

## DO JUDGES THINK? COMMENTS ON SEVERAL PAPERS PRESENTED AT THE DUKE LAW JOURNAL'S CONFERENCE ON MEASURING JUDGES AND JUSTICE

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I accepted an invitation to speak on this Symposium's panel addressing Professor Ramseyer's article on the political preferences of the Japanese Supreme Court—despite the danger of citation to foreign law.<sup>1</sup> But I have also been invited to comment on all of the Symposium's articles, and generally on the so-called legal and attitudinal models that seek to better explain or evaluate judicial opinions. These models do not address, as a rule, other judicial responsibilities, judicial virtues (if they exist), or even justice itself (if it too exists, as some of us hopeless romantics think). At the outset, I should mention that most of my comments relate to the federal appellate judiciary, from whence I hail.

Over one hundred years ago, Finley Peter Dunne's fabled Irish immigrant sage Mr. Dooley explained to his friend Mr. Hennesy, over a pint in a South-Side Chicago pub, how the cow ate the cabbage.<sup>2</sup> In explaining the "reasoning" behind the Supreme Court's decision in the Insular Cases of 1901 (which essentially held that, after the Spanish-American War, certain protections of the Constitution did not extend to new U.S. subjects in Hawaii, Cuba, Puerto Rico, Guam, and the Philippines), Mr. Dooley expressed some frustration before announcing the dispositive rule. He wondered aloud to Hennesy, in the words popularly describing the issue, whether the Constitution followed the flag<sup>3</sup>—that is, after the Stars and Stripes heralded the military victories that gained much of the Spanish empire, whether

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1. J. Mark Ramseyer, *Predicting Court Outcomes Through Political Preferences: The Japanese Supreme Court and the Chaos of 1993*, 58 DUKE L.J. 1557 (2009).
2. See FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 21–26 (1901).
3. *Id.* at 21–22.

the noble Constitution applied to new areas under American control. The fourteen decisions that make up the Insular Cases covered several issues, from whether duties applied to sugar imported from Puerto Rico<sup>4</sup> to the application of the Bill of Rights to new acquisitions.<sup>5</sup> All in all, the cases could be thought of as deciding whether and how United States imperialism was legally possible.

After a very amusing discussion of the Court and the various Justices, Mr. Dooley finally announced his theory of the *ratio decidendi* of the case, suggesting that the massive defeat of William Jennings Bryan by William McKinley might have had something to do with it: “That is,” said Mr. Dooley, “no matter whether the constitution follows the flag or not, the supreme court follows the election returns.”<sup>6</sup>

I suppose that this conference is here, over one hundred years later, to put some meat on the bones of the Dooley dictum. Are judges political? Well, those that run for office, particularly after *Republican Party of Minnesota v. White*,<sup>7</sup> are certainly political.<sup>8</sup> And if, in Professor David Easton’s classic phrase, politics is the authoritative allocation of values,<sup>9</sup> then surely judges are political actors. But what about those who are appointed, or what about the judicial enterprise itself? Are they meaningfully constrained by the law, or common purposes, or professional techniques and values?

Current scholarship, including Judge Posner’s fascinating book *How Judges Think*, makes it clear that election returns—politics—play a role (as well as ideology, life experiences, emotion, personality, collegiality; and maybe religion, strategy, illness, and a bad hair day).<sup>10</sup> And of course, he is not just talking about elections in which judges have to run for office.

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4. *De Lima v. Bidwell*, 182 U.S. 1, 2 (1901).

5. *See, e.g., Hawaii v. Mankichi*, 190 U.S. 197, 218 (1903).

6. DUNNE, *supra* note 2, at 26.

7. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

8. And unlike life-tenured judges, those judges may very well fit within some models of public choice theory used to explain the actions of those that run for office. One example is the idea that only two kinds of politicians exist, *maximizers* and *maintainers*. The omnipresent goal is to get reelected, and some politicians cater every action to maximize that result. Others are willing to push the envelope a bit, voting for ideology or even religion or morality, but not so much so that they cannot maintain political office. For an excellent description of this theory, see MORRIS P. FIORINA, REPRESENTATIVES, ROLL CALLS, AND CONSTITUENCIES 29–40 (1974).

9. DAVID EASTON, A FRAMEWORK FOR POLITICAL ANALYSIS 50 (1965).

10. RICHARD A. POSNER, HOW JUDGES THINK (2008).

What some scholars—not Judge Posner—seem to forget is that law, lawyers, litigants, precedent, statutes, constitutions, treaties, other legal materials<sup>11</sup> (sometimes legal scholarship!), and even craft and imagination play extensive roles too. Judge Posner, noting that American judges' considerable freedom from internal and external constraints does not suggest that judging is random, willful, or political in a partisan sense, makes an important point:

Most judges, like most serious artists, are trying to do a “good job,” with what is “good” being defined by the standards for the “art” in question. The judicial art prominently includes the legalist factors, and so those factors figure prominently in judicial decisions—and rightly so. But innovative judges challenge the accepted standards of their art, just as innovative artists challenge the accepted standards of *their* arts. As there are no fixed, incontestable criteria of artistic excellence, so there are no fixed, incontestable criteria of judicial excellence. And in law as in art, the innovators have the greater influence on the evolution of their field.<sup>12</sup>

Implicit in this scholarship, is, of course, another question: *Do* judges think? As Judge Posner points out, if pure legalism or formalism, or textualism or originalism, fully explained the phenomena of judging, then judges “would be well on the road to being superseded by digitized artificial intelligence programs.”<sup>13</sup> He wonders aloud (well, in a footnote) “why originalists and other legalists are not AI [artificial intelligence] enthusiasts.”<sup>14</sup> This is an interesting point—I vote for the Oxford English Dictionary as the word model, which would at least allow for a little literary flare from time to time.

