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These materials consist of one complete article (but very short), followed by excerpts from three other articles, from which, moreover, tables, figures, and footnotes have been omitted.--RAP

SOME REALISM ABOUT JUDGES: A REPLY TO EDWARDS AND LIVERMORE

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For some years, I have been arguing for a realistic approach to understanding judicial behavior.² That approach is challenged in a recent article by Judge Harry Edwards of the U.S. Court of Appeals for the D.C. Circuit and Michael Livermore, the executive director of the Institute for Policy Integrity at N.Y.U. law school.³

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² See, for example, my article "What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)," 3 *Supreme Court Economic Review* 1 (1994). The fullest explanation of my approach is in my recent book *How Judges Think* (2008).

³ Harry T. Edwards and Michael A. Livermore, "Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking," 58 *Duke Law Journal* 1895 (2009).

What I am calling the “realistic approach” is, most simply, the view that judges play a legislative role in many cases, and those usually the most important ones—the ones that shape the law or have an immediate effect on society. And they play that role not only in common law cases, and other areas of explicitly recognized judge-made law, but also in the interpretation of statutes and—of course—of the U.S. Constitution. The opposing approach, which I call the “legalistic” approach, pictures judges as oracles, engaged in applying law stated in orthodox legal sources, such as statutory or constitutional text or judicial decisions having the status of precedents, to the facts of new cases. Judges in this picture are transmitters of law, not creators, just as the oracle at Delphi was the passive transmitter of Apollo’s prophecies. The analogy of judge to oracle was Blackstone’s, who went so far as to argue that even common law judges were oracles, engaged in translating immemorial custom into legal doctrines rather than in legislating doctrines.⁴

The realistic view goes back to Plato’s dialogue *Gorgias*—before there even was a legal profession or professional judges; we find it in Bentham, famously in Holmes (and less bluntly in Cardozo), in legal realism, later in political science, and then in economics and in critical legal studies. Though Holmes is venerated by lawyers and judges, the legalistic view continues to dominate professional discourse about judging. The reason is that lawyers and judges—particularly judges—like to think that judicial decisionmaking is an “objective” activity, that decisions are produced by analysis. No one thinks the process oracular, but the idea of the judge as an analyst shares with the idea of the judge as an oracle the assumption that legal questions always have right answers: answers that can be produced by transmission from an authoritative source, though in the modern view the transmission

⁴ William Blackstone, *Commentaries on the Laws of England*, vol. 1, p. 69 (1765).

is not direct but is mediated by analysis. And the judge remains an oracle in the sense that his personality doesn't count. The personality of the oracle at Delphi was no more important than the personality of a coaxial cable. To the legalist, a judge is a calculating machine. To the realist, he or she is a typical human being, whose judicial votes, because they are not generated by a process that resembles the operation of the scientific method or the rules of logic, are influenced by life experiences, professional experiences, political ideology, temperament, personal-identity characteristics such as race and sex, energy, ambition, sentiment, taste for leisure or for hard work, cognitive quirks, training and intelligence, and the other influences on human behavior.

The realistic approach to judicial behavior is strongly challenged in the article by Judge Edwards and Mr. Livermore, to which I now turn. I will not try to go through the article page by page, registering my disagreement with the points made by the authors; with many of their points I have no disagreement. I will confine this reply to the seven points with which I disagree.

1. They say that the realists exaggerate the degree to which judges are unable to achieve agreement through deliberation that, overriding ideological and other differences, generates an objectively correct decision. Their evidence for the charge of exaggeration is that even in the Supreme Court many decisions are unanimous though the Justices are ideologically diverse; and "many" becomes "most" in the federal courts of appeals (I do not know the situation in the state court system).

But no realist has ever denied that *most* judicial decisions are legalistic. Legalism is a *category* of realistic judicial decisionmaking. Legalistic doctrines such as plain meaning and stare decisis enable judges to economize on their time and effort; to minimize controversy with other branches of government by appearing to play a modest, technical, "professional" (in the sense in which members of professions seek deference from the laity on the basis of their real or pretended specialized knowledge) role; and to pro-

vide a product—reasonably predictable law—that is socially valued and therefore justifies the judges’ privileges.

The mistake in equating unanimity (absence of published dissent) to agreement is that judges don’t always dissent publicly from a decision with which they disagree. I have discussed what I call “dissent aversion”⁵ elsewhere and will not repeat the discussion here. A more important point (since dissent aversion is much less pronounced in the Supreme Court than in the courts of appeals) is that the cases that can be decided by the methods of legalism are rarely cases that shape the law. Today’s law, insofar as it is the product of judicial decisions, is the product of decisions that were stabs in the dark rather than applications of settled law. Some of those cases were unanimous, such as *Brown v. Board of Education*, but that decision was not and could not have been arrived at by legalistic analysis. It was the product of political agreement—a shared repugnance to racial segregation viewed as antithetical to evolving American values.

