formalists* (St. John’s Univ. Sch. of Law Legal Studies Research Paper Series, Paper #08-0130, 2008), available at <http://ssrn.com/abstract=1123498>.

¹⁶Haines, *supra* note 13, at 100 n.15 (quoting *Allen v. Jackson*, (1875) 1 Eng. Rep. 399, 405 (Ch. D.) (Mellish, L.J.)).

¹⁷BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 128 (1st ed. Yale Univ. Press 1921).

being made under the statute which is and can be nothing but ‘*judge-made law*.’”¹⁸ Unanticipated situations regularly arise, lacking any clear preexisting determinative legal rule. In such cases, Cooley continued, “it is evident that what the law was to be could not have been known in advance of decisions, and it is also evident that when declared by the court its effect must be retroactive.”¹⁹ Judge John F. Dillon wrote in the same year that “stupendous work of judicial legislation has been silently going on” for a “long period”²⁰; and “it is *no longer denied*, nor can it be, that the judges . . . are actually, though indirectly, engaged in legislating.”²¹ In a 1903 article with the “tell all” title “Judge-Made Law,” Judge A.M. Mackey matter-of-factly wrote that “a large portion of the unwritten or common law is judge-made law.”²² U. S. Circuit Judge Le Baron Colt wrote, also in 1903, that judges “have carried on judicial legislation from the infancy of the law in order that it might advance with society.”²³

To be sure, judges also can be found asserting that courts “make no laws, they establish no policy, they never enter into the domain of popular action,” as Justice Brewer insisted in an 1893 speech.²⁴ That is the standard line demarking the proper role of judges. Sometimes it was offered by judges as a statement of the ideal, sometimes as a descriptive claim about what judges do, often with an eye on defending or bolstering judicial legitimacy. “Judicial power is never exercised for the purpose of giving effect to the will of the judge,” wrote Chief Justice John Marshall nearly two centuries ago. “Judicial power, as contradistinguished from the power of laws, has no existence . . . Courts are mere instruments of law, and can will nothing.”²⁵

But when judges provide reflective accounts of judging, as Cardozo did, they typically have not denied that on occasion they make law. Judge Cooley and Judge Dillon were among the most prominent judges of the late Nineteenth century. Both judges asserted that judicial legislation is necessary to keep the law in sync with the times, and furthermore that it is inevitable that judges must make law when confronted with unanticipated situations that the existing law (cases and statutes) does not provide for.²⁶ With no sign of delusion or deception, well before the arrival of the legal realists, these judges expressed very realistic views about law and judging.

¹⁸Thomas M. Cooley, *Another View of Codification*, 2 COLUM. JURIST 465, 466 (1886) (emphasis added).

¹⁹*Id.* at 465.

²⁰John F. Dillon, *Codification*, 20 AM. L. REV. 1, 32 (1886).

²¹JOHN F. DILLON, *LAW AND JURISPRUDENCE OF THE UNITED STATES* 267-68 (Little, Brown and Co. 1894) (emphasis added).

²²A. M. Mackey, *Judge-Made Law*, 2 OKLA. L. J. 193, 197 (1903).

²³Le Baron B. Colt, *Law and Reasonableness*, 37 AM. L. REV. 657 (1903).

²⁴G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 46 (2005) (quoting David P. Brewer).

²⁵*Osborn v. Bank of U.S.*, 22 US (9 Wheaton) 738, 866 (1824).

²⁶See Cooley, *Another View of Codification*, *supra* note 18; DILLON, *supra* note 21, Lectures XI, XII, and XIII.