Alternatively speaking, if judges are purely political, they also would not need to think. They could simply mirror the party platform, or comply with their appointers' wishes, or read a good opinion poll and do likewise. (But, of course, judges cannot appear to have done only this; they still have to make their decisionmaking process looked reasoned, and therefore marketable.)<sup>15</sup>

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11. Indeed, the vast majority of cases are decided by these materials, especially in courts other than the Supreme Court of the United States. It is only cases in the “open areas,” as Judge Posner describes controversial cases, “in which a judge is a legislator.” *Id.* at 15.

12. *Id.* at 12–13.

13. *Id.* at 5.

14. *Id.* at 5 n.10.

15. Kelly A. MacGrady & John W. Van Doren, *AALS Constitutional Law Panel on Brown, Another Council of Nicaea?*, 35 AKRON L. REV. 371, 423 (2002) (“[T]he Supreme Court

Despite the fact that there are no incontestable criteria of judicial excellence, economics scholars seek to find some common ground. Studies seek to predict judicial outcomes by analysis of judicial inputs, such as party identification of appointers and the ideology that judges carry with them. They also seek to evaluate judges by various criteria: productivity, citation, and independence being a primary model. This process has engendered considerable controversy. Political scientists accuse the legal academy of abdicating its duty to write in this area; legal academicians counter that the political science community does not adequately understand sophistications necessary to evaluate legal models; and scholars of both camps have crossed pens with judges who find these studies reductionist, incomplete, and possibly worrisome, especially if the studies are designed to influence production as well as to accomplish prediction.

It is also a bit unclear why scholars conduct these studies: Do they intend their studies to be descriptive and predictive, or do they have normative goals? I suppose most scholars seek to describe and explain what is happening, yet why do this without an outcome in mind? Perhaps these studies result simply from what philosopher Lionell Rubinoff terms “the law of the possible”: “What it is possible for science to know science must know. What it is possible for technology to do technology is obliged to do. Whatever is possible is obligatory.”<sup>16</sup> Scholars have the tools to study these phenomena, and therefore they must do so. Yet given the scarcity of scholarly time, and perhaps the need to have scholars address more helpful things (as Judge Harry Edwards has rather notoriously noted),<sup>17</sup> does it make sense to study for the sake of studying? Will this confuse knowledge with virtue?

But some scholars suggest a crisis exists that needs to be addressed: that the Supreme Court appointment process is broken, that it produces “mediocre” judges (Roman Hruska’s famed

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could not just send out a decree and expect everyone to salute. The legal process require[s] a process of reasoned elaboration.”).

16. Lionel Rubinoff, *Technology and the Crisis of Rationality: Reflections on the Death and Rebirth of Dialogue*, 15 PHIL. F. 261, 278 (1977).

17. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 54 (1992) (“As a practitioner, I benefit very little from academic literature. This is perhaps the greatest disparity between ‘what goes on’ at most law schools . . . and the actual practice of law. The greatest problem is that most of the academic literature does not address the problems that arise in my practice. I am not sure that most law professors have much of a sense of (or care) what those legal issues are.”).

comment comes to mind<sup>18</sup>), that the system is a “mess”<sup>19</sup> and needs to be “fixed.”<sup>20</sup> The idea seems to be that these evaluations and studies (mostly of sitting federal appellate judges, from whose ranks most recent appointees have come) will help that process.<sup>21</sup> Yet it is unclear that the process wants help, or will need or use it. President Obama is a talented lawyer and may have his own ideas about how to select a Justice, which may include going outside the box of my brothers and sisters. Remember Hugo Black? Presidents sometimes grant the ermine in appreciation for a life’s work, for friendship and political loyalty, or perhaps even for political strategy. Will the models factor in these considerations?

Further, some scholars argue that the Supreme Court appointment process is working just fine, although they damn it with faint praise. For example, Professors Cross and Lindquist conclude that today’s confirmation process “precludes the selection of ‘great’ Justices and is biased in favor of ‘competent, noncontroversial jurists with a restrained understanding of the role of the federal judiciary.’”<sup>22</sup> First do no harm, less can be more. Other scholars conclude that Mr. Dooley was not only descriptively correct but also normatively correct: Presidents appoint judges based largely on ideological compatibility, most judges are confirmed, and thus the Court is politically representative in a broad way, with some lag. The Court does follow election returns, and why worry about that in a nation largely based on democratic principles?<sup>23</sup>

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18. See William H. Honan, *Roman L. Hruska Dies at 94; Leading Senate Conservative*, N.Y. TIMES, Apr. 27, 1999, at B8 (“‘Even if he were mediocre,’ Mr. Hruska declared, ‘there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren’t they, and a little chance? We can’t have all Brandeises, Frankfurters and Cardozos.’” (quoting U.S. Sen. Roman L. Hruska)).

19. See, e.g., STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1995).

20. See generally CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 4 (2007) (“Americans need a better way to talk about Supreme Court appointments, and they need it now . . .”).

21. Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383, 1396–400 (2009).

22. *Id.* at 1397.

23. See, e.g., TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* (2d ed. 2001); see also *The ABA Plots a Judicial Coup*, WALL STREET J., Aug. 14, 2008, at A12 (“A better option is to keep the judicial nominating process democratically accountable and transparent. Those who don’t like the judges a President appoints can take their preferences out at the ballot box.”).

