

REALISM ABOUT JUDGES

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[J]udicial responsibility . . . connotes the recurring choice of one policy over another[†]

The courts must address themselves in some instances to issues of social policy, not because this is particularly desirable, but because often there is no feasible alternative.[‡]

Henry Friendly and Roger Traynor, the authors of the epigraphs of this paper, were two of the most distinguished American judges of the modern era. The realistic theory of adjudication that they summarized in the passages I have quoted was orthodox when they wrote. Similar passages could be quoted from Holmes, Hand, Cardozo, Brandeis, Jackson, and other distinguished judges, from leading academics and practitioners, from presidents like Franklin Roosevelt, and from philosophers like John Dewey. The realistic theory can be traced back to Plato's dialogues, before there was a legal profession or professional judges. In the *Apology*, Socrates notes that each judge (really juror—there were no judges) “has sworn that he will judge according to the laws, and not according to his own good pleasure”¹—but in *Gorgias* Socrates predicts that his trial will be the equivalent of the trial of a doctor prosecuted by a cook before a jury of children.² And in the *Republic* Thrasymachus argues that justice is simply the will of the stronger.³

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[†] Roger J. Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1, 12 (1977).

[‡] Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 21 (1978).

¹ Plato, *Apology*, in 1 THE DIALOGUES OF PLATO 360 (B. Jowett trans., Clarendon Press 4th ed. 1953) (1871).

² See Plato, *Gorgias*, in 2 THE DIALOGUES OF PLATO, *supra* note 1, at 553.

³ Plato, *Republic*, in 2 THE DIALOGUES OF PLATO, *supra* note 1, at 176.

We find the first full articulation of the realist view in the late eighteenth century, in Jeremy Bentham's *Introduction to the Principles of Morals and Legislation*. We find it amplified in the self-described "legal realists" of the 1920s and 1930s, such as Jerome Frank and Karl Llewellyn, in the "legal process" school of Henry Hart and Herbert Wechsler, and in the "critical legal studies" school of the 1970s. It has assumed its present form as a result of contributions by economists, political scientists, psychologists, and sociologists—and by lawyers, some with degrees in other fields as well, who adopt a social-scientific approach to law.

The realist view has always been strongly opposed. The opponents, the legalists, believe (or pretend to believe) that adjudication is strictly analytical, with no tincture of ideology, no taking sides on issues of social or economic policy. The legalist theory of adjudication received its canonical modern expression by John Roberts at his senatorial confirmation hearing to be Chief Justice in 2005, when he said that the role of a Supreme Court Justice, which he would faithfully inhabit, was similar to that of a baseball umpire, who calls balls and strikes but does not make or alter the rules of baseball.⁴ This was echoed four years later by Sonia Sotomayor at her confirmation hearing.⁵

In an older metaphor, judges are oracles, applying law found in orthodox legal sources to the facts of new cases, such as statutory or constitutional text or judicial decisions having the status of precedent, and doctrines built from those decisions. They are transmitters of law, not creators, just as the Oracle at Delphi was the passive transmitter of Apollo's prophecies. The analogy of judge to oracle was Blackstone's. He argued that even common law judges were oracles, engaged in translating immemorial custom into legal doctrines rather than engaging in legislating doctrines.⁶ The modern idea of the judge as analyst shares with the idea of the judge as oracle the assumption that legal questions always have right answers: answers that can be produced by transmission from an authoritative source, though in the modern view the transmission is not direct but is mediated by analysis.

No one actually *believes* that all judges, or even most judges, are always realists or always legalists. Although a great deal of adjudication involves the more or less mechanical application of given law to neutrally found facts, a great deal also involves policymaking, casting judges in a legislative role, and this whether they are doing common law reasoning,

⁴ "I will remember that it's my job to call balls and strikes, and not to pitch or bat." *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. 56 (2005).

