Judging the Judges: Some Remarks on the Way Judges Think and the Way Judges Do

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Judges, as everybody knows, have a very special place in the legal system in common law countries. Much of the law in common-law systems is judge-made. This means that there is an important body of rules, doctrines, practices, which developed over time, through case-law, and which cannot be tied to any statutory text. The bulk of the law of contracts and torts, and a good deal of the law of property developed in this way. The common law mentality extends even to those fields that do have a text (which, today, is most of them). To a common law lawyer, a statute hardly means anything until it goes through its baptism of fire-- getting construed by courts. Some statutes are so vague that they hardly restrict the judges at all; and the case-law under such statutes are basically common law. In other words, in many fields that are in theory statutory, there are vast bodies of doctrine which in form are "interpretations" but are in fact attached to any texts (of statutes or regulations) by the thinnest of strings, or no string at all.

The internal legal culture of the common law countries also focuses on the work of the judges. Statutes, laws, regulations, ordinances have multiplied in the last century like rabbits; yet law schools still spend almost all of their time on case-law. The materials that students break their heads over are contained in thick books called "Cases and other materials;" but there is much less "other materials" than the situation warrants.

In the common law, then, the judge is culturally king. Yet, at the same time, there is a powerful counter-ideology, also within the common law, that rejects the whole idea of "judicial legislation," and denies any creative role to judges. Judges who make up new rules are thwarting the will of the people, or usurping the role of the legislature, or some comparable slogan. An older form of this ideology was captured in the saying that judges do not make the law, they just find it or declare it. Law is somehow conceived of as pre-existing, there, waiting to be discovered, like the statue encased in or immanent in a piece of marble. Judges are supposed to decide according to the law, whatever that might mean. This slogan has significant political meaning. Republicans in particular talk endlessly about "strict constructionists." There is a strong body of opinion that insists that judges should follow precedent; that they have no right to go off on a frolic of their own, and that exceptions, if they occur at all, should be rare. In the field of constitutional law, we have a lot of worrying and nagging about "countermajoritarianism," a very long and extremely ugly word.(1) This is the problem, if it is a problem, that the law should be made by the people the people elect; and when judges undo their work, either by overturning some statute or administrative action, or construing something to death, they are going against the people, and since this is a democracy, how dare they do that.

There are of course many good responses to statements like these. In constitutional theory, and in constitutional cases, we hear and see phrases like "evolving standards of decency," or the "living Constitution," or "judicial creativity," or the like. But even the people who take this line seem somehow a bit uneasy about it. I will make no attempt to summarize the literature on the countermajoritarian controversy, partly because I have never bothered reading most of it. I do think, though, that there is a
real paradox or dilemma or contradiction in the common law tradition. The common law puts so much emphasis on the judge, on the personality of the judge, on the brain of the judge, on the philosophy of the judge, on the craftsmanship of the judge, on the skill of the judge in manipulating legal stuff. Yet there is also a very powerful strand of thought and rhetoric that is opposed to the whole idea of making up new rules and discarding old ones. This strand of thought rejects as completely improper exactly those kinds of creativity and suppleness which made judges like Brandeis or Cardozo or Holmes or Lemuel Shaw famous. No strict constructionist is ever going to get into the legal equivalent of the Hall of Fame.

In this talk, I want to explore this paradox or contradiction. I am going to draw on history, but not exclusively.

I want to begin by drawing attention to three terms that we often hear in any discussion of judges and their work—three adjectives, to be precise. Judges are said to be (ideally) impartial, or independent, or autonomous, or some combination of these. The three terms are often confused in the literature. But they are in my view quite distinct. A judge can be independent, for example, without being impartial or autonomous, and in fact I am going to argue that this is the normal case in our legal system.

First, however, I should say something about what these three terms mean. Exact definition isn't possible, and different people might use the terms in different ways; but I sense a core meaning to the three terms, and one which would keep them distinct from each other. Impartial implies neutrality; a impartial judge is not prejudiced, not corrupt, and approaches issues with an open mind. A judge who takes bribes, or a judge who always decides against women, or against blacks, or for that matter always decides for women or blacks, is definitely not an impartial judge.