III. JUDGES HAVE LONG ADMITTED THAT LAW CAN BE UNCERTAIN, THAT THERE ARE GAPS IN THE LAW, AND THAT PRECEDENTS MAY CONFLICT

Haines suggested in his portrayal that judges believed that law was comprehensive and logically consistent, and that judges mechanically decided cases through logical deduction. But what judges repeatedly said about the law is contrary to this portrayal. Judge Dillon, in 1886, candidly detailed the legal uncertainty judges at the time faced:

It is manifest from the foregoing discussion, that the Judges from the very nature of their functions, can not develop the general principles of the law so as to take in the entire subject, or do anything except (if you will pardon the expression) automatically (that is depending upon the accident of cases arising for judicial action) towards giving anything like completeness to the law or any branch of it. Not only is the case law incomplete, but the MULTIPLICITY AND CONFLICT OF DECISIONS is one of the most fruitful causes of the unnecessary uncertainty, which characterizes the jurisprudence of England and America. Thousands of decisions are reported every year. An almost unlimited number can be found upon almost any subject. What any given case decides, must be deduced from a careful examination of the exact facts, and of the positive legislation, if any, applicable thereto. A general principle will be found adjudged by certain courts. Other courts deny or doubt the soundness of the principle. Exceptions are gradually but certainly introduced. Almost every subject is overrun by a more than tropical redundancy of decisions, leaving the most patient investigator entangled in doubt.²⁷

This luxuriant muddle was made worse, Dillon added, because legislation was “irregular and fragmentary,” and often poorly drafted.²⁸

Judge Seymour D. Thompson, the long time editor of the leading *American Law Review*, gave an address to the Georgia Bar in 1889 that exposed the extensive legal uncertainty judges were faced with. After detailing the situation in several areas of law, he asserted that “the jumble through which I have just conducted you, though full of legal technicality, is utterly destitute of any element of certainty; and every title of law abounds in such labyrinths.”²⁹ Thompson then articulated an argument (in 1889) that would be identified with the much later legal realists and Critical Legal Studies³⁰—that there are exceptions for legal rules and principles which can be invoked at any time:

Again, take the general proposition that a request is necessary to raise an implied promise. This is reiterated in many legal judgments. But it is

²⁷Dillon, *supra* note 20, at 29, 36 (emphasis in original).

²⁸*Id.*

²⁹Seymour D. Thompson, *More Justice and Less Technicality*, 23 AM. L. REV. 22, 44 (1889).

³⁰See Robert W. Gordon, *Critical Legal Studies*, 10 LEGAL STUD. F. 335, 338 (1986) (describing the indeterminacy thesis of CLS in terms reminiscent of Judge Thompson’s description of the state of the law).

easily shown that in many cases the law will imply a promise where there has been no request; but in what cases it will imply it and what not, who can tell? Similar doubts and infirmities seem to permeate every title of our case-made law.³¹

In an 1890 address to the Kansas Bar, Judge Thomas Ewing estimated that in about forty percent of his cases “the decisions [precedents] conflict, and a large weight of reason and authority is found on both sides.”³² “In these doubtful cases,” Ewing asked rhetorically, “who shall weigh them by reason, when the questions may be of mere arbitrary law. Who shall weigh them by conscience, when they may present no conflict solvable by the moral sense?”³³ President of the American Bar Association, Judge Uriah Milton Rose, remarked in his 1902 address that, owing to the proliferation of cases, judges have “discretion . . . in deciding cases . . . ; for our courts can generally find precedents for almost any proposition.”³⁴ Judge Oscar Fellows, in 1912, conveyed the sense of being overwhelmed by this mass of cases, remarking:

The reported decisions in all our states so enormously multiply that the lawyer’s problem is not so much where to find the law as to weigh and estimate the value of what he discovers. It is in truth more than ever “the lawless science of the law, the countless myriad of precedents.”³⁵