⁵ "The task of a judge is not to make law, it is to apply the law." *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 59 (2009) [hereinafter *Sotomayor Hearing*]. Both Chief Justice Roberts and Justice Sotomayor of course know better.

⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

constitutional interpretation, or statutory interpretation. More cases fit the legalist theory than the realist (notably appellate cases decided without a published opinion—which are now most cases decided in the federal courts of appeals⁷), but a greater number of *important* cases fit the realist theory than the legalist.

Realists consider legalism a component of actual judicial behavior because they regard it as realistic to expect that judges will decide most cases legalistically. In contrast, although one or another version of the legalist theory of judging is voiced incessantly by judges, law professors, politicians, and leaders of the bar,⁸ many of its proponents would, if pressed, acknowledge that legalism is less a rival to the realist theory as a description of judicial behavior than a normative theory expressive of the aspirations of influential segments of the legal and political communities for judicial behavior, and a theory that resonates with the naïve conception of the judicial process held by much of the general public.

A rapidly growing empirical literature on judicial behavior confirms the importance of the realistic theory as a description of adjudication; the literature is summarized and extended in my forthcoming book, *Judicial Behavior*, coauthored with Lee Epstein and William M. Landes.⁹ But if you are impatient with academic studies, you have only to read the transcripts of Senate hearings on judicial nominees both to the Supreme Court and to the federal courts of appeals (less so to the district courts, which have less discretionary authority) to realize that the judicial process is remote from the exact sciences. The senators pay attention to the legal skills or other technical qualifications to be a judge, but the main focus is on the nominee's ideology.¹⁰ Are the senators deceived in thinking that ideology influences judges? Was then-Senator Obama mistaken when he voted against the confirmation of John Roberts to be Chief Justice, believing that he would decide cases in accordance with his conservative ideology?¹¹ Were President Reagan and his advisers deceived when they tried to alter the ideological complexion of the federal courts of appeals by challenging “senatorial courtesy” and appointing conservative law professors?¹² The decisions that in-

⁷ Table S-3: U.S. Courts of Appeals—Types of Opinions or Orders Filed in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2010, U.S. COURTS (2010), <http://www.uscourts.gov/uscourts/statistics/judicialbusiness/2010/tables/s03sep10.pdf>.

⁸ See, e.g., DAVID BARTON, *RESTRAINING JUDICIAL ACTIVISM* (2003); ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1997); Michael A. Livermore, *Realist Lawyers and Realistic Legalists: A Brief Rebuttal to Judge Posner*, 59 DUKE L.J. 1187 (2010).

⁹ LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *JUDICIAL BEHAVIOR: THEORETICAL AND QUANTITATIVE PERSPECTIVES* (forthcoming 2011).

¹⁰ See, e.g., *Sotomayor Hearing*, *supra* note 5, at 633–80.

¹¹ See *Why Obama Voted Against Roberts*, WALL ST. J., June 2, 2009, at A21.

¹² See David M. O'Brien, *Why Many Think that Ronald Reagan's Court Appointments May Have Been His Chief Legacy*, in *THE REAGAN PRESIDENCY: PRAGMATIC CONSERVATISM AND ITS LEGACIES* (W. Elliot Brownlee & Hugh Davis Graham eds., 2003).

validated the early New Deal statutes, the decisions that overruled those decisions, the decisions of the Warren Court, the decisions overruling or narrowing those decisions, the conservative activism of the Rehnquist and Roberts Courts—how can such a cacophony of conflicting judicial voices be thought the result of judges’ reasoning with the same tools learned in law school, honed in practice, and drawn from the same constitutional language and the same precedents?¹³ Liberal legalist commentators regard the decisions of liberal judges as correct, and conservative legalist commentators regard the decisions of conservative judges as correct, not realizing that “liberal legalism” and “conservative legalism” are oxymorons, like “Jewish physics” (a Nazi expression).