Even Judge Edwards says that 5 to 15 percent of cases decided by his court are indeterminate from a legalist standpoint.⁶ If one cumulates those figures over many years and many courts, it is apparent that an immense number of decisions are legalistically indeterminate; and among them, as I have said, are the decisions that have made the law what it is today.

2. Edwards and Livermore point out that the standard realist variable in empirical studies of judicial behavior—the party of the President who appointed the judge who cast the vote in question—explains only a fraction of judges’ votes. But that is because the variable is a crude proxy for ideological leanings (in part because the political parties are not ideologically uniform), and no

⁵ *How Judges Think*, note 2 above, at 32–34. See also Lee Epstein, William M. Landes, and Richard A. Posner, “Why (and When) Judges Dissent: A Theoretical and Empirical Analysis (September 2009, unpublished).

⁶ Edwards and Livermore, note 3 above, at 1898.

proxy at all for the other nonlegalistic factors that I mentioned, such as background and temperament, that influence judicial votes.

3. Judge Edwards in his part of the joint paper gives heavy weight to what judges—in fact, to what Judge Edwards—reports about how they decide to vote in a case as they do. The assumption is that judicial self-reporting—judicial introspection—is a valid source of knowledge. I am skeptical, especially when it conforms closely to the “party line” on judicial decisionmaking. For largely political reasons—mainly to avoid seeming to throw their weight around too much—most judges most of the time downpedal the creative or legislative role in judging. Sometimes the parade of modesty becomes ludicrous, as when John Roberts at his confirmation hearing said that the role of a Supreme Court Justice, which he would faithfully inhabit, was similar to that of a baseball umpire who calls balls and strikes but does not make or alter the rules of baseball.⁷ That was so ridiculous, and Roberts is so sophisticated, that it can’t be what he actually thought. But judicial confirmation hearings have become a farce in which a display of candor is suicide. To be candid in such a hearing would be what philosophers call a “category mistake”; it would be like a Shakespearean actor’s interrupting his recital of Hamlet’s “To be, or not to be” soliloquy by saying that he didn’t actually think that death was “a consummation devoutly to be wished”; he was just saying it because it was in the script he’d been given.

But much of the judicial self-reporting is I think sincere, though not, by virtue of that, reliable; we’ve all heard of “cognitive dissonance” and how people will fool themselves in order to erase it. There is a well-defined “official” judicial role and most judges would be uncomfortable if they realized that in reality they

⁷ Hearing on the Nomination of John Roberts to Be Chief Justice of the Supreme Court, before the Senate Judiciary Committee, 109th Cong., 1st Sess. 56 (Sept 12, 2005).

were actually playing a different role. So they suppress the realization.

I do not deny that judicial introspection can play a valid role in studies of judicial behavior, but only as a source of hypotheses to be tested. Many of my own views about judicial behavior were arrived at my introspection, but I don't expect anyone to be convinced by them unless I present evidence; my say-so is not evidence and neither is Judge Edwards's.

4. A related point made in defense of the legalist approach as a description of actual judicial behavior is that most judicial opinions are legalistic in style. They cite prior decisions as if those decisions really were binding; reason by analogy; give great weight to statutory and even constitutional language; delve into history for clues to original meaning; and so forth. But that is what one would expect if, as I acknowledge, most judges think of themselves as legalists, or think the pose politically useful. But the rhetoric of judicial opinions is weak evidence of what actually moves judges to vote one way or another in a case, and this apart from the fact that most judicial opinions nowadays are written largely by law clerks, who lack both the confidence and the experience that they would need to adopt a realist style of opinion writing, the kind one finds in opinions by judges like Holmes, Cardozo, Hand, Jackson, and Traynor. And, as I have suggested already, judges have political reasons to represent creativity as continuity, and innovation as constraint; and as there is no recognized duty of candor in judicial opinion writing, they cannot be accused of hypocrisy in writing that way even if they are aware that it doesn't track their actual decisional process.

5. The strongest rhetorical move by legalists is to call the legalist approach "law" and the realist approach "politics." It is effective rhetoric because it makes a "realist" judge seem like someone who flouts the judicial oath—which requires a judge to uphold the law—and thus a usurper, and realist discourse a blueprint for usurpation.