An independent judge is a judge who is free from political interference. Nobody in the government tells this judge how and what to decide. A judge in a totalitarian system, who could lose his job or his head if he went against the policy of the government, is obviously not independent. In the former German Democratic Republic, or East Germany, people spoke of "telephone justice." That is, a judge hearing a sensitive case would get a phone call from higher authorities, suggesting strongly how the case should come out. Even in a democratic society, if bad decisions (from the standpoint of the administration) get the judge demoted, or fired, or transferred to the local equivalent of Siberia, then the judge is definitely not independent.

Autonomous has quite a different nuance to it. It implies some kind of insulation, not from government or authority, though this is perhaps part of it, but rather from pressures in general—indipendence not from government but from society, from social norms, from the not-legal. A judge can be autonomous only if the legal system is autonomous. An autonomous legal system is one that marches to its own drummer. It behaves and grows according to its own internal program, free (or relatively free) from considerations of politics, economics, and social causes and consequences in general.

In the popular conception of the rule of law, judges are supposed to be all three things—impartial, independent, and autonomous. The popular view of the judge is not a view that gives the judge a creative or law-making role. The judge is supposed to do justice, not make it up. To the ordinary person, it is if there is some giant book out there somewhere, a book called "the law," which has in it all possible answers to all possible legal questions. It is a hard book to read, since it is written in a kind of foreign language, and that is one of the things that judges are for; they have been trained to find and read "the law" in this great big book in the sky. It is also the case that whatever is not in the book, is not part of "the law," and judges must not make use of such things; whatever is on the other side of the fence is strictly verboten. When the Supreme Court decided Brown v. Board of Education, in 1954, (2) there was
a particularly vicious attack on famous Footnote 11. The problem of this footnote was that it social science sources. James Reston, in the New York Times, complained that the case "read more like an expert paper on sociology," than a legal opinion; and that it relied "more on the social scientists than on legal precedents."(3) There were those who sneered at the court as 44nine sociologists." In my opinion, that was one of the greatest compliments you could have paid the court, but it was certainly not so intended. Of course, the critics of Brown were not really upset by a footnote; they were upset by what the justices had done. But they thought the footnote gave them an additional argument. The justices had done the wrong thing. They had violated their trust. They had eaten a poisoned apple.

Social scientists are of course much more realistic than the general public about what judges do and don't do; and are quite skeptical about the timeless, free-floating neutrality or independence or autonomy of judges. But social scientists do not agree among themselves on such issues either: on how judicial decision-making gets done, and what influences it. Whether judges are or can be impartial is a difficult question, which I will return to. Whether they are, can be, or should be autonomous is also a difficult question. But here is my own view: judges cannot and should not be autonomous; that they can aspire to a kind of impartiality, though only within limits; on the other hand, judicial independence, it seems to me, is a going concern in Western countries, among them most certainly the United States.

On what basis can we say that our judges are independent? John Ferejohn has distinguished between two meanings of independence.(5) A judge, he says, is independent "if she is able to take actions without fear of interference." This is, basically, close to the definition I have used here. But he also points out that "a person or an institution [is]... dependent" if she or it "is unable to do its job without relying on some other institution or group." In this sense, the federal judiciary is not at all independent. The government pays the judges' salaries. More to the point, legislature and executive can tinker with jurisdiction of courts, can cut budgets, can hamstring judges through the power of creating procedural rules, and so on. Legislators can also criticize, abuse, and rail at particular judges and particular decisions. They make use of this great privilege from time to time.

Probably the most serious threat to structural independence is the elective system. In almost every state, the judges have to run for office; and the citizens can throw them out of office as well as vote them in. In fact, this is one of the aspects of our system that is most surprising to foreigners: the fact that yahoos on the street can decide who sits on the California Supreme Court or the New York Court of Appeals. In fact, it is hard to see whether it is more peculiar that we vote for high courts or more peculiar that every municipal judge, police court judge, or justice of the peace gets voted in or out.