As for the empirical literature, the legalists tend simply to ignore it. An exception is a recent article by Judge Harry Edwards of the U.S. Court of Appeals for the D.C. Circuit and his coauthor Michael Livermore, the executive director of the Institute for Policy Integrity at New York University School of Law.¹⁴ Judge Edwards is the most pertinacious current critic of legal realism as a positive theory of judicial behavior,¹⁵ and his article with Livermore is the fullest account of his position. Key portions of the article are by Judge Edwards alone, and to simplify exposition I shall pretend that he is the sole author.

Judge Edwards contends that the realist scholars exaggerate the degree to which judges are unable to achieve agreement through deliberations that, overriding ideological and other differences, generate an objectively correct decision.¹⁶ Edwards’s main evidence for the charge of exaggeration is that many decisions of the Supreme Court are unanimous (sixty percent—so does that mean that the Court is sixty percent realist and forty percent legalist?) even though the Justices are ideologically diverse, and “many” becomes “most” in the federal courts of appeals.¹⁷

That is no evidence at all. Realists do not deny that most judicial decisions are legalistic. Legalism is, as I said, a *category* of realistic judicial decisionmaking. Legal doctrines such as plain meaning (a rebuttable presumption that statutes and constitutions mean what they say) and stare decisis (decision in accordance with precedent—that is, following precedent without *necessarily* making a judgment whether it is sound—treating it as an authority rather than as an argument, but not as an unshakeable authority) enable judges to economize on their time and effort. This minimizes

¹³ See Robert Justin Lipkin, *We Are All Judicial Activists Now*, 77 U. CIN. L. REV. 181 (2008).

¹⁴ Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009).

¹⁵ Besides Edwards’s article with Livermore, see Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998), and Harry T. Edwards, *Public Misperceptions Concerning the “Politics” of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619 (1985).

¹⁶ See Edwards & Livermore, *supra* note 14, at 1908–10.

¹⁷ *Id.* at 1899.

controversy with other branches of government by allowing judges to appear to play a modest, technical, “professional” role (in the sense in which members of professions seek deference from the laity on the basis of their real or pretended specialized knowledge and not their ideology) and to provide a product—reasonably predictable law—that is socially valued and therefore justifies the judges’ privileges. But plain meaning is helpless in the face of ambiguous constitutional or statutory text and when it produces absurd results, and *stare decisis* cannot be used to decide a novel case. Whatever judges think they are doing when they decide a case whose outcome cannot be deduced from the orthodox legal materials of legislated text and judicial precedent, they are not deciding it legalistically.

In fairness to the legalists, lack of unanimity is not proof of realism; after all, scientists frequently disagree with each other. But at the same time, equating unanimity—which simply means absence of published dissent—with agreement is a mistake because judges do not always dissent publicly from a decision with which they disagree, particularly in decisions at the court of appeals level.¹⁸ More importantly, the cases that can be decided by the methods of legalism are not the cases that shape the law. Today’s law, insofar as it is the product of judicial decisions—and to a considerable degree it is—is the product of decisions that, when made, were for the most part stabs in the dark rather than applications of settled law. Some of those cases were unanimous, such as *Brown v. Board of Education*,¹⁹ but that decision was not arrived at by legalistic analysis and could not have been. It was the product of political agreement among the Justices, reflecting a change in elite opinion—a growing repugnance of Americans to racial segregation, which the Court viewed as antithetical to evolving American values.

Judge Edwards makes the important concession that five to fifteen percent of cases decided by his court are indeterminate from a legalist standpoint.²⁰ And his is an intermediate appellate court, not a court of last resort. If one cumulates those figures over many years and many courts, it is apparent that an immense number of decisions are legalistically indeterminate. And among them are the decisions that have made the law what it is today: just compare the text of the Constitution with the body of modern constitutional doctrine or, for that matter, the text of the Sherman Act with the body of modern antitrust law. True, Judge Edwards’s court, the U.S. Court of Appeals for the D.C. Circuit, hears few criminal cases; in the other courts of appeals, criminal appeals bulk large and few such appeals have much merit. So in those courts the percentage of indeterminate cases is lower than in the D.C. Circuit yet high enough to change the law profoundly over a period of

¹⁸ Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 101–03, 107 fig.1 (2011).