Chief Justice Albert Savage of the Maine Supreme Court, in 1914, acknowledged that cases arise in which authority can be found on both sides or precedent is lacking, “[a]nd it would be contrary to all human experience to say that his temperament and his predictions may not give color to his conception [of the law].”³⁶ Writing in 1922, Judge Charles M. Hough confirmed the presence of a “not inconsiderable number of causes wherein precedents are not ruling, where the statute or constitution does not directly and plainly cover, and where the Court has to deal with something previous lawmakers had not thought of, and therefore did not speak of.”³⁷ Judge Irving Lehman delivered a reflective speech at Cornell Law School in 1924 stating that judges are sometimes confronted with conflicting precedents, or erroneous precedents, or indeed no precedents, and that they must sometimes change the law for reasons of public policy.³⁸ As a law student, he came to realize that “[l]aw was not an exact science founded upon immutable principles”; upon becoming a judge,

³¹See Thompson, *supra* note 29, at 47-48.

³²Thomas Ewing, *Codification*, 41 ALB. L.J. 439, 440 (1890).

³³*Id.*

³⁴U.M. Rose, *American Bar Association*, 64 ALB. L.J. 333, 336 (1902).

³⁵Oscar F. Fellows, *The Multiplicity of Reported Decisions*, 6 ME. L. REV. 263, 264 (1912).

³⁶Albert R. Savage, *Some Sore Spots*, 7 ME. L. REV. 29, 37 (1913).

³⁷Charles M. Hough, *Book Reviews*, 7 CORNELL L. REV. 287, 288 (1922).

³⁸Irving Lehman, *The Influence of the Universities on Judicial Decisions*, 10 CORNELL L.Q. 1 (1924).

he “realized that in many cases there were no premises from which any deductions could be drawn with logical certainty.”³⁹

Almost all of the above observations were uttered by judges *before* the legal realists began their campaign to dispel the purported delusions and pretensions of judges.⁴⁰ Recent generations of judges have been equally explicit. Supreme Court Justice William O. Douglas, for example, remarked that “there are usually plenty of precedents to go around; and with the accumulation of decisions, it is not a great problem for the lawyer to find legal authority for most propositions.”⁴¹ Judge Patricia Wald acknowledged that sometimes conflicting lines of precedent exist, allowing judges to “follow those precedents which they like best,”⁴² and she admitted that judges can ignore or distinguish away precedents they do not like when the precedents are not precisely on point.⁴³

IV. JUDGES HAVE LONG ACKNOWLEDGED THAT THEY MUST SOMETIMES MAKE CHOICES, AND THAT THEIR PERSONAL VIEWS SOMETIMES COLOR THEIR DECISIONS

Another charge made against judges is that they are deluded or deceptive in denying that their personal values have any role in their decisions. Haines suggested this when writing that “[d]ue to the general acceptance of this view by the legal fraternity, it has become a habit of those trained in law to bestow little attention upon their individual views or prejudices and to turn attention instead to precedents which are regarded as forming the authoritative basis of the law.”⁴⁴ While it is correct that judges typically assert that the law determines the bulk of their decisions, it is wrong to suggest that judges deny that their values have any influence their decisions.

Again the best known counter-example is Judge Cardozo. He insisted that judges should base their decisions on the moral or policy position of the community, rather than the judge’s personal views. The judge’s duty is to be careful to bring into the law “not my own aspirations and convictions and philosophies, but the aspirations and philosophies and convictions of the men and women of my time.”⁴⁵ Judges must strive to shape the law to conform to the “mores of their day,” consistent with “customary morality,”⁴⁶ which might not coincide with the judges’ own moral views. But Cardozo recognized that it is extremely difficult for judges to keep these apart. “No effort or revolution of the mind will overthrow utterly and at all times the

³⁹*Id.* at 2-3.

⁴⁰According to conventional accounts, the realists emerged in the mid-1920s and 1930s. For a critique and reconstruction of this standard view of legal realism, see Brian Z. Tamanaha, *Understanding Legal Realism*, TEX. L. REV. (forthcoming 2009).

⁴¹William O. Douglas, STARE DECISIS, ESSAYS IN JURISPRUDENCE FROM THE COLUMBIA LAW REVIEW 19 (1963).