It is true that it is not easy to get rid of a judge at the polls. In fact, the rules, in many states, deliberately make it tough to defeat a judge who is running for election or reelection. This is the essence of the so-called Missouri plan. In some states-- California is an example-- the judges do not run against anybody; the public simply votes ja or nein. There is an old saying that you can't fight somebody with nobody. This works most of the time, but there are definitely cases on record in which nobody decisively defeated somebody. California's controversial chief justice, Rose Bird, was tossed out of office, running against nobody but herself Enough people voted no to cost her her job; and she dragged down two associate justices with her.

It is undoubtedly true, moreover, that the legislature can undo what a court does, simply by passing a law changing the rule or doctrine (with the important exception of a constitutional ruling). If a court "interprets" a statute, the legislature can either say, that's not what we meant at all; or simply change its collective mind. Even constitutional decisions can be undone, though this is much, much harder; it takes a constitutional amendment. But this too has happened: the income tax amendment is a good example. Upper court judges can slap lower court judges on the wrists, in the course of reversing their decisions.
Bad publicity is another control device that can be used against judges. No judge likes to be criticized. Judges will surely hesitate before making a decision, or a statement, that is apt to end up in the newspapers and make them look bad. And this certainly happens, from time to time: judges who make nasty comments, or who seem to be coddling criminals, get fried in the local press.

All this is true, but even so, I do not think it adds up to a serious case of nonindependence. Legislatures can and do change the rules; but most of the time they do not, and even when they do, it does not seem to be taken as a threat by the judges; or even resented very much. In any event, most judicial decisions have such low visibility that there simply isn't any public opinion on the subject, one way or the other; and the legislature takes no notice. Judges who get in trouble because they talk too much or say the wrong thing are relatively rare.

In other cases, paradoxically, the work of the judges cannot be overturned precisely because the subject is so highly charged. There is a delicate balance, and the court decision powerfully shifts the burden of going forward; it goes back to the legislature, where any proposals for change die either because the subject is too hot to handle or the forces on this or that side are evenly balanced. "Accomplishing change," says Ronald Gilson, "is more difficult than merely having to protect the status quo." He gives as an example the unpopular Embarcadero Freeway in San Francisco. This freeway was downtown, and blocked part of the downtown from access to the water. A lot of people always hated this freeway, and there was a movement to tear it down, but this movement failed to generate enough strength to accomplish its purpose. Then fate stepped in, in the form of 7.1 on the Richter scale. This was in 1989; the so-called Loma Prieta earthquake damaged the freeway so badly that it had to be torn down. Now those who were in favor of the freeway had to generate enough political force, to have it put up again. And now it was their turn to fail. Many judicial decisions do what the 1989 earthquake did to the Embarcadero Freeway: they disturb a delicate balance, and shift an impossible burden from one side of an issue to the other.

This freeway effect is even more powerful, of course, in constitutional decisions. It is enough to cite Roe v. Wade on the abortion issue, or Brown v. Board of Education itself. There is certainly room to argue about the long and even the short term effects of these decisions, but they do illustrate the power of an independent judiciary. They do so, among other things, in contrast to legislatures, which are much less independent than judges under almost any definition of the term. In the 1950's there was absolutely no hope of persuading Congress to get rid of school desegregation--Congress could not even pass a law outlawing lynching; only at the end of a process which Brown v. Board certainly stimulated, was there enough push in Congress to get a civil rights bill through.

What about judicial elections? Surely they impair the independence of judges. True; but it is easy to exaggerate their influence. First of all, federal judges are appointed for life (and so of a handful of states-Massachusetts, notably). Elsewhere, despite the few, lurid examples, judges tend to get re-elected with monotonous regularity. In short, independence seems to be a working reality. It is possible that the situation can change--elections seem to be getting a bit more partisan, and the elective system may turn out to be more of a threat than it is now. But this is conjecture; and about the future to boot.