But this rhetoric reflects (or perpetuates) a misunderstanding of the nature of American law. That law is suffused with politics (in the ideological rather than the partisan sense—few federal judges have, or at least exhibit in their decisions, a strong sense of party loyalty). Constitutional law, which is law made by the Supreme Court by loose interpretation of the antiquated constitutional text, is political in the sense of being the product not of orthodox legal materials (authoritative text plus precedents) but of the values, political in a broad (but sometimes in a rather narrow) sense, of the Justices. That doesn't make their decisions "lawless." The primary duty of a judge is to decide cases, and the duty is not waived merely because the judge confronts a case, as he often will, that cannot be decided simply by reference to orthodox judicial materials—that can be decided only by making a value or policy choice, a choice that inevitably will be influenced by political ideology, career and personal background, and a variety of psychological factors. The critics of the realist approach either do not acknowledge these obvious facts about the American judicial system, or are unable to come up with a competing theory of judicial motivations.

Edwards and Livermore, however, do not make this mistake. Judge Edwards acknowledges that the American conception of law "encompasses, at least in some circumstances, forms of moral or political reasoning."⁸ But why does he call it "reasoning"? What exactly *is* moral and political reasoning? Edwards doesn't explain. Had he said moral and political *beliefs*, we would be in agreement. Such beliefs are less likely to be the product of a reasoning process than of temperament, upbringing, religious affilia-

⁸ Id. at 1900. See also id. at 1898–1901, 1946 ("some play for inherently contestable political judgments is simply built into law and strikes us as a normal constituent of good judging").

tion, personal and professional experiences, and characteristics of personal identity such as race and sex.⁹

6. Recognizing though he does that there is a considerable area of indeterminacy in law viewed from a legalistic perspective, Judge Edwards falls back on the idea of deliberation as a way of overcoming indeterminacy. I think he exaggerates the significance of judicial deliberation. I note that until quite recently English judges did not engage in deliberation—they were forbidden to do so by the rule of “orality”: everything a judge did was to be done in public so that the public could monitor judicial behavior. Yet the product of these nondeliberating judges was highly regarded; nor am I aware that the decline of orality in the English legal system—a product of increased workload—has improved the system. (In fairness, though, the extreme length, by U.S. standards, of English appellate proceedings may have provided a substitute for deliberation—each judge on the appellate panel had much more time than his American counterpart to think about the case.)

The problem with judicial deliberation is the heterogeneity of American courts. Judges do not select their colleagues and successors; nor are the judges of a court selected by the same person—even when all the judges on an appellate panel were appointed by the same President (which is infrequent), the appointments will have been influenced by considerations (such as the recommendations of a Senator, the quest for diversity, even political services and campaign contributions) that are unrelated to the likelihood that the appointees will form a coherent deliberating entity.

Further evidence for my reservations concerning the productivity of judicial deliberation is the curiously stilted character of judicial deliberation. The judges speak their piece, usually culminating in a statement of the vote they are casting, either in order of seniority or reverse order of seniority, depending on the court,

⁹ See my book *The Problematics of Moral and Legal Theory* (1999), for a skeptical account of moral reasoning.

and it is a serious breach of etiquette to interrupt a judge when he has the floor. This structured discussion reflects the potential awkwardness of a free-wheeling discussion among persons who are not entirely comfortable arguing with each other, because they were not picked to form an effective committee, and, as an aspect of the diversity that results from the considerations that shape judicial appointments, may have sensitivities that inhibit discussion of relevant issues involving race, sex, religion, criminal rights, immigrants' rights, and other areas of strong emotion. Judicial deliberation can be highly productive when the issues discussed are technical in character, rather than entangled with moral or political questions the frank discussion of which is likely to produce animosity.

7. The legalists, while strongly committed to the view that most judges *are* legalists, don't offer a theory of why it is plausible to expect judges in our system to be legalists. Anyone who has studied professional behavior, including the behavior of academics, knows that self-interest, along with personality and, yes, in many fields (including law!) politics, plays a role in their behavior. Why wouldn't we expect that to be true with respect to judges? Are they saints by birth or continuous prayer? Are they made saints by being appointed to the bench? The realistic view of judges is that they care about the same things that other people care about, including salary, benefits, how hard they work, and how well they are treated by their colleagues. They thus have "leisure preference" and "effort aversion," but also a desire to be respected and influential. They thus respond to incentives and constraints, like other people; from the assumption that they are like other people, the hypotheses of the realistic approach derive. The effects of lifetime tenure must surely be factored in when modeling judicial behavior. The critics have not explained how it is that federal judges are made over into—baseball umpires.