⁴²Patricia M. Wald, *Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 481 (1986).

⁴³*Id.* at 490.

⁴⁴Haines, *supra* note 13, at 97-98.

⁴⁵*Id.* at 173.

⁴⁶*Id.* at 135, 136.

empire of these subconscious loyalties.”⁴⁷ “The perception of objective right takes the color of the subjective mind. The conclusions of the subjective mind take the color of customary practices and objectified beliefs. There is constant and subtle interaction between what is without and what is within.”⁴⁸ Hence, Cardozo concluded, the distinction between the judge’s subjective views of the right and the community’s general view “is shadowy and evanescent.”⁴⁹

Other judges at the time also acknowledged that personal values may influence judicial decisions. In a positive review of the book, Judge Hough affirmed Cardozo’s account of the difficulty of maintaining the appropriate separation between “the subjective or individual conscience, and the objective or general conscience; and to indicate how far each can rightly sway judicial decision.”⁵⁰ In a 1924 speech, Chief Judge Frank Harris Hiscock (who sat on the same court with Cardozo) reviewed a string of recent decisions and declared: “All of these cases could have been decided the other way.”⁵¹ He told his audience that constitutional questions about rights and liberties that courts are called upon to decide are less questions of law than “of policy and state craft.”⁵² Hence, rulings are a function of the “policy and viewpoint of a court,” which can change when the membership changes.⁵³ Another colleague on the New York high court, Judge Irving Lehman, observed that “no thoughtful judge can fail to note that in conferences of the court, differences of opinion are based at least to some extent upon differences of viewpoint”⁵⁴; and “it is inevitable that a judge in weighing individual rights as opposed to collective benefit will to some extent be influenced by his personal views”⁵⁵

Judges continued to make these points in subsequent decades, as the following sampling of statements shows. Associate Justice Horace Stern of the Pennsylvania Supreme Court, for example, wrote in the 1937 *Harvard Law Review*:

however fondly we may like to delude ourselves into the belief that constitutional law is a pure science, the interpretation and evolution of which are wholly independent of political predilections, we must, if realists, recognize that courts controlled by a ‘conservative’ personnel and those dominated by a ‘liberal’ membership are more than likely to decide constitutional questions from different angles and with different results.⁵⁶

⁴⁷*Id.* at 175.

⁴⁸*Id.* at 110-11.

⁴⁹*Id.* at 110.

⁵⁰*Id.* at 289.

⁵¹Frank Harris Hiscock, *Progressiveness of New York Law*, CORNELL L.Q. 371, 376 (1924).

⁵²*Id.* at 381.

⁵³*Id.* at 374.

⁵⁴Lehman, *supra* note 38, at 6.

⁵⁵*Id.* at 12.

⁵⁶Horace Stern, *Book Reviews*, 51 HARV. L. REV. 178, 179 (1937).

Justice Bernard L. Shientag, sitting on an intermediate appellate court of New York State, gave the Benjamin Cardozo Lecture in 1944, published as a book with the descriptive title: *The Personality of the Judge (and the Part it Plays in the Administration of Justice)*. Shientag emphasized that the personality and beliefs of judges matter, and that judges vary in personalities and attitudes—some thoughtful and fair, others tyrannical, impatient, or close-minded⁵⁷:

Naturally, it is in cases where the creative faculty of the judicial process operates, where there is a choice of competing analogies, that the personality of the judge, the individual tone of his mind, the color of his experiences, the character and variety of his interests and his prepossessions, all play an important role. For the judge, in effect, to detach himself from his whole personality, is a difficult, if not an impossible, task. We make progress, therefore, when we recognize this condition as a part of the weakness of human nature.⁵⁸

Federal Circuit Judge Amistead Dobie in 1951 observed that, contrary to former “Utopian” dreams, a judge must deal with an imperfect legal order:

There never has been, and there never will be, a judge worthy of his salt who can be classified as a cool and clammy thinking machine. No judge, however he may try, can, in his decisions, completely and effectively divorce himself from what he has seen, has heard, has experienced and has been.⁵⁹

Federal Appellate Judge Calvert Magruder candidly remarked in 1958 that “[a]ll too often we have to realize that the case might be written up either way, in a lawyer-like opinion. The judge may not recognize that this is so, or even be conscious of the inner springs that led him to choose one result rather than the other.”⁶⁰

In a 1959 article by Federal Circuit Judge Albert Tate entitled “The Judge as a Person,” Tate took it as obvious that judges’ views influence their decisions, and he offered advice to lawyers, perhaps surprising coming from a judge, that they should tailor their argument in ways calculated to appeal to the particular judge or judges who will hear their case.⁶¹ “[L]ike all other human beings [judges] have limitations of vision, knowledge, intelligence, or predisposition which sometimes influence their judicial actions, however much they conscientiously try to avoid the occasion of error.”⁶² Tate hastened to add that in the “vast and overwhelming majority of cases the same result will be reached” regardless of who sits on the case, but he also

⁵⁷Bernard L. Shientag, *THE PERSONALITY OF THE JUDGE* 73 (1944).

⁵⁸*Id.* at 51.

⁵⁹Amistead D. Dobie, *A Judge Judges Judges*, 1951 WASH. U. L.Q. 471, 480 (1951).

⁶⁰Calvert Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 CORNELL L.Q. 1, 5 (1958).

⁶¹Albert Tate, Jr., *The Judge as a Person*, 19 LA. L. REV. 438, 439 (1959).

⁶²*Id.*

admitted that cases arise in which “several judges may with equal sincerity and equal reason reach different results.”⁶³

In a 1962 address at the University of Chicago Law School, Justice Roger Traynor of the California Supreme Court, one of the leading common law judges of his generation, confirmed that judges must make choices in certain situations.⁶⁴ Traynor admitted that there are cases in which the decision can go either way⁶⁵; he accepted that judges have predilections that they must struggle to overcome (or be conscious of),⁶⁶ and wrote that the judge must “arrive at last at a value judgment as to what the law ought to be and to spell out why.”⁶⁷ Also in 1962, Judge Henry Friendly wrote that

the judge should try to make sure he is interpreting the long term convictions of the community rather than his own evanescent ones; but we may well recognize this goal will not always be realized even “by the best.” Sometimes the judge will fail of this because the community has no true convictions . . . on other occasions because it is asking too much that a judge suppress the basic beliefs by which he lives.⁶⁸

“The Limits of Judicial Objectivity” was the title of a 1963 lecture delivered at the law school at American University by Federal Circuit Judge Charles Clark, the former Dean of Yale Law School. In the small percentage of open cases where law is unclear (he mentioned Cardozo’s rough estimate of about ten percent legally uncertain cases⁶⁹), Clark wrote, the judge (after becoming as prepared and knowledgeable as he can) “is on his own for the ultimate result which must reflect his background, his personality, and his inner conviction.”⁷⁰ In these genuinely open legal questions, “judicial objectivity” does not get a judge very far, according to Clark. The judge has no choice but to make a decision “where there is no one and nothing to tell him how or where to go.”⁷¹ Justice Walter Schaefer of the Illinois Supreme Court published an article in the 1966 *Chicago Law Review* which likewise asserted that the “great bulk” of cases are determined by legal rules and principles.⁷² But in a small subset of cases, judges must grapple with legally uncertain questions and must make policy decisions. Like Cardozo, Schaefer asserted that policy

⁶³*Id.* at 440.

⁶⁴Roger J. Traynor, *La Rude Vita, La Dolce Giustizia; Or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223 (1962).

⁶⁵*Id.* at 224.

⁶⁶*Id.* at 234.

⁶⁷*Id.*

⁶⁸Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218, 231 (1961).

⁶⁹Charles E. Clark, *The Limits of Judicial Objectivity*, 12 AM. U. L. REV. 1, 4 (1963) (citation omitted).