If the studies are meant to evaluate sitting judges, other problems emerge. First, in a sense of sporting fairness, we might want to tell the judges what the criteria are before cumulating them. Second, related to the study cited above, are the processes really broken? Federal appellate courts get relatively high marks, and anecdotally I will tell you that every one of my colleagues on the Tenth Circuit is remarkably bright and industrious. Perhaps most amazingly, all of us get along rather well. The selection process may be more detailed and effective than the academy understands. It includes a thorough review of the work an applicant has done; extensive evaluations by professional peers through a detailed process conducted by the American Bar Association (ABA);<sup>24</sup> and background checks by the Federal Bureau of Investigations (FBI), White House Counsel, the Department of Justice, and counsel to both parties in the Senate Judiciary Committee. Interestingly, the studies I have read spend little time considering the ABA process, the evaluations in the Almanac of the Judiciary, and the executive and legislative investigations.

With respect to elected or retained judges, it is unclear whether the electorate would be informed by scholarly information, especially given the way it is written—for scholars. The media could summarize the studies, and interest groups who like them could utilize them to inform the electorate, but again it is unclear how useful they would be. Twenty-second sound bites seem to dominate the hustings, and the relevance of the studies may depend upon the skill of a candidate's public relations consultants and the amount of the campaign budget.

I hesitate to enter this fray for several reasons. First, when the status quo is acceptable, judicial anonymity is almost always a good idea. As President Coolidge famously said, "I have never been hurt by anything I didn't say."<sup>25</sup> I hope that this does not make me a leisure-seeking, unadventurous judicial minimalist. Second, my inability to deal with things mathematical was, as it is for many lawyers and judges, a strong reason why I left the study of political science for law school. I do not deal very much with the economic and social science techniques used in many of these studies, and when I

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24. Although the ABA has its critics, see *The ABA Plots a Judicial Coup*, *supra* note 23, a group of lawyers is probably best positioned to evaluate the issue of temperament—whether that is the ABA or some other group.

25. ROBERT SOBEL, COOLIDGE: AN AMERICAN ENIGMA 138 (2000).

must do so in a case, I have a bit more time to focus on a particular sample or technique.

Third, I am a bit unsure of the whole enterprise—believing, like my old friend Professor Don Songer, that precedent still plays a key role in decisions that appellate judges make.<sup>26</sup> And perhaps a number of other factors play a role, too: the language of the text (“[we] are all originalists now, Dworkin says,”<sup>27</sup> although his originalism is unorthodox, or maybe neo-orthodox), canons and counter-canons, possibly collegiality, fairness and justice, and—as a study I recently glanced at suggested—maybe even law clerks.

Something I always liked about my esteemed friend Sandra Day O’Connor when she was sitting with the Supremes was that one was never quite sure where she would come out in a close case. This made one think that perhaps she was looking at the facts at hand to resolve the case narrowly (what a concept!)—that her decision did not reflect the GOP line, textualism, originalism, purposivism, civic republicanism, restrained pragmatism, pragmatic restraint, or even the spicy posole that was last night’s dinner. Close cases with her were interesting, and quite often not easily predictable—especially in the details. Perhaps ideological shift, judicial cosmopolitanism, innovation, or craft can explain Justice O’Connor’s decisionmaking—whatever it was, it was interesting.

The late Judge Richard Arnold, one of the most admired federal judges in the United States, told the story of his nomination to the federal district court in a Goldberg Lecture at Southern Methodist University. His story speaks partially to this Symposium’s topic in that it shows that *literal* judicial inputs are certainly political. After explaining that Senator Bumpers instructed him to write his own letter of nomination to the president, a request with which he eagerly and eloquently complied, he continued the story:

A few days later, I got a call to appear at the Department of Justice to be interrogated, and I thought they would ask me what my judicial philosophy was. I didn’t have one. I don’t think I have one now. But I was most relieved when only two questions were put to

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26. See Susan B. Haire, Stefanie A. Lindquist & Donald R. Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC’Y REV. 143, 147 (2003).

27. See Lawrence H. Tribe, *Comment*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 65, 67 (Amy Gutmann ed., 1997).

me: “Was I breathing?” and “Did I come from [Senator Bumpers]?”<sup>28</sup>

I think it is interesting that Judge Arnold believed that he had no judicial philosophy; and having known Judge Arnold a bit, I believe him. He did not fit a particular mold. I realize that judicial philosophy is different from ideology—I suppose that, like the mythical daimon, everyone has some sort of attendant spirit of ideology. (I, for one, am a liberal Baptist evolutionist.) But Judge Arnold was almost universally acclaimed as a jurist and highly regarded in Congress. Even the academy seemed to think he was worth knowing. My point is that he thought that a number of things comprised the art of judging, including the belief that everything judges do should be formally published and citable.<sup>29</sup> (I wonder how that would work in the academy). Judge Arnold thought that efficiency was a goal, but also that, within certain parameters, compromise, collegiality, craft—even fairness and justice—might be relevant. Different things counted in different ways at different times and under different circumstances. I suppose he was a restrained legal pragmatist, though perhaps a bit less restrained than Judge Posner—although Judge Posner seems to be able, often brilliantly, to write his way out of anything. But again, predicting the voting pattern of an individual like Judge Arnold may require some very advanced paradigms.