Excerpt from Lee Epstein, William M. Landes, and Richard A. Posner, "Why (and When) Judges Dissent: A Theoretical and Empirical Analysis":

Following earlier work analyzing judicial behavior from an economic (rational-choice) standpoint, we set forth and test a model of self-interested judicial behavior. We assume, plausibly in the case of federal judges, who enjoy life tenure (and our empirical analysis is limited to such judges), that judges have leisure preference or, equivalently, effort aversion, which they trade off against their desire to have a good reputation and their desire to express their legal and policy beliefs and preferences (and by doing so perhaps influence law and policy) by their vote, and by the judicial opinion explaining their vote, in the cases they hear. We use this simple model to explore the phenomenon of judicial dissents, and in particular what we call "dissent aversion," which sometimes causes a judge not to dissent even when he disagrees with the majority opinion. We use dissent aversion to explain the well-documented panel-composition effect on judicial decisions. An implication of our model is that such effects, which are typically attributed to the power of judges with extreme conservative or liberal views to push more moderate judges to vote with them, can be explained in terms of self-interested behavior that is independent of the influence of other judges.

We use data on the number and frequency of dissenting opinions in the federal courts of appeals from 1990 to 2007 to test the hypothesis that the likelihood of dissenting in a circuit is negatively related to the cost of dissenting and positively related to ideological differences among judges. We also look at the Fifth Circuit in the period 1971 to 1997 to explore the impact on dissenting of the splitting of that circuit into two circuits, the Fifth and the Eleventh, in 1981. We find that the split reduced the dissent rate, and, more generally, that dissent rates are lower the smaller the circuit. These findings are consistent with our economic

model, which predicts that what we call the “collegiality” cost of dissenting is higher the fewer the judges in a court.

In a random sample of 404 published court of appeals opinions in 1990, we found 45 in which there was a dissenting opinion. We selected that year so that we could obtain a nearly complete history of citations (a rough measure of the influence and importance of an opinion) to each majority and dissenting opinion. In a sample consisting of all 446 Supreme Court opinions in the 1963, 1980, and 1990 terms (chosen so that we would have opinions in three different chief justiceships, those of Warren, Burger, and Rehnquist), there were 283 dissenting opinions. We find that majority opinions are longer when there is a dissent and that dissents are rarely cited in either the courts of appeals or the Supreme Court. These findings support the hypothesis that dissents impose costs on nondissenting judges (and, therefore, “collegiality” costs on the dissenter) while yielding minimal benefits (as proxied by number of citations) to a dissenter in prestige or recognition.

I. AN ECONOMIC MODEL OF DISSENT AVERSION

A. The Cost of Dissenting

Judges are assigned majority opinions to write and must do so in order to remain in good standing, but there is no requirement of dissenting. Since writing a dissenting opinion requires effort, which is a cost, a judge will not dissent unless he anticipates a benefit from dissenting that offsets his cost. An obvious benefit is to undermine the influence of the majority opinion, although possible offsets are that a dissent draws attention to the majority opinion and may magnify the significance of that opinion by exaggerating its potential scope in order to emphasize the harm that it will do.

Dissenting imposes an effort cost on the majority as well and sometimes a reputation cost too, if the dissenting opinion criticizes the majority forcefully. To minimize the dissenter’s criti-

cisms and try not to lose the vote of the other judge on the majority (in a panel of three judges, the normal number of judges who decide cases in the federal courts of appeals), the author of the majority opinion often will revise his opinion to meet, whether explicitly or implicitly, the points made by the dissent. The effort involved in these revisions, and the resentment at criticism by the dissenting, may impose a collegiality cost on the dissenting judge and make it more difficult for him to persuade judges to join his majority opinion in a future case. This implies that dissents will be less frequent in circuits that have fewer judges because any two of its judges will sit together more frequently and thus have a greater incentive to invest in collegiality.

The effort cost of writing a dissent will tend to be greater the heavier the court's caseload; likewise the ill will generated by a dissent. We therefore expect that other things being equal dissents will be less frequent the heavier a court's caseload. This, together with the fact that the Supreme Court has more (and more experienced) law clerks than the federal courts of appeals, may help to explain why in our sample the dissent rate is so much higher in the Supreme Court (61 percent) than in the courts of appeals (11 percent).

B. The Benefits of Dissenting

We assume that the benefit of dissenting derives from the influence of the dissenting opinion and the enhanced reputation of the judge who writes the dissent. We proxy this benefit by the number of citations to the dissenting opinion. If dissenting opinions are rarely cited, this suggests that the benefits from dissenting are small. Another possible benefit from dissenting in the court of appeals is (as we show later) that the Supreme Court is more likely to grant certiorari in a case in which there is a dissent. The added benefit is likely to be small, however, because the Supreme Court grants certiorari in only a tiny fraction of cases.