⁷⁰*Id.* at 12.

⁷¹*Id.* at 10.

⁷²Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 4 (1966).

decisions ought to be based upon community views and not the judge's own view,⁷³ but he recognized the difficulty of keeping the two apart. "There is nothing new in the notion that the personality of the judge plays a part in the decision of cases."⁷⁴

Additional examples from past judges can be offered, but enough has been conveyed above to demonstrate that judges have expressed consummately realistic views about judging for a long time. Highly respected contemporary judges have made similar statements.

Judge Jon Newman wrote that "I am not so naïve as to deny that some judges in some cases permit personal predilections to determine the result. The equities sometimes matter, the rule of law is sometimes bent."⁷⁵ Judge Alex Kozinski, a self-proclaimed legalist, declared: "judges do in fact have considerable discretion in certain of their decisions"⁷⁶; with legal principles "there is frequently some room for the exercise of personal judgment"⁷⁷; "[p]recedent . . . frequently leaves room for judgment"⁷⁸; "[w]e all view reality from our own peculiar perspective; we all have biases, interests, leanings, instincts"⁷⁹; and "[i]t is very easy to take sides in a case and subtly shade the decision-making process in favor of the party you favor . . ."⁸⁰ Judge Harry Edwards acknowledged that in very hard cases with no clear right legal answer, "it may be true that a judge's views are influenced by his or her political or ideological beliefs."⁸¹

Judge Patricia Wald forthrightly stated that "the judge's political orientation *will* affect decision-making."⁸² "I would be naïve to suggest that all judges reason alike,"⁸³ she wrote.

How could they, given their different backgrounds, experiences, perceptions, and former involvements, all of which are part of the intellectual capital they bring to the bench. The cumulative knowledge,

⁷³*Id.* at 14.

⁷⁴*Id.* at 22.

⁷⁵Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200, 204 (1984).

⁷⁶Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 994 (1992). Although Kozinski takes a hard line on strictly following the law when it is clear, he admits that on occasion his personal views have influenced his decisions. See Emily Bazelon, *The Big Kozinski*, LEGAL AFFAIRS, available at http://www.legalaffairs.org/issues/January-February-2004/feature_bazelon.

⁷⁷Kozinski, *supra* note 76, at 996.

⁷⁸*Id.* at 997.

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 854 (1991).

⁸²Patricia M. Wald, *Some Thoughts on Judging As Gleaned From One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 895 (1987).

⁸³Patricia M. Wald, *Thoughts on Decisionmaking*, 87 W. VA. L. REV. 1, 12 (1984).

experience, and internal bents that are in us are bound to influence our notions of how a case is to be decided.”⁸⁴

Judge Wald expressed “something of a *ho-hum* reaction to the notion that judges’ personal philosophies enter into their decisionmaking when statute or precedent does not point their discretion in one direction or constrain it in another In such cases personal philosophies may well play a significant role in judging.”⁸⁵ “But how could it be otherwise?” asks Judge Wald.⁸⁶

An essential lesson lies in the many realistic accounts of judging offered by judges: the judges did not think that the inherent limitations of law and (human) judges necessarily defeats their appointed task to render *legal* decisions. Even as judges freely acknowledge that law can be uncertain and that the influence of their subjective values cannot be entirely screened out, they also uniformly insist that a substantial proportion of the time their decisions are consistent with and determined by the law. Judge Newman declared:

The ordinary business of judges is to apply the law as they understand it to reach results with which they do not necessarily agree. They do this every day. Distasteful statutes are declared constitutional and applied according to the legislators’ evident intent; unwise decisions of administrative agencies are enforced; trial court rulings within the trial judge’s discretion are upheld even though the reviewing judge would surely have ruled to the contrary; precedents of the local jurisdiction are followed that would be rejected as an initial proposition.⁸⁷