My example of Judge Arnold may not be worth much, economically speaking. As Judge Posner noted in a fascinating article in 1993:

By treating judges and Justices as ordinary people, my approach makes them fit subjects for economic analysis; for economists have no theories of genius. It is fortunate for economic analysis, therefore, that most law is made not by the tiny handful of great judges but by the great mass of ordinary ones . . . . Because there are so many ordinary judges, and because anti-intellectualism runs deep in the American soul, there is even a cult of ordinariness in judging. Exceptionally able judges arouse suspicion of having an “agenda,”

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28. Richard S. Arnold, *Irving L. Goldberg Lecture, Southern Methodist University Dedman School of Law: The Federal Courts: Causes of Discontent*, 56 SMU L. REV. 767, 767 (2003).

29. See, e.g., *Anastasoff v. United States*, 223 F.3d 898, 899, *vacated on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).



that is, of wanting to be something more than just corks bobbing on the waves of litigation or umpires calling balls and strikes.<sup>30</sup>

So it may be simply that Judge Arnold was an extraordinary judge; that he was less predictable, not a bobbing cork or a mechanistic umpire; or that he was a thinking judge, and maybe even a noble one, less desirous of his own self-maximization, hardworking and conscientious.

Professor Ramseyer, the Mitsubishi Professor of Japanese Legal Studies at Harvard, has offered an answer. In his article, he joins most of this Issue's articles in concluding that empirical studies successfully explain *some* court decisions through the party identification of judicial appointers.<sup>31</sup> He suggests that others—nonempirical students, and some judges—find these studies offensive, partly because they miss the point: Judges are predictable only because they are independent,<sup>32</sup> and to the extent judicial independence is a good thing (and, say, the Bangalore Principles<sup>33</sup> suggest that a great many countries think it is), the fact that judges are political should engender pride. Of course, pride cometh before the fall, and I am not sure the Professor's economical colleagues share his pride—if he is proud, of which I am also unsure (in an earlier draft he stated: “To the extent judicial independence is a good, it should engender pride.”<sup>34</sup>) It would help if I could confer with a couple of colleagues on this and take an initial vote. Although some of the articles suggest that judicial independence is in fact a very good thing, especially from the perspective of economics, one would hope that scholars might spend some more time on the virtues of judicial independence.<sup>35</sup>

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30. Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUPREME CT. ECON. REV. 1, 4 (1993) (footnotes omitted).

31. Ramseyer, *supra* note 1, at 1558.

32. *Id.* at 1558–59.

33. BANGLORE PRINCIPLES OF JUDICIAL CONDUCT (2002), available at [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf). Brazil, the Czech Republic, Egypt, France, Mexico, Mozambique, the Netherlands, Norway, the Philippines, Madagascar, Hungary, Germany, Sierra Leone, the United Kingdom, and the United States participated in the rule-making process. *Id.* at 10–11.

34. J. Mark Ramseyer, *Predicting Court Outcomes Through Political Preferences: The Japanese Supreme Court and the Chaos of 1993*, at 3 (Harv. John M. Olin Ctr. for L., Econ., & Bus., Discussion Paper No. 624, 2008), available at <http://ssrn.com/abstract=1326548>.

35. Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313, 1323–25 (2009).

I would like to briefly discuss these issues, first exploring why there may be some offense taken and some offense given.<sup>36</sup> Beyond some unfortunate rhetoric on both sides, I think judges are skeptical of the models scholars have offered because we do not think they are accurate; we are not sure of their relevance; and we think that whether they are descriptive or predictive, they still may not be helpful.

### I. TAKING OFFENSE

This important conference at Duke University School of Law is a relatively unique one. There have been few conferences where judges (especially judges who are not empirical scholars) and scholars have convened to discuss these issues. Professor Ramseyer, as noted, finds that some take offense at empirical studies, and he is correct, but he does not adequately speak to why this occurs.

Part of the problem is rhetorical, in the popular sense of that term. Professors Spaeth and Segal suggest a matter of honor with

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36. Although I am always happy to talk about justice, especially outside of a courtroom, I am not so sure that the dismal science is yet capable of measuring it. Natural science is value neutral; the facts are what they are, and a hypothesis either better explains the phenomena than the previous one or not. Law and economics appears to have some values, although they are not necessarily universally shared. One of its founders, Oliver Wendell Holmes, Jr., whom acclaimed historian Jacques Barzun described as the lesser Holmes, was famously without values, other than perhaps “might makes right.” Efficiency and cost-benefit analysis are notoriously viewed from the eyes of the beholder. Recall Justice Holmes’s dissent in *Lochner v. New York*, 198 U.S. 45 (1905): he thought that the Fourteenth Amendment did not enact Herbert Spencer, but Holmes himself was privately a fan! See *id.* at 75–76. The late Bernard Schwartz, criticizing a Judge Posner opinion that he believed minimized the value of procedural rights, noted that cost-benefit analysis can create Oscar Wilde’s cynic: a person “who knows the price of everything and the value of nothing.” See Bernard Schwarz, *Recent Administrative Law Issues and Trends*, 3 ADMIN. L.J. 543, 559 n.14 (1990). It rarely is efficient to grant a defendant procedural rights.