The benefits of dissenting are also affected by caseload. The heavier a court's caseload, the less likely the court will be to reexamine its precedents, since a decision in accordance with precedent reduces the effort cost of judicial decision making and may also reduce caseload by making the law more predictable. The less likely the court is to reexamine its precedents, the less effect a dissenting opinion is likely to have, since the majority opinion will be a precedent and therefore unlikely to be rejected in the future in favor of the dissent. The Supreme Court's caseload is lighter than that of the courts of appeals and therefore should make the Court more willing to reexamine precedents than the courts of appeals are, and this should increase the benefit to Supreme Court Justices of dissenting. And because precedents are inherently less authoritative in the Supreme Court than in lower courts—owing to the political nature of so many of the Court's cases and the fact that there is no higher court to discipline the Supreme Court's decision making—the Justices are likely to chafe at having to follow precedents created by their predecessors. (Justice Thomas has made clear that he does not follow precedent.) We therefore predict that dissenting opinions in the courts of appeals will be cited, relative to majority opinion, proportionately less frequently than dissenting opinions in the Supreme Court.

One is not surprised, therefore, that the dissent rate in Figure 1 is much higher in the Supreme Court than in the courts of appeals. And for two other reasons as well: First, because the Supreme Court chooses which cases it will hear, it tends to select cases that are "close" in the sense that good legal arguments can be made on both sides, whereas the courts of appeals must decide every case appealed to them that is within their appellate jurisdiction, regardless of whether the appeal has any merit. This implies that there is more room for disagreement among Supreme Court judges than among appellate court judges and therefore that the dissent rate will be higher in the Supreme Court because judges dissent only when they disagree with the majority.

Second, the panel size in the Supreme Court is larger—nine Justices (usually) rather than three. This increases the probability that at least one member of the panel will strongly disagree with the majority.

C. Panel-Composition Effects

A court of appeals panel in which the judges were not all appointed by a president of the same party is likely to decide a politically controversial case, such as a sex discrimination case or an abortion case, differently from a panel all of whose judges were appointed by a president of the same party. And a panel in a sex discrimination case in which all the judges are male is likely to decide the case differently from a panel that contains a female judge.

Why might panel composition have this curious effect—why, that is, would a majority ever yield to the wishes of the minority? One possibility is that the odd man out acts as a whistleblower. Another is that he or she may bring to the panel's deliberations insights that the other judges, with their presumably different priors based on political ideology or their different life experiences correlated with gender, may have overlooked. But a bigger factor may be differences among panel members in intensity of preference for a particular outcome, coupled with dissent aversion. If one judge feels strongly that the case should be decided one way rather than another, while the other two judges, though inclined to vote the other way, do not feel strongly, one of those two may decide to go along with the third to avoid creating ill will, perhaps hoping for reciprocal consideration in some future case in which *he* has a strong feeling and the other judges do not. Once one judge swings over to the view of the dissentient judge, the remaining judge is likely to do so as well, for similar reasons or because of dissent aversion.

Of course, a judge who disagrees strongly with the majority may end up dissenting if he fails to persuade a member of the majority to switch his vote. Presumably the greater the ideological

differences among judges in a circuit, other things being equal, the more likely are members of a panel to disagree about the correct outcome and therefore the higher the dissent rate can be expected to be in that circuit. We test this hypothesis in our empirical analysis.

Ideological disagreement is unlike a disagreement over the best means to a shared end because ideological disputants rarely argue from shared premises. A liberal on a panel with two conservatives is unlikely to produce facts or arguments to change the ideology of his colleagues, or vice versa. But if he feels more strongly about how the case should be decided than the other judges do, this implies that he would derive greater benefits than they from a decision of the case his way and therefore that he would be willing to incur greater costs to get his way, as by writing a dissent. His threat to dissent is thus a credible threat to impose costs on his colleagues (the costs arising from their dissent aversion) if they refuse to yield to his preference. If those costs exceed the benefits to at least one of his colleagues of deciding the case his preferred way because he does not feel strongly about the outcome, that colleague will give way.

Jury holdouts are a parallel phenomenon. A juror who feels very strongly about what the verdict in the case should be will be willing to incur costs by protracting the jury's deliberations. By thus imposing costs on the majority he may induce the jurors in the majority to yield to him, compromise with him, or report to the judge that the jury is hung. The requirement (not always imposed in civil cases any longer) that a jury verdict be unanimous strengthens the holdout's hand relative to that of the dissentient judge on a three-judge panel because the normal pressures to conform to prevailing views in social settings, including jury deliberations, are weaker in appellate panels because of the long and honorable tradition of dissent.