¹⁹ 347 U.S. 483 (1954).

²⁰ Edwards & Livermore, *supra* note 14, at 1898.

years even apart from the seismic changes brought about by Supreme Court decisions.

Judge Edwards points out that the standard variable used in empirical studies of judicial behavior to estimate ideological voting—the party of the President who appointed the judge who cast the vote in question—explains only a fraction of judges’ votes.²¹ And that is true. It is true in part because the variable is a crude proxy for ideological leanings; the political parties are not ideologically uniform, and ideology is not the only influence on the appointing authorities when they are picking a judge. And it is no proxy at all for other nonlegalistic factors that influence judicial votes, such as background and temperament—though some of these factors, such as race, religion, and gender, are correlated with ideological positions on specific issues.²²

Yet despite its crudeness, the party-of-the-appointing-President proxy has been found in numerous studies—including those conducted for and reported on in the forthcoming book that I mentioned, *Judicial Behavior*²³—to have a significant explanatory effect even after correction is made for other variables that might influence a judge’s votes.²⁴ The crudeness of the variable actually enhances the empirical significance, for the realist approach, of the variable’s correlation with judicial votes classified by ideology, for there could be many judges whose votes are motivated by a different ideology from that of the party of the President who appointed them. And there are less crude proxies for a judge’s ideology that students of judicial behavior have employed and have found to have the predicted effect.²⁵

Judge Edwards gives great weight to what judges report—in fact, to what Judge Edwards reports—about how they decide to vote as they do.²⁶ The premise is that judicial introspection is a valid source of knowledge. Assuming the judges are being candid in their self-reporting (and why assume that?), is it not possible, in fact likely, that judges in their public statements downplay the creative or legislative element in judging to avoid seeming to compete with the other branches of government in making policy? Judge Edwards bolsters his premise with an appeal to the secrecy of judicial deliberations: “the deliberative process pursuant to which case inputs are transformed into a judicial decision cannot be observed by outsiders.”²⁷ So we have to take what he says on faith—but why what *he* says, and not what *I* say? I am not an outsider. And secrecy is characteristic of political and business deliberations as well as judicial ones, yet Judge Ed-

²¹ *Id.* at 1919–20.

²² FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* ch. 3 (2007).

²³ EPSTEIN, LANDES & POSNER, *supra* note 9.

²⁴ CROSS, *supra* note 22, ch. 3.

²⁵ *See, e.g., id.* at 18–21.

²⁶ *See* Edwards & Livermore, *supra* note 14, at 1950–58.

²⁷ *Id.* at 1903.

wards doubtless believes, and rightly so, that he understands a good deal about political and commercial decisionmaking.

Most judicial opinions, it is true, are legalistic in style. They cite prior decisions as if those decisions really were binding, reason by analogy, give great weight to statutory and even constitutional language, delve into history for clues to original meaning, and so forth. But that is what one expects if most judges think of themselves as legalists, or if most judicial opinions are written largely by law clerks (as they are), who are inveterate legalists because they lack the experience, confidence, or “voice” to write a legislative opinion of the kind that judges like Holmes, Cardozo, Hand, Jackson, Traynor, or Friendly wrote. (The delegation of judicial opinion writing to law clerks may explain the decline in the number of judges whom anyone would be inclined to call “great.”) It is what one would expect if judges think the legalist pose is a useful disguise, conveying a becoming modesty and avoiding an acknowledgment of conflict with rival branches of government. Judges have political reasons to represent creativity as continuity and innovation as constraint. And as there is no recognized duty of candor in judicial opinion writing, they cannot be accused of hypocrisy in writing that way even if they are aware that it does not track their actual decisional process.