Judge Kozinski repeated what many judges have said, that notwithstanding the ample room for discretion and judgment, judges are “subject to very significant constraints,” and can try to become aware of and attempt to counter the influence of their biases.⁸⁸

While judges routinely admit the presence of ideological influence on decisions, they also consistently maintain that it comes into play in a relatively small proportion of cases. Judge Wald estimated that difficult judgments must be made in about fifteen percent of the cases.⁸⁹ Judge Edwards similarly estimated that about five to fifteen percent of appellate cases are very hard, with equally strong competing legal arguments. “Disposition of this small number of cases, then, requires judges to exercise a measure of discretion, drawing to some degree on their own social and moral beliefs.”⁹⁰ Beginning with Cardozo, a long string of appellate judges have offered a similar estimate of the high percentage of cases with legally clear

⁸⁴*Id.*

⁸⁵Patricia Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 236 (1999) (emphasis added).

⁸⁶*Id.* at 250.

⁸⁷Newman, *supra* note 75, at 204.

⁸⁸Kozinski, *supra* note 76, at 994.

⁸⁹Wald, *supra* note 85, at 236 & n.6.

⁹⁰Edwards, *supra* note 81, at 857.

outcomes, wherein one result can be ranked as stronger on legal terms than any other outcome. In support of their estimate, judges can point to the fact that federal appellate courts have historically rendered unanimous decisions about ninety percent of the time.

Extending back for more than a century, judges have uniformly expressed a balanced realistic view about judging, maintaining that they follow the law in the substantial proportion of cases where the legal result is clear, and in the remaining cases they do the best they can to arrive at the strongest legal answer. No more can be asked or expected of a rule of law system manned by human judges.

V. THE BALANCED REALISM OF JUDGE RICHARD POSNER

No account of the realism of contemporary judges can neglect Judge Richard Posner. He is renowned for uttering bluntly realistic comments about judging. His review of the Rehnquist Court had the unadorned title “A Political Court.”⁹¹ His recent summa on judging, *How Judges Think*, contains many dramatically realistic assertions: “[s]o judging is political.”⁹² Posner declared:

Because the materials of legalist decision making fail to generate acceptable answers to all the legal questions that American judges are required to decide, judges perforce have occasional—indeed rather frequent—recourse to other sources of judgment, *including their own political opinions or policy judgments, even their idiosyncrasies*. As a result, *law is shot through with politics* and with much else besides that does not fit a legalist model of decision making.⁹³

Judge Posner might be considered unique among his judicial brethren in his realistic views of judging. This is a misperception (although his outspokenness and prolific output on the topic *are* unparalleled), as the many realistic statements by judges about judging reproduced in this Article demonstrate. Everything Posner says about the uncertainties and openness of law and the limitations of human judges has been said by prominent judges before, many times over.

Another potential misimpression must be cleared up about Judge Posner: he is not a skeptic about the substantial role law plays in judging, although it is easy to get this misimpression from the above quotes. Like other judges, Posner carefully circumscribes the scope of his comments about politics and ideology to apply to the relatively small proportion of legally uncertain cases.⁹⁴ Judges are regularly confronted with “open areas,” he asserts, “in which the orthodox (the legalist) methods of analysis yield unsatisfactory and sometimes no conclusions, thereby allowing or even dictating that emotion, personality, policy intuitions, ideology, politics, background, and experience will determine a judge’s decision.”⁹⁵

“But,” Posner cautions:

⁹¹Richard A. Posner, *A Political Court*, 119 HARV. L. REV. 31 (2005).

⁹²POSNER, *supra* note 6, at 369.

⁹³*Id.* at 9.

⁹⁴*Id.* at 11, 82.

⁹⁵*Id.* at 11.

[J]udging is not just personal and political. It is also impersonal and nonpolitical in the sense that many, *indeed most*, judicial decisions really are the product of a neutral application of rules not made up for the occasion to facts fairly found. Such decisions exemplify what is commonly called ‘legal formalism,’ though the word I prefer is “routine.”