But while requiring unanimity strengthens the hand of the holdout juror, his hand is weakened by the fact that the other ju-

rors can, at low cost, walk away from the case by declaring the jury hung, in which event there will be a new trial at which the side favored by the current holdout is quite likely to lose. The majority of the new jury probably will favor the other side just as the majority of the first jury did, and there is unlikely to be a holdout the next time because holdouts are rare.

Excerpt from: Lee Epstein, William M. Landes, and Richard A. Posner, “Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument” (forthcoming in *Journal of Legal Studies*):

Chief Justice John Roberts, and others, have noticed that the lawyer in an oral argument in the Supreme Court who is asked more questions than his opponent is likely to lose the appeal. Our empirical analysis confirms his observation, and this raises the question—why?

The key lies, we think, in the nature of judicial deliberation. Although judges like to describe the appellate process as one in which judges deliberate carefully before rendering a decision, deliberation in most appellate courts tends to be quite limited. It usually is limited to a brief conference shortly after the court has heard oral argument in several cases. The judges state their views in a prescribed order—order of seniority in the U.S. Supreme Court, reverse order of superiority in a number of other courts. Often the statement consists simply of an indication of the judge’s vote, and discussion among the judges is usually brief, even perfunctory; sometimes there is no discussion, but just a statement of desired outcome.

The limited value of judicial deliberation is suggested by the practice, until quite recently, of English judges. The judges were committed to the principle of “orality”—that everyone a judge

does must be done in public, to facilitate the monitoring of judicial behavior by the public. Consequently they were forbidden to deliberate; instead, in an appeal, each judge at the end of the lawyers' arguments would state his view of the case. Yet the English judiciary was very highly regarded; it seemed to have lost little or anything by not deliberating.

The reason for the limited value and significance of judicial deliberation in the American legal system has partly to do with the indeterminacy of many cases that reach the appellate level; when the outcome of a case cannot be determined by a cogent, objective method of inquiry, deliberation may have little or no influence on the vote. In addition, judges are not selected by their colleagues, or even by higher judges, but by politicians, or, in many state courts, by elections. Hence a judiciary tends to be heterogeneous, and this retards easy communication; contrast a university faculty or a committee in a business firm.

Then too, a strong norm of equality within each court, and the limited power that a judge (even a chief judge) has over his colleagues, promotes a norm of collegiality, one aspect of which is a judge's treating his colleagues with kid gloves and so avoiding sharp debate. This is related both to heterogeneity—judges with an academic background are likely to be more aggressive in debate, and they mask this tendency to avoid ruffling the feathers of colleagues with a different background—and to the emotional sensitivity of many of the issues that come before a court, such as issues involving abortion rights, sexual discrimination, and religious liberty. Judges are uncomfortable arguing with a colleague about issues that stir the colleague's emotions.

Oral argument provides an alternative venue for judicial deliberation. The opportunity cost is zero because judges have to attend oral argument. (In contrast, conferences do not have a fixed length, so judges incur a cost if they spend a lot of time at the conference wrangling with each other.) Concern with sharp-edged confrontational debate is alleviated because the judges are talking

directly to the lawyers and only indirectly to their colleagues. Oral argument precedes the post-argument conference and so gives judges an idea to try to persuade a colleague before the colleague, in advance of conference, decides how to vote. It also gives a judge an opportunity to signal a colleague who is likely to respect the judge's view of the case. Without that signal, the colleague might vote the "wrong" way at conference—before the other judge had a chance to speak, if the colleague spoke before him in the prescribed order of discussion.

We do not expect the data to refute either the legalistic or the realistic model of judicial behavior. The reason is that the models are compatible, or more precisely that the legalistic model is a special case of the realistic. Supposing—realistically—that judges have utility functions similar to those of nonjudges in similar professions and thus value leisure (especially since they cannot increase their incomes by working harder), prestige, self-expression, power, and so forth, one can see that behaving legalistically in many, probably most, cases would be utility maximizing. Decision in accordance with statutory language and with precedent, for example, both economizes on judicial time and creates the politically valuable impression that judges merely "follow" or "apply" law and do not just make it up as they go along to promote their political preferences.

We should consider the implications of this analysis for theories of judicial behavior. One prominent theory, which we'll call the legalistic, claims that judges, including Supreme Court Justices, create and apply legal rules by using techniques of legal reasoning that are objective, impersonal, and politically neutral. The other, which we'll call the realistic, claims that judges, especially those who sit on supreme courts and so both deal with the more indeterminate cases and are not constrained by threat of reversal by a higher court, often behave strategically and politically. The legalistic theory suggests two possible explanations for why the losing party might be asked more questions at the oral argument.