Independence is in part a structural matter, as I have just discussed. But perhaps the cultural protections are even more important. Judging is an honorable profession. The judges wear robes, everybody rises when they enter the courtroom, they have an aura about them. The fact that so many lawyers are willing to take a pay cut for the title "judge" tells us the same story. Judging has an honorable tradition, on the whole, in the United States; the aura is not entirely undeserved. In many countries, the judiciary is quite corrupt, and people know it; but the record in the United States is much better than this. In particular, the federal judiciary has an excellent record for honesty. Very few federal judges have ever been
impeached-- less than ten, I think. The worst scandal involved Judge Martin Manton, a judge on the second circuit, in the 1930's. Manton took bribes, was exposed, tried, convicted, and went to prison.(8)

Over time, the aura of the high courts has gotten thicker and more mystical. The Supreme Court in particular seems to be protected by a kind of magic barrier of myth and mystery. Franklin D. Roosevelt, as we all know, came to grief with his court-packing plan.(9) Even many New Dealers who hated the work of the court jumped ship on this issue. FDR was desecrating something holy. The Supreme Court shies away from publicity; it is an almost impenetrable body; it hires no public relations men, gives no press conferences, and stands almost entirely apart from the hoopla of modern government. But all this probably does the court more good than public relations would; it helps maintain the air of sanctity and independence. The state high courts inspire a lot less awe, but they also have an excellent record, by and large. Scandal and corruption are mostly matters of the big city lower courts. Even here, it is a long time since the days of the Tweed ring. Big city machines are not what they used to be; and big city judges are a lot better than they were.

There is a long history in the U.S., and considerable controversy, over judges and judging--over their impartiality, in particular, in the early years of the Republic. Some of the federalist judges were wildly partisan, and it was very, very obvious. They pontificated politically on the bench. Jefferson, when he came to power, was determined to do something about the problem. During his administration, there was a famous attempt--which failed--to impeach Samuel Chase, a justice of the Supreme Court.(10) But in a way, the rise of the elective principle in the states is part of the same story. Electing judges was an admission that judges were important people, who made policy and exercised power; electing them was therefore a way of controlling them, of making sure they did what the people wanted. In other words, the whole point of the elective principle was to curb the independence of the judges. But the elective principle in this sense was a failure. It never quite did the job. And, in time, it fell into some disrepute. For various reasons, elites turned against the elective principle. The strength of the elective principle was that it made judges accountable. This was of course also its weakness. What seemed like a great idea in the early part of the 19th century seemed quite different in the late 19th century, when men like Tweed ran the big cities, and there were millions of immigrants willing to trade their political loyalty for a Thanksgiving turkey and a bit of respect. Some judges were indeed corrupt; and the respectable, old-American jurists thought the whole system of local politics, including the election of judges, was thoroughly despicable. The Missouri plan, and other such schemes, were in essence schemes to preserve the form of the elective principle, while gutting the substance.

On the whole, I think, it is fair to conclude that judges of the United States are about as independent as anyone has a right to expect. Nobody is perfect; and no institution. We can grant Ferejohn's point; but it does not seriously interfere with what we understand to be judicial independence. I will move on, then, to the other two prongs of my triangle. Are the judges autonomous? Here my answer will be a fairly resounding no. And are they impartial? Here my answer is a somewhat qualified no.

Judicial Autonomy.

I will begin with the issue of autonomy. Put in crude terms, the question is this: how do judges decide cases? Do they simply follow the law? If so then their own attitudes and views are irrelevant. Most of the time, perhaps almost all of the time, two judges who are as different as night and day in their outlook and philosophy will still come to the same legal conclusion. If you think, however, that social norms, forces, currents, and structures, are the real decision-makers, refracted prismatically through the judges, then it may still be the case that judge Black and Judge White will come out the same, but not because of the autonomy of the legal system, only rather because the judges are contemporaries, breathe the same air, live in the same country, and share the same social milieu. And there will be other cases where
the judges will differ even in their "legal" results, because of their differences in attitudes and values.

In any event, perhaps the truth of the matter does not lie at either extreme, but somewhere in the middle. Some writers talk about the partial autonomy of law. The question is where the center of gravity lies. Is it in the law, or in society? I tend to think it is in society. I have to concede the partial autonomy of law; but I think it is awfully partial, and that non-autonomy on the whole has the better case.