The legalists’ strongest rhetorical move is to label the legalist approach “law” and the realist approach “politics.” It is effective rhetoric because it makes a “realist” judge seem like someone who flouts his judicial oath—which requires a judge to uphold the law—and thus a usurper. Judge Edwards quotes approvingly a statement by legalist law professor Brian Tamanaha that “[j]udges 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.”²⁸ But what does the word “law” mean when its “openness” is conceded? If it is open to ideology, what is left of legalism? Tamanaha goes on to state that judges say “they follow the law in the substantial proportion of the cases where the legal result is clear.”²⁹ Assuming the judges are telling the truth, what are they doing in the *other* cases? Are they saying to themselves: “we have no law with which to decide this case, so we’re going to be lawless”?

American law, as Judge Edwards and Professor Tamanaha obliquely but unmistakably acknowledge, is suffused with politics albeit mainly in the ideological rather than in the partisan sense of the word because few judges exhibit in their decisions a strong sense of party loyalty. Even the realist approach to *Bush v. Gore*³⁰ would emphasize not party loyalty—which Jus-

²⁸ *Id.* at 1915 (quoting Brian Z. Tamanaha, *The Realism of Judges Past and Present*, 57 CLEV. ST. L. REV. 77, 91 (2009)).

²⁹ *Id.* at 1943 (quoting Tamanaha, *supra* note 28, at 89).

³⁰ 531 U.S. 98 (2000).

tice Stevens, appointed by a Republican President, of course did not exhibit in his passionate dissent³¹—but that judges want the President to be someone who will appoint judges who think like themselves. Constitutional law, which is law made largely by the Supreme Court by loose interpretation of antiquated constitutional text, is political in the sense of being the product not of orthodox legal materials (authoritative text plus precedents) but of the values, political in a broad (but sometimes in a rather narrow) sense, of the Justices. That does not make their decisions “lawless.” A judge’s primary duty is to decide cases, and this duty is not waived merely because the judge confronts a case, as he often will, that cannot be decided simply by reference to orthodox judicial materials but only by the judge’s making a value or policy choice inevitably influenced by political ideology, career and personal background, and psychological factors.

The critics of the realist approach either do not acknowledge these obvious facts about the American judicial system or are unable to come up with a competing theory of judicial motivations. But Judge Edwards does not make this mistake. He does state incorrectly that “[e]mpirical studies . . . assume . . . that ideology is invariably extrinsic to law,”³² but what is interesting about his statement is the implication that ideology is *intrinsic* to law—which is true and is what realists think. Continuing in this vein, he acknowledges that “some play for inherently contestable political judgments is simply built into law and strikes us as a normal constituent of good judging”³³ and that the American conception of law “encompasses, at least in some circumstances, forms of moral or political reasoning.”³⁴ The first acknowledgment gives the game away. The second is puzzling. Why call judicial resort to moral and political considerations “reasoning”? What exactly *is* moral and political reasoning? Had Judge Edwards said moral and political *beliefs*, I would agree with him, but would add that such beliefs are less likely to be the product of a reasoning process than of temperament, upbringing, religious affiliation, personal and professional experiences, and characteristics of personal identity such as race and sex.³⁵

Judge Edwards makes other concessions to realism. He says that law includes what is “ideological in a law-like way”³⁶ and that there are “situations in which ideological or political questions are intrinsic to law.”³⁷ He does not indicate how common those situations are, however, and his article offers no example of a case in which ideology or politics improperly influ-

³¹ *Id.* at 123–29 (Stevens, J., dissenting).

³² Edwards & Livermore, *supra* note 14, at 1948.

³³ *Id.* at 1946.

³⁴ *Id.* at 1900.

³⁵ See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999), for a skeptical account of moral reasoning.

³⁶ Edwards & Livermore, *supra* note 14, at 1947.