Suppose a judge asks a question of one of the lawyers, and gets an unsatisfactory answer. So he asks a follow-up question, and again gets an unsatisfactory answer. The longer the string of such answers, the likelier it is that the judge believes the lawyer has a weak case, and so the likelier the judge is to rule against the lawyer's client. The second legalistic explanation is that a judge who, coming into the argument, is leaning against one party on the basis of the judge's reading of the briefs and other pre-argument study of the case will direct most questions at the lawyer for that party in order to test whether his case is indeed as weak as the judge had inferred from the briefs.

The realistic theory, which is based in part on the indeterminacy of many appeals, is that judges often make up their mind before oral argument, since the benefits of argument are fewer the less the decision is likely to be based on a careful weighing of contentions and evidence. Indeed, in the case of judges who have discretion to decide which cases to hear, such as the Justices of the U.S. Supreme Court, their minds may be made up when they decide whether to vote to hear the case, in which case they are likely to use oral argument to try to persuade the other judges, and this implies asking more questions of the lawyer for the party they plan to vote against in order to punch holes in the lawyer's case and perhaps prevent him from articulating his best arguments. Hostile questions to a lawyer resemble cross-examination at trial and are more effective than friendly, "softball" questions to the side that the judge favors. Still, judges do ask some questions of the party they are leaning in favor of—friendly questions designed to elicit information or argument that will advance the party's cause.

Now if *all* the judges have made up their mind before oral argument, none is persuadable and therefore there is no point in asking questions intended to sway another judge. But what we are calling "making up one's mind before oral argument" is more realistically understood as just forming a prior probability (prior

to hearing oral argument) that will one vote for a particular side, and this is consistent with being persuadable by facts or contentions elicited at the oral argument.

We should consider precisely how asking questions of the lawyer that a judge is predisposed to vote against helps that judge persuade other judges. One possibility is that the judge is recognized by his colleagues as especially expert in the type of case being argued, so that questioning that conveys his view of the case influences them before they vote. This is more likely to be factor in a lower appellate court, with its heavier caseload, larger range of cases, and higher proportion of cases in which the judges do not have an emotional or ideological stake, than in the U.S. Supreme Court.

Another possibility is that the judge's questions will contain argument or information that sways other judges on the panel (as in, "Is it not true that...?"), or that his questions will elicit information (as distinct from just acknowledgment of the information in a question) that indicates the weakness of the lawyer's case. This too is more likely to an effective strategy in a lower court. Because of the Supreme Court's light caseload, high ratio of law clerks to opinions, and relative specialization (a heavy concentration in constitutional law), Supreme Court Justices are unlikely to defer to any supposed superior expertise possessed by another Justice in some type of case.

Just as students of free speech distinguish between instrumental and expressive functions of speech, so we should recognize the possibility that tendentious questioning—questioning that signals a judge's view of the merits of the case being argued—provides expressive utility to the judge. This is especially likely in the case of the Supreme Court, because the views expressed by Justices in open court are newsworthy, and so tendentious questioning gives a Justice an opportunity to express himself to a potentially large audience other than just in a judicial opinion, speech, or interview, settings in which judicial ethics constrain a judge's freedom

to express himself about the merits of a case, especially a case that has not yet been decided.

Excerpt from: William M. Landes and Richard A. Posner, "Rational Judicial Behavior: A Statistical Study" (forthcoming in *Journal of Legal Analysis*):

V. CONCLUSION

The principal methodological contribution of this paper is the correction of a number of systematic errors in the ideological classification of Supreme Court and court of appeals decisions—errors such as classifying all judicial votes for the plaintiff in an intellectual property case as a liberal outcome—in the Spaeth (1953 to 2000, Supreme Court) and Songer (1925 to 2002, courts of appeals) databases; in addition we identified errors in the Songer database in ideological classification of individual outcomes of cases decided before 1960. The two databases have been used in a large number of previous studies (see Appendix A); our corrections enable more accurate statistical measurements and analyses. The corrections are limited to the systematic errors, but our separate analyses of the post-1960 cases enable us to eliminate most of the individual case errors as well. Another methodological contribution is the study of group effects in a real-world group rather than a group contrived for experimental purposes.

We analyzed the Supreme Court and court of appeals data separately, using where feasible an informal economic model to explain some of our results. With regard to the Supreme Court we found that our ideology measure (the corrected version of the ideological measure in the Spaeth database) corresponds closely though not identically to what "everyone knows" is the ideological rank order of the Justices who served between 1953 and 2002. We also found, consistent with many other studies, that Justices appointed by Republican Presidents vote more conservatively

than Justices appointed by Democratic Presidents, with the difference being most pronounced in civil-rights cases and least pronounced in privacy and judicial-power cases. We related to this finding to the “self-expression” argument that we posit in the federal judicial utility function.