To be sure, judges themselves often describe themselves in formalist terms. They think of themselves as autonomous. What is the duty of a judge? Simply to decide according to the law. Making policy? No: that job is for the legislature. Stirling Price Gilbert, a justice of the Supreme Court of Georgia, put it this way, in his autobiography: "No informed judge will dispute the rule that courts are never concerned with what ought to be the law. Their concern is to correctly rule what the law is." Gilbert also quoted from a 1944 resolution of the Texas Bar Association, denouncing the Supreme Court (even before the Brown case), and which referred to the belief that the court should remain "free of political, personal, and unworthy motives," and should interpret and declare the law "as it is written, according to tradition and precedent."(11)

What are we to make of statements like this (and there are countless examples)? Henry R. Glick interviewed high court judges in four states, New Jersey, Massachusetts, Louisiana, and Pennsylvania, in a study published in 1971. He asked the judges whether "nonlegal" factors were important to them in deciding cases. The judges in New Jersey said yes, the judges in Louisiana said no. Probably most judges would react the way the Louisiana judges did.

On the other hand, most of us in the academy are in fact totally convinced that judges do make policy; they make policy all the time, and they always have. It seems completely obvious. It would an insult to the intelligence of this audience to give examples; there are way too many of them. Legal realists and social scientists sneer at the myths of the judges-- at the way the judges describe themselves. Are the judges simply hiding behind the law? Are they disingenuous? Possibly. They are, perhaps, mouthing sentiments that they feel they are supposed to mouth. If you recite pious platitudes long enough, you may even come to believe them. These are, after all, the safest sentiments to have. Prospective justices of the Supreme Court, grilled by the Senators, have to assert the most naive positions imaginable-- that is, if they want the Senate to vote yes.

Or perhaps the judges are simply mistaken. This is certainly another possibility. I suppose it must seem like enormous nerve for a law professor, who has never been a judge, and never will be, to read judges' minds, and say that these men and women are just wrong in the way they describe their own jobs and their own behavior. Yet all of us are often wrong about ourselves. And, specifically, we tend to assume much more autonomy, in our ordinary lives, than we actually have. We constantly make decision that we think are totally our own, but are really not. It is like buying clothes off the rack. We are sure--and we aren't wrong, of course-- that this shirt or dress is entirely our choice; nobody forced us to buy it; it's our taste, our decision entirely. But the range of shirts or dresses on the rack is not something we control. And our own notion of what looks nice or is fashionable is also affected by forces we do not understand, and are hardly even aware of. Thousands of families are naming their children Justin or Dustin or Tracy or Casey, positive that this is entirely their own decision. It is but it isn't. There are so many aspects of the way we live that we take for granted or don't think about. Only a brilliant anthropologist, looking in on society from outside, can perhaps grasp the indeterminacy of the determinate, and the determinacy of the indeterminate, in any particular society.

Decision-making, I think, is a two-stage process for judges, whether they know it or not. First comes the decision whether to be "formalist" or not. In other words, I don't doubt that the most judges most of the
time do think they will decide most cases according to the law, or the precedents, or whatever; and they think they are acting accordingly. That is, they decide to look for the better "legal" argument. Yet this decision itself is socially determined. That is, it depends on such factors as whether or not the judge considers the case important enough, or socially-charged enough, to be worthy of non-formalist treatment. It is not self-evident that a case on, say, the constitutionality of abortion laws is something that calls for extra or different treatment from a "routine" tax case. This is a social judgment, into which many cultural, historical, and political factors go.

I don't mean to suggest that a judge literally says or thinks, hmm, this is really significant, I had better cast a wider net; but judges are not blind, deaf, and dumb; they read the newspapers, they know what is and what is not controversial, and they know or think they know that such and such a case might upset stupendous apple-carts; while this other case, a simple tort case or construing a contract, affects only the two parties; and perhaps not even them very much. These judgments surely affect the process of deciding: or deciding how to decide.

In any event, so long as there are some decisions that the judge considers worthy of non-formalist treatment, consciously or unconsciously, then all decisions in a sense have this quality. That is, the decision to be formalist or not is not dictated by the law, but by other things. That a judge can choose to be formalist, or not, means, paradoxically, that in a real sense no decision is formalist or mechanical, even when the judge thinks it is.