In a bit of a paradigm shift, there has been some interesting use of law and economics public choice theory techniques to take sides in value allocation. Professor Jonathan Macey has advocated that public interest statutes ought to be liberally interpreted by reference to their announced purposes, and that by doing this judges would raise the costs of rent-seeking (through which small but powerful groups obtain legislative benefits at the expense of the citizenry at large) and would contribute to the public welfare. See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 261–66 (1986). Likewise, Professor William Eskridge has suggested legislative interpretive strategies for the appropriate treatment of statutes. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY* 813 (4th ed. 2007). Judge Frank Easterbrook mentioned a similar approach in his Harvard Law Review Foreword on the Supreme Court’s 1983 Term. See Frank Easterbrook, *The Supreme Court, 1987 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

their discussion on the antepenultimate page of their famed study. Arguing that substantive due process alone disproves that the Court has major constraints operating upon it (and referencing celebrated cases such as *Lochner v. New York*,<sup>37</sup> *Roe v. Wade*,<sup>38</sup> *Griswold v. Connecticut*,<sup>39</sup> *Flood v. Kuhn*,<sup>40</sup> and the notoriously illogic and evil consideration of a tomato as a fruit), they note that “It is precisely because the justices exercise virtually untrammelled discretion—and do so, moreover, authoritatively—that enables them to blink at reality and incorporate illogic and falsehood into the law of the land.”<sup>41</sup> I submit that the number of Justices—or judges—who intend to or *think* that they incorporate illogic and falsehood into the law is virtually nonexistent. Further, I think that the number who actually do so is statistically insignificant. “*Per leggem terrae*,” the Latin phrase for “law of the land” that over centuries has become the American concept of due process of law, has evolved. And by and large, it has been the near consensus (less so of late, but still a near consensus) that the Constitution must be flexible in the joints (Justice Holmes), that it should not be read as a tax statute (Justice Frankfurter), and that we might have living traditions (Justice Harlan).<sup>42</sup> One should keep in mind that Frankfurter and Harlan were the paradigmatic conservatives of the Warren Court, and Justice Holmes was, well, the Judge Posner of his time.

I suppose that Professors Segal and Spaeth think that these various interpretations of due process, or extensions of due process, are false—but law, like economics, does not often think profitably in terms of true and false. A tomato by any other name is either a fruit or a vegetable; I suspect that a lot of “vegetables” are botanically fruits, and I have never termed anyone evil who was unclear or inclusive on the point. I grow “fruits” in my “vegetable garden,” never realizing the error of my ways. And, although judicial consciences have become a bit numb and are not what they used to be, I think we ought to do something in the rare cases in which they get “shocked.” The authors may be responding to criticism of their model, but they seem to be inordinately defensive.

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37. *Lochner v. New York*, 198 U.S. 45 (1905).

38. *Roe v. Wade*, 410 U.S. 113 (1973).

39. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

40. *Flood v. Kuhn*, 407 U.S. 258 (1972).

41. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 361 (1993).

42. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

That is not to say that judges have not fired back a bit rhetorically (again, in the popular meaning of the term). Professor Ramseyer quotes Judge Harry Edwards, who has been known to send salvos to the academy, as commenting on the “heedless observations of academic scholars who misconstrue and misunderstand the work of . . . judges.” Judge Edwards called it “absurd” and “sheer speculation” to term dissenting judges “whistle-blowers.”<sup>43</sup> Ramseyer, in an earlier draft, goes on to accuse Judge Edwards of missing the point:

If Edwards thinks attempts to predict judicial votes through political variables demeaning, he misses the way they capture the fundamental independence of the federal courts. Were courts not independent, judges could not costlessly indulge their political biases. And if they could not indulge them at low cost, they would not indulge them often. That they act politically in political cases simply reflects their essential independence. That politics matters should not embarrass. To the extent judicial independence is a good, it should engender pride.<sup>44</sup>

I must say that I do not think that Judge Edwards has missed the point. He is not known for such oversights. His point is that, if scholars espouse the view that law is only a reductionist, mechanistic model of individual preferences, the very independence that we judges have would be under attack and respect for decisions would be diminished.<sup>45</sup>

To take a tough example, it was not correct to think that Democrats would vote for Al Gore and Republicans would vote for George Bush in *Bush v. Gore*,<sup>46</sup> disappointing as that decision was to many who neutrally felt that the Court should restrain from Justice Frankfurter’s political thicket—especially because the partisan Florida legislature or the partisan House of Representatives would have reached the very same result. One should recall that two

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43. Ramseyer, *supra* note 1, at 1558 (quoting Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1335, 1337 (1998)).

44. Ramseyer, *supra* note 34 (manuscript at 2–3).

45. However, lest we judges be unfairly criticized as hostile to the whole endeavor, let me remind you that the federal courts are moving to electronic case filing which results in remarkable openness and transparency with respect to judicial outcomes and statistics. Indeed, given this easily available information, the economical scholars may figure out a way to create virtual federal courts and even market these as a cheaper alternative. See Lynn M. Lopucki, *Court-System Transparency*, 92 IOWA L. REV. 482 (2009).

46. *Bush v. Gore*, 531 U.S. 98 (2000).

Republican-appointed Justices did not vote with the majority.<sup>47</sup> Perhaps some other models could explain the decision—maybe even a simple “liberal versus conservative” model—but again, judges are skeptical that simple models explain enough cases to be accurate. The citizenry may think something else is going on, too. The judicial branch always outscores the other two branches in public opinion polls (although it was tied with President Bush at the height of his popularity), and polls showed that public support of the Supreme Court did not diminish after *Bush v. Gore*. Maybe the citizens were ready for some other news; maybe mysticism—the Court as oracle—still works. As the late Pope John Paul II lamented, “Unfortunately, there is no lack of young people and adults who search for signs of their destiny in the stars.”<sup>48</sup>

## II. ARE THE MODELS ACCURATE?

The first substantive reason that “offense” may be taken is that judges do not think that most models are accurate. That is for several reasons. First, as Judge Posner has noted, the models only operate in the “open area—the area in which a judge is a legislator.”<sup>49</sup> The large majority of cases decided by appellate judges on the courts of appeal are decided unanimously.<sup>50</sup> There is a certain legalism—there are certain rules that clearly apply to a large majority of cases, and political ideology or philosophy has nothing to do with those decisions. Likewise, the majority of trial court decisions are very similar in result. Even after the Sentencing Guidelines have become advisory, there is still great consensus on sentence ranges.