³⁷ *Id.* at 1943.

enced the outcome. One way to interpret Judge Edwards's article is that *all* judicial decisions are proper because ideology and politics are proper influences on law in difficult cases, at least in the American legal system, but that empirical students of judicial behavior deny this, define law as legalism, and so regard all traces of ideological or political influence in judicial decisions as showing that much of time judges are not doing "law"; they are politicians in robes. That is one possible reading of some of the early empirical studies of judicial behavior, but it is an inaccurate description of current studies.

Recognizing that there is a considerable area of indeterminacy in law viewed from a legalistic perspective, Judge Edwards falls back on the idea of deliberation as a way of overcoming indeterminacy.³⁸ But he exaggerates the significance of judicial deliberation. English judges until quite recently did not engage in deliberation at all—they were forbidden to do so by the rule of "orality": everything a judge did was to be done in public so that the public could monitor judicial behavior.³⁹ Yet the product of these nondeliberating judges was highly regarded; I am unaware that the decline of orality in the English legal system—a product of increased workload—has improved the system. In fairness, however, I note that the extreme length of English appellate proceedings by U.S. standards may have provided a substitute for deliberation; each judge on the appellate panel had much more time than his American counterpart to think about a case.⁴⁰

The problem with judicial deliberation in the American context is the heterogeneity of American judges. Judges do not select their colleagues or successors, nor are the judges of a court selected for the same reasons or on the basis of the same criteria. Even when all the judges on an appellate panel were appointed by the same President, the appointments will have been influenced by considerations unrelated to the likelihood that the appointees will form a coherent deliberating entity—considerations such as the recommendations of a senator, the quest for diversity, even political service that the appointee had rendered to the party of the appointing President.

Consider too the curiously stilted character of judicial deliberation. The judges speak their piece, usually culminating in a statement of the vote they are casting, either in order of seniority or reverse order of seniority, depending on the court, and it is a serious breach of etiquette to interrupt a judge when he has the floor. This discussion structure reflects the potential awkwardness of a freewheeling discussion among persons who are not entirely comfortable arguing with each other because they were not picked to form an effective committee and who, as an aspect of the diversity that re-

³⁸ *Id.* at 1949.

³⁹ ROBERT J. MARTINEAU, APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS 101–03 (1990).

⁴⁰ *Id.* at 232.

sults from the considerations that shape judicial appointments, may have sensitivities that inhibit discussion of issues involving race, sex, religion, criminal rights, immigrants' rights, or other areas of law that arouse strong emotions. Judicial deliberation can be highly productive when the issues discussed are technical in character, rather than entangled with moral or political questions, frank discussion of which is likely to produce animosity—but cases that raise issues that all the judges agree are merely technical tend not to be the cases that shape the law in momentous ways that make the law what it is.

Believers that most judges are legalists do not explain why it is plausible to expect judges in a legal system such as that of the United States to *be* legalists. Anyone who has studied professional behavior, including the behavior of academics, knows that self-interest, along with personality and—yes, in many fields (including law!)—politics, plays a role in their behavior. Why would we not expect that to be true with respect to judges? Are they saints by birth or by continuous prayer? Are they made saints by being appointed to the bench? Does a politicized selection process select for saints? Legalist theorists have not explained how it is that federal judges are made over into baseball umpires. Granted there are expectations concerning the judicial role; there is a degree of self-selection into the career of a judge, and anyway, persons uncomfortable in the role are unlikely to seek a judgeship or remain a judge; there is an appreciation for legal values that is inculcated by legal training and reinforced by experience as a lawyer. So judges are not just like other people or, in their legislative role, just like members of Congress. But Judge Edwards has conceded that a significant fraction even of intermediate appellate cases cannot be decided by legalist methods but require what he calls moral and political reasoning. In the cases that count, judges cannot be legalists even if they want to be or think they are. Presidents know this; the Senate knows this; most of the public knows this—and Judge Edwards knows this but is unwilling to draw the implications of it for judicial behavior.