The most powerful decision maker then is the framework of norms and values and ideas floating about in society. Of course, this is not easy to prove. "Social norms" are not clear-cut, simple, and universal things. There are perhaps some tendencies that everybody in a society more or less shares, but in any given culture, at any given time, there is a range of norms, attitudes, ideas. We have conservative judges and liberal judges and all sorts of gradations in between. We have judges who are conservative on this issue and liberal on that issue and vice versa. The judges can be arranged along various dimensions, so as to form a nice, ordinary bell-shaped curve. This would be true in any generation; but the bell curve itself travels and shifts and moves through space and time. Thus, the most conservative Supreme Court justice today is far more liberal on issues of race than the most liberal justice of the 19th century. This can be demonstrated just by comparing the majority and minority opinions in, say, Plessy v. Ferguson, with any recent Supreme Court decision rejecting affirmative action. Even the one dissenter, John Marshall Harlan, in the Plessy case, uses language when he talks about race, that would get him into really deep trouble today; would get him denounced as a racist. Today, on the other hand, the most conservative justices on the race question pay homage to Harlan; they like to use (misuse, I think) Harlan's phrase about a color-blind constitution, in fact they trot out this phrase as an excuse for getting rid of preferences for minorities. But they are conservative only about these preferences, about arrangements which (they think) gives minorities more rights than white people; none of them, not a one, would be willing to accept the situation which was almost universal a century ago, in which minorities had less rights than white people. Eight out of nine justices in 1896 though segregation was a really good thing for the race problem. Nine out of nine justices today would reject any form of segregation. And I have the feeling this would even be true for the Supreme Court of Mississippi.

Similarly, with regard to issue after issue: take censorship and pornography. The most conservative justice or judge today would allow things to be printed, spoken, or shown, that could never get by even the most liberal judge of a century ago. We know it when we see it, but what we know and see today is not what we knew or saw in, say, 1850; or even 1930. Legal arguments that were persuasive in the past seem ridiculous today; and arguments made today are taken seriously that would have been laughed off the boards in the past, or rejected in shock. Nobody today would seriously argue to the Supreme Court or a high state court that the 14th Amendment makes it impossible to pass a minimum wage law.
Nobody a century ago would have dreamt of making a gay rights argument, or would even mention such a thing as a constitutionally-protected right of privacy.

We know, too, that "conservatives" and "liberals," to take these two crude labels, refer exclusively to contemporary conservatives and liberals. Rehnquist, when he was a clerk, apparently wrote a memo that suggested Brown v. Board was a bad idea; I know that he later denied ever thinking such a thing. In any event, he has recanted. The world marches on. People change. The conservatives fell all over themselves praising Clarence Thomas, a black man married to a white woman. Two or three decades earlier, Clarence Thomas could have gone to prison for the crime of miscegenation. And for generations, the bugaboo of interracial sex was the white south's strongest argument against anything that smacked of racial equality.

All of this suggests, quite strongly, a point that should be obvious to everybody except some lawyers and judges; judges are not and cannot be truly autonomous; their apparent autonomy is either a legend or an illusion. If it is a legend, it is, of course, a legend that many judges firmly believe in. Or it may be, for judges, an ideal, something difficult to get to, but worth striving for. But Dorothy is never going to reach this Emerald City.

I do not want to overdo the point. There may be degrees and degrees of nonautonomy. Some judges may be more autonomous than others. In some periods, there may be more autonomy than in other periods. Certainly, some fields of law, in any given society, are more apt to evoke either formalism or its opposite. Moreover, there are real differences, no doubt, between high courts and lower courts. The lower courts may have less leeway than the courts that sit in judgment on top of them. It is an interesting question whether they do; the answer is far from obvious. Lower courts do not publish their decisions. Most cases never get appealed. In practice, then, the judges of trial courts have a good deal more freedom or autonomy (from the upper courts) than they enjoy in theory. Consequently, it is possible that trial courts can get away with matters that a high court would find much more difficult-- just as the jury, which deliberates in secret and gives no reasons, has a degree of normative suppleness that courts might lack.