Some empirical scholars note this point, but they rarely emphasize it because they do not find it interesting. But it is important not to understate reality; rules, standards of review, and precedents do a lot of heavy lifting. There is usually no Democratic or Republican response to armed bank robbery; nor is there a pragmatist, civic republican, or dreaded judicial cosmopolitan view of

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47. See *id.* at 123 (Stevens, J., dissenting); *id.* at 129 (Souter, J., dissenting).

48. Helen Kennedy, *Pope Tells Followers Don't Wish on Stars*, N.Y. DAILY NEWS, May 20, 1996, at 6.

49. POSNER, *supra* note 10, at 15.

50. Interestingly, I recently heard Justice Ginsburg point out to a group of students that about 30 percent of the cases heard by the Supreme Court are unanimous—even though the Supreme Court takes cases that are often controversial and have split the circuits. That all nine Justices, some of widely divergent views, agree on potentially divisive cases suggests concepts of law at work.

the offense (although Europeans, well, I guess almost everyone, incarcerates for shorter periods than we do). Almost everyone opposes armed bank robbery, and rather predictable legalistic results occur if one commits this offense. The phenomena of judicial decisionmaking cannot be explained by ignoring the fact that there are many legal rules that judges consistently follow in the great majority of cases. Further, judges' decisions in controversial cases often move into a great body of precedent and cease to be controversial. In law, it is often sufficient to know what the rule is, rather than whether the rule makes sense. Thus, baseball is not subject to antitrust laws like other big sports—but baseball is off-base, and this rule is now predictable, okay, and not worth the effort of overturning that nifty Blackmun opinion that literarily explains the legal differences.<sup>51</sup>

Further, judges believe that the initial models were often themselves inaccurate, even in the open areas. The first studies seemed to argue that judicial decisions could be largely predicted by simple party identification. This argument can quickly become problematic. A few Justices who did not hew to the appointer's line come to mind: Earl Warren, Harry Blackmun, John Paul Stevens, David Souter, and of course, Oliver Wendell Holmes, Jr.

Even as the methodologies have become more nuanced, other problems have surfaced. Although Professors Choi and Gulati advanced the ball with their tripartite index using productivity (number of published opinions), quality (relative number of citations), and independence (frequency with which judges disagreed with appointees from the same political party),<sup>52</sup> each of these categories poses certain problems.

With regard to measuring productivity as a function of published opinions, some judges take a completely different approach. Partly for reasons of judicial modesty (I think) but mostly because I sympathize with lawyers, I do not publish cases that add nothing to the corpus of the law. Some circuits render very summary affirmations that are only a couple of paragraphs and are not usually "published." (Of course, everything is actually published these days, and is accessible, though not in an official reporter.) We do not use these summary affirmations in the Tenth Circuit; even though many

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51. See *Flood v. Kuhn*, 407 U.S. 258 (1972).

52. See Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23, 40–68 (2004).

of our decisions do not establish binding precedent, they do, as a rule, thoroughly explain the action taken. But, if the case does not add to the law, or refine a concept, I usually do not publish it. These cases are at best merely persuasive, and should not be cited as a rule. But they are real opinions, though, and some of them may take quite a bit of work (for example, multiple claims by an inmate against a prison come to mind). Indeed, my first case taken by the Supreme Court was an unpublished opinion.<sup>53</sup> I had merely cited and followed our dispositive circuit precedent (with which I personally disagreed, preferring *Chevron* deference to the administering agency) and followed it. The Court evidently wanted the fact pattern of my case, and took it with several others to resolve circuit differences on a point of law.

So if the mere *number* of opinions is to be a factor in judicial evaluations, I suppose I need to publish more. I hate that more trees must die for me to be “productive.” I would prefer to evaluate opinions in a way that is not based on raw numbers of one class of cases. Although the number of opinions one writes may reflect a certain efficiency, it may also simply reflect the court’s caseload.

Likewise, with regard to citation of judicial opinions by other judges, problems may exist. Although this measure is often suggestive of a certain quality, it may not be the reality. For example, Professors Cross and Lindquist suggest in their article that “nimbleness” of pen may result in more citations than the logic or clarity of the opinion.<sup>54</sup> The ability to turn a Handian or Holmesian phrase may lend to citation, as might wit or polymathic magniloquence. Also, writing an opinion notorious for being “wrong” might also lead to many cites. It is interesting to note that Professors Cross and Lindquist, unlike Professors Choi and Gulati, conclude in their study that the judges who scored best “for outside circuit citations did not tend to have greater success when the Supreme Court reviewed their decisions.”<sup>55</sup>

Finally, independence is indeed a value (although potentially a costly one, as I will discuss in the next paragraph), but I am not sure that disagreeing with appointees of one’s own party defines it. Perhaps the quality of a dissent or concurrence might be relevant to independence. Towing the legal line in a controversial case might be

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53. See *Murphy v. United Parcel Serv.*, No. 96-3380, 1998 WL 105933 (10th Cir. Mar. 11, 1998), *aff’d*, 527 U.S. 516 (1999).