We used regression analysis to try to isolate the causes of various aspects of the judicial behavior of Supreme Court Justices, beginning with their ideological voting. We found, for example, that some though by no means all Justices become more conservative and others more liberal during their time on the Court. This “ideology drift” is consistent with the correlation between the appointing President’s party and a Justice’s ideology, because over time issues and party ideologies change. A challenge for further research is to determine whether it is the Justice’s ideology that changes over time or that of the party of the appointing President, or perhaps the ideological character of the cases.

We find no dissent aversion on the part of Supreme Court Justices and therefore no tendency for members of a liberal or conservative minority on the Court to go along with the majority the larger that majority is. That is, we find no conformity effect. Nor do we find a group-polarization effect, though it is notable that we find a political-polarization effect among Justices appointed by Democratic but not by Republican Presidents: The fewer of them there are, the more liberally they vote. This finding is consistent with the proposition that there is more ideological intensity or commitment among conservatives than among liberals, for the more committed a person is to a particular view the less likely he is to be influenced by persons holding other views. (An alternative interpretation, however, is that as the Court becomes more conservative, the majority produces more decisions that the liberal minority disagrees with.) There is further evidence of the greater ideological commitment of presumptively conservative judges in our finding that an increase in the fraction of Republican Senators results in more conservative voting by Justices appointed by De-

mocratic Presidents but that there is no parallel effect of Democratic Senators on Justices appointed by Republican Presidents.

Another finding is that, other things being equal, Justices appointed from the federal courts of appeals vote more liberally than other Justices. We speculate that this is because these Justices have been socialized by their lower-court experience to be respectful of precedent, and the most controversial Supreme Court precedents are those created in the liberal Warren Court era. Examining nonideological aspects of the Supreme Court's behavior, we found among other things that the number of cases the Court decides is increasing in the fraction of the Court's decisions that reverse the lower court. This makes sense because the greater the disagreement between lower courts and Supreme Court, the more cases the Court must hear in order to enforce its views on the lower courts. This is an effect of what organizational economists refer to as "management by exception."

Regarding court of appeals judges, we found among other things that the fraction of conservative votes cast is much higher in the courts of appeals than in the Supreme Court, even for judges appointed by Democratic Presidents. We attribute the difference to a selection effect—the courts of appeals, which have a mandatory rather than a discretionary jurisdiction, decide a great many one-sided cases; the Supreme Court decides more evenly balanced cases because the one-sided ones tend not to present significant issues and the Court's decisional capacity is very limited relative to the number of lower-court decisions. The difference is especially pronounced in criminal cases. Most criminal appeals are subsidized and lack merit, so that even liberal judges usually vote to affirm; hence the study of ideological influences in the federal courts of appeals is better focused on civil than on all appeals. But the Supreme Court only agrees to hear criminal appeals that have substantial merit.

Perhaps the most interesting finding in our court of appeals

regressions is of both a conformity effect and group polarization. Thus there is a triple effect when, holding the size of a court of appeals constant, a judge appointed by a President of one party is replaced by a judge appointed by a President of the other party and the newly appointed judge is part of the majority bloc on the court. If, for example, the majority consists of judges appointed by Republican Presidents, a more conservative judge will replace a less conservative one, the members of the majority bloc will vote more conservatively than when there were fewer of them, and the members of the minority will vote more conservatively than when there were more of them.

We speculate that the difference in conformist behavior between the Supreme Court and the courts of appeals is due to the stronger commitment of the courts of appeals to *stare decisis*, as a result of which a dissent (say by a liberal on a conservative panel) has less effect in those courts on the precedential effect of a decision. With fewer dissents, a conservative (liberal) minority will tend to vote more with the liberal (conservative) majority, or in other words to conform to the majority, which is the conformity effect that we find in the courts of appeals but not in the Supreme Court. We explain the different role of precedent in the two judicial tiers by reference to differences in costs and benefits resulting mainly from differences in workload pressures.

There is much additional work that could be done to refine our analysis. We suggest just two projects, in closing: The first would be to identify from media accounts court of appeals judges who have had good prospects for promotion to the Supreme Court, based on media speculation, and see whether they dissent more than their peers, or otherwise behave differently, in order to attract attention or otherwise enhance their promotion prospects. The second project would be to use number of amicus curiae briefs filed in Supreme Court cases as proxies for the importance of case, which could be used as a variable to attempt to explain the likelihood of dissent, on the theory that the value of judicial

self-expression through dissenting from a decision with which he disagrees is greater, the more important the case.