Does the "family" to which a legal system belongs make a difference? Are civil law courts more bound by laws and legal traditions than common law courts? Certainly this is a common understanding; the mythology in these countries is that judges do not, cannot, and should not make law. They are just mouthpieces of the law. But this may be just as much an illusion as the homologous belief in the common law system. The theory in civil law countries puts judges in a more subordinate role than in common law countries. The reality of judging is another story. It is difficult to measure the performance of civil law judges in any rigorous way. One thing seems clear: the times are changing, and with it, the theory. Judicial review has been sweeping the civil law world. A court, like the German constitutional court, which has the power to invalidate acts of the German parliament, can hardly behave with the same kind of bashfulness that was traditional in civil law countries. The activist lower court judge has also made a startling appearance, in recent years, in Italy and Spain, to take two prominent examples. In both countries, judges have been raising a lot of hell. It is enough to refer to the mani pulite scandal in Italy; and the Pinochet affair coming out of Spain.

Impartiality

I turn now to our third term, impartiality. Here again we have to be somewhat nuanced. One can use "impartial" in a number of senses. One crude but very important sense basically means nothing more than honest. A judge like Judge Manton, who took bribes, is definitely not impartial. In this sense, American judges do very well on the scale of impartiality. Most of them try honestly to deal fairly with the litigants; and they will recuse themselves if they see some sort of conflict of interest.
But judges most certainly have prejudices, presuppositions, attitudes, points of view, and so on; and the question is, to what extent do these affect the outcome of cases? There was at one time a fairly sizeable literature on this subject; but the subject is not an easy one to investigate, and in the end the results of the studies were somewhat disappointing. Everybody assumed that judges were not really impartial; that their age, race, sex, and background would have a prismatic effect on their decision-making. It turned out to be hard to show this. This is perhaps because the variables are too crude and the human beings too complicated and unpredictable. But we know that attitudes matter, at least in some cases, or else we would be totally unable to differentiate between a William Rehnquist and a William Brennan. After all, we can predict, pretty well, how Scalia and company will vote on certain issues. The judges sometimes like to fool us, but still, we are right much more often than we are wrong. It is for this reason that appointments to the Supreme Court are hot political issues; and sometimes appointments to other courts as well. It makes a difference who gets to sit on the court. Candidate Gore has in fact made it an issue in the current political campaign. Whether attitudes and political values make a big difference at the trial court level is another question. Undoubtedly, it depends on the type of case. Before the civil rights issue, southern (white) trial judges were notoriously biased in race-sensitive cases. Hopefully, this is no longer the case. Do women judges act differently from men judges? In rape cases if not in contract cases? Perhaps so, perhaps not. But whether there are systematic differences that we can tie to race or gender or ethnic status or political part is not the same as to say that there are individual differences that can be tied to attitude, viewpoint, frame of mind, psychological make-up. But I will leave this point for now.

The Time Dimension

This last point suggests yet another factor: the issue of historical development. There are a number of conventional accounts. There is the Karl Llewellyn story: Llewellyn saw what he considered a movement from the Grand Style to the Formal Style and back again (he hoped) to the Grand Style. The Grand Style judges were sensitive to policy, boldly innovative; they brushed aside technicality, cited few "authorities," and worried about the social consequences of their decisions. The Grand Style flourished in the first half of the 19th century. Such judges and justices as John Marshall, Lemuel Shaw, and James Kent were examples of Grand Style. The Formal Style judges were wooden, literal, and conceptual; they hid their personalities behind strings of citations. They were deliberately formalist. These judges, according to Llewellyn, were at their peak in the last half of the 19th century.

Another account, which centers a good deal on the Warren court, comes in a right wing and a left wing version. The left wing version is that we had activist conservative courts at the turn of the century. This Court decided cases like Lochner v. New York. The justices hated organized labor and consistently thwarted the will of the people. Then we had activist liberal courts, from the late New Deal on. These courts tried to make our national ideals a reality. The will of the people somehow dropped out of the picture. Or maybe the will of the "people" now centered on different people. The people of the Lochner era were workers and poor people. Then we started hearing about the tyranny of the majority. Now we have conservative activist courts again.