“[M]ost cases are routine,”⁹⁶ he repeats, and the “routine cases are those that can be decided by legalist techniques.”⁹⁷ Posner also reminds us that the vast bulk of disputes never make it into court because the expected legal outcome is clear, and a substantial majority of judicial decisions are not appealed “because the case is ‘controlled’ by precedent or clear statutory language.”⁹⁸

Although easily overlooked beneath his attention-grabbing skeptical assertions, Posner has consistently said this for many years: “the social interest in certainty of legal obligations requires the judge to stick pretty close to statutory text and judicial precedent in most cases and thus to behave, much of the time anyway, as a formalist.”⁹⁹ A substantial proportion of time, he says, judges duly adhere to precedent because they have internalized this in their role as judges.¹⁰⁰ Most judges strive to live up to the conventional standards of judging for their own self-esteem, and to earn the accolades and respect of their judicial colleagues and legal audiences.¹⁰¹ A “willful” judge is a bad judge,¹⁰² and judges don’t want to be seen as bad at what they do. “The business of judges is to enforce the law,”¹⁰³ Posner repeats, and that is what judges do.

Few people would have the temerity to assert that Judge Posner is deluded or deceptive about judging. Yet what Posner says about judging comports with what judges have been saying for many decades. Thus, again, it is wrong to assert that judges typically have been deluded or deceptive about judging. Judges admit that they make law, that they make choices, that they make policy decisions, that a different decision can sometimes be justified, and that sometimes their personal values have any impact on their decisions. Judges have admitted all of this many times over.

VI. WHY IT IS IMPORTANT TO RECOGNIZE THE BALANCED REALISM OF JUDGES

Our contemporary legal culture is increasingly saturated with skepticism about judges and judging.¹⁰⁴ This skepticism is reflected in and fed by the explosion of

⁹⁶*Id.* at 46.

⁹⁷*Id.* at 76, 373.

⁹⁸*Id.* at 44-45.

⁹⁹RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 209 (1999).

¹⁰⁰*Id.* at 45, 61, 71, 125, 145.

¹⁰¹*Id.* at 61, 71.

¹⁰²*Id.* at 112.

¹⁰³*Id.* at 213.

¹⁰⁴The development is explored in BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006).

quantitative studies of judging now coming out in law reviews and political science journals which aim to prove that judicial decisions are influenced by the political views of judges.¹⁰⁵ Judges have recently engaged in contentious debates with political scientists and law professors over the validity and implications of these studies.¹⁰⁶

Owing to the belief that judges are deluded or deceptive about judging, it is easy to dismiss what judges say on the subject as untrustworthy. This is a mistake. Judges as a group have been neither deluded nor duplicitous about what is involved in the process of judging. It is time to get over this dismissive notion and pay attention to what they are saying, for they offer a font of reliable information about what is involved in judging. Judges have acknowledged the openness of law and their frailty as humans, but steadfastly maintain that this reality does not prevent them from carrying out their charge to make decisions in accordance with the law to the best of their ability. This insight is born of and supported by experience.

¹⁰⁵For a critique of these studies, see Brian Z. Tamanaha, *The Distorting Slant of Quantitative Studies of Judging*, B.C. L. REV. (forthcoming 2009).

¹⁰⁶See Wald, *supra* note 85, at 236 n.6; Emerson H. Tiller and Frank B. Cross, *A Modest Reply to Judge Wald*, 99 COLUM. L. REV. 262 (1999); Harry Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998); Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805 (1999); Harry T. Edwards and Linda Elliott, *Beware of Numbers (and Unsupported Claims of Judicial Bias)*, 80 WASH. U. L.Q. 723 (2002); Kevin M. Clermont & Theodore Eisenberg, *Judge Harry Edwards: A Case in Point!*, 80 WASH. U. L.Q. 1275 (2002).