54. Cross & Lindquist, *supra* note 21, at 1417 n.127.

55. *Id.* at 1386.

relevant, as well. It is widely thought (though questioned by some scholars of late) that certain federal judges who courageously enforced civil rights legislation in the South were engaging in behavior that should be encouraged. (I'm with the wide thinkers.) Even life tenure judges face problems in controversial cases. Being attacked by or in the press without the ability to respond is painful; scorn, reproach, contempt, and ridicule hurt despite the security of life tenure, creating pain for a judge's family and friends. Judges can demonstrate courage and independence in many ways and disagreeing with judges from one's own party is just one of these ways.

Another problem with the accuracy of the studies is that the titles often overstate their arguments—a trait particularly annoying to judges who frequently see attorneys do the same. A 2008 study is entitled *The Myth of the Generalist Judge*.<sup>56</sup> But the study does not disprove the existence of generalist judges at all; it merely shows that there is a relatively small bit of specializing going on.<sup>57</sup> Another study, entitled *Mr. Justice Posner? Unpacking the Statistics*, posits that the winner of a tournament of judges would likely be Justice Posner.<sup>58</sup> But that is highly unlikely for several reasons, some of which are completely missed by the model. The model does not consider age (Judge Posner is over 70, and although one would expect him to be in league with his hero Justice Holmes in this regard, the likelihood of a person of his age being appointed to the Court is slim); nor does it consider the appointer's political party (although President Obama and Judge Posner share a love of the Windy City, it is unlikely that a moderate-to-liberal Democrat would appoint a "conservative" Republican to the Court, even though Judge Posner was a registered Democrat when President Reagan appointed him). Further, although the model gives points for something elusively defined as "independence,"<sup>59</sup> it is independence (or perhaps academic independence) that can keep a person from getting on the Court—perhaps analogous to Judge Posner's explanation of why Judge Bork did not make the cut.<sup>60</sup> Some of Judge Posner's earlier academic

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56. Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519 (2008).

57. *See id.* at 533–44.

58. *See* Stephen J. Choi & G. Mitu Gulati, *Mr. Justice Posner? Unpacking the Statistics*, 61 N.Y.U. ANN. SURV. AM. L. 19, 42 (2005).

59. *Id.* at 38–42.

60. *See* RICHARD POSNER, *OVERCOMING LAW* 237–55 (1995). Judge Posner lists some of Judge Bork's controversial views, pointing out that his failure to be confirmed was not due to



writings may be the reason why he is not on the Court now. Judge Posner's writing style is very clear, informal, and too frank and controversial for squeamish politicians—that may be why his opinions are fun to read. Finally, one must speculate that an individual like Judge Posner would be bored with the relatively simple task of producing one-ninth of less than a hundred opinions.<sup>61</sup>

This does not mean that prediction cannot be improved. It does, however, caution against overstating titles, and overstating the models. A recent study did purport to predict Supreme Court decisions more accurately than a panel of experts, and that suggests that some real progress is being made.<sup>62</sup> But some other values—like following precedent and complying with standards of review—ought to be considered, whereas some values—like craft—may be very difficult to quantify for mathematical study.

### III. ARE THE STUDIES RELEVANT?

Another problem that some judges have with the studies relates to accuracy. If the studies are envisioned to do something other than predict, such as *evaluate*, then judges have real concerns. First, as Professor Larry Solum has written, a core of judicial values is not included in the studies. As noted early, although Professors Choi and Gulati advanced the ball with their tripartite index, the more or less Aristotelian virtues that Professor Solum has mentioned are not considered. These virtues include his “thin” virtues of incorruptibility, courage, temperament and impartiality, diligence and carefulness, intelligence, and craft; and his “thick” virtues of justice (dare we say

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the power of the intellectual class or the “knowledge class,” as Bork termed his adversaries. Rather, Posner concludes that a large number of Americans simply disagreed with Bork's stated views and controversial terminology. He notes, for example, that Americans do not want states to enforce racial restrictive covenants; they do not think the federal government should racially discriminate; and they do not believe that under Chief Justice Rehnquist and his predecessors, “the political seduction of the law continues apace”—all positions Bork had taken at various times. Further, Americans do not like the results that Bork would be likely to reach based on his writings. *Id.* at 254–55. Posner is neutral on this phenomenon: “In a representative democracy, the fact that many (it need not be most) people do not like the probable consequences of a judge's judicial philosophy provides permissible, and in any event inevitable, grounds for the people's representatives to refuse to consent to his appointment, even if popular antipathy to the judge is not grounded in a well-thought-out theory of adjudication.” *Id.* at 255.

61. See Christopher Shea, *Posner Writes Faster than Publishers Can Publish*, BOSTON GLOBE, Feb. 24, 2009, [http://www.boston.com/bostonglobe/ideas/brainiac/2009/02/posner\\_writes\\_f.html](http://www.boston.com/bostonglobe/ideas/brainiac/2009/02/posner_writes_f.html).

62. See POSNER, *supra* note 10, at 24 n.12.

it?) and practical wisdom.<sup>63</sup> Admittedly, some of these virtues are difficult to quantify. But the ABA takes great care in rating judges for temperament, and it is widely believed that the ABA has prevented a few disasters over the years.<sup>64</sup>

To be sure, it might be hard to fit these kinds of virtues into any metric. But these words regularly appear in the Almanac on the Judiciary, an admittedly anecdotal but frequently consulted evaluation of judges from the lawyers who practice before them. Justice Frankfurter was once asked if making a person a judge made them a better person. He replied that this would be true only if the person were a good person to begin with.<sup>65</sup> Giving a jerk the ermine is not likely to cause him or her to change ways.