The right wing version of the same story is that the old courts were sound, sensible courts, doing their best to protect property rights and the economy, and traditional values; and then came along the fire-eating liberals and upset the apple-cart. They did some good things (nobody dares criticize the result in Brown v. Board of Education) but a lot of bad things, especially in the criminal justice field; and with regard to affirmative action. Now we are trying to restore some sort of balance. The right also claims that it wants judges who are "strict constructionists;" but what they really mean is judges who will overturn Warren court decisions and come out on the conservative side of most issues.
Still another story, more subtle and complex, but clearly related, is the story told by Max Weber, though of course he was not writing about the United States. Here the progression is from irrationality to formal rationality, which is (roughly speaking) legal autonomy. Weber also detected a certain amount of decay—a progression from formal rationality—strict and systematic legal logic—to substantive rationality, in which judges took into account political, social, economic, ethical, and cultural factor. Weber died quite a while ago. I am sure he would find the process accelerating today.

The politics of all this is clear enough. But most of the schemes rest on very flimsy empirical bases. There is really no way of knowing whether or not the "formalist" judges were really formalists, or just wrote in a formalist style. There is no way to distinguish style from actual mental processes. We have no way of reading the minds of the judges. Let me go back to Judge Manton, the famous corrupt judge. We could perform an interesting experiment. We could take a flock of Manton opinions, including some that we know were bought and paid for, and some that were not. Take his name off the opinions. Give them to skilled lawyers and law professors. Ask them to pick out the fakes—the decisions that were corrupt. I guarantee you that they could not do it. This would not be a surprise to the lawyers at all. As they would gladly tell you, any lawyer worth his salt can argue both sides of any contested issue. Any judge worth his salt—or maybe it would be more accurate to say, any judge handed professional briefs by the two parties—can write an opinion coming out either way; in fact, the judge can write an opinion coming out any possible way—in any case that is difficult enough to get to the level of an appellate court. If this is the case, then it is clearly impossible to tell if formalist judges were really formalists, or whether this was just a convention, a way of writing, in a period in which there was a lot of controversy about judges, and the justices found it safer to hide behind the mask of formalism. This is true of Weber's famous scheme as well. How can we be sure that the German jurists of the 19th century were really working within a tradition of formal rationality, or whether they were merely talking a good game?

Indeed, I think the truly interesting questions are not about whether judges are impartial and autonomous—they are not; but what they decide, and why. If we see-and we do—a kind of liability explosion in the field of torts, something that courts and legislatures both took part in, and which proceeded more or less along the same lines in Kansas or Vermont as in California and New York, in the 20th century, what lies behind it? Is it insurance, or the New Deal, or sunspots, or the invention of air conditioning? What lies behind no-fault divorce and rights for people in wheelchairs, and the discovery rules in the code of civil procedure and the erosion of the at-will doctrine in cases where people are fired from their jobs? These are all questions of legal culture and of social forces and none of the answers are at all obvious.

As far as the independence of the judges are concerned, here the question is not whether our judges are independent—on the whole they are; but what difference this makes. We insulate them from partisan politics, at least to a degree; we do not and cannot insulate them from the vast glacial and volcanic movements of society. What is the result? The short answer is that judges behave differently from legislatures. How different, and in what regard? These are difficult but in principle answerable questions—answerable empirically, of course. I hope that scholars soon will provide us with at least some tentative answers. Legal scholars are not very good at questions like this—they are too intoxicated by a high normative vocabulary, and their prestige is too tied up with the floating of vast normative balloons. But social science may yet come to the rescue. At any rate, I hope this series of talks at least helps a bit in the dialogue.

1. The word, if not the issue, perhaps stems from Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962), p. 16.


4. It also has be said- and should be obvious- that in fact the famous footnote had little or nothing to do with the actual decision. It was make-weight. If someone had told Earl Warren, while he was writing his opinion, that the works cited in the footnote were no good, he would have simply left them out. It is impossible to imagine that anything else would have changed.


6. Ronald Gilson, "Globalizing Corporate Governance: Convergence of Form or Function," forthcoming, American J. of Comparative Law, at

7. Gerald Rosenberg, The Hollow Hope

8. On the Manton scandal, see Gerald Gunther, Learned Hand (1994), pp. 503 -513

9. There is, of course, a huge literature on this famous episode. See, in general, William Leuchtenberg, The Supreme Court Reborn(1995).


14. On this point, see Lawrence M. Friedman, "Taking Law and Society Seriously,

15. 198 N.Y. 45 (1905).