Another virtue ignored by the studies but valued by most judges is the elusive concept of collegiality. Some judges are peacemakers, and they are to be blessed. They promote civility and prevent courts from becoming scorpions in a bottle. Likewise, fairness and openness to other views are valued. It is difficult to know how these virtues affect prediction of judicial outcomes, and it is likewise difficult to evaluate whether they suggest that a judge should be retained or reelected. Yet these judges are esteemed and valued highly by their colleagues: Judge Frank Coffin and Judge Arnold come to mind. Known and esteemed by virtually all of their colleagues, they add much to the judicial enterprise both from within and without.

Finally, other judicial functions are not addressed by most of the studies. If we are evaluating judges to take some kind of action (and given the hard-fought independence of federal judges, taking action other than in the rare cases in which judges seek promotion is unlikely), it is necessary to get everything in the mix. Chief judges often have a large amount of administrative work. Some judges, typically among the best, have committee service both within their judicial districts and nationwide. They may serve on committees that draft proposed jury instructions, or on judicial councils that handle administrative affairs and the relatively rare but vitally important matters of judicial misconduct. Attorney discipline and misconduct also demand time.

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63. See Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 498–522 (2005).

64. I can't say everything I know here.

65. Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 901 (1953).

## IV. ARE THE STUDIES HELPFUL?

I have discussed the possibility that these studies have limited use. Appointers, like presidents and governors, may have their own criteria and many may simply feel that things are going well the way they are. Further, restraint is “in” again, and there is much to say for the conventional wisdom of “if it ain’t broke don’t fix it.”

One of the seemingly obvious factors that could be evaluated is the time it takes a judge to render an opinion. With all the economists studying these things, I am surprised that I have not read more about this. I am surprised, but not necessarily disappointed.

Justice delayed can be justice denied, but as one of my colleagues once said in a debate, “justice rushed is justice flushed.” From my discussions with colleagues and my experiences on both sides of the bench, I have learned about two kinds of efficiency issues. First, there are indeed judges who are very slow. This can be terribly unjust to litigants, delaying recompense for damages, often thereby enhancing those damages, and in perhaps the worst of situations, resulting in incarceration when a litigant should be released. But judges have ways of working on this. One of the duties of chief judges is to monitor delay, and they try to do so and use the tools that they have to address the issues. But delay comes from different sources. In some cases, the judge may be new; the case may be hard; or the authoring judge may await a dissent, concurrence, or even a vote for weeks or months. A judge may become ill or have a life crisis that requires a bit of delay. This is not to say that judicial evaluations should not consider inordinate delay, but that the consideration must be nuanced.

The second problem I have sometimes seen is excessive speed. Some judges are dismissive of others’ views, simply firing off a quick opinion without considering other judges’ perspectives. I remember an old Scottish prayer that decorated the office of a Benedictine monk who was president of a local college: “Grant O Lord that we might always be right, for Thou knowest we will never change our minds.” I think it is unfortunate when judges advance speed over collegial consideration and openness to other views. And I am uncomfortable with evaluations that encourage speed by promoting a tournament of speedy judging. Timed chess is interesting to watch, but it does not really reveal who the ideal player is.

And that is the final point. We judges believe that judicial independence is good, and we believe that litigants believe and

recognize that it is good. We are reluctant to have evaluations that we fear are inaccurate introduced into the mix.

Of course, these evaluations will continue. I hope that they become further refined, that they better explain judicial outcomes, and that the knowledge will translate to virtue. Judge Posner states that he wants to “part the curtains a bit.”<sup>66</sup> I think parting the curtains a bit is good, but I am for not drawing them completely.

Alexis de Toqueville was right that there is a sense of American exceptionalism,<sup>67</sup> and that the judicial branch encompasses much of that exceptionalism. I also agree with Harold Koh that there is good exceptionalism and bad exceptionalism,<sup>68</sup> but I think that our judicial system is by and large in the former category. Our legal rules and legal culture have devised a system that validly restrains judges, and has developed a certain sense of confidence, though it also uses a bit of curtain.

Before I walked into the ceremonial courtroom to take my public oath of office when I became a judge, I scratched out a brief outline of some remarks that I would say. It was a rhetorical moment, so I hope to be forgiven a certain epideictic character. I quoted Judge Coffin’s view that appellate courts exist to correct mistakes, but not all of them. I mused at the excitement of how panels of judges “of diverse legal backgrounds and experiences, with talented staffs and clerks and assistants, can view the law from different perspectives, within the common framework, however, of the law itself, which is never static.” Having mentioned the restraint on judges provided by the Constitution’s clear text and masterful generalities, I closed with these words, which, I confess, I still believe:

Judges are restrained by the legal system in America, by our common law school education, by the Bar, by our friends and especially those friends of ours who are judges at the trial level whom we know and respect. Judges are restrained by the law and tradition, as well they should be. But judges, like legislators, executives and citizens, all share a responsibility to keep the courts open so that the aggrieved, whether multi-national corporations or

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66. POSNER, *supra* note 10, at 2.

67. See SEYMOUR MARTIN LIPSET & GARY MARKS, *IT DIDN’T HAPPEN HERE: WHY SOCIALISM FAILED IN THE UNITED STATES* 15 (2000).

68. See Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 *STAN. L. REV.* 1479, 1480–87 (2003).

pro se prisoners, can have their day in court. I know I am inadequate to this task, but not surprisingly, I accept the appointment.

Judges are people too. They try to maximize what they want to maximize. But they do think, and they are restrained in a pragmatic sort of way by the factors I have mentioned. I am grateful that the *Duke Law Journal* made this Symposium possible because it provided a rare opportunity for discussion between bench and academy. I wish the academy well in its continued search to predict and evaluate judges. I will watch its work, and try to do better in